

REDEFINING EN BANC REVIEW IN THE FEDERAL COURTS OF APPEALS

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Every circuit has the ability to review cases en banc. Hearing cases en banc allows the full circuit court to overturn a decision reached by a three-judge panel. Due to the decreasing probability of U.S. Supreme Court intervention, the circuit court is often the court of last resort in the ordinary life of a case, thereby amplifying the importance of en banc review. Despite its significance, many critics contend that en banc review is inefficient and rarely granted.

Each circuit has enacted its own rules governing en banc procedure. These rules have both slight and significant differences from one another and from Federal Rule of Appellate Procedure 35, which governs all of the circuits' en banc review procedures. Because of the lack of uniformity across the circuits, the proper application of Rule 35 is unclear.

This Note proposes to change the current en banc landscape by altering the method in which a court will make the decision to sit en banc. This Note suggests that petitions for en banc review should only be raised by judges sua sponte, and the decision of whether to sit en banc should be affirmatively voted on by a lower number of active-duty judges than is now required under the simple majority rule.

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INTRODUCTION

In 1988, a jury convicted Gregory Wilson of murder, kidnapping, rape, robbery, and conspiracy to commit robbery.¹ Wilson’s trial has been regarded as “one of the worst examples . . . of the unfairness and abysmal lawyering that pervade capital trials,” with commentators noting that his “defense was clearly a charade” and that he was “sentenced to death in a kangaroo court.”²

Wilson’s case began with a handwritten note from the trial judge begging for a lawyer to represent Wilson.³ The handwritten note, posted on the courtroom door, read: “PLEASE HELP. DESPERATE. THIS CASE CANNOT BE CONTINUED AGAIN.”⁴ While the judge found two lawyers to represent Wilson, it was soon clear that neither was competent.⁵ One lawyer had never tried a felony case.⁶ The other was a “semi-retired”

1. See *Wilson v. Rees*, 620 F.3d 699, 700 (6th Cir. 2010).

2. See *Wilson v. Rees*, 624 F.3d 737, 739, 741 (6th Cir. 2010) (Martin, J., dissenting from denial of rehearing en banc); see also Andrew Wolfson, *Kentucky Death-Row Inmate’s Trial Littered with Problems*, COURIER-J., Sept. 8, 2010, at A1.

3. See *Wilson*, 624 F.3d at 739.

4. See *id.*

5. See Wolfson, *supra* note 2.

6. See *id.*

lawyer who volunteered to serve as lead counsel for free” and had no office, staff, copy machine, or law books.⁷ The case was referred to as “a ‘travesty of justice’ and among the worst examples . . . of a defendant tried for his life with unqualified counsel.”⁸ Additionally, extreme bias undermined the fairness of Wilson’s trial: Wilson’s co-defendant, who testified against Wilson, was having sexual relations with the trial judge’s colleague throughout the duration of Wilson’s trial.⁹ The jury sentenced Gregory Wilson to death.¹⁰

Wilson appealed his judgment and sentence. The U.S. Supreme Court denied certiorari on October 4, 1993, concluding direct review of his case.¹¹ On November 21, 2007, Wilson filed a 42 U.S.C. § 1983 action in the Eastern District of Kentucky for injunctive relief.¹² The § 1983 action challenged the constitutionality of Kentucky’s lethal injection protocol under the U.S. Constitution and the Kentucky Constitution.¹³ On September 30, 2009, the district court dismissed with prejudice Wilson’s complaint as time barred by Kentucky’s one-year statute of limitations on civil actions, which stipulates that the accrual date for method of execution claims is the date of the conclusion of direct review.¹⁴ On September 3, 2010, the Sixth Circuit affirmed the district court’s holding, agreeing that Wilson’s complaint was time barred.¹⁵

On September 3, 2010, Wilson petitioned the Sixth Circuit for rehearing en banc (i.e., rehearing by the full appellate court).¹⁶ A poll was taken, and, because less than a majority of the active judges favored doing so, en banc review was denied.¹⁷ Sixth Circuit Judge Boyce F. Martin, Jr., however, filed a vigorous dissent from the denial of rehearing en banc.¹⁸

Wilson’s case highlights the significance of en banc review.¹⁹ Gregory Wilson was sentenced to death by the state trial court, denied certiorari by the Supreme Court, and denied injunctive relief by the Sixth Circuit in part because he was unable to get the Sixth Circuit to rehear his case en banc. Although some of the active Sixth Circuit judges voted to rehear the case en banc to reassess the Sixth Circuit’s rule that time barred his complaint, a majority was not attained and, thus, Wilson’s case was not heard on the

7. *See id.*

8. *See id.*

9. *See Wilson*, 624 F.3d at 738 (Martin, J., dissenting from denial of rehearing en banc).

10. *See Wilson v. Rees*, 620 F.3d 699, 700 (6th Cir. 2010).

11. *See Wilson v. Kentucky*, 507 U.S. 1034, *cert. denied*, 510 U.S. 909 (1993).

12. Complaint for Declaratory Judgment and Injunctive Relief, *Wilson v. Rees*, 3:07-CV-00078 (E.D. Ky. Nov. 21, 2007), ECF No. 1.

13. *See Wilson*, 620 F.3d at 700.

14. *See id.*

15. *See id.* at 701.

16. *See Wilson v. Rees*, 624 F.3d 737, 738 (6th Cir. 2010).

17. *See id.*

18. *See id.* at 738–41 (Martin, J., dissenting from denial of rehearing en banc).

19. The term “in banc” appeared in earlier versions of Federal Rule of Appellate Procedure 35. *See* FED. R. APP. P. 35 (1967) (amended 2005). The rule currently uses the term “en banc,” *see id.* R. 35 (2005), and the current spelling will be used throughout this Note other than in quoted excerpts from other written works.

merits. It is unclear which circuit judges voted to rehear Wilson's case en banc, as the circuits are not required to publish these votes.²⁰ It is also unclear why en banc review was denied, as the circuits similarly are not required to provide their reasoning for denying review.²¹

En banc review gives every judge on a circuit court the opportunity to review a decision announced by a three-judge panel. Because of the discretionary nature of the writ of certiorari, very few cases are granted review by the Supreme Court. Practically speaking, the courts of appeals are the courts of last resort for the vast majority of cases.²² Despite the significance of en banc review, the federal courts of appeals very rarely sit en banc.²³ En banc hearings consistently make up less than 1 percent of the caseload of the federal circuit courts.²⁴ In 2010, for example, en banc decisions accounted for only 0.146 percent of the cases decided by the federal circuit courts.²⁵ In the Second Circuit, which grants the lowest percentage of en banc petitions, en banc cases were only 0.03 percent of its total docket in 2010.²⁶

