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How Panels Affect Judges: Evidence From United States District Courts

Ahmed E. Taha
Wake Forest University School of Law

HOW PANELS AFFECT JUDGES: EVIDENCE FROM UNITED STATES DISTRICT COURTS

Ahmed E. Taha *

Recent research has shown that judges on panels decide cases differently than they do individually. Understanding these panel effects is essential to understanding and predicting judicial behavior. This Article uses a unique natural experiment, and interviews of United States district court judges who participated in this experiment, to empirically investigate panel effects. Specifically, in fourteen district courts the judges chose to sit in an en banc panel to decide the constitutionality of the Federal Sentencing Guidelines; in fifty-three other districts, the judges decided the issue individually instead. This Article compares the decisions and the characteristics of these districts to study how panels affect judicial decision making and to answer the related question of why federal judges who have the authority to decide a case individually would choose to do so as part of a panel instead.

Among the panel effects the Article finds is that judges in districts that sat en banc were much more likely to be unanimous in their voting and also were more likely to find the Guidelines unconstitutional than were judges in other districts. In addition, it appears that a primary purpose of sitting en banc was to obtain these panel effects. Finally, the Article provides evidence of the effects of court structure and composition on judicial collegiality and the propensity to sit en banc. Among the issues the Article examines are how the number of judges and the geographic distances between judges on a court affect judicial collegiality and the likelihood that a court sits en banc.

I. INTRODUCTION

Recent legal scholarship is discovering that when a judge is part of a panel of judges that hears a case, the judge's decision is

often greatly affected by the other members of the panel.[1] Understanding these "panel effects" is essential to understanding and predicting judicial decision making. For example, judges on United States courts of appeals ("courts of appeals") typically hear cases as part of a three-judge panel.[2] Recent empirical studies find that, in some areas of the law, the political orientation of the other two judges on a panel is at least as good of a predictor of a judge's vote as is the judge's own political orientation.[3] Indeed, a Republican judge[4] sitting on a three-judge panel with two Democratic judges is more likely to vote to uphold an affirmative action program than is a Democratic judge sitting on a panel with two Republican judges.[5] Thus, studies that ignore panel effects will misevaluate the effect of judges' political orientation on judicial decision making.

Because judges on courts of appeals only hear cases as part of a panel,[6] these recent studies investigate the effect of panels by examining how judges' decision making differs when the composition of the panels they are on differs. For example, these studies compare how a Democratic judge on a court of appeals votes when she is on a panel with two other Democratic judges versus when she is on a panel with two Republican judges.[7]

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* Assistant Professor of Law, Wake Forest University School of Law. J.D., Ph.D. Stanford University, 1996; B.A, B.S. University of Pennsylvania, 1988. I am very grateful to the United States district court judges who agreed to be interviewed for this Article and to Michael Heise, Andrew Morriss, and Gregory Sisk for access to their database. I also appreciate the very helpful comments of Judge Earl Carroll, Judge Frank Coffin, Michael Green, Judge Harry Hupp, Judge James King, Judge J. Frederick Motz, Alan Palmiter, Wendy Parker, Gregory Sisk, Judge Deanell Tacha, Carl Tobias, Ronald Wright and the WERL workshop at Washington University. I am also grateful to Damien Savoie for his excellent research assistance.

1. Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1751–69 (1997); Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 337–54 (2004).

2. *See* Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 214 (1999) (stating that United States courts of appeals ("courts of appeals") sit en banc in less than one percent of their cases).

3. Revesz, *supra* note 1, at 1719; Sunstein et al., *supra* note 1, at 317.

4. A "Republican judge" is defined as a judge who was appointed by a Republican president. A "Democratic judge" is a judge who was appointed by a Democratic president.

5. Sunstein et al., *supra* note 1, at 319; *cf.* Revesz, *supra* note 1, at 1719 (finding that in environmental regulation cases before the United States Court of Appeals for the District of Columbia Circuit "the party affiliation of the other judges on the panel has a greater bearing on a judge's vote than his or her own affiliation").

6. 28 U.S.C. § 46(c) (2000).

7. Revesz, *supra* note 1, at 1751–66; Sunstein et al., *supra* note 1, at 314–30.

The present Article, however, takes advantage of a unique natural experiment to investigate panel effects more directly. It empirically examines the effect of being on a panel by comparing the decisions of judges who decided an issue as members of a panel to the decisions of judges who instead decided the same issue individually. Specifically, it studies United States district court ("district court") judges' decisions regarding the constitutionality of the Federal Sentencing Guidelines ("Guidelines"). It compares the decisions of judges who decided this issue as part of an en banc panel in their district to the decisions of judges who decided the issue individually instead.[8] In addition, to aid in interpreting these results, this Article's empirical analyses are supplemented by interviews of thirteen federal district judges who participated in the en banc panels.[9]

Other studies of judicial behavior have analyzed judges' rulings in actual cases.[10] An inherent limitation of this approach, however, is the lack of comparability of the cases used in the analyses: different judges are rarely faced with the same legal question and factual situation. Using the decisions of hundreds of federal district judges regarding the Guidelines' constitutionality provides a unique opportunity to avoid this problem. All of the cases posed essentially the same legal question, which was unrelated to the specific facts of each case: Are the Guidelines constitutional?[11]

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8. As will be detailed below, United States district courts ("district courts") have it within their discretion to have all the judges in the district hear a case en banc, i.e., to have all the judges in the district sit together to decide a case. *See infra* notes 44–53 and accompanying text. These en banc panels should not be confused with three-judge district court panels that must be convened when an action is brought "challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body" or when otherwise required by Congress. 28 U.S.C. § 2284(a) (2000).

9. Thirteen district court judges were interviewed via telephone and email from October 2002 to March 2003. Notes from these interviews are on file with the author.

10. *See, e.g.*, Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 265–73 (1995); Sunstein et al., *supra* note 1, at 314–30.

11. Although the ultimate question—whether the Federal Sentencing Guidelines ("Guidelines") are constitutional—was the same in every case, the exact legal arguments made by the parties sometimes differed. Sharing of legal briefs, however, was very common. The small group of attorneys who represented the government in these cases used briefs containing substantially similar legal arguments, and a model defense brief was circulated to defense counsel by the defense bar. Andrew P. Morriss, Michael Heise, and Gregory C. Sisk, Private Interest, Public Interest, and Public Choice: An Empirical Analysis of Signaling and Precedent in Judicial Opinions 16 (2000) (unpublished manuscript, on file with author).

Because these decisions present such a unique natural experiment, some researchers have also used them to study other aspects of judicial behavior.[12]

Recent studies of panel effects have examined courts of appeals. Unlike court of appeals judges, who are required to sit on panels, judges in the district courts that sit en banc *choose* to do so.[13] This difference allows this Article to examine a related question as well: Why would federal district judges, who have the authority to decide a case individually, instead sometimes choose to hear the case as part of a panel? In most federal districts, the judges who had cases challenging the constitutionality of the Guidelines decided the issue individually.[14] In fourteen districts, however, judges chose to decide the issue en banc instead.[15] In addition to examining the effect of sitting on a panel, this Article also studies which factors lead judges to sit en banc.

Among the Article's major findings is that judges who sat en banc were much more likely to agree about whether the Guidelines were constitutional than were judges who decided the issue individually. This propensity of en banc panels to be unanimous is likely due to several factors. Judges in a panel discuss the case with each other and thus may be more likely to reach a consensus on the correct decision. In addition, this unanimity probably reflects go-along voting by some judges who, for a variety of reasons, wish to avoid writing a dissent. Finally, districts with greater collegiality, or that were otherwise more likely to reach unanimous decisions, were probably also more likely to choose to sit en banc.

The Article also finds that judges in districts that sat en banc were more likely to find the Guidelines unconstitutional than were judges who decided the issue independently. The greater willingness to strike down the Guidelines as part of a panel may

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12. *See, e.g.*, Mark A. Cohen, *Explaining Judicial Behavior or What's "Unconstitutional" About the Sentencing Commission?*, 7 J.L. ECON. & ORG. 183, 190–97 (1991) (analyzing which factors affected how judges ruled on the Guidelines' constitutionality); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1451–98 (1998); Ahmed E. Taha, *Publish or Paris? Evidence of How Judges Allocate Their Time*, 6 AM. L. & ECON. REV. 1, 10–25 (2004) (studying which factors affect whether judges publish their opinions).

13. The statutory authority for district courts to choose to sit en banc is discussed *infra* text accompanying note 46.

14. *See* Sisk et al., *supra* note 12, at 1416 n.172.

15. *See infra* note 36 and accompanying text.

reflect a hesitance by judges to strike down such an important federal policy without the support of their colleagues. This is especially true given the great political popularity of the Guidelines at the time; some judges may perceive panels as providing political cover for unpopular decisions.

These findings of panel effects also at least partly explain why some districts chose to sit en banc. Districts that especially desired that judges have a uniform policy toward the Guidelines were more likely to choose to sit en banc because doing so would be more likely to lead to uniformity.[16] In addition, it is reasonable to believe that judges who were leaning toward striking down the Guidelines were more likely to desire the input—and the possible political cover—from their colleagues that would come from sitting en banc.

This Article also finds evidence that more collegial districts are more likely to sit en banc. Although there is no single definition of judicial collegiality, many judges have described collegiality similarly. Representative is Judge Edwards's description of a collegial court as one in which "judges have a common interest, as members of the judiciary, in getting the law right, and that, as a result, we are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect."[17]

Many of the judges who were interviewed for this study emphasized the role of judicial collegiality in their district's decision to sit en banc. The comments of these federal district judges echo those of many judges on courts of appeals who have emphasized the role of judicial collegiality in their own decision making.[18]

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16. En banc decisions of district courts are not binding even on the judges in the district. *See infra* note 84 and accompanying text.

17. Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1645 (2003); *see also* FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 215 (1994) (defining collegiality as "[t]he deliberately cultivated attitude among judges of equal status and sometimes widely differing views working in intimate, continuing, open, and noncompetitive relationship with each other, which manifests respect for the strengths of the others, restrains one's pride of authorship, while respecting one's own deepest convictions, values patience in understanding and compromise in nonessentials, and seeks as much excellence in the court's decision as the combined talents, experience, insight, and energy of the judges permit").

18. Patricia M. Wald, *Calendars, Collegiality, and Other Intangibles on the Courts of Appeals*, *in* THE FEDERAL APPELLATE JUDICIARY IN THE TWENTY-FIRST CENTURY 171, 178 (Cynthia Harrison & Russell R. Wheeler eds., 1989) (calling collegiality "all important" to appellate courts); *see also* Edwards, *supra* note 17, at 1690 ("[C]ollegiality invokes the

Despite its importance, however, the role of collegiality has been given little attention in studies of judicial decision making. As a result, empirical studies of judicial decision making have been "inherently suspect, because they fail to account for the effects of collegiality on judicial decision making. . . . [C]ollegiality merits serious discussion to generate a fuller understanding of judicial decision making."[19] Collegiality significantly affects the quality of courts' opinions and the development of the law.[20]

Scholars lack access to judicial deliberations in which the effects of collegiality could be directly observed.[21] As a result, most of the discussions of collegiality come from judges who participate in decisions as part of a panel, although even these discussions generally have not been rigorous.[22]

This Article, however, studies a specific group context that allows for an empirical analysis of the factors that affect collegiality and of collegiality's effect on judicial decision making. This Article examines a number of measurable characteristics of a court's structure and composition that could impact collegiality. By empirically examining the relationship between these characteristics and the likelihood of sitting en banc, and by supplementing this with interviews of many of the judges who participated in these

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highest ideals and aspirations of judging."); Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981–1990*, 59 GEO. WASH. L. REV. 1008, 1017 (1991) ("In all the courts of appeals, the judges must value collegiality, if only because an individual circuit judge has little authority when acting alone; any substantive decision requires the concurrence of at least two judges.").

