JUDICIAL DECISION-MAKING ON THE D.C. CIRCUIT: A LAW CLERK'S PERSPECTIVE

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This article presents a set of reflections about judicial decision-making on the D.C. Circuit informed by a recent clerkship on that court. My interest lies in distilling certain social practices and norms that guide and constrain the ways in which judges approach and decide the cases that come before them. To that end, I will describe some psychological, behavioral, and institutional dynamics that shape processes of legal decision-making. I hope that these reflections will be useful to scholars of comparative legal procedure, legal sociologists, and D.C. Circuit watchers.

There is an inevitable tension between offering detailed observations and maintaining the strict confidentiality required of court personnel. Thus, certain points that I could have illustrated with specific examples will be stated only at a general level or with hypothetical illustrations, and other relevant points will be omitted altogether. My perspective is also constrained by clerking for a single judge on one court, which itself "has a reputation as a unique federal court"[1] that is "different in significant respects from the other courts of appeals."[2] The D.C. Circuit has distinctive historical and legislative

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1. Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL'Y 131, 132 (2013).

2. John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 376 (2006).

origins;[3] it has a smaller caseload than most other circuits;[4] it handles an outsized number of administrative law cases[5] and cases with national scope,[6] and considerably fewer private civil cases, commercial cases, and criminal cases (including prisoner petitions) than other circuits;[7] all judges work in a single building (alongside all D.C. district court judges),[8] and they need not reside within the very small geographic region covered by the circuit to be nominated to the court;[9] the President plays a comparatively greater role than senators ordinarily do in selecting judges in this circuit;[10] and D.C. Circuit judges may hold some distinctive views on legal doctrine.[11]

While my focus is on judicial decision-making and not on a law clerk's functions, I will say a few words

3. *See id.* at 377 ("[T]he reason the D.C. Circuit has such a unique role with respect to reviewing legal challenges and decisions of the national government has at least as much to do with its unique history as it does with its physical location."); Fraser et al., *supra* note 1, at 134–37.

4. *See U.S. Court of Appeals Summary—12-Month Period Ending December 31, 2020*, FEDERAL COURT MANAGEMENT STATISTICS-ADMINISTRATIVE OFFICE OF THE U.S. COURTS (last accessed Oct. 6, 2021), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appsumary1231.2020.pdf; *see also* Adam Feldman, *Empirical SCOTUS: The Singular Relationship Between the D.C. Circuit and the Supreme Court*, SCOTUSBLOG (Oct. 3, 2019), https://www.scotusblog.com/2019/10/empirical-scotus-the-singular-relationship-between-the-d-c-circuit-and-the-supreme-court/.

5. This is so not only because federal agencies are headquartered in Washington, D.C., making it a natural place to challenge agency action with national scope (often using local counsel specializing in administrative law), but because some statutes, such as the Clean Air Act, require suing in this circuit. *See* 42 U.S.C. § 7607(b)(1); *see also* Fraser et al., *supra* note 1, at 143–44.

6. Fraser et al., *supra* note 1, at 133 (explaining that "the D.C. Circuit has special jurisdiction not only over certain substantive areas of the law, notably those areas involving 'national subjects,' such as immigration and foreign relations, but also over controversies that are more likely than others to have a 'national effect.'").

7. *Id.* at 137–38, 144.

8. Roberts, *supra* note 2, at 376.

9. *Id.*; *see also* Fraser et al., *supra* note 1, at 136–37.

10. Fraser et al., *supra* note 1, at 136.

11. *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1312 (2018) (noting as a "major theme" "that the D.C. Circuit judges appear different from" judges on other circuits in their willingness to defer to administrative agencies under the *Chevron* doctrine).

about the latter here. The experiences of law clerks are as varied as the personalities of the judges for whom they work. In general, law clerks carry out a unique set of roles that are akin, perhaps, to a combination of special assistant, private secretary, ghostwriter, confidant, intelligence gatherer, and personal aide who shuttles large sets of files to and from the courtroom for oral argument. Unlike an executive or politician, who may have a special assistant but can still freely seek advice from others within and outside her organization, the same is not true of judges due to confidentiality constraints. This aspect of judicial practice means that judges rely on their law clerks considerably more than principals need to rely on assistants in other contexts to inform, converse, debate, draft, edit, and perform time-sensitive tasks. Among other contributions, clerks can propose creative ideas for resolving cases and can acquire valuable insights into other judges' views on key issues in a case through discussions with other clerks.[12] When things go well—perhaps a judge convinces colleagues to accept a particular position on a controversial issue—these victories (and, likewise, any setbacks) can only be shared within chambers. The myriad ways in which judges depend on their law clerks, coupled with strong confidentiality requirements, can engender especially close-knit bonds between judges and their law clerks.