Rule 35 of the Federal Rules of Appellate Procedure permits a case to be heard or reheard en banc if so ordered by “[a] majority of the circuit judges who are in regular active service.”²⁷ Rule 35 warns, however, that an en banc hearing or rehearing “is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance.”²⁸

Although Rule 35 seems straightforward, its application is anything but clear. The determination of whether to grant review en banc has sparked controversies between judges on the same court.²⁹ Although en banc review has a huge impact on a circuit court's jurisprudence, as it is the mechanism available for overruling precedent within a circuit,³⁰ many

20. See Abigail Stecker, *En Banc Revealed: Procedure, Politics, and Privacy* 17 (Dec. 2012) (unpublished manuscript), available at http://works.bepress.com/abigail_stecker/2/.

21. See Michael E. Solimine, *Due Process and En Banc Decisionmaking*, 48 ARIZ. L. REV. 325, 326–30 (2006).

22. See *infra* notes 60–64 and accompanying text.

23. See *infra* Part II.A.

24. See Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. REV. 29, 29–30 (1988).

25. See SECOND CIRCUIT COURTS COMM., *EN BANC PRACTICES IN THE SECOND CIRCUIT: TIME FOR A CHANGE?* 5 (2011), available at http://www.federalbarcouncil.org/vg/custom/uploads/pdfs/En_Banc_Report.pdf.

26. See *id.* at 4–5.

27. See FED. R. APP. P. 35(a).

28. See *id.*

29. See, e.g., *Ricci v. DeStefano*, 530 F.3d 88 (2d Cir. 2008) (denying rehearing en banc). In *Ricci*, five separate opinions were published responding to the denial of rehearing en banc. See *id.* at 88 (Calabresi, J., concurring in the denial of rehearing en banc); *id.* at 89 (Katzmann, J., concurring in the denial of rehearing en banc); *id.* at 90 (Parker, J., concurring in the denial of rehearing en banc); *id.* at 92 (Jacobs, C.J., dissenting from the denial of rehearing en banc); *id.* at 93 (Cabrane, J., dissenting from the denial of rehearing en banc).

30. See Amy E. Sloan, *The Dog That Didn't Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals*, 78 FORDHAM L. REV. 713, 718–19 (2009).

judges and scholars argue that the en banc procedure is a waste of judicial resources; although almost all en banc petitions are denied, counsel generally files them as a matter of course.³¹

There is little transparency in a circuit court's decision to grant en banc review, and little is known about why courts select certain cases for en banc review while denying others. Generally, a case will be heard en banc only if each of three conditions are met: (1) a litigant files a petition, or a judge asks, for a hearing or rehearing en banc;³² (2) a judge in active service on the circuit requests that the entire court be polled on the petition;³³ and (3) a majority of the judges in active service vote to grant the petition.³⁴ Despite the confusion surrounding the en banc procedure, one thing is perfectly clear: en banc hearings and rehearings are rarely granted.³⁵

Like most procedures in the federal courts, en banc procedures have their positive and negative aspects.³⁶ Unlike most others, however, en banc procedure is often the subject of institutional derision by many circuit judges and is a subject of exceptional controversy.³⁷

This Note assesses the controversy over en banc procedure and the various points of inconsistency among the circuit courts on whether, and under what circumstances, to grant en banc review. Part I provides the context for this discussion. Specifically, it discusses the history of the federal court system and the initial debate over the en banc procedure. It explores *Textile Mills Securities Corp. v. Commissioner*,³⁸ where the Supreme Court first approved the en banc procedure. It also discusses *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*,³⁹ where the Court enunciated "certain fundamental [en banc] requirements [that] should be observed by the Courts of Appeals."⁴⁰ Part I then explores Federal Rule of Appellate Procedure 35 in greater detail and related federal procedural rules which impact the decision to hear or rehear a case en banc.

While the federal courts of appeals and the Supreme Court are not bound by their own opinions, they do not routinely disregard them. *Id.* at 717. "Horizontal stare decisis" refers to the rule that courts conform to their own prior decisions. *Id.* at 717–18. Horizontal stare decisis is not a requirement but, rather, a preferred policy that allows people to "know the rules that govern their conduct to organize their lives, and basic fairness requires that similarly situated parties be treated similarly." *Id.* at 718. The circuit courts follow "the law-of-the-circuit rule" which implements the policy of horizontal stare decisis. *Id.* "The law of the circuit rule provides that the decision of one panel is the decision of the court and binds all future panels unless and until the panel's opinion is reversed or overruled, either by the circuit sitting en banc or the Supreme Court." *Id.* at 718–19.

31. See Irving R. Kaufman, *Do the Costs of the En Banc Proceeding Outweigh Its Advantages?*, 69 JUDICATURE 7, 57 (1985).

32. See FED. R. APP. P. 35(b); see also *id.* R. 35 advisory committee's note.

33. See *id.* R. 35(f).

34. See *id.* R. 35(a).

35. See *infra* Part II.A.

36. See *infra* Part III.A–B.

37. See *infra* Part III.B.

38. 314 U.S. 326 (1941).

39. 345 U.S. 247 (1953).

40. *Id.* at 260.

Part II provides a survey of the various en banc procedures the thirteen circuit courts use. It analyzes the points where the circuits differ on the question of when to grant en banc review. Specifically, Part II examines the frequency of en banc hearings and rehearings, language disparities in local circuit rules governing en banc procedure, idiosyncrasies in certain circuit courts' en banc procedures, and informal polling procedures utilized by some of the circuits to replace en banc review.

Part III addresses the positive and negative aspects of en banc review, as enunciated by various judges and scholars. Finally, considering all of these benefits and criticisms, Part IV argues that petitions for en banc review should only be raised by judges sua sponte. Further, Part IV contends that granting petitions for en banc review should require a fewer number of votes than the simple majority vote required under Federal Rule of Appellate Procedure 35.

I. BACKGROUND

To understand the en banc procedure one must first understand how the federal courts of appeals developed a practice of sitting in three-judge panels, rather than as an entire court. This Part discusses the evolution of the federal court system, the creation of our now familiar federal courts of appeals, and the development of the panel system to hear and decide cases. Part I.A provides a history of the federal court system, the initial debate over whether a circuit could convene en banc, and the ultimate acceptance and development of the en banc procedure by the Supreme Court and Congress. Part I.B examines Rule 35 of the Federal Rules of Appellate Procedure, the current appellate rule governing en banc hearings and rehearings. It also examines related federal procedural rules that impact a circuit's ability to convene en banc.

