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Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review

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UNIFORMITY IN THE FEDERAL COURTS: A PROPOSAL FOR INCREASING THE USE OF EN BANC APPELLATE REVIEW

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I. INTRODUCTION

More than fifty years ago, in *Textile Mills Securities Corp. v. Commissioner*,¹ the Supreme Court upheld the right of federal courts of appeals to conduct en banc rehearings of prior three-judge appellate

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1. 314 U.S. 326 (1941).

panel decisions.² Subsequently, Congress codified the en banc procedure in section 46(c) of the Judicial Code of 1948.³

Almost from the inception of en banc review, commentators have criticized its use by the federal courts of appeals. Most commonly, critics have balanced the benefit of the uniformity of intra-circuit law achieved by en banc review against such perceived disadvantages as judicial inefficiency,⁴ diminished finality of three-judge panel decisions⁵ and impairment of collegiality within a circuit.⁶ The critics have concluded that the federal appellate judiciary would be served best by severely limiting the number of en banc rehearings. They argue that the number of rehearings could be limited by strictly adhering to circuit precedent, circulating proposed three-judge panel opinions among all

2. The term "en banc" is derived from the law french for "[i]n the bench" and refers to full court disposition of an appeal. BLACK'S LAW DICTIONARY 472 (6th ed. 1990). Both Federal Rule of Appellate Procedure 35 and the enabling statute, 28 U.S.C. § 46(c), use the term "in banc" rather than "en banc." See FED. R. APP. P. 35; 28 U.S.C. § 46(c) (1988). See also Jon O. Newman, *Foreword: In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 BROOK. L. REV. 365, 365 n.1 (1984) (offering a possible etymology of the anglicized term "in banc"). Being likewise "doubtful (dubitante)," of any progress (or value) in the direction of anglicizing legal terminology, the term "en banc" will appear as the nomenclature for rehearing throughout this article due to "its prevalence in the case law and literature." Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. REV. 29, 29 n.1 (1988).

Technically, an en banc "hearing" refers to full court consideration by a circuit in lieu of determination by a three-judge panel, while a "rehearing" refers to en banc review of a case by all the active judges of a circuit after it has already been presented to a three-judge panel, regardless of whether a decision has been announced. See Note, *En Banc Review in Federal Circuit Courts: A Reassessment*, 72 MICH. L. REV. 1637, 1638 n.5 (1974) (citing *Lansdale v. Tyler Junior College*, 470 F.2d 659 (5th Cir. 1972) (hearing en banc)). Although the terms "rehearing" and "review" are interchanged in text, this article limits itself to rehearings.

When an appellate court grants en banc review, the prior three-judge panel decision is vacated. See, e.g., 1ST CIR. INTER. OPER. P. X(D) ("Usually when an en banc rehearing is granted the previous opinion and the judgment will be vacated."); 4TH CIR. INTER. OPER. P. 40.6 ("If a petition for rehearing is granted, the original judgment and opinion of the Court are vacated and the case will be reheard before the original panel."); 6TH CIR. INTER. OPER. P. 20.10 ("The effect of granting a petition for rehearing en banc is to vacate the previous opinion and judgment."); 10TH CIR. R. 35.6 ("Unless specifically otherwise ordered, the effect of granting a rehearing en banc is to vacate the panel decision and judgment.").

This article addresses only federal en banc appellate procedures, even though en banc review may also occur at the state appellate court level. See, e.g., David W. Louisell & Ronan E. Degnan, *Rehearing in American Appellate Courts*, 44 CAL. L. REV. 627 (1956) (broadly discussing state appellate court en banc procedures).

3. 28 U.S.C. § 46(c) (1988). A full history of the enabling statute is set forth *infra* text accompanying notes 10-57.

4. See *infra* text accompanying notes 120-59.

5. See *infra* text accompanying notes 160-74.

6. See *infra* text accompanying notes 175-94.

the judges of a circuit prior to publication, and requiring a supermajority vote to authorize en banc review.⁷

Within the last few years, however, a new group of commentators has criticized en banc review based on quite different concerns. These commentators have suggested that the rehearing process, if not blatantly political, is at least tacitly so. They have asserted that one of the main motivations—if not *the* main motivation—for many recent decisions by courts of appeals having conservative majorities to grant en banc review is their desire to overturn the decisions of panels composed of more liberal colleagues in order to conform them to a more conservative ideology.⁸ Typically, these critics have also advocated reducing the number of cases granted rehearing.

Contrary to these criticisms, and notwithstanding any ideological consequences, this article advocates increasing the use of en banc review in order to ensure greater uniformity of circuit law. It also demonstrates that the benefit of intra-circuit uniformity obtained through rehearing cases more than justifies an increased use of the procedure, and that critics have greatly overstated the institutional costs of en banc review. Finally, the article suggests that the use of en banc rehearings can best be increased by reducing the number of judges necessary to grant rehearing.

Part II reviews the history of en banc review. Part III first asserts that the greater uniformity of intra-circuit law attained through en banc rehearings outweighs the costs involved, and advocates increasing the use of en banc review. Part III then demonstrates that increasing the use of en banc procedure, and hence majority control of circuit law, properly helps prevent minority decisions from binding a court's majority to follow decisions with which they disagree, and also conserves judicial resources by reducing the flow of cases to the Supreme Court.

Part IV begins by examining the criticisms of en banc review put forward by those commentators who have emphasized the institutional costs of full court rehearings, and concludes that although en banc review may not dispose of cases as expeditiously as three-judge panels, the threat that en banc rehearings pose to efficiency, finality, collegiality and judicial integrity is exaggerated. Next, Part IV suggests that use of en banc rehearings may be increased either by ensuring that all circuits in the federal judiciary interpret the number of judges neces-

7. See *infra* text accompanying notes 256-68.

8. See *infra* text accompanying notes 195-225.

sary to grant rehearing as a majority of the active *available* circuit judges, instead of a majority of the active *eligible* judges or, more radically, by amending the governing statute and federal procedural rule to allow en banc rehearings even when en banc review is desired by less than a majority of the judges in regular active service. Part IV then argues that continuing vacancies on the courts of appeals mandate reducing the number of judges necessary to grant en banc rehearings because these vacancies have created a *de facto* supermajority requirement of judges to authorize en banc review. Finally, Part IV evaluates the proposals that the critics of en banc review have advanced to improve the procedure by reducing its use and concludes that these proposals will not improve en banc review.

II. HISTORICAL DEVELOPMENT OF EN BANC REVIEW⁹

The Judiciary Act of 1789 established three separate tiers of federal courts: the Supreme Court, the district courts and the circuit courts—each of which was composed of two Supreme Court justices and one district court judge sitting together.¹⁰ In 1802, each Supreme Court justice was specifically assigned to a circuit and, when presiding, was referred to as a “circuit justice.”¹¹ The circuit court could be held jointly by the circuit justice of the circuit and the district judge of the district in which the circuit court was located, or individually by either the circuit justice or the district court judge.¹² When sitting as circuit court judges, district court judges were not allowed to hear appeals from their own cases.¹³

As the workload of the Supreme Court grew, the burden of sitting as circuit justices became too great for the Supreme Court justices and, in 1869, one circuit court judge was appointed to each of the nine ex-

9. The description of the historical development of en banc review is derived in large part from the discussions set forth in *Commissioner v. Textile Mills Sec. Corp.*, 117 F.2d 62 (3d Cir. 1940) (en banc), *aff'd*, 314 U.S. 326 (1941). See also *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 250-53 (1953); Neil D. McFeeley, *En Banc Proceedings in the United States Courts of Appeals*, 24 IDAHO L. REV. 255, 255-61 (1987); A. Lamar Alexander, Jr., Note, *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities (Part I)*, 40 N.Y.U. L. REV. 563, 567-74 (1965) [hereinafter Alexander, *Part I*]; Peter Michael Madden, Comment, *In Banc Procedures in the United States Courts of Appeals*, 43 FORDHAM L. REV. 401, 402-03 (1974); Richard J. Fay, Note, *En Banc Proceedings in the United States Courts of Appeals*, 22 GEO. WASH. L. REV. 482, 482-84 (1954).

10. Ch. 20, 1 Stat. 73 (1789).

11. See *Textile Mills I*, 314 U.S. 326 (1941).

12. *Id.*

13. *Id.*

isting circuits.¹⁴ These circuit judges “soon became primarily responsible for holding the circuit courts, relieving the circuit justices of this work.”¹⁵

The Evarts Act of 1891¹⁶ created a “circuit court of appeals” in each circuit consisting of three judges, two of whom constituted a quorum.¹⁷ The Evarts Act also directed the President to appoint an additional circuit judge in each circuit.¹⁸ Thus, with the exception of the United States Court of Appeals for the Second Circuit, to which there previously had been appointed one additional circuit judge,¹⁹ two circuit judges were appointed within each circuit. The Evarts Act further provided that, with the exception of judges who already had been appointed permanently to the courts of appeals, the three judges who constituted each circuit court were to be drawn from the existing three categories of judges: the circuit justices, the circuit judges and the district judges within the circuit.²⁰

The Judicial Code of 1912²¹ abolished the three-judge circuit court system established by the Evarts Act, “thus depriving the circuit judges of the courts for which they had been primarily responsible since 1869.”²² The enactment of the Judicial Code of 1912 thus left questions unresolved “as to whether the circuit judges had become ex officio judges of the circuit court of appeals, and as to whether the circuit court of appeals in those circuits having more than three circuit

14. The legislation provided in pertinent part: “[t]hat for each of the nine existing judicial circuits there shall be appointed a circuit judge, who shall reside in his circuit, and shall possess the same power and jurisdiction therein as the justice of the Supreme Court allotted to the circuit.” Act of April 10, 1869, ch. 22, § 2, 16 Stat. 44 (current version at 28 U.S.C. §§ 41-48 (1968 & Supp. 1992)).

15. See *Commissioner v. Textile Mills Sec. Corp.*, 117 F.2d 62, 68 (3d Cir. 1940) (en banc), *aff’d*, 314 U.S. 326 (1941).

16. Evarts Act, ch. 517, 26 Stat. 826 (1891) (current version at 28 U.S.C. §§ 41-48 (1968 & Supp. 1992)).

17. *Id.* at § 2.

18. *Id.* at § 1.

19. See Act of March 3, 1887, ch. 347, 24 Stat. 492 (current version at 28 U.S.C. §§ 41-48 (1968 & Supp. 1992)).

20. The statute provided that if either the Supreme Court Justices or the circuit court judges could not attend a sitting, “one or more district judges within the circuit shall be competent to sit in the court”. Evarts Act at § 3.

21. Ch. 231, § 116, 36 Stat. 1132 (1911) (current version at 28 U.S.C. §§ 41-48 (1968 & Supp. 1992)). The statute became effective January 1, 1912.

22. *Commissioner v. Textile Mills Sec. Corp.*, 117 F.2d 62, 69 (3d Cir. 1940) (en banc), *aff’d*, 314 U.S. 326 (1941).

judges consisted of all the circuit judges or only three of them, and if the latter, which three."²³

A subsequent amendment to the Judicial Code of 1912²⁴ only partially responded to these questions. Although the amendment expressly declared that "[t]he circuit judges in each circuit shall be judges of the circuit court of appeals in that circuit," it ambiguously provided that "it shall be the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law."²⁵ Hence, although the amendment clarified that the circuit judges were now assigned to the courts of appeals, the issue of how many circuit judges constituted any particular court of appeals—and at what point in time—remained unsettled. As noted during the Senate's consideration of the amendment, the revision "makes no change whatever in the existing law except to make it clear that the circuit judges in the various circuits of the United States shall constitute the circuit court of appeals."²⁶ This question would remain unresolved for twenty-nine years until the Supreme Court was called upon to mediate an inter-circuit conflict between the Ninth and Third Circuits on whether a court of more than three members could sit together en banc.

In *Lang's Estate v. Commissioner*,²⁷ a three-judge panel of the Ninth Circuit "was faced with the situation where the decision of two judges of the circuit"²⁸ in *Bank of America v. Commissioner*²⁹ created a precedent with which "[t]he three judges sitting in [*Lang's Estate*] did not agree."³⁰ Instead of convening the full court to overrule the *Bank of America* decision, however, the three-judge panel in *Lang's Estate* presented a certificate to the Supreme Court "disclosing the

23. *Id.*

24. Act of January 13, 1912, ch. 9, 37 Stat. 52 (1912). The amendment was passed only 12 days after enactment of the original Judicial Code.

25. *Id.* at 53.

26. 47 CONG. REC. 2736 (1912) (remarks of Sen. Sutherland). This conclusion was echoed by the Committee on the Judiciary to the House of Representatives. See H.R. 199, 62d Cong., 2d Sess. (1911) (noting that the bill did no more than make "it clear that the circuit judges shall constitute the circuit court of appeals.").

27. 97 F.2d 867 (9th Cir. 1938).

28. *Id.* at 869.

29. 90 F.2d 981 (9th Cir. 1937). Judge Curtis D. Wilbur dissented from the opinion. *Id.* at 983.

30. *Lang's Estate*, 97 F.2d at 869. At the time of these decisions, the Ninth Circuit was composed of seven circuit court judges. There was no overlap in the judges assigned to the two cases, hence the majority opinion of the two judges in *Bank of America* "made a precedent for the remaining five." *Id.*

conflict between the two groups of judges and asking that it be resolved by that tribunal.”³¹ The panel explained that it chose to certify the question rather than independently act upon it due to its belief that because “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.”³²

By contrast, in *Textile Mills Securities Corp. v. Commissioner* (“*Textile Mills I*”),³³ the Third Circuit was faced with a potential ruling by two judges of a three-judge panel with which the remaining two judges of the five member circuit, and the dissenting judge on the original panel, disagreed.³⁴ In response, the full court of appeals held that it “has the power under existing statutes to sit en banc.”³⁵ The majority justified the use of its power to exercise en banc review as a means of ensuring intra-circuit uniformity by explaining that “[a] court, as distinguished from the quorum of its members whom it may authorize to act in its name, cannot consist of less than the whole number of its members.”³⁶ The court explained that such a holding would serve only to “destroy the authority of the court as a court and to open the way to possible confusion and conflict among its personnel and in its procedure and decisions.”³⁷ The “possible confusion” about which the court expressed concern was that arising from situations “where two of the three judges sitting in a case may have a view contrary to that of the other three judges of the court.”³⁸ Then, the court reasoned, “it is advisable that the whole court have the opportunity, if it thinks it necessary, to hear and decide the question.”³⁹

The following year, in *Oughton v. National Labor Relations Board*,⁴⁰ the Third Circuit was once more faced with a potential ruling by two judges of a three-judge panel with which a dissenting panel member and the remaining two judges of the circuit disagreed. The

31. *Id.* at 870.

32. *Id.* at 869.

33. 117 F.2d 62 (3d Cir. 1940), *aff'd*, 314 U.S. 326 (1941).

34. *Id.* at 71.

35. *Id.* In so ruling, the Court of Appeals for the Third Circuit was also upholding its own internal operating rule that “[t]hree judges shall sit in the court to hear all matters, except those which the court by special order directs to be heard by the court en banc.” 3D CIR. INTER. OPER. R. 4 (March 1, 1940), *quoted in Textile Mills Sec. Corp. I*, 117 F.2d at 67 n.4.

36. *Id.* at 70.

37. *Id.*

38. *Id.* at 71.

39. *Id.*

40. 118 F.2d 486 (3d Cir. 1941) (en banc).

court expressed concerns similar to those which had motivated it to grant rehearing in *Textile Mills I*, stating that:

[T]he present is but another instance of the justification for the rule. Its use removes any possibility that the majority opinion of the court, when composed as ordinarily of three judges, may conflict with the majority opinion of the court when composed of one of the same judges and the two remaining judges of the court. The majority opinion of all will be binding upon all regardless of the views of individual judges.⁴¹

Faced with an irreconcilable inter-circuit conflict, the Supreme Court in *Textile Mills Securities Corp. v. Commissioner* ("*Textile Mills II*"),⁴² granted the petition for certiorari in *Textile Mills I* "because of the public importance" of the en banc issue and because of the growing "contrariety of the views" between the Third and Ninth Circuits.⁴³ In *Textile Mills II*, the Court upheld the Third Circuit's interpretation of the Evarts Act, ruling that the en banc rehearing procedure "makes for more effective judicial administration [because] conflicts within a circuit will be avoided [and] finality of decision in the circuit courts of appeal will be promoted."⁴⁴ The Court also stated that the benefits of uniformity and finality achieved by en banc review "are especially important in view of the fact that in our federal judicial sys-

41. *Id.* at 494-95. The Third Circuit's concern for intra-circuit uniformity of its decisions was described by Judge Albert Maris in a 1953 article as follows:

The principal utility of determinations by the courts of appeals in banc is to enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions, while enabling the court at the same time to follow the efficient and time-saving procedure of having panels of three judges hear and decide the vast majority of cases as to which no division exists within the court. Without the procedure in banc it would be possible for different panels of the court to reach and apply in individual cases diametrically opposite conclusions upon important questions of law or practice. Not only would this confuse the law but it might also result in serious strains in the court when subsequently a panel of judges who individually disagreed with one of these decisions was called upon to decide the same question in a later case.

Albert Maris, *Hearing and Rehearing Cases In Banc*, 14 F.R.D. 91, 96 (1953).

42. 314 U.S. 326 (1941).

43. *Id.* at 327. Justice Jackson took no part in the consideration or disposition of the case.

44. *Id.* at 334-35. In addition, the Court held that any "ambiguity in the statute" regarding how many judges constituted a circuit court "is doubtless the product of inadvertence." *Id.* at 333. The Court further explained that "[although] the problem of construction is beset with difficulties, the conclusion that § 117 provides merely the permissible complement of judges for a circuit court of appeals results in greater harmony in the statutory scheme than if the language of § 117 is taken too literally." *Id.* at 333-34.

tem these courts are the courts of last resort in the run of ordinary cases."⁴⁵

Seven years later, the Court's decision in *Textile Mills II* was codified⁴⁶ into section 46(c) of the Judicial Code of 1948,⁴⁷ which authorized en banc review whenever ordered by the majority of a circuit's judges in regular active service.⁴⁸ During the hearings on the House

45. 314 U.S. at 335.