By taking on responsibilities for most aspects of a case and coordinating closely with judges, law clerks gain a unique outlook on the lifecycle of appellate cases and relations among judges. Taking up these issues here, I discuss four main topics: (1) some distinctive psychological traits of appellate judges important to carrying out

12. Discussing cases with clerks from other chambers is not a universal practice. Individual judges may restrict their clerks' interactions with other clerks entirely or, perhaps, before the clerks have discussed the case with their own judge. Moreover, in some circuits there are prohibitions on clerk-to-clerk conversations about pending cases. One reason for this may be that, unlike at the D.C. Circuit, where all judges' chambers are located in the same building, chambers in other circuits are spread across multiple cities, raising worries of differential access and familiarity among clerks if (for example) a majority of chambers are physically proximate while some others are located farther afield.

their judicial functions; (2) a comparison of deliberative practices in appellate decision-making and in ideal democratic theory; (3) a tendency toward unanimity in resolving cases; and (4) the latitude extended to the judge assigned to write an opinion (the "writing judge") by other members of a three-judge panel. While seemingly disparate, these themes are linked in ways that will emerge below.

I. SOME KEY PSYCHOLOGICAL TRAITS OF APPELLATE JUDGES

Judicial decision-making on the D.C. Circuit calls to mind two sets of traits not often combined in one person—I will label them *opinionated decisiveness* and *detached impartiality*.

The judicial role is, quite obviously, not suited to individuals prone to indecision, second-guessing, fretting about oversights and mistakes, pining for do-overs, or worried about taking sides on controversial issues. With such a temperament, judging would become a paralyzing ordeal. It is unsurprising, then, that appellate judges appear to be, by and large, opinionated, sure-footed, and have well-developed, firmly held legal outlooks that help them quickly make consequential judgment calls. Besides the big decisions—for example, how to rule in a given case—judges face a constant stream of other votes and rulings. Should a party's request to file briefs late be granted? Should a word-length extension be allowed? How long should oral argument last? May deadlines for filings and oral arguments be pushed back due to a government shutdown?[13] Should the court sit *en banc* to rehear a case because a three-judge panel may have erred? The incessant drumbeat of decisions big and small calls for an opinionated and decisive cast of mind. (That is not

13. Judges on the D.C. Circuit, for example, articulated contrasting views on this issue during the federal shutdown in winter 2018–19. *Compare* Air Transp. Ass'n of Am., Inc. v. FAA, 912 F.3d 642 (D.C. Cir. 2019), *with id.* at 642–43 (Randolph, J., dissenting); *compare* Kornitzky Grp., LLC v. Elwell, 912 F.3d 637 (D.C. Cir. 2019), *with id.* at 639–41 (Randolph, J., dissenting).

to say, of course, that judges are always efficient at carrying out these tasks—though even here there may be hidden virtues.[14])

Opinionated and decisive individuals sometimes display other, less admirable, qualities. These can include a penchant for competitiveness and antagonism, impatience, heightened sensitivity to slights, a tendency to hold grudges, and readiness to exact payback. But these traits are clearly inimical to the judicial role. Indeed, judges often appear to display qualities of an opposite sort—those of *detached impartiality*. By this I mean the capacity to adopt a relatively impersonal attitude toward disappointing outcomes; an ability not to let sharp differences of opinion or tense exchanges in one case determine interactions in other cases; a propensity not to hold grudges—or at least exercise sufficient self-restraint so that irritations about procedural or substantive issues in one case do not undermine working relationships in other cases, which might even be taking place simultaneously. In other words, many appellate judges seem to have the psychological flexibility to bracket prior, or even concurrent, interactions sufficiently to proceed on a relatively clean slate in new cases and remain ready to make decisions not clouded by, or at least not dominated by, prior experiences. That means resisting temptations to react to annoyances or perceived slights and being gracious in acquiescing in compelling counterarguments, whatever one's feelings toward the judge who advances them. Detached impartiality can be viewed as a set of traits that contributes to, and is reinforced by, what D.C. Circuit Judge Harry T. Edwards has called practices of judicial collegiality.[15]

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14. *See* Harold R. Medina, *Some Reflections on the Judicial Function at the Appellate Level*, 1961 WASH. U. L.Q. 148, 154 (1961) ("Even the [judge] who seems always to be behind with his work exerts a steadying influence and often steers his [fellow judges] away from pitfalls they did not see in their haste to keep current the work of the court.").