A. *The History of En Banc Review*

Part I.A.1 discusses the creation of our now-familiar federal courts of appeals and the evolution of our three-tiered federal court system. Part I.A.2 discusses the initial circuit split over whether a circuit court could hear cases as a full court and the approval of the en banc procedure by the Supreme Court in *Textile Mills Securities Corp. v. Commissioner*,⁴¹ the ratification of this decision by Congress in 28 U.S.C. § 46(c),⁴² and the development of the en banc procedure by the Supreme Court in *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*⁴³

41. 314 U.S. 326 (1941).

42. 28 U.S.C. § 46(c) (2006).

43. 345 U.S. 247.

1. The Evolution of the Courts of Appeals

The Judiciary Act of 1789 created the federal court system.⁴⁴ The Act created a Supreme Court, district courts, and the old “Circuit Courts.”⁴⁵ Section 11 of the Act gave the circuit courts concurrent jurisdiction with the state courts over civil cases where the amount in controversy exceeded \$500 and where the United States was plaintiff or petitioner; where an alien was a party; or where the suit was between a citizen of the state where the suit was brought and a citizen of another state.⁴⁶ It gave the circuit courts exclusive jurisdiction of crimes and offenses under the authority of the United States, except as otherwise provided elsewhere in the Act or by federal law.⁴⁷ It gave the circuit courts concurrent jurisdiction with the district courts for criminal offenses made cognizable by that court.⁴⁸

Additionally, the Act gave the circuit courts authority to review on writ of error final decisions of the district courts in civil cases where the amount in controversy exceeded \$50 and, on appeal, final decrees in admiralty and maritime cases where the matter in controversy exceeded \$300.⁴⁹ Where the amount in controversy exceeded \$2,000, however, the Supreme Court had appellate jurisdiction to review the decision of the circuit court.⁵⁰

The Act also provided that the circuit courts would sit twice a year in the various districts comprising their circuit.⁵¹ The Act provided that the circuit courts would sit in three-judge panels, but it did not create circuit judgeships.⁵² Rather, a circuit would be composed of two Supreme Court justices and one district court judge from the district in which the case was pending.⁵³ No district judge, however, was allowed to sit on appeal from his own decision.⁵⁴

When Congress passed the Judiciary Act of 1869, it finally provided for the permanent appointment of circuit judges and appointed one circuit judge for each of the then-existing nine circuit courts.⁵⁵ The circuit judge was to sit on a three-judge panel with two other federal judges drawn from the Supreme Court or from the district courts comprising the circuit.⁵⁶

On March 3, 1891, Congress passed the Circuit Court of Appeals Act of 1891⁵⁷ (the Evarts Act). The Evarts Act established the now-familiar three-

44. See ERWIN C. SURRENCY, *HISTORY OF THE FEDERAL COURTS* 14 (2d ed. 2002).

45. See ROSCOE POUND, *ORGANIZATION OF COURTS* 103–04 (1940). There were originally three circuits: the eastern, middle, and southern circuits. *Id.*

46. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

47. *Id.*, 1 Stat. at 78–79.

48. *Id.*, 1 Stat. at 79.

49. *Id.* §§ 11, 21, 22, 1 Stat. at 78–79, 83–85.

50. *Id.* § 22, 1 Stat. at 84.

51. *Id.* § 4, 1 Stat. at 74–75.

52. See Tracey E. George, *The Dynamics and Determinants of the Decision To Grant En Banc Review*, 74 WASH. L. REV. 213, 221 (1999).

53. See POUND, *supra* note 45, at 104.

54. See *id.*

55. See Judiciary Act of 1869, ch. 22, § 2, 16 Stat. 44, 44.

56. See *id.*

57. Circuit Court of Appeals (Evarts) Act of 1891, ch. 517, 26 Stat. 826.

tiered judicial system and a circuit court of appeals in each circuit.⁵⁸ The Evarts Act also created the discretionary writ of certiorari.⁵⁹

The Evarts Act did not abolish the old circuit courts, but it took away their appellate jurisdiction over the district courts in their circuits and gave it to the new circuit courts of appeals.⁶⁰ The determination of appeals by the new circuit courts was to be final unless the Supreme Court decided to grant review by certiorari.⁶¹ Review by certiorari, however, “is not a matter of right, but of judicial discretion,” and will be “granted only for compelling reasons.”⁶² The following are some of the reasons that the Supreme Court has found “compelling”:

- (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power;
- (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
- (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.⁶³

Thus, because the writ of certiorari is rarely granted,⁶⁴ circuit courts have the final word in most cases.

58. See POUND, *supra* note 45, at 198.

59. See Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1650–51 (2000). The Supreme Court maintained mandatory appellate jurisdiction over many of the cases decided by the courts of appeals, but was given discretionary appellate jurisdiction over cases otherwise deemed “final” in these courts. *See id.*

60. See POUND, *supra* note 45, at 198 (“[R]eview of judgments, decrees, and sentences in the District and Circuit Courts was committed to the Circuit Courts of Appeals.”).

61. *See id.*

62. SUP. CT. R. 10. In the first two years after the Evarts Act, only two petitions for certiorari were granted. *See Hartnett, supra* note 59, at 1656. Congress expanded the Supreme Court’s discretionary power over their appellate docket in the Judges’ Bill of 1925. *See Emily Grant et al., The Ideological Divide: Conflict and the Supreme Court’s Certiorari Decision*, 60 CLEV. ST. L. REV. 559, 565 (2012). The Judges’ Bill of 1925 eliminated many categories of cases for which Supreme Court review was mandatory and instead made these cases reviewable by a writ of certiorari. *Id.* The Supreme Court, by way of the Judges’ Bill, “effectively ‘achieved absolute and arbitrary discretion over the bulk of its docket.’” *Id.* (quoting Hartnett, *supra* note 59, at 1705).

