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Playing with Numbers: Determining the Majority of Judges Required to Grant En Banc Sittings in the United States Court of Appeals

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PLAYING WITH NUMBERS: DETERMINING THE MAJORITY OF JUDGES REQUIRED TO GRANT EN BANC SITTINGS IN THE UNITED STATES COURTS OF APPEALS

The recent opinion of the United States Court of Appeals for the Fourth Circuit in *Arnold v. Eastern Air Lines*[1] bares an apparent intercircuit conflict in the interpretation of the statute authorizing federal courts of appeals to sit en banc.[2] Each circuit is permitted by 28 U.S.C. § 46(c) to convene en banc hearings upon the order of a "majority of the circuit judges of the circuit who are in regular active service,"[3] but this ostensibly simple language is clouded by disagreement over the proper meaning of "majority." In *Arnold*, the Fourth Circuit concluded that the majority requirement of section 46(c) did not oblige the court to count a recused judge when calculating whether a majority of the circuit's judges in regular active service had voted to grant en banc rehearing. With one of the circuit's ten active judges disqualified, the court ordered rehearing based on the affirmative votes of five of the court's nine remaining active judges.[4] Several other circuits have embodied the same result in local rules and operating procedures,[5] but *Arnold* represents a first examination of the importance of this definitional problem.

A few circuits have rejected formulations of section 46(c) that, like the Fourth Circuit's rule in *Arnold*, would permit en banc sittings to be ordered by less than an absolute majority of the circuit's active judges.[6]

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[1] 712 F.2d 899 (4th Cir. 1983) (en banc), cert. denied, 104 S. Ct. 703 (1984).

[2] 28 U.S.C. § 46(c) (1982). The controversy over the unresolved conflict in interpretation of the en banc statute has received considerable recent attention in the legal commmunity. See Harper, The Breakdown in Federal Appeals, A.B.A. J., Feb. 1984, at 56; Note, The En Banc Requirements of 28 U.S.C. § 46(c): What Constitutes a Majority in the Event of a Recusal or Disqualification, 11 J. Legis. 373 (1984); Sylvester, What Does a "Majority" Mean in En Banc Cases?, Nat'l L.J., Jan. 16, 1984, at 6.

[3] 28 U.S.C. § 46(c) (1982). The courts of appeals normally sit in three judge-panels. Id. § 46(b).

[4] 712 F.2d at 901-02.

[5] See infra notes 138-41 and accompanying text.

[6] See, e.g., Lewis v. University of Pittsburgh, 725 F.2d 910, 928 (3d Cir. 1983) (en banc) (order denying en banc rehearing), cert. denied, 105 S. Ct. 266 (1984); Clark v. American Broadcasting Cos., 684 F.2d 1208, 1226 (6th Cir. 1982), cert. denied, 460 U.S. 1040, mandamus denied sub nom. In re Am. Broadcasting Cos., 104 S. Ct. 538 (1983); Copper & Brass Fabricators Council v. Department of Treasury, No. 81-2091 (D.C. Cir. Aug. 3, 1982) (en banc) (per curiam) (order denying en banc rehearing); Zahn v. International Paper Co., 469 F.2d 1033, 1040 (2d Cir. 1972) (order denying en banc rehearing), aff'd on other grounds, 414 U.S. 291 (1973).

Rejection of an absolute majority standard runs afoul of an assumption underlying the avowed necessity of the en banc power: that the limited availability of en banc sittings will permit circuits to ensure the stability of circuit law through the majority control effected by en banc decisions.[7] Not only could a looser definition of majority lead, if only by chance, to more common exercise of the en banc tool, but the fortuitous exclusion of judges from controversial en banc decisions might imply more frequent shifts in circuit law.

Despite the potential infringement on majority control foreshadowed in *Arnold*, the exclusion of disqualified judges from the calculation of the necessary majority finds support in the statutory commands and ethical canons controlling judicial disqualifications.[8] Though voting whether to grant an en banc hearing is presumptively a vote tied only to judicial administration, and not to the merits of a particular case,[9] a rule requiring an absolute majority of judges to favor the en banc sitting vitiates the intent of the disqualification standards by treating the recused judge as a voter opposed to rehearing.[10] Because, in effect, the denial of rehearing leaves intact a panel decision on the merits, counting a disqualified judge may improperly circumvent ethical restrictions.

This note addresses the effects that these two interests—majority control of circuit law and judicial integrity—have on the appropriate definition of majority. Neither legislative history[11] nor Supreme Court constructions[12] of section 46(c) provide an unambiguous rule, and interpretation of the majority requirement remains within the authority of each circuit. The Judicial Conference of the United States, at its meeting in September 1984, recommended that each circuit clearly describe its en banc voting procedures.[13] This note delineates considerations that may

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There are several reasons why a particular judge might not be counted when deciding how many votes are needed to authorize use of the en banc power, including illness, recusal, vacation, assignment, or abstention. See infra notes 74-77 and accompanying text. In a court with an even number of judges, excluding a single judge from this calculus will reduce by one the number of votes needed for a majority; each subsequent pair of exclusions will further lower the requisite majority by one vote. In courts with odd numbers of judges, each pair of exclusions decreases by one the number of votes needed to reach a majority. Thus, depending on the number of exclusions in a given case, and on the number of positions authorized and filled in the circuit, see infra note 184, the number of votes needed to reach a majority decreases below that needed to reach an absolute majority.

[7] See infra notes 149-187 and accompanying text.

[8] See infra notes 188-91 and accompanying text.

[9] See infra notes 170-171 and accompanying text.

[10] See infra notes 196-204 and accompanying text.

[11] See infra notes 42-73 and accompanying text.

[12] See infra notes 90-108 and accompanying text.

[13] Judicial Conference Moves on Wide-Ranging Agenda at Fall Meeting, Third Branch, Nov. 1984, at 3, 3 [hereinafter cited as 1984 Judicial Conference].

assist the circuit courts in their efforts to outline the method by which they should order en banc sittings.[14]

I. Constraints on the Exercise of En Banc Power

The ability of a court of appeals to convene en banc was not generally acknowledged until the Supreme Court's decision in *Textile Mills Securities Corp. v. Commissioner*.[15] Congress enacted section 46(c) to codify the Court's holding in *Textile Mills*.[16] The statute provides:

> Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . unless a hearing or rehearing in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service . . . .[17]

The burgeoning caseload of the courts of appeals[18] highlights the statu-

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[14] See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 208(a), 96 Stat. 25, 54-55 (codified at 28 U.S.C. § 2077 (1982)) (requiring courts of appeals to publish rules of business and operating procedures and to appoint an advisory committee for the study of those rules and procedures).

[15] 314 U.S. 326 (1941). The Court granted certiorari in *Textile Mills* to resolve the conflict between the Third and Ninth Circuits respecting the propriety of en banc hearings. Id. at 327. Compare Commissioner v. Textile Mills Sec. Corp., 117 F.2d 62, 67-71 (3d Cir. 1940) (en banc) ("the court has the power under existing statutes to sit en banc"), aff'd, 314 U.S. 326 (1941), with Lang's Estate v. Commissioner, 97 F.2d 867, 869 & n.2 (9th Cir. 1938) ("[s]ince no more than three judges may sit in the Circuit Court of Appeals, there is no method of hearing or rehearing by a larger number").

[16] See H.R. Rep. No. 306, 80th Cong., 1st Sess. A6 (1947).

[17] 28 U.S.C. § 46(c) (1982). The entire section reads:

> Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member.

Id.

[18] The courts of appeals disposed of 13,217 cases in fiscal year 1982. 1983 Director of the Ad. Off. of the U.S. Courts Ann. Rep., *in* 1983 Rep. of the Proc. of the Jud. Conf. of the U.S. 109 Table 9 [hereinafter cited as Ann. Rep.]. The corresponding caseloads were 12,327 cases in fiscal year 1981, 11,980 in fiscal year 1980, 10,598 in fiscal year 1979, and 8,994 in fiscal year 1978. 1982 Ann. Rep., supra, at 87 Table 8; 1981 Ann. Rep., supra, at 193 Table 7; 1980 Ann. Rep., supra, at 208 Table 8; 1979 Ann. Rep., supra, at 204 Table 9.

Both the total number of cases and the caseload per judge have increased. See J. Howard,

tory assumption that three-judge panels will decide most cases and that en banc sittings are reserved for exceptional situations.[19] The number of en banc hearings ordered, though, increases steadily each year.[20]

Despite this increase, there remains a strong presumption against exercise of the en banc power. Judges view en banc hearings as divisive and seek to avoid the friction engendered by a procedure designed to resolve intracircuit conflicts.[21] En banc sittings are costly as well, requiring the attention of each active circuit judge in the circuit.[22] As Congress adds judges to many of the circuits, the problems inherent in assembling bigger groups encourages judges in larger circuits to vote against use of the en banc power.[23]

Irrespective of the shortcomings of the en banc procedure, its availability serves a crucial function in the administration of federal courts. In most cases the courts of appeals are the final arbiters of federal law; the Supreme Court has long ceased to perform this function in the run-of-the-mill case.[24] The en banc procedure permits a court of appeals to maintain decisional uniformity, a purpose heightened in importance by the likelihood that large courts and growing caseloads will prevent circuit

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Courts of Appeals in the Federal Judicial System 10-13 (1981) (causes for increased appeals); Note, En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities (pt. 1), 40 N.Y.U. L. Rev. 563, 575-77 (1965) (increase in per judge workload).

[19] See 28 U.S.C. § 46(b) (1982).

[20] En banc cases heard orally or submitted on briefs increased from 52 in fiscal year 1978 to 65 in 1979, 69 in 1980, and 74 in 1981. 1979 Ann. Rep., supra note 18, at 204 Table 9; 1980 Ann. Rep., supra note 18, at 208 Table 7; 1981 Ann. Rep., supra note 18, at 193 Table 7; 1982 Ann. Rep., supra note 18, at 87 Table 8. The number of en banc sittings dropped to 66 in fiscal 1982, but the statistic excludes data from the Federal Circuit. See 1983 Ann. Rep., supra note 18, at 109 table 9. Professor Eugene Gressman predicts that the increasing number of en banc cases will create more frequent troubles with the definition of "majority" in section 46(c). Sylvester, supra note 2, at 6.

[21] See J. Howard, supra note 18, at 217.

[22] See Note, supra note 18, at 576-77; see also Church of Scientology v. Foley, 640 F.2d 1335, 1341 (D.C. Cir.) (en banc) (Robinson, J., dissenting), cert. denied, 452 U.S. 961 (1981); Carrington, Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law, 82 Harv. L. Rev. 542, 582-83 (1969); Comment, In Banc Procedures in the United States Courts of Appeals, 43 Fordham L. Rev. 401, 417-18 (1974); Note, En Banc Review in Federal Circuit Courts: A Reassessment, 72 Mich. L. Rev. 1637, 1645 (1974).

[23] See Comm'n on Revision of the Fed. Court Appellate Sys., Structure and Internal Procedures: Recommendations for Change 58-59 (Final Report June 1975).

[24] See *Textile Mills*, 314 U.S. at 335. Justice Douglas observed for the majority that the en banc power is "especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases." Id. See also Comm'n on Standards of Judicial Admin., Am. Bar Ass'n., Standards Relating to Appellate Courts § 3.01, at 10-11 (Approved Draft 1977).

judges from remaining fully abreast of panel decisions in which they do not participate.[25] Any benefit that litigants receive from the additional review afforded by an en banc rehearing is incidental to the advantages to the court of ensuring decisional consistency on important issues of law.[26]

The tension between judicial efficiency and the value to courts of en banc proceedings is recognized in attempts to restrict resort to the en banc hearing. The Supreme Court noted in *United States v. American-Foreign Steamship Corp.*[27] that en banc courts "are convened only when extraordinary circumstances exist."[28] The Federal Rules of Appellate Procedure echo that sentiment in Rule 35(a), which provides that en banc hearings "ordinarily will not" be ordered unless "necessary to secure or maintain uniformity" of circuit decisions, or when a case addresses an issue of "exceptional importance."[29] The exceptional importance standard does not refer to the subjective importance of a case to its litigants, but rather demands that the case involve issues of substantially broader impact.[30] The "ordinarily will not" qualifier, however, gives the courts of

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[25] Cf. Carrington, supra note 22, at 583-84 (en banc procedure helps maintain decisional uniformity only in circuit courts of nine or fewer judges; beyond that, en banc procedure becomes "entirely unmanageable").

[26] Litigants' rights are limited to the ability to suggest an en banc sitting and the expectation that the court will fully explain in advance its en banc procedures. Western Pac. R.R. Case, 345 U.S. 247, 267-68 (1953). A court is not even obliged to make formal response to a litigant's suggestion for en banc hearing. See Fed. R. App. P. 35 advisory committee note. Indeed, because the court may initiate en banc rehearing sua sponte, see id., litigants may be subjected involuntarily to the costs of protracted litigation. Carrington, supra note 22, at 582-83.

[27] 363 U.S. 685 (1960).

[28] Id. at 689.

[29] Fed. R. App. P. 35(a). The rule reads:

> (a) *When Hearing or Rehearing in Banc Will be Ordered.* A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

Id.