15. *See* Harry T. Edwards, *The Effects of Collegiality and Judicial Decision Making*, 151 U. PENN. L. REV. 1639, 1645 (2003) (defining "collegiality" as "a *process* that helps to create the conditions for *principled* agreement, by allowing all points of view to be aired and considered," which "plays an important part in

True, game-theoretical considerations would seem to favor this general approach in any event. Judges are similarly situated players in a multi-iteration game of extended but unknown duration. Capitalizing on temporary advantages or alliances is most likely incompatible with a judge's own long-term self-interest, understood in terms of achieving one's preferred legal outcomes in one's preferred way as often as possible. If a judge expects to be outvoted on an issue if it is addressed squarely in a case, causing the law to develop in what that judge sees as an undesirable direction, she may request of her colleagues to rule on narrower, or alternative, grounds. But precisely because she cannot predict when she might find herself in that posture, she should extend other judges the same courtesy when they request to dispose of a matter on narrower, though still acceptable, grounds.[16] Such game-theoretical considerations may help explain judicial conduct to some extent. They may also operate as background constraints that reinforce already-existing habits and dispositions.

It is worth noting that the two sets of psychological traits I've singled out apply in different ways to appellate judges and district court judges. *Opinionated decisiveness* is critical for both sets of judges. But *detached impartiality* is more relevant for appellate judges because they engage in joint decision-making. District court judges, by contrast, are largely islands onto themselves. They face many fewer horizontal pressures from colleagues about how to conduct proceedings, decide cases, and structure opinions and orders.[17] As a kind of

mitigating the role of partisan politics and personal ideology"); Harry T. Edwards, *Collegial Decision Making in the US Court of Appeals*, New York University School of Law, Public Law & Legal Theory Research Paper Series, Working Paper No. 17-47, 2017; *see also* Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt To Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1950–51 (2009).

16. This leaves unaddressed the "last period" problem in game theory, in which there is no self-interested incentive to cooperate, though I will not speculate here on its role in the judicial context.

17. *Cf.* Patricia M. Wald, *Some Real-Life Observations About Judging*, 26 IND. L. REV. 173, 174–75 (1992) ("Trial judges run their own courtrooms, manage their own proceedings, and have elbow room to experiment with 'creative'

compensatory dynamic, district judges experience much stronger vertical pressures given the live possibility of reversal. Appeals from final judgments of a district court are as-of-right—they are guaranteed to be heard with some exceptions. By contrast, appeals from appellate courts go to the Supreme Court, whose review is discretionary and highly selective. As for appellate judges, although they are not concerned with reversals in run-of-the-mill cases because prospects of a rehearing *en banc* or Supreme Court review are vanishingly small, the collaborative nature of appellate decision-making creates horizontal disciplining dynamics unfamiliar to district judges (particularly in day-to-day rulings and orders that are not subject to immediate review, or any review at all).

Close working relationships among appellate judges do not necessarily mean that judges frequently form full-fledged friendships with one another, though there are subtle gradations of familiarity and closeness. Appellate judges may serve for twenty or thirty years with a rarefied cohort of colleagues with whom they share professional backgrounds and bonds of secrecy in making major decisions touching countless aspects of national life, exchanging views thousands of times on issues big and small. And still, they may remain not much more than businesslike neighbors—even while developing extremely nuanced insights into each other's ways of approaching issues and situations, as well as admiration for various dimensions of a colleague's work.