19. Edwards, *supra* note 17, at 1641, 1643; *see also id.* at 1643 ("[S]cholars have not afforded collegiality the attention it deserves.").

20. COFFIN, *supra* note 17, at 213, 216 ("I can think of no other contemporary institution that brings to every decision this degree of intimate, equal, permanent, independent, and single-minded collegiality. . . . Collegiality enhances quality, as its absence diminishes quality."); FRANK M. COFFIN, THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH 172 (1980) ("[C]ollegiality has much to do with the flavor, quality, and—at their best—the wisdom of appellate opinions . . . ."); Wald, *supra* note 18, at 182 ("[W]e judges need to think and care more about our collegial relationships. They affect the law we produce in significant and often unpredictable ways."); Edwards, *supra* note 17, at 1640–41 ("[C]ollegiality mitigates judges' ideological preferences and enables us to find common ground and reach better decisions."); Michael R. Murphy, *Collegiality and Technology*, 2 J. APP. PRAC. & PROCESS 455, 456 (2000) ("The product of a collegial court, its opinions, are 'better in substance, style, and tone' than those of a court which expends little effort to harmonize diverse views.") (quoting COFFIN, *supra* note 17, at 228).

21. Edwards, *supra* note 17, at 1643.

22. *Id.* at 1641–42 ("[D]iscussions of collegiality, mostly by judges, have been brief and suggestive, usually introduced only in passing. No one has attempted a comprehensive, sustained treatment of collegiality . . . .").

decisions, this Article provides evidence of the effect of these characteristics on judicial collegiality and on the decision to sit en banc.

This Article's findings are also relevant to other courts. For example, there has been much discussion regarding changing the structure of the United States Court of Appeals for the Ninth Circuit, including even proposals to split the Ninth Circuit into smaller circuits. The congressionally created Commission on Structural Alternatives for the Federal Courts of Appeals recommended organizing the Ninth Circuit into three smaller adjudicative divisions,[23] in part because the Commission believed that "when an appellate court operating as a single decisional unit reaches eighteen judgeships, the en banc process becomes too cumbersome to be feasible."[24] This Article contributes information that is important to this debate. For example, it finds that even small geographic distances between judges deter some courts from sitting en banc. This result appears to be due both to the greater logistic difficulties in convening an en banc panel in such a court and because judges who are able to see each other more often tend to be more collegial and thus more willing to hear a case en banc.

This Article also finds that courts with fewer judges are not more likely to sit en banc than are larger courts. This may be because obtaining the aggregate input of the other judges is more valuable in a large court or because having the entire court decide an issue en banc, rather than having each judge decide it separately, leads to greater resource savings in districts with a large number of judges. In addition, the Article finds that districts in which there has been recent addition of judges, and thus less familiarity among the judges, are less likely to sit en banc.

Finally, it should be noted that although en banc hearings in district courts occur rarely,[25] they have very recently received additional attention. In its June 2004 decision, *Blakely v. Washington*,[26] the Supreme Court of the United States found that the

23. COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, FINAL REP. 40 (1998). Congress created the Commission to recommend reforms of United States courts of appeals. *Id.* at 2.

24. *Id.* at 61.

25. *See infra* text accompanying note 34.

26. 124 S. Ct. 2531 (2004).

Sixth Amendment right to a jury trial prevented judges from using many factors in sentencing unless the jury found those factors were present.[27] This has led many courts and commentators to question whether the Guidelines are still valid.[28] In response to these concerns, at least one district court was asked to decide the issue en banc.[29] The effects of sitting en banc and the factors that affected courts' decisions to sit en banc to decide the Guidelines' constitutionality earlier are also likely to be relevant today.

In Part II of this Article, a brief overview of en banc proceedings in district courts provides necessary background information. Part III describes the Article's data and empirical methodology, including a description of the variables that are examined and the reasons to expect that they may be related to whether a district sits en banc. The results of this empirical analysis and their implications will be discussed in Part IV. Part V summarizes and concludes the Article.

II. EN BANC PROCEEDINGS IN U.S. DISTRICT COURTS

In courts of appeals, cases are normally heard by a panel of three judges.[30] En banc proceedings are very atypical; less than one percent of circuit court decisions are reviewed en banc.[31] Nevertheless, the procedure for hearing a case en banc is well-established. A majority of the circuit's active judges can choose to have an appeal heard or a panel's decision reviewed en banc by all of the circuit's active judges and any senior judge who served on the original panel.[32] The original panel's decision, if it exists, is vacated and replaced with the en banc court's decision.[33]

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27. *Id.* at 2538–41.

28. *See, e.g.*, *A Supreme Mess*, WASH. POST, July 15, 2004, at A20 (stating that *Blakely* "casts grave constitutional doubt on sentencing rules throughout the country, including federal sentencing guidelines").

29. Jay Weaver, *Judges Asked to Assess Ruling*, MIAMI HERALD, July 17, 2004, at 4B (stating a defense attorney has filed a motion asking the United States District Court for the Southern District of Florida to sit en banc to declare the Guidelines unconstitutional in light of the *Blakely* decision).

30. *See supra* text accompanying note 2.

31. 2002 ADMIN. OFF. OF THE U.S. CTS., JUD. BUS. OF THE U.S. CTS.: ANN. REP. OF THE DIRECTOR 37 tbl.S-1.

32. 28 U.S.C. § 46(c) (2000); FED. R. APP. P. 35(a).

33. *See, e.g.*, 4TH CIR. R. 35(c); 11TH CIR. R. 35-10.

In district courts, en banc proceedings are much rarer. Instead, a single judge typically presides over a case. District courts, however, sat en banc approximately thirty-three times from 1928 to 1987.[34] In 1988, however, there was a relative flood of en banc decisions by district courts.[35] After having made a total of thirty-three en banc decisions over the previous sixty years, federal district courts issued fourteen en banc decisions in 1988 deciding the constitutionality of the Guidelines.[36]

In 1984, Congress passed the Sentencing Reform Act,[37] dramatically changing federal criminal sentencing. Among the Act's most important provisions was the creation of the United States Sentencing Commission, an independent agency in the judiciary with the mandate to establish guidelines for federal judges to use in sentencing.[38] The Sentencing Reform Act requires the Commission to develop categories of offender and offense characteristics and create a relatively narrow range of permissible sentences for each combination of these categories.[39] After congressional review, these Guidelines became effective on November 1, 1987.[40]

In many jurisdictions, however, the Guidelines did not take effect until much later because of separation of powers and due

34. John R. Bartels, *United States District Courts* En Banc—*Resolving the Ambiguities*, 73 JUDICATURE 40, 40 (1989). Although Judge Bartels was able to find thirty-three en banc decisions, there were probably more. Some unpublished decisions would be almost impossible to discover. Because of their importance, however, it is likely that most en banc district court decisions are published. For example, ten of the fourteen en banc decisions on the Guidelines' constitutionality were published. *See infra* note 36.

35. *See* Bartels, *supra* note 34, at 40.

36. *See* United States v. Allen, 685 F. Supp. 827 (N.D. Ala. 1988); United States v. Bogle, 689 F. Supp. 1121 (S.D. Fla. 1988); United States v. Bolding, 683 F. Supp. 1003 (D. Md. 1988); United States v. Brittman, 687 F. Supp. 1329 (E.D. Ark. 1988); United States v. Christman, Cr. 88-4-2 (D. Vt. Nov. 19, 1988); United States v. Gentry, Criminal No. 87-50062-01 (W.D. La. June 22, 1988); United States v. Harris, No. 88-CR-6-B (N.D. Okl. Apr. 28, 1988); United States v. Johnson, 68 F. Supp. 1033 (W.D. Mo. 1988); United States v. Macias-Pedroza, 694 F. Supp. 1406 (D. Ariz. 1988); United States v. Ortega Lopez, 684 F. Supp. 1506 (C.D. Cal. 1988); United States v. Serpa, 688 F. Supp. 1398 (D. Neb. 1988); United States v. Stokley, Criminal Action No. 2:87-00206 (S.D. W. Va. July 8, 1988); United States v. Swapp, 695 F. Supp. 1140 (D. Utah 1988); United States v. Williams, 691 F. Supp. 36 (M.D. Tenn. 1988).

37. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1987–2040 (codified in scattered sections in titles 18 and 28 of the United State Code).

38. Pub. L. No. 98-473 tit. II, § 217(a), 98 Stat. 2019 (codified as amended at 28 U.S.C. § 994 (2000)).

39. 28 U.S.C. § 994(b) (2000).

40. U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2004).

process challenges to their constitutionality.[41] From November 1987 to January 1989, almost 300 federal district judges ruled on the Guidelines' constitutionality, most of them holding the Guidelines unconstitutional.[42] As a result, the Guidelines did not become binding in all districts until January 18, 1989, when the Supreme Court of the United States upheld their constitutionality.[43]

En banc panels of district courts should not be confused with the three-judge district court panels that must be convened when an action is brought "challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body" or when otherwise required by Congress.[44] Rather, district court en banc panels are those in which all judges in a particular district court sit together to decide a particular case. These en banc panels are not mandatory; the judges in a district have complete discretion regarding whether to sit en banc.[45]

Statutory authority for district courts to choose to sit en banc is at least implicitly granted by 28 U.S.C. § 132(c), which provides that "[e]*xcept as otherwise provided by law, or rule or order of court*, the judicial power of a district court with respect to any action, suit or proceeding may be exercised by a single judge."[46] No statute, however, describes the procedure for calling for a district court to sit en banc. As a result, different district courts have used different procedures. A review of district courts' en banc decisions indicates that some en banc panels were formed at the request of the judge assigned to the case,[47] others were formed at the request of the district's chief judge,[48] and even some were formed at the request of the parties in the case.[49] The interviews of judges conducted for this Article found that courts did not follow a formal procedure in choosing to sit en banc to decide the

41. *See infra* note 77 and accompanying text.
42. Sisk et al., *supra* note 12, at 1382.
43. Mistretta v. United States, 488 U.S. 361 (1989).
44. 28 U.S.C. § 2284(a) (2000).
45. *See* Bartels, *supra* note 34, at 40–41.
46. 28 U.S.C. § 132(c) (2000) (emphasis added).
47. *E.g.*, Smith v. Baldi, 96 F. Supp. 100, 101 (E.D. Pa. 1951).
48. *E.g.*, Lucas v. Schiffahrts Ges. Franz Lange G.m.b.H. & Co., 379 F. Supp. 759, 760 (E.D. Pa. 1974).
49. Bartels, *supra* note 34, at 41.

constitutionality of the Guidelines.[50] To the best recollection of the interviewed judges, all the judges in a district simply reached a consensus to hear the case en banc after one judge in the district suggested sitting en banc.[51]

In addition, no formal guidance exists regarding what type of case should be heard en banc by a district court.[52] As Judge Bartels observed, however, district courts have advanced four justifications for calling an en banc panel: "1) commonality of the facts and the legal issue; 2) uniform treatment for similarly situated litigants, while fostering intracourt comity; 3) conservation of scarce judicial, governmental and private resources; [and] 4) issues that, as a matter of law and public concern, are particularly serious."[53]

An examination of many of the en banc decisions prior to the Guidelines decisions illustrates the type of cases that courts have found to satisfy these criteria. The United States District Court for the Eastern District of Pennsylvania sat en banc in 1937 to hear a petition by the National Cash Register Company to reclaim from a bankruptcy trustee a cash register that the bankrupt party possessed at the time of the bankruptcy.[54] The National Cash Register Company claimed that it was entitled to recover the cash register because the bankrupt party received it under a bailment lease contract, which was now in default.[55] The court chose to hear the case en banc because the "case presents a question with which referees in bankruptcy are now confronted in almost every bankruptcy case. There should be a uniform rule of decision and the parties not left to the accident of to whom the cause is referred or the judge who hears the petition for review."[56]

In 1980, the United States District Court for the Southern District of Florida sat en banc to hear motions to dismiss eighty-four

50. *See supra* note 9.