[30] But in some circumstances the extraordinary importance of a case might provide a rationale for denial of rehearing. See Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1020 (2d Cir. 1973) (order denying rehearing and en banc rehearing), vacated on other grounds, 417 U.S. 156 (1974), where the case was viewed by a majority voting against en banc rehearing as of such "extraordinary consequence" that an en banc proceeding would only delay eventual Supreme Court resolution of the case. 479 F.2d at 1020-21 (Kaufman, J.). The minority viewed this attitude as one that would "render the en banc statute a nullity." Id. at 1021 (Oakes, J., dissenting from denial of en banc rehearing) (footnote omitted).

appeals discretion to grant en banc hearings in cases seemingly outside the scope of the rule.[31]

The potential for abuse[32] of the en banc power that this discretion implies encourages secondary restrictions on initiation of en banc hearings. Most circuits, for example, require a litigant seeking an en banc hearing or rehearing to supply the court with a statement setting forth the intracircuit conflict or issue of exceptional importance raised in the case.[33] The majority vote requirement of section 46(c) similarly restricts the exercise of the en banc power: by limiting en banc review only to cases where an absolute majority of circuit judges favor en banc consideration, the costs and burdens of the procedure are reserved to fewer cases.[34]

The degree to which the majority vote requirement is a limitation on the use of the en banc power depends on the definition of "majority" a particular circuit adopts. The *Arnold* court, for example, chose a rule that permits en banc hearings based on the affirmative votes of less than an absolute majority of the circuit's active judges. Conversely, a rule that does require an absolute majority of the circuit's active judges, whether or not disqualified, creates the potential for a supernumerary standard in

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[31] One set of cases probably worthy of en banc treatment outside the ordinary limits of Rule 35 is where attorney misbehavior tarnishes the judicial process. Cf. Note, supra note 18, at 589 (discussing en banc review of cases generally involving "the integrity of the judicial process"). Although unexplored by the Fourth Circuit, this theory might answer a lengthy dissent in *Arnold*, where the court's reversal of the panel opinion turned in part on a trial court ruling that facilitated serious attorney misbehavior. Arnold v. Eastern Air Lines, 712 F.2d 899, 906-07 (4th Cir. 1983) (en banc), cert. denied, 104 S. Ct. 703 (1984). The dissent believed the case did not deserve en banc resolution. Id. at 913-24 (Phillips, J., dissenting).

[32] Because Rule 35 does not effectively prevent courts from hearing en banc cases arguably not worthy of such treatment under the rule's standards, the en banc mechanism is always available to judges who merely disagree with a circuit panel's decision. For example, even if a particular case does not present legal issues of "exceptional importance," it may be reheard en banc if several judges are convinced that the panel decision is "wrong." The en banc device was not created to provide an additional opportunity for review, but rather exists for the limited set of cases in which circuit law will be charted or where exceptional circumstances exist.

One writer has commented that the "fact that four judges have voted in favor of en banc-ing a case, is, of itself, an indication of the case's importance." Note, supra note 2, at 382. If the votes of judges are not always consistent with the "exceptional importance" standard, however, the fact that any number of judges votes in favor of en banc consideration may indicate only that some judges disagreed with the panel decision.

[33] See 3d Cir. R. 22; U.S. Court of Appeals for the Fifth Circuit, Loc. R. § 35.2.2, *in* Rules of the United States Court of Appeals for the Fifth Circuit 96 (1983); 6th Cir. R. 14(b); 7th Cir. R. 16(b); 8th Cir. R. 16(d); 11th Cir. R. 26(f)(2); D.C. Cir. R. 14(a)(3); Fed. Cir. R. 19(b). One commentator has even suggested requiring courts to justify decisions to convene en banc. See Note, supra note 22, at 1655.

[34] See Arnold v. Eastern Air Lines, 712 F.2d 899, 911 (4th Cir. 1983) (en banc) (Widener, J., concurring and dissenting), cert. denied, 104 S. Ct. 703 (1984).

some cases. In *Arnold*, six was an absolute majority of the ten judges in active service, but represented two-thirds of the judges eligible to vote on the suggestion for en banc rehearing.[35] Despite the potential institutional advantages of a supermajority standard,[36] alternative definitions of majority reveal more significant benefits to judicial administration.

II. The Majority Vote Requirement

A. Alternative Approaches to the Meaning of "Majority"

An analysis of decisionmaking rules must begin with the standard that defines how decisionmakers choose between competing alternatives. When a rule provides that a majority determination will suffice to resolve disputed questions, attention must be given to the type of majority intended by the rule. If it states simply that a "majority vote" prevails, it is generally understood to contemplate a majority of the votes cast on a particular proposition: a majority of those present and voting, excluding abstentions.[37] Alternative formulations of the voting standard might provide that a "majority" is a majority of all present, or even a majority of an entire membership, present or not.[38]

These three interpretations correspond to the range of possible readings of "majority" in section 46(c). A majority of the entire membership would be an absolute majority of all the judges of a court. A majority of judges present might exclude from the calculus judges not participating because of recusal, illness, vacation, or assignment to another court. A majority of votes cast would further eliminate abstentions or non-votes from consideration.

Section 46(c) states that a "majority of the circuit judges of the circuit who are in regular active service" is necessary to convene an en banc court.[39] Because "majority" is modified by "judges of the circuit who are in regular active service," the statute seems to require more than a simple

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[35] Id. at 902.

[36] See Note, supra note 22, at 1655 (advocating two-thirds vote requirement as a restriction on the number of cases that will receive en banc consideration). But see Supplemental Brief of Eastern Air Lines, Inc., Relating to Rehearing In Banc 16 n.8, Arnold v. Eastern Air Lines, 712 F.2d 899 (4th Cir. 1983) (en banc) (Congress provided for majority, not supermajority, standard), cert. denied, 104 S. Ct. 703 (1984).

[37] See P. Mason, Manual of Legislative Procedure for Legislative and Other Governmental Bodies § 510, at 355-56 (1979); H. Robert, Robert's Rules of Order Newly Revised § 43, at 339 (S. Robert ed. 1970); F. Shackleton, The Law and Practice of Meetings 50 (5th ed. 1967).

The *Arnold* court found support in the Robert's Rules of Order definition for its decision not to consider the presence of a disqualified judge. *Arnold*, 712 F.2d at 905-06.

[38] See H. Robert, supra note 37, § 43, at 341.

[39] 28 U.S.C. § 46(c) (1982).

majority of the judges who choose to vote. Nevertheless, if reasons other than voluntary nonparticipation prevent some judges from taking part in the en banc vote, the definition of "judges . . . who are in regular active service" could assume a more flexible meaning than one requiring an absolute majority. The legislative history accompanying the development of statutory authorization for the en banc power[40] provides some support for the conclusion that section 46(c) may not necessarily require an absolute majority.

As early as 1940 the Judicial Conference of the United States advocated a change in the Judicial Code that would allow a "majority of the circuit judges" to provide for an en banc court.[41] Congress began to consider this proposal in 1941; the bill passed in the House of Representatives during October of that year proposed that a "majority of the circuit judges may provide for a court of all the active and available judges of the circuit."[42] The House committee report on the bill does not reveal any legislative intent that "majority" assume any particular meaning,[43] but the semantic distinction between "circuit judges" and "active and available circuit judges" may indicate that "majority of circuit judges" meant an absolute majority of the judges of the circuit.

Senate hearings on an identical bill reveal a more active discussion of the purposes of the contemplated legislation.[44] Testimony there shows that the Judicial Conference intended that an en banc court consist of "all the judges who are not for some reason disqualified";[45] "active and available," then, is the language chosen by the Judicial Conference and the drafters of the proposed legislation to encompass the potential disqualification of some judges. Because the words used to define the majority necessary to convene an en banc court differ from those describing the composition of an en banc court, the argument that Congress intended to require an absolute majority of circuit judges to vote in favor of an en banc hearing is plausible. Two considerations militate against this conclusion. First, Congress did not enact the 1941 bill. Second, nothing in the legislative history points to Congressional consideration of the proper definition of majority.

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[40] The legislative history of § 46(c) is extensively outlined in the Western Pac. R.R. Case, 345 U.S. 247 (1953).

[41] 1940 Rep. of the Jud. Conf. of Senior Circuit Judges 7.

[42] H.R. 3390, 77th Cong., 1st Sess., 87 Cong. Rec. 8117 (1941). The House of Representatives adopted the bill without debate on the meaning of "majority." 87 Cong. Rec. 8117 (1941).

[43] H.R. Rep. No. 1246, 77th Cong., 1st Sess. (1941). See Lewis v. University of Pittsburgh, 725 F.2d 910, 930 n.5 (3d Cir. 1983) (en banc) (Adams, J., statement sur petition for rehearing), cert. denied, 105 S. Ct. 266 (1984).

[44] See Administration of U.S. Courts: Hearings Before a Subcomm. of the Comm. on the Judiciary, United States Senate, 77th Cong., 1st Sess. 13-19 (1941).

[45] Id. at 14 (statement of Henry P. Chandler, Director, Admin. Office of the U.S. Courts).

The *Textile Mills*[46] decision, in which the Court discerned authority for en banc hearings in existing law, closely followed House passage of the 1941 en banc bill and temporarily eliminated the impetus for Congressional action to amend the Judicial Code.[47] When Congress moved to enact section 46(c) several years later, the first version of the section paralleled the language of the 1941 bill, permitting authorization of a hearing or rehearing en banc by a "majority of the circuit judges of the circuit who are in regular active service" and providing that an en banc court "shall consist of all active circuit judges circuit present and available in the circuit."[48] The House report that discusses the proposed section 46(c) does not define "majority," but refers generally to *Textile Mills* as the basis for the legislation.[49] The report indicates that 46(c) "preserves" the interpretation of *Textile Mills* but limits en banc hearings to cases where the court has "provided" for or "ordered" an en banc sitting.[50] There is no indication that the use of the word "majority" in 46(c) is anything more than a general prescription of the means by which judges may order en banc hearings.

The extant version of section 46(c) differs from the original House bill[51] by its substitution of "all circuit judges in regular active service" for "all active and available judges of the circuit present and available in the circuit" as the appropriate panel to hear a case en banc. Although the original language had been designed to exclude from en banc panels judges disqualified from participation, it cannot be concluded that the language in the final legislation represented a congressional intent to include recused judges among those who "shall" sit in en banc hearings. Congress certainly did not authorize judges barred from taking part in a proceeding to sit on a case merely because the circuit decided to hear the controversy en banc; rather, the statute defining a quorum of three-judge panels and en banc courts impliedly permits fewer than "all circuit judges in regular active service" to constitute the court en banc.[52]

The quorum requirement expressly indicates that disqualified judges

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[46] Textile Mills Sec. Corp. v. Commissioner, 314 U.S. 326 (1941).

[47] See the Western Pac. R.R. Case, 345 U.S. 247, 252-53 (1953).

[48] See H.R. 3498, 79th Cong., 1st Sess. § 46(c) (1945).

[49] H.R. Rep. No. 306, 80th Cong., 1st Sess. A6-A7 (1947).

[50] Id. Note that Fed. R. App. P. 35(a) mimics the language of § 46(c) and thus offers no additional guidance with regard to the definitional problem. An early draft of Rule 35 evidences no relevant language different from that finally adopted. See Comm. on Rules of Prac. & Proc., Jud. Conf. of the U.S., Uniform Rules of Federal Appellate Procedure Rule 35(a) (Preliminary Draft 1964).

[51] See supra note 48 and accompanying text.

[52] 28 U.S.C. § 46(d) (1982) (providing that "[a] majority of the number of judges authorized to constitute a court or panel thereof . . . shall constitute a quorum").

do not fit within the meaning of the phrase in 46(c)—"regular active service"—that defines the composition of an en banc court. This flexible definition seems to clash with another provision in the Judicial Code that reads "regular active service" as equivalent to membership on a court.[53] Indeed, one Supreme Court opinion has used that definition to conclude that "[a]n 'active' judge is a judge who has not retired from regular active service."[54] Yet any interpretation of "regular active service" in section 46(c) that includes disqualified judges ignores the impact of the quorum limitation on the meaning of "all circuit judges in regular active service." If these two provisions are to be read consistently, "all circuit judges" must not mean literally each and every judge in active service. Thus, section 46(c) implicitly allows the nonparticipation of some judges.[55] Disqualified judges are not in "regular active service" for the purposes of the clause in section 46(c) that governs the composition of an en banc panel. It is possible, therefore, that a judge who is in regular active service as a member of the court will be "out of service" for a particular case.[56]

Section 46(c) uses the phrase "regular active service" twice; the forgoing analysis leads to the conclusion that a judge may in some circumstances be a judge not in regular active service for purposes of the provision that prescribes the composition of an en banc court. The vote whether to convene en banc is also conducted among "judges of the circuit who are in regular active service"; no rule of legal construction would permit "regular active service" to assume two different meanings in consecutive sentences.[57] If judges in regular active service do not, for example, include disqualified judges, then a "majority of the circuit judges of the circuit who are in regular active service" is less than an absolute majority of the court's membership. Unless Congress has indicated that an absolute majority is intended by section 46(c), a rule that would give "regular active service" two separate meanings within section 46(c), the

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[53] See id. § 43(b) (positing that "[e]ach court of appeals shall consist of the circuit judges of the circuit in regular active service"). Judges assigned or designated to the circuit court are not judges in regular active service. Id. (by implication).

[54] United States v. American-Foreign S.S. Corp., 363 U.S. 685, 688 (1960) (quoting 28 U.S.C. § 371(b) (1982)); see also Second Circuit Note, Federal Jurisdiction and Practice, 47 St. John's L. Rev. 339, 346 (1972).

[55] See Alltmont v. United States, 177 F.2d 971, 973 (3d Cir. 1949) (en banc), cert. denied, 339 U.S. 967 (1950).

[56] See Arnold v. Eastern Air Lines, 712 F.2d 899, 904 (4th Cir. 1983) (en banc), cert. denied, 104 S. Ct. 703 (1984).

[57] See Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 87 (1934); Arnold v. Eastern Air Lines, 712 F.2d 899, 904 (4th Cir. 1983) (en banc), cert. denied, 104 S. Ct. 703 (1984); Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit 14-15, American Broadcasting Cos. v. Clark, 460 U.S. 1040 (1983), denying cert. to 684 F.2d 1208 (6th Cir. 1982).

majority rule does not require the affirmative votes of a majority of all circuit judges.

