The "C" Word: On Collegiality

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I.

I recently had the privilege of participating in the federal judiciary's long-range planning effort. Strikingly, one of the preeminent issues was whether Congress should limit the size of the federal judiciary. The underlying question was whether the quality of judicial decisionmaking is related to the size of the judiciary. The debate suggested that decisionmaking, particularly at the appellate level, involves more than judges simply voting their own views. Is there any value in the interactions among judges that would be affected by increasing the number of judges?

Our discussion sparked charges of elitism, political biases, and the like. While those charges may to some degree be true, I believe that the debate was a legitimate effort to focus the thoughts of federal judges on an important issue: whether the quality of our decisionmaking would be adversely affected by increasing the size of the judiciary.

The judiciary, like almost every segment of American society, has increasingly fallen prey to the tyranny of statistics, often causing us to analyze our work in unimaginative, piecework, and arithmetic ways. But the difference between acting alone and acting in a collegial decisionmaking group cannot be quantified. I do not pretend to have any sophisticated understanding of the differences between decisions that are the product of individual deliberation and those that result from group interaction. Nor do I pretend to be a biologist or sociologist. But I suspect that both biology and sociology could help judges consider the decisionmaking process. In the game parks in Africa, I have seen the wisdom of animal species who consider together the best means for collective protection and organization. The Constitution itself reflects the basic view that we will reach some decisions better collectively, but that some decisions must, by design, protect the minority and therefore be reached by individuals without regard for majoritarian views.

Thus, the question recast is whether the judiciary—entrusted with safeguarding the Constitution, protecting against the tyranny of the majority, and vigilantly maintaining the separation of powers—suffers a dilution in the quality of its decisionmaking when the number of judges increases.

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Alternatively, does the principle of the independence of the judiciary, which clearly underlies Article III, dictate that each judge should act without regard to the views of his or her colleagues, or, instead, should the mix of judges from different backgrounds and appointed by different administrations and parties qualitatively enhance the decisionmaking process through interaction? If judges cast their votes independent of their colleagues' views, the number of judges should never matter. But if the exchange of opinions and analyses is an appropriate component of the decisionmaking process, size is very important indeed; collegiality would be a value to be protected and preserved.

This essay focuses on appellate decisionmaking and examines the judiciary's long-range planning discussions in that context. I confess directly that I speak from my own experience on the Tenth Circuit; I concede the biases that I have derived therefrom. I nevertheless believe that there *is* a value in collegiality that affects the quality of judicial decisionmaking. This value therefore suggests that merely adding judges may not always be the right response to an expanding federal caseload. I urge that we go beyond the matrix of computerized decisionmaking to consider the qualitative aspects of judicial interaction in assessing the effect of our decisions on the lives and fortunes of those coming before our courts.

II.

A principal topic of discussion at the federal judiciary's recent long-range planning sessions has been whether the number of federal judges should be limited to approximately one thousand. The federal judiciary is now composed of 820 judges (including the unfilled vacancies).[1] Thus, the adoption of such a proposal would mean the addition of very few more federal judges.[2] Central to the debate has been whether judicial collegiality enhances the quality of appellate decisionmaking. My answer is an emphatic, "Yes."

It is easy to articulate the value of collegiality to the judges themselves, but that, obviously, is not the final test. The true test is whether the existence of collegial relationships among judges enhances the quality and efficiency of their work and thereby serves the national interest. I believe that the experience of the Tenth Circuit is proof of the importance of judicial collegiality and collegial

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[1] In addition to the nine Supreme Court justices, there are 179 appeals court judges, 28 U.S.C. § 44(a) (1988 & Supp. IV 1992), and 632 district court judges, 28 U.S.C. § 133(a) (1988 & Supp. IV 1992).

[2] *Compare* Jon O. Newman, *Are 1,000 Federal Judges Enough? Yes. More Would Dilute the Quality*, N.Y. TIMES, May 17, 1993, at A17, *with* Stephen Reinhardt, *Are 1,000 Federal Judges Enough? No. More Cases Should Be Heard*, N.Y. TIMES, May 17, 1993, at A17.

decisionmaking.

Before describing the impact of collegiality on an appellate court, I must somehow define it. I come from an academic background, where collegiality was at least a professed (if not practiced) value. Like Justice Stewart's experience with obscenity, I know collegiality when I see it, and I have experienced its failures where it was important in supporting professional relationships. Most succinctly stated, collegiality on an appellate court is knowing my fellow judges so well, and respecting their intellects and work patterns so much, that I am willing to listen and consider carefully their perspectives on each legal issue that we confront. It is a personal understanding that transcends political backgrounds, personal idiosyncracies, and the natural tendency to adhere unyieldingly to one's personal opinions.

The collegiality of which I speak, however, goes far beyond listening and considering. It requires judges to leave their hard-learned styles of advocacy at the door of the conference room. Collegial judges in conference are not advocates of a position but students of an issue—comparing, contrasting, and weighing each other's viewpoints and rationales. Often these deliberations do not change a judge's vote or a case's outcome, but the rationale behind the vote is more fully informed and intellectually sound because of the collegial interaction. Of course, I cannot speak for other circuit courts or even for the other judges on my court. But having seen the dynamic in conferences, on administrative issues, and in the discussion of prevailing national issues, I am convinced that it has enhanced the quality of our work.