46. See *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 250 (1953) (declaring that the statutory authorization "is but a legislative ratification of" *Textile Mills II*); Fay, *supra* note 9, at 483 ("The Court's sanction of en banc action [in *Textile Mills II*] was incorporated into Title 28 . . . with the express purpose of both recognizing the power to sit en banc and at the same time continuing the tradition of the three-judge appellate court."). Earlier efforts to amend the statute had been unsuccessful. See *Textile Mills II*, 314 U.S. at 334 n.14 ("Beginning in 1938 the Judicial Conference of Senior Circuit Judges recommended an amendment to the [then operative Judicial] Code which would enable a majority of the circuit judges in circuits where there were more than three to provide for a court of more than three judges.") (citing ATT'Y GEN. REP. 23 (1938)); ATT'Y GEN. REP. 15-16 (1939); REP. OF THE JUDICIAL CONFERENCE OF SENIOR CIR. JUDGES 7 (1940). The proposed amendment provided that:

in a circuit where there are more than three judges, the majority of the circuit judges may provide for a court of all the active and available circuit judges of the circuit to sit in banc for the hearing of particular cases, when in their opinion such action is advisable.

Textile Mills II, 314 U.S. at 334 n.14. This bill passed the House. H.R. 3390, S. 1053, 77th Cong., 1st Sess. (1941), quoted in *Western Pac. R.R. Corp.*, 345 U.S. 247 at 251.

47. 28 U.S.C. § 46(c) (1988). In whole, § 46(c) provides that:

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 [the applicable statute] except that any senior circuit judge of the circuit shall be eligible to participate, at his election and upon designation and assignment pursuant to [the applicable statute] 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.

The rules governing appellate practice mirror this language. See FED. R. APP. P. 35(a) ("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."). The federal rules, however, add the caveat that the granting of en banc review "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.*

48. 28 U.S.C. § 46(c). The number of circuit court judges in active service is provided by statute. Currently they are authorized by circuit as follows:

D.C.	12	Fourth	15	Eighth	11
First	6	Fifth	17	Ninth	28
Second	13	Sixth	16	Tenth	12
Third	14	Seventh	11	Eleventh	12

28 U.S.C. § 44(a) (Supp. 1992). Because of vacancies, courts often operate at less than their full constituency. The implications for these vacancies upon the mechanics of granting en banc review

and Senate bills that eventually became section 46(c), many witnesses testified that the purpose of amending the Judicial Code to authorize en banc rehearings was to "obviate the situation where . . . a decision of two judges . . . sets the precedent for the remaining judges."⁴⁹

When enacting section 46(c), Congress "left no doubt as to the power of the courts to hear cases en banc."⁵⁰ It did, however, leave a critical question unresolved, for Congress made no provision as to how an en banc procedure might be utilized.⁵¹ Five years later, this question was addressed by the Supreme Court.

In *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*,⁵² the Supreme Court was asked to decide whether section 46(c) of the Judicial Code required courts of appeals to hear cases en banc whenever suggested by petitioners.⁵³ The Court held that section 46(c) did not address litigants, but instead granted power to the courts of appeals, and left the decision of whether to rehear cases to the appellate courts.⁵⁴ Although the Court authorized each circuit to "devise its

are discussed *infra* text accompanying notes 247-55.

49. H.R. REP. NO. 1246, 77th Cong., 1st Sess. (1941); HEARINGS BEFORE A SUBCOMM. OF THE SENATE COMM. ON THE JUDICIARY ON S. 1053, 77th Cong., 1st Sess. (1941), at 39-40 (statement of H. Chandler, Administrator, Judicial Conference of the United States). See also ADMINISTRATION OF UNITED STATES COURTS: HEARINGS ON S. 1050-1054, AND H.R. 138 BEFORE THE SUBCOMM. OF THE SENATE COMM. ON THE JUDICIARY, 77th Cong., 1st Sess. at 15-16 (1941) (statement of H. Chandler, Administrator, Judicial Conference of the United States) ("a majority of the court should not be bound by a decision of two members, particularly if the other members of the court . . . desire to have their say in regard to what they think the law is." (quoting Judge John Biggs)); *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 252 (1953) ("This bit of legislative history [*i.e.*, the hearings] is significant. Congress was attempting to frame legislation which would empower a majority of circuit judges in any Court of Appeals to 'provide' for hearings en banc.").

50. Fay, *supra* note 9, at 483-84.

51. See *id.*

52. 345 U.S. 247 (1953).

53. 345 U.S. at 248. A *petition* for rehearing refers to a litigant's request for reargument before the same three-judge panel who heard the appeal. By contrast, a *suggestion* refers to a request for a rehearing by the full court. McFeeley, *supra* note 9, at 261 n.36. See also Newman, *supra* note 2, at 367 n.9 ("The somewhat quaint terminology of a 'suggestion' for an in banc rehearing appears to have originated in colloquy among members of a subcommittee of the Senate Judiciary Committee during hearings on a bill" that was "a predecessor of what became the Act of June 25, 1948 When Senator Danaher asked, '[o]n whose motion would the court assemble en banc?', he was told that counsel might make a 'suggestion.'" (citing HEARINGS ON S. 1053 BEFORE A SUBCOMM. OF THE SENATE COMM. ON THE JUDICIARY, *supra* note 49 (statement of Sen. Danaher)); *Western Pac. R.R. Corp.*, 345 U.S. at 252.

54. *Id.* at 250. Federal Rules of Appellate Procedure 35(b) and (c) now provide that:

(b) A party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular

own administrative machinery to provide the means whereby a majority may order such a hearing,"⁵⁵ the Court also held that "determinations en banc are indicated *whenever* it seems likely that a majority of all the active judges would reach a different result than the panel assigned to hear a case or which has heard it."⁵⁶ The Court explained that it had authorized frequent use of en banc rehearings because the en banc power was too "necessary and useful [a] power . . . that we should ever permit a court to ignore the possibilities of its use in cases where its use might be appropriate."⁵⁷

As the result of the Court's directive in *Western Pacific Railroad Corp.* that each circuit determine its own administrative procedures, the individual courts of appeals have developed their own caselaw, rules and internal operating procedures to govern en banc proceedings. The most significant of these rules and procedures are those specifying what constitutes a "majority" of the court for purposes of tallying en banc votes.⁵⁸ In this respect, the administrative machinery developed in one circuit may often differ from that employed in another. For example, the internal operating rule of the United States Court of Appeals for

active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

(c) If a party desires to suggest that an appeal be heard initially in banc, the suggestion must be made by the date on which the appellee's brief is filed. A suggestion for a rehearing in banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgement of the court of appeals or stay the issuance of the mandate.

FED. R. APP. P. 35(b), (c).

55. *Western Pac. R.R. Corp.*, 345 U.S. at 250. For contemporaneous accounts of the procedures in effect at the time of the *Western Pacific Railroad Corp.* decision, see Fay, *supra* note 9, at 484-88.

56. *Western Pac. R.R. Corp.*, 345 U.S. at 270 (Frankfurter, J., concurring) (emphasis added).

57. *Id.* at 260.

58. For a detailed description of the different practices within the circuits, see, e.g., Note, *Playing With Numbers: Determining the Majority of Judges Required to Grant En Banc Sitings in the United States Courts of Appeals*, 70 VA. L. REV. 1505, 1523-29 (1984) [hereinafter Note, *Playing with Numbers*]; Judah I. Labovitz, Note, *En Banc Procedure in the Federal Courts of Appeals*, 111 U. PA. L. REV. 220, 221-27 (1962). See also Thomas J. Waters, Note, *The En Banc Requirements of 28 U.S.C. § 46(c): What Constitutes a Majority in the Event of a Refusal or Disqualification?*, 11 J. LEGIS. 373 (1984) (discussing the requirements of achieving a "majority" of circuit court judges for the purposes of ordering full court review); Kathleen Sylvester, *What Does a "Majority" Mean in En Banc Cases?*, NAT'L L.J., Jan. 16, 1984, at 6. See also *infra* text accompanying notes 241-51.

the Sixth Circuit, which requires an affirmative vote for rehearing by an "absolute majority"—*i.e.*, a majority of all the active circuit judges who are *eligible* to vote—provides that a "majority is determined by calculating the majority vote of all active judges on the court, not the number qualified to hear the case."⁵⁹ Thus, under an "absolute majority" rule, judges who are either recused or unavailable count as votes against rehearing during en banc polls.⁶⁰ By contrast, the opposite approach has been adopted in the Seventh Circuit. There, the operating procedure provides that only "[a] simple majority of the voting active judges is required to grant a rehearing in banc."⁶¹ Under this "simple majority rule," only an affirmative vote by a majority of those active judges *present* is required to grant review.⁶² Additionally, some circuit internal operating procedures and rules altogether avoid defining standards for how many and what type of judges are required to vote in favor of rehearing in order to reach a majority of the judges in regular active service, and have instead made this determination through caselaw.⁶³

59. See 6TH CIR. INTER. OPER. R. 20.7 (1990).

60. See *Copper & Brass Fabricators Council, Inc. v. Department of Treasury*, 679 F.2d 951 (D.C. Cir. 1982); *Curtis-Wright Corp. v. General Elec. Co.*, 599 F.2d 1259 (3d Cir. 1979), *cert. denied*, 449 U.S. 1022 (1980); *Zahn v. International Paper Co.*, 469 F.2d 1033 (2d Cir. 1972), *aff'd*, 414 U.S. 291 (1973); 5TH CIR. R. 35.6 (1990) ("For purposes of en banc voting under 28 USC § 46(c), the term 'majority' is defined as a majority of all judges of the court in regular active service presently appointed to office. Judges in regular active service who are disqualified for any reason or who cannot participate in the decision of an en banc case nevertheless shall be counted as judges in regular active service."). Some courts of appeals even construe a non-response as a vote against rehearing. See, e.g., 3D CIR. INTER. OPER. P. 9.5.4 ("An active judge who does not communicate with the opinionwriting judge concerning rehearing within eight (8) days after the date of the Clerk's letter transmitting the petition for rehearing is presumed not to desire in banc or that an answer be filed.").

61. 7TH CIR. OPER. P. 5(d)(1).

62. See, e.g., 10TH CIR. R. 35.5 ("Hearing or rehearing en banc may be ordered by a majority of the judges of this court who are in regular active service and not disqualified in the particular case or controversy."); 4TH CIR. R. 35(b) ("A majority, but no fewer than four, of all eligible, active and participating judges may grant a hearing or rehearing in banc."); 2D CIR. R. 35 ("Neither vacancies nor disqualified judges shall be counted in determining the base on which 'a majority of the circuit judges who are in regular active service' shall be calculated, pursuant to 28 U.S.C. § 46(c), for purposes of ordering a hearing or rehearing in banc.").

63. See, e.g., 8TH CIR. INTER. OPER. P. IV D ("A rehearing en banc is granted if a majority of judges in regular active service vote affirmatively."). Cf. 3D CIR. INTER. OPER. R. 9.5.3 ("Pursuant to 28 U.S.C. § 46(c), only active judges of this court may vote for rehearing in banc. Therefore, rehearing in banc shall be ordered only upon the affirmative votes of a majority of the judges of this court in regular active service."); *Lewis v. University of Pittsburgh*, 725 F.2d 910 (3d Cir. 1983) (en banc), *cert. denied*, 469 U.S. 892 (1984) (denying en banc consideration despite affirmative votes by five of the available eight circuit judges when the circuit was comprised of ten judges). For a detailed account of *Lewis v. University of Pittsburgh*, see generally Neal J.

TABLE I
En Banc Decisions by Circuit
1982-1991

Circuit	1982	83	84	85	86	87	88	89	90	91
D.C.	5	10	3	5	2	4	13	12	1	7
First	0	0	2	0	1	1	1	5	4	5
Second	1	1	0	1	1	1	2	1	1	0
Third	5	5	3	5	5	8	4	4	2	2
Fourth	8	6	6	18	6	13	19	11	13	9
Fifth	12	11	19	13	18	10	17	5	10	8
Sixth	4	3	9	7	5	7	6	7	4	6
Seventh	7	8	6	3	7	8	7	10	7	15
Eighth	7	5	15	15	9	11	12	14	7	15
Ninth	9	4	14	6	5	7	9	7	6	8
Tenth	2	3	16	4	12	8	13	17	19	10
Eleventh	10	14	8	19	18	10	16	7	12	4
Totals:	74	66	106	85	90	88	117	98	85	89

The data in this, and subsequent tables, are derived from the Annual Reports of the Director of the Administrative Office of the United States Courts, which set forth various statistics for their respective federal fiscal years.

The courts of appeals have also developed their own individual circuit cultures regarding the proper use of en banc rehearings. These circuit cultures "vary according to the size of the circuit, its workload, the complexity of its en banc cases, the number and perhaps the individual characteristics of its active judges."⁶⁴ Circuit cultures also affect how

Blaher, *Appellate Procedure—Effect of Refusals on Voting for Rehearing In Banc*, 30 VILL. L. REV. 908 (1985).

64. Alexander, *Part I*, *supra* note 9, at 576. See also Patricia M. Wald, *Calendars, Collegiality, and Other Intangibles on the Courts of Appeals*, in *THE FEDERAL APPELLATE JUDICIARY IN THE 21ST CENTURY* 171 (Cynthia Harrison & Russell R. Wheeler, eds. 1989) [hereinafter Wald, *Calendars, Collegiality*] ("The character of a circuit is a delicate composite of history, judges' personalities, distinct kinds of regional issues and problems, and even different types of counsel who appear in court.").

frequently courts of appeals review cases en banc. For instance, because "[o]ne of the distinctive characteristics of the United States Court of Appeals for the Second Circuit is the infrequency of rehearings en banc,"⁶⁵ it has granted the fewest rehearings of any circuit over the last decade, averaging slightly less than one per year.

TABLE II

Average Number of Cases Decided
En Banc Per Circuit
1982-1991

Circuit	Avg/yr
D.C.	6.2
First	1.9
Second	.9
Third	4.3
Fourth	10.9
Fifth	12.3
Sixth	5.8
Seventh	7.8
Eighth	11.0
Ninth	7.5
Tenth	10.4
Eleventh	11.8
Total	7.5

By contrast the Fourth and Eleventh Circuits have each averaged about eleven en banc rehearings per year over the last decade;⁶⁶ and

65. Newman, *supra* note 2, at 365. See also *Lopinsky v. Hertz Drive-Ur-Self Sys., Inc.*, 194 F.2d 422, 429 (2d Cir. 1951) (per curiam) (Clark, J.) (stating that it is "the practice of this circuit never to sit *in banc*."); Note, *The Second Circuit: Federal Judicial Administration in a Microcosm*, 63 COLUM. L. REV. 874, 900-08 (1963) (detailing the history of the Second Circuit's treatment of en banc review).

66. Table II, *supra*.

the Fifth Circuit, with an average of more than twelve annual en banc rehearings, has reheard more cases en banc than any other circuit.⁶⁷

III. INCREASING THE USE OF EN BANC REVIEW

A. Greater Uniformity

Beginning with the Supreme Court's decision in *Textile Mills II*, the process of en banc review has been the subject of extensive legal scholarship.⁶⁸ Advocates of the procedure have lauded its power to encourage uniformity within a circuit's jurisprudence, while detractors have asserted that the rehearing process diminishes judicial efficiency, erodes the finality of three-judge panel decisions, decreases collegiality among the members of a court and raises serious concerns about whether judges are ideologically result-oriented in reaching their decisions.⁶⁹ This disagreement over the benefits of en banc rehearings may result, as one commentator has suggested, from the fact that "no one model of appellate review can at the same time maximize procedural values such as finality, economy, consistency, impartiality, and power concentration."⁷⁰

Whatever the origin of the disparity of scholars' opinions regarding the desirability of en banc review, academics who have analyzed the en banc process typically have engaged in a cost-benefit analysis, weighing the benefits of the uniformity of intra-circuit law⁷¹ achieved

67. *Id.*

68. The first published treatment of en banc review was a Note in the 1942 Harvard Law Review that reported the Supreme Court's decision in *Textile Mills II*. See Note, *The Power of a Circuit Court of Appeals to Sit En Banc*, 55 HARV. L. REV. 663 (1942). Two additional Notes were published the year following the Supreme Court's later decision in *Western Pacific Railroad Corp.* See Note, *The En Banc Procedures of the United States Courts of Appeals*, 21 U. CHI. L. REV. 447 (1954); Fay, *supra* note 9.

69. See text accompanying notes 120-225.

70. Solimine, *supra* note 2, at 41 (citing Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 845-59, 874 (1984)).

71. Professor Arthur Hellman, in his study of the jurisprudence and appellate procedures of the Ninth Circuit, has posited a three-part test for determining the existence of an intra-circuit conflict. See Arthur Hellman, *Breaking the Banc: The Common-Law Process in the Large Appellate Court*, 23 ARIZ. ST. L.J. 915, 923 and *passim* (1992) [hereinafter Hellman, *Breaking the Banc*]. The first part, which asks whether the holding of a new opinion reaches a different result from that of an existing circuit precedent, is discussed in the context of *Wright v. United States Parole Comm'n* and *E.M. Diagnostic v. Local 169*, discussed *infra* text accompanying notes 92-99, and underlies the frustration exhibited by judges authoring opinions dissenting from the denial of the grant of en banc review, such as the dissent authored by the dissenters in *Bartlett ex rel. Neuman v. Bowen*, discussed *infra* text and accompanying notes 187-91. The second part, which questions whether the new case can be distinguished from the existing precedent and is therefore

by en banc review against such potential disadvantages as judicial inefficiency, diminished finality of three-judge panel decisions and impairment of collegiality within a circuit. One commentator finds ironic the use of cost-benefit analysis by the critics of en banc review, noting his surprise that "the debate over the en banc proceeding has been conducted in largely utilitarian terms" even though the "commentators criticizing the most recent use of the en banc process for its lack of efficiency, are often the first to condemn the use of cost-benefit tests or balancing formulas when interpreting or applying various procedural requirements."⁷²

Regardless of the irony involved, the critics of en banc review have concluded from their balancing test that the advantage of uniformity attained by rehearings is outweighed by the institutional costs incurred,⁷³ and therefore that en banc rehearings should be granted only in "the rarest circumstances."⁷⁴

Specifically, the critics have argued that en banc rehearings may not be used justifiably to ensure intra-circuit uniformity through major-

not "compelling," is discussed in the context of Part IV, *infra* text accompanying notes 185-92, which suggests that the determination of whether certain portions of a proposed opinion actually conflict with an existing precedent is a matter capable of being given much latitude by individual judges who often temper their jurisprudential rigidity with collegial considerations. The third part raises the issue of how, as an institutional objective, conformity to precedent balances against the growth of a circuit's law through what Professor Karl Llewellyn termed "trial [and] correction." Arthur Hellman, *Breaking the Banc*, *supra*, at 923 (quoting KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 397 (1960)). This process, which has also been termed "percolation" by Professors Estreicher and Sexton, *see* note 183 *infra*, does not conflict with the assertions made in this article because "conformity" is limited here to those situations where, despite the similarity of the litigants, "it might be possible," as Judge Maris wrote, "for different panels of the court" to render "diametrically opposite conclusions." Maris, *supra* note 41. For a more complete discussion of the percolation theory, see Todd Tiberi, *Supreme Court Denials of Certiorari in Conflicts Cases: Percolation or Procrastination?*, 54 U. PITT. L. REV. 865 (1993). These circumstances are different from those in which a panel is asked to apply existing precedent to a new factual scenario.