The Supreme Court carefully disavowed judicial tampering with express provisions of section 46(c) in two decisions construing the statute. In *United States v. American-Foreign Steamship Corp.*,[58] the Court vacated an en banc decision of the Second Circuit because that court permitted a senior judge to sit on the en banc panel. The definition of "regular active service" unambiguously excludes senior judges, and circuit court discretion stops short of clear violations of the statutory limits on en banc procedure.[59] The Court took notice of a Judicial Conference proposal to enable senior judges to sit in en banc rehearings where the senior judge was a member of the original en banc panel,[60] but concluded that this observation strengthened its holding that any amendment of the statute be left to Congress.[61] In *Moody v. Albemarle Paper Co.*,[62] the Court found that a senior judge was not a judge in regular active service vested with authority to vote on whether to grant en banc rehearing. Though Congress revised section 46(c) after *American-Foreign Steamship* to allow senior judge participation in en banc rehearings, it did not broaden participation in the vote to convene en banc, and the Court remained powerless to effect such an amendment.[63]

Congress has been presented with an opportunity to clarify the majority vote provision of section 46(c). In response to a decision of the Second Circuit that imposed an absolute majority requirement despite the presence of a judge disqualified from the case,[64] the Judicial Conference proposed an amendment in 1973 to "make clear that a majority of the judges in regular active service who are entitled to vote should be sufficient to *en banc* a case."[65] Though the Conference advocated legislation to amend

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[58] 363 U.S. 685 (1960).

[59] Id. at 688-89.

[60] Id. at 690.

[61] Id. at 690-91.

[62] 417 U.S. 622 (1974).

[63] Id. at 627. But see U.S. Court of Appeals for the Federal Circuit, Internal Operating Procedure § 27(b), which permits a senior judge originally involved in a panel decision to participate in "consideration and decision on the petition" for rehearing. This rule clearly disobeys *Moody*.

[64] Zahn v. International Paper Co., 469 F.2d 1033 (2d Cir. 1972), aff'd on other grounds, 414 U.S. 291 (1973). Although the Judicial Conference proceedings never mention *Zahn*, the proposal to clarify § 46(c) originated with Judge Friendly, the judge disqualified in *Zahn*. See Comm'n on Revision of the Fed. Court Appellate Sys., Second Phase Hearings: 1974-75, at 879 (testimony of John R. Brown, Chief Judge, U.S. Court of Appeals for the Fifth Circuit) [hereinafter cited as Second Phase Hearings].

[65] 1973 Rep. of the Proc. of the Jud. Conf. of the U.S. 47. In September 1984, the Judicial Conference rescinded its 1973 recommendation and suggested that each court of appeals adopt a rule to make clear its interpretation of § 46(c). 1984 Judicial Conference, supra note

section 46(c) to ensure this interpretation, it did not concede that the present language of the statute stipulates that en banc hearings may be ordered only with the concurrence of an absolute majority of circuit judges, but simply took note of a single judicial construction reaching that conclusion.[66] An account of the Judicial Conference action observes that section 46(c) is "not clear as to whether the majority takes into consideration judgeship vacancies or disqualifications."[67] In spite of the Conference recommendation, however, Congress took no action on the proposed amendment after its introduction in the House.[68]

This failure by Congress to clarify the ambiguous meaning of "majority" in section 46(c) might be characterized as an implicit indication of legislative intent. After all, if Congress chose not to adopt a standard excluding vacancies and disqualifications from the calculation of a majority, perhaps it intended to permit or to require the votes of an absolute majority before an en banc sitting could be ordered.[69] But the inaction of Congress with regard to the 1973 Judicial Conference proposal renders its legislative history inconclusive; although Congress took no action to reject

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13, at 3; see infra note 89 and accompanying text.

[66] 1973 Rep. of the Proc. of the Jud. Conf. of the U.S. 47.

[67] Judicial Conference Report Released, Third Branch, Nov. 1973, at 1, 2.

[68] The Judicial Conference proposal was received in both the House of Representatives and the Senate on October 1, 1973. 119 Cong. Rec. 32,129 (1973) (House); 119 Cong. Rec. 32,153 (1973) (Senate). The en banc procedure amendment addressing the Conference recommendation was introduced as H.R. 10,805 and referred to the House Judiciary Committee on October 9, 1973. 119 Cong. Rec. 33,430 (1973). No subsequent action by the House committee is reported.

[69] See Arnold v. Eastern Air Lines, 712 F.2d 899, 911 (4th Cir. 1983) (Widener, J., concurring and dissenting), cert. denied, 104 S. Ct. 703 (1984). But Judge Widener's argument that an absolute majority rule is binding rests upon his contention that the law at the time of the Judicial Conference report "was to the contrary" of the *Arnold* rule. Id. Judge Widener ignores the possibility that the Judicial Conference recommendation served only to clarify the statute and ensure a preferred interpretation of existing law. Despite the Second Circuit's holding in *Zahn*, no decision of any other circuit before 1973 had discerned in § 46(c) an obligation to count disqualified judges in the en banc voting process. If § 46(c) as written permits a standard other than that embraced in *Zahn*, Congress' failure to endorse a particular interpretation of the statutory language does not bind all courts to the first judicial constrnction of the statute. The fact that Congress has twice amended § 46(c) since 1973, see Federal Courts Improvements Act of 1982, Pub. L. No. 97-164, § 205, 96 Stat. 25, 53 (restoring authority for senior judges to sit en banc and permitting large circuits to sit in en banc panels consisting of less than the full court); Act of Oct. 20, 1978, Pub. L. No. 95-486, § 5(a)(2), 92 Stat. 1629, 1633 (removing authority for senior judges to sit en banc), does not add to the contention that Congress favors an absolute majority standard. Contra *Arnold*, 712 F.2d at 911 (Widener, J., concurring and dissenting). The legislative history of these statutes diplays no indication that Congress made any decision regarding the mechanics of the en banc vote.

the absolute majority interpretation, neither did it endorse that reading of the statute.

A decision by a court to adopt the interpretation favored by the Judicial Conference would appear to be contrary to the position taken by the Supreme Court in *American Foreign Steamship*, where the Court refused to preempt the Congressional duty to choose whether to enact a Conference recommendation.[70] The Court's reticence in *American-Foreign Steamship* should be contrasted, however, with its analysis in *Textile Mills*. In *Textile Mills*, the Court bypassed Congressional authority on a Judicial Conference proposal to authorize en banc sittings and drew justification for en banc hearings from existing law.[71] The crucial distinction between the two cases rests with recognition that the statutory provision construed in *Textile Mills* did not foreclose the Court's interpretation;[72] in *American-Foreign Steamship*, on the other hand, the en banc statute specifically forbade participation of senior judges on en banc panels.[73] A rule allowing a majority of judges able to participate in a particular case to order an en banc sitting is a permissible reading of section 46(c), and the absence of any legislative authority barring that interpretation delivers the problem of defining majority to the circuit courts.

Because the legislative history of section 46(c) does not command an absolute majority, it is worthwhile to consider a number of alternative definitions. These alternatives grow out of the several possible explanations for the nonparticipation of a judge in a particular case. First, a judge may be disqualified from taking part in en banc consideration of a matter.[74] Second, a circuit judge may be assigned in another circuit when the en banc petition is considered or when the en banc hearing takes place.[75] Finally, a judge might fail to participate in an en banc vote or

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[70] See 363 U.S. at 690-91.

[71] See 314 U.S. at 334.

[72] See id. The Court observed that "any sacrifice of literalness for common sense does no violence to the [statute]. That history is largely negative in that there is no clear statement by the sponsors of this legislation that . . . prevents the conclusion which we have reached." Id.

[73] 363 U.S. at 691.

[74] See 28 U.S.C. § 47 (1982) (disqualification of judge from hearing appeal of case or issue tried by that judge); id. § 455 (disqualification to avoid conflict of interest).

[75] See id. § 291. Although no statute prevents an assigned judge from participating in the affairs of the "home" circuit, cf. id. § 296 (powers and duties of assigned judge), even a short assignment could in a rare case make full participation in en banc proceedings impossible. An assigned judge cannot take part in the en banc proceedings of the circuit of assignment, because by definition an assigned judge is not in regular active service. See id. § 43(b).

hearing because of illness,[76] vacation, or a preference not to cast a vote in the en banc poll.[77]

A circuit court might adopt a definition of majority that would permit it to disregard in its calculation of the majority a judge who does not, for any of the above reasons, participate in the en banc vote.[78] The basis for not counting recused judges remains stronger, however, than that for excluding judges not participating for other reasons. Some courts do not adequately explain the nonparticipation of their judges in en banc polls, and it is difficult to determine whether the rules of some circuits that have adopted an absolute majority definition were fashioned in cases where judges were legally barred from voting on the suggestion for en banc rehearing.[79] Nonetheless, the distinction between recused judges and judges who fail to take part for other reasons is fundamental. Statutes mandate the nonparticipation of a judge disqualified by recusal;[80] a judge who merely abstains on an en banc petition is a voluntary non-voter.[81] A definition of "regular active service" that permits the exclusion of recused judges from the number of judges considered when measuring a majority is reasonable. To contend that a judge who is ill, vacationing, assigned to another circuit, or abstaining is not a "judge . . . who is in regular active service" is somewhat less reasonable, and a rule that required a majority of *voting* judges only would appear to countermand congressional intent.

An absolute majority rule is also a plausible reading of section 46(c),[82]

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[76] See Note, *United States v. Mandel*: The Problem of Evenly Divided Votes in En Banc Hearings in the United States Courts of Appeals, 66 Va. L. Rev. 919, 932-33 (1980).

[77] See infra note 83 and accompanying text.

[78] See infra notes 84-86 and accompanying text.

[79] Compare Clark v. American Broadcasting Cos., 684 F.2d 1208 (6th Cir. 1982) (one active judge disqualified), cert. denied, 460 U.S. 1040, mandamus denied sub nom. In re American Broadcasting Cos., 104 S. Ct. 538 (1983); Boyd v. Lefrak Org., 517 F.2d 918 (2d Cir.) (judge disqualified), cert. denied, 423 U.S. 896 (1975); Zahn v. International Paper Co., 469 F.2d 1033 (2d Cir. 1972) (judge disqualified), with Copper & Brass Fabricators Council v. Department of Treasury, No. 81-2091, slip op. at 1 (D.C. Cir. Aug. 3, 1982) (two judges "did not participate"); Porter County Chapter of the Izaak Walton League of Am. v. Atomic Energy Comm'n, 515 F.2d 513, 533 (7th Cir.) (judge "took no part"), rev'd on other grounds sub nom. Northern Ind. Pub. Serv. Co. v. Porter County Chapter of the Izaak Walton League of Am., Inc., 423 U.S. 12 (1975) (per curiam). The First and Ninth Circuits do not differentiate between recusals and abstentions. Letter from Francis P. Scigliano, Clerk of the U.S. Court of Appeals for the First Circuit (Sept. 30, 1983) (copy on file with the Virginia Law Review Association); Letter from Cathy A. Catterson, Chief Deputy Clerk of the U.S. Court of Appeals for the Ninth Circuit (Feb. 6, 1984) (copy on file with the Virginia Law Review Association).

[80] See 28 U.S.C. § 47 (1982); id. § 455.

[81] See Arnold v. Eastern Air Lines, 712 F.2d 899, 903 n.3 (4th Cir. 1983) (en banc), cert. denied, 104 S. Ct. 703 (1984).

[82] See generally 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3506 (1975 & Supp. 1982) (discussing anomolous nature of *Zahn* rule); Annot., 27 A.L.R.

but to consider judges unable to participate in the en banc poll as judges in regular active service requires a strained interpretation of the statute. The most acceptable definition of majority would permit the court to distinguish between nonparticipation that effectively removes a judge from service in a case and behavior of a more voluntary nature. Although a true abstention may legitimately be considered a vote against rehearing, judges who do not participate for other reasons arguably should not affect the decision whether to en banc a case. Circuit rules should at minimum require the disclosure of circumstances indicating that a judge's non-vote is intended as a vote in opposition to rehearing.[83]

The 1973 Judicial Conference report advocated excluding recused judges when determining what constitutes the majority of circuit judges necessary to convene en banc.[84] Another federal commission endorsed a rule making a "majority of the active circuit judges who are qualified . . . to sit" sufficient to order en banc consideration.[85] Other rules that would allow courts to ignore judges who do not vote because of illness, vacation, or assignment to another court are less attractive. These judges would be categorized with recused judges if the adopted standard accepted a majority vote of "available judges," a rule akin to requiring only a majority of members present.[86] Such judges are, in a sense, out of service during a particular time period in the same way that recused judges are out of service for a particular case,[87] yet the temporary character of their inabil-

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Fed. 274, 291-92 (1978) (discussing cases in which absolute majority standard adopted). Although a court may require that an absolute majority of the judges of the circuit favor an en banc hearing, vacancies are not considered when computing a majority, since unfilled judgeships cannot be defined as judges in active service. United States v. Martorano, 620 F.2d 912, 920 (1st Cir.) (en banc), cert. denied, 449 U.S. 952 (1980); see also Arnold v. Eastern Air Lines, 712 F.2d 899, 910 n. 2 (4th Cir. 1983) (en banc) (Widener, J., concurring and dissenting), cert. denied, 104 S. Ct. 703 (1984).

[83] Assessment of the cause of a judge's nonparticipation is blocked, however, when circuit policy permits a judge to remain silent rather than cast a vote. See, e.g., U.S. Court of Appeals for the Third Circuit, Internal Operating Procedures chs. 9(A)(2), 9(B)(4)(b) (1983), which provide that a non-response will be considered as a vote against rehearing. The Supreme Court upheld this practice as a valid exercise of discretion in Shenker v. Baltimore & O.R.R., 374 U.S. 1 (1963). The Second Circuit may also utilize a similar procedure. See Note, supra note 23, at 1643 & n.28.

