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THE EFFECTS OF COLLEGIALLY ON
JUDICIAL DECISION MAKING

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In *The Nature of the Judicial Process*, Justice Benjamin Cardozo tried to explain how appellate judges overcome their individual predilections in decision making.¹ His thesis was that the different perspectives of the members of an appellate bench “balance one another.”² He argued that “out of the *attrition* of diverse minds there is *beaten* something which has a constancy and uniformity and average value

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¹ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 176-77 (1921).

² *Id.* at 177.

greater than its component elements.”³ Attrition, of course, literally means the gradual wearing down through sustained attack or pressure, or the wearing away by friction.⁴ It is interesting that Justice Cardozo chose this word to explain how “diverse minds” come together to produce “truth and order”⁵ in decision making. I think that he was wrong in his explanation. *Collegiality*, not attrition, is the process by which judges achieve the “greater value” of which he wrote.

INTRODUCTION

In recent years, I have written several articles and given a number of speeches in which I have reflected on collegiality as it informs the judicial function.⁶ I have contended that some academics who have analyzed judicial decision making, especially on the basis of limited empirical data, have paid insufficient attention to collegiality.⁷ In particular, I have rejected the neo-realist arguments of scholars who claim that the personal ideologies and political leanings of the judges on the D.C. Circuit are crucial determinants in the court’s decision-making process.⁸ These scholars invariably ignore the many ways in which col-

³ *Id.* (emphasis added).

⁴ See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 142 (1981) (defining attrition as “the condition of being worn down or ground down by friction,” and “a breaking down or wearing down from repeated attacks”).

⁵ CARDOZO, *supra* note 1, at 176-77.

⁶ See, e.g., Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1358-62 (1998) [hereinafter Edwards, *Collegiality*] (arguing that collegiality among appellate judges facilitates judicial decision making); Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 852-53, 858-59 [hereinafter Edwards, *The Judicial Function*] (suggesting that collegiality assists with principled decision making for judges in difficult cases); Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL’Y REV. 325, 329 (2002) [hereinafter Edwards, *Race and the Judiciary*] (reasoning that “a judicial environment in which collegial deliberations are fostered . . . necessarily results in better and more nuanced opinions”); Harry T. Edwards, *Reflections (on Law Review, Legal Education, Law Practice, and My Alma Mater)*, 100 MICH. L. REV. 1999, 2006 (2002) [hereinafter Edwards, *Reflections*] (arguing that judicial collegiality helps foster intellectual discourse, resulting in enhanced performance by the court in its decision making).

⁷ See, e.g., Edwards, *Collegiality*, *supra* note 6, at 1357-58 (criticizing a prior study for “ignor[ing] the possibility of collegiality” in its analysis).

⁸ See, e.g., Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2169 (1998) (arguing that empirical evidence demonstrates that “there is a significant political determinant to judicial decisionmaking” in the D.C. Circuit); Richard L. Revesz, *Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit*, 76 N.Y.U. L. REV. 1100, 1104 (2001) [hereinafter Revesz, *Congressional Influence*] (concluding that “strong, statistically significant evidence

legality mitigates judges' ideological preferences and enables us to find common ground and reach better decisions.

When I first joined the D.C. Circuit twenty-three years ago, collegiality drew very little attention in scholarly writings on judicial decision making. In recent years, especially as empiricists have attempted to quantify judicial decision making, the idea of collegiality has gained some currency. Scholars and judges have noted that these quantitative studies are inherently suspect, because they fail to account for the effects of collegiality on judicial decision making.⁹ Thus far, however, discussions of collegiality, mostly by judges, have been brief and suggestive, usually introduced only in passing.¹⁰ No one has attempted a

of ideological voting" in the D.C. Circuit exists in administrative law cases); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997) [hereinafter Revesz, *Environmental Regulation*] (concluding that judges' "ideology significantly influences judicial decisionmaking on the D.C. Circuit"); Richard L. Revesz, *Ideology, Collegiality, and the D.C. Circuit: A Reply to Chief Judge Harry T. Edwards*, 85 VA. L. REV. 805, 844 (1999) [hereinafter Revesz, *Reply*] (reaffirming Revesz's earlier conclusion that "in certain cases, ideology significantly influenced judicial votes" in the D.C. Circuit despite possible collegiality among the judges of that court).