This juxtaposition of professional intimacy and relative personal aloofness may be linked to discharging judicial functions in psychologically sustainable ways. After all, robust friendships between judges may create a risk of personal feelings, conscious or not, coloring one's judgments and producing uncomfortable perceived alliances among friends (or a friend's friends) and latent tensions with a friend's detractors or critics. A judge needs to base decisions on the best reading of the law, acting neither out of special understandings nor grudges. Deep

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settlements and remedies. . . . Trial judges are seldom, if ever, in conflict with their fellow trial judges, and can therefore be truly collegial with them . . . .").

personal ties among judges could thus jeopardize a judge's fidelity to the law, or simply create an impression of the risk of partiality, especially in the context of small three-judge panels.[18]

In sum, the unlikely combination of traits that I have singled out—opinionated decisiveness coexisting alongside detached impartiality—can help in carrying out the appellate judicial function with integrity and psychological coherence across time.

II. APPELLATE DELIBERATION AND IDEAL DEMOCRATIC DELIBERATION

The traits described above can influence the dynamics of judicial decision-making in various ways. Before highlighting two aspects of that process, I will comment on the enterprise as a whole. Appellate decision-making, with each case assigned to a three-judge panel,[19] has something in common with ideals of democratic deliberation in Western political philosophy. Clarifying some points of commonality and divergence offers a clearer picture of what is distinctive about the judicial role.

In an ideal deliberative situation as conceived by some political theorists, equal, rational, and well-informed citizens bring diverse perspectives to the public square, where they exchange reasoned views and arrive

18. In contrast to the Supreme Court's model in which all nine Justices hear every case by default (and where the friendship between the late Justice Ginsburg and the late Justice Scalia has been widely discussed), it may be that a key structural feature of appellate courts—namely, small three-judge panels assigned to every case rather than the full complement of judges—renders concerns about partiality especially salient.

19. It is worth pointing out that, on the D.C. Circuit, the makeup of three-judge panels and the assignment of cases to panels aim at *equalization* rather than *randomness* in two key respects. First, "[t]he Clerk [of the Court] attempts to pair each active judge with each other active judge an equal number of weeks during the year, insofar as availability permits." D.C. CIR. HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES § X.B (2021). Second, the mix of cases in a given sitting, usually consisting of three cases, is selected in a way that "reflects roughly the proportions of the Court's overall caseload," which is made up of "criminal appeals, private civil appeals, civil appeals where the federal government is a party, and administrative agency cases." *Id.* at § X.C.

at outcomes binding on everyone, even if one's opinions turn out to be in the minority.[20] This ideal reflects a commitment to "deliberative democracy."[21] Whereas discourse in any actual polity embodies this ideal highly imperfectly, the realities of an appellate court reflect it more closely in some key ways. Members of large polities will exhibit substantial disparities in education levels, professional statuses, social clout, wealth, skills, and willingness and ability to devote time to mastering issues of public policy. Matters are far more homogenous among federal appellate judges, who share similar educational backgrounds and elite professional status. Each judge's vote is weighted equally, so that no judge can be marginalized or ignored, especially in the context of repeat future interactions. Financial motives should play no role in legal outcomes; the Constitution's guarantee of life tenure and salary,[22] as well as recusal norms,[23] help advance that objective. Judges work from the same materials and may not venture outside the record, leveling the playing field with respect to informational access. And judges are generally committed to, and typically have time to, think matters through carefully and arrive at well-informed views with input from their law clerks. In all of these ways, the dynamics on a court of appeals come closer to embodying some aspects of a democratic deliberative ideal.

Judicial practice on the D.C. Circuit departs in one interesting respect from the model of deliberative democracy noted above. One might expect judges to deliberate with one another about a case *before* oral argument in order to flesh out their positions, minimize blind spots, grapple with their colleagues' perspectives, and try to persuade one or both of the other panel members. Yet

20. *See, e.g.,* John Rawls, *The Idea of Public Reason Revisited*, 64 UNIV. CHI. L. REV. 765 (1997).

21. *Id.* at 772.

22. U.S. CONST. art. III, § 1.

23. *See* 28 U.S.C. § 455.

such discussions occur very rarely.[24] Most pre-oral argument debate takes place within chambers among judges and their law clerks. In addition, the clerks of all three judges may meet to exchange views.[25] Debate and discussion among judges typically begins only at oral argument itself (or perhaps in the few minutes preceding it in the robing room). It then carries on at the post-oral argument "conference," where judges meet privately to decide the cases. Results of the conference are then captured in an internal disposition memorandum that sets out agreed-upon positions on key issues in a case and is circulated to all three chambers.[26] Discussions can continue thereafter as needed.