[84] See supra notes 65-67 and accompanying text.

[85] Comm'n on Revision of the Fed. Court Appellate Sys., supra note 22, at 63. In hearings on the proposal several witnesses indicated judicial support for the rule. See Second Phase Hearings, supra note 64, at 879 (testimony of John R. Brown, Chief Judge, U.S. Court of Appeals for the Fifth Circuit); id. at 986 (statement of Floyd R. Gibson, Chief Judge, U.S. Court of Appeals for the Eighth Circuit); id. at 1303 (letter of Thomas E. Fairchild, Chief Judge, U.S Court of Appeals for the Seventh Circuit, on behalf of the Seventh Circuit Judicial Council).

[86] See supra at 1511.

[87] But if an assignment or illness is of sucb duration that nonparticipation can no longer

ity to participate in the en banc poll weakens the justification for their total exclusion from the voting process. Significant delay already accompanies most decisions whether to grant en banc rehearings;[88] perhaps the court could simply delay further voting on en banc suggestions until a full complement of judges eligible to participate is available. The fortuitous absence of particular judges should not affect en banc disposition if no legal barrier prevents consideration of the en banc petition by the entire court. "Majority" should be defined to exclude only judges who cannot reasonably be recognized as judges in regular active service for a particular case.

Absent controlling Supreme Court or congressional interpretations of "majority," the exact scope of this exception to the absolute majority standard remains within the purview of individual circuits. At its September 1984 meeting, the Judicial Conference retreated from its 1973 endorsement of the majority of judges eligible rule and recommended merely that each circuit formulate a standard that would make litigants aware of the definition applied in that circuit.[89] Congress has never taken any action that could be construed to bind the courts of appeals to a particular definition of majority. The Supreme Court has similarly failed to favor a particular construction of section 46(c).

B. Supreme Court Treatment of Section 46(c)

In *Shenker v. Baltimore & Ohio Railroad*,[90] the Supreme Court upheld the Third Circuit's decision to deny rehearing en banc where a majority of circuit judges voting favored en banc rehearing. Of the eight judges who then constituted the Third Circuit, four voted for rehearing, two voted against rehearing, and two abstained.[91] The Court in *Shenker* accepted the Third Circuit's policy requiring an absolute majority of the active judges of the court to grant rehearing en banc.[92]

Some critics assert that *Shenker* represents an effort by the Supreme Court to define "majority" as an absolute majority of a circuit court's membership.[93] *Shenker*, however, dealt simply with judicial abstentions.

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be viewed as temporary, a judge might indeed be "out of service" for the cases arising during the period of assignment or illness.

[88] See Note, supra note 18, at 600 n.216.

[89] 1984 Judicial Conference, supra note 13, at 3.

[90] 374 U.S. 1 (1963).

[91] Id. at 4. The Third Circuit counts abstentions as votes against rehearing. See supra note 83.

[92] 374 U.S. at 4.

[93] See Arnold v. Eastern Air Lines, 712 F.2d 899, 909-910 (4th Cir. 1983) (Widener, J., concurring and dissenting), cert. denied, 104 S. Ct. 703 (1984); Note, supra note 18, at 736 n.286. Judge Widener reaches this conclusion after stating that "[i]t is at once apparent that

The decision, therefore, does not address the appropriate posture toward judges whose nonparticipation is a product of an involuntary decision not to vote. *Shenker* does not even require a circuit to count abstaining judges when calculating the necessary majority. The Supreme Court merely refused to interfere with a decision it thought best made by the Third Circuit. In holding that the practice of counting abstentions was within the permissible discretion of the circuit court, the Supreme Court developed no binding definition of majority.[94]

Although the Supreme Court will rarely interfere with the processes adopted by circuit courts to effect the en banc authority of section 46(c), several arguments might bring the dispute over the meaning of "majority" to the Court's attention.[95] First, the Court has recognized that the circuit courts must comply with "certain fundamental requirements"[96] when exercising the en banc power. The Court initially suggested this limitation in the *Western Pacific Railroad Case*,[97] where, exercising its "general power to supervise the administration of justice in the federal courts,"[98] it stated that courts of appeals should recognize the full scope of powers granted under section 46(c).[99] The Court invoked this general

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four to two is a majority of those judges not disqualified, and so the fact situation presented to the Supreme Court in *Shenker* is the same as presented to us here." 712 F.2d at 909. There is no indication, however, in either the Supreme Court or Third Circuit opinions, that any judge was disqualified in *Shenker*; in *Arnold*, on the other hand, the definitional issue centered around the statutory disqualification of Judge Ervin. Compare *Shenker*, 374 U.S. 1 (1963), and Shenker v. Baltimore & O.R.R., 303 F.2d 596 (3d Cir. 1962), rev'd on other grounds, 374 U.S. 1 (1963), with *Arnold*, 712 F.2d at 901.

[94] See *Arnold*, 712 F.2d at 903 n.3; 2 Federal Procedure § 3:752 (Law. Ed. 1981). Contra *Arnold*, 712 F.2d at 909-10 (Widener, J., concurring and dissenting). Judge Widener views *Arnold* as a rejection of the Court's decision in *Shenker*, id., but does not address the Court's obvious willingness in *Shenker* to permit differing interpretations of the § 46(c) requirement. See *Shenker*, 374 U.S. at 4-5.

[95] One commentator argues that the Supreme Court has tacitly taken a position permitting the *Arnold* rule by denying certiorari in that case. Note, supra note 2, at 379. In fact, however, a "denial of certiorari imparts no implication or inference of the [Supreme] Court's view of the merits." Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363, 366 n.1 (1973); see also Maryland v. Baltimore Radio Show, Inc., 338 U.S 912, 919 (1950) (Frankfurter, J.) ("[A]ll that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted . . . . The Court has said this again and again; again and again this admonition has to be repeated."). Moreover, the Court also recently denied review in two cases that adopted the absolute majority standard. See Lewis v. University of Pittsburgh, 105 S. Ct. 266 (1984), denying cert. to 725 F.2d 910 (3d Cir. 1983); In re Am. Broadcasting Cos., 104 S. Ct. 538 (1983), denying mandamus to Clark v. American Broadcasting Cos., 684 F.2d 1208 (6th Cir. 1982), cert. denied, 460 U.S. 1040 (1983).

[96] See the Western Pac. R.R. Case, 345 U.S. 247, 260 (1953).

[97] 345 U.S. 247 (1953)

[98] Id. at 260 (quoting United States v. National City Lines, 334 U.S. 573, 589 (1948)).

[99] Id. at 260-61

authority in *Moody v. Albemarle Paper Co.*,[100] where it concluded that allowing senior judges to take part in the en banc poll would violate the en banc statute.[101] Because most alternative definitions of majority do not expressly contradict the statutory command of majority rule, however, the Court probably will leave such definitional decisions to the courts of appeals.[102]

Second, the Supreme Court may have a unique responsibility to control interpretations of the Federal Rules of Appellate Procedure:[103] it promulgated these rules under its statutory authority.[104] Rule 35, however, merely mimics the wording of section 46(c);[105] it is not a new guideline worthy of special Supreme Court attention. Rule 35 thus does not provide an independent rationale for Supreme Court interference with circuit court discretion.

Finally, a special need for uniformity among the circuits might justify Supreme Court resolution of the confusion caused by competing definitions of majority: the disparity in the treatment litigants receive under these competing definitions presumably offends advocates of uniformity among the circuits.[106] This result is not, however, a problem that deserves Supreme Court attention. Nonuniformity is the precise result contemplated by the permissive grant of authority to make any rules "not inconsistent" with the binding standards of federal law and the federal appellate rules. The possibility that one court will impose a more stringent definition of majority than another is no more offensive than the likelihood that judges of one circuit will be more willing to grant an en banc rehearing than those of a second court.

Criticism of en banc procedures based on a desire for uniformity in the circuits also ignores the precept that the en banc power is simply a tool of judicial administration—it is not intended to serve litigants. Litigants can demand little more than a prospectively announced rule.[107] Given the

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[100] 417 U.S. 622 (1974).

[101] Id. at 626.

[102] But if counting disqualified judges violates the statutory scheme by vitiating the disqualification statutes, the Court might appropriately intervene in the rule-making process.

[103] See Note, supra note 22, at 1640 nn.15-16.

[104] See 28 U.S.C. § 2072 (1982).

[105] Section 46(c) requires a "majority of the circuit judges of the circuit who are in regular active service to order a hearing en banc." Id. § 46(c). Rule 35 requires a "majority of the circuit judges who are in regular active service." Fed. R. App. P. 35(a).

[106] See, e.g., Petition for a Writ of Certiorari to the Third Circuit 11-12, Lewis v. University of Pittsburgh, 105 S. Ct. 266 (1984), denying cert. to 725 F.2d 910 (3d Cir. 1983).

[107] See *Western Pacific*, 345 U.S. at 258-62; cf. 1984 Judicial Conference, supra note 13, at 3 (Judicial Conference suggestion that each circuit adopt clear rule).

A recent note advocated the amendment of section 46(c) by Congress. See Note, supra note 2, at 391-92. The author suggested that each circuit should have an identical rule. Id. at

substantial latitude afforded the circuit courts in management of the en banc power,[108] and considering the rulemaking authority delegated by statute and Supreme Court preference to the courts of appeals, the responsibility for defining majority appropriately rests in the circuit courts.

C. "Majority" Definition in the Courts of Appeals

The authority to promulgate circuit court rules governing en banc proceedings derives not only from the Supreme Court's willingness to leave these duties to the individual courts, but is also granted by the Judicial Code and the Federal Rules of Appellate Procedure.[109] The courts of appeals are obliged as well to publish their operating procedures.[110] These delegations of power afford the circuits the means to comply with the Supreme Court's admonition to offer litigants rules that clearly outline the en banc voting process.[111]

The rules and statutes do not require the circuits to adopt identical

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379. That analysis ignores the concept that the en banc tool exists largely to facilitate judicial administration. If en banc procedures in each circuit are clearly defined, as the recent Judicial Conference proposal suggested they should be, see supra note 89 and accompanying text, it matters whether the rule in each circuit is identical only if there are principled reasons for favoring one approach to the definition of majority over another. The author of the Note, supra note 2, overlooks the judicial integrity arguments that support a rule similar to that embraced in *Arnold*. Compare id., with infra notes 188-204 and accompanying text.

[108] See *Western Pacific*, 345 U.S. at 259. The discretion afforded to the circuits by *Shenker* and *Western Pacific* should be viewed against the history of the disqualification statute, 28 U.S.C. § 455 (1982), to provide an argument against allowing the circuits to define majority as an absolute majority of all circuit judges. At the time of *Shenker*, section 455 affected fewer cases than it does today; the statute prior to its amendment in 1974 simply forbade a judge to participate in a case in which the judge had "a substantial interest" or where a connection to the case would "render it improper, in [the judge's] opinion," to sit in the case. Id. § 455 (1970), amended by Act of Dec. 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609 (1974); see Lewis v. University of Pittsburgh, 725 F.2d 910, 930 n.6 (3d Cir. 1983) (Adams, J., statement sur petition for rehearing), cert. denied, 105 S. Ct. 266 (1984). The disqualification statute now causes frequent disqualifications and compounds the effect of the absolute majority rule on the frequency of en banc determinations. Cf. infra note 175.

[109] 28 U.S.C. § 2071 (1982) (federal courts can make rules consistent with acts of Congress and the rules prescribed by the Supreme Court); Fed. R. App. P. 47 (courts of appeals may adopt practice rules "not inconsistent" with the Federal Rules of Appellate Procedure); see generally 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure § 3993 (1977).

[110] 28 U.S.C. § 2077 (1982).

[111] See the Western Pac. R.R. Case, 345 U.S. 247, 260-61 (1953); see also 1984 Judicial Conference, supra note 13, at 3 (suggesting that each circuit adopt a rule outlining its definition of majority). Two early law review articles surveyed the en banc voting procedures adopted by the various circuits. Editorial Note, En Banc Proceedings in the United States Courts of Appeals, 22 Geo. Wash. L. Rev. 482 (1954); Note, En Banc Procedure in the Federal Courts of Appeals, 111 U. Pa. L. Rev. 220, 221-27 (1962).

procedures. The Judicial Code states that court rules must be "consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."[112] The Federal Rules of Appellate Procedure permit the circuits to adopt any rule that is "not inconsistent with" the federal rules.[113] Acting upon these bases of authority, the several circuits have adopted significantly different rules.

Five circuits have indicated a preference for an absolute majority standard. The Second Circuit has no rule describing the en banc vote, but in fact requires that a majority of the total membership of the court agree to an en banc proceeding.[114] It first enunciated this rule in *Zahn v. International Paper Co.*[115] In *Zahn*, the court denied rehearing despite votes in favor of rehearing by a majority of the circuit judges not disqualified in the case.[116] Supporters of the absolute majority rule emphasized the danger to majority control of circuit law that would result from allowing a minority of the members of the circuit to force en banc sittings.[117] None of the opinions in the case discussed the ethical propriety of participation by a disqualified judge.

The Third Circuit also requires an absolute majority. The rule simply parrots section 46(c), providing that an en banc sitting will be ordered by a "majority of the circuit judges in regular active service."[118] The circuit's operating procedures are no more specific, and they refer only to the need for "affirmative votes of a majority of the circuit judges of this court in

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[112] 28 U.S.C. § 2071 (1982).

[113] Fed. R. App. P. 47.

[114] See Comm. on Fed. Courts of the Ass'n of the Bar of the City of N.Y., Appeals to the Second Circuit 47 (1980) ("[I]t is necessary for a majority of the active judges of the Court, regardless of abstentions or temporary absences, to agree that such procedure is warranted.").