51. *Id.*

52. In contrast, the Federal Rules of Appellate Procedure provide explicit guidance for when a court of appeals should meet en banc: "[a]n en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." FED R. APP. P. 35(a).

53. Bartels, *supra* note 34, at 42 (footnotes omitted).

54. *In re* Stein, 17 F. Supp. 587, 588 (E.D. Pa. 1936).

55. *Id.*

56. *Id.* at 589–90.

indictments against 336 defendants accused of transporting or conspiring to transport illegal aliens into the United States.[57] The defendants were all involved in the "Cuban Refugee Freedom Flotilla" in 1980 in which over 125,000 Cuban nationals were transported from Mariel, Cuba to Key West, Florida.[58] The court stated that the primary reason for sitting en banc regarding these cases was the "commonality of the facts and the legal issue set forth" in the motions to dismiss the indictments.[59] It said that these common issues should be handled uniformly by all the judges in the district, especially because the cases involved potential criminal sanctions.[60] The court also pointed out that this uniformity would be consistent with the doctrine of intra-court comity, "a general rule that, absent unusual or exceptional circumstances, judges of coordinate jurisdiction within a jurisdiction should follow brethren judges' rulings."[61] Finally, the court noted that because of the commonality of the facts and the legal issue in the cases, hearing them en banc would "limit unnecessary duplication of effort thereby conserving scarce judicial, governmental and private resources" that would be expended if each case was decided individually by different judges.[62]

Another example of the use of en banc hearing to achieve uniformity on an important and recurring issue is *Dondi Properties Corporation v. Commerce Savings and Loan Association*.[63] There, two unrelated cases in which attorney misconduct had allegedly occurred were consolidated in the United States District Court for the Northern District of Texas so that the court could adopt en banc standards of litigation conduct for attorneys in civil cases in the district.[64]

In addition, in *White v. Swenson*,[65] the United States District Court for the Western District of Missouri sat en banc to decide a habeas corpus petition filed by a state prisoner.[66] "Because vari-

57. United States v. Anaya, 509 F. Supp. 289, 292 (S.D. Fla. 1980).
58. *Id.*
59. *Id.* at 293.
60. *Id.* ("Where, as here, criminal sanctions are involved, the significance of uniformity, from both an individual and societal point of view, cannot be understated.").
61. *Id.*
62. *Id.*
63. 121 F.R.D. 284 (N.D. Tex. 1988).
64. *Id.* at 285.
65. 261 F. Supp. 42 (W.D. Mo. 1966).
66. *Id.* at 44.

ous facets of the general problem of state and federal court jurisdiction are frequently presented to this Court," the court chose to "state in some detail in this memorandum opinion of this Court en banc the principles that control the exercise of our federal habeas corpus jurisdiction."[67]

As noted above, challenges to the constitutionality of the Guidelines resulted in a relative flood of en banc hearings by district courts.[68] After sitting en banc just thirty-three times in the previous sixty years, fourteen district courts sat en banc in 1988 to decide the Guidelines' constitutionality.[69] The great propensity for the Guidelines' constitutionality to be decided en banc is unsurprising because these cases satisfy all four justifications for en banc proceedings that Judge Bartels identified.[70]

First, as discussed above, all these cases posed essentially the same legal question—whether the Guidelines are constitutional—which was unrelated to the specific facts of each case. Second, similarly situated defendants in the same district could receive markedly different sentences if judges in the district differed in whether they applied the Guidelines.[71] For example,[72] a judge who does not apply the Guidelines could, under the federal bank robbery statute, impose any prison sentence from zero to ten years on someone who committed a nonviolent $500,000 robbery of a federally insured bank.[73] If the judge instead applied the Guidelines, the judge could be required to impose a sentence of between thirty-three and forty-one months.[74] Third, in many districts, challenges to the Guidelines' constitutionality arose in

67. *Id.*

68. *See supra* notes 35–36 and accompanying text.

69. *See supra* note 36 and accompanying text.

70. *See* Bartels, *supra* note 34, at 42.

71. Paul J. Hofer et al., *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239, 256 (1999).

72. This example is provided in Andrew D. Goldstein, *What Feeney Got Right: Why Courts of Appeals Should Review Sentencing Departures De Novo*, 113 YALE L.J. 1955, 1959–60 (2004).

73. 18 U.S.C. § 2113(b) (2000).

74. Goldstein, *supra* note 72, at 1960. The exact sentencing range required by the Guidelines depends on factors such as the robber's criminal history and details of the offense. *Id.*; *see also* Michael S. Gelacak et al., *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 MINN. L. REV. 299, 301 (1996) (noting that the Guidelines' significant reduction in judicial sentencing discretion "was, and remains, highly controversial").

cases presided over by different judges.[75] Each time a judge heard a challenge to the Guidelines, parties presented their arguments to the judge in writing or orally. En banc proceedings require only one presentation and decision per district, potentially saving litigants' and judges' resources.[76] Fourth, the Guidelines raised significant separation of powers and due process issues,[77] and because the Guidelines dramatically changed federal sentencing they were also of great public concern.[78]

The degree to which the issue of the Guidelines' constitutionality satisfied these four criteria differed across districts. This Article empirically examines whether these criteria and other factors help explain why some districts decided the Guidelines' constitutionality en banc, while others did not.

Other researchers have studied which factors affect whether courts of appeals hear cases en banc. For example, Professor George found that three factors largely account for which panel decisions will be reheard en banc: the three-judge panel's reversal of a lower court or agency ruling, the filing of a dissent in the panel decision, and a liberal panel ruling.[79] Such findings, however, are inapplicable to the present study; none of the district court en banc decisions regarding the Guidelines was a rehearing of a decision.

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75. For example, in the District of Kansas, four judges separately heard challenges to the Guidelines' constitutionality. United States v. Boyd, No. 87-30025-01, 1988 U.S. Dist. LEXIS 17091 (D. Kan. July 22, 1988) (Rogers, J.); United States v. Sistrunk, No. 88-20025-01, 1988 U.S. Dist. LEXIS 17053 (D. Kan. July 21, 1988) (O'Connor, C.J.); United States v. Bryant, No. 88-10036-01, 1988 U.S. District LEXIS 17079 (D. Kan. July 14, 1988) (Crow, J.); United States v. Tolbert, 682 F. Supp. 1517 (D. Kan. 1988) (Kelly, J.).

76. Bartels, *supra* note 34, at 42.

77. *See* Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CAL. L. REV. 1, 23–40 (1991) (discussing many of the constitutional issues raised by the Guidelines).

78. Mistretta v. United States, 488 U.S. 361, 371 (1989) (calling the Guidelines' constitutionality an issue of "imperative public importance"); Cohen, *supra* note 12, at 188 (noting that judges' rulings on the Guidelines' constitutionality were receiving attention from the legal community and typically even from the local press); Todd E. Witten, Comment, *Sentence Entrapment and Manipulation: Government Manipulation of the Federal Sentencing Guidelines*, 29 AKRON L. REV. 697, 705 (1996) ("Since their enactment, the guidelines have had a substantial impact on the federal court system. Accordingly, they have been the subject of harsh criticism from commentators and members of the federal judiciary.").

79. George, *supra* note 2, at 220; *see also* Douglas H. Ginsburg & Brian M. Boynton, *The Court En Banc: 1991–2002*, 70 GEO. WASH. L. REV. 259, 264 (2002) (finding that whether the original panel heard oral argument and whether there was a dissent from the decision of the original panel are important predictors of whether a decision will be reheard en banc).

This distinction is important. Courts of appeals generally use en banc panels to review decisions of a three-judge panel of the same court of appeals. The decisions of these three-judge panels are binding on the rest of the judges on the court unless the decision is overturned by the Supreme Court of the United States or by an en banc panel of the same court of appeals.[80] Thus, judges on courts of appeals can use en banc panels to reverse decisions made by a three-judge panel with which they disagree.[81] At the call of the majority of the circuit's active judges, a three-judge panel's decision is reviewed en banc.[82] The original panel's decision is then vacated and replaced with the en banc court's decision.[83]

En banc panels by district courts, however, are not used to review the decision of a federal district judge. In addition, these en banc decisions are not binding authority even on judges in the district.[84] As will be discussed below, however, for the sake of uniformity in the district's law, even dissenting judges sometimes agree to be bound by the en banc decisions.

These differences between en banc decisions by courts of appeals and by district courts mean that the motivation for sitting en banc differs. Thus, some factors that explain courts of appeals' decisions to sit en banc are unlikely to explain district courts' decisions to do so, and vice versa. Other factors—such as the logistical difficulties of convening a court en banc—should affect both types of courts. Part III of this Article examines which factors explain why some district courts sat en banc to decide the Guidelines' constitutionality while judges in other districts sat individually. In the course of the Article, the applicability of some of these factors to courts of appeals' decisions to sit en banc will also be discussed.

80. *See, e.g.*, Indus. Turnaround Corp. v. NLRB, 115 F.3d 248, 254 (4th Cir. 1997).

81. Ginsburg & Falk, *supra* note 18, at 1033.

82. FED. R. APP. P. 35(a).

83. *See, e.g.*, 4TH CIR. R. 35(c); 11TH CIR. R. 35-9.

84. *See, e.g.*, United States v. Johnson, 682 F. Supp. 1033, 1038–39 (W.D. Mo. 1988) (Wright, J., dissenting) (dissenting from United States District Court for the Western District of Missouri's en banc holding that the Guidelines are constitutional and stating that he personally will "utilize the Guidelines strictly on an advisory basis").

III. DATA AND EMPIRICAL METHODOLOGY

This Part describes the data and empirical methodology used in this Article to study panel effects and the related question of why some district courts choose to sit en banc.