72. See Solimine, *supra* note 2, at 40.

73. *Proceedings of the Annual Judicial Conference of the Second Judicial Circuit of the United States*, 106 F.R.D. 103, 159 (1984) [hereinafter *Second Circuit Conference*] (remarks of Judge Irving R. Kaufman) ("In balancing the benefits and burdens of the in banc proceeding, I am firmly convinced that its costs are too great and its advantages too few to warrant its use. . .").

74. *Second Circuit Conference*, *supra* note 73, at 159 (remarks of Judge Kaufman). See also Alexander, *Part I*, *supra* note 9, at 600 ("En banc rehearings therefore should be strongly disapproved."); Note, *supra* note 2, at 1654 ("It may be more profitable to reserve en banc treatment for those rare conflicts that involve the integrity of the judicial process."); Steven Bennett & Christine Pembroke, "Mini" *In Banc Proceedings: A Survey of Circuit Practices*, 34 CLEV. ST. L. REV. 531, 541 (1986) ("Courts and commentators agree that conventional in banc review must be used sparingly. . .").

ity control of circuit law. The critics reach this conclusion by interpreting the language of the federal rule and the enabling statute that a court should hear cases en banc only when it is necessary "to secure or maintain uniformity of its decisions" or to address "a question of exceptional importance,"⁷⁵ as meaning that en banc rehearings "are supposed to be limited to cases resolving intracircuit conflicts between panel opinions or to cases deciding questions 'of exceptional importance' "⁷⁶ and not "to assure that cases are decided in the way the majority of the whole court would have decided them."⁷⁷ This assertion that en banc review should not be used to maintain majority control within a circuit is unconvincing because the overwhelming importance of uniformity to circuit law outweighs the institutional costs incurred by en banc rehearings.⁷⁸

Uniformity has been described as "the most basic principle of jurisprudence."⁷⁹ This is because "[u]niformity promotes the twin goals of equity and judicial integrity."⁸⁰ Uniformity advances these principles by ensuring that similar litigants receive similar treatment and, by thus injecting a measure of predictability into the processes of the legal pro-

75. See 28 U.S.C. § 46(c); FED. R. APP. P. 35.

76. Solimine, *supra* note 2, at 30. See also Note, *Playing With Numbers*, *supra* note 58, at 1510 n.32 ("The en banc device . . . exists for the limited set of cases in which circuit law will be charted or where exceptional circumstances exist."); Labovitz, *supra* note 58, at 220 ("There is little doubt that the en banc procedure . . . was developed for the resolution of intracircuit conflict.").

77. *Second Circuit Conference*, *supra* note 73, at 162 (remarks of Judge James R. Browning). See also Note, *Playing With Numbers*, *supra* note 58, at 1510 n.32 ("The en banc device was not created to provide an additional opportunity for review . . .").

78. The critics' misunderstanding should not come as a surprise. One commentator has termed en banc review "[o]ne of the least understood proceedings in the federal judicial system." McFeeley, *supra* note 9, at 255. Institutional policy concerns may also contribute to affirmative voting in favor of rehearing. See, e.g., Henry J. Friendly, *Of Voting Blocs, and Cabbages and Kings*, 42 U. CIN. L. REV. 673, 676 (1973) ("as the federal courts are taking over more and more of the management of the country, many courts of appeals judges are experiencing considerable discomfiture in being committed to far reaching policies in whose formulation they had no voice."); BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 165 (1921) ("[T]here remains a percentage [of cases], not large indeed, and yet not so small as to be negligible, where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law. These are the cases where the creative element in the judicial process finds its opportunity and power.").

79. Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982).

80. Ruth B. Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1424-25 (1987) (quoting Note, *Intercircuit Conflicts and the Enforcement of Extracircuit Judgments*, 95 YALE L.J. 1505 (1986)). See also Patricia M. Wald, *Changing Course: The Use of Precedent in the District of Columbia Circuit*, 34 CLEV. ST. L. REV. 477, 488 (1986) [hereinafter Wald, *Changing Course*] ("the integrity of the circuit's law is [of] paramount concern.").

cess, providing the "consistency and moral stature essential for the public's confidence in the justice system."⁸¹

When viewed in abstract, intra-circuit uniformity does not mandate majority control of a circuit's law. Conceivably, a circuit can achieve uniformity of law without a majority of its judges controlling its decisions through strict adherence to existing precedent by all of the circuit members. In reality, however, judges, whether within the minority or majority of their circuits, will either avoid or conflict with existing precedent when they do not believe previous rulings correctly apply their circuit's law or aptly reflect what the law should be. As Judge Wald has observed, "[s]ometimes, different lines of precedent based on quite different premises coexist uneasily for years without actually colliding, and the judges will follow those precedents which they like best."⁸² Thus, until either en banc or Supreme Court review of conflicting or minority three-judge panel decisions occurs, a court is left in the interim with a perplexing disarray of precedent, and each of these rulings might be thought to "reflect[] the majority view of the active judges."⁸³ The results of such circumstances are decisions that serve only to "confuse the law" and create serious strains in a circuit when the panel of judges who individually disagreed with one of these decisions is later called upon to decide the same question.⁸⁴ Accordingly, without majority control of circuit law, judicial integrity is severely challenged because similar litigants leave the courthouse with divergent results. Thus, as Judge Maris observed, en banc review of cases "enable[s] the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control . . . its decisions."⁸⁵

In addition, given the option of revising an opinion en banc, a majority of the judges of a circuit should not be forced to abide by decisions that do not reflect their understanding of the law, because this raises greater concerns over the integrity of the judicial process. After all, one reason for having multiple judges on appellate courts is that

81. John E. Simonett, *The Use of the Term Result-Oriented to Characterize Appellate Decisions*, 10 WM. MITCHELL L. REV. 187, 202 (1984).

82. Wald, *Changing Course*, *supra* note 80, at 481. This is an additional reason for the failure of the critics' proposal to improve en banc review through strict adherence to circuit precedent, as discussed *infra* text accompanying notes 259-261.

83. Alexander, *Part I*, *supra* note 9, at 586.

84. Maris, *supra* note 41, at 96.

85. *Id.* This language was later quoted favorably by the Supreme Court. See *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689-90 (1960).

their "different perceptions, premises, logic, and values . . . insures a better judgment."⁸⁶ This is so even if the judges may have similar jurisprudential ideologies. The diversity of their backgrounds and personalities add to the general formula. Majority control of a circuit's decisions is therefore necessary both to achieve intra-circuit uniformity and to protect the integrity of the judicial process.

B. *Avoiding Minority Control*

Although an increase in en banc review will immediately create a more conservative jurisprudence reflecting the current majority of federal circuit judges, it should not be sacrificed because a temporary ideological change will result.⁸⁷ Increasing the use of en banc rehearings will enable circuits to achieve greater intra-circuit uniformity of law, avoiding minority control of circuit law, and preventing the confusion generated by conflicting lines of precedent. In addition, fewer cases will flow to the Supreme Court.

It is well-settled that for the purposes of circuit precedent, every decision by a three-judge panel binds the entire circuit and only a court en banc, not another three-judge panel, can reverse the holding of a three-judge panel decision.⁸⁸ Without en banc rehearings, a mere two-judge minority can prevent the "policy that the active circuit judges shall determine to be the major doctrinal trends of the future for their court"⁸⁹ and may use "majority status on a panel to commit the court

86. FRANK M. COFFIN, *THE WAYS OF A JUDGE, REFLECTIONS FROM THE FEDERAL APPELLATE BENCH* 174 (1980).

87. The extent to which the jurisprudence of any individual circuit can shift because of a changed constituency of the majority that controls circuit precedent is dependent on the number of vacant judgeships, see Table VII, *infra*, as well as the characteristics of individual judges (for example, how strictly they adhere to circuit precedent). Despite temporary—even strong—ideological shifts, majority control is the preferable means by which to achieve uniformity within a circuit. It is, moreover, quite natural for circuit law to develop through "swings" in ideology. See text *supra* accompanying notes 221-25.

88. See, e.g., *Rodriguez v. Meba Pension Trust*, 956 F.2d 468, 471 n.3 (4th Cir. 1992) ("under this circuit's long-standing, formal practice" a prior three-judge panel decision "is considered binding upon all panels of this court until overruled by an en banc decision of this court or a decision of the Supreme Court"); *Dawidoff v. Minneapolis Bldg. & Constr. Trades Council*, 550 F.2d 407, 411 n.3 (8th Cir. 1977). Several courts of appeals have set forth this principle in their internal rules. See, e.g., 3D CIR. INTER. OPER. P. 9.1 ("It is the tradition of this court that the holding of a panel in a reported opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a published opinion of a previous panel. Court in banc consideration is required to do so."). See also Newman, *supra* note 2, at 370 ("It is now widely agreed that in banc consideration is normally required to overrule existing precedent in a circuit.").

89. *United States v. American-Foreign S.S. Corp.*, 265 F.2d 136, 155 (2d Cir. 1957)

to its own view.”⁹⁰ Thus, en banc review of cases is necessary in order to achieve uniformity of intra-circuit law, because only en banc rehearings “permit[] a court of appeals to maintain decisional uniformity.”⁹¹ The necessity of en banc review to prevent a majority of a court from committing its entire circuit to a holding with which the full court would disagree may be seen from the dissenting opinions in two cases originating in different circuits.

In *Wright v. United States Parole Commission*,⁹² the panel majority relied upon a prior decision, *Jones v. United States Bureau of Prisons*⁹³ that apparently departed radically from circuit precedent and, according to the dissent, abandoned the traditional abuse-of-discretion standard deployed by the Eighth Circuit to review parole decisions.⁹⁴ Judge Heaney’s dissent asserted that not only was the *Jones* panel obligated to follow prior circuit cases but that the panel in *Wright* was obligated to follow pre-*Jones* precedent.⁹⁵ To do otherwise not only would ignore established circuit practice that “our traditional standard can only be overturned by the court en banc,” but also would create confusing and conflicting lines of precedent.⁹⁶ Accordingly, Judge Heaney urged that the decision “be referred to the court en banc to decide

(Clark, C.J. and Waterman, J., separate statement), *vacated and remanded on other grounds*, 363 U.S. 685 (1960). See also Madden, *supra* note 9, at 409 (en banc rehearings allow “all the active judges in the circuit [to] establish a rule of the majority for the circuit.”). *Id.* at 402 (“Some method is needed for the majority of active judges to maintain control over the panels. Use of the en banc procedure can accomplish this.”).

90. Fay, *supra* note 9, at 491. See also Friendly, *supra* note 78, at 675 (“a policy by which two judges are empowered to commit a [larger] court to a decision which is contrary to the views of the other [appellate] judges and then to prevent that dissenting majority from ordering a determination of the case en banc, violates both the spirit and the letter of the statute and frustrates the salutary purpose of the en banc procedure.”); McFeeley, *supra* note 9, at 263 (“Without en banc review, a majority of the circuit judges might be unable to have ‘their say.’”).

91. Note, *Playing With Numbers*, *supra* note 58, at 1508. See also Bennett & Pembroke, *supra* note 74, at 536 (the “structure and function of federal appellate courts mandate an en banc review process.”); Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 583-84 (1969) (“en banc procedure is essential to a healthy law of the circuit.”); McFeeley, *supra* note 9, at 274 (“En banc consideration is essential to maintain the integrity of each circuit’s decisions.”); A. Lamar Alexander, Jr., Note, *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities (Part II)*, 40 N.Y.U. L. REV. 726, 744 (1965) [hereinafter Alexander, *Part II*] (“There is no workable alternative to consideration by all the active judges of the circuit en banc.”).

92. 948 F.2d 433 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1772 (1992).

93. 903 F.2d 1178 (8th Cir. 1990).

94. *Wright*, 948 F.2d at 436 (Heaney, J., dissenting).

95. *Id.* (citing *Johnson v. Moral*, 843 F.2d 846, 847 (5th Cir. 1988)).

96. *Id.*

whether we should depart from our traditional abuse-of-discretion standard when we review parole decisions."⁹⁷

Similarly, in *E.M. Diagnostic v. Local 169*,⁹⁸ a case involving collective bargaining agreements, Judge Garth dissented from a majority holding he believed was unsupported by authority stating:

The majority's decision in this case must inevitably lead to the confusion of the labor bar, unions, management, and the district court judges. Rather than fostering the goals of predictability and precedential integrity in the interpretation of collective bargaining agreements, I fear that this decision by the majority will do just the opposite. It is for that reason that I not only respectfully dissent, but I urge consideration by the court in banc.⁹⁹

Along with early en banc review cases, the contemporary writings of one of the judges who codified the en banc procedure and co-wrote the subsequent legislative history of section 46(c), all help demonstrate that the "maintenance of uniformity in circuit decisions was the dominant purpose underlying the creation of the en banc procedure."¹⁰⁰ Judge Maris who, in addition to being an influential and respected judge on the United States Court of Appeals for the Third Circuit,¹⁰¹ was also the Chairman of the Judicial Conference Committee on the Revision of the Judicial Code¹⁰² and one of the main forces behind the

97. *Id.* at 438.

98. 812 F.2d 91 (3d Cir. 1987).

99. *Id.* at 104 (Garth, J., dissenting).

100. Note, *The Politics of En Banc Review*, 102 HARV. L. REV. 864, 875 (1989). See also *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 271 (1953) (Frankfurter, J., concurring) ("the dominant ends of [en banc review are] avoiding or resolving intra-circuit conflicts. . . ."); Bennett & Pembroke, *supra* note 74, at 536 ("The legislative history of the in banc rules and the thrust of the relevant Supreme Court cases indicate that the in banc procedure was originally designed to minimize conflicts in precedent."); McFeeley, *supra* note 9, at 261 ("The major reason for the existence of en banc rehearings is to ensure intra-circuit consistency. . . ."); *Second Circuit Conference*, *supra* note 73, at 162 (remarks of Judge Browning) ("The en banc process . . . helps achieve . . . predictability."); Madden, *supra* note 9, at 408 ("the underlying purpose of the in banc procedure [is] the maintenance of control over the decisions within the circuit."). Cf. Daniel Egger, *Court of Appeals Review of Agency Action: The Problem of En Banc Ties*, 100 YALE L.J. 471, 477 (1990) ("The en banc jurisdiction of the United States Courts of Appeals was not created deliberately as part of a coherent theory of Article III jurisprudence; its existence owes more to historical accident.").

101. See *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 253 (1953) (noting Judge Maris's position of prominence); *In Memory of Hon. Albert Branson Maris (1893-1989) United States Circuit Judge* (remarks of Judge John P. Fullam), 894 F.2d at CIII (Judge Maris "was a role model for every judge on our Court . . . [h]e was the ideal of what a judge should be.").

102. See *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 253-54 (1953) ("At that time, Judge Maris, Chairman of the Judicial Conference Committee on the Revision of

creation of section 46(c).¹⁰³ Judge Maris set forth his views in a 1953 article entitled *Hearing and Rehearing Cases In Banc*:¹⁰⁴ "The principal utility of determinations by the courts of appeals in banc is to enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions."¹⁰⁵ Judge Maris further explained that by maintaining majority control of circuit law, the members of a circuit could prevent intra-circuit conflicts that served only to "confuse the law" and "also result[ed] in serious strains in the court when subsequently a panel of judges who individually disagreed with one of these decisions was called upon to decide the same question in a later case."¹⁰⁶

The legislative history of section 46(c) also amply demonstrates that Congress intended en banc review to be used to maintain majority control. The record of the hearings on the House and Senate bills that eventually became section 46(c), reveals that the purpose of amending the Judicial Code to add a section specifically providing courts of appeals with statutory authorization to sit en banc was to "obviate the situation where . . . a decision of two judges . . . sets the precedent for the remaining judges."¹⁰⁷ The testimony given at the hearings "ex-

the Judicial Code, submitted a memorandum to the House Committee on Revision of Laws . . . This proposal was the genesis of the present § 46(c)). In addition, Judge Maris also was the Chairman of the Standing Committee on Rules of Practice and Procedure and a member of the Advisory Committee on Appellate Rules. See Madden, *supra* note 9, at 407 n.63.

103. See Revision of Federal Judicial Code, Preliminary Draft of H.R. 3498, 79th Cong., 1st Sess., Committee Print 11 (1945) (recognizing in the reviser's Notes to the draft of § 46(c) that "[s]uch subsection (c) is based on recommendations of Circuit Judge Albert B. Maris of the Third Circuit in his memorandum dated August 18, 1944, and submitted to the Committee on Revision of the Laws on August 21, 1944."); *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 254 n.9, *cert. denied*, 346 U.S. 910 (1953). Both the Supreme Court and Congress took these facts into account when considering the adoption of § 46(c):

Judge Maris was called upon by Chief Justice Stone to serve as chairman of the Judicial Conference's Committee of Revision of the Laws of the United States. He served on this committee from 1944 until 1967 by successive appointments of Chief Justices Vinson and Warren. That committee collaborated with the Judiciary Committee from the House of Representatives and its staff, first in the monumental job of revising Title 28 of the United States Code and thereafter in considering continuing issues related thereto.