63. SUP. CT. R. 10.

64. The contemporary Supreme Court hears far fewer cases than its predecessors. *See Ryan J. Owens & David A. Simon, Explaining the Supreme Court’s Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1224 (2012). Since the 2005 term, the Supreme Court has decided an average of eighty cases per term. *See id.* at 1225. Earlier in the twentieth century

Section 2 of the Evarts Act carried forward the practice of sitting in three-judge panels by providing that each circuit court “shall consist of three judges.”⁶⁵ The Evarts Act also created an additional circuit judge for each circuit, thus “providing two circuit judges in all the circuits except the second, which, having received an additional judge in 1887, now had three.”⁶⁶ The third spot on the three-judge panel would be filled by either a district judge or a Supreme Court justice.⁶⁷

In the Judicial Code of 1911, Congress finally abolished the old circuit courts created by the Judiciary Act of 1789 and vested all original jurisdiction in the district courts.⁶⁸ Additionally, it codified section 2 of the Evarts Act without material change—it kept the circuit courts of appeals established by the Evarts Act and carried forward the three-judge panel requirement.⁶⁹ The Code, however, increased the number of circuit judges from three to four in the Second, Seventh, and Eighth Circuits, although it made no express provision authorizing these judges to sit in panels of more than three judges.⁷⁰ Because Congress allowed these circuits to have more than three judges, there was uncertainty as to whether Congress intended these circuits to continue hearing cases only by three-judge panels or whether a full court hearing was also permissible.⁷¹

In the following years, as court dockets and caseloads grew, Congress continued to increase the number of circuit judgeships across all the circuits, but the circuits continued the practice of sitting in divisions of three judges rather than sitting as an entire court.⁷² The increased number of circuit judges, however, presented the likelihood of inconsistent panel decisions within the circuit and created the need for an administrative solution.⁷³

2. The En Banc Procedure

The en banc procedure was first approved by the Supreme Court in 1941 in *Textile Mills*,⁷⁴ after the Third and Ninth Circuits generated conflicting decisions over whether the court had the power to convene itself en banc.

the average was approximately 200 cases per term. *Id.* For a comprehensive survey of the decline in the Supreme Court’s docket size, see *id.*

65. See Circuit Court of Appeals (Evarts) Act of 1891, ch. 517, § 2, 26 Stat. 826.

66. RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 29 (6th ed. 2009); POUND, *supra* note 45, at 197. In the following years, additional judges were added to each circuit at various times. POUND, *supra* note 45, at 197.

67. See FALLON ET AL., *supra* note 66, at 29–30.

68. See FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 133 (1928).

69. See George, *supra* note 52, at 224.

70. A. Lamar Alexander, Jr., Note, *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities (Part 1)*, 40 N.Y.U. L. REV. 563, 570 (1965).

71. See *id.* at 570–71.

72. See *id.*

73. See *id.* at 570–72.

74. 314 U.S. 326 (1941).

The Ninth Circuit, on June 27, 1938, was the first circuit court to address the permissibility of circuit courts sitting en banc. In *Bank of America National Trust & Savings Ass'n v. Commissioner*,⁷⁵ a divided Ninth Circuit panel decided a question regarding estate taxes. In *Lang's Estate v. Commissioner*,⁷⁶ decided one year later, a different Ninth Circuit panel addressed the same question but disagreed with the decision of the *Bank of America* panel.⁷⁷ The panel in *Lang's Estate* concluded, however, that the Judicial Code of 1911 did not allow "more than three judges [to] sit in the Circuit Court of Appeals, [and] there [was] no method of hearing or rehearing by a larger number."⁷⁸ Thus, rather than overrule the *Bank of America* decision, the *Lang's Estate* panel presented a certificate to the Supreme Court to answer the estate tax question.⁷⁹

The Supreme Court granted certiorari and agreed with the second panel on the estate tax question, but did not address the question of whether a circuit court had the power to convene itself en banc.⁸⁰

By contrast, two years later, in *Commissioner v. Textile Mills Securities Corp.*,⁸¹ the Third Circuit, sitting en banc, noted that although contrary to the Ninth Circuit's holding, a circuit court has the power to sit en banc.⁸² The Third Circuit justified its use of the en banc procedure by explaining: "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."⁸³ It contended that holding otherwise would "destroy the authority of the court as a court and [would] open the way to possible confusion and conflict among its personnel and in its procedure and decisions."⁸⁴ The potential for this confusion occurs most significantly, the court said, where "there is a difference in view among the judges upon a question of fundamental importance" and where a panel "sitting in a case may have a view contrary to that of the other . . . judges of the court."⁸⁵ In these situations, the court reasoned, "it is advisable that the whole court have the opportunity, if it thinks it necessary, to hear and decide the question."⁸⁶

In light of "the public importance" of the en banc question and to resolve the conflict between the Third and Ninth Circuits, the Supreme Court granted certiorari in *Textile Mills*⁸⁷ and unanimously decided that the

75. 90 F.2d 981 (9th Cir. 1937).

76. 97 F.2d 867 (9th Cir. 1938).

77. *See id.* at 869.

78. *See id.*

79. *See id.* at 869–70.

80. *See generally* *Lang v. Comm'r*, 304 U.S. 264 (1938).

81. 117 F.2d 62 (3d Cir. 1940) (en banc), *aff'd*, 314 U.S. 326 (1941).

82. *See id.* at 67–71.

83. *See id.* at 70.

84. *See id.*

85. *See id.* at 71.

86. *See id.*

87. 314 U.S. 326, 327 (1941).

federal courts of appeals have the power to convene themselves en banc.⁸⁸ In its decision, the Court noted that allowing a court to sit en banc “makes for more effective judicial administration,” avoids intracircuit conflicts, and promotes “[f]inality of decision in the circuit courts of appeal.”⁸⁹ After approving the en banc device in *Textile Mills*, the Supreme Court stopped accepting cases certified to it by a court of appeals in order to resolve a point of intracircuit conflict.⁹⁰

On June 25, 1948, Congress codified the *Textile Mills* decision in section 46(c) of the Judicial Code of 1948.⁹¹ Section 46(c) provides:

Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . unless a hearing or rehearing 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. . . .⁹²

The Reviser’s Note explains:

This section preserves the interpretation established by the *Textile Mills* case but provides in subsection (c) that cases shall be heard by a court of not more than three judges unless the court has provided for hearing in banc. This provision continues the tradition of a three-judge appellate court and makes the decision of a division, the decision of the court, unless rehearing in banc is ordered. It makes judges available for other assignments, and permits a rotation of judges in such manner as to give to each a maximum of time for the preparation of opinions.⁹³

Textile Mills and the Judicial Code of 1948 clearly give the federal courts of appeals the power to convene en banc. However, neither *Textile Mills* nor the Judicial Code of 1948 prescribe any particular en banc procedures for the circuit courts to follow, nor do they state the types of cases that are appropriate for en banc review. The Supreme Court did not offer any more clarity on the power to convene en banc until it decided *Western Pacific* twelve years later.⁹⁴

In *Western Pacific*, the Supreme Court held that 28 U.S.C. § 46(c) empowers, but does not compel, federal circuit courts to sit en banc.⁹⁵ The Court determined that § 46(c) does not give litigants the power to compel a circuit court to entertain each motion for a hearing or rehearing en banc, and a party cannot challenge the circuit court’s decision to grant or deny a

88. *See id.* at 333–35.