It would trivialize the concept of collegiality to describe it as "getting along with one's colleagues." Indeed, in some cases "getting along" is the antithesis of collegiality. Collegiality is lively, tolerant, thoughtful debate; it is the open and frank exchange of opinions; it is comfortable controversy; it is mutual respect earned through vigorous exchange. In making the Supreme Court an en banc body, I think the Framers saw that the strength of having several views on a particular issue would outweigh the resulting inefficiency. The three-judge panels of the federal courts of appeals and the occasional en banc consideration continue to endorse that implicit rationale.

It would save significant time to have appeals decided by one judge. But, in my view, the reliance on collegiality among appellate judges undergirds our belief in the fairness of the appellate process and our confidence in fully informed and thoughtful appellate decisions. Thus, those who condemn collegiality as "the C word"—an elitist concept designed to preserve judges' circle of association—misunderstand the meaning of collegiality on appellate courts.

III.

I have found the Tenth Circuit to be a model of collegial decisionmaking. The characteristics I have just described exist among all of the judges on our court. Such relationships, however, are developed only through conscious efforts by each judge and the circuit as a whole. This process is neither simple nor easy; federal judges are appointed precisely because of their independence. They have demonstrated an ability to take strong and persuasive positions on hundreds of issues, many of which involve issues now before them as judges. For the most part, they were successful advocates answerable only to their work or their clients. They were senior partners, presidents of bar associations, tenured faculty members, and, above all, extremely confident lawyers. Thus, for most appellate judges, the world of collegial decisionmaking is a very new one. And holding such a group of thoroughbreds together as a functioning collegial body requires the concerted dedication of each judge.

I am often asked why the Tenth Circuit perceives itself as a collegial court. I can only respond with anecdotal evidence revealing the fostering of mutual respect and admiration. Some of the examples I cite may seem trivial, but they contribute to a style of interaction that adds incrementally to our knowledge of each other and the understanding of our work.

The first and most important factor is that the judges know each other well personally. We have visited each other's homes, become well-acquainted with each other's spouses and children, and know each other's religious backgrounds. We therefore enjoy the kind of personal relationships that allow humor and empathy to flow freely. For instance, when one of the judges' children suffered through a serious illness, the concern among the other judges was palpable. The celebration of our children's weddings and the sharing of our family experiences produces rich conversations after work in Denver. We often even vacation together, providing us both with amusement and greater insight into our colleagues.

I will always remember one evening in Denver when most of the judges sat on the pillows at a Moroccan restaurant, eating from a common pot and sharing our diverse religious views. It was an illuminating opportunity to test one's own spiritual beliefs in the context of the challenging and thoughtful views of others who had thought carefully about their own moral, ethical, and spiritual dimensions. Developing this easy, comfortable tolerance and understanding among very different and independent human beings is not easy. It requires time and serious commitment. But each judge on our court is committed to cultivating such relationships because of their importance to our substantive work and our experience as judges. Most of us came into the appellate judiciary, in part, for the intellectual stimulation of confronting difficult legal

issues; that same intellectual stimulation derives in part from our close relationships with each other.

Our day-to-day work on the Tenth Circuit relies on these relationships. Because we are so dispersed geographically and meet face-to-face only once every two months, it would be easy to retreat into our chambers, interacting only at oral arguments or administrative meetings. But we have learned that many of our minor differences in opinions, viewpoints, and methods of operation can be resolved by a quick telephone call or computer message. If we exchanged viewpoints only in our final written products (*i.e.*, opinion drafts, concurrences, and dissents), we would be far more fractious. Instead, it is a rare day when I do not get a call from another judge suggesting language in a proposed draft. All of these conversations reflect the intense respect that we have developed for each other's viewpoints. While the result may not change, frequently my concerns are thoughtfully addressed in the written product. Inevitably, our easy relationships mean less friction, greater understanding, and even less strident banter.

Collegiality also leads to a greater respect for each other's personal style. I have learned to direct my concern to substance and worry less about form. For instance, I tend to be a bit of a "schoolmarm" regarding grammar, punctuation, and spelling. Thus, in my first months on the court, I wrote a letter to another judge pointing out quite minor grammatical errors in a proposed opinion. I soon received a phone call from a more senior judge, who, in a kind and thoughtful way, suggested that it may be more effective to restrict formal communications to the substantive issues of an opinion. In this sage advice, I learned a rather obvious lesson: We are not very responsive to nit-picking, but we respect substantive differences of opinion. Tenth Circuit judges therefore do little "tinkering" with style and format, but we actively debate the substance and merits of proposed opinions. In this way, we avoid the tendency to defend our personal preferences and rely instead on the intellectual merits of our positions. This approach may result in a few grammatical or punctuation errors ending up in the Federal Reporter, but the benefits of this restraint far outweigh the occasional errors in our product.