⁹ See Edwards, *Collegiality*, *supra* note 6, at 1357-62 (arguing that the "moderating effect of collegial deliberation" is not properly evaluated in statistical studies that attempt to assess the amount of "ideological" or "strategic" decision making by federal judges); Deannell Reece Tacha, *The "C" Word: On Collegiality*, 56 OHIO ST. L.J. 585, 586 ("I urge that we go beyond the matrix of computerized decisionmaking to consider the qualitative aspects of judicial interaction . . ."); cf. Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2298 (1999) (arguing that legal scholars "have paid insufficient attention to the ways in which the vote of each individual judge is influenced by the views of her colleagues on a multimember court"); Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 1 (1993) [hereinafter Kornhauser & Sager, *The One and the Many*] (stating that the collective nature of adjudication is "[o]ne of the most salient features of appellate courts[, but] is also one of the most ignored"); Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 82 (1986) [hereinafter Kornhauser & Sager, *Unpacking the Court*] (reasoning that "[t]raditional theories of adjudication are curiously incomplete" because they ignore the fact that judges "sit and act together with colleagues on adjudicatory panels"); Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 255 (1999) (noting that the "formal labeling of judges" by political party is "the antithesis of collegial decisionmaking").

¹⁰ See, e.g., FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 213-29 (1994) (defining collegiality and discussing its impact on the process of judicial decision making); FRANK M. COFFIN, THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH 58, 171-92 (1980) [hereinafter COFFIN, THE WAYS OF A JUDGE] (describing different manifestations of judicial collegiality and cooperation, and discussing specific cases that were a product of that value); JONATHAN MATTHEW COHEN, INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS 12-13 (2002) (arguing that collegiality among appellate judges "promotes judicial efficiency and a better judicial work product"); Shirley S. Abrahamson, *Judging in the Quiet of the Storm*,

comprehensive, sustained treatment of collegiality—what it is, how it affects group decisions on appellate courts, how it is achieved and

24 ST. MARY'S L.J. 965, 992 (1993) (mentioning collegiality as a constraint on judicial decision making); Rudolph J. Gerber, *Collegiality on the Court of Appeals*, ARIZ. ATT'Y, Dec. 1995, at 19 (offering a personal accounting of collegial decision making on the Arizona Court of Appeals); Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 141, 148 (1990) (discussing the effect of collegiality on the number of dissents and concurrences by members of a federal appellate court); Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981-1990*, 59 GEO. WASH. L. REV. 1008, 1016-18 (1991) (noting that the D.C. Circuit may be more collegial than other federal appellate circuits because all members of the D.C. Circuit are located in a single courthouse); Douglas H. Ginsburg & Brian M. Boynton, *The Court En Banc: 1991-2002*, 70 GEO. WASH. L. REV. 259, 260 (2002) (citing collegiality as one possible explanation for the increase of cases reheard en banc during the 1990s); Anthony M. Kennedy, *Judicial Ethics and the Rule of Law*, 40 ST. LOUIS U. L.J. 1067, 1072 (1996) (“[J]udicial etiquette [is] a means of maintaining the collegiality requisite to a great court.”); Michael R. Murphy, *Collegiality and Technology*, 2 J. APP. PRAC. & PROCESS 455, 457-61 (2000) (discussing how the use of technology, like teleconferencing and e-mail, can lead to a breakdown in collegiality); Francis P. O'Connor, *The Art of Collegiality: Creating Consensus and Coping with Dissent*, 83 MASS. L. REV. 93, 93 (1998) (arguing that an appellate judge's “dissents are entirely consistent with collegiality”); Diarmuid F. O'Scannlain, *A Ninth Circuit Split Study Commission: Now What?*, 57 MONT. L. REV. 313, 315 (1996) (noting that “[a]s a court of appeals becomes increasingly larger, it loses the collegiality among judges that is a fundamental ingredient in [the] effective administration of justice”); Randall T. Shepard, *The Special Professional Challenges of Appellate Judging*, 35 IND. L. REV. 381, 386 (2002) (arguing that judicial collegiality “is absolutely imperative if we are to maintain public respect for the judiciary”); Walter K. Stapleton, *The Federal Judicial System in the Twenty-First Century*, DEL. LAW., Fall 1995, at 34, 37-38 (explaining why relatively small appellate courts are necessary for collegiality); Tacha, *supra* note 9, at 592 (asserting that “collegiality is critical in energizing and qualitatively improving the work of any court”); Deannell Reece Tacha, *The Community of Courts: The Complete Appellate Judge*, J. KAN. B. ASS'N, May 1996, at 4, 5 [hereinafter Tacha, *The Community of Courts*] (“Because appellate judges in both the state and federal system always operate as either three-judge or en banc panels, the interaction among judges . . . has an important effect upon the decision-making process”); Deanell Reece Tacha, *The Federal Courts in the 21st Century*, 2 CHAP. L. REV. 7, 19 (1999) [hereinafter Tacha, *The Federal Courts*] (expressing concern over the potential loss of collegiality due to video conferencing); Patricia M. Wald, *Calendars, Collegiality, and Other Intangibles on the Courts of Appeals*, in THE FEDERAL APPELLATE JUDICIARY IN THE 21ST CENTURY 171, 178-82 (Cynthia Harrison & Russell R. Wheeler eds., 1989) (stating that collegiality is “all important” in the appellate process); Patricia M. Wald, *The Problem with Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 784-86 (1983) (discussing the necessity of judicial rules and deadlines to preserve collegiality); Patricia M. Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books*, 100 HARV. L. REV. 887, 905 (1987) (arguing that “the major constraint on appellate discretion is probably judicial collegiality”); J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1173-78 (1994) (concluding that a “loss of collegiality” comes with the expanding size of a federal appellate court).