The Federal Sentencing Guidelines took effect on November 1, 1987.[85] However, their constitutionality was quickly challenged in district courts throughout the country.[86] This Article uses the 293 decisions by federal district judges regarding the Guidelines' constitutionality that were compiled by Professors Sisk, Heise, and Morriss from (1) a list of decisions that the U.S. Sentencing Commission assembled from attorneys and courts involved in the cases, (2) a search of WESTLAW and LEXIS, and (3) contacting some courts directly.[87] Of these decisions, 188 were made by judges in fifty-three district courts who decided the Guidelines' constitutionality on their own; the remaining 105 of these decisions were part of en banc decisions made in fourteen district courts.[88]

This Article studies the effect of sitting en banc on judicial decision making. It also studies whether differences in the extent to which districts satisfied the four criteria cited by Judge Bartels[89] and satisfied other criteria help explain which district courts sat en banc. To accomplish these related goals, the Article examines a number of quantifiable variables that may be correlated with whether a district court sat en banc. These variables are defined in Table 1. They reflect characteristics of a particular district court's decisions regarding the Guidelines' constitutionality, as well as many aspects of the court's structure, composition, and caseload.

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85. *See supra* text accompanying note 40.

86. *See supra* text accompanying notes 41–42.

87. Sisk et al., *supra* note 12, at 1407–08. Their compilation omits three decisions: one by a court of appeals judge sitting by designation on a district court, one by a judge in the Virgin Islands, and one that was erroneously included in the Sentencing Commission's list. *Id.* at 1408 n.143. Despite these omissions, their study reports 294, not 293, decisions by district court judges regarding the Guidelines' constitutionality. Professor Sisk's and my efforts to account for the difference in our courts was unsuccessful.

88. *Id.* at 1408–09.

89. Bartels, *supra* note 34, at 42. Recall that these criteria are: "1) commonality of the facts and the legal issue; 2) uniform treatment for similarly situated litigants, while fostering intracourt comity; 3) conservation of scarce judicial, governmental and private resources; [and] 4) issues that, as a matter of law and public concern, are particularly serious." *Id.* (footnotes omitted).

Table 1: Definition of Variables	
Variable	**Definition**
Unanimity[90]	Judges in district express unanimous view on Guidelines' constitutionality (1=yes, 0=no)
Strike Guidelines[91]	Majority of judges who express a view declare the Guidelines unconstitutional (1=yes, 0=no)
Criminal Cases[92]	Number of criminal cases terminated in district (fiscal year 1988)
Same City[93]	All active judges' chambers in same city (1=yes, 0=no)
Number of Judges[94]	Number of active judges in district
Caseload[95]	Weighted caseload in district per judge (fiscal year 1988)
Judicial Turnover	Number of days between most recently appointed judge taking office and the first decision in the district regarding the Guidelines' constitutionality

The remainder of this section discusses how each of these variables might relate to whether a particular district court sat en banc to decide the Guidelines' constitutionality.

90. Whether the judges in a district were unanimous regarding the Guidelines' constitutionality was obtained directly from the decisions. *See* Sisk et al., *supra* note 12, at 1407–09.

91. Whether a majority of the judges struck down the Guidelines was obtained directly from the decisions. *See id.*

92. The number of criminal cases in a district is from the Administrative Office of the U.S. Courts. *See* 1989 ADMIN. OFF. OF THE U.S. CTS., ANN. REP. OF THE DIRECTOR 11–12 [hereinafter 1989 ANN. REP. OF THE DIRECTOR].

93. The location of judges' chambers is from West Group's *Federal Supplement*. *See* Judges of the Federal Courts, 700 F. Supp. VII–XXXII (1989).

94. The number of judges in the district is from West Group's *Federal Supplement*. *See id.*

95. The judges' caseload is from the Administrative Office of the U.S. Courts. *See* 1989 ANN. REP. OF THE DIRECTOR, *supra* note 92, at 11–12.

A. *Unanimity*

As noted above, recent empirical research has shown the existence of large panel effects: judges on panels are often greatly influenced by their colleagues.[96] These panel effects include both "ideological dampening" and "ideological amplification." Ideological dampening is the phenomenon of judges voting less consistent with their own political ideology when they are on a panel with judges of a different political ideology.[97] An example of ideological dampening is the finding that on a three-judge court of appeals panel, in some areas of the law, a Democratic judge sitting with two Republican judges will cast a politically liberal vote less often than if that judge is sitting on a panel with one Democratic judge and one Republican judge.[98]

Ideological amplification is the phenomenon of judges voting even more consistently with their own political ideology when they are on a panel with judges of the same political ideology.[99] An example of ideological amplification is the finding that, in some areas of the law, a Democratic judge sitting with two other Democratic judges will vote liberally more often than if the judge is sitting with one Democratic judge and one Republican judge.[100]

These panel effects can be dramatic. In some areas of law, the political orientation of the other judges on a panel is an even better predictor of a judge's vote than is the judge's own political orientation. For example, Professor Sunstein's collaborative study found that Republican judges sitting on a three-judge court of appeals panel with two Democratic judges are actually more likely to vote to uphold an affirmative action program than are Democratic judges sitting on a panel with two Republican judges.[101]

There are likely several reasons for the existence of such panel effects. First, judges on a panel might be genuinely persuaded by the views of the other panel members. In addition, a judge on a panel may vote with the majority even if the judge disagrees with the majority's decision. Such "go-along" voting occurs in panels on

96. *See supra* text accompanying notes 1–7.
97. Sunstein et al., *supra* note 1, at 304, 316–17.
98. *E.g.*, Revesz, *supra* note 1, at 1753 tbl.10.
99. Sunstein et al., *supra* note 1, at 304.
100. *Id.* at 304–05.
101. *Id.* at 319.

courts of appeals.[102] Custom dictates that a dissenting judge write a dissenting opinion and thus it is not unusual for a judge who disagrees, although not passionately, with the majority's opinion to nevertheless vote with the majority to avoid having to write a dissenting opinion.[103] Go-along voting may also be motivated by the usual human tendency to make one's views conform to the views of others.[104] Judges, like other people, likely prefer to be in agreement with their colleagues.

Go-along voting may have been especially likely on the district court en banc panels that decided the Guidelines' constitutionality. Although the Guidelines evoked strong views from judges,[105] it seemed likely that the Supreme Court of the United States would soon rule on the Guidelines' constitutionality.[106] Thus potentially dissenting district court judges reasonably may have believed that their respective district's en banc decision would not have long-term consequences, making it even less worthwhile to dissent. In addition, because a primary reason for ruling on the Guidelines en banc was to encourage a uniform sentencing policy in the district,[107] some judges may have engaged in go-along voting to ensure a uniform sentencing policy in the district. If some judges in a district applied the Guidelines while others did not, then whether a defendant would be subject to the Guidelines would depend upon which judge was randomly assigned to the defendant's case.

Regardless of which reasons are responsible for panel effects in a particular situation, the ultimate impact is that judges' votes

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102. Richard A. Posner, *What do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 20 (1993).

103. RICHARD A. POSNER, OVERCOMING LAW 123 (1995).

104. *See* Sunstein et al., *supra* note 1, at 342.

105. James Zagel & Adam Winkler, *The Independence of Judges*, 46 MERCER L. REV. 795, 833 (1995) ("When Congress took much of [judges' sentencing] discretion away with the federal sentencing guidelines, the protests of judges were anguished, sincere, and widespread . . . .").

106. Indeed, because of the importance of the question of the Guidelines' constitutionality and the "disarray" among sentencing courts regarding their constitutionality, the Supreme Court of the United States took the unusual step of granting certiori even before the court of appeals had issued a judgment in a case. Mistretta v. United States, 488 U.S. 361, 371 (1989).

107. United States v. Allen, 685 F. Supp. 827, 828 (N.D. Ala. 1988) ("Because of the desirability of consistency, the judges of this court—like those in several other districts—have elected to consider collectively [the guidelines' constitutionality].") (footnotes omitted).

are influenced by the other members of the panel. A judge who sits on a panel will be more likely to vote the same as other judges on the panel than the judge would if the judge decided the case individually. Therefore, one can predict that federal judges who decide a case as part of an en banc panel are more likely to reach a unanimous decision than they would if they each decided the case separately.

Panel effects lead to the prediction that sitting en banc will make federal district judges more likely to vote unanimously. Federal district judges on en banc panels may also be more likely to vote unanimously because more collegial districts may be more likely to choose to sit en banc. Recall that the definition that many judges give to collegiality includes a willingness to listen to and be persuaded by the arguments of one's colleagues.[108] Thus, judges in a collegial district may be more likely to agree on the Guidelines' constitutionality because they are more likely to reach a consensus on controversial topics than are less collegial districts.[109] If more collegial districts are also more likely to choose to sit en banc, then there should be an especially strong positive correlation between sitting en banc and reaching a unanimous decision on the Guidelines' constitutionality.

Finally, note that if judges believe that pressure for unanimity exists in an en banc setting—for example, that the district will have a uniform sentencing policy—then judges who suspect that their views regarding the Guidelines' constitutionality are in the minority in the district might oppose hearing the case en banc. Thus, courts in which all the judges agree regarding the Guidelines' constitutionality might be more likely to also agree to sit en banc.

For all these reasons, districts that sat en banc to decide the Guidelines' constitutionality should have been more likely to be unanimous than were the districts in which judges individually decided the issue instead.

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108. *See supra* note 17 and accompanying text.

109. *See* COFFIN, *supra* note 17, at 224–25 (calling dissenting and concurring opinions "ruptures in the cloak of consensus ordinarily worn by collegiality," and calling a court's long history of unanimous opinions "a testament to the efficacy of real collegial interaction in reaching a result all can accept").

B. *Majority Vote to Strike Down the Guidelines*

For two reasons, districts in which a majority of judges voted to strike down the Guidelines may have been more likely to sit en banc. First, deciding the Guidelines' constitutionality as part of an en banc panel may have made some judges more willing to vote to strike down the Guidelines. Second, districts in which many judges suspected that they would find the Guidelines unconstitutional may have been more likely to choose to sit en banc.

Federal district judges likely were reluctant to strike down the Guidelines. Many judges are hesitant in general to invalidate statutes,[110] and the Guidelines were promulgated pursuant to the federal Sentencing Reform Act.[111] This reluctance might be particularly high when the statute has a very large effect on public policy, such as the Guidelines' dramatic change of federal sentencing policy.[112]

Judges were likely especially hesitant to strike down the Guidelines because the Guidelines were politically very popular. For example, both the Democratic and Republican presidential nominees at the time—George H.W. Bush and Michael Dukakis—publicly supported the Guidelines.[113] Prior empirical research has found that this political popularity made many judges reluctant to strike down the Guidelines. All else equal, judges with a greater probability of promotion to courts of appeals were more likely to uphold the Guidelines than were other judges.[114]

Sitting en banc may have made some judges more willing to strike down the Guidelines. Some judges might have felt empowered by having colleagues who were also voting to strike them down. If a judge's colleagues favored striking down the Guidelines, then some judges might follow their own inclination to do so

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110. *See, e.g.*, Gregory S. Crespi, *Overcoming the Legal Obstacles to the Creation of a Futures Market in Bodily Organs*, 55 OHIO ST. L.J. 1, 63 (1994) (noting courts' reluctance to invalidate acts of Congress).

111. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1987–2040 (codified in scattered sections in titles 18 and 28 of the United States Code).

112. Marc L. Miller, *Domination & Dissatisfaction: Prosecutors As Sentencers*, 56 STAN. L. REV. 1211, 1212 (2004) (describing the Guidelines as a cause of the "both radical and reactionary" transformation that the federal sentencing system has undergone since 1984).

113. Cohen, *supra* note 12, at 195.

114. *Id.* at 193; Sisk et al., *supra* note 12, at 1488–90.

as well.[115] In addition, voting to strike down the politically popular Guidelines as part of an en banc decision rather than individually might be perceived as providing some political cover to judges. A judge's vote to strike down the Guidelines would appear as only one of a number of judges' votes in the case.

For the same reasons, districts in which many judges were at least preliminarily inclined to strike down the Guidelines may have been more likely to choose to sit en banc. Before holding the Guidelines unconstitutional, such judges might have desired the input of their colleagues that an en banc panel provides. In addition, some judges may also have wanted the political cover that would come from striking down Guidelines as part of an en banc panel rather than individually.

C. *Number of Criminal Cases*

The more defendants who could be sentenced under the Guidelines, the greater the importance of uniform treatment of defendants, and the greater the public concern regarding whether the Guidelines are constitutional. Thus, all else equal, districts with more criminal cases should have been more likely to decide the Guidelines' constitutionality en banc.

D. *All Judges' Chambers in Same City*

For two reasons, it is reasonable to expect that districts in which all judges have their chambers in the same city will be more likely to sit en banc. First, it is easier logistically to gather all the judges in a district to hear and discuss a case if all the judges' chambers are in the same city. Many of the en banc decisions regarding the Guidelines' constitutionality were preceded by oral argument, and the judges also met after the argument to discuss the case.[116] Logistical considerations dictated that almost

115. *See* Sunstein et al., *supra* note 1, at 342 ("If other people seem to share your view . . . you are likely to become more confident that you are correct . . . .").

116. *See supra* note 9.

all the en banc hearings were held in the city where most judges had their chambers.[117]

Second, judges who are geographically closer together are more likely to regularly interact with each other. Greater collegiality between judges may result from more frequent interaction.[118] In turn, this collegiality may lead to a greater propensity to act as a group, such as by taking the unusual step of sitting en banc.

E. *Number of Judges*

As noted above, one reason district courts have given for sitting en banc is to save the judicial, governmental, and private resources that would be used by having multiple judges separately decide the same issue.[119] The degree to which sitting en banc can save parties' or judges' resources may be affected by the number of judges in the district. Each time a judge heard challenges to the Guidelines' constitutionality, the parties had to present their arguments to the judge in writing and/or orally. An en banc proceeding allows all the judges in a district to hear oral argument at the same time and to read the same briefs, thus potentially conserving parties' resources by requiring only one set of arguments for the entire district. The more judges in a district, the greater the potential resource savings from being able to present arguments to all the judges at the same time.

Sitting en banc is less likely to conserve judges' time, however; all the judges still must hear oral argument and read the parties' briefs. In fact, en banc consideration of the constitutionality of the Guidelines may require greater judicial time, because if no en banc hearing occurred, then some judges in the district likely would have been able to avoid deciding the Guidelines' constitutionality before the Supreme Court of the United States settled the issue. Indeed, in most districts that did not sit en banc, less than half the judges ruled on the Guidelines' constitutionality.[120]

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117. Although most judges of the United States District Court for the Central District of California had their chambers in Los Angeles, the en banc hearing was held in nearby Pasadena because no courtroom in Los Angeles was large enough. *See supra* note 9.

118. Edwards, *supra* note 17, at 1675 ("Having the entire circuit's chambers in the same building . . . can also be immensely helpful [in building collegiality].").

119. *See supra* text accompanying note 53.

120. At the time of the decisions regarding the Guidelines' constitutionality, there were 389 judges in the fifty-three district courts that did not sit en banc despite having at least

In addition, more effort is likely required to write a decision acceptable to a majority of an en banc panel than one acceptable to a single judge. The decision must be circulated among all the judges in the district for comments and often must be revised in light of these comments.[121]

For all these reasons, the more judges there are in a district, the greater may be the expenditure of judicial resources caused by an en banc hearing. In addition, the logistics of gathering all the judges together to hear oral argument and discuss the case likely becomes more complicated as the number of judges in a district increases.

On the other hand, an en banc decision might save judicial resources by allowing some judges who would have published an opinion regarding the Guidelines' constitutionality to simply join the decision of another judge instead. The more judges in the district, the greater this potential resource savings. Such savings may be insignificant, however, because judges have great discretion regarding whether to publish or even write an opinion, so judges with too little time might have chosen not to write an opinion anyway.[122]

Finally, as noted above, more collegial district courts may be more likely to meet en banc.[123] Many judges have argued that judicial collegiality is more difficult to attain in courts with a larger number of judges.[124] Therefore, district courts with more judges may be less collegial, and thus less likely to sit en banc than are district courts with fewer judges. The negative effect on collegiality of having more judges may even occur in districts with rela-

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one judge in the district decide the Guidelines' constitutionality. 680 F. Supp. VII–XXX (1988). Only 187 of those 389 judges ruled on the Guidelines' constitutionality. *See supra* text accompanying note 88. Note that one of these judges issued two decisions; therefore, 188 decisions were issued by 187 judges. Sisk et al., *supra* note 12, at 1409.

121. Ginsburg & Falk, *supra* note 18, at 1019.

122. In fact, all else equal, district judges with a greater caseload—and thus who were busier—were less likely to publish their opinions on the Guidelines' constitutionality. Taha, *supra* note 12, at 20.

123. *See supra* note 109 and accompanying text.

124. COFFIN, *supra* note 17, at 216 ("The threatened dilution of collegiality in federal courts has led some to propose capping the numbers of appellate and trial judges."); Edwards, *supra* note 17, at 1674–75 ("Many judges are convinced that collegiality enables better decisions, and that smaller courts tend to be more collegial. I agree."); Diarmuid F. O'Scannlain, *A Ninth Circuit Split Study Commission: Now What?*, 57 MONT. L. REV. 313, 315 (1996) ("As the court of appeals continues to grow, it becomes increasingly difficult to maintain the collegiality necessary for the court to do its job.").

tively few judges. As Judge Harrison Winter stated, "[i]t's easy to sit down with three judges and feel a closeness of association; when you become five, that closeness is somewhat diluted, more so when you become seven, still more when you are nine."[125]

F. *Caseload*

If hearing a case en banc requires more judicial resources, busier judges should be less likely to hear a case en banc. Therefore, a higher caseload—defined as the number of weighted cases[126] per year per judge in the district—may reduce a district's propensity to sit en banc.

G. *Judicial Turnover*

As discussed above, collegial districts may be more likely to meet en banc.[127] In addition, a number of judges have stated that familiarity with one's colleagues is important to creating collegiality.[128] Thus, districts with more stable judicial composition may be more collegial, because the judges will have known and interacted with each other for longer. Thus, all else equal, the longer since a new judge has joined the district court, the more collegial the court may be, and therefore the more likely the court will sit en banc.

For the reasons discussed, all the variables in Table 1 might affect the likelihood that districts sat en banc to decide the Guidelines' constitutionality. It should be noted, however, that other factors that could not be examined in this Article also may affect

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125. Harrison L. Winter, *Goodwill and Dedication, in* THE FEDERAL APPELLATE JUDICIARY IN THE TWENTY-FIRST CENTURY 167 (Cynthia Harrison & Russell R. Wheeler eds., 1989).

126. The amount of time a judge typically spends on a case differs by case type. Therefore, to measure workload more accurately, the Judicial Conference uses a case weighting system that takes these differences into account. A. Leo Levin, *Beyond Techniques of Case Management: The Challenge of the Civil Justice Reform Act of 1990*, 67 ST. JOHN'S L. REV. 877, 886 n.45 (1993).

127. *See supra* note 109 and accompanying text.

128. COFFIN, *supra* note 17, at 221 (noting that collegiality is enhanced when judges are conscious of their colleagues' "values and philosophies as years of service together have revealed them"); Charles Clark, *A Healthy and Diverse Judiciary, in* THE FEDERAL APPELLATE JUDICIARY IN THE TWENTY-FIRST CENTURY 163 (Cynthia Harrison & Russell R. Wheeler eds., 1989) ("Contact [between judges] is important to collegiality.").

the propensity to sit en banc. For example, some of the interviewed judges credited the high quality of their district's chief judge as being a factor.[129] They saw their chief judges' leadership as being important to their districts' decisions to sit en banc.[130] In addition, the collegiality in a district is likely affected by the individual personalities of the judges in the district.[131] Like the quality of the chief judge, however, such a factor cannot be measured easily and thus is not included in this Article's empirical analysis.

IV. RESULTS AND IMPLICATIONS

The last Part of this Article examines the variables that measure possible panel effects and that may be correlated with the likelihood that a particular district sat en banc to decide the Guidelines' constitutionality. To determine whether these variables are related to sitting en banc, the values of these variables in districts that sat en banc are compared to their values in districts that did not do so.

Table 2 gives the mean value of each of the variables in Table 1 for those districts that sat en banc and for those districts in which judges individually decided the Guidelines' constitutionality. In addition, the third column presents the p-value[132] for the test of the null hypothesis that both types of districts have the same mean value of the particular variable.[133]

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129. *See supra* note 9. In federal district courts, the chief judge is generally the active judge with the longest tenure who is under sixty-five years of age and has never served as the chief judge before. 28 U.S.C. § 136(a) (2000).

130. *See supra* note 9. Chief judges have been credited with importance in creating collegiality in courts of appeals as well. Edwards, *supra* note 17, at 1670–74 (stating the importance of the circuit's chief judge in promoting collegiality and describing how some chief judges have done so); Winter, *supra* note 125, at 167–68 (stating that a chief judge can encourage collegiality by "exercis[ing] moral leadership and persuasion, verbally and by example").

131. Edwards, *supra* note 17, at 1677 ("One judge alone probably cannot destroy collegiality on a court, because of the various ways in which the group can successfully bring him or her into the fold of institutional norms. But a few uncompromising personalities, together, can distract a court from its mission.").