Our personal discussions about differing opinions occur so frequently that judges often apologize for writing a concurrence or dissent before fleshing out the differences by conversation. This may happen when a judge has been out of town or when the difference of opinion is so difficult to explain orally that mutual understanding will be better achieved through a written document. But, importantly, these circumstances are the exception and not the rule.

Collegiality also requires judges to consider carefully the extent of their involvement in cases on which they were not on the reviewing panel. Judges on our court read every proposed opinion before it is issued; we place a high

premium on consistency within the circuit. While each judges' practices differ, we all attempt to read proposed opinions soon after they reach our desks. A difficult question for us is when to express views about a proposed opinion in a case on which we did not sit. I have found that, not surprisingly, judges consistently reserve their nonpanel comments for issues that are important to maintain consistency in circuit law or to guide district courts throughout the circuit. Thus, the occasions on which a nonpanel judge will intervene in a proposed opinion are limited and only go directly to issues that the entire court should consider.

This procedure also allows the court to reach full court consensus before the panel issues the opinion, sometimes saving the court from a formal en banc hearing after the opinion has been issued. Formal en banc consideration is a time-consuming and expensive process—waiting for a petition for rehearing, polling the court for rehearing en banc, and affording full en banc review. Where the issue is not so important, however, the intervention of a nonpanel judge may complicate the panel consideration, exact a toll in relationships among judges, and ultimately make little difference to the outcome. Thus, the occasions on which a nonpanel judge will intervene prior to the issuing of a panel opinion are infrequent.

IV.

I am always proud to read a concurrence or dissent written by a Tenth Circuit judge; there is little, if any, strident or rancorous language. We all recognize that the purpose of a dissent or concurrence is to illuminate more fully the substantive merits of an issue. But, in my opinion, they should never attempt to discredit the personal integrity or intellectual acumen of one's colleagues. It is distressing to sometimes perceive the lack of such mutual respect on other courts.

The importance of maintaining a high level of professional written discourse is not in protecting judges' reputations but in protecting the integrity of the system. Ours is a system of laws, not of people. In my view, judges bear a heavy responsibility of demonstrating that judicial opinions are based upon the judges' best efforts at analyzing precedent—the language of the Constitution, statutes, and cases—and thorough legal analysis. Too often the public seriously misunderstands the court system and the role of judges in the decisionmaking process. To the extent that our writings attack the personalities and abilities of each other, we contribute to this public misconception.

Another example of the Tenth Circuit's collegiality has been the judges' extraordinary ability to adapt to new procedures and new ideas. Shortly after I came on the bench, we faced a backlog of roughly three thousand cases. The

Tenth Circuit took longer to dispose of cases than most courts of appeal. Moreover, the court had several vacancies for an extended period of time. The judges were discouraged and frustrated about the perceived hopelessness in ever becoming caught up. At an informal retreat, I suggested judge-screening procedures that would significantly increase judges' workloads and substantially change the court's procedures. Rather than react with suspicion or reticence, the judges not only considered the suggestion but adopted it with remarkable speed. I have often reflected on that incident as an extraordinary example of the mutual respect accorded each judge when he or she joins the court. In fact, because the suggestion produced very satisfactory results for the court, I have received far more credit than I deserve for my suggestion.

The value that we place on collegiality is largely a function of tradition. Since the inception of the Tenth Circuit, judges have always socialized together during terms of court in Denver. For example, the tradition of eating breakfast together still persists for a number of the judges; it has only been diluted by a few of us younger renegades who do not eat breakfast. Another example is the nightly social hour in the chief judge's hotel room. The past few chief judges have expended considerable efforts and personal resources (both in Denver and at judicial conferences) to provide opportunities for the other judges to visit outside of the context of work. The evening social hour is a valuable opportunity to reflect on the events of the day and current issues for the court or the nation generally, as well as to preserve personal friendships. They also allow the Tenth Circuit judges to become acquainted with visiting or district judges sitting by designation.

Each of the examples I have raised may seem trivial, but they are the foundations of collegiality. The collective effect is to build qualitative dimensions to the relationships between the judges. The collegiality of these relationships, in turn, greatly enhances our decisionmaking process. For me, this is one of the great strengths of the Tenth Circuit.

V.

This description of the Tenth Circuit is my way of defining the characteristics of collegiality. One cannot express the value of collegiality quantitatively or understand its importance except in context. When the federal judiciary discussed limiting its size, a pervasive underlying question was whether collegiality has any value separate from enhancing the

experience of judges. I clearly believe that it does, and others share that view.[3]

It would be impossible to design consciously a system that would cultivate collegiality for a court or for any other group. Rather, collegiality is a goal whose characteristics are defined by those who pursue it in their interactions. It takes different forms in every court because it is a function of the individuals themselves and the history of the particular institution. Nevertheless, I suggest to my colleagues around the country that the association of collegiality with elitism and other negative characteristics fails to account adequately for the important intangible qualities of collegial interaction among judges. To me, the "C" word is critical in energizing and qualitatively improving the work of any court.

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[3] *See generally* DANIEL J. MEADOR, MAURICE ROSENBERG & PAUL D. CARRINGTON, APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL 547–90 (1994).