The typical lack of engagement among judges before oral argument may suggest a subtle but important difference between the responsibilities of citizens and judges. Whereas a citizen's role in ideal theory may be both to vote one's conscience and to be receptive to ideas put forward by fellow citizens in debate on matters on public importance, judges are nominated by the President and confirmed by the Senate based on their existing track record to apply the law as they understand it. A judge's job, then, is perhaps less to listen to *colleagues* with a view toward changing her own mind—or theirs—and more to listen to *the parties* with an open mind and decide fairly based on the best reading of the law.

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24. *Cf.* RICHARD A. POSNER, HOW JUDGES THINK 2 (2008) ("The difficulty outsiders have in understanding judicial behavior is due partly to the fact that judges deliberate in secret, though it would be more accurate to say that the fact that they do not deliberate (by which I mean deliberate *collectively*) very much is the real secret."). *But see* Edwards, *Collegial Decision Making*, *supra* note 15, at 31 (arguing that Judge Posner underestimates the extent of deliberation on a "collegial court"); Edwards & Livermore, *Pitfalls of Empirical Studies*, *supra* note 15, at 1951 n.197 (same).

25. This will depend on the practices of individual judges and circuits. *See supra* note 12; *see also* Wald, *Some Real-Life Observations*, *supra* note 17, at 177 ("The law clerks . . . carry on a lively dialogue with clerks in other chambers which often provides useful point-counterpoint that would not otherwise exist, because judges almost never discuss cases with each other before argument.").

26. *Cf.* Edwards, *Collegial Decision Making*, *supra* note 15, at 42 (compiling survey answers from Chief Judges about practices in their respective circuits about memorializing dispositions of cases).

Minimizing exchanges prior to oral argument also helps to ensure that oral argument itself retains its live and adversarial nature, so that matters are not foreordained, and judges remain receptive to new ideas. But the near-total absence of pre-argument discussion on the merits indicates that, at least implicitly, judges do not see it as central to discharging their Constitutional duties or may not find it especially necessary—perhaps due in part to the intimate familiarity they develop with each other's outlooks, approaches, and predilections.[27] This is also, surely, a function of the difficulty level of various cases; the less complicated the issues, the less pressing the need to engage with colleagues in advance. And only a minority of cases raise truly hard issues.[28] If we take unanimity as a very crude heuristic for complexity, in the period between 2011 and 2016, out of all published dispositions on the merits by the D.C. Circuit, dissents occurred in only 6.9% to 13.1% of dispositions, while concurrences accompanied 8.6% to 14.4% of published dispositions.[29] These statistics are generally in line with, and in some cases lower than, statistics for other circuits in the same period.[30]

Since oral argument is ordinarily the first time that judges directly encounter each other's perspectives on a case, a few points about it deserve notice. Setting aside unusually complex cases, oral arguments on the D.C.

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27. *Cf.* Edwards, *Collegial Decision Making*, *supra* note 15, at 31 (remarking that "a judge's cognition during preparations for oral argument can be moderated in anticipation of a colleague's views—a kind of tacit deliberation"); *see also* Edwards, *Pitfalls of Empirical Studies*, *supra* note 15, at 1963–64.

28. *Cf.* Edwards, *Pitfalls of Empirical Studies*, *supra* note 15, at 1897–99.

29. Edwards, *Collegial Decision Making*, *supra* note 15, at 70; *see also id.* at 18–23.

30. *Id.* at 58–71. As for other circuits, comparable statistics for the same period are as follows: First Circuit (3.7% to 4.8% and 1.3% to 3.6%); Second Circuit (6.1% to 10.9% and 4% to 6%); Third Circuit (7.9% to 15.8% and 2.2% to 7%); Fourth Circuit (15.9% to 19.6% and 7.9% to 11.2%); Fifth Circuit (10.2% to 13% and 3% to 8.1%); Sixth Circuit (12.7% to 21.5% and 6.5% to 12.3%); Seventh Circuit (3.5% to 5% and 1.9% to 3.4%); Eighth Circuit (8% to 9.8% and 3.3% to 5.4%); Ninth Circuit (16.3% to 22.3% and 5.6% to 9%); Tenth Circuit (4.2% to 12.8% and 5.7% to 7.5%); and Eleventh Circuit (6.9% to 11% and 5.8% to 12.4%). *Id.* at 59–69.