89. *See id.* at 334–35.

90. *See, e.g.,* *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (refusing to grant certiorari to resolve potential conflict between two Eighth Circuit panels).

91. *See* *United States v. Am.-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960) (noting that section 46(c) “was added to the Judicial Code in 1948 simply as a legislative ratification of *Textile Mills*” (internal quotation mark omitted)).

92. 28 U.S.C. § 46(c) (2006).

93. *Id.* note (Historical and Statutory Notes).

94. *See* *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247 (1953).

95. *See id.* at 250 (“In our view, § 46(c) is not addressed to litigants. It is addressed to the Court of Appeals. It is a grant of power. It vests in the court the power to order hearings *en banc*. It goes no further.”).

request for an en banc hearing.⁹⁶ Rather, § 46(c) allows a circuit court “to devise its own administrative machinery to provide the means whereby a majority may order [an en banc] hearing.”⁹⁷ The Court, after holding that a litigant cannot compel a circuit court to formally examine an en banc petition and that § 46(c) does not require any particular en banc procedures, devised “certain fundamental [en banc] requirements [that] should be observed by the Courts of Appeals.”⁹⁸

The Court enunciated five requirements: First, the circuit court must clearly define the procedure it uses to determine whether to convene en banc.⁹⁹ Second, the circuit may adopt a practice where a majority of the full court determines whether to convene en banc or it may delegate this decision to a division of the full court; however, a majority of the full court always has the power to revise the circuit’s en banc procedures and withdraw any decisionmaking power delegated to a division of the court.¹⁰⁰ Third, the circuit must give a litigant the opportunity “to suggest to the court, or to the division . . . that a particular case is appropriate for consideration by all the judges.”¹⁰¹ Fourth, a circuit has the power to initiate an en banc hearing sua sponte.¹⁰² Fifth, the decision of whether to hear a case en banc must be decided separately from the decision of whether there should be a rehearing before a three-judge panel.¹⁰³

Following the Supreme Court’s *Western Pacific* decision, each circuit enacted its own rules and developed its own case law governing the en banc procedure.¹⁰⁴ The broadly defined en banc requirements enunciated in *Western Pacific* gave the federal circuit courts ample discretion to create their own en banc procedures. The en banc procedural rules developed by each circuit were not uniform and often did not fully explain the processes used by the courts when considering whether to grant en banc review.¹⁰⁵

B. Rule 35 and Related Rules

When considering available options, a practitioner who has suffered an adverse determination by a three-judge panel will turn to Rule 35 of the Federal Rules of Appellate Procedure.¹⁰⁶

Rule 35 governs en banc hearings and rehearings in the federal courts of appeals.¹⁰⁷ Congress ratified Rule 35 in 1967, intending to standardize the en banc procedures across the circuits.¹⁰⁸

96. *See id.* at 252, 259.

97. *See id.* at 250.

98. *See id.* at 260.

99. *See id.* at 260–61.

100. *Id.* at 261.

101. *Id.*

102. *See id.* at 262.

103. *See id.* at 262–63.

104. *See infra* notes 121–26 and accompanying text.

105. *See infra* Part II.

106. *See* FED. R. APP. P. 35.

107. *See id.*

Rule 35 tracked the language of 28 U.S.C. § 46(c) by stating that “[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.”¹⁰⁹ Rule 35 sets time limits and certain procedures for a party petitioning for a hearing or rehearing en banc, provides that the court is not required to file a response to a suggestion for a hearing or rehearing en banc, and provides that an en banc hearing or rehearing “is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court’s decisions; or (2) the proceeding involves a question of exceptional importance.”¹¹⁰

The “maintain[ing] uniformity” test allows the circuit courts to use the en banc process to resolve intracircuit conflict.¹¹¹ The “exceptional importance” test anticipates future conflict between the majority of the judges of a circuit and a three-judge panel’s decision and permits the full court to rehear the case before that anticipated conflict arises.¹¹² The 1967 Advisory Committee’s Note makes clear that Rule 35 does not affect the power of the court to initiate en banc hearings or rehearings sua sponte—in other words, the court can initiate the en banc procedure without the request of a litigant.¹¹³

Generally, a case will be heard en banc only if three conditions are met: (1) a litigant files a petition or a judge asks for a hearing or rehearing en banc,¹¹⁴ (2) a judge in active service on the circuit requests that the entire court be polled on the suggestion,¹¹⁵ and (3) a majority of the judges in active service vote to grant the petition.¹¹⁶

108. See Mario Lucero, Note, *The Second Circuit’s En Banc Crisis*, 2013 CARDOZO L. REV. DE NOVO 32, 38 (2013).

109. See FED. R. APP. P. 35 (1967) (amended 2005). This language was amended in 2005 and now states: “A majority of the circuit judges who are in regular active service *and who are not disqualified* may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc.” FED. R. APP. P. 35(a) (emphasis added). This language was added as a result of a circuit split regarding how disqualified judges were to be dealt with in determining how many judges made up a majority of the court. *Id.* advisory committee’s note. The 2005 amendment adopted the “case majority” approach where disqualified judges are not counted in the base number of judges when determining whether a majority of judges have voted to hear a case en banc. *Id.* Additionally, senior circuit judges are not eligible to participate in the decision of a case on rehearing en banc. See *United States v. Am.-Foreign S.S. Corp.*, 363 U.S. 685, 688 (1960). This is because en banc courts should not be employed unless “extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit.” See *id.* at 689.

110. See FED. R. APP. P. 35(a)–(c), (e). In *United States v. American-Foreign Steamship Corp.*, the Supreme Court declared that “[e]n banc courts are the exception, not the rule” and should be “convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit.” See *Am.-Foreign S.S. Corp.*, 363 U.S. at 689.