maintained, and how courts with collegiality may differ from those without it.¹¹ That is my aim in this Article.

[REDACTED]

In discussing the effects of collegiality on judicial decision making, I have in mind collegiality only in the circuit courts. I do not address district courts or the Supreme Court. Trial judges sit alone, so they normally do not experience the sort of collegial deliberations at the core of appellate judging. The Supreme Court, however, is a collegial

¹¹ Cf., e.g., Edwards, *Collegiality*, *supra* note 6, at 1338 (“The qualitative impressions of those engaged in judging must be thoughtfully considered as part of the equation.”); Tacha, *The Community of Courts*, *supra* note 10, at 5 (“Defining collegiality is, of itself, a difficult task. Attempting to identify its characteristics and effects upon the work of the judiciary is even more difficult.”).

¹² See Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 420-22 (1983-1984) (stating that those outside the judiciary may perceive “a circuit court as consisting of a group of judges who are woefully lacking in collegiality”).

¹³ See Edwards, *Collegiality*, *supra* note 6 (responding to Revesz, *Environmental Regulation*, *supra* note 8).

¹⁴ See *id.* at 1364 (“[J]udges’ views on how they decide cases should be relevant to understanding how judges in fact decide cases.”).

body,¹⁵ and commentators have noted the group-decisional aspects of the Court's work.¹⁶ Some of the insights generated by the social science studies of group decision making among Supreme Court Justices¹⁷ may lend to an understanding of judicial deliberations among circuit court judges. But I limit my own observations on collegiality to the circuit courts, because it is what I know best and, also, because I am inclined to believe that the differences between the Supreme Court and circuit courts may be too substantial to generalize from one to the other.

Most significantly, the Supreme Court's docket consists of many more "very hard" cases than do those of the lower appellate courts.¹⁸ The majority of the cases in the circuit courts admit of a right or a best answer and do not require the exercise of discretion.¹⁹ Lower appellate courts are thus constrained far more than the Supreme Court. As a result, in the eyes of the public, the media, judges, and the legal profession, the Supreme Court is seen as more of a "political" institution than are the lower appellate courts. The Supreme Court also faces the burden of having to sit en banc in every case. This may mean that collegiality on the Court operates very differently from the collegial process at work in the lower appellate courts, where judges only rarely sit en banc. Thus, my discussion of collegiality does not refer to the Supreme Court.

THE PRINCIPLE OF "COLLEGIALITY" BRIEFLY STATED

When I speak of a collegial court, I do not mean that all judges are friends. And I do not mean that the members of the court never

¹⁵ By "collegial body" here, I mean only that it takes a vote of the majority to decide a case, not that collegiality is necessarily present on the Supreme Court.

¹⁶ A *New York Times* article, for example, noted that the Court is not immune from basic principles of small group dynamics. In a place where little can happen without a majority . . . the justices are locked into intricate webs of interdependence where the impulse to speak in a personal voice must always be balanced against the need to act collectively in order to be effective.

Linda Greenhouse, *The Court: Same Time Next Year. And Next Year.*, N.Y. TIMES, Oct. 6, 2002, § 4, at 3.