In Memory of Hon. Albert Branson Maris (1893-1989) United States Circuit Judge (remarks of Judge Dolores K. Sloviter), 894 F.2d at C.

104. 14 F.R.D. 91 (1953).

105. *Id.* at 96. This language was later mentioned by the Supreme Court. See *United States v. American Foreign Steamship Corp.*, 363 U.S. 685, 688 (1960).

106. 14 F.R.D. at 96.

107. H.R. REP. NO. 1246, 77th Cong., 1st Sess. (1941); HEARINGS BEFORE A SUBCOMM. OF THE SENATE COMM. ON THE JUDICIARY ON S. 1053, *supra* note 49, at 39-40 (statement of H.

plain[s that] the underlying purpose of the in banc procedure . . . [was] the maintenance of control over the decisions within the circuit."¹⁰⁸ This legislative history is significant because, as the Supreme Court later explained in *Western Pacific Railroad Corp.*, "Congress was attempting to frame legislation which would empower a majority of circuit judges in any Court of Appeals to 'provide' for hearings *en banc*" in order to maintain majority control of circuit law.¹⁰⁹

The Eighth and Third Circuit rulings in *Wright* and *E.M. Diagnostic*, as well as the earlier decisions in *Textile Mills I* and *Oughton*, along with the contemporaneous writings of Judge Maris and the legislative history of section 46(c), demonstrate the importance of en banc review as a means of ensuring intra-circuit uniformity through majority control by preventing minority control of circuit law.

C. Reducing the Supreme Court's Burden

Increasing the use of en banc review will also assist courts of appeals in their administrative task of reducing the flow of cases to the Supreme Court.¹¹⁰ This is because the only alternative to ordering en banc rehearing of a case that either raises an intra-circuit conflict or does not reflect the majority of a court's view, is to leave the matter unresolved in the hope that the Supreme Court will itself decide to determine the issue. This is an unsatisfactory result as the Supreme Court cannot, and should not, be required to be the arbiter of intra-circuit conflicts.

The Supreme Court cannot be relied upon to determine intra-circuit conflicts because the Court is functionally "no longer capable of providing the supervision of federal judicial law making that it once provided."¹¹¹ Moreover, the Court has clearly shown a disinclination to supervise closely the courts of appeals in this regard because it rou-

Chandler, Administrator, Judicial Conference of the United States). See also ADMINISTRATION OF UNITED STATES COURTS: HEARINGS ON S. 1050-1054, AND H.R. 138 BEFORE THE SUBCOMM. OF THE SENATE COMM. ON THE JUDICIARY, *supra* note 49, at 15-16 (statement of H. Chandler, Administrator, Judicial Conference of the United States) ("a majority of the court should not be bound by a decision of two members, particularly if the other members of the court . . . desire to have their say in regard to what they think the law is." (quoting Judge Biggs)).

108. Madden, *supra* note 9, at 408.

109. 345 U.S. 247, 252 (1953).

110. See, e.g., Note, *Playing With Numbers*, *supra* note 58, at 1508 ("the en banc procedure . . . serves a crucial function in the administration of federal courts.").

111. Carrington, *supra* note 91, at 553. See also Note, *Playing With Numbers*, *supra* note 58, at 1508 ("the Supreme Court has long ceased to perform this function").

tinely "refuses to accept certification of an intra-circuit conflict on the grounds that it is the institutional responsibility of a court of appeals to resolve its own internal conflicts and uniformly develop circuit precedent."¹¹² For example, in *Civil Aeronautics Board v. American Air Transport, Inc.*,¹¹³ the Court dismissed a certificate from the D.C. Circuit, which had been "unable to agree on a disposition of the case," and suggested that "the Court of Appeals . . . hear this case en banc to resolve the deadlock indicated in the certificate and give full review to the entire case."¹¹⁴ Additionally, as the Court has noted on numerous occasions, the adjudication of intra-circuit conflict through en banc review is primarily an appellate court task because the courts of appeals "are the courts of last resort in the run of ordinary cases."¹¹⁵

Surprisingly, despite the Supreme Court's clear mandate that the courts of appeals resolve their own intra-circuit disputes, two judges of the Second Circuit have advocated, or at the very least condoned, the practice of leaving intra-circuit conflicts for the Supreme Court.¹¹⁶ Fortunately, this view has been rejected by most circuit judges. For example, in *Ford Motor Co. v. Federal Trade Commission*,¹¹⁷ Judge Rein-

112. Alexander, *Part I*, *supra* note 9, at 582.

113. 344 U.S. 4 (1952).

114. *Id.* at 4-5. See also *United States ex rel. Robinson v. Johnston*, 316 U.S. 649, 650 (1942) (remanding the case "for further proceedings, including leave to petitioner to apply for a hearing before the court en banc" where it appeared that a "conflict of views" had arisen "among the judges of the Ninth Circuit"), *cited with approval in* *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 260 n.20 (1953) (observing "that this Court has deemed the *en banc* power to be an important and useful device in the administration of justice in the courts of appeals is apparent from our action in" these cases).

115. *Textile Mills II*, 314 U.S. 326, 334-35 (1942).

116. See *Second Circuit Conference*, *supra* note 73, at 158 (remarks of Judge Kaufman) ("By subordinating personal views to the institutional needs for certainty and finality" and refusing to grant en banc review of cases creating intra-circuit conflict, the "question will finally be settled where it ought to be settled—at the Supreme Court level."); Newman, *supra* note 2, at 383 ("In the Second Circuit, we [are] . . . mindful that review by higher authority is available" and have therefore rejected en banc reconsideration). On at least two occasions, the Supreme Court justified the Second Circuit's confidence and granted certiorari. See, e.g., *Green v. Santa Fe Indus., Inc.*, 533 F.2d 1309, 1310 (2d Cir.) (per curiam), *cert. granted*, 429 U.S. 814 (1976) ("This Court has denied en banc . . . not because we believe these cases are insignificant, but because they are of such extraordinary importance that we are confident the Supreme Court will accept these matters under its certiorari jurisdiction"); *Eisen v. Carlisle & Jacqueline*, 479 F.2d 1005, 1020 (2d Cir.) (Kaufman, Feinberg, Mansfield, Mulligan, JJ. & Friendly, C.J. concurring in the denial of rehearing en banc), *cert. granted*, 414 U.S. 908 (1973) ("I vote against en banc, not because I believe this case is unimportant, but because the case is of such extraordinary consequence that I am confident the Supreme Court will take this matter under its certiorari jurisdiction.").

117. 673 F.2d 1008 (9th Cir. 1981), *cert. denied sub nom.* *Fed. Trade Comm'n v. Francis*

hardt dissented from the denial of rehearing en banc mainly on his belief that "our circuit would be better served if we did the necessary job [of resolving intra-circuit conflicts] ourselves. I think that it is *our* function to correct our errors in cases of general importance . . . through our en banc process."¹¹⁸ In fact, some circuit judges believe that even inter-circuit conflicts should be reviewed en banc.¹¹⁹

IV. CRITICISMS OF EN BANC REVIEW

A. Inefficiency

Most of the criticisms of en banc rehearings have focused on its alleged inefficiency.¹²⁰ For example, one circuit court judge has averred that "the en banc proceeding is the most time-consuming and inefficient device in the appellate judiciary's repertoire."¹²¹ The en banc procedure has also been disparaged by terms that run the gamut from "cumbersome"¹²² to "unwieldy,"¹²³ and has even been referred to as a "damned nuisance."¹²⁴

In claiming that en banc rehearings are inefficient, critics have asserted that "federal circuit courts currently labor under very heavy

Ford, Inc., 459 U.S. 999 (1982).

118. *Id.* at 1011 (Reinhardt, J. dissenting from denial of rehearing en banc). *See also* Madden, *supra* note 9, at 408 ("The courts of appeals have a duty to develop the federal law with uniformity."); Maris, *supra* note 41, at 96 ("The procedure in banc enables the court itself to deal authoritatively with problems of this nature, thus relieving the burden of the Supreme Court."); Carrington, *supra* note 91, at 583 ("the responsibility for maintaining the law of the circuit" belongs to the circuit judges.).

119. *See, e.g.*, Financial Inst. Employees Local No. 1182 v. NLRB, 750 F.2d 757, 758 (9th Cir. 1984) (Kennedy, J., dissenting from denial of rehearing en banc); *Uviedo v. Steves Sash & Door Co.*, 760 F.2d 87, 88-89 (5th Cir. 1985) (Rubin, J., dissenting from denial of rehearing en banc), *cert. denied*, 474 U.S. 1054 (1986).

120. *See, e.g.*, Bennett & Pembroke, *supra* note 74, at 532 ("in banc proceedings . . . are cumbersome, costly and time-consuming."); Note, *supra* note 2, at 1644 ("The major drawback of en banc review is its heavy cost in court and litigant time and expense."); Madden, *supra* note 9, at 418 ("The in banc procedure is inherently and unavoidably, time-consuming."); Carrington, *supra* note 91, at 582 ("The en banc procedure is . . . time consuming for the judiciary and burdensome to litigants.").

121. *Second Circuit Conference*, *supra* note 73, at 155 (remarks of Judge Kaufman).

122. Newman, *supra* note 2, at 382; *Green v. Santa Fe Industries*, 533 F.2d 1283, 1310 (2d Cir. 1976) (*per curiam*), *rev'd*, 430 U.S. 462 (1977).

123. RICHARD A. POSNER, *THE FEDERAL COURTS: CRISES AND REFORM* 101 (1985).

124. J. WOODFORD HOWARD, *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS* 217 (1981). *See also Second Circuit Conference*, *supra* note 73, at 152 (remarks of Judge Lawrence W. Pierce) (referring to en banc consideration as "[n]ettlesome").

caseloads"¹²⁵ without rehearing cases en banc.¹²⁶ Because more time is necessary to conduct full court review of a case than simply to dispose of it by a three-judge panel, the critics argue that the use of en banc rehearings "must be strongly disfavored, and justification for them should approach the level of necessity."¹²⁷

Although en banc review of a case may not be as efficient as a three-judge panel disposition of the same case, the extent and effect of its "inefficiency" have been greatly exaggerated. It is certainly true that the workload of the federal courts is heavy and has been increasing at a rapid pace. The Federal Judicial Center reported that in the thirty year period between 1958 and 1988, the annual number of civil cases terminated on the merits by the courts of appeals increased 577% from an annual figure of 2,831 to 19,178.¹²⁸ This increase in the

125. Note, *supra* note 2, at 1644. See also Alexander, *Part I, supra* note 9, at 576 (observing that most federal court circuit judges are functioning at full caseload capacity); *Second Circuit Conference, supra* note 73, at 155 (remarks of Judge Kaufman) (noting the "the federal courts' staggering work load"). It is also worth noting the candid remark of one circuit court judge that "American judges think of themselves as continuously besieged." Patricia M. Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books*, 100 HARV. L. REV. 887 (1987) [hereinafter Wald, *Some Thoughts on Judging*].

126. "Each year, every judge has a heavy schedule of brief-reading, oral arguments, motions work and opinion writing in connection with cases on the regular calendar. It is an enormous distraction to break into this schedule and tie up the *entire* court to hear one case en banc." Bartlett *ex rel.* Neuman v. Bowen, 824 F.2d 1240, 1243 (D.C. Cir. 1987) (en banc) (Edwards, J., concurring in the denial of rehearings en banc) (emphasis in original). See also Solimine, *supra* note 2, at 30 ("As it is, federal judges and their staffs are busy enough reading briefs, hearing oral arguments, and writing opinions in the panel process. The en banc process requires the judiciary to engage in another round of written and sometimes oral argument from the litigants.").

127. Alexander, *Part I, supra* note 9, at 577. See also Village of Belle Terre v. Boraas, 476 F.2d 806, 827 n.2 (2d Cir. 1973), *rev'd*, 416 U.S. 1 (1974) ("en banc review adds immeasurably to the expenditure of judicial time, energy and resources on the part of members of this already overburdened court."); Newman *supra* note 2, at 382 ("[t]he in banc process . . . places a severe strain on judicial resources already considerably overburdened."); Note, *supra* note 2, at 1644 ("en banc hearings occupy all of the active judges of the circuit with the adjudication of a single case."). The overall situation has caused one circuit judge to state that "[a]s one keenly aware of the federal courts' staggering workload and the concomitant need for efficient judicial administration, I am particularly distressed by the increasing popularity of the in banc procedure in several circuits." *Second Circuit Conference, supra* note 73, at 155 (remarks of Judge Kaufman). Interestingly, another judge of that same circuit asserts that the heavy workload of the federal courts has had the opposite effect—that of dissuading rehearings. See Friendly, *supra* note 78, at 676 ("[The] desire for more en bancs is being held in check by the tremendous pressure of work due to the explosion of the business of the courts of appeals.").

128. See THE FEDERAL APPELLATE JUDICIARY IN THE 21ST CENTURY, *supra* note 64. This figure reached an all-time high last year when the United States Courts of Appeals reached a disposition of 39,825 cases. See REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 135 (1991). By comparison, the annual number of civil cases commenced in

federal appellate caseload has had a similar impact on the individual judges, despite a coinciding expansion in the number of federal circuit court judges.¹²⁹ In 1964, Professor Wright's study of Fifth Circuit judges concluded that circuit judges who disposed of 80 cases per year were working at capacity.¹³⁰ By comparison, in 1989 Judge Edwards of the D.C. Circuit reported that during an average full court term he participated in the resolution of between 175 and 200 cases.¹³¹ Despite the voluminous number of cases handled by the circuits, the collective courts of appeals have granted only an average of 90 full court reviews each year over the past decade—approximately 8 annual rehearings per circuit. Viewed in proportion, en banc rehearings account only for .524% of all cases decided by the courts of appeals during the last decade, just slightly more than one-half of 1%.¹³² This figure is materially lower than the .644% of total cases decided en banc during the previous decade.¹³³ Moreover, the overall percentage of cases heard en

U.S. District Courts "only" increased 257%, from 67,115 annual cases to 239,634. *See id.* at 88. *See also* Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 387 (1983) [hereinafter Edwards, *The Rule of a Judge*] (reporting "an enormously expanding caseload, both in the quantity of cases heard and the mix of substantive issues").

129. The number of circuit judges authorized to sit on the courts of appeals is provided in 28 U.S.C. § 44(a).

130. *See* Charles A. Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEX. L. REV. 949, 956-57 (1964).

131. *See* Edwards, *The Role of a Judge*, *supra* note 129, at 389. *But see* Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986) (dismissing concerns about the litigation explosion by comparing gross percentage gains with per capita increases); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. REV. 4 (1983).

132. *See* Table III, *supra*.

133. *See* Table IV, *infra*. Thus, the criticism directed by one author at Professor Solimine that his study suffers from shortcomings "because it does not incorporate cases decided in 1988" and hence "fails to include decisions from the circuits that attained Reagan-appointed majorities [after] 1987" is without merit. *See* Note, *supra* note 100, at 866-67. This student's criticisms of en banc review that "[t]he overall number of cases disposed of en banc reached an all time high" in 1988 while "rehearings as a percentage of the total caseload also increased relative to" 1986-1987, are also irrelevant. *See id.* at 867 n.13.

TABLE III
Totals and Percentages of
En Banc Decisions
1982-1991

Year	Total Cases	Total En Banc Decisions	% of Total Caseload Heard En Banc
1982	12,327	74	.600
1983	13,217	66	.499
1984	14,327	106	.739
1985	16,369	85	.519
1986	18,199	90	.494
1987	18,502	88	.476
1988	19,178	117	.610
1989	19,322	98	.507
1990	21,006	85	.405
1991	22,707	89	.392
Ten Year Average	17,515	90	.524

banc by the courts of appeals has been steadily decreasing since 1988,¹³⁴ reaching a 20 year low in 1991 of .392% of total cases terminated on the merits.¹³⁵ In fact, the current yearly proportion of rehearings to decided cases is only about one-fifth of the 2.5% rate of 40 years ago.¹³⁶ Thus, contrary to alarmist critiques, rehearings constitute an insignificant, as well as a dwindling, share of the workload of federal circuit judges, and do not add a measurable burden to the existing federal caseload.¹³⁷

134. See Table IV, *supra*.

135. See Table III, *supra*; Table IV, *supra*.

136. In 1953, Judge Maris noted that "[t]he total number of cases heard or reheard in banc during the last annual term of the court was only six out of the total of 239 cases heard." Maris, *supra* note 41, at 92.

137. See Solimine, *supra* note 2, at 42 (noting that an intolerable burden is not created by these cases, which comprise approximately 0.5% of the caseload).

TABLE IV
Totals and Percentages of
En Banc Decisions
1972-1981

Year	Total Cases	Total En Banc Decisions	% of Total Caseload Heard En Banc
1972	5,748	20	.348
1973	6,555	23	.350
1974	5,980	81	1.355
1975	8,596	69	.803
1976	8,660	63	.727
1977	9,113	65	.713
1978	8,895	64	.720
1979	8,994	52	.578
1980	10,598	65	.613
1981	11,980	69	.576
Ten Year Average	8,512	57	.644

Critics of en banc review have also claimed that it is inefficient due to the decisionmaking dynamics involved in full court rehearings. Specifically, the critics assert that: (1) a full court "lacks the benefits of small, flexible decision making conferences and rapid exchanges of draft opinions;"¹³⁸ (2) larger groups of judges cannot function as efficiently as smaller groups;¹³⁹ and (3) "[c]ircuit judges, accustomed to accommodating three views in panel decision, will be less skillful in accommodating" the views of all their colleagues sitting en banc.¹⁴⁰

138. Alexander, *Part I*, *supra* note 9, at 577.

139. See, e.g., *Second Circuit Conference*, *supra* note 73, at 155 (remarks of Judge Kaufman) ("It is axiomatic that three judges, in an intimate conference, will find the heart of a case more quickly than will 11."); Alexander, *Part I*, *supra* note 9, at 576 ("[T]hree judges is generally conceded to be the most efficient number for hearing appellate cases"); Madden, *supra* note 9, at 417 ("A court comprised of three judges can decide a case in less time than a court comprised of seven to fifteen judges.").