111. See Solimine, *supra* note 21, at 325–38.

112. See Note, *The Politics of En Banc Review*, 102 HARV. L. REV. 864, 876 (1989).

113. See FED. R. APP. P. 35 advisory committee’s note.

114. See *id.* R. 35(b).

115. See *id.* R. 35(f).

116. See *id.* R. 35(a).

In the Omnibus Judgeship Act, which was passed on October 20, 1978, Congress authorized federal circuit courts consisting of more than fifteen judges to delegate en banc authority to a division of the full court, commonly referred to as a “mini en banc hearing” or “limited en banc court.”¹¹⁷ Currently, the Fifth, Sixth, and Ninth Circuits have more than fifteen authorized judgeships.¹¹⁸ But only the Ninth Circuit has exercised this option formally.¹¹⁹ Many circuits, however, have devised methods of informal en banc review.¹²⁰

Each court of appeals has authority to make and amend rules governing its own practice and procedure.¹²¹ These rules are referred to as the “local rules” of the circuit.¹²² Rule 47 of the Federal Rules of Appellate Procedure says that “local rules” are to be enacted by a majority of the circuit’s judges “in regular active service.”¹²³ It also provides that a local rule must be consistent with federal law, the appellate rules, and local rules of the circuit.¹²⁴ Every circuit has a local rule governing the en banc procedure.¹²⁵ Additionally, the First, Second, Third, Fifth, Sixth, Seventh, and Eleventh Circuits have “internal operating procedures” governing petitions for en banc hearings or rehearings.¹²⁶

II. SURVEY OF THE CIRCUITS: INCONSISTENCY

This Part surveys the various points of inconsistency in en banc procedures across the federal courts of appeals. Part II.A analyzes the frequency at which particular circuits implement the en banc procedure. Part II.B scrutinizes the local rules and internal operating procedures of the

117. See Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633 (codified as amended at 28 U.S.C. § 46(c) (2006)).

118. See 28 U.S.C. § 44. The Fifth Circuit has seventeen authorized judgeships, the Sixth Circuit has sixteen authorized judgeships, and the Ninth Circuit has twenty-eight authorized judgeships. See *id.*

119. See 9TH CIR. R. 35-3 (“The en banc court, for each case or group of related cases taken en banc, shall consist of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the Court.”).

120. See *infra* Part II.D.

121. See 28 U.S.C. § 2071.

122. See FED. R. APP. P. 47.

123. See *id.* R. 47(a)(1).

124. See *id.* R. 47(b).

125. See 11TH CIR. R. 35-1 to -11; 1ST CIR. R. 35; 6TH CIR. R. 35; D.C. CIR. R. 35; 2D CIR. R. 35.1; 8TH CIR. R. 35A; 5TH CIR. R. 35; 9TH CIR. R. 35-1 to -4; FED. CIR. R. 35; 3D CIR. R. 35.0-4; 4TH CIR. R. 35; 7TH CIR. R. 35; 10TH CIR. R. 35.1-7.

126. See 11TH CIR. I.O.P. (accompanying FED. R. APP. P. 35); 6TH CIR. I.O.P. 35; 3D CIR. I.O.P. 2.2, 9.1-6; 2D CIR. I.O.P. 35.1; 5TH CIR. I.O.P. (Petition for Rehearing En Banc); 7TH CIR. APP. III I.O.P. 5; 1ST CIR. I.O.P. X. Internal operating procedures guide the inner conduct of the court. See 20A JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE § 347.12 (3d ed. 2013). However, unlike local rules, a circuit court promulgating or amending an internal operating procedure does not have to give appropriate public notice and opportunity for comment. See *id.* §§ 347.11-12. Appellate Rule 47(a)(1) mentions internal operating procedures but does not describe them. See FED. R. APP. P. 47(a)(1). Rule 47, however, prohibits a circuit court from putting “[a] generally applicable direction to parties or lawyers regarding practice before a court” in an internal operating procedure, rather, it must be in a local rule. See *id.*

various circuits to identify where language differences exist between: (1) the local rules of the circuits themselves and (2) the local rules of the circuits and Rule 35 of the Federal Rules of Appellate Procedure. Part II.C looks at idiosyncrasies of particular circuits' en banc procedures. Finally, Part II.D identifies informal polling procedures utilized by some circuit courts to undo a circuit's precedent without further briefing or argument by the litigants.

A. Frequency of Use

En banc hearings and rehearings represent a small fraction of all cases heard by the federal courts of appeals. For example, in 2010, the circuit courts heard forty-five cases en banc out of more than 30,914 cases terminated on their merits.¹²⁷ While en banc review is relatively rare in all circuits, the circuits vary in how frequently they use the en banc procedure.¹²⁸ For instance, the Federal Circuit seems particularly attuned to using en banc review,¹²⁹ while the Second Circuit is the least likely to use it.¹³⁰

1. The Second Circuit's "Tradition"

One reason the Second Circuit may tend to refrain from invoking the en banc procedure is because of "tradition."¹³¹ Second Circuit Judge Robert A. Katzmann explains that the Second Circuit has a "longstanding tradition of general deference to panel adjudication—a tradition which holds whether or not the judges of the Court agree with the panel's disposition of the matter before it. Throughout [its] history, [the Second Circuit] ha[s] proceeded to a full hearing en banc only in rare and exceptional circumstances."¹³²

127. See SECOND CIRCUIT COURTS COMM., *supra* note 25, at 5.

128. For example, looking at the data from 2001 to 2009, the frequency of en banc cases in each circuit from lowest to highest, based on the percentage of en banc cases of a circuit's total docket, was: 0.01 percent in the Second Circuit; 0.07 percent in each of the Third, Seventh, and Eleventh Circuits; 0.08 percent in the Fifth Circuit; 0.09 percent in the Fourth Circuit; 0.10 percent in the First Circuit; 0.13 percent in the Sixth Circuit; 0.14 percent in the Ninth Circuit; 0.15 percent in the D.C. Circuit; 0.19 percent in the Tenth Circuit; 0.23 percent in the Eighth Circuit; and 0.30 percent in the Federal Circuit. See Ryan Vacca, *Acting Like an Administrative Agency: The Federal Circuit En Banc*, 76 MO. L. REV. 733, 738 (2011).

129. Other circuits that hear a larger proportion of cases en banc include the D.C., Eighth, Ninth, and Tenth Circuits. See SECOND CIRCUIT COURTS COMM., *supra* note 25, at 6.

130. See *id.* From 2000 through 2010, the average number of en banc cases heard in the Second Circuit was about one-eighth that of the system-wide average. See *id.* at 4.