132. The p-value indicates if the difference between the means of the variable for en banc districts and for the non-en banc districts is statistically significant. *See* MICHAEL O. FINKELSTEIN & BRUCE LEVIN, STATISTICS FOR LAWYERS 120 (2d ed. 2001). A p-value of .05 or less means that the difference between the means is significant at a ninety-five percent confidence level. *See id.* at 166–71. A p-value of .10 or less means that the difference between the means is significant at a ninety percent confidence level. *See id.*

133. For a discussion relating to testing of a null hypothesis, see *id.* at 120–22.

Table 2: Means of Variables

Variable	En Banc Districts	Non-En Banc Districts	p-value
Unanimity	0.6429	0.3143	.0538 *
Strike Guidelines	0.7143	0.3962	.0406 **
Criminal Cases	463.7143	485.9811	.8717
Same City	0.4286	0.2642	.3249
Number of Judges	6.7143	6.8887	.9054
Caseload	469.9286	463.4528	.8375
Judicial Turnover	1133.4300	888.3962	.3298

* Difference between en banc and non-en banc districts is statistically significant at a 90% confidence level

** Difference between en banc and non-en banc districts is statistically significant at a 95% confidence level

Because some of the variables may not be independent of each other, additional analysis is also necessary. For example, if districts that have a large number of criminal cases also tend to have a large number of judges, then Table 2 will not accurately show the effect of these variables on the likelihood of sitting en banc. Thus, in addition, a multivariate analysis is used to calculate the effect of a change in one variable when all the other variables are held constant. Specifically, a logistic regression is run of a dependent variable—whether the district sat en banc—against all of the variables and an intercept term.[134] The regression results are presented in Table 3, and the estimated coefficients are

134. A logistic regression is appropriate because the dependent variable has only two possible values: a district either sat en banc or it did not do so. *See id.* at 458–59; *see also* G.S. MADDALA, LIMITED-DEPENDENT AND QUALITATIVE VARIABLES IN ECONOMETRICS 22–27 (1983) (describing logistic regressions).

transformed in Table 4 to measure the variables' effect on the probability of sitting en banc.[135]

Overall, the results are consistent with the expectations discussed above. Despite the small number of observations, all of the estimated coefficients in Table 3 have the predicted signs (where such a prediction existed) and one is even statistically significant.

In addition, thirteen judges who participated in the Guidelines' en banc decisions were interviewed. The interviews included at least one judge from eleven of the fourteen districts that sat en banc. These interviews further confirmed that many of the variables affect the propensity of districts to sit en banc.[136]

Table 3: Determinants of Sitting En Banc—Logit Estimates

Variable	Co-efficient	Standard Error	p-value
Intercept	-3.5038 **	1.7706	0.0478
Unanimity	1.8835 *	1.0523	0.0735
Strike Guidelines	0.9195	0.7591	0.2258
Criminal Cases	0.0009	0.0009	0.3130
Same City	0.2049	0.7175	0.7752
Number of Judges	0.0563	0.0867	0.5159
Caseload	-0.0011	0.0033	0.7482
Judicial Turnover	0.0003	0.0004	0.4841

n=67 Log-Likelihood = -29.872 pseudo R^2 = .1301
* Statistically significant at a 90% confidence level
** Statistically significant at a 95% confidence level

135. The probabilities are calculated by setting each variable equal to its mean value.
136. *See supra* note 9.

Table 4: Effect on Probability of Sitting En Banc	
Variable	**Difference in Probability of Sitting En Banc**
Unanimity[137] (Differing Views v. No Differing Views)	28.9%
Strike Guidelines[138] (Majority of Judges Find the Guidelines Unconstitutional)	13.3%
Criminal Cases[139] (708.07 cases v. 254.58 cases)	5.8%
Same City[140] (All judges' chambers in same city)	3.0%
Number of Judges[141] (9.27 judges v. 4.44 judges)	3.8%
Caseload[142] (516.77 cases v. 412.85 cases)	-1.6%
Judicial Turnover[143] (1354.68 days v. 524.51 days)	3.4%

137. The effect of the Unanimity variable is measured by the change in the probability of sitting en banc if judges in the district who expressed a view on the Guidelines constitutionality were unanimous in that view (i.e., Unanimity=1) versus if judges expressed differing views (i.e., Unanimity=0).

138. The effect of the Strike Guidelines variable is measured by the change in the probability of sitting en banc if the majority of judges in the district who expressed a view on the Guidelines' constitutionality found the Guidelines unconstitutional (i.e., Strike Guidelines=1) versus if the majority did not do so (i.e., Strike Guidelines=0).

139. The effect of the number of Criminal Cases is measured by the difference in the probability of sitting en banc when the value of the variable is its mean plus one-half standard deviation, versus when its value is its mean minus one-half standard deviation.

140. The effect of the Same City variable on the probability of publication is measured by calculating the difference in the probability of sitting en banc when all the judges' chambers are in the same city (i.e., Same City=1) versus when the judges' chambers are in different cities (Same City=0).

141. The effect of the Number of Judges in the district is measured by the difference in the probability of sitting en banc when the value of the variable is its mean plus one-half standard deviation, versus when its value is its mean minus one-half standard deviation.

142. The effect of the judges' Caseload is measured by the difference in the probability of sitting en banc when the value of the variable is its mean plus one-half standard deviation, versus when its value is its mean minus one-half standard deviation.

143. The effect of Judicial Turnover is measured by the difference in the probability of sitting en banc when the value of the variable is its mean plus one-half standard deviation, versus when its value is its mean minus one-half standard deviation.

A. *Unanimity*

Districts sitting en banc were much more likely to be unanimous regarding the Guidelines' constitutionality. All else equal, districts in which the judges were unanimous regarding the Guidelines' constitutionality were a statistically significant 28.9% more likely to sit en banc than were districts in which judges expressed differing views.[144]

As discussed above, several possible explanations for this result exist.[145] The process of hearing a case en banc may have made judges more likely to be unanimous. For example, some judges on a panel may have been genuinely persuaded by their colleagues regarding the constitutionality of the Guidelines. In addition, some potential dissenters may have engaged in go-along voting, either out of a desire for uniform sentencing practices in the district, or simply to avoid having to write a dissenting opinion. On the other hand, districts that were more likely to be unanimous may have been more likely to have chosen to sit en banc. For example, more collegial districts may have been more likely to sit en banc, and this collegiality may also have encouraged the development of a real consensus among the judges regarding the Guidelines' constitutionality. In addition, districts in which there was a feeling that the judges had common views on the Guidelines' constitutionality may have been more likely to choose to sit en banc.

Interviews of judges clarify which explanations likely are most responsible for this result. Although judges in some districts stated that earlier conversations with other judges in their district allowed them to gauge how many of their colleagues felt about the Guidelines, no judge believed that this knowledge was a factor in the decision to sit en banc.[146]

In addition, all interviewed judges believed that there was not even implicit pressure to go along with the majority's decision on the Guidelines' constitutionality.[147] Still, many said that when the en banc hearing was called, it was hoped that the decision would be unanimous so that there would be a uniform sentencing policy in the district.[148] Indeed, the desire for uniformity was one of the

144. *See supra* Table 4.
145. *See supra* Part III.A.
146. *See supra* note 9.
147. *Id.*
148. *Id.*

two reasons that the interviewed judges cited for choosing to sit en banc.[149] If a purpose of sitting en banc was to obtain uniformity in the district, it is reasonable to expect that some judges felt at least an implicit pressure to reach a unanimous decision. Indeed, although none of the interviewed judges were aware of any go-along voting in their district, a few acknowledged that it was possible it had occurred.[150]

Even pressure for uniformity need not necessarily discourage dissent, however. For example, in two districts that sat en banc, dissenting judges explicitly stated in their dissenting opinions that they disagreed with the majority's decision but, for the sake of uniformity in the district's sentencing practices, they would adopt the majority's approach toward the Guidelines.[151] Nevertheless, the desire to avoid having to write a dissenting opinion may have deterred such a practice, especially because it was expected that the Supreme Court of the United States would soon decide the issue anyway.[152]

The second reason that interviewed judges gave for sitting en banc was that they desired the input of their colleagues on a very important issue: the Guidelines' constitutionality.[153] This suggests that judges in districts that chose to sit en banc might be particularly receptive to being persuaded by their colleagues.

This interest in their colleagues' views can be considered an application of Condorcet's Jury Theorem.[154] That theorem states:

> Suppose that there are n voters who must decide between two alternatives, one of which is correct and the other incorrect. Assume that the probability that any given voter will vote for the correct alternative is greater than ½. Then the probability that a majority vote will select the correct alternative approaches 1 as the number of voters gets large.[155]

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149. *Id.*

150. *Id.*

151. United States v. Macias-Pedroza, 694 F. Supp. 1406, 1419–20 (D. Ariz. 1988) (Rosenblatt, J., dissenting); United States v. Ortega Lopez, 684 F. Supp. 1506, 1515 (C.D. Cal. 1988) (Hupp, J., dissenting).

152. Recall, that to speed its determination of the Guidelines' constitutionality, the Supreme Court of the United States took the unusual step of granting certiorari before the court of appeals had issued a judgment in the case. Mistretta v. United States, 488 U.S. 361, 371 (1989).

153. *See supra* note 9.

154. Paul H. Edelman, *On Legal Interpretations of the Condorcet Jury Theorem*, 31 J. LEGAL STUD. 327, 328 (2002).

155. *Id.*

Assuming that each judge is more likely than not to rule correctly on the Guidelines' constitutionality, Condorcet's Jury Theorem implies that a majority of an en banc panel is even more likely to rule correctly than is an individual judge. Thus if a judge is faced with a strong majority of their colleagues that hold one view on the Guidelines' constitutionality, a judge might be inclined to believe that this majority is correct, and thus may be more likely to be persuaded by those judges.

A number of the interviewed judges also expressed the belief that their courts were especially collegial, and that this collegiality contributed to the decision to sit en banc.[156] This greater collegiality may have either directly or indirectly caused the greater unanimity in the en banc decisions. Collegiality might indirectly encourage unanimity simply by encouraging the use of en banc panels. If more collegial courts are more likely to meet en banc, and if being on a panel encourages potential dissenting judges to vote the same as the majority does, then more collegial courts should be more likely to be unanimous.

Collegiality likely also more directly caused greater unanimity. As discussed above, many judges believe that in a collegial court, judges sincerely listen to, and are willing to be persuaded by, the views of their colleagues.[157] Thus, a more collegial court may have more unanimous decisions than a less collegial court because the judges are more likely to allow themselves to be genuinely persuaded by their colleagues.[158]

This type of unanimity should be contrasted to unanimity obtained when a potential dissenting judge instead engages in go-along voting. As Judge Edwards points out, "[i]n 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

156. *See supra* note 9.

157. *See supra* note 17 and accompanying text.

158. *See* COFFIN, *supra* note 17, at 214 (stating that keeping an open mind about cases is important to collegiality and that "nothing is more disheartening than to hear a colleague in opening discussions [about a case], say, 'Nothing's going to change my mind'"); *id.* at 224–25 (calling a court's long history of unanimous opinions "a testament to the efficacy of real collegial interaction in reaching a result all can accept").

reached. This is not a matter of one judge 'compromising' his or her views to a prevailing majority."[159]

Other judges have noted that in a collegial environment this deliberative process can result in a compromise decision to which all the judges can agree, rather than resulting in judges being persuaded by the arguments of their colleagues.[160] Even such compromises, however, should not be troublesome. Panel decisions are, by definition, the decision of a panel, not of individual judges. Thus, only a decision that can command the support of a majority of a panel can become the law.[161]

The en banc decisions regarding the constitutionality of the Guidelines are unlikely to have been compromise decisions, at least regarding the ultimate question in the case—whether the Guidelines are constitutional. The judges had to decide whether or not to apply the Guidelines to criminal cases in their district; no compromise position was available.