140. Alexander, *Part I*, *supra* note 9, at 577. Thus, "[t]hree judges, in an intimate conference, will more quickly find the heart of a case than will seven or nine in a necessarily more

Additionally, the critics assert the process of deciding whether to grant en banc review is in itself time consuming because "[j]udicial time is expended not only in deciding the in banc appeal but also in deciding whether to support an in banc request initiated by a member of the court."¹⁴¹ Consequently, two Second Circuit judges have posited a direct correlation between a circuit's overall efficiency in disposing of appeals and the number of annual en banc rehearings granted, averring that "[i]t is not accidental . . . that the Second Circuit, which has the lowest rate of rehearings in banc of all the circuits, is also the most efficient circuit."¹⁴²

Although more judges are involved in en banc review of a case than in regular panel adjudication, it does not necessarily follow that full court disposition is less efficient. Indeed, Professors Lewis A. Kornhauser and Lawrence G. Sager have shown that "given a reasonable understanding of what the job of judging is and under reasonable assumptions about how well individual judges are likely to do it, enlarging the number of judges who sit on a court can be expected to improve the court's [overall] performance."¹⁴³ This is because the aggregation of judgments of a judicially consistent group of judges will create a greater "consistency" in their decisions.¹⁴⁴

Moreover, the criticisms levelled at the perceived inefficiency of en banc review based on the factors involved in aggregate decisionmaking are overly broad and miss the point, for the number of cases reviewed en banc, as well as the delays that ensue,¹⁴⁵ ultimately "vary according

formal conference." *Id.* at 576. See also John J. Parker, *Improving Appellate Methods*, Address before the American Political Science Assoc. (Dec. 28, 1949) in 25 N.Y.U. L. REV. 1, 9 (1950).

141. Newman, *supra* note 2, at 382. See also Solimine, *supra* note 2, at 38 ("The decision to en banc also affects how and when judicial resources will be applied to the remaining cases on the docket. Substantial delays can result, not only in rendering the en banc decision itself, but also in other cases not being heard en banc.").

142. *Second Circuit Conference*, *supra* note 73, at 155 (remarks of Judge Kaufman); see also Newman, *supra* note 2, at 382.

143. Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 83 (1986).

144. See *id.* at 102-15 (explaining and diagramming the correlation). See also Solimine, *supra* note 2, at 49 ("While Kornhauser and Sager do not specifically address en banc decisions, their analysis applies usefully to that process.").

145. The extent of delay has not been resolved. See *Second Circuit Conference*, *supra* note 73, at 155 (remarks of Judge Kaufman) ("The interval between oral argument and in banc disposition [sic] is five times as great—on average—as that for a panel disposition."); Alexander, *Part I*, *supra* note 9, at 577 ("If the en banc court is substituted after some panel consideration of the case, the average time elapsed from panel argument to en banc judgment quadruples"); Note, *supra* note 2, at 1644 ("[c]ases initially heard en banc take approximately two-and-one-half to three-and-one-half times longer than cases heard and disposed of by three-judge panels."); Note,

to the size of the circuit, its workload, the complexity of its en banc cases, the number and perhaps the individual characteristics of its active judges."¹⁴⁶ For example, although there are approximately the same number of judges on the Second and D.C. Circuits,¹⁴⁷ the judges of the D.C. Circuit consistently hear more cases en banc than their peers on the Second Circuit.¹⁴⁸ At least two reasons relating to individual circuit character explain this discrepancy. First, while the Second Circuit prides itself on cordiality and a general reluctance to grant en banc review of three-judge panel decisions,¹⁴⁹ the judges on the D.C. Circuit have been characterized as being embroiled in ideological division and often engage in heated disputes over the granting of en banc review.¹⁵⁰ Next, whereas the Second Circuit addresses a wide variety of

supra note 100, at 879 n.76 ("Three-judge panels can decide fifteen appeals for every case reheard en banc." (citing N.Y. L.J., Sept. 17, 1984, at I, col. 4)).

146. Alexander, *Part I, supra* note 9, at 576. See also Wald, *Calendar, Collegiality, supra* note 64, at 171 ("The character of a circuit is a delicate composite of history, judges' personalities, distinct kinds of regional issues and problems, and even different types of counsel who appear in court.").

147. See note 48, *supra*; Table VII, *supra*.

148. See Table II, *supra*.

149. See, e.g., Newman, *supra* note 2, at 384 ("Despite the occasions when each of us has read a panel opinion with which we profoundly disagree, we have been able, to a remarkable degree, to submerge our individual judicial convictions in the interest of the proper functioning of our court."). See also *Lopinsky v. Hertz Drive-Ur-Self Systems, Inc.*, 194 F.2d 422, 429 (2d Cir. 1951) (per curiam) (Clark, J., concurring) (stating that it is "the practice of this circuit never to sit *in banc*").

150. See, e.g., *Doe v. United States*, 821 F.2d 694, 711 (D.C. Cir. 1987) (en banc) (Mikva, J., dissenting) (lamenting that the majority "achieve[s] their results by distorting the statute which governs this case"); *Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Comm'n*, 826 F.2d 1074, 1092 (D.C. Cir. 1987) (en banc), *cert. denied*, 108 S. Ct. 1088 (1988) (Mikva, J., dissenting) ("The majority's conclusions are marred at every step by skewed articulation of the facts and warped application of the law. The court today manages in one opinion to do violence to principles of preclusion, retroactivity and statutory interpretation."); *Bartlett ex rel. Neuman v. Bowen*, 824 F.2d 1240, 1243 (D.C. Cir. 1987) (en banc) (Edwards, J., concurring in denial of rehearing en banc) ("Collegiality cannot exist if every dissenting judge feels obliged to lobby his or her colleagues to rehear the case en banc in order to vindicate that judge's position."); *id.* at 1245 (Ginsburg, J., concurring in denial of rehearing en banc) ("To demonstrate that *Martin v. D.C. Metropolitan Police Dept.*, 812 F.2d 1425 (D.C. Cir. 1987), warrants en banc attention, our dissenting colleagues indulge in much 'make believe' about that case and the precedent it applies. . . ."). See also H. SCHWARTZ, *PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION* 155 (1988) ("Many cases in the District of Columbia Circuit were *en banc* because the conservative majority on the circuit led by Judge Bork was unhappy with the decision"). Judge Edwards has taken particular umbrage at these remarks. See Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 Wis. L. REV. 837, 849 [hereinafter Edwards, *The Judicial Function*] ("I have felt damned by an increasingly common image of the judiciary, and particularly of the D.C. Circuit, as a fundamentally political body.").

conventional appeals,¹⁵¹ the D.C. Circuit's docket has a high concentration of administrative agency appeals¹⁵² and is often "the first, and usually the only, Article III court that will pass on the citizen's protest against what he or she perceives to be an arbitrary bureaucracy."¹⁵³ Because the D.C. Circuit may often be the only court to resolve the important type of disputes that appear only before it, its occasional fervor relating to en banc cases, and its tendency to grant rehearing, are not surprising.

The critics of en banc review have also asserted that once a rehearing has been granted, the logistics of en banc review, in which judges often travel to their circuit "seat" to hear a case,¹⁵⁴ further depletes the limited time of judges.¹⁵⁵ This again exaggerates the cost of reviewing cases en banc.

Although no formal internal operating procedure sets forth how often, or where, en banc rehearings are held, it is the informal practice of at least one circuit to designate a number of days each year in which to hear oral argument on cases granted en banc rehearing.¹⁵⁶ This practice, if not already in place in other circuits, may be easily adopted in order to minimize logistical inefficiencies, including judges' travel time, that may be caused by full court rehearings. Alternatively, because circuit judges are required by statute to attend semi-annual meetings of their judicial circuit,¹⁵⁷ it is possible to schedule en banc review of at least some cases around the time of these conferences in

151. The Second Circuit docket includes numerous cases arising under admiralty law and the Jones Act. *See, e.g.,* Alexander, *Part I, supra* note 9, at 588 ("[H]alf of all federal admiralty and Jones Act claims are begun in Second Circuit trial courts . . .").

152. One commentator notes that "[o]ne-fourth of all federal agency review cases reach the D.C. Circuit, far more than any other circuit." Egger, *supra* note 100, at 479 n.46 (1990). A. Leo Levin, *Uniformity of Federal Law, in* THE FEDERAL APPELLATE JUDICIARY IN THE 21ST CENTURY, *supra* note 64, at 138 (The D.C. Circuit "has exclusive venue on appeals in F.C.C. cases . . . and in cases growing out of a whole roster of other statutes.").

153. Wald, *Calendar, Collegiality, supra* note 64, at 172.

154. *See* 28 U.S.C. § 48(a), which governs the "seating" or terms of court.

155. *See, e.g.,* Alexander, *Part I, supra* note 9, at 577 ("[A]ssembling the judges en banc from among the several states of the[ir] . . . circuits may add to delay.").

156. This practice has been a standard procedure in the Third Circuit. *See* Letter from Chief Judge Dolores K. Sloviter to Michael A. Stein (August 8, 1992) (noting that "[i]t seems to me self-evident that when a court votes to in banc more than one case, they would be scheduled on the same day") (on file with the author).

157. *See* 28 U.S.C. § 332 (1988) (requiring each circuit's chief judge to "call, at least twice in each year and at such places as he may designate, a meeting of the judicial council of the circuit").

order to reduce expenditure of judicial resources further. It is also possible to limit the scope of en banc rehearings to specific issues of law.¹⁵⁸

Finally, because approximately one in six en banc cases are decided "on the briefs" without oral argument, they do not require the circuit judges to convene in a single place. Instead, the judges can either conference call or exchange electronic mail, faxes or memoranda. In fact, many circuits do not even require oral argument in cases they rehear en banc.¹⁵⁹

B. Finality

A second criticism of en banc rehearings is that they threaten the finality of three-judge panel decisions.¹⁶⁰ Critics of en banc review argue that the grant of appellate rehearing vacating an original panel decision "squarely contradicts the principle that there shall be one, final decision of the court of appeals"¹⁶¹ and that vacating an original panel decision indicates "that decisions reached by three-judge panels are not final but represent merely one step on an elongated appellate

158. See, e.g., 10TH CIR. INTER. OPER. P. IX(6) ("the rehearing may be limited as to particular issues"); 9TH CIR. R. 35-3(5) ("If any issues have been isolated for specific attention, the order may also set forth those issues."). The Second Circuit has ruled that an appeal may be heard en banc with respect to a particular issue. See *New York v. 11 Cornwell Co.*, 718 F.2d 22, 24 (2d Cir. 1983) (en banc on cross-appeal for attorney's fees); *Daye v. Att'y Gen. of New York*, 696 F.2d 186, 190 (2d Cir. 1982) (en banc on exhaustion of state remedies).

159. See, e.g., *Newman*, *supra* note 2, at 369 ("An in banc rehearing in the Second Circuit does not require oral argument." (quoting *S.E.C. v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1309-10 (2d Cir. 1971))). In addition, some circuits allow en banc courts to affirm a panel decision without opinion. See, e.g., United Circuit Court of Appeals for the Eleventh Circuit Rule 36.1. Rule 36.1 provides:

When the court determines that any of the following circumstances exist: (a) judgment of the district court is based on findings of fact that are not clearly erroneous; (b) the evidence in support of a jury verdict is sufficient; (c) the order of an administrative agency is supported by substantial evidence on the record as a whole; (d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record; (e) judgment has been entered without an error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

160. See, e.g., *Alexander*, *Part I*, *supra* note 9, at 599 ("the more serious objection to an en banc rehearing is its unsettling effect on finality of panel decisions."); Note, *supra* note 2, at 1645 ("Finality is also impaired by the availability of en banc rehearings."). But see *Maris*, *supra* note 41, at 96 ("A decision . . . made by a majority of all the judges of the court in banc obviously has much greater authority").

161. *Alexander*, *Part I*, *supra* note 9, at 600.

TABLE V

Percentage of En Banc Cases
Decided on the Briefs
1982-1991

Year	Total En Banc Decisions	Number of Cases En Banc Decided After Oral Argument	Number on the Briefs	% of Cases En Banc Decided on the Briefs
1982	74	68	6	8.1
1983	66	56	10	15.2
1984	106	95	11	10.4
1985	85	76	9	10.6
1986	90	71	19	21.1
1987	88	73	15	17.0
1988	117	92	25	21.4
1989	98	81	18	18.4
1990	85	64	21	24.7
1991	89	75	14	15.7
Ten Year Average	90	75	15	16.3

ladder.”¹⁶² It has also been suggested that “[t]he possibility that the decision of a three-judge panel may be overruled by an en banc court may result in routine suggestions for an en banc [re]hearing by the losing party.”¹⁶³

It must again be pointed out that en banc rehearings constitute little more than one half of one percent of all federal appellate court decisions.¹⁶⁴ Thus, even if the critics are correct that rehearing a three-

162. *Second Circuit Conference*, *supra* note 73, at 157 (remarks of Judge Irving R. Kaufman).

163. Note, *supra* note 2, at 1645.

164. See Table III *supra*.

judge panel decision en banc goes against the principle of one final appellate decision—a vastly overstated proposition—the infrequency with which cases are reviewed en banc moots this point. Moreover, however distasteful it might be for any particular judge to have her opinion overruled, it is a normal facet of judicial life that on occasion, a judge's decision will be overturned at the next level of review.¹⁶⁵

The critics have also asserted that en banc decisions erode finality of circuit law¹⁶⁶ and that they tend to generate multiple opinions, often with dissents,¹⁶⁷ resulting “in ambiguously worded compromise decisions accompanied by a host of concurring and dissenting opinions that

165. For example, of the appealed district court opinions terminated on the merits by the courts of appeals in 1991, 11% were reversed, 79% were affirmed, 6% were dismissed, and 3% were remanded back to the district courts. See REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (1991). Similarly, during the last Supreme Court term, the Court reversed 34.6%, vacated 47.4%, and affirmed 41% of the cases it reviewed from the courts of appeals. See *The Statistics of the Supreme Court 1991 Term*, 105 HARV. L. REV. 419 (1991).

166. See, e.g., *Second Circuit Conference*, *supra* note 73, at 156 (remarks of Judge Kaufman) (en banc cases tend to produce “either a majority opinion that was created in purposefully vague manner to forge a consensus within the court, or a litany of diverging opinions, injecting a degree of uncertainty into the law that we can well do without.”); Newman, *supra* note 2, at 383 (en banc decisions frequently produce “either a single majority opinion that is deliberately vague to key points in order to gain broad support within a court, or several opinions that express the differing views of groups of judges unable to join a definitive majority opinion.”). It is ironic that Judges Kaufman and Newman would be critical of forging panel consensus, given their professed favor of this practice. See *Second Circuit Conference*, *supra* note 73, at 158 (remarks of Judge Kaufman) (noting with approval the practice of “subordinating personal views to the institutional needs for certainty and finality.”); Newman, *supra* note 2, at 384 (“Despite the occasions when each of us has read a panel opinion with which we profoundly disagree, we have been able, to a remarkable degree, to submerge our individual judicial convictions in the interest of the proper functioning of our court.”).

167. For example, one pair of commentators reported that during 1983 and 1984, approximately two-thirds of all en banc opinions issued by the D.C. Circuit contained a dissent. See Bennett & Pembroke, *supra* note 74, at 541. This figure is significantly higher than the overall dissent rate on the D.C. Circuit of 6%. See Edwards, *Public Misconceptions Concerning the Politics of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619, 642 (1985); see also Ruth B. Ginsburg, *The Obligation to Reason Why*, 37 U. FLA. L. REV. 205, 212 nn.35-36 (1985). The results of a more representative study, which examined each of the 282 published en banc decisions rendered by the Courts of Appeals from 1985 through 1987, reported that only about one quarter of the published opinions contained *either* a concurrence or dissent. See Solimine, *supra* note 2, at 61. Professor Solimine has also suggested that the higher rate of dissent on en banc, as compared to panel decisions, may be inevitable. See *id.* at 46-47 n.92 (“On a panel of three judges, two will almost always agree on something even if all three reach decisions by flipping coins. Accordingly, the rate of dissent on a panel is given by the rate of dissent on any single judge. If each judge on the panel goes along with any given colleagues 90% of the time, panels will be unanimous in 90% of the cases. The probability of unanimity falls as the size of the court increases.” (citing Kornhauser & Sager, *supra* note 143, at 99-100 (discussing Supreme Court voting behavior on certiorari))).

give subsequent panels ammunition for distinguishing or ignoring the en banc decision."¹⁶⁸

The assertion that multiple opinions impede finality of circuit law lacks merit. Regardless of the number of opinions contained in a decision, the majority's ruling controls.¹⁶⁹ Multiple opinions are also the usual method by which the Supreme Court announces its rulings,¹⁷⁰ yet no one would claim that as multiple opinions they make the Court's rulings less dispositive.

Moreover, the "evils" of separate opinions "have been overstated."¹⁷¹ Because multiple opinions generally make individual judges' positions on specific issues more readily comprehensible and predictable, instead of eroding finality they add "considerable rationality, continuity, and legitimacy to the decision making process."¹⁷² This is especially true of dissenting opinions, because "a judge can write her dissent just the way she wants; she need not defer to a colleague's sensibilities in order to gain a needed vote. The dissenter can thus be an unabashed advocate."¹⁷³ Consequently, "[s]ome of our greatest juris-

168. Note, *supra* note 100, at 877.

169. Admittedly, one way en banc cases can fail to achieve uniformity is when an en banc panel is evenly split. Under those circumstances, the original trial court decision is reinstated, and the opportunity for a full appellate court to issue an opinion on the state of the law is lost. *See, e.g.,* Ginsburg, Feldman & Bress v. Federal Energy Admin., 591 F.2d 752 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 906 (1979); Bankers Life Co. v. United States, 587 F.2d 893 (8th Cir. 1978); Illinois Migrant Council v. Pilliod, 548 F.2d 715 (7th Cir. 1977); United States v. Holmes, 537 F.2d 227 (5th Cir. 1976); Pennsylvania v. O'Neill, 473 F.2d 1029 (3d Cir. 1973); United States v. Walden, 458 F.2d 36 (4th Cir.), *cert. denied sub nom. Ard v. United States*, 409 U.S. 867 (1972); Allegheny Corp. v. Kirby, 340 F.2d 311 (2d Cir. 1964), *cert. dismissed sub nom. Holt v. Allegheny Corp.*, 384 U.S. 28 (1966).

