Circuit Personalities

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Although typically lumped together, the thirteen different U.S. Courts of Appeals do not behave as one; indeed they have developed distinct norms, rules, and customs that tend to endure over time. These circuit-specific practices (some written down, others not) have led to different circuit personalities. Consider, for example, en banc review. The Second Circuit prides itself on its collegiality and almost never sits en banc, while the Sixth Circuit sits en banc a lot (relatively) and is known for producing sharp dissents. The First Circuit is small enough that the judges could all fit in the same minivan, while the Ninth Circuit is so big it goes en banc only as a subset of the whole circuit. Other personality traits are only obvious to insiders. Judges on the Fourth Circuit, for example, descend from the bench after every argument and shake the hands of the lawyers in a tradition of Southern civility which they claim echoes the way they treat each other. The Seventh Circuit circulates every draft opinion among all members of their court before publication and often accommodates suggestions from judges who are not on the panel. And the Third Circuit even bears a self-imposed nick-name – "The Mighty Third" – which one can imagine is stitched on the back of their judicial softball jerseys.

Repeat players at this roundtable might recall that Neal and I have been working on a paper about en banc decisions that makes use of an original dataset scanning six decades and twelve circuits. [1] That project ultimately grew into two papers: (1) one that explores partisan behavior in en banc decisions over time (*Weaponizing En Banc,* ready for submission in February) and (2) one that discusses circuit by circuit variation and the implications that flow from it (this paper). Interestingly (but perhaps not surprisingly) the normative arguments in both papers are linked in that they both urge a resistance to partisan judicial impulse.

The point of this article is to applaud the existence of different circuit personalities as being a critical tool in the fight against judicial tribalism. We live in an era in where judges are screened for ideology before their appointment to the bench. The people selected for appellate judgeships in particular are more ideologically divided than ever before, and they are selected in large part for their demonstrated allegiance to a cause -- be it the Federalist Society or American Constitution Society. These "my team-your team" impulses threaten to overtake historically well-entrenched rule of law and judicial independence norms. One way to cut against the partisan impulse felt by judges is to generate a loyalty to something else. Judicial independence, we will argue in this paper, requires judicial ownership of norms and rules of a circuit. The initiation into "the mighty Third," in other words, dilutes the power of prior allegiances to party or cause. Our goal is to

[1] Our database collects all en banc decisions (a multi-step task that is itself more complicated than you might suspect) from twelve different circuits (including the DC Circuit but not including the Federal Circuit) for the following time periods: 1966-68, 1976-78, 1986-88, 1996-98, 2006-2008, and then 2016-2020.

argue for the space necessary for these circuit personalities to develop and to warn of forces currently working to minimize them.

The descriptive part of our project will draw sketches of the various circuit court personalities. Building on Marin's work (and her forthcoming book with Judge Newman), we will also supplement the existing landscape with (1) interviews with top appellate advocates and sitting federal appellate judges and (2) en banc data we have already collected. We have already interviewed four top-notch appellate attorneys who have vast experience arguing in front of many of these circuits. They were able to give us a bird's eye view into the various personality features they noticed. We also have plans to interview at least one sitting judge from every circuit (whom we know from various other adventures). We want to ask them about the unique features of their circuit culture (formal and informal) and we also intend to ask about changes to those circuit personalities they have observed over time. We suspect there will be a difference in perception from judges who have sat on a circuit for decades versus those who have just arrived, and we intend to get impressions from both types. (Any suggestions for questions we should ask are welcome; the judge interviews will take place this winter and spring.)