In addition, it is debatable if even blatant go-along voting is undesirable in general. As noted above, a judge may go along with the majority on a panel to avoid having to spend time writing a dissent about an issue the judge does not feel particularly strongly about or that is not of great public importance.[162] In such circumstances, arguably the judge's—and the judge's clerks'—time is better spent on tasks other than writing a dissent.[163] Also, many judges believe:

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159. Edwards, *supra* note 17, at 1646; *see also* COFFIN, *supra* note 17, at 221 (recalling that "on a significant number of occasions [upon receiving a draft opinion from a colleague], responding judges have been able to present a new way of looking at a case, or a hitherto overlooked case authority, or some undervalued fact or procedural point, and . . . a writing judge has gracefully changed course").

160. COFFIN, *supra* note 17, at 214 (stating that, because judges on a panel must achieve a consensus, "[n]ot only must [they] be prepared to live with a certain restraint on their style, but they must compromise on many matters of substance. They write for not just themselves but others also."); Wald, *supra* note 18, at 178–79 ("Colleagues who are perennially annoyed and irritated with one another have difficulty listening respectfully and open-mindedly to each other; they have little incentive to seek a middle ground.").

161. COFFIN, *supra* note 17, at 220 (observing that "[t]he whole idea behind appellate courts is that a collection of different minds is better able to perceive error and to guide the development of the law than is one mind").

162. *See supra* text accompanying note 103; *see also* Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 142 (1990) (noting that in the distribution among the judges on a court of opinions to be written, dissenting and concurring opinions do not count, thus "[d]issents or concurrences are written on one's own time").

163. COFFIN, *supra* note 17, at 226 (advising judges considering writing a concurring opinion to "weigh the time involved and decide whether a separate opinion is worth the

> [d]issents and concurrences need to be saved for major matters if the Court is not to appear indecisive and quarrelsome, [because] the appearance of indecision and quarrelsomeness are drains on the energy of the institution, leaving it in weakened condition at those moments when the call upon it for public leadership is greatest.[164]

It is believed that judges such as Justice Louis Brandeis and Justice Benjamin Cardozo often ultimately engaged in go-along voting out of this concern.[165] This concern, however, is much less applicable to district courts because they very rarely issue group decisions.

Finally, however, it should be noted that some have argued that a more collegial environment might actually lead to more dissents.[166] Some social science studies suggest that when a group of people are more familiar with each other, they will also feel more comfortable disagreeing with each other.[167] The evidence presented in this Article, however, supports the conclusion that greater collegiality leads to fewer dissenting opinions.

B. *Majority Vote to Strike Down Guidelines*

Districts in which a majority of judges voted to strike down the Guidelines were much more likely to sit en banc.[168] As displayed in Table 4, all else equal, districts in which most judges found the Guidelines unconstitutional were 13.3% more likely to sit en banc

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sacrifice to your regular opinion load"); Taha, *supra* note 12, at 20 (finding that district court judges in courts with a greater caseload are less likely to publish their decisions, which indicates that time spent publishing decisions at least partly reduces the time judges spend on their other cases).

164. Ginsburg, *supra* note 162, at 143 (quoting John P. Frank, Book Review, 10 J. LEGAL ED. 401, 404 (1958) (reviewing A. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS (1957))); *see also* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 354 (1996) ("Abuse [of another judge] in opinions is not only a distraction to the reader but also lowers the reputation of the judiciary in the eyes of the public. . . ."); Wald, *supra* note 18, at 179 (stating that perceived personal feuds between judges can cause "public distrust or disenchantment" with the judicial process); Winter, *supra* note 125, at 169 (the public's confidence in, and acceptance of, courts' decisions are undermined by intemperate dissents).

165. See Ginsburg, *supra* note 162, at 142–43.

166. *See* Edwards, *supra* note 17, at 1646–47.

167. *See id.*

168. *See supra* Table 4.

than were other districts.[169] Given that only fourteen of the sixty-seven districts—20.9%—sat en banc, this is a very large effect.[170]

This result likely has two related causes. First, districts in which many judges suspected that they would find the Guidelines unconstitutional may have been more likely to choose to meet en banc. Second, being in a panel likely made many judges more willing to strike down the Guidelines.

As noted above, in the interviews of judges one of the two reasons cited for sitting en banc was to obtain the input of colleagues.[171] Finding the Guidelines unconstitutional—a dramatic change in federal sentencing policy—is a major action by a judge. In addition, the political popularity of the Guidelines at the time made striking down the Guidelines seem even more serious. Indeed, judges who had a greater chance of promotion to a court of appeals were more likely to uphold the Guidelines.[172] Thus some cautious judges who believed they were likely to strike down the Guidelines may have been more desirous of the counsel of their colleagues before doing so. In addition, some judges may have believed that their voting only as part of a panel to hold the Guidelines unconstitutional may give them more political cover than if they had instead struck down the Guidelines on their own.

For the same reasons, sitting on an en banc panel may have made some judges feel more comfortable striking down the Guidelines. Judges whose colleagues also voted to strike down the Guidelines may have felt more empowered to do so as well, because the vote confirmed their own views, and it provided them some political cover.

C. *Number of Criminal Cases*

District courts with more criminal cases were more likely to sit en banc, although this result is not statistically significant.[173] All else equal, having 708 criminal cases rather than 255 criminal cases in the district led to a 5.8% greater probability of deciding

169. *See supra* Table 4.
170. *See supra* text accompanying note 88.
171. *See supra* note 9 and text accompanying note 153.
172. Cohen, *supra* note 12, at 193; Sisk et al., *supra* note 12, at 1490.
173. *See supra* Table 4.

the Guidelines' constitutionality en banc.[174] It should be recalled, however, that only 20.9% of the districts sat en banc,[175] so even a small change in the absolute probability of sitting en banc is large in relative terms.

As discussed above, districts with a greater number of criminal cases were expected to have been more likely to have sat en banc, because the Guidelines would affect more cases in those districts and because the benefit of uniform sentencing policies among judges would be greater in those districts.[176] In fact, for these reasons, two of the interviewed judges predicted that the number of criminal cases in a district would be the primary factor that explained which districts sat en banc.[177] Indeed, in its en banc decision, the United States District Court for the Southern District of Florida, which has a large number of criminal cases, explicitly stated that "[b]ecause of the paramount importance of the issue *to this district in particular*, as well as our desire to promote procedural uniformity and avoid disparate sentencing, we decided to hear these cases *en banc*."[178]

D. *All Judges' Chambers in Same City*

All else equal, districts in which all the judges' chambers were in the same city were a little more likely (three percent) to sit en banc than were districts in which judges' chambers were in different cities, although this result is not statistically significant.[179] As discussed above, two possible explanations exist for this finding.[180] First, as judges' geographic proximity increases, the logistical difficulties of hearing and deciding a case en banc are reduced. Second, judges who are geographically closer are more likely to interact regularly with each other and thus may form a greater collegiality, leading to a higher propensity to act as a group by sitting en banc.

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174. *See supra* Table 4.

175. *See supra* text accompanying note 88.

176. *See supra* Part III.C.

177. *See supra* note 9.

178. United States v. Bogle, 689 F. Supp. 1121, 1123–24 (S.D. Fla. 1988) (first emphasis added).

179. *See supra* Table 4.

180. *See supra* Part III.D.

The interviews with judges indicate that both explanations are likely valid. Some judges believed that a geographically diverse district would be less likely to meet en banc because of the travel burden that it would impose on distant judges.[181] A number of judges placed at least equal emphasis on the fact that geographic proximity results in greater collegiality.[182] They pointed to, as an example, the fact that having all judges in the same city encourages more frequent judges' meetings.[183] In fact, several judges believed that the idea of deciding the Guidelines' constitutionality en banc first arose at their district's regularly scheduled judges' meeting.[184]

Many judges also emphasized the importance of less official meetings in building collegiality.[185] For example, one judge attributed the high collegiality in his district largely to the fact that being in the same location allows the judges to often have lunch with half their colleagues one day and the other half the next day.[186] Many judges on courts of appeals also believe that informal contact between judges is important to establishing and maintaining collegiality.[187] For example, to help build collegiality, the United States Court of Appeals for the District of Columbia Circuit has luncheons for the judges and a dinner each term for the judges and their spouses.[188]

Interestingly, judges do not all share the belief that contact increases collegiality. One interviewed judge stated that he believes absence makes the heart grow fonder: judges who see each other

181. As one judge said, "[w]e wouldn't want to make ol' Harry come all the way down here [to hear a case en banc]." *See supra* note 9.

182. *E.g.*, *supra* note 9.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. Murphy, *supra* note 20, at 459 (stating that collegiality in courts of appeals is enhanced by judges "frequently din[ing] together and otherwise socializ[ing] when they are gathered for terms of court"); Wald, *supra* note 18, at 181 (encouraging judges to socialize with each other to foster collegiality); Winter, *supra* note 125, at 168 (emphasizing the positive effect that judges eating together has on collegiality in the Fourth Circuit).

188. Edwards, *supra* note 17, at 1672. Public figures of interest to the judges, such as Washington Redskins owner Daniel Snyder, are also sometimes invited to the luncheons. *Id.*

less frequently are generally more collegial.[189] Some courts of appeals judges have expressed the same opinion.[190]

The effect of a court's structure on judicial collegiality has been widely debated, especially after the Commission on Structural Alternatives for the Federal Courts of Appeals recommended organizing the United States Courts of Appeals for the Ninth Circuit into three smaller, regionally based adjudicative divisions.[191] Some in favor of the proposal argued that a more geographically compact court with fewer judges would have greater collegiality, which is necessary to maintain a consistent, coherent body of law throughout the circuit.[192] Some opponents of the proposal disputed that a relationship between court structure and collegiality exists, and argued that the large, geographically wide Ninth Circuit was sufficiently collegial.[193]

This Article's results suggest that geographic proximity leads to more frequent interaction between judges, which at least marginally fosters collegiality. At the district court level, this collegiality appears to lead to a greater propensity to decide a case en banc.

Judges' increasing use of technology may reduce the importance of geographic proximity in maintaining collegiality.[194] Technological advances such as email and telephone and video conferencing can facilitate interaction between judges who are geographically distant. Nevertheless, it is unlikely that such technology can ever fully replicate the effect of face-to-face interaction among judges that occurs in a geographically centralized court. In fact, to the extent that technology such as video confer-

189. *See supra* note 9.

190. JONATHAN MATTHEW COHEN, INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS 160 (2002).

191. COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, FINAL REP. 40 (1998).

192. *See, e.g.*, Eric J. Gribbin, Note, *California Split: A Plan to Divide the Ninth Circuit*, 47 DUKE L.J. 351, 381–82 (1998); Procter Hug, Jr. & Carl Tobias, *A Preferable Approach for the Ninth Circuit*, 88 CAL. L. REV. 1657, 1660 (2000); Jennifer E. Spreng, *The Icebox Cometh: A Former Clerk's View of the Proposed Ninth Circuit Split*, 73 WASH. L. REV. 875, 912–13 (1998).