170. For example, the 120 written opinions of the Court's 1991 term included 95 dissents and 47 concurrences. *See The Statistics of the Supreme Court 1991 Term, supra* note 165. Prior tabulations may be found in the annual November issues of that publication.

171. David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 743 (1987).

172. Note, *supra* note 2, at 1655.

173. Wald, *Changing Course, supra* note 80, at 495. Dissents may also potentially influence a judge's peers—or even a higher court—to modify their views. For example, Judge Wald has described how some judges, through the use of "invitational dissents," have played a "John the Baptist" role in the evolution of the law. *See id.* at 495 & n.54 (citing ROBERT J. GLENNON, JEROME FRANK: ICONOCLAST AS REFORMER 181-82 (1985)). Brennan's biography of Judge Frank chronicles how Judge Frank's dissenting position in a Fourth Amendment issue was eventually vindicated by the Supreme Court. *See also* Wald, *Changing Course, supra* note 80, at 493 n.51 ("it is not at all uncommon to see a dissenter singled out for recognition in Supreme Court opinions."); *Interaction and Decisionmaking on Collegial Courts: A Panel Discussion*, 71 JUDICATURE 339, 342 (Apr. 1988) ("Over 77 percent of the responses [from a comprehensive study] indicated that a dissenter frequently or sometimes causes the majority to alter its original opinion." (remarks of Professor John W. Cooley)).

prudence has been introduced into the law in the form of dissents and expressions of minority views."¹⁷⁴

C. Collegiality

A third criticism of en banc rehearings is that they erode collegiality among the members of a circuit. It is asserted that some judges regard a vote in favor of rehearing a case upon which they sat as a personal insult,¹⁷⁵ and that even the prospect of an en banc rehearing deals a heavy blow to the psyches of the judges constituting a three-judge panel whose decision will become the focus of the full court's attention.¹⁷⁶ Similarly, it has also been asserted that "en banc reversals amount to a vote of no confidence in the three-judge panel that already decided the appeal."¹⁷⁷

Despite any bruised feelings that might be engendered, en banc review is required by the institutional norm that judges speak and vote their conscience because they may not "properly sacrifice openness and candor for the sake of other goals."¹⁷⁸ This is not to say that judges may not compromise in either writing or in joining an opinion, for it is undeniable that a certain amount of give-and-take is necessary in order

174. Wald, *Calendar, Collegiality*, *supra* note 64, at 176. This is because "[t]he dissenting opinion provides insight into judicial attitudes usually not found in opinions for the court." Douglas O. Linder, *How Judges Judge: A Study of Disagreement on the United States Court of Appeals for the Eighth Circuit*, 38 ARK. L. REV. 479, 481 (1985). See also PERCIVAL E. JACKSON, *DISSENT IN THE SUPREME COURT: A CHRONOLOGY* 15 (1969) ("It is the dissenter who dares to be outspoken. . .").

175. See, e.g., Wald, *Changing Course*, *supra* note 80, at 486; Alexander, *Part I*, *supra* note 9, at 543; Linder, *supra* note 174, at 487 ("[E]n banc cases more frequently generate 'bad feelings' than do panel cases."). But see COFFIN, *supra* note 86, at 174 ("In these differences and in the process of criticism, response, and resolution lies the virtue of the appellate process.").

176. See, e.g., *Second Circuit Conference*, *supra* note 73, at 157 (remarks of Judge Kaufman); Wald, *Calendar, Collegiality*, *supra* note 64, at 181 ("En bancs generate the highest personal tensions on a court . . . losing an en banc is a bitter pill, since the entire court is now on record the other way.").

177. Note, *supra* note 100, at 880. See also Wald, *Calendar, Collegiality*, *supra* note 64, at 181 ("When a full court is asked to en banc a panel opinion, collegiality is at its greatest risk.").

178. See Shapiro, *supra* note 171, at 731. See also Guido Calabresi, *Bakke as Pseudo-Tragedy*, 28 CATH. U. L. REV. 427, 428-30 (1979); Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 236-41 (1968); L.L. Fuller, *Legal Fictions*, (Parts 1-3) 25 ILL. L. REV. 363, 513 & 877 (1931); Grant Gilmore, *Law, Logic and Experience*, 3 HOW. L.J. 26, 37-38 (1957); Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 17 n.29 (1934). Cf. Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 299-326 (1990) (arguing that the belief in law is partially self-fulfilling and that introspection, in addition to candor, threatens those partially self-fulfilling beliefs).

to reach a case disposition that is mutually agreeable to all involved.¹⁷⁹ Nor would anyone disagree about the important role that collegiality plays on a court. Certainly one of the most crucial aspects of "running an appellate court is maintaining an atmosphere in which judges can agree or disagree on substance free of personality clashes or risk of personal reprisal."¹⁸⁰

Professor Cooley has written at length on the dynamics of appellate decisionmaking:

The judge's performance of the problem solving function in a small group, for example at the appellate level, is a much more complex, and indeed a more sophisticated, type of negotiation. It requires the delicate intermeshing of the separate problem solving functions of several persons, taking into account, at the very least, their personalities, their philosophies, their varying intellectual and interpersonal abilities, and their individual biases and prejudices formed through varying backgrounds and experience, both legal and nonlegal. "Appellate decision making," if used to describe what appellate judges primarily do, is really a misnomer. It describes only part of the appellate judge's function, omitting the more difficult and perhaps more important behavioral aspects of the function—the creative, generative, persuasive, interpersonal tasks. Indeed, what we all have long believed to be "appellate decision making" is truly negotiation on a higher plane.¹⁸¹

Judge Edwards' insights are also worth quoting at length:

When judges respect one another and are amicable in their dealings, the decisionmaking process runs smoothly: the judges' post-hearing conference focuses on the applicable legal precedent and record facts, with each judge openly airing concerns about difficulties seen with the case; there are post-conference memoranda and discussions between chambers which are thoughtful and helpful in narrowing the issues before the panel and in pursuing the correct answer to the case; if and when the judge who is assigned to write the case runs into unexpected difficulties, these matters are discussed with judicial colleagues with an aim to reaching a mutually satisfactory accord; and, once a draft opinion is circulated, comments from judicial colleagues are given to improve the opinion, e.g., to correct record citations, to question applications of circuit precedent and to

179. "Certainly, the art of compromise is not out of place in the halls of justice." Shapiro, *supra* note 171, at 743. See also *Ellis v. Minneapolis Comm'n on Civil Rights*, 295 N.W.2d 523, 525 (Minn. 1980) ("In the collegial decision making of an appellate court an individual judge's purely personal views are of less significance than they would be in a trial court and he is subject to collegial restraint should he be inclined to act on them. . . .") (quoting ABA STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS § 3.42 (1977 draft)); Wald, *Changing Course*, *supra* note 80, at 503 ("The search for consensus is a vital part of the dynamics of any decisionmaking body.").

180. Wald, *Calendar, Collegiality*, *supra* note 64, at 178. See also Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 807-11 (1982).

181. John W. Cooley, *How Decisions Are Made in Appellate Courts*, THE JUDGES' J., Spring 1987, at 3.

offer suggestions for language changes where the draft opinion is unclear. There is no enmity in this process; there are no hidden political agendas at stake; there are no ideological leanings affecting the dialogue between the judges.¹⁸²

Nevertheless, as Professor David Shapiro has noted, "the sticking point can and should be an unwillingness to make or join in a statement that does not represent the judge's views and that will mislead the opinion's readers as to what those views are."¹⁸³ Under those circumstances, strict institutional integrity obligates individual judges to vote for rehearing of three-judge panel decisions that do not represent their understanding of the law.¹⁸⁴

Ultimately, the determination of whether certain portions of a proposed opinion adequately "represent the judge's views"¹⁸⁵ receives much latitude from the individual judges themselves, as judges often disagree over whether "mere" disagreement is sufficient cause to overturn a panel decision en banc.¹⁸⁶ A striking example of how individual judges may disagree over whether en banc is necessary in any particular case is provided by *Bartlett ex rel. Neuman v. Bowen*.¹⁸⁷ In *Bartlett*, the Court of Appeals for the D.C. Circuit on its own motion reconsidered appellees' suggestions for en banc rehearing of a panel decision that consolidated three appeals; vacated its previous orders granting en banc rehearing of the consolidated panel decision, and reinstated the

182. Edwards, *The Judicial Function*, *supra* note 150, at 858.

183. Shapiro, *supra* note 171, at 743. See also SAMUEL ESTREICHER & JOHN SEXTON, *REDEFINING THE SUPREME COURT'S ROLE* 57 (1986) ("Disuniformity in the law becomes intolerable when litigants are . . . unable readily to adjust their affairs to the law's divergent commands."); Easterbrook, *supra* note 180, at 807-08 ("The assertion that it is 'beneficial' to write skeletal opinions in order to obtain more agreement is dubious."); *Interaction and Decisionmaking on Collegial Courts: A Panel Discussion (remarks of Justice Seymour Simon)*, *supra* note 173, at 340 ("If you get a lot of dissenting opinions, so be it; I think that's the way the law grows and if collegiality means a great effort toward unanimity, who needs it.").

184. Note, *Playing with Numbers*, *supra* note 58, at 1510 n.32 ("[T]he en banc mechanism is always available to judges who merely disagree with a circuit panel's decision.").

185. Shapiro, *supra* note 171, at 743.

186. Compare *Walters v. Moore-McCormack Lines, Inc.*, 312 F.2d 893, 894 (2d Cir. 1963) (en banc) ("Mere disagreement, or likelihood of disagreement, with the panel decision, has not generally been regarded as sufficient reason for a further hearing . . .") with *United States v. Singleton*, 763 F.2d 1432, 1432 (D.C. Cir. 1985) (Edwards J., concurring in denial of rehearing en banc despite his "find[ing] it difficult to subscribe to the panel's decision"). Moreover, one pair of commentators finds disuniformity in the federal court system expected, tolerable, and sometimes even beneficial, because it allows issues to "percolate" and undergo a thorough analysis in lower courts before reaching the appellate or Supreme Court level. See ESTREICHER & SEXTON, *supra* note 183, at 50-52.

187. 824 F.2d 1240 (D.C. Cir. 1987) (en banc).

original panel decisions.¹⁸⁸ Although the judges concurring and dissenting to the denial of rehearing en banc agreed that no single opinion could represent every judge's view,¹⁸⁹ they vehemently disagreed whether the original three-judge panel decision was a "sweeping and revolutionary decision"¹⁹⁰ or one which "merely follows well-established Supreme Court precedent."¹⁹¹

As a practical matter, jurisprudential rigidity is tempered by collegial considerations, and "the most effective antidote" against unwarranted en banc reconsideration of a case still remains "the very human desire of judges to coexist in peace."¹⁹²

Finally, it is worth noting that some judges believe rehearings *induce* collegiality. For example, Judge James R. Browning of the Ninth Circuit has reported that members of his circuit "thoroughly enjoy participating in en banc proceedings" and in fact view en banc gatherings as an "opportunity for interchange that leads to improved personal communication and to the development of the attitude of trust and respect that is essential to judicial deliberation."¹⁹³ In fact,

188. *Id.* at 1240-42.

189. *See id.* at 1244 (Edwards, J., concurring in denial of rehearings en banc) ("Obviously, no judge agrees with all of the decisions handed down in the circuit, nor would every judge write a particular opinion in the same fashion."); *id.* at 1253 (Starr, J., dissenting from vacatur of orders) ("Whether a particular exercise of judicial judgment is sound or not is itself, I recognize, peculiarly a matter of judgment. There is apt to be no incontestably 'right' answer if the issue is truly one entrusted to the exercise of a court's judgment. What is right and meet will depend in large measure upon one's conception of what is appropriate and proper under the circumstances.").

190. 824 F.2d at 1248 (Bork, Starr, Buckley, Williams and D.H. Ginsburg, J.J., dissenting from the vacatur of orders and from denial of rehearings en banc). The polemics were sufficiently heated to gain national attention. *See Karpay, En Banc Furor, Liberal Fury*, AM. LAW., May/June 1988, 10 (special supplement) (noting "the commitment of many Reagan appellate appointees to leave their ideological fingerprints on as many key decisions as possible."). Ironically for those critics who assert that many judges vote in favor of en banc because of ideological considerations, *see infra*, the "swing" vote which ultimately vacated the previous orders in favor of en banc rehearings, was cast by a Reagan appointee. *See Bartlett ex rel. Neuman*, 824 F.2d at 1246 (Silberman, J., concurring in denial of rehearings en banc) ("I am the one who, upon reflection, has reconsidered his views.").

191. *Id.* at 1242-43 (Edwards, J., concurring in denial of rehearings en banc).

192. Wald, *Changing Course*, *supra* note 80, at 488. These considerations often result in the balancing of otherwise competing values. *See Interaction and Decisionmaking on Collegial Courts: A Panel Discussion*, *supra* note 173, at 342 (remarks of Professor Geoffrey Miller) ("I think that judges and justices want it both ways. At times most of them have enormous collegiality and stick to the view that this is the law and we want unanimity. On the other hand, when it suits their purposes or interests, then it is their responsibility to disagree.").

193. *Second Circuit Conference*, *supra* note 73, at 163 (remarks of Judge Browning). Other judges share Judge Browning's view. *See, e.g., Maris*, *supra* note 41, at 96-97 ("The Circuit Judges of the Third Circuit think that [the en banc] procedure has been very helpful in maintaining the very high esprit de corps which they enjoy."). The differing attitudes towards en banc

"[i]nstitutional harmony may be *advanced* by permitting judges to participate in important cases about which they have strong feelings."¹⁹⁴

D. Ideology

Finally, a recent group of critics has asserted that the Reagan and Bush appointees, who comprise a majority of the present federal appellate judiciary,¹⁹⁵ are actively turning the jurisprudence of their circuits to the right.¹⁹⁶ This second group of critics argue that one way the new conservative majorities achieve their ideological goals is by granting rehearings in order to overrule fundamental constitutional decisions rendered earlier by more liberally-minded panels.¹⁹⁷ For example, one commentator, reiterating criticisms made in other publications, asserts that the changed political composition of the Sixth, Seventh and Eighth Circuits has yielded an increased use of en banc review to override established circuit caselaw,¹⁹⁸ thereby compromising "important judicial values."¹⁹⁹

rehearings may ultimately be due to the fact that "[c]ollegiality is not a matter of numbers." *Second Circuit Conference*, *supra* note 73, at 159 (remarks of Judge Browning).

194. Note, *supra* note 2, at 1649 (emphasis added).

195. As of October 1992, 92 of 145—almost two-thirds of all federal circuit judges—had been appointed by either President Reagan or Bush.

196. See, e.g., Stephen Wermiel, *Full-Court Review of Panel Rulings Becomes Tool Often Used by Reagan Judges Aiming to Mold Law*, WALL ST. J., Mar. 22, 1988, at 70, col. 1 (declaring that en banc review "has become a weapon for some Reagan appointees seeking to steer federal courts in a more conservative direction."); SCHWARTZ, *supra* note 150 ("Many cases in the District of Columbia Circuit were *en banc*ed because the conservative majority on the circuit led by Judge Bork was unhappy with the decision, and there are indications that this is happening in other circuits as well."). But see *Rakovich v. Wade*, 850 F.2d 1179, 1180 (7th Cir. 1987) (Ripple, J., dissenting from granting hearing en banc) ("Certainly, no member of the court believes, I hope, that an en banc proceeding may be used as a vehicle to permit judges to further their own ideological predilections.").

197. See, e.g., Solimine, *supra* note 2, at 32 (concluding "that over one-half of the cases" [reviewed by en banc from 1980 to 1987] should not have been decided by the full court."); Note, *supra* note 100, at 874 (criticizing "the emergence of a trend towards the use of en banc review to advance ideological and partisan goals."); Noreen Marcus, *Rule of Law (and Economics)*, AM. LAWYER, June 1988, at 39 (special supplement) ("The conservative majority is using en bancs to say to the liberals, 'You'd better get in line. We're running the show now.'"); Ann Woolner, *Tug of War Gets Intense*, AM. LAWYER, June 1988, at 34 (special supplement) (dichotomous partisan appointment "has led to a deeply divided court replete with spats among the judges and bitter battles over en banc rehearings that often turn the tables on panel decisions and even on precedent.").

198. See Note, *supra* note 100, at 874-75. As of October 1992, 9 of the 14 active Sixth Circuit Court judges, 7 of the 10 active Sixth Circuit judges, and 8 of the 10 active Eighth Circuit Court judges had been appointed by either President Reagan or Bush.

199. Note, *supra* note 100, at 866.

TABLE VI
Number of Active Reagan/Bush
Appointed Circuit Judges

Circuit	Number of Active Judges	Number of Reagan/Bush Appointees
D.C.	11	7
First	4	3
Second	12	8
Third	11	10
Fourth	13	6
Fifth	13	11
Sixth	14	9
Seventh	10	7
Eighth	10	8
Ninth	28	14
Tenth	10	6
Eleventh	9	4
Total	145	92

There are several flaws in these assertions. First, the critics' assertions of conspiratorial jurisprudence fail when examined in light of the contrary evidence that has been assembled. For example, a thorough study of the en banc voting patterns of circuit judges by Professor Michael Solimine concluded that "[t]he data do not support the charge that the Reagan-appointed judges are using the en banc procedure as an ideological tool."²⁰⁰ In addition, the assertions made just do not

200. Solimine, *supra* note 2, at 62. See also Timothy B. Tomasi & Jess A. Velona, Note, *All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766, 791 (1987) (concluding that "Reagan judges do not appear to be more conservative in their judicial decision-making than their Republican colleagues."); Joan M. Cheever & Edward Frost, *A Reagan Star Shines Bright on the 'Hot Bench'*, AM. LAW., June 1988, at 17 (special supplement) ("The idea that appointees of any administration, including [Reagan's], have significantly changed the day-to-day decision making of the courts is vastly overstated." (quoting Judge Jon O. Newman)); Freiwald, *The Mission: Stock Bench*, AM. LAW.,

stand up to numerical scrutiny, for they cannot account for why the Second Circuit, whose twelve members include eight Reagan/Bush appointees,²⁰¹ consistently has among the fewest annual en banc rehearings.²⁰²

Moreover, these criticisms are based upon the postulate that judges vote in blocs that can be directly correlated to party affiliation.²⁰³ Consequently, both an individual judge's position, and by extension those of her similarly appointed colleagues, can be predicted in advance. The validity of such a jurisprudential litmus test is at best debatable.²⁰⁴

Certainly, presidents have historically chosen federal court judges whom they believe will uphold their own party's general philosophical outlook.²⁰⁵ It is, however, incorrect to aver that on any given issue all

May/June 1988, 7 (special supplement) ("Reagan judges rarely vote in blocs"); Susan D. Rice, *Earl Warren Would Blush*, AM. LAW., May/June 1988, 46 (special supplement) ("In 95 percent of the cases, it doesn't make a difference whether you're a Republican, a Democrat, or a radical. You arrive at the same result." (quoting Judge Browning)).