¹⁷ See, e.g., LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 112-27 (1998) (discussing the strategic aspects of judicial decision making); WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 12-36 (1964) (considering the political context in which Supreme Court Justices act).

¹⁸ See Edwards, *supra* note 12, at 389-92 (defining "very hard" cases).

¹⁹ See *id.* at 390 ("Using rough numbers, I would say that in only five to fifteen percent of the disputes that come before me do I conclude . . . that the competing arguments . . . are equally strong.").

disagree on substantive issues. That would not be collegiality, but homogeneity or conformity, which would make for a decidedly unhealthy judiciary. Instead, what I mean is that judges have a common interest, as members of the judiciary, in getting the law right,²⁰ and that, as a result, we are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect. Collegiality is a *process* that helps to create the conditions for *principled* agreement, by allowing all points of view to be aired and considered. Specifically, it is my contention that collegiality plays an important part in *mitigating* the role of partisan politics and personal ideology by allowing judges of differing perspectives and philosophies to communicate with, listen to, and ultimately influence one another in constructive and law-abiding ways.²¹

What is at issue in the ongoing collegiality-ideology debate is not whether judges have well-defined political beliefs or other strongly held views about particular legal subjects; surely they do, and this, in and of itself, is not a bad thing. Instead, the real issue is the degree to which those views ordain the outcomes of the cases that come before the appellate courts. Collegiality helps ensure that results are not preordained. The more collegial the court, the more likely it is that the cases that come before it will be determined solely on their legal merits.

THE MITIGATING EFFECTS OF COLLEGIALLY ON PARTISANSHIP, DISAGREEMENT, AND DISSENTING OPINIONS

In an uncollegial environment, divergent views among members of a court often end up as dissenting opinions. Why? Because judges tend to follow a “party line” and adopt unalterable positions on the issues before them. This is especially true in the hard and very hard cases that involve highly controversial issues. Judges who initially hold different views tend not to think hard about the quality of the arguments made by those with whom they disagree, so no serious attempt is made to find common ground. Judicial divisions are sharp and

²⁰ Professor Kornhauser’s “team model” of judging assumes that “all judges seek to maximize the number of correct answers and that the judges share a conception of ‘right answers.’” Lewis A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605, 1613 (1995).

²¹ Throughout this Article, “ideology” and “politics” are used interchangeably. These and other related terms are used to refer to judges’ *personal* predilections that may or may not coincide with what the law requires. It is my view that these personal predilections have no place in judicial decision making.

firm. And sharp divisions on hard and very hard issues give rise to “ideological camps” among judges, which in turn beget divisions in cases that are not very difficult. It is not a good situation.

I should be clear again that, when I speak of collegial decision making, I am not endorsing the suppression of divergent views among members of a court. Quite the contrary. In a collegial environment, divergent views are more likely to gain a full airing in the deliberative process—judges go back and forth in their deliberations over disputed and difficult issues until agreement is reached. This is not a matter of one judge “compromising” his or her views to a prevailing majority. Rather, until a final judgment is reached, judges participate as equals in the deliberative process—each judicial voice carries weight, because each judge is willing to hear and respond to differing positions. The mutual aim of the judges is to apply the law and find the right answer.

Some commentators worry that, when members of a court have strong collegial relationships, judges may be reluctant to challenge colleagues and may join opinions to preserve personal relationships. They argue that “[l]ess collegiality may thus increase independence—a virtue of good judging.”²² In my view, it is collegiality that allows judges to disagree freely and to use their disagreements to improve and refine the opinions of the court. Strong collegial relationships are respectful of each judge’s independence of mind while acknowledging that appellate judging is an inherently *interdependent* enterprise.²³

Social science studies on group composition and decision making²⁴ offer some support for the idea that collegiality may make dis-

²² Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 BYU L. REV. 67, 72; see also William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 324 (1996) (“Judges who know, like, and depend on each other might be less likely to risk their relationship by disagreeing on matters of importance to one or the other. Over time, colleagues might accumulate debts of deference on key issues, and subtle, unarticulated vote trading could occur.”).

²³ Others raise the question whether the principle of judicial independence that underlies Article III dictates that each judge should act without regard to the views of colleagues. See, e.g., Tacha, *supra* note 9, at 586 (“[D]oes the principle of the independence of the judiciary, which clearly underlies Article III, dictate that each judge should act without regard to the views of his or her colleagues, or, instead, should the mix of judges from different backgrounds . . . qualitatively enhance the decisionmaking process through interaction?”). But the interdependence of judicial colleagues does not impede the independence of the judiciary as an institution.