In terms of en banc decisions, the data we have reflects the circuit by circuit variation you might expect. It indicates that some circuits tend to go en banc more frequently than others (the Ninth, the Sixth and the Fourth Circuits were the front-runners here), and some circuits rarely go en banc at all (I'm looking at you, Second and First Circuits). Some circuits have a pretty consistent en banc rate historically (the DC Circuit) while others (like the Tenth Circuit) tend to go through periods of time with many en bancs followed by quieter periods of en banc lulls. We also noticed some other interesting circuit patterns in our en banc data. The Third Circuit goes en banc sua sponte far more than the other circuits, and it also leads the pack in terms of initial en bancs, meaning the choice to go en banc without a panel decision. The First and Tenth Circuits earn the award for the most unanimous en banc decisions and the Sixth Circuit pulls up the rear in that category.

When it comes to partisan behavior in en banc decisions (the subject of our first paper), there was more evidence in some circuits than in others. We noticed a higher percentage of what we called partisan splits (decisions divided by party of appointed President) or partisan reversals (when a circuit dominated by one party reins in a renegade panel composed of judges from the opposite party) in the Fourth Circuit and Sixth Circuits, although that behavior varied over time. The circuits with the lowest percentages of partisan en banc behavior included the Third and the Tenth Circuits, but that also varied over time. [2]

[2] While we did not find a steady increase of partisan en bancs over time across circuits until 2018 (enter shameless plug to read *Weaponizing En Banc*), we did find periodic increases in specific circuits during specific time periods. For example, partisan behavior spiked in the Fourth Circuit in the 1990s, and then decreased in the 2000s and 2010s, only to spike back up again in 2018-2020. The Eighth Circuit, meanwhile, had a relatively low percentage of partisan en banc decisions throughout the timeline of our study, with the exception of a rather large spike in the 1980s. We can speculate on the causes of these relative times of discord (perhaps it matters who is the Chief Justice or what is on the docket) but there doesn't seem to us an obvious generalization that can explain partisanship patterns over time circuit by circuit.

Through our interviews, en banc data, and publicly-available documents (like Internal Operating Procedures (IOPs) and local rules), we hope to describe factors that lead to the development of a circuit's personality including: size, geography, how frequently a circuit grants oral argument, how frequently it goes en banc, how much the judges depend on staff attorneys, whether the circuit circulates all panel opinions before publishing them, how long the Chief Judge holds her office, and probably many other factors you can help us brainstorm. The goal is to highlight norms and rules that an appellate judge likes to boast about – what sets them apart – in addition to features of the personality that maybe aren't quite boast-worthy but are still hard to deny.

Ultimately, we suspect that the normative argument (pro circuit personalities) will drive this paper. We want to identify and argue for ways to facilitate circuit personalities as a counter-measure to the ideology screening of candidates that is par for the judicial appointment course now. One proposal we have thought about, for example, is the need to phase in new judges to allow for some period of assimilation into the norms of the circuit. Judges have remarked in the past that circuit culture is often threatened by the influx of new members, and this we imagine is particularly true when a new class of judges starts all at once (with peers one becomes more emboldened to make waves). Furthermore a circuit personality seems particularly fragile when a circuit flips (when its membership gets more appointments from Republicans or Democrats, like the Second Circuit under President Trump or the Fourth Circuit under President Obama). In those circumstances the need for uniting norms seem to us to be the most acute.

As we explain in our first paper, our en banc data revealed that for the past fifty years (at least up until 2018) there was not as much partisan behavior in en banc decisions as we suspected; this was surprising to us given the well-documented narrative of partisan polarization in judicial appointments. There must be forces pushing against the impulse to line up in teams en banc, and the normative argument in this paper seeks to take advantage of those counter-partisan forces. One might argue that rule of law norms transcend circuit boundaries and that there is no need for circuit variation to fight the impulse of partisan loyalty. That, to us, seems insufficient. Commitment to "rule of law" as an abstract matter is nice, but commitment to that norm in combination with peer pressure and loyalty to a specific group is better. Assuming the trend towards partisan polarization is going to continue (and we see no indication that it won't), it seems prudent to look for forces that cut against the my-team your-team partisan judicial impulse. Embracing that which makes each circuit unique and entrenching those local norms and customs could well be an answer to a very significant growing problem.