One Second Circuit judge recently advocated a change in the circuit's rule to permit a majority of eligible judges to order en banc consideration. See Newman, Foreword: In Banc Practice in the Second Circuit: The Virtues of Restraint, 50 Brooklyn L. Rev. 365, 368 (1984).

[115] 469 F.2d 1033, 1040 (2d Cir. 1972) (order denying en banc rehearing), aff'd on other grounds, 414 U.S. 291 (1973).

[116] The vote on suggestion for rehearing en banc was four in favor, three opposed, with one judge disqualified. 469 F.2d at 1040. The Second Circuit at the time of *Zahn* had an authorized complement of nine judges, but a vacancy existed on the court. Id. at 1042 (Timbers, J., dissenting from denial of en banc rehearing). *Zahn* was criticized by two commentators, who encouraged alternatives to the absolute majority standard. See Comment, supra note 22, at 420; Second Circuit Note, supra note 54, at 345-48. *Zahn* has nevertheless been applied in a later case. See Boyd v. Lefrak Org., 517 F.2d 918 (2d Cir.) (four judges in favor of rehearing, three judges opposed, one disqualification), cert. denied, 423 U.S. 896 (1975).

[117] 469 F.2d at 1041 (Mansfield, J., concurring in denial of en banc rehearing). *Zahn* was complicated by the presence of two senior judges on the original panel; these judges would have been eligible to sit on the en banc court.

[118] 3d Cir. R. 2(3).

regular active service"[119] or a "majority of the active judges of the court"[120] before an en banc court may be convened. Nevertheless, the absolute majority standard represents a long-standing Third Circuit policy,[121] and in *Lewis v. University of Pittsburgh*[122] the court reaffirmed the absolute majority definition and denied rehearing in a case where five of eight available judges favored en banc consideration.[123]

The Sixth Circuit recently held in *Clark v. American Broadcasting Cos.*[124] that the majority required by section 46(c) is a majority of "all active judges sitting on the court of appeals as opposed to a majority vote of all active circuit judges eligible to vote."[125] The court has not published a rule embodying this standard,[126] but its decision in *Clark* indicates a clear intention to count disqualified judges when defining majority.[127]

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[119] U.S. Court of Appeals for the Third Circuit, Internal Operating Procedures ch. 9(B)(4) (1983).

[120] Id. ch. 9(B)(4)(d); see id. ch. 9(B)(6)(a).

[121] See Maris, Hearing and Rehearing Cases In Banc, 14 F.R.D. 91, 93 (1953). Judge Maris, then a member of the Third Circuit, explained Third Circuit en banc procedure and emphasized the majority control factor. Id. at 96.

[122] Lewis v. University of Pittsburgh, 725 F.2d 910 (3d Cir. 1983) (en banc) (five judges favored rehearing, three opposed, with two recusals), cert. denied, 105 S. Ct. 266 (1984).

[123] Judge Adams explained in a separate statement his rationale for the Third Circuit's refusal to adopt the majority defuition espoused recently in other circuits. He recognized the definitional inconsistency of the absolute majority rule, but expressed concerns similar to those set forth by the concurring opinions in *Zahn*, and pointed to the risk that trends in circuit law would be charted by a minority of circuit judges under a looser construction of section 46(c). Id. at 929 (Adams, J., statement sur petition for rehearing). But cf. infra notes 163-175 and accompanying text.

An earlier Third Circuit case also pointed to a circuit policy to count disqualified judges when determining the majority vote necessary to convene the court en banc. See Curtiss-Wright Corp. v. General Elec. Co., 599 F.2d 1259 (3d Cir. 1979), vacated on other grounds, 446 U.S. 1 (1980). In that case the vote was four to grant rehearing, three to deny, with two judges not participating. The two judges not participating had recused themselves. Id. at 1265 n.8 (Gibbons, J., dissenting).

[124] 684 F.2d 1208 (6th Cir. 1982), cert. denied, 460 U.S. 1040, mandamus denied sub nom. In re Am. Broadcasting Cos., 104 S. Ct. 538 (1983).

[125] Letter from John P. Hehman, Clerk of the U.S. Court of Appeals for the Sixth Circuit (Oct. 6, 1983) (copy on file with the Virginia Law Review Association).

[126] The practice handbook distributed in the Sixth Circuit states only that a "majority of the judges" must support en banc rehearing. Comm. on Fed. Courts of the Cincinnati Chapt. of the Fed. Bar Ass'n, Practitioner's Handbook for Appeals to the United States Court of Appeals for the Sixth Circuit 49 (rev. ed. 1979).

[127] The vote on whether to rehear was five in favor, four opposed, with one disqualification. 684 F.2d at 1226. The court initially concluded that this vote represented a majority decision, but then withdrew its order granting rehearing. Id. The court's short order denying rehearing does not discuss majority control or the possibility that recusals should not be counted. Id.

The parties raised no objections to this approach.[128]

Until recently, the Eighth Circuit allowed en banc hearings and rehearings to be ordered by "a majority of the judges of [the] court who are actively participating in the affairs of the court and who are not disqualified in the particular case or controversy."[129] That court has adopted a new rule that requires an absolute majority of the circuit's judges to vote for an en banc hearing or rehearing.[130]

The United States Court of Appeals for the District of Columbia Circuit does not define majority by rule,[131] but it has stated that "a majority of all active judges, regardless of recusals or temporary absences, must approve rehearing."[132] The court enforced this policy in a recent denial of rehearing,[133] but has not questioned the role of circuit stability or judicial disqualification in the en banc voting process.

At least three circuits permit less than an absolute majority of all judges to order en banc rehearings. The Fourth Circuit created its rule in *Arnold v. Eastern Air Lines*,[134] where it held that a disqualified judge is not a judge in service for purposes of determining whether a majority of circuit judges had voted for rehearing en banc.[135] The court has incorporated this policy in its new operating procedures,[136] which provide that

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[128] Respondent's Brief in Opposition 1, American Broadcasting Cos. v. Clark, 460 U.S. 1040 (1983), denying cert. to 684 F.2d 1208 (6th Cir. 1982).

[129] 8th Cir. R. 7; Id. R. 16(a).

[130] Letter from Michael E. Gans, Chief Deputy Clerk of the U.S. Court of Appeals for the Eighth Circuit (May 16, 1984) (amendment to Rule 16(a) effective Dec. 5, 1983) (copy on file with the Virginia Law Review Association).

[131] The circuit rule that governs suggestions for rehearing en banc refers to Fed. R. App. P. 35, but adds no further explanation of the en banc procedure. D.C. Cir. R. 14.

[132] U.S. Court of Appeals for the D.C. Circuit, Handbook of Practice and Internal Procedures 73 (1978).

[133] See Copper & Brass Fabricators Council v. Department of Treasury, No. 81-2091 (D.C. Cir. Aug. 3, 1982) (en banc) (per curiam) (order denying en banc rehearing).

[134] 712 F.2d 899 (4th Cir. 1983), cert. denied, 104 S. Ct. 703 (1984).

[135] The *Arnold* rule was alluded to in an earlier case where the court reported denial of rehearing with the statement: "each of the judges in regular active service *who is not disqualified* having been polled . . . it appear[s] that fewer than a majority of *them* have voted for it." United States v. Mandel, 609 F.2d 1076, 1076 (4th Cir. 1979) (emphasis added), cert. denied on other grounds, 445 U.S 961 (1980). The Fourth Circuit also applied the *Arnold* rule in Adams v. Proctor & Gamble Mfg. Co., 697 F.2d 582 (4th Cir. 1983), cert. denied, 104 S. Ct. 1318 (1984).

The Fourth Circuit might have avoided the debate over the definition of majority by deciding *Arnold* on an alternative ground. Judge Butzner, who voted against rehearing, took senior status before rehearing was ordered; if Judge Butzner's vote were to be disregarded because at the time of the relevant order he was no longer a judge in regular active service, then five of nine judges, including the recused Judge Ervin, voted for rehearing. *Arnold*, 712 F.2d at 902 n.1; id. at 912-13 (Hall, J., concurring).

[136] U.S. Court of Appeals for the Fourth Circuit, Internal Operating Procedures § 35.1

"[a] majority vote of all eligible, active and participating judges is required to grant en banc hearing or rehearing."[137] The language used to define majority may eliminate from the calculation judges not taking part for reasons other than disqualification. The rule appears to permit a simple majority of voting judges to order en banc sittings.

The Seventh Circuit adhered until recently to an absolute majority standard,[138] but its new operating procedures permit en banc hearings to be ordered by a "simple majority of the voting active judges."[139] The Tenth Circuit's rules do not reveal that court's procedure,[140] but the court's practice is to order rehearing en banc if favored by a majority of voting judges.[141] Significantly, neither of these circuits has measured its rule against possible concerns of judicial efficiency or ethics, even though they may have liberalized the majority requirement beyond what Congress intended by adopting simple majority standards.

The Ninth Circuit has indicated in one case that "a majority of eligible judges" may order en banc consideration.[142] A general order of the court, though, states that "[t]he number of votes required for a majority shall be the same regardless of recusals."[143] If this is indeed the Ninth Circuit's rule, then that court has embraced the absolute majority definition.

Four circuits have not yet defined their standard. The First Circuit has not confronted the question and has no rule governing the mechanics of

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(1984). The majority in *Arnold* warned that its rule was adopted only for purposes of that case. 712 F.2d at 901-02.

[137] U.S. Court of Appeals for the Fourth Circuit, Internal Operating Procedures § 35.1. (1984)

[138] See Porter County Chapter of the Izaak Walton League of Am. v. Atomic Energy Comm'n, 515 F.2d 513, 533-34 (7th Cir.) (rehearing en banc denied with four judges voting for rehearing, three judges voting against, and one judge taking no part), rev'd on other grounds sub nom. Northern Ind. Pub. Serv. Co. v. Porter County Chapter of the Izaak Walton League of Am., 423 U.S. 12 (1975) (per curiam); Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit 59 (1981 ed.) (rehearing en banc will be ordered "only if a majority of the active judges (not merely a majority of those voting) vote to grant such a rehearing").

[139] U.S. Court of Appeals for the Seventh Circuit, Operating Procedures § 5(d)(1) (1983).

[140] Nor is the Tenth Circuit practice manual helpful. It states that an en banc sitting may be ordered by a "majority of the active judges." Practitioner's Guide to the United States Court of Appeals for the Tenth Circuit 71 (2d rev. ed. 1981).

[141] Letter from Robert L. Hoecker, Chief Deputy Clerk of the U.S. Court of Appeals for the Tenth Circuit (Oct. 5, 1983) (copy on file with the Virginia Law Review Association).

[142] Ford Motor Co. v. Federal Trade Comm'n, 673 F.2d 1008, 1010 (9th Cir. 1981), cert. denied, 459 U.S. 999 (1982); id. at 1012 n.1 (Reinhardt, J., dissenting from denial of en banc rehearing); cf. U.S. Court of Appeals for the Ninth Circuit, Internal Operating Procedures § II(K)(2)(d) (1977) ("majority of the members of the Court in active service").

[143] Letter from Cathy A. Catterson, Chief Deputy Clerk of the U.S. Court of Appeals for the Ninth Circuit (Feb. 6, 1984) (citing Ninth Circuit General Order 5.5(d)) (copy on file with the Virginia Law Review Association).

the en banc vote.[144] Neither the Fifth nor Eleventh Circuit addresses the majority question by rule. The Fifth Circuit practice has been described as requiring simply "a majority of active judges voting";[145] but this wording may be unintentional, and the procedure in the Fifth Circuit remains unclear.[146] The Eleventh Circuit rules refer only to Rule 35 of the Federal Rules of Appellate Procedure with no additional explanation.[147] The Fed-

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[144] Letter from Francis P. Scigliano, Clerk of the U.S. Court of Appeals for the First Circuit (Sept. 30, 1983) (copy on file with the Virginia Law Review Association). The First Circuit rule covering petitions for en banc consideration states only that the rule supplements Fed. R. App. P. 35. 1st Cir. R. 15.

The First Circuit consisted of only four active judges until this year, and the small size of the court made it unlikely that a vote to hear a case en banc would turn on whether an absolute majority definition or some other standard was applied by the court. The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 201(b), 98 Stat. 333, 346-47, increases the First Circuit's authorized complement of judges to six. With a larger court the definitional problem presented by section 46(c) is more likely to arise, and the First Circuit should anticipate this possibility by adopting an en banc voting rule.

[145] G. Rahdert & L. Roth, Appeals to the Fifth Circuit Manual ch. 15, at 22 (1977).

[146] The testimony of Chief Judge Brown before the Commission on Revision of the Federal Court Appellate System implied that the Fifth Circuit would not count recused judges when establishing the requisite majority. When asked how many judges must vote to en banc a case in the Fifth Circuit, Judge Brown indicated that the number changes when circuit judges are disqualified. Second Phase Hearings, supra note 64, at 879 (testimony of John R. Brown, Chief Judge, U.S. Court of Appeals for the Fifth Circuit).

Despite the possible inference from this testimony that the Fifth Circuit has adopted an interpretation of the majority requirement, the court recently pointed out that it has not yet confronted the problem addressed by the Fourth Circuit in *Arnold*. See New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co., 719 F.2d 733 (5th Cir. 1983). The Fifth Circuit was nearly forced to address the definitional issue in *New Orleans Public Service*, but avoided the question when advised that the disqualification of several judges on the court was not statutorily necessary. Id. at 734-35.