²⁴ See, e.g., Deborah H. Gruenfeld et al., *Group Composition and Decision Making: How Member Familiarity and Information Distribution Affect Process and Performance*, 67 ORG’L BEHAV. & HUM. DECISION PROCESSES 1, 2-3 (1996) (examining how “the extent

agreement more comfortable and more likely, not less. These studies indicate that group members who are familiar to each other feel less of a need to conform and to suppress alternative perspectives and judgments.²⁵ Unfamiliar group members, by contrast, are likely to be concerned with social acceptance within the group.²⁶ This leads to a tendency to conform: unfamiliar group members are apprehensive about how they will be evaluated, which leads them to suppress “alternative perspectives and judgments”²⁷ and to “behave like other group members, regardless of the nature of their private beliefs.”²⁸ Unfamiliar group members may be less likely to express views inconsistent with those that others have expressed.²⁹ In contrast, group members who are familiar with one another have less uncertainty and less anxiety about social acceptance.³⁰ This increases the fluency and flexibility of their thoughts³¹ and reduces the pressure to suppress unique perspectives to avoid social ostracism.³²

Familiarity is one of the major components of collegiality, and these insights on the effect of familiarity in groups resonate, to a certain degree, with my experience on the D.C. Circuit. Through the experience of working as a group, one becomes familiar with col-

to which members know one another and the extent to which they hold common or specialized knowledge can affect how groups process information and make decisions”).

²⁵ *Id.* at 2 (citing SOLOMON E. ASCH, *SOCIAL PSYCHOLOGY* (1952); Charlan Jeanne Nemeth, *Differential Contributions of Majority and Minority Influence*, 93 *PSYCHOL. REV.* 23 (1986); Stanley Schacter & Jerome E. Singer, *Cognitive, Social, and Physiological Determinants of Emotional State*, 69 *PSYCHOL. REV.* 379 (1962)).

²⁶ *See id.* (“[Unfamiliar group members] are as likely to be concerned with social acceptance as they are with task performance” (construing STANLEY SCHACHTER, *THE PSYCHOLOGY OF AFFILIATION: EXPERIMENTAL STUDIES OF THE SOURCES OF GREGARIOUSNESS* (1959); Morton Deutsch, *A Theory of Co-operation and Competition*, 2 *HUM. REL.* 129 (1949))).

²⁷ *Id.* at 3 (citing Charles S. Carver & Michael F. Scheier, *The Self-Attention-Induced Feedback Loop and Social Facilitation*, 17 *J. EXPERIMENTAL SOC. PSYCHOL.* 545 (1981); Lawrence J. Sanna & R. Lance Shotland, *Valence of Anticipated Evaluation and Social Facilitation*, 26 *J. EXPERIMENTAL SOC. PSYCHOL.* 82 (1990)).

²⁸ *Id.* (citing James H. Davis, *Group Decision and Social Interaction: A Theory of Social Decision Schemes*, 80 *PSYCHOL. REV.* 97 (1973); Sarah Tanford & Steven Penrod, *Social Influence Model: A Formal Integration of Research on Majority and Minority Influence Processes*, 95 *PSYCHOL. BULL.* 189 (1984)).

²⁹ *See id.* (concluding that such members would be reluctant to share ideas that others haven’t previously mentioned (citing ROBERT S. BARON ET AL., *GROUP PROCESS, GROUP DECISION, GROUP ACTION* (1992))).

³⁰ *Id.* (citing Paul S. Goodman & Dennis Patrick Leyden, *Familiarity and Group Productivity*, 76 *J. APPLIED PSYCHOL.* 578 (1991)).

³¹ *Id.* (citing Nemeth, *supra* note 25).

³² *Id.*

leagues' ways of thinking and reasoning, temperaments, and personalities. All of this makes a difference in how smoothly and comfortably group members can share, understand, and assimilate each other's ideas and perspectives.

[REDACTED]

³³ JEFFREY BRANDON MORRIS, *CALMLY TO POISE THE SCALES OF JUSTICE: A HISTORY OF THE COURTS OF THE DISTRICT OF COLUMBIA CIRCUIT 197* (2001) (quoting Letter from Felix Frankfurter to Philip B. Kurland, Professor, University of Chicago Law School (1962)).