131. See Wilfred Feinberg, *Unique Customs and Practices of the Second Circuit*, 14 HOFSTRA L. REV. 297, 311 (1986) ("The tradition of hostility to in bancs goes back a long way in the Second Circuit. Learned Hand strongly disapproved of in bancs, and while he was Chief Judge [the Second Circuit] had none."). See generally *Ricci v. DeStefano*, 530 F.3d 88 (2d Cir. 2008) (denying rehearing en banc).

132. See *Ricci*, 530 F.3d at 89–90 (Katzmann, J., concurring in the denial of rehearing en banc); see also *id.* at 89 (Calabresi, J., concurring in the denial of rehearing en banc) ("[R]ehearing *en banc* is always a matter of choice, not necessity . . .").

Chief Judge Dennis Jacobs, also of the Second Circuit, criticizes using “tradition” as a reason not to grant en banc hearings and rehearings.¹³³ He argues that by using tradition to avoid convening en banc, the Second Circuit fails to exercise the discretion called for by Rule 35.¹³⁴ He further argues that the exercise of discretion to hear cases en banc is integral to the judicial process particularly because “en banc proceeding[s] provide[] a safeguard against unnecessary intercircuit conflicts.”¹³⁵ Finally, he argues, relying on tradition to deny en banc rehearings “look[s] very much like abuse of discretion.”¹³⁶

2. Shaping Patent Policy in the Federal Circuit

Out of all thirteen circuits, the Federal Circuit hears the largest proportion of its total cases en banc.¹³⁷ Professor Ryan Vacca has offered two possible explanations for this.¹³⁸

The first is geographic proximity—because all the active judges on the Federal Circuit sit in only one location—Washington, D.C.—it is particularly easy for them to convene as a full court.¹³⁹ However, while this may explain some of the differences between the Federal Circuit and other circuits, it does not explain the difference between the Federal Circuit and the D.C. Circuit, where all of the active judges also sit in only one location.¹⁴⁰

The second possible explanation is that the Federal Circuit uses its en banc procedure to engage in substantive rulemaking.¹⁴¹ The Federal Circuit serves as the appellate body for cases “arising under[] any Act of Congress relating to patents,”¹⁴² and, accordingly, “[t]he Federal Circuit’s numerous en banc hearings . . . set forth rules regarding a wide range of issues and sub-issues . . . which consequently set patent policy.”¹⁴³ Professor Vacca argues that the Federal Circuit’s frequent use of en banc sittings make the court look much like an administrative agency engaging in substantive rulemaking, and he suggests this practice is beneficial in shaping patent policy as a whole.¹⁴⁴

133. *See id.* at 92–93 (Jacobs, C.J., dissenting from the denial of rehearing en banc).

134. *See id.*

135. *See id.* at 93 (quoting FED. R. APP. P. 35 advisory committee’s notes (1998 Amendments)).

136. *See id.*

137. *See Vacca, supra* note 128, at 738–39.

138. *See id.* at 738, 744–59.

139. *See id.* at 738–39.

140. *See Douglas H. Ginsburg & Donald Falk, The Court En Banc: 1981–1990*, 59 GEO. WASH. L. REV. 1008, 1016 (1991). The D.C. Circuit hears on average 0.15 percent fewer cases en banc than the Federal Circuit. *See supra* note 128.

141. *See Vacca, supra* note 128, at 744–49.

142. *See* 28 U.S.C. § 1295(a)(1) (2006) (granting the Federal Circuit “exclusive jurisdiction” over appeals in cases where a district court’s jurisdiction was based on a congressional act relating to patents).

143. Vacca, *supra* note 128, at 747.

144. *See generally Vacca, supra* note 128.

3. Utilizing En Banc Review To Maintain Intracircuit Consistency

There seems to be a correlation between the frequency of en banc hearings and rehearings in a particular circuit and the size of the circuit court. Larger circuits may need to use en banc review more frequently in order to maintain intracircuit consistency.¹⁴⁵ In theory, the consistency of decisions of a court sitting in panels would diminish “as the pool of judges from which a panel may be drawn expands.”¹⁴⁶ The First Circuit’s en banc practice suggests that this theory has some merit. For example, from 1983 to 2007, the First Circuit, the circuit with the smallest number of judgeships (at only nine judges, of which five are active-duty judges),¹⁴⁷ handed down only forty-four en banc rulings.¹⁴⁸ This suggests that the First Circuit may not use en banc review to maintain intracircuit consistency but rather may grant en banc review only to hear cases of “exceptional importance.”¹⁴⁹ Conversely, the Ninth Circuit, the circuit with the largest number of judgeships (at twenty-seven active-duty judges), hears a larger proportion of its total cases en banc.¹⁵⁰ Thus, these statistics suggest that a larger court will have a greater reason to resort to rehearings en banc more frequently to maintain consistency in its panel decisions.¹⁵¹

4. The Costs of En Banc Review

The frequency of en banc hearings and rehearings in a particular circuit may be impacted by the costs associated with using the procedure. A larger court must incur a greater cost to hear a case en banc for two reasons. First, in a larger court, more judges have to hear or rehear the case, which increases the amount of total judicial time consumed. Second, the time spent preparing an opinion after an en banc sitting is significantly greater for larger courts.¹⁵² This is because “[t]he author of the opinion for the

145. See Procter Hug, Jr. & Carl Tobias, *A Preferable Approach for the Ninth Circuit*, 88 CALIF. L. REV. 1657, 1668 (2000).

146. Ginsburg & Falk, *supra* note 140, at 1018.

147. See *Judges*, U.S. CT. APPEALS FOR FIRST CIRCUIT, <http://www.ca1.uscourts.gov/judges> (last visited Feb. 24, 2014) (listing the names of both active and senior judges on the court).

148. See Stephen L. Wasby, *A Look at the Smallest Circuit*, 43 SUFFOLK U. L. REV. 417, 429–30 (2010). Most First Circuit en banc courts are composed of five, six, or seven judges. *Id.* at 435. While an en banc court consists of all active judges, senior judges who were on the panel of a case being reheard en banc may sit on the en banc court. See *id.* at 434.

149. See FED. R. APP. P. 35(a)(2). “The small number of judges on the [First Circuit]—small even if the senior judges are included—may facilitate greater collegiality” Wasby, *supra* note 148, at 424. This may also explain the low number of concurring and dissenting First Circuit opinions. *Id.*

150. See *supra* note 128. This may also be because of the Ninth Circuit’s limited en banc court. See *infra* Part II.C.1.