201. As of this writing, the Second Circuit had one vacancy. For a list of the authorized number of appellate judges per circuit, see note 48, *supra*.

202. See Table I, *supra*.

203. One of the first individuals to study judges' voting patterns was Professor Sheldon Goldman, a political scientist who reviewed the voting behavior of federal appellate court judges and concluded that "an element of justice-by-lottery is inherent in the three member panel device." Sheldon Goldman, *Conflict and Consensus in the United States Courts of Appeals*, 1968 WIS. L. REV. 461, 481. This thesis was in turn sharply criticized by Judge Henry J. Friendly, who cautioned that the reader of Goldman's article "should not draw from these figures, relating to a small fraction of the cases decided by the courts of appeals, a conviction that judges regularly vote on ideological lines." See Friendly, *supra* note 78, at 677. Subsequent studies have buttressed Judge Friendly's position. See, e.g., J. WOODFORD HOWARD, JR., COURTS OF APPEAL IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH AND DISTRICT OF COLUMBIA CIRCUITS 160-88 (1981) (study of appellate judge voting found that judges tend to vote along lines of duty rather than along lines of political preconceptions); Jilda M. Aliotta, *Combining Judges' Attributes and Case Characteristics: An Alternative Approach to Explaining Supreme Court Decision-making*, 71 JUDICATURE 277 (1988) (identifying correlation in voting patterns by prestige of education, political and prior judicial experience, and specific judicial viewpoints.); Edwards, *The Judicial Function*, *supra* note 150, at 854 ("There is simply no significant statistical support for [the] underlying . . . premise that judicial results invariably flow from judges' politics, rather than from legal principles.").

204. Judge Edwards has lamented the prevalence of this premise as well. See Edwards, *The Judicial Function*, *supra* note 150, at 849-50 ("This vision of a politicized judiciary, in which cases are decided on ideological grounds and judges defined by their partisan affiliations, seems to grow more popular each year. By now, it is almost taken for granted by much of the media, and doubtlessly accepted as truth by significant portions of the bar and the public as well.").

205. See, e.g., Justin J. Green, *Parameters of Dissensus on Shifting Small Groups*, in JUDICIAL CONFLICT AND CONSENSUS 139, 150 (Sheldon Goldman & Charles M. Lamb eds., 1986) ("[The] party of the appointing president would be the best variable to adopt as a surrogate measure of political ideology."); Wald, *Calendar, Collegiality*, *supra* note 64, at 178

judges appointed by the same political party, or even for that matter by the same president, will always reach the same conclusion, even if that is often the result.²⁰⁶ Such a premise is based upon faulty methodological assumptions for it ignores the unique nature of judges in both their individual capacity and as collective bodies. For example, in the *Bartlett* decision discussed above, Judge Laurence H. Silberman, an otherwise rather conservative Reagan-appointee, reconsidered his views and voted alongside his democratic-appointed colleagues on reconsideration of the court's previous orders granting rehearings.²⁰⁷ Indeed, the characterization of judges voting along strictly ideological lines, has been ardently rejected by Judge Edwards, one of the "victims" of the conservatives' alleged tactics, who asserts that "members of the federal judiciary strive, most often successfully, to decide cases in accord with the law rather than with their own ideological or partisan preferences."²⁰⁸ Judge Edwards has also noted that the more judges are depicted as engaging in political or result-oriented decisionmaking, the greater the likelihood that these accusations will be believed regardless of their intrinsic validity.²⁰⁹

Second, even if judges were inclined to vote along party affiliation lines, it is by no means clear that the decision to vote in favor of rehearing a case is motivated by political, rather than jurisprudential, concerns.²¹⁰ The same circuit judge who avowed that there are circuit

("[P]residents overwhelmingly choose judges with sympathetic philosophies. . . ."). For an examination of the possible congruence of political party affiliation and voting patterns, see generally Richard A. Brisbin, *Federal Courts and the Changing Role of American Political Parties*, 5 N. ILL. U. L. REV. 31 (1984); John C. Danforth, *The Federal Judiciary and Partisan Politics*, 4 ST. LOUIS U. PUB. L. REV. 199 (1984); Goldman, *supra* note 203, at 481.

206. See, e.g., Edwards, *The Judicial Function*, *supra* note 150, at 854 ("It is absolutely false, however, that judges' politics routinely determine the outcomes of cases.").

207. *Bartlett ex rel. Neuman v. Bowen*, 824 F.2d 1240, 1246 (D.C. Cir. 1987) (Silberman, J., concurring in the denial of rehearings en banc).

208. Edwards, *The Judicial Function*, *supra* note 150, at 838.

209. See Edwards, *The Judicial Function*, *supra* note 150, at 838-39 (asserting that "[e]ven if judges are able to resist the temptation to conform to the false perception, continued assessments of judicial performance in political terms will promote a 'new reality,' for most people will come to believe that the judicial function is nothing more than a political enterprise.").

210. This postulate has become the foundation of the critical legal studies movement. See, e.g., Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 571-72 (1983) (castigating the notion that legal doctrine and principled decisionmaking may be distinguished from "open-ended ideology."). Interestingly, many of the judges who are presumably the subject of this scholarship, disagree with its conclusion. See, e.g., Edwards, *The Judicial Function*, *supra* note 150, at 838 ("[M]embers of the federal judiciary strive, most often successfully, to decide cases in accord with the law rather than with their own ideological or partisan preferences."); Alvin B. Rubin, *Does Law Matter? A Judge's Response to the Critical Legal Studies*

judges "who believe it is their duty to seek in banc reconsideration of every opinion that has decided a significant issue contrary to their judicial views,"²¹¹ acknowledged at the same time that "[t]here is frequently room for honest difference of opinion about whether a panel decision is really at variance with a precedent of the circuit or merely looking the other way on distinguishable facts."²¹²

Most importantly, even if it could be shown that certain judges decide cases based upon "political considerations,"²¹³ such action hardly "compromises . . . important judicial values."²¹⁴ This is because "political considerations" themselves account for a good many of these critics' assertions, and are often the result of intense scrutiny by anti-conservative commentators to the voting patterns of judges recently appointed by Republican administrations.²¹⁵ Thus, as one commentator has suggested, perhaps someone "should remind the critics who charge the Reagan appointees with political use of the en banc process of the danger of throwing stones from glass houses."²¹⁶

Further, these criticisms are based upon unfair assumptions. Under their scheme, the critics of en banc review consider liberal decisions rendered by panels composed of a majority of Democrat-appointed judges neutral, while the reversals of these decisions by circuits composed of a majority of Republican-appointed judges are labelled

Movement, 37 J. LEGAL EDUC. 307, 307-08 (1987) ("My conclusions are that legal doctrine is a real force, judges follow it, and they decide all but a small fraction of the cases that come before them in accordance with what they perceive to be the controlling legal rules.").

211. Newman, *supra* note 2, at 384. See also Wald, *Changing Course*, *supra* note 80, at 483 ("[T]here are judges . . . who, as a point of honor, seek to en banc every case they lost at the panel stage.").

212. Newman, *supra* note 2, at 370-71. See also Solimine, *supra* note 2, at 40 n.53 ("Reasonable judges can disagree over whether different panel decisions in fact conflict." (citing *Klein v. Stop-N-Go*, 824 F.2d 453, 453 (6th Cir. 1987) (per curiam) (Krupansky, J., dissenting) (accusing the panel majority with creating an intracircuit conflict))) and *Bartlett ex rel. Neuman v. Bowen*, 824 F.2d 1240, 1249 (D.C. Cir. 1987) (Bork, Buckley, D. Ginsburg, Starr & Williams, JJ., dissenting from denial of en banc rehearings) (asserting that since there was a conflict in the panel decisions, the case ought to be heard en banc.); Wald, *Changing Course*, *supra* note 80, at 491 ("Judges honestly differ about whether the facts distinguishing one case from another, despite common principles, are material enough to justify or even dictate a different result.").

213. See, e.g., Wald, *Changing Course*, *supra* note 80, at 479 ("[I]n the high visibility cases, involving controversial social or 'moral' issues, our differences in judicial philosophy, on the proper role of the courts in a democratic society, do emerge front and center.").

214. Note, *supra* note 100, at 866.

215. "[T]he recent shift in composition of the courts, has focused attention on the purported motivations and strategic behavior of the appellate judges deciding cases en banc." Solimine, *supra* note 2, at 29 n.5.

216. *Id.* at 47-48.

ideological.²¹⁷ As one circuit judge has noted, "[s]o entrenched is the political vision of the circuit court that commentators can find partisan overtones in even quite neutral court activities."²¹⁸ There are, however, other less extreme, and in fact politically neutral methods, for depicting the conduct of federal court judges.²¹⁹ For example, Professor Richard Fallon has characterized the traditionally opposite approaches to the assertion of power by federal courts over state courts as an ideological struggle between the advocates of "Federalist" and "Nationalist" theories,²²⁰ without passing judgment on the validity of the jurisprudence of either group.

Finally, even if the jurisprudential outlook of the collective circuits has become more conservative, this does not mean that institutional values have been compromised, for it is normal that "gradually and subtly, the jurisprudence of a court reflects the politics of the nation."²²¹ Because appointments to the federal judiciary have been in the

217. One D.C. Circuit Court judge offers the following example:

a decision not to reconsider a panel ruling allowing Eastern Airlines to furlough thousands of employees is described as a win for "the Reagan appointees" and a defeat for "the liberals"; the same story, in an effort at a novel brand of nonpartisanship, is quick to point out that "the conservatives were the losers last October," when "[f]our Reagan appointees lost a bid to rehear a decision" involving attorney's fees.

Edwards, *The Judicial Function*, *supra* note 150, at 850, citing *Eastern Case Stirs D.C. Circuit Discord*, *LEGAL TIMES*, Jan. 16, 1989, at 12. The literature is replete with other examples. *See, e.g.*, Note, *supra* note 100, at 880 ("[I]deological use of en banc review . . . introduces the hazard of result-oriented manipulation at another level and is worth excising when no strong reasons justify its use."); Bernard Weinraub, *Reagan Says He'll Use Vacancies to Discourage Judicial Activism*, *N.Y. TIMES*, Oct. 22, 1985, at A1 (reporting that Harvard Law Professor Laurence H. Tribe believes that Reagan has been "stacking . . . the Federal judiciary" with individuals "hand-picked to serve a concrete social and political agenda."); Tom Wicker, *Splendid for Starters*, *N.Y. TIMES*, May 6, 1986, at A31 (referring to Reagan appointees as "rigid ideologues").

218. Edwards, *The Judicial Function*, *supra* note 150, at 852.

219. *See* Simonett, *supra* note 81, at 207 ("There is a large variety of labels for judges: liberal or conservative, innovator or traditionalist, strict or loose constructionist, pragmatist or idealist, activist or nonactivist. But labels are little more than that. . . .").

220. *See* Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 *VA. L. REV.* 1141, 1143-46 (1988). Under the Federalist model "states emerge as sovereign entities against which federal courts should exercise only limited powers, and state courts, which are presumed to be as fair and competent as federal courts, stand as the ultimate guarantors of constitutional rights." *Id.* at 1143-44 (citations omitted). By contrast, the Nationalist model posits that "state sovereignty interests must yield to the vindication of federal rights and that, because state courts should not be presumed as competent as federal courts to enforce constitutional liberties, rights to have federal issues adjudicated in a federal forum should be construed broadly." *Id.* at 1145 (citations omitted). According to Fallon, Federalist jurists include Chief Justices Rehnquist and Burger, Justices Harlan, Frankfurter, and Powell, while Nationalist jurists include Justices Brennan and Marshall and Judge Gibbons. *Id.* at 1146.

221. Wald, *Some Thoughts on Judging*, *supra* note 125, at 894.

hands of Republican administrations for all but four of the last twenty years, it is to be expected that new appointees would eventually gain majority status within most of the circuits and begin to assert their particular jurisprudential views. It is natural that "[c]ircuit court majorities come and go with the administration in power"²²² and therefore it is to be expected that after a period of time in the other direction, the judicial "pendulum swings back toward a more stable—if different—body of circuit precedent."²²³ As discussed above,²²⁴ it is proper that a circuit should follow the understanding of the law held by the majority of its members regardless of ideological consequences. Finally, it points to the political bent of the critics themselves that none voiced concern when "[a]s a result of the addition of the new judges during President Carter's administration," the Ninth Circuit, which had been "a rather conservative court of appeals was converted into a rather liberal one."²²⁵

E. Proposals to Improve En Banc Review

The use of en banc rehearings may be increased by ensuring that all circuits in the federal judiciary interpret the number of judges necessary to grant rehearing as a majority of the active *available* circuit court judges instead of a majority of the active *eligible* judges.²²⁶

To grant rehearing, both section 46(c) of the Judicial Code and Rule 35 of the Federal Rules of Appellate Procedure require an affirm-

222. Wald, *Calendar, Collegiality*, *supra* note 64, at 176.

223. Wald, *Changing Course*, *supra* note 80, at 490.

224. See *supra* text accompanying notes 87-99.

225. *Second Circuit Conference*, *supra* note 73, at 161 (remarks of Judge James R. Browning).

226. This suggestion has met with the approval of several circuit court judges. See, e.g., *Federal Courts Improvement Act of 1979: Hearings on S. 677 and S.678 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 162, 205 (1979) (statement of Judge Friendly); Newman, *supra* note 2, at 368 ("the base for determining whether a majority of the active judges favors an in banc should be the number of active judges eligible to participate in the case at hand."). See also *Lewis v. Univ. of Pittsburgh*, 725 F.2d 910, 929 (3d Cir. 1983) (reh'g en banc denied) (Adams, J., statement sur petition for rehearing) (musing that in light of the fact that affirmative votes by five of the available eight circuit judges for en banc rehearing was insufficient to grant the petition because the circuit was comprised of ten judges, "our Court's in banc voting rule must appear quite unfair."), *cert. denied*, 469 U.S. 892 (1984); *Zahn v. International Paper Co.*, 469 F.2d 1033, 1042 (2d Cir. 1972) (reh'g in banc denied), *aff'd*, 414 U.S. 291 (1973) (Timbers, dissenting from denial of rehearing) ("I think it is most unfortunate that en banc reconsideration of such a substantial question of unusual importance is being *denied* despite" a majority of the eligible active circuit judges voting in favor of rehearing); Blaher, *supra* note 63 (discussing *Lewis v. University of Pittsburgh*).

active vote by a majority of the active circuit judges of the circuit who are in regular active service.²²⁷ Neither the enabling statute nor the rule, however, sets forth which judges are in "regular active service."

In *United States v. American-Foreign Steamship Corp.*,²²⁸ the Supreme Court declined an opportunity to interpret what Congress meant by "regular active service" and instead held narrowly that "under existing legislation a retired circuit judge is without power to participate in an en banc Court of Appeals determination."²²⁹ Subsequently, Congress modified the "existing legislation" to allow a senior judge to participate "as a member of an in banc court reviewing a decision of a panel of which such judge was a member."²³⁰ Although this amendment to section 46(c) explained that senior judges are not included among those judges who are in "regular active service," it has remained unclear exactly which judges are included within the meaning of this term.

One commentator has interpreted the phrase "regular active service" to mean those judges who have been "appointed to the circuit pursuant to section 44(a) of the Judicial Code who ha[ve] not retired by the time of the en banc decision."²³¹ Such a definition, however, begs the question of whether judges who are recused or otherwise unavailable—due to illness or personal circumstances—are considered to be in "regular active service."

The ambiguity of the term "regular active service" in combination with the Supreme Court's ruling "that Congress left it to the courts of appeals to decide how they would exercise their discretionary power to

227. See 28 U.S.C. § 46(c) and FED. R. APP. P. 35, the full texts of which are set forth *supra* note 51.

228. 363 U.S. 658 (1960).

229. *Id.* at 691.

230. 28 U.S.C. § 46(c). The legislation was the result of a bill approved by the Judicial Conference of the United States, which suggested adding the following sentence to Section 46(c): "A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof." ANNUAL REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 9-10 (1959) (*quoted in* *United States v. American-Foreign Steamship Corp.*, 363 U.S. at 690 n.7). This legislation was pending at the time of the Court's adjudication of the *American-Foreign Steamship* case. *Id.* at 690. The effect of the legislation is well-settled: "Only the active judges of the circuit may participate in an en banc rehearing except that a retired judge of the circuit may also sit if he participated in the original panel hearing." Alexander, *Part II*, *supra* note 91, at 738.

231. Alexander, *Part II*, *supra* note 91, at 738.

sit *en banc*”²³² has led courts of appeals to promulgate inconsistent internal operating rules and procedures relating to their *en banc* powers.

For example, the internal operating rule of the Sixth Circuit that requires an affirmative vote for rehearing by an “absolute majority”—*i.e.*, a majority of all the active circuit judges who are *eligible* to vote—provides that a “majority is determined by calculating the majority vote of all active judges on the court, not the number qualified to hear the case.”²³³ Thus, under an “absolute majority” rule, judges who are either recused or unavailable, count as votes against rehearing during *en banc* polls.²³⁴ By contrast, the Court of Appeals for the Seventh Circuit has adopted the opposite approach; its operating procedure provides that only “[a] simple majority of the voting active judges is required to grant a rehearing in banc.”²³⁵ Under this “simple majority rule,” only an affirmative vote by a majority of those active judges *present* is required to grant review.²³⁶ Additionally, some circuits have altogether avoided defining standards in their internal operating procedures and rules for how many and what type of judges are required to vote in favor of rehearing in order to reach a majority of the judges in

232. *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 269 (1953) (Frankfurter, J., concurring).