Circuit are usually scheduled for ten, fifteen, or twenty minutes per side. Despite this seemingly short duration, judges can quickly pick up on where their colleagues stand on key points in a case based on the substance, tenor, and frequency of a judge's questions, as well as any noteworthy silences. Judges can discern when a colleague takes the lead in engaging with counsel in a way that signals a desire to write the opinion if that judge ends up in the majority. Based on such cues—which can confirm or refute prior predictions about the direction in which one's colleagues are leaning—judges can react accordingly. A judge might decide to underscore a colleague's point with follow-up questions. Or, sensing vulnerability on the part of a litigant that a judge thinks should likely prevail, a judge might intercede to encourage counsel to address a colleague's skepticism, or perhaps even to anticipate an expected line of criticism from a fellow judge. It is worth noting, too, that presiding judges on the D.C. Circuit usually do not adhere strictly to set time limits, so that oral arguments are allowed to run over, often significantly. This flexibility gives judges ample opportunities to voice their perspectives, develop a sense for their colleagues' stances, and decide how to approach the conference following oral argument.

III. TENDENCY TOWARD UNANIMITY

A broad range of norms shapes many aspects of judicial practice, including the decision about how to vote in a case and the form that an opinion will take. One centripetal force relevant to decision-making on the D.C. Circuit is an inclination toward unanimity. Whatever the explanations and possible justifications for this tendency—endowing an opinion with greater authority through a united front, minimizing disputes, reinforcing collegiality, cabining the number of separate opinions that a judge must write—genuine efforts are made to accommodate the view of all three judges in the process of ruling on a case and drafting and editing an opinion once it has been circulated by the writing judge.

A penchant for unanimity, of course, means that what is said in an opinion must be something that all three judges can accept. The process of triangulating drafts to reach consensus can require finessing language, accepting omissions, and tweaking arguments, formulations, and even citations, to keep cleavages at bay that could unravel a potentially fragile agreement. There might be two independently sufficient grounds to reject a party's argument: a substantive legal doctrine or some procedural defect, such as a failure adequately to develop an argument. A preference for unanimity makes it likelier that a panel will rest on forfeiture (or some kindred procedural, rather than substantive, doctrine), since it limits grounds for disagreement. As another example, if a party's claim, or a conclusion reached by a district court, receives only cursory treatment in an opinion—perhaps a few measured sentences noting that a district court committed no error—what appears to be unexceptionable treatment could well mean that the issue was indeed straightforward. But it could also mean that dissensus lay just beneath the surface and that making more elaborate claims would have exposed conflicting viewpoints about the law or its application that would be harder to reconcile among panel members. So a preference for unanimity tends to encourage a relatively disciplined approach to opinion writing, striving to keep fissures under wraps until legal issues become unavoidable and must be confronted head on.

Whether these dynamics are normatively desirable is an open question. On the one hand, the Constitution tasks judges with resolving "Cases" and "Controversies,"[31] without pronouncing on extraneous subjects or issuing advisory rulings. So if an issue can be resolved on relatively narrow grounds, doing so seems sensible. Moreover, it means smoother working relationships with colleagues, greater collegiality, and more efficient disposition of cases. On the other hand, downplaying disagreements that, if brought to light and confronted, could

31. U.S. CONST. art. III, § 2.

settle open legal questions in the circuit—even at the cost of messy concurrences and dissents—in the name of a general preference for unanimity may be in tension with a judge's Article III responsibilities. How to assess these competing considerations is hardly obvious.

In sum, a defeasible preference for unanimity creates dynamics that favor less controversial grounds for disposing of issues as well as less elaborate dicta, either of which could create rifts on the panel that delay resolution, require more time-intensive back-and-forth, and possibly result in a dissent or a concurrence in the judgment only, undermining the point of unanimity.

Yet there is also pressure within the appellate system in a contrary direction—i.e., toward inclusion of somewhat lengthier dicta and more controversial holdings, so long as they fall short of engendering separate opinions. This pressure comes from the prerogatives extended to the writing judge, and it is reinforced by norms of collegiality that shape judges' leeway in making modifications to opinion drafts.