193. Hug & Tobias, *supra* note 192, at 1660.

194. COHEN, *supra* note 190, at 156 ("[M]any [court of appeals] judges indicated that the increasing relevance of instant communication through electronic mail went some distance toward moderating the negative effects of geographic dispersion."); Edwards, *supra* note 17, at 1676.

encing replaces face-to-face interaction, it may actually undermine collegiality.[195] Similarly, email can reduce oral conversations and may encourage indelicate correspondence[196] or misunderstandings that could harm collegiality.[197]

E. *Number of Judges*

Districts with more judges were more likely to sit en banc. All else equal, a district with 9.3 judges had a 3.8% greater probability of sitting en banc than did a district with 4.4 judges, although this difference is not statistically significant.[198] As discussed above, in theory, in districts with more judges en banc proceedings would save more resources of litigants but have a less clear effect on the expenditure of judicial resources.[199] Thus, the proper interpretation of this result is not obvious.

For example, it may indicate that saving litigants' resources is a factor in judges' decisions to sit en banc, and that en banc hearings do not affect significantly the expenditure of judicial resources. On the other hand, it could mean that en banc proceedings save judicial resources as well as litigants' resources. Alternatively, it may suggest that even if sitting en banc requires more judicial resources, it is more than offset by savings in litigants' resources. Finally, it may even indicate that courts do not consider the effect on judicial resources of sitting en banc. This final interpretation is less plausible because, as discussed above, saving judges' time likely was part of the reason that district courts were more likely to sit en banc if all the judges' chambers were in the same city.[200]

Also, recall that there is evidence that more collegial courts are more likely to sit en banc. As discussed above, it is reasonable to believe that courts with fewer judges are more collegial than are

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195. Murphy, *supra* note 20, at 458.

196. *Id.* at 460 (stating that because e-mail may be "perceived as essentially a substitute for, if not interchangeable with, oral conversation, it is often not used with the same thoughtful reflection as a more traditional written memorandum").

197. *Id.* at 459 ("The phone and personal conversation are more forgiving [than e-mail], as they allow for voice inflection and immediate defusing of misinterpreted remarks and do not produce a written record.").

198. *See supra* Table 4.

199. *See supra* Part III.E.

200. *See supra* Part IV.D.

courts with more judges.[201] Indeed, in the debate over changing the structure of the Ninth Circuit, some argue that the large number of judges in the Ninth Circuit is harming collegiality.[202] This Article's results do not suggest a clear relationship between the number of judges and collegiality. In fact, all else equal, districts with more judges actually were more likely to sit en banc.[203]

One other possible explanation for this result exists. Recall that the interviewed judges said that obtaining the input of their colleagues regarding the Guidelines' constitutionality was one of the primary reasons their districts chose to sit en banc.[204] As discussed above, assuming that each judge has a greater than fifty percent chance of correctly deciding the question of the Guidelines' constitutionality, Condorcet's Jury Theorem implies that the more judges who decide a case, the more likely that the majority of them will decide it correctly.[205] Therefore, the more judges in a district, the more likely that the majority of an en banc panel in the district will rule correctly on the Guidelines' constitutionality. Thus, input from one's colleagues is likely to be more valuable in districts with more judges.

Finally, note that the number of judges in a court probably has a greater effect on collegiality in courts of appeals than in district courts. Federal district judges almost always individually decide cases; courts of appeals judges generally decide cases as part of a three-judge panel.[206] Thus, in courts of appeals, much of the interaction between judges that can affect collegiality occurs in their hearing cases and issuing decisions together. Because panels are randomly assigned, judges are assigned less frequently to a panel containing another particular judge when the court has more judges.[207] Thus there is less opportunity to build collegiality in larger courts of appeals.[208] As Judge Coffin states, "[t]he difference in the collegial atmosphere between sitting with all of one's

201. *See supra* notes 124–25 and accompanying text.

202. Hug & Tobias, *supra* note 192, at 1660.

203. *See supra* Table 4. Of course, it is possible that larger courts are less collegial, but this lesser collegiality is offset by the greater savings of litigants' resources from en banc proceedings in larger courts.

204. *See supra* note 9 and text accompanying note 153.

205. *See supra* note 155 and accompanying text.

206. *See supra* notes 30–33 and accompanying text.

207. COHEN, *supra* note 190, at 161.

208. *Id.*

colleagues each month and sitting with each only once or twice or even three times a year is enormous."[209] In contrast, because federal district judges almost always decide cases individually, an increase in the number of judges in a district should have less of an effect on collegiality.[210]

In addition, it should be cautioned that although this Article finds that greater collegiality leads to district courts being more likely to sit en banc, this relationship likely does not also exist in appellate courts. Unlike in district courts, en banc proceedings in courts of appeals are generally used to review the decision of a three-judge panel.[211] Thus, in a court of appeals, a high rate of en banc review, rather than being a sign of collegiality, "can both reflect and feed a court's lack of confidence in the work of [three-judge] panels."[212]

F. *Caseload*

Caseload per judge does not appear to have a substantial effect on the propensity to sit en banc. All else equal, having approximately 104 more cases per judge reduced the probability of sitting en banc by only a statistically insignificant 1.6%. [213]

If sitting en banc was viewed as requiring more judicial resources, then busier districts—defined as those with a higher caseload—should be less likely to sit en banc. Thus the existence of little, if any, relationship between caseload and the likelihood

209. COFFIN, *supra* note 17, at 216.

210. *Id.* at 214 (noting that although collegiality among judges in trial courts may be important, it is "transcended by" the collegiality of appellate courts because appellate judges decide cases as part of a panel rather than individually).

211. Ginsburg & Boynton, *supra* note 79, at 262.

212. Edwards, *supra* note 17, at 1680; *see also* Ginsburg & Boynton, *supra* note 79, at 260 (stating that a decline in the number of cases heard en banc might reflect a greater collegiality in the court "in the sense that the judges, notwithstanding their different views, had more confidence in each other's good faith and competence, and so deferred more to judgments of panels on which they did not sit"); Ginsburg & Falk, *supra* note 18, at 1021 ("[E]ither too high or too low a rate of rehearing en banc could jeopardize the collegial atmosphere prevailing on the [District of Columbia Circuit] court."); Wald, *supra* note 18, at 176, 180–81 (calling the en banc process in the United States Court of Appeals for the District of Columbia Circuit "a tense, even nasty, process" that poses the "greatest risk" to collegiality, and advising fellow judges to "[t]hink hard before you vote to en banc; your time will come, and judges have long memories").

213. *See supra* Table 4.

of sitting en banc suggests that judges do not view sitting en banc as significantly affecting the expenditure of judicial resources.

G. *Judicial Turnover*

Districts with less recent turnover were more likely to sit en banc. All else equal, having not had any judges added to a district in about twenty-seven months resulted in a 3.4% greater probability of sitting en banc, although this result was not statistically significant.[214]

As discussed above, this result supports the conclusion that familiarity with one's colleagues is important to building judicial collegiality. All else equal, districts with no recent addition of judges should be more collegial because there is no need to become familiar with a new colleague.[215] This greater collegiality appears to result in a greater propensity to sit en banc.

V. CONCLUSION

Judges on a panel decide cases differently than they do individually. Understanding these panel effects is essential to understanding and predicting judicial behavior. This Article uses a unique natural experiment and interviews of judges to study panel effects and to answer the related question of why judges who have the authority to decide a case individually sometimes instead choose to do so as part of a panel.

District courts rarely sit en banc. Fourteen districts, however, sat en banc to decide the constitutionality of the Guidelines, while in fifty-three other districts, judges instead individually decided the issue.[216] This Article discovers panel effects by comparing the decisions of the judges in the districts that sat en banc to the decisions of judges who sat individually. Supplementing this with a comparison of the characteristics of districts that sat en banc with

214. *See supra* Table 4.

215. *See supra* text accompanying note 128; *see also* COFFIN *supra* note 17, at 214 (stating that a quality of collegiality is intimacy "resulting in a deep if selective knowledge of one another," and that "[n]obody knows one's societal values, biases, and thought ways better than a colleague").

216. *See supra* text accompanying note 88.

those that did not do so also helps explain why some district courts choose to sit en banc.

A primary panel effect is that judges on an en banc panel are much more likely to reach a unanimous decision. This propensity of panels to be unanimous is likely due to multiple factors. Judges in a panel discuss the case with each other and thus may be more likely to reach a consensus on the correct decision. In addition, there is reason to believe that some judges engaged in go-along voting to establish a uniform sentencing policy in the district or to avoid writing a dissent.

This Article also finds that judges on a panel are more willing to strike down a law or make a politically unpopular decision. Judges who sat en banc were much more likely to find the politically popular Guidelines unconstitutional than were judges who sat individually. This suggests that some judges can be emboldened when their colleagues vote with them.

These panel effects also help explain why some districts chose to sit en banc: part of the purpose of sitting en banc was to obtain these panel effects. For example, judges that especially desired that their districts have a uniform policy regarding the Guidelines were more likely to have chosen to sit en banc, because doing so would likely lead to uniformity in the district. In addition, judges who were leaning toward striking down the Guidelines may have been more likely to desire the input—and the possible political cover—from their colleagues that would come from an en banc hearing.

Many other factors also partly explain a district's propensity to sit en banc. For example, many judges cited the desire for a uniform sentencing policy in their district as the primary reason for deciding the Guidelines' constitutionality en banc. Indeed, the number of criminal cases in the district—which should be positively correlated with the desirability of a uniform sentencing policy—was positively related to the likelihood of sitting en banc.

Because of the inherently small number of observations in this study, the empirical results should not be overstated. These results, however, in combination with interviews of judges who participated in the decisions, provide evidence of how judicial collegiality and other factors affect courts' decision making. They also give insight into how court structure and composition affect collegiality.

Districts in which all judges' chambers were in the same city were more likely to sit en banc. Part of the explanation for this probably is the greater logistical difficulties in arranging an en banc hearing by judges who are in different cities. The greater collegiality that can develop from geographically close judges regularly interacting with each other appears to be responsible also. The effect of judges' geographic proximity on judicial collegiality and on the propensity to sit en banc was debated when the Commission on Structural Alternatives for the Federal Courts of Appeals recommended organizing the United States Court of Appeals for the Ninth Circuit into smaller adjudicative divisions. This Article's results suggest that even relatively short distances between judges may reduce collegiality and may deter the convening of en banc panels.

There has also been much debate regarding the effect of the number of judges on a court on judicial collegiality and the propensity to sit en banc. Interestingly, this Article found a positive correlation between the number of judges and the likelihood of sitting en banc. It is reasonable to expect that the presence of more judges would impair collegiality and increase the logistical difficulties in coordinating an en banc hearing. The Article's results suggest, however, that in district courts these considerations are more than offset by the greater resource savings of litigants (and possibly of judges) obtainable from en banc hearings in districts with more judges. In addition, the more judges on a court, the more beneficial obtaining the aggregate input of these judges is likely to be.

Finally, this Article finds evidence that turnover in the judges on a court reduces collegiality. Collegiality requires that judges be familiar with each other; changing the judges on a court reduces that familiarity.

Overall, this Article demonstrates the importance of understanding how judges are affected by their colleagues. Even federal district judges, who normally decide cases individually, exhibit panel effects, and court structure and composition can affect the collegiality—and thus the decisions—of their courts.