³⁴ *But cf.* Greenhouse, *supra* note 16 (discussing scholars' speculations that sitting together for a long period of time leads to stable coalitions and "a greater willingness

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On a collegial court, the overarching mission of a panel is to figure out where a particular case fits within the law of the circuit. The goal is to find the *best answer* (not the best “partisan” answer) to the issues raised. The judges also think carefully about writing too much on an issue and about deciding issues that are not before the panel. Our mutual aim is to avoid these things. The consequences of alternative approaches are also openly discussed, so that all members of the panel are equally informed. We are looking for a sound basis for decision making, not a strategy for achieving one’s preferred result.

to compromise in order for the group to speak with one voice,” accounting for the Rehnquist Court’s “lock-step march”).

The mental states of judges who are engaged in collegial deliberations are entirely different from those of judges on a court that is not operating collegially. On the D.C. Circuit of today, judges not only accept feedback from colleagues on draft opinions, they welcome it, and might even be disappointed if none is forthcoming. When a judge disagrees with the proposed rationale of a draft opinion, the give-and-take between the commenting judge and the writing judge often is quite extraordinary—smart, thoughtful, illuminating, probing, and incisive. Because of collegiality, judges can admit and recognize their own and other judges' fallibility and intellectual vulnerabilities. No judge, no matter how smart and confident, can figure out everything perfectly on his or her own. To be able to admit that one is not perfect and to look to one's colleagues to provide a safety net and a check against error is a wonderful thing in a work environment. The result is a better work product. If one's reasoning or writing admits of ambiguities that one did not intend or legal consequences that one did not foresee, these can be cured through the give-and-take of collegial deliberation. When such flaws are addressed during the drafting of the opinion for the court, dissenting and concurring opinions are rarely required.

[REDACTED]

³⁵ 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).

[REDACTED]

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[REDACTED]

On a collegial court, if there is to be a dissent in a case, judges will help one another to make dissenting opinions as effective as possible. Dissents become more precise, focused, and useful to the development of the law. In a collegial environment, a dissenting judge can more effectively identify and articulate what exactly bothers him or her about the majority position, because other judges on the panel participate in playing that out. The simple truth, however, is that most cases in the lower appellate courts do not warrant a dissent. The Supreme Court's practice of issuing multiple opinions in a relatively large percentage of their cases is an entirely inappropriate norm for the courts of appeals. We hear too many cases, most of which admit of a best answer. What the parties and the public need is that answer, not a public colloquy among judges. A multiplicity of opinions in a single case can contribute to confusion about what the law is.³⁸ These

³⁶ David Segal, *A Game of Judicial Roulette: Microsoft's Fate Could Hinge on Which Judges Hear Appeal*, WASH. POST, Nov. 20, 1998, at D1.

³⁷ Benjamin Wittes, *What Judges Do*, WASH. POST, July 6, 2001, at A25.

³⁸ *See, e.g.*, Ginsburg, *supra* note 10, at 148 (noting that what is "[m]ore unsettling than the high incidence of dissent [in Supreme Court opinions] is the proliferation of separate opinions with no single opinion commanding a clear majority," and suggesting that this may signal less collegiality).

days, the trend on the D.C. Circuit is to dissent less and less,³⁹ because the members of the court can see that collegiality enables all judges' views to be aired and routinely taken into account in the court's judgments. When dissenting opinions are written, they are more likely to indicate the presence of truly important competing legal arguments that ought to be presented to the legal community, the legislature, and the public at large.

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³⁹ See *infra* note 65 (citing dissent statistics).

⁴⁰ See Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1635 (1998) (analyzing the attitudinal and strategic models of judicial decision making, and their ability to answer the question, "[H]ow do courts of appeals judges actually decide cases?"); see also LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* 90-94 (1997) (discussing strategic voting and suggesting that strategy plays a role in both the attitudinal and strategic models of decision making).

⁴¹ For a general discussion of the attitudinal model of judicial decision making, see DAVID W. ROHDE & HAROLD J. SPAETH, *SUPREME COURT DECISION MAKING* 134-57 (1976); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993); Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 265-79 (1997); George, *supra* note 40, at 1642-55; Harold J. Spaeth, *The Attitudinal Model*, in *CONTEMPLATING COURTS* 296 (Lee Epstein ed., 1995).

⁴² See, e.g., George, *supra* note 40, at 1652 ("[O]n average, judges reflect the ideological positions of the President who appoints them.").