233. See 6TH CIR. INTER. OPER. R. 20.7 (1990).

234. See *Copper & Brass Fabricators Council v. Department of Treasury*, No. 81-2091 (D.C. Cir. Aug. 3, 1982) (unpublished order denying rehearing in banc); *Curtis-Wright Corp. v. General Elec. Co.*, 599 F.2d 1259 (3d Cir. 1979), *cert. denied*, 449 U.S. 1022 (1980); *Zahn v. International Paper Co.*, 469 F.2d 1033 (2d Cir. 1972), *aff'd*, 414 U.S. 291 (1973); 5TH CIR. R. 35.6 (“For purposes of *en banc* voting under 28 U.S.C. § 46(c), the term ‘majority’ is defined as a majority of all judges of the court in regular active service presently appointed to office. Judges in regular active service who are disqualified for any reason or who cannot participate in the decision of an *en banc* case nevertheless shall be counted as judges in regular active service.”). Some circuits even construe a non-response as a vote against rehearing. See, e.g., 3D CIR. INTER. OPER. P. 9.5.4 (1992) (“An active judge who does not communicate with the opinionwriting judge concerning rehearing within eight (8) days after the date of the Clerk’s letter transmitting the petition for rehearing is presumed not to desire in banc or than an answer be filed.”).

235. 7TH CIR. OPER. P. 5(d)(1) (1992).

236. See, e.g., 10TH CIR. R. 35.5 (1990) (“Hearing or rehearing *en banc* may be ordered by a majority of the judges of this court who are in regular active service and not disqualified in the particular case or controversy.”); 4TH CIR. R. 35(b) (1990) (“A majority, but no fewer than four, of all eligible, active and participating judges may grant a hearing or rehearing in banc.”); *but see* 2D CIR. R. 35 (1990) (“Neither vacancies nor disqualified judges shall be counted in determining the base on which ‘a majority of the circuit judges who are in regular active service’ shall be calculated, pursuant to 28 U.S.C. § 46(c), for purposes of ordering a hearing or rehearing in banc.”).

regular active service,²³⁷ and have instead made this determination through caselaw.²³⁸

Reducing the number of judges necessary to grant rehearing may be accomplished by using the discretionary power granted to the courts of appeals. In contrast to the circumstances faced by a three-judge panel of the Ninth Circuit in *Lang's Estate*,²³⁹ which had no formal "method of hearing or rehearing by a larger number,"²⁴⁰ the Supreme Court in *Western Pacific Railroad Corp.*, authorized each circuit to "devise its own administrative machinery to provide the means whereby a majority may order such a hearing."²⁴¹ In bestowing this power upon the courts of appeals,²⁴² the Court made clear its intention to allow future circuit majorities to amend their internal operating procedures and rules to serve their own needs by stating that courts "should adopt a practice whereby the majority of the full bench may determine whether there will be hearings or rehearings en banc . . . so that a majority always retains the power to revise the procedure."²⁴³ The Court also directed the circuits to "adopt such means as will enable its full membership to determine whether the court's administration of the power is achieving the full purpose of the statute so that the court will better be able to change its en banc procedure, should it deem change advisable."²⁴⁴ Thus, the individual circuits may promulgate rules and internal operating procedures that would allow modification in the way en banc votes are tallied.

A second method to increase the use of en banc rehearings is to amend section 46(c) and the federal procedural rule to allow en banc rehearings even when they are desired by less than a majority of the judges in regular active service. The exact number required for grant-

237. See, e.g., 8TH CIR. INTER. OPER. P. IV D (1990) ("a rehearing en banc is granted if a majority of judges in regular active service vote affirmatively.").

238. Compare 3D CIR. INTER. OPER. R. 9.5.3 (1992) ("Pursuant to 28 U.S.C. § 46(c), only active judges of this court may vote for rehearing in banc. Therefore, rehearing in banc shall be ordered only upon the affirmative votes of a majority of the judges of this court in regular active service.") with *Lewis v. Univ. of Pittsburgh*, 725 F.2d 910 (3d Cir. 1983) (en banc), cert. denied, 105 S. Ct. 266 (1984) (denying en banc consideration despite affirmative votes by five of the available eight circuit judges when the circuit was comprised of ten judges).

239. 97 F.2d 867 (9th Cir. 1938).

240. *Id.* at 869.

241. 417 U.S. 622, 625 (1974).

242. 28 U.S.C. § 2072(a) provides that "[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure [for the] courts of appeals." *Id.*

243. *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 261 (1953) (emphasis added).

244. *Id.* (emphasis added).

ing rehearing would vary according to the determination by an individual circuit as to "whether the court's administration of the power is achieving the full purpose of the statute."²⁴⁵ Although this second suggested method for improving en banc review is more radical than simply modifying the way courts interpret how many judges are required to grant en banc rehearing, and may more drastically reduce the number of judges required, the decision to vote en banc will still remain one of "the most serious non-merits determinations an appellate court can make"²⁴⁶ and will continue to receive thoughtful consideration. In addition, it must be remembered that a decision to rehear a case notes only its significance to a circuit and is not a final determination of its merits.

Regardless of which suggestion for increasing the use of en banc rehearings is adopted, it is imperative that the number of judges necessary to grant rehearing be reduced. Continuing vacancies on the courts of appeals²⁴⁷ have severely affected the mechanics of granting en banc review. As discussed above, most courts require an affirmative vote by a majority of a circuit's eligible judges in regular active service in order to authorize en banc rehearings.²⁴⁸ In other words, more than one-half of a court's members must normally vote in favor of sitting en banc. Continuing vacancies have, however, effectively required courts of appeals to obtain a supermajority of affirmative votes to grant en banc review. Although a comprehensive table is set forth, two examples help illustrate this point. In the Court of Appeals for the Eleventh Circuit, which is authorized to have twelve members, seven active circuit judges must affirmatively vote in favor of rehearing a case in order for that case to be reviewed en banc.²⁴⁹ Because of unfilled judgeships, the Eleventh Circuit presently has only nine sitting active judges.²⁵⁰ Thus, instead of seven of twelve judges, or 58 % of the court's affirmative vote, seven of nine, or 78 % are required.²⁵¹ Along even more dramatic lines,

245. *Id.*

246. *Bartlett ex rel. Neuman v. Bowen*, 824 F.2d 1240, 1242 (D.C. Cir. 1987) (en banc) (Edwards, J., concurring in denial of rehearings en banc).

247. *See* Table VII, *infra*.

248. *See supra* text accompanying notes 227-38.

249. *See* Table VII, *supra*.

250. *See id.*

251. *See id.*

TABLE VII

Number and Percentage of Judges
Required to Grant En Banc Rehearings

Circuit	Number of Authorized Judges	Number of Judges Required to Achieve Majority	Percentage	Number of Actual Judges	Number of Judges Required to Achieve Majority	Percentage
D.C.	12	7/12	58 %	11	7/11	64 %
First	6	4/6	66 %	4	4/4	100 %
Second	13	7/13	54 %	12	7/12	58 %
Third	14	8/14	57 %	11	8/11	73 %
Fourth	15	8/15	53 %	13	8/13	62 %
Fifth	17	9/17	53 %	13	9/13	69 %
Sixth	16	9/16	56 %	14	9/14	64 %
Seventh	11	6/11	55 %	10	6/10	60 %
Eighth	11	6/11	55 %	10	6/10	60 %
Ninth	28	15/28	54 %	28	15/28	54 %
Tenth	12	7/12	58 %	11	7/11	64 %
Eleventh	12	7/12	58 %	9	7/9	78 %

the First Circuit, which is authorized to have six active judges in regular service,²⁵² normally requires four of the six, or 66 % of its members to be disposed toward rehearing.²⁵³ Because of two vacancies that leave the circuit with only four judges, conceivably every judge must vote in favor of en banc review for rehearing to be granted.²⁵⁴ Moreover, the overall percentage of circuit judges required to vote en banc has

252. *See id.*

253. *See id.*

254. *See id.* Even more peculiarly, assuming that there was some method by which the First Circuit could presently review a case en banc without senior circuit judge inclusion, and the two judges who made up the majority on the original three-judge panel did not change their votes—then the best result would be an even split and the decision of the district court would be affirmed. For a more detailed account of the effects of a split en banc court, see discussion set forth *supra* note 169.

swelled from 56% to 67%.²⁵⁵ These increases make it imperative that the number of judges required to grant en banc review be reduced.

The critics of en banc review have themselves made three proposals to improve the en banc procedure, each of which would reduce the number of rehearings granted. These proposals are self-disciplined adherence to circuit precedent,²⁵⁶ circulation of opinions among all the judges of a circuit prior to publication,²⁵⁷ and requiring a supermajority of active circuit judges to grant en banc review.²⁵⁸ The perceived benefits of these proposals to limit, and hence improve, en banc review, are more illusory than real.

Advocates of judicial self-discipline explain that direct conflicts in caselaw seldom arise when judges strictly follow the law of their circuits.²⁵⁹ As can be expected, most courts of appeals already require their members to adhere to circuit precedent.²⁶⁰ There is therefore no

255. See Table VII *supra*.

256. See, e.g., Alexander, *Part II*, *supra* note 91, at 743 ("One alternative [to en banc consideration] is to attempt to eliminate intra-circuit conflict by absolute adherence to circuit precedent"); Note, *supra* note 2, at 1655 ("[T]he success of any efforts to limit the use of the en banc procedure must rely on the reasoned self-restraint of the circuit judges.").

257. Alexander, *Part II*, *supra* note 91, at 727. See also Newman, *supra* note 2, at 381 ("Some circuits routinely circulate all proposed panel opinions to the full court, thereby affording each active judge an opportunity to request an in banc poll before the panel opinion is issued."). Provision for the circulation of suggestions to panel members was made in a 1979 amendment to Rule 35. See FED. R. APP. P. 35, NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES ("Provision is made for circulating the suggestions to members of the panel despite the fact that senior judges on the panel would not be entitled to vote on whether a suggestion will be granted."). Judge Newman has pointed out that when opinions are circulated, there often transpires an "in banc polling" in which judges will send each other memoranda on the merits (or lack thereof) for en bancing a case. Newman, *supra* note 2, at 379-80.

258. See, e.g., Note, *supra* note 2, at 1655 (it may be useful to require a larger degree of consensus among circuit judges before en banc review will be ordered . . . Congress could require an affirmative vote of two thirds."); Note, *supra* note 100, at 866 ("[R]equiring a supermajority of the judges sitting in a circuit to vote to rehear a case offers the most promising alternative to the current practice."). See also Carrington, *supra* note 91, at 585-96 (advocating supernumerary judges who would not sit en banc). Not all judges agree. See, e.g., Newman, *supra* note 2, at 368 ("[T]he base for determining whether a majority of the active judges favors an in banc should be the number of active judges eligible to participate in the case at hand.").

259. See, e.g., Newman, *supra* note 2, at 382 ("[T]he need to 'secure or maintain uniformity of . . . decisions' will rarely arise if a court disciplines itself to follow its precedents faithfully.") (footnote omitted). See also *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 270 (1953) (Frankfurter, J., concurring) ("[T]he most constructive way of resolving conflicts is to avoid them"); Kornhauser & Sager, *supra* note 143, at 83 ("If each judge on a court acts consistently from case to case, so too will the court that they constitute.").

260. See, e.g., 3D CIR. INTER. OPER. P. 9.1 (1992) ("It is the traditional of this court that the holding of a panel in a reported opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a published opinion of a previous panel. Court in banc consideration is required to do so."). See also *Bartlett ex rel. Neuman v. Bowen*, 824 F.2d 1240, 1243-44 (D.C.

reason to believe that judges who presently ignore or evade this requirement would now yield to it because the incentives for following circuit precedent would not change. In addition, strict adherence to circuit precedent may, as has been demonstrated above,²⁶¹ prove detrimental to circuit law in situations where the adhered-to precedent reflects a minority of a court's view of the law.

Similarly, if a conflict is about to arise between existing circuit law and a panel's proposed decision in a case, it is asserted by the critics that this conflict can often be eliminated or at least minimized through the dissemination and discussion of the pending opinion because this "is clearly the most effective intramural method of discovering possible en banc indications before panel decision is announced."²⁶² Judge Wald reports that under these circumstance a mini en banc device known as the "*Irons Footnote*," after *Irons v. Diamond*,²⁶³ has become popular in the D.C. Circuit:

Because only a full en banc court can overrule a panel opinion and because some obsolete or unpopular precedents are just not important enough to elevate to full scale briefing and en banc argument treatment, a panel may draft an opinion overruling a prior precedent and circulate it to the full court, highlighting what it is doing. If the court agrees, it will then be noted in the opinion that the former precedent is no longer valid.²⁶⁴

Again, there is no reason to believe that judges who had previously persisted in contra-majority holdings will now relent in their beliefs simply because they are required to review a circulated opinion first. Moreover, judges may be reluctant to persuade their colleagues to amend their decisions because of "a combination of the notion that the

Cir. 1987) (en banc) (Edwards, J., concurring in denial of rehearings en banc) (Circuit court judges "are both intelligent enough to know the law and conscientious enough to abide by their oath to uphold it.").

261. See *supra* text accompanying notes 87-99.

262. Alexander, *Part II*, *supra* note 91, at 727. See also Friendly, *supra* note 78, at 676 ("Consideration of an en banc at this stage is less traumatic than later when the full court is being asked to alter a published opinion of a panel, and probably less time consuming as well."); Newman, *supra* note 2, at 380 ("A noteworthy aspect of the unsuccessful in banc polls is that on occasion the request for a poll and the indication of some support for an in banc rehearing has been followed by modification of the panel opinion.").

263. 670 F.2d 265, 268 n.11 (D.C. Cir. 1981).

264. Wald, *Changing Course*, *supra* note 80, at 486 n.30 (citing *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 75 n.24 (D.C. Cir. 1984); *Commodity Futures Trading Commission v. Nahas*, 738 F.2d 487, 496 n.19 (D.C. Cir. 1984); *Hobson v. Wilson*, 737 F.2d 1, 16 n.46 (D.C. Cir. 1984), *cert. denied*; 105 S. Ct. 1843 (1985); *Londrigan v. F.B.I.*, 722 F.2d 840, 845 n.6 (D.C. Cir. 1983)).

panel is the 'court' and an unwillingness to meddle in other judges' opinions unless invited,"²⁶⁵ or because some jurists hold to the perception that "consistent attention to decisions of other panels takes a great deal of time from a busy judge's own panel duties."²⁶⁶

Finally, the critics argue that requiring a supermajority of judges to vote in favor of rehearing ensures that only cases that truly warrant en banc scrutiny will be passed upon by the full court.²⁶⁷ As stated above, however, due to vacancies on the circuits, which now effectively require affirmative voting by a supermajority of a court's members, this proposal would make it nearly impossible for courts to grant en banc review. As one commentator has stated:

[A] policy by which two judges are empowered to commit a [larger] court to a decision which is contrary to the views of the other [appellate] judges and then to prevent that dissenting majority from ordering a determination of the case en banc, violates both the spirit and the letter of the statute and frustrates the salutary purpose of the en banc procedure.²⁶⁸

Two uncommon proposals also bear noting. Justice Walter Schaefer of the Illinois Supreme Court has suggested that "every circuit follow the first panel decision anywhere in the country, unless an en banc decides to the contrary, in which event that en banc will control until the Supreme Court holds otherwise."²⁶⁹ Professor Leo Levin has correctly pointed out that this proposal would "put an intolerable burden on the U.S. Supreme Court, because you run the risk of achieving uniformity at the price of a less than optimal result, unless and until the Supreme Court decides to intervene."²⁷⁰ A second proposal is to increase the use of "mini" en banc reviews. Under this scheme, a panel will circulate a proposed, yet unpublished decision that it believes will conflict with circuit precedent prior to publication.²⁷¹ Once more it

265. See, e.g., Alexander, *Part II*, *supra* note 91, at 728. But see LLEWELLYN, *supra* note 71, at 317 (the reluctance to meddle in other judges' opinions is a "regrettable" condition in a court which sits in divisions.).

266. Alexander, *Part II*, *supra* note 91, at 728.

267. See, e.g., Note, *supra* note 100, at 866 ("[R]equiring a supermajority of the judges sitting in a circuit to vote to rehear a case offers the most promising alternative to the current practice."). See also Carrington, *supra* note 91, at 585-96 (advocating supernumerary judges who would not sit en banc).

268. Fay, *supra* note 9, at 491.

269. Levin, *supra* note 152, at 139.

270. *Id.*

271. See generally Bennett & Pembroke, *supra* note 74, at 544-64.

seems unlikely that judges convinced enough of their position to go against established precedent would later amend their views.²⁷²

Thus, the proposals offered by the critics of en banc review to reduce the use of en banc rehearings, if adopted, would not improve the procedure, because the same judges who have previously failed to follow circuit rules are now bound by more rules.

V. CONCLUSION

This article has advocated increasing the use of en banc review in order to achieve greater uniformity of circuit law. In so doing, it has demonstrated how the intra-circuit uniformity achieved through en banc rehearings justifies an increased use of en banc review by helping to avoid minority control of circuit law and by reducing the flow of cases to the Supreme Court. In responding to the critics of the procedure, this article has shown that the underlying institutional costs that commentators impute to en banc review are greatly overstated. For although en banc rehearings do not dispose of cases as quickly as three-judge panel decisions, their infrequent use mitigates against its increased inefficiency. In addition, en banc rehearings have not been demonstrated to erode finality of decisions, abrade the harmony of circuits or arise as the result of decision-oriented politics. Finally, this article has shown that continuing court of appeals vacancies, which create the need for a supermajority vote for en banc consideration, make increased use of en banc rehearings a practical necessity because otherwise, decisions that do not reflect the views of a majority of a circuit's judges will stand as precedent, and perhaps create intra-circuit conflicts that can only be resolved by serendipitous Supreme Court review. It has suggested that the use of en banc review can best be increased by reducing the number of judges necessary to grant rehearing from a majority of eligible circuit judges to a majority of those available.

272. *But see id.* at 544-64. *Accord* Alexander, *Part I*, *supra* note 9, at 601, offering the alternative of panel rehearing ("When a panel decision requires rehearing, it often may be done more appropriately by the panel than by the court en banc.").