In an earlier en banc vote taken in *New Orleans Public Service*, the court ruled that a majority had not voted for en banc rehearing after fewer than seven of the court's 13 active judges voted in favor of en banc consideration. 707 F.2d 834, 834 (5th Cir. 1983). At the time of that vote, four judges had disqualified themselves from the case. Id. Although this decision seems to indicate that the Fifth Circuit may already have adopted the absolute majority rule, such a conclusion is not justified. First, the order announcing that en banc hearing would not be ordered was issued a month prior to the Fourth Circuit's decision in Arnold v. Eastern Air Lines, 712 F.2d 899 (1983) (en banc), cert. denied, 104 S. Ct. 703 (1984). Until the *Arnold* decision the en banc voting issue had not received much attention, and it is likely that the Fifth Circuit never considered alternate definitions of majority when it issued its order denying rehearing. Second, the order later granting en banc rehearing in *New Orleans Public Service*, 719 F.2d at 734, was written for the court by Chief Judge Clark, who stated explicitly that it had become unnecessary to resolve the en banc voting question in that case. Id. at 735. Finally, the order denying rehearing stated that seven judges were necessary to grant rehearing in *New Orleans Public Service*, but does not reveal whether five of the judges participating in the case voted to en banc the case. It is therefore impossible to determine whether the court rejected the majority of eligible judges definition.

[147] 11th Cir. R. 26. The Eleventh Circuit recently denied en banc rehearing in a case

eral Circuit allows a "majority vote of all active judges" to trigger an en banc rehearing.[148]

This split in the circuits over the appropriate definition of majority is not a product of carefully reasoned judicial rulemaking but, results instead from ad hoc constructions of section 46(c). The holdings of the Second and Sixth Circuits require an absolute majority of judges to vote for en banc rehearing, and the Fourth Circuit's opinion in *Arnold* establishes a distinct rule, but none of these opinions fully discusses the considerations of judicial administration that are entangled with alternative definitions of majority. En banc voting procedures should both consider the traditional importance of intracircuit uniformity of law and protect important tenets of judicial integrity.

Although the discretion of each of the courts of appeals is broad enough to permit intercircuit variation, each court should reconcile its chosen definition with congressional intent, the purpose of the en banc power, and the importance of effective judicial disqualification statutes. Appropriate consideration of these factors will narrow the range of acceptable definitions of the majority vote required to convene en banc; absent principled justifications for liberal interpretations of the majority definition, a check on circuit authority seems reasonable.

III. Impact of the Majority Definition on Judicial Administration

A. En Banc Hearings and Majority Control of Circuit Law

The principal claimed purpose of the en banc procedure is to make it possible for a "majority of [a circuit's] judges always to control and thereby to secure uniformity and consistency in its decisions."[149] The Federal Rules of Appellate Procedure formalize this emphasis on majority control by providing that a need for decisional uniformity will justify en banc determination.[150] Because the holdings of three-judge panels may be viewed as less authoritative and perhaps non-binding for subsequent panel decisions, the en banc hearing or rehearing arguably creates a stronger precedent for later panel decisions.[151]

The value of the en banc procedure as a tool for majority control may

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where the court split 6-6 on a vote whether to convene en banc. See Stephens v. Kemp, 722 F.2d 628 (11th Cir. 1983) (en banc) (per curiam). A tie vote does not implicate any definition of majority. Cf. infra note 176.

[148] U.S. Court of Appeals for the Fed. Circuit, Internal Operating Procedures § 27(b) (1983).

[149] United States v. American-Foreign S.S. Corp., 363 U.S. 685, 689-90 (1960) (quoting Maris, supra note 121, at 96).

[150] Fed. R. App. P. 35(a).

[151] See Comment, supra note 22, at 408-09.

be more illusory than real. En banc decisions only infrequently address intracircuit conflicts. Resolution of issues of exceptional importance may now be the most important criterion in deciding whether to en banc a particular case.[152] Furthermore, if an en banc panel fails to adopt a clear majority opinion, but instead yields separate concurrences and dissents, these non-majority opinions will perpetuate court conflicts by permitting future three-judge panels to embrace the concurrence or dissent most attractive to that panel's majority.[153] Yet despite these reservations, it is unquestionably true that without en banc decisions, circuit law would be formulated piecemeal by three-judge panels.

Even though three-judge circuit panels may include assigned district judges, judges designated from other circuits,[154] and judges on senior status,[155] en banc decisions and votes to rehear en banc do not ordinarily include these judges. Judges in regular active service are presumptively more familiar with circuit law than judges who do not participate in the daily affairs of the court.[156] A large number of cases in which en banc rehearing is granted, in fact, arise out of cases where non-active judges controlled the three-judge panel opinion.[157] Exclusion of assigned or senior judges recognizes the likelihood that these "temporary" judges may not be present on the court the next time an en banc decision on a particular issue is sought.[158] Neither assigned[159] nor senior judges[160] may vote on whether to convene the court en banc. Senior judges, though, may participate in an en banc rehearing if the court is reviewing the decision of a panel on which the senior judge sat.[161]

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[152] Note, supra note 22, at 1646-48.

[153] En banc decisions leave open the potential for en banc dissenters to distinguish subsequent cases in order to avoid the result reached by the en banc majority. See Note, supra note 18, at 583-84.

[154] See 28 U.S.C. § 291(a) (1982) (designation of circuit judges to sit on other circuits); id. § 292(a) (designation of district judge to sit on circuit panel within circuit); id. § 292(d) (assignment of a district judge to another circuit).

[155] See id. § 371(b) (circuit judge may retain office but withdraw from active service).

[156] Note, supra note 18, at 596.

Although Congress modified section 46 to require that a majority of each panel consist of judges of the circuit, see 28 U.S.C. § 46(b) (1982), it is still possible for a circuit court panel to consist of only senior judges and judges from other courts. See, e.g., In re Bongiorno, 694 F.2d 917, 918-19 n.1 (2d Cir. 1982).

[157] Note, supra note 18, at 595-98.

[158] Note, supra note 111, at 228-29.

[159] See 28 U.S.C. § 46(c) (1982).

[160] Moody v. Albemarle Paper Co., 417 U.S. 622, 626-27 (1974).

[161] 28 U.S.C § 46(c)(1982).

One writer has commented that the availability of senior judges to sit en banc in some cases strengthens the argnment for permitting less than an absolute majority of judges to order an en banc rehearing. See Note, supra note 2, at 382. Yet the use of senior judges

The decision to restrict the voting on en banc rehearing to active judges rests on the assumption that to do so will guaranty majority control of the en hanc decision by active judges.[162] But this will not always be the case. Because a majority of judges *authorized to sit* may constitute a quorum for an en banc court,[163] establishing a rule defining majority in section 46(c) as an absolute majority is to some extent a further extension of the goal of majority control.[164] An absolute majority standard will coincidentally deny rehearing in some cases where less than a full complement of judges is available to sit en banc, but does not alone preempt the possibility that a minority of circuit judges will control the eventual holding of the court en banc. Considering section 46(c) together with the quorum requirement of section 46(d) reveals that the concern over minority formulation of circuit law is clearly misplaced.

The Second Circuit concurring opinions in *Zahn v. International Paper Co.* predicated the importance of the absolute majority definition on the possibility that, under a less stringent standard, circuit law might be determined by a minority of judges,[165] but such is not the inevitable re-

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exacerbates the problem of majority control, and if more en banc rehearings in which senior judges participate are held, it becomes more likely that some en banc decisions will not represent the majority opinion of the full court. A senior judge may not sit on the next en banc panel, but may be the swing vote for an en banc panel consisting of fewer than all of the circuit's active judges. Although this note contends that the majority control rationale is not of sufficient import to justify counting disqualified judges when calculating a majority, it cannot be accurately said that en banc hearings should be encouraged because the presence of a senior judge somehow compensates for the unavailability of an active judge.

[162] But cf. Note, supra note 76, at 924-33 (evenly divided en banc courts place decisions in hands of district court, erode public faith in the judicial system, and leave important issues unresolved and thus nonuniform). When a circuit court en banc contains an even number of judges, allowing a senior judge or an assigned judge to sit en banc would avoid the problem of an evenly divided circuit court. Id at 936-40.

[163] 28 U.S.C. § 46(d) (1982).

[164] The statutory requirement of a "majority," regardless of how majority is defined, is merely a voting rule that serves to establish a threshold limiting the number of cases taken en banc. By requiring an absolute majority of judges to vote to hear or rehear a case en banc, a court will likely increase the chance that en banc determinations will be made by a majority of all of the court's active judges, because the probability that an absolute majority of the judges will join the eventual en banc opinion will be greater in cases where disqualifications do not shrink the size of the court. This effect of the absolute majority definition is equally attainable under the quorum statute, however, and the quorum rule is arguably better suited to effecting majority control in en banc cases. Cf. infra note 175.

The use of a quorum rule to limit the cases in which a small number of a court's active judges can order en banc consideration was advocated in Note, supra note 2, at 390-92. The author of that note overlooked the extant quorum statute, 28 U.S.C. § 46(d) (1982), which serves the same purpose. That note also suggested that establishing the quorum at a supermajority would assuage majority control concerns. Note, supra note 2, at 390-92.

[165] 469 F.2d at 1040 (Kaufman, J., concurring in denial of en banc rehearing); id. at 1041 (Mansfield, J., concurring in denial of en banc rehearing).

sult of a move away from the Second Circuit's definition. Under a rule that defines majority in terms of judges eligible, the number of judges who eventually vote with the majority of the en banc court may represent a minority of the entire court, but the same result is possible with an absolute majority definition.[166] One of the opinions in *Zahn* hypothesized the "extreme" case where only five judges of a nine judge court are available to sit en banc and the where defining majority as "majority of judges eligible" would permit just three judges to determine the law of the circuit.[167] If the vote for or against rehearing is truly a vote distinct from the merits of the case, a 3-2 split on the en banc panel is as likely under an absolute majority rule, where all five available judges might vote for rehearing but divide on the merits, as it is under a standard that makes a majority of eligible judges sufficient to order rehearing.[168] The *Zahn* concurrences,[169] as well as a statement by Judge Adams in *Lewis v. University of Pittsburgh*,[170] mistakenly assume that votes for rehearing are votes to overturn a panel decision and votes against rehearing are cast in support of a panel holding. If the en banc vote is simply a decision of judicial administration, a ballot in the en banc poll is not linked inextricably to the merits of the controversy at hand.[171] Indeed, the Supreme Court ac-

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[166] See, e.g., International Business Machs. Corp. v. United States, 480 F.2d 293 (2d Cir. 1973) (en banc) (four judges, three active and one senior, of eight-judge court rendered majority decision of en banc court even though the four constituted less than a majority of the entire circuit; all the judges eligible to participate voted for en banc rehearing), cert. denied, 416 U.S. 979 (1974).

[167] 469 F.2d 1033, 1041 (2d Cir. 1972) (Mansfield, J., concurring in denial of en banc rehearing), aff'd on other grounds, 414 U.S. 291 (1973).

[168] The author of Note, supra note 2, at 391, suggested that if a quorum requirement is established to limit en banc consideration in cases where judges are unavailable, an exception to the quorum rule would be appropriate whenever an absolute majority of the court's active judges votes in favor of hearing a case en banc. Such an exception would only recreate the voting scenario that existed in the hypothetical presented in *Zahn*—each of a bare majority of the circuit's judges may vote for rehearing, but a relatively few judges could constitute the majority opinion of the en banc court.

[169] 469 F.2d at 1040-41 (Kaufman, J., concurring); id. at 1041 (Mansfield, J., concurring).

[170] 725 F.2d 910, 929 (3d Cir. 1983) (Adams, J., statement sur petition for rehearing), cert. denied, 105 S. Ct. 266 (1984). Judge Adams observed that in order to obtain the necessary six votes from a court of ten members, two of whom had recused themselves, the proponent of the en banc hearing in *Lewis* would need to receive the vote of "every judge not in the original panel majority." Id. Judge Adams thus equates panel votes on the merits to votes on the appropriateness of an en banc rehearing. This is not the necessary result. See International Business Machs. Corp. v. United States, 480 F.2d 293, 303-05 (2d Cir. 1973) (en banc) (Timbers, J., dissenting), cert. denied, 416 U.S. 979 (1974); infra note 171 and accompanying text.

[171] See Second Circuit Note, supra note 54, at 346-47.

Practically, of course, there are alternative explanations for the vote of an individual judge on the decision whether to convene en banc. Though the decision primarily involves a

knowledges the possibility that the author of a panel opinion might desire en banc rehearing.[172]

Because even under the absolute majority rule the quorum statute may permit en banc decisionmaking by a minority of circuit judges, the choice of an en banc voting rule does not itself guaranty majority control of circuit law. Objections to the effect of a quorum rule on majority determination could be countered by the exercise of judicial discretion to vote against rehearing in cases where, because some circuit judges are not participating, there is a chance of minority control;[173] strict definition of majority is an unneeded surrogate for judicial authority to label en banc hearings inappropriate whenever a majority determination of circuit law might not result from the en banc hearing. When legal issues substantial enough to warrant en banc determination arise in a case, each judge voting on an en banc suggestion need not assume that the case under immediate consideration is the appropriate vehicle for their resolution. A large number of disqualifications in a case posing important questions might prompt the court to forgo en banc hearing of these questions until a case

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judicial inquiry into the necessity for maintaining or creating majority control of important issues of circuit law, it is probable that some judges will favor or oppose en banc reconsideration based on their subjective assessment of the correctness of the panel decision. This probability underscores the importance of ensuring that recused judges do not affect the final outcome of a case under a definition of majority that implicitly equates their disqualification with a vote against rehearing.

[172] See the Western Pac. R.R. Case, 345 U.S. 247, 261-63 (1953) (power to grant or deny rehearing may be allowed to rest initially with panel); see also *Zahn*, 469 F.2d at 1042 n.1 (Timbers, J. dissenting). A panel judge might also switch positions once the case is taken en banc. Id. One judge recently commented that as the author of a panel opinion, he has initiated a request for en banc consideration. See Newman, supra note 114, at 379 n.86.

In MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081 (7th Cir.), cert. denied, 104 S. Ct. 234 (1983), only five of eight judges then constituting the Seventh Circuit were available to participate in the en banc poll, id. at 1081, and under the absolute majority rule then applied in that court, see supra note 138 and accompanying text, rehearing en banc could have been ordered only with the concurrence of all five eligible judges. One writer blames the absolute majority definition for the Seventh Circuit's failure to grant en banc rehearing in *MCI*. Harper, supra note 2, at 56. This assertion ignores two contrary considerations. First, Harper assumes that the result of an en banc vote was preordained by the need to secure the vote of the judge who wrote the panel opinion, but that judge might have favored rehearing, despite his panel opinion, if the case was worthy of en banc determination. Second, there is no indication that there were issues of law in *MCI* that merited an en banc sitting. Cf. supra note 30 and accompanying text. Though the damage award, trebled to $1.8 billion, was extraordinarily large, the Seventh Circuit did not even conduct a vote on the en banc suggestion, see Harper, supra note 2, at 56, and the Supreme Court denied certiorari. 104 S. Ct. 234 (1983).

[173] See, e.g., Green v. Santa Fe Indus., 533 F.2d 1309 (2d Cir.) (per curiam) (rehearing inappropriate because circuit law might be charted by a minority of circuit judges), vacated on other grounds sub nom. AFW Fabric Corp. v. Marshel, 429 U.S. 881 (1976).

arises in which a full complement of judges is available.[174] Moreover, the quorum statute establishes a lower limit on the number of judges who could authorize an en banc sitting, for if a large number of judges are disqualified, the number of judges remaining might not suffice to constitute a quorum, and even a majority of eligible judges would be unable to order rehearing.[175]

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[174] In *Lewis*, Judge Adams defended Third Circuit policy by observing the need for full court participation in important decisions, and he characterized the absolute majority rule as a device capable of preventing minority determination of circuit law. 725 F.2d at 929 (Adams, J., statement sur petition for rehearing). Judge Adams overlooked three responses. First, the court may always exercise discretion to not hear a particular case, thereby preserving the court's ability to sit in cases that are worthy of en banc treatment notwithstanding the fortuitous absence of one or more judges. An absolute majority rule would deprive the court of the ability to hear these cases. Second, use of the en banc statute in the manner advocated by Judge Adams is of limited value: the quorum statute already permits "minority" en banc decisions. See supra notes 166-73 and accompanying text. Third, the quorum statute obviates Judge Adams' apparent concern that the absolute majority definition is needed to set a floor on the number of judges capable of constituting an en banc panel. See infra note 175 and accompanying text.

[175] See, e.g., Hall v. Federal Energy Regulatory Comm'n, 700 F.2d 218, 219 (5th Cir.) (Clark, C.J., dissenting from denial of panel and en banc rehearing) (nine of 13 Fifth Circuit judges disqualified; no appeals from FERC can ever go en banc in the Fifth Circuit), cert. denied, 104 S. Ct. 88 (1983); American Elec. Power Serv. Corp. v. Federal Energy Regulatory Comm'n, 675 F.2d 1226 (D.C. Cir. 1982) (panel decision 3-0; en banc rehearing denied with six judges disqualified and no quorum of 11-judge court available), rev'd sub nom. American Paper Inst. v. American Elec. Power Serv. Corp., 461 U.S. 402 (1983) (unanimous decision).

Although the lack of an en banc quorum due to disqualifications effectively deprives litigants of a "right" to the availability of the en banc procedure, see *Hall*, 700 F.2d at 219 (Clark, C.J., dissenting from denial of panel and en banc rehearing), this problem cannot be attributed to the difficulty in defining majority in section 46(c), but is instead a result of the quorum definition, as well as the strict disqualification statute, cf. infra note 190. In any case, viewing the occasional absence of a quorum as an impingement of litigant's rights overlooks the concept that no litigant rights arise from the existence of the en banc device. See supra note 26 and accompanying text.

The quorum requirement is of course an arbitrary standard, and the line drawn by the statute that commands that an absolute majority of the judges authorized to sit en banc participate in the en banc determination might be drawn elsewhere. If the desired policy goal of the quorum rule is to permit fewer en banc hearings and rehearings, the required quorum might be raised above a majority to a supermajority. Cf. Note, supra note 2, at 390-91 (suggesting similar scheme); supra note 36 and accompanying text. If en banc hearings should be facilitated in cases where disqualifications make en banc determination impossible because a majority of the court's judges are not eligible to sit on an en banc panel, a proposal to change the quorum requirement by defining a quorum as less than a majority could be furthered.

Notice that the minimum majority will not always equal a majority of a majority of the active circuit judges, since the availability of senior judges for en banc panels will lower the number of regular service judges needed toward a quorum. In circuits with an odd number of judges in regular active service the minimum majority will not be affected by the eligibil-

The majority control rationale for the en banc power is not important enough to dictate the appropriate definition of majority. First, less effective majority control is not incident to a rule allowing less than an absolute majority to order en banc hearings and rehearings.[176] Second, the exceptions already made to the majority control rationale weaken the argument for strict construction of section 46(c).

Judicial vacancies, for example, because not counted as judgeships, do not affect the en banc procedures adopted by the courts of appeals.[177] Vacancies may develop after an en banc hearing is ordered;[178] and a decision rendered by a court thus diminished is subject to any shifting majority that might be created by the appointment of new judges. The exclusion of circuit judges assigned to other circuits creates an identical risk, and if feasible, en banc decisions should be delayed until all eligible active judges are present.[179]

The presence of senior judges on the en banc court could also transform an opinion endorsed by a minority of the regular service judges into the majority opinion of the court. Congress removed the authority of senior judges to sit en banc in 1978,[180] but restored the privilege in 1982[181] after discovering that judges were reluctant to take senior status if it meant they were to be denied the right to sit on en banc panels.[182]

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ity of senior judges; in circuits with an even number of judges the lowest permissible majority decreases by one if senior judges will participate on the en banc panel.

[176] One commentator advocates permitting a tie vote to send a case en banc. Comment, supra note 22, at 420 (referring to Boraas v. Village of Belle Terre, 476 F.2d 806, 825 (2d Cir. 1973) (Timbers, J., dissenting) (rehearing denied on 4-4 vote), rev'd on other grounds, 416 U.S. 1 (1974)); cf., e.g., Chaney v. Heckler, 724 F.2d 1030 (D.C. Cir. 1984) (en banc) (order denying en banc rehearing) (five judges in favor of rehearing, five opposed, with one "abstention"), cert. granted, 104 S. Ct. 3532 (1984); Stephens v. Kemp, 722 F.2d 628 (11th Cir. 1983) (en banc) (per curiam) (order denying en banc rehearing) (6-6 vote). Although the suggested rule would be no more dangerous to majority control than the definition of majority as a majority of judges eligible to vote, such a rule could not fit within the statutory requirement of a majority. See Note, supra note 18, at 736-37.

[177] United States v. Martorano, 620 F.2d 912, 920 (1st Cir.) (en banc), cert. denied, 449 U.S. 952 (1980).

[178] See, e.g., Burns v. Estelle, 626 F.2d 396, 397 (5th Cir. 1980) (en banc).

[179] See Note, supra note 18, at 739.

[180] Act of Oct. 20, 1978, Pub. L. No. 95-486, § 5(a)(2), 92 Stat. 1629, 1633. The Senate report accompanying the bill noted that the senior judge provision added to the administrative problems of en banc rehearings in large circuits. S. Rep. No. 117, 95th Cong., 1st Sess. 52 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News 3569, 3615.

[181] Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 205, 96 Stat. 25, 53. The version of § 46(c) extant prior to 1978 permitted senior judges to sit en banc even when rehearing was ordered before the original panel issued its decision, see Allen v. Johnson, 391 F.2d 527 (5th Cir. 1968) (en banc), but the new statute will not permit a senior judge to sit en banc unless the three-judge panel rendered a decision. See 28 U.S.C. § 46(c) (1982).

[182] See S. Rep. No. 275, 97th Cong., 1st Sess. 27 (1981), reprinted in 1982 U.S. Code Cong.

Finally, Congress recently amended section 46(c) to permit large circuits to sit en banc in units smaller than the entire court.[183] This amendment applies only to circuits with more than fifteen judges, and therefore currently affects only the Fifth and Ninth Circuits.[184] The statute leaves the method of choosing the judges who will sit on the en banc court wholly within the discretion of the circuit court,[185] and the full impact of this new rule will depend upon the particular procedures implemented by each affected court of appeals.[186] Under any alternative rule, however, the

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& Ad. News 11, 37. The Judicial Conference proposed this amendment. See 1981 Rep. of the Proc. of the Jud. Conf. of the U.S. 13.

[183] Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 205, 96 Stat. 25, 53. The amendment implements the authority granted by Congress in 1978 to circuits with more than 15 judges. Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633.

[184] The size of each circuit is prescribed by 28 U.S.C. § 44(a)(1982), as amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 201(b), 98 Stat. 333, 346-47 (1984), which establishes the number of active judges for each court: District of Columbia, 12; First, 6; Second, 13; Third, 12; Fourth, 11; Fifth, 16; Sixth, 15; Seventh, 11; Eighth, 10; Ninth, 28; Tenth, 10; Eleventh, 12; Federal 12. Id. The Fifth Circuit has an authorized strength of 16 judges and the Ninth Circuit has an authorized strength of 28 judges, but several other circuits have an authorized strength of more than 10 judges, id., and further expansion of the appellate bench could give more circuits the opportunity to exercise the limited en banc option.

[185] A court may "perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals." Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633. The Ninth Circuit has elected to sit in en banc panels of 11, composed of the chief judge (or next most senior judge available) and 10 members chosen at random. U.S. Court of Appeals for the Ninth Circuit, Internal Operating Procedures § II(K)(2)(e) (1983). The Fifth Circuit recently increased in authorized size to 16 judges, see Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 201(b), 98 Stat. 333, 346-47 (1984), but has not yet considered adopting a limited en banc procedure.

[186] The "mini en banc" has received considerable attention. Most proposals attempt to resolve the diseconomies of scale encountered by large circuits, but one advocate views the limited en banc as an answer to the problem of evenly divided en banc courts. Note, supra note 76, at 935-36.

The Commission on Revision of the Federal Court Appellate System recommended the limited en banc for all circuits with a total of more than nine active and senior judges. Comm'n on Revision of the Fed. Court Appellate Sys., supra note 23, at 60-62. Alternative methods of choosing the judges who will sit en banc in each case were discussed in hearings on the Commission's preliminary report. A number of witnesses favored a plan that would allow the nine most senior active judges to sit. Second Phase Hearings, supra note 64, at 717 (testimony of John D. Butzner, Judge, U.S. Court of Appeals for the Fourth Circuit); id. at 856 (testimony of M. Ronald Nachman, Esq., past president, Alabama State Bar); id. at 985-86 (statement of Floyd R. Gibson, Chief Judge, U.S. Court of Appeals for the Eighth Circuit). The principal flaw in this scheme is the potential for insulating new judges from circuit policymaking. See J. Howard, supra note 18, at 258.

One witness backed selection of the en banc judges by rotation. Second Phase Hearings, supra note 64, at 1153 (statement of Milton Handler, Professor Emeritus, Columbia Univer-

decisions of a limited en banc court will control circuit law only when the holding coincides with the sentiments of the full court.[187]

Each of these variations in en banc procedure weakens the argument that control of circuit law is important enough to justify including disqualified judges when interpreting the majority vote requirement of section 46(c). The quorum statute further indicates that majority formulation of the law of the circuit would be only slightly enhanced by a rule that demanded an absolute majority vote to convene an en banc hearing. The limited value of this benefit, when weighed against the cost to judicial integrity of including disqualified judges in the majority calculation, demonstrates that a rule requiring only a majority of eligible judges would not unduly offend concerns of efficient judicial administration.

B. Judicial Integrity and Effective Disenfranchisement of Disqualified Judges

Two sets of rules guide the decisions of federal judges: ethical canons and federal statutes. Both guidelines proscribe judicial involvement in any controversy in which impartiality could become an issue. Canon 3(C)(1) of the Code of Judicial Conduct for United States Judges states that "[a] judge shall disqualify himself in a proceeding in which his impartiality might be questioned" and delineates numerous potential conflicts that would require disqualification.[188] Section 455(a) of the Judicial

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sity School of Law). The judges who will sit en banc also might be drawn at random. The Commission's reluctance to advocate a random drawing, however, is based partly on the fear that chance could consistently exclude a judge from the en banc process. Comm'n on Revision of the Fed. Court Appellate Sys., supra note 23, at 61. The Ninth Circuit's random selection process automatically places a judge whose name has not been drawn for three consecutive hearings on the en banc court. U.S. Court of Appeals for the Ninth Circuit, Internal Operating Procedures § II(K)(2)(e) (1982).

Several witnesses at the Commision hearings opposed the limited en banc in any form because of the threat posed by the procedure to majority control of circuit law. See Second Phase Hearings, supra note 64, at 796 (statement of Martba A. Field, Professor, University of Pennsylvania Law School); id. at 1080-81 (statement of Clement F. Haynsworth, Jr., Chief Judge, U.S. Court of Appeals for the Fourth Circuit); id at 1124 (statement of Committee on Federal Courts of the Association of the Bar of the City of N.Y.); id. at 1382-83 (letter of H. Emory Widener, Jr., Judge, U.S. Court of Appeals for the Fourth Circuit).

[187] See Note, supra note 18, at 743-44.