IV. DEFERENCE TO THE WRITING JUDGE

While the dispositive results in a legal case are its bottom line—who wins or loses and on what grounds—it is equally important who takes pen to paper as the writing judge. In complex cases judges often divide up responsibilities, with each writing a portion of a per curiam opinion; I put aside complications raised by that arrangement, though what I say here largely applies to that context, as well.

How is the writing judge chosen at the conference following oral argument in a given case? The nuances can vary from circuit to circuit.[32] Relevant considerations may include seniority, preferences, expertise in a given

32. *See* Edwards, *Collegial Decision Making*, *supra* note 15, at 41, 43–44 (reporting findings of survey sent to chief judges of all thirteen U.S. courts of appeal asking, among other things, "In What Order Do the Judges Speak at Conference?" and "Do You Have any Rules or Customs Regarding the Assignment of Opinions?").

area of law, and equitable distribution of workload in a sitting. Two senses of seniority—rank and years of service—can interact in complex ways. Judges are either "active" or "senior." Active judges, who hold one of the limited number of seats on the circuit designated by Congress, formally outrank—no matter how little time they have been on the bench—all senior judges, an optional status for which a judge is eligible upon reaching age sixty-five and completing at least fifteen years of judicial service. This status permits taking on a reduced caseload and absolves judges of certain responsibilities.[33] So while a newly appointed circuit judge may technically have priority in selecting cases over a senior judge who might have been on the bench for twenty-five years, matters are less clear-cut in practice. Out of a sense of deference, younger active judges may at times defer to senior status colleagues. More junior judges recognize, in turn, that they will have greater say in case assignments as time goes on; and each judge can expect to enjoy the prerogatives of the writing judge in cases assigned to that judge.

The writing judge does far more than turn an outline from the disposition memorandum into an opinion.[34] Such memoranda, which are circulated shortly after oral argument, can be relatively cursory, sketching in broad strokes how the central issues in a case are to be resolved. They may under-describe how to handle even key points in a given case, and some topics that an opinion will need to tackle may not be addressed at all. That is unsurprising, since not everything can be set out in a terse (as well as non-binding) memorandum, particularly in complex cases. There is thus an understanding that the writing judge will need to exercise considerable discretion in doing the hard work of ironing out and filling in details and arguments on which the panel will later weigh in.

The identity of the writing judge, then, takes on considerable importance, since that judge enjoys outsized

33. *See* 28 U.S.C. § 371.

34. *See supra* note 26 and accompanying text.

control over the approach and tenor of an opinion.[35] This freedom manifests in various ways that can have substantial implications for how a decision turns out and how the law develops in a given area. The nineteenth-century British jurist Henry Sumner Maine observed that, in early English courts, "substantive law has at first the look of being gradually secreted in the interstices of procedure."[36] A variant on that remark is apt here, if "procedure" refers to norms of opinion writing and draft revision.

As is to be expected, judges hold highly developed views on various aspects of law. They might believe that certain interpretations of the Administrative Procedure Act should be reevaluated; they may wish to reverse what they see as unfortunate trends in criminal procedure; they may want to find an appropriate vehicle to voice skepticism of tendencies exhibited by district courts; and so on. A case could present an occasion to articulate one or more such views, even if they are not critical to a holding. The writing judge could incorporate some of these perspectives, either explicitly or more obliquely, in a draft. The parameters within which a judge can maneuver are wide and can have implications for the evolution of legal doctrine that may not at first be obvious. What is true of a writing judge's leeway applies in derivative fashion to law clerks with strongly held legal views, which may even have informed their hiring. Those views can find expression in conversations, memoranda, and, ultimately, the substance and tenor of opinions that clerks take a first stab at drafting, though this practice varies by judge.[37]

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35. *Accord* Medina, *supra* note 14, at 152 ("[T]he ultimate and definitive decision in a particular case may depend in no small measure on the judge to whom the writing of the opinion is assigned. Until the moment of filing, all votes are, and must be, tentative and subject to change.").

36. HENRY SUMNER MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM 389 (London, 3d ed. 1883).

37. *Cf.* Medina, *supra* note 14, at 153 ("Learned Hand writes all his [opinions] out in longhand. He will not even permit his law clerk to draft a paragraph here or there for his consideration. The work is all his own and it bears the unmistakable stamp of his style and his personality.")