[188] Code of Judicial Conduct for United States Judges Canon 3(C)(1) (1973). The Code adopts the American Bar Association's proposed standards of judicial ethics, see Code of Judicial Conduct (1972), but changes the language of Canon 3(C)(1) to make its policy mandatory, rather than suggestive. Compare Code of Judicial Conduct for United States Judges Canon 3(C)(1) (1973) ("shall disqualify") with Code of Judicial Conduct Canon 3(C)(1) (1972) ("should disqualify"). The strict disqualification requirements of Canon 3(C)(1), which are replicated in the disqualification statute, 28 U.S.C. § 455(b), may too frequently cause recusals in cases where the risk to judicial integrity is marginal. See infra

Code states that a "judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned"[189] and lists instances requiring disqualification that parallel those included in the Code of Judicial Conduct.[190] Section 47 of Title 28 bars a judge from hearing or determining an appeal of a case tried by that judge.[191]

After the *Zahn v. International Paper Co.*[192] decision, one commentator asserted that the absolute majority rule violated the section 47 prohibition against the "determination" of a case by a disqualified judge.[193] Section 455, however, and not section 47, applies to the disqualification for interest of the type involved in *Zahn.*[194] Section 455 will explain almost all recusals,[195] and its commands are not limited to judicial non-

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note 190.

[189] 28 U.S.C. § 455(a) (1982).

[190] Id. § 455(b). Most of the circumstances listed in § 455(b) that command disqualification address prior or familial connections to parties or lawyers involved in the controversy, but a judge is also disqualified by reason of a personal or family financial interest, "however small," see id. at § 455(d)(4), that "could be substantially affected by the outcome of the proceeding." Id. at § 455(b)(4). For example, judges who hold minimal quantities of stock in a corporation party to a case are forced to disqualify themselves whenever the result of the litigation will forseeably affect substantially the value of the stock. This strict rule may leave few judges available to hear or rehear a case. See, e.g., MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081 (7th Cir.) (three of eight judges disqualified), cert. denied, 104 S. Ct. 234 (1983); Hall v. Federal Energy Regulatory Comm'n, 700 F.2d 218, 218 (5th Cir.) (Clark, C.J., dissenting) (9 of 13 judges disqualified), cert. denied, 104 S. Ct. 88 (1983); American Elec. Power Serv. Corp. v. Federal Energy Regulatory Comm'n, 675 F.2d 1226 (D.C. Cir. 1982) (6 of 11 judges "did not participate"), rev'd on other grounds sub nom. American Paper Inst., Inc. v. American Elec. Power Serv. Corp., 461 U.S. 402 (1983). See generally Harper, supra note 2, at 57-58. Multiple disqualifications may prevent rehearing en banc by making it impossible for the court to obtain a quorum of the en banc court or by imposing a supermajority requirement in circuits adhering to an absolute majority definition of "majority" in section 46(c). See supra note 175 and accompanying text.

Some judges believe the disqualification requirements are overbroad. See, e.g., *Hall*, 700 F.2d at 219 n.4 (Clark, C.J., dissenting from denial of en banc rehearing); Harper, supra note 2, at 57-58. One recent case exhibits a move away from the strict application of § 455. New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co., 719 F.2d 733, 734-35 (5th Cir. 1983) (judges not required to disqualify themselves in case involving utility of which they are ratepayers where no ratepayer class had been formed).

[191] 28 U.S.C. § 47 (1982).

[192] 469 F.2d 1033 (2d Cir. 1972), aff'd on other grounds, 414 U.S. 291 (1973).

[193] Second Circuit Note, supra note 54, at 347-48.

[194] Judge Friendly, who was disqualified in *Zahn*, was not disqualified due to any earlier participation as a trial judge.

[195] Section 47 would seem to apply only when a district judge is sitting by designation on the court of appeals or when a district judge has been elevated to the district court. When originally enacted in the late nineteenth century, the statute eliminated the practice of trial judges sitting in appeals from their judgements. See P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 40 (2d ed. 1973).

determination of a matter but act as a complete bar to any judicial involvement in a proceeding where impartiality would be questioned.

The absolute nature of section 455 should also negate suggestions that a disqualified judge may properly vote on an en banc petition. Because the vote to convene en banc does not explicitly address the merits of a case, but is a decision of judicial administration, it is conceivable that a disqualified judge could vote on the petition without improperly considering the merits of litigation in which he has a personal interest.[196] This reasoning overlooks three contrary contentions. First, it assumes that a judge always possesses the ability to ignore any personal interest in the case even though a vote for or against rehearing might determine the outcome of the litigation. Second, even if an individual judge could approach the en banc vote without bias, statutory and ethical canons seek to avoid even the *appearance* of impropriety and would still bar participation.[197] Third, it is unlikely that disqualified judges would vote even if permitted to do so; recused judges are very sensitive to the risk of overstepping ethical boundaries.[198]

It is inappropriate to interpret section 46(c) to include disqualified judges in the calculation of a majority. To require such an absolute majority, regardless of refusals, is to treat a disqualified judge as if he were not disqualified at all. Considering the presence of the recused judge for the purpose of determining the appropriate majority, but not allowing him to cast a vote, is in effect counting the judge as a no vote.[199] Although this may not directly violate section 455—which only requires the judge to withdraw from the case—the policy of the disqualification statute is not given effect when the recused judge has this negative impact on the vote for rehearing.

Alternatively, not counting a disqualified judge will sometimes lower the number of votes necessary to grant rehearing en banc.[200] Such an ef-

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[196] See Note, supra note 18, at 736.

[197] Supplemental Reply Brief for Eastern Air Lines, Inc., Relating to Rehearing In Banc 6-7, Arnold v. Eastern Air Lines, 712 F.2d 899 (4th Cir. 1983) (en banc), cert. denied, 104 S. Ct. 703 (1984).

[198] Arnold v. Eastern Air Lines, 712 F.2d 899, 905 (4th. Cir. 1983) (en banc), cert. denied, 104 S. Ct. 703 (1984). Faced with both ethical and legal restrictions that are so strict as to mandate disqualification even when the judge's interest in a controversy is de minimus, many circuits are faced with multiple disqualifications in important cases. See supra note 190.

[199] *Arnold*, 712 F.2d at 912 (Widener, J., concurring and dissenting); Comment, supra note 22, at 420.

[200] See supra note 6.

A single disqualification in a circuit with an odd number of judges will not change the number of votes needed for rehearing under either an absolute majority or majority of judges eligible rule. Cf. *Arnold*, 712 F.2d at 912 n.3 (Widener, J., concurring and dissenting)

fect, which treats a recusal as a ballot in support of rehearing, might be as objectionable as counting it as a no vote.[201] It is appealing to suggest that the choice between counting disqualified judges as yes or no votes is unimportant: under either standard the effect is as likely to be contrary to as to be consistent with the personal interests of a disqualified judge. It could thus be argued that the disqualification statute does not provide a compelling basis for the use of either definition.[202]

In spite of this observation, however, the absolute majority definition uniquely weakens the effectiveness of disqualification guidelines. The definition of majority should depend in each case on the number of judges eligible to participate. Counting a recused judge as a no vote affects the final outcome of a case in a way that counting the recusal as a yes vote does not. If by treating a disqualification as a yes vote the outcome of the voting decision is altered, the merits of the case remain unaffected by the changed outcome; granting a rehearing does not, a priori, represent a choice between competing positions on the merits of a controversy. If the disqualification is equivalent to a no vote, on the other hand, the disqualified judge's presence may indeed determine the final outcome of a case. Although a denial of rehearing is primarily tied only to interests in judicial administration, the order to deny rehearing also assumes some secondary character as a decision to leave intact the conclusions of the three-judge panel.[203] Because the no vote has then affected the disposi-

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(if court has odd number of judges, required majority decreases by one with every *pair* of disqualifications). If the process of multiple judges withdrawing from a case can be viewed as an iterated activity, some disqualifications will be more significant than others, but whenever more than one judge is disqualified, each recusal should be viewed as having affected the voting process. Not only should the choice of definition not depend from case to case on whether disqualifications will affect the result of the en banc vote under alternative definitions, but when the disqualification of one judge does not affect the majority calculus, any definition yields the identical result, and no particular definition is explicitly applied in the case. It is only in the cases where the treatment of recusals will vary the result of the en banc poll that the choice of definition matters in a practical sense, and reaching a general rule is preferable to ad hoc attempts to apply mathematical counting concepts in individual cases.

[201] *Arnold*, 712 F.2d at 912 (Widener, J., concurring and dissenting). Yet a majority of eligible judges rule creates yes votes only if the statutory majority is first described as an absolute majority; if a definition of majority that changes from case to case is appropriate under the statute, then the number of votes needed to obtain rehearing has not technically been lowered: the number that represents a majority is never established until after the court determines which judges are eligible to participate in a case.

[202] Id.

[203] But the outcome effect of a decision not to rehear en banc can be contrasted with a situation where a coart considers conducting the original determination of the controversy en banc without a prior decision by a three-judge panel. In such cases a vote not to convene en banc will only leave the decision in the hands of a three-judge court, and the choice of a majority rule is divorced from any impact on the outcome of the merits of the appeal. A

tion of the case by allowing a particular resolution of the underlying merits, an absolute majority rule cannot avoid potential interference with the ethical goal of ensuring the neutrality of a disqualified judge.[204]

IV. Conclusion

Although the en banc statute permits courts of appeals to sit en banc whenever a majority vote orders an en banc hearing or rehearing, choosing the appropriate definition of majority compels an inquiry beyond the present statute and into considerations of judicial administration. Congress experimented with several versions of section 46(c), but legislative history reveals no congressional intent to select or impose a particular meaning of majority. The Supreme Court decisions construing section 46 indicate only that the definitional problem is left to the individual courts of appeals.

The circuit courts shoulder a statutory obligation to formulate clear operating procedures, and the en banc voting process is worthy of description in circuit rules. The Judicial Conference has recently suggested that circuits adopt en banc voting rules that will provide notice to litigants of the definition of majority applied by each court. Two possible definitions of majority fit within the meaning of the en banc statute: an absolute majority of the judges of the circuit or a majority of the judges of the circuit eligible to vote in the rehearing decision. An absolute majority standard undercuts the ethical prescriptions of judicial disqualification statutes by allowing disqualified judges to affect the vote in a manner that could result in the denial of rehearing; a rule that focuses on a majority of the judges eligible to vote cannot by itself ensure any particular

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judicial integrity argument for a majority of judges eligible definition in these cases will rest not on the risk of allowing a disqualified judge to affect the ultimate resolution of a case, but with the desirability of a complete separation of recused judges and the controversies in which they are statutorily ineligible to participate.

[204] See Comment, supra note 22, at 420. The petitioners in *Arnold* raised a unique argument against allowing disqualifications to lower the number of judges needed for a majority. If disqualified judges are not counted, a litigant facing rehearing would benefit by taking action to ensure that a judge would withdraw from a case and thereby lower the number of votes necessary to obtain a majority. Supplemental Brief by Petitioners Richard Arnold, IV and Francis C. Mihalek 3-4, Arnold v. Eastern Air Lines, 104 S. Ct. 703 (1984), denying cert. to 712 F.2d 899 (4th Cir. 1983) (en banc). Two arguments balance out this concern. First, the litigants who act improperly in causing a disqualification would benefit only if the disqualified judge would have cast a vote against rehearing. Second, an absolute majority rule presents an analogous opportunity for abuse to opponents of rehearing: an additional disqualification would force the party seeking rehearing to obtain a greater proportion of the votes cast by the remaining judges. See Supplemental Brief for Eastern Air Lines, Inc. 3-4, Arnold v. Eastern Air Lines, 104 S. Ct. 703 (1984), denying cert. to 712 F.2d 899 (4th Cir. 1983) (en banc).

resolution of the merits of the case for which en banc rehearing is sought. Moreover, the concerns for circuit workload and for majority control of circuit precedents implicated by this latter standard are insufficient to outweigh the danger to judicial integrity attendant to a definition that considers a disqualified judge.

Although definition of the current statute's majority requirement should be left to the courts of appeals, the interest in judicial integrity implicated by any definition of majority that counts recused judges is sufficiently important to warrant an attempt to rewrite section 46(c). More than a decade ago the Judicial Conference sent to Congress a recommendation that the en banc provision be amended to make clear that a majority of eligible judges is the definition contemplated by the present statute; another federal commission renewed that suggestion. Circuits could adopt the language urged by these two recommendations as a reading of current law, but the importance of protecting the decision whether to grant en banc hearing or rehearing from the potentially decisive impact of a disqualified judge merits codification of the preferred definition urged by those proposals. Either the Supreme Court or Congress could adopt an interpretation of section 46(c) that would eliminate the ethical dilemma posed by counting disqualified judges in en banc votes. The Judicial Conference has declined to resurrect its 1973 proposal that Congress rewrite the en banc statute, but the current language of the provision suffices to allow the interpretation advocated by this note. Alternatively, the Supreme Court might embrace a uniform definition, but despite the nascent intracircuit conflict on the definitional question, the Court has consistently chosen not to examine current circuit constructions of the en banc statute.[205] Given this uncertainty, the courts of appeals should overcome their reluctance to revamp their en banc voting procedures.

J.J.W.

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[205] See, e.g., Lewis v. University of Pittsburgh, 105 S. Ct. 266 (1984), denying cert. to 725 F.2d 910 (3d Cir. 1983); Adams v. Proctor & Gamble Mfg. Co., 104 S. Ct. 1318 (1984), denying cert. to 697 F.2d 582 (4th Cir. 1983); Arnold v. Eastern Air Lines, 104 S. Ct. 703 (1984), denying cert. to 712 F.2d 899 (4th Cir. 1983); In re Am. Broadcasting Cos., 104 S. Ct. 538 (1983), denying mandamus to Clark v. American Broadcasting Cos., 684 F.2d 1208 (6th Cir. 1982), cert. denied, 460 U.S. 1040 (1983); American Broadcasting Cos. v. Clark, 460 U.S. 1040 (1983), denying cert. to 684 F.2d 1208 (6th Cir. 1982).