An opinion with the same holding written by two judges with distinct legal philosophies, styles, and temperaments may look strikingly different.[38] One might be succinct and businesslike, giving a skeletal outline of the facts and a terse treatment of the law and its application, producing a dry, compact opinion. Another judge could adopt a more elaborate route. She might set out the parties' arguments, objections, and replies in considerable detail and with a hint of greater sympathy toward one of the sides. She may trace the background of certain legal doctrines with specificity, interweaving qualifications and queries. The judge may also shape a reader's impression of just how mistaken a district court is (if it is being reversed) or how close to the line it came (if it is being affirmed). In reviewing a district court decision for abuse of discretion, for example, the same conclusion—a finding of no abuse of discretion—can be characterized in ways that send different signals to district courts and future appellate panels. A mere hint on a given topic—which the other two judges may see as too insignificant to contest—could be relied on by future courts as persuasive authority. Through a process of gradual accretion, later courts can assemble citations to seemingly tertiary remarks in prior cases that can be marshaled in support of a new doctrine or interpretation (broadening, perhaps, the scope of a certain rule or the leeway that it affords the government or private parties). In these ways, the writing judge can give momentum and directionality to the law as it will be developed by district judges and future appellate panels.

38. The distinction between opinions and judgments deserves notice here. A panel has discretion to choose whether its decision will take the form of an ordinary opinion or a judgment, which will not be published in the Federal Reporter (though judgments do appear in the Federal Appendix, and both opinions and judgments are found in electronic databases such as Westlaw). The main difference is that the holdings of opinions are binding not only on the parties in a case but on future panels in the circuit (until a majority of judges sitting *en banc* hold otherwise). Judgments, by contrast, dispose of the case at hand but have no precedential weight and thus do not bind future panels. This means that the stakes are much lower with judgments, and judges have more discretion with them. But precisely because judgments lack precedential weight, judges have little incentive to write elaborate judgments.

That is true for two further reasons. First, in reviewing opinion drafts, there are only so many recommendations that practicality and decorum will allow the two other judges to make. Second, whereas it takes two judges on a three-judge panel to make new circuit law, it requires the majority of the entire court sitting *en banc* to modify or abrogate circuit precedent, producing a one-way ratchet that cements the writing judge's leeway into circuit law and persuasive authority.

After the writing judge circulates a draft opinion to the panel, an interesting issue can arise in the background. May judges *negotiate* over what stays in, what is removed, and what is added to the draft? To increase the chances of prevailing on what a panel member sees as a key issue, may that judge give ground on a somewhat less important point in the opinion? Since judicial decision-making is ordinarily supposed to be a matter of principle, perhaps doing so is problematic—at least if it requires acquiescing on a matter with which one firmly disagrees or omitting something one views as critical. In practice, the writing judge may accept some recommendations made by the panel, decline others, and specify which further changes she is and is not prepared to make. Her colleagues may conclude that, in light of the writing judge's discretion, they have achieved most of what they could reasonably expect. Judges can thus performatively arrive at a compromise draft that is minimally, though not necessarily equally, acceptable to all, so that an opinion contains nothing with which any judge seriously disagrees. On some issues, of course, no compromise will be possible and separate opinions will follow.

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This article has discussed some aspects of judicial decision-making on the D.C. Circuit, albeit from one perspective limited by clerking for a single judge on that court, as well as for reasons of confidentiality. The distinctive combination of psychological dispositions that

many D.C. Circuit judges seem to embody, shifting deftly between opinionated decisiveness and detached impartiality, offers much to admire and helps to explain how judges can faithfully execute their functions over time. While the appellate deliberative context has something in common with ideal democratic theory—with well-informed, similarly situated parties engaging in reason-giving discourse for public benefit—key differences should be kept in mind, particularly the typical absence of pre-oral argument discussion of cases among judges. Finally, two norms—one that inclines judges toward unanimity, thereby reducing tensions and deferring confrontation, and another that gives the writing judge leeway to go beyond what is essential to a holding—seem to operate in productive tension against a backdrop of collegiality norms and other legal and practical constraints. Reflecting on these dynamics offers a richer context for understanding the D.C. Circuit in particular and appellate judicial craft more generally.