151. In an empirical study of en banc decisions by district courts it was found that districts with more judges were more likely to sit en banc. See Ahmed E. Taha, *How Panels Affect Judges: Evidence from United States District Courts*, 39 U. RICH. L. REV. 1235, 1273 (2005).

152. See Ginsburg & Falk, *supra* note 140, at 1018–20.

court must circulate it to [all judges] rather than to two colleagues, each of whom may make comments or suggestions, or indeed, launch a dissent that needs to be addressed.”¹⁵³ Additionally, revising opinions consumes much more time on hearings or rehearings en banc than it does with a three-judge panel because

at each step the opinion writer must accommodate multiple, sometimes conflicting, suggestions; and the author must secure anew the concurrence of each member of the majority or minority for which he or she writes each time the opinion is revised in response to a further iteration by the other faction.¹⁵⁴

Thus, it is significantly less costly for a smaller court—like the First Circuit—to hold an en banc hearing or rehearing rather than a larger court—like the Fifth¹⁵⁵ or Ninth Circuit.¹⁵⁶

In sum, the circuits have differing opinions about the utility of en banc proceedings. Those circuits that frequently invoke the en banc procedure presumably believe it is useful to do so. Those circuits that rarely invoke the en banc procedure presumably believe the cost of doing so is not outweighed by a benefit to the administration of justice.

B. Lack of Uniformity in Language

Because *Western Pacific* gave the circuit courts ample discretion to establish en banc procedures,¹⁵⁷ the circuit courts enacted local en banc rules and internal operating procedures to govern their en banc procedures. These rules, however, are often circuit specific and contain differences from other regional circuits and also from the text of Rule 35.

1. Exceptional “Public” Importance

Rule 35(a)(2) states, “An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless the proceeding involves a *question of exceptional importance*.”¹⁵⁸ The Fifth, Sixth, and Tenth Circuits have a local rule that states that en banc review is an extraordinary procedure intended to focus the full court on an issue of “exceptional *public importance*.”¹⁵⁹ This language differs from Rule 35, which does not

153. *Id.* at 1019.

154. *See id.*

155. The Fifth Circuit, with seventeen authorized judgeships, is the next largest circuit after the Ninth Circuit. *See* 28 U.S.C. § 44(a) (2006).

156. Although the costs associated with en banc sittings are greater for larger courts, some larger courts (like the Ninth Circuit) convene en banc at a greater frequency than smaller courts. *See supra* note 128 and accompanying text. This suggests that the risk of intracircuit inconsistency justifies the use of the costly en banc procedure. *See supra* Part II.A.3.

157. *See* *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 250 (1953).

158. *See* FED. R. APP. P. 35(a)(2) (emphasis added).

159. *See* 6TH CIR. I.O.P. 35 (emphasis added); 5TH CIR. I.O.P. (Petition for Rehearing En Banc) (emphasis added); 10TH CIR. R. 35.1(A) (emphasis added).

specify that matters must be of exceptional importance to the “public.”¹⁶⁰ It also differs from the local rules of the Third, Eleventh, and Federal Circuits, which do not specify that matters must be of exceptional importance to the public.¹⁶¹ The First, Second, Fourth, Seventh, Eighth, and D.C. Circuits do not have a local rule altering Federal Rule of Appellate Procedure 35(a)(2).¹⁶² The Ninth Circuit Local Rule does not mention the exceptional importance test but, rather, sets up a unique test of its own.¹⁶³

Determining what “exceptional importance” means is not an easy task and “begs the question of whether courts should weigh the impact on the public, the judiciary, or the parties.”¹⁶⁴ A case is likely to be of exceptional importance to the public “if it concerns either a unique issue of great moment to the community, or a recurring issue that is likely to affect a large number of cases or persons.”¹⁶⁵ In the history of the D.C. Circuit’s en banc practice, the cases arising out of the Watergate affair and the cases involving the subpoena of the President’s tapes are examples of cases that were considered of exceptional importance to the public.¹⁶⁶

Alternatively, a case is likely to be of exceptional importance to the court if it involves “questions concerning the jurisdiction of the court or the standards for determining the justiciability of a particular case—including matters such as standing, and ripeness.”¹⁶⁷ This is because “[t]he resolution of these questions provides the bar with important guidance as to whether and when a party may litigate in [a] circuit.”¹⁶⁸

And finally, a case is likely to be of exceptional importance to the parties when, although the issues raised are not particularly significant to the public generally or to the court, the “cases involv[e] large amounts of money or hav[e] extraordinary emotional impact upon the individuals involved, regardless of the likely importance of the case as a precedent.”¹⁶⁹

160. See FED. R. APP. P. 35.

161. See 11TH CIR. R. 35-3; FED. CIR. R. 35(b); 3D CIR. R. 35.1.

162. See 1ST CIR. R. 35; D.C. CIR. R. 35; 2D CIR. R. 35; 8TH CIR. R. 35A; 4TH CIR. R. 35; 7TH CIR. R. 35.

163. See *infra* Part II.B.3.

164. See Sarah J. Berkus, Note, *A Critique and Comparison of En Banc Review in the Tenth and D.C. Circuits* and *United States v. Nacchio*, 86 DENV. U. L. REV. 1069, 1073 (2009).

165. See Ginsburg & Falk, *supra* note 140, at 1025.

166. See *id.* at 1025–26.

167. See *id.* at 1028–29. Despite the Tenth Circuit’s local rule that it will only take cases of “exceptional public importance,” it has interpreted this language loosely and often takes cases based on their importance to judicial administration. See, e.g., *United States v. Nacchio*, 555 F.3d 1234 (10th Cir. 2009) (en banc) (granting en banc review to determine whether evidentiary evidence was properly excluded); *Cortez v. McCauley*, 478 F.3d 1108 (10th Cir. 2007) (en banc) (granting en banc review to determine whether a claim of excessive force must be subsumed into a claim of unlawful seizure); *Robbins v. Chronister*, 435 F.3d 1238 (10th Cir. 2006) (en banc) (granting en banc review to determine whether to place a cap on attorneys’ fees for those representing prisoners).

168. See *id.* at 1029.

169. *Id.* at 1032. Some commentators have doubted the legitimacy of exceptional importance to the parties as a criterion for allocating the attention of the full court. *Id.* at 1031–32. The Federal Circuit’s “practice notes” seem to recognize that this type of “exceptional importance” is not legitimate. See U.S. COURT OF APPEALS FOR THE FED.

However, because courts rarely state their reasons for granting en banc review and because en banc cases rarely fit neatly into one category or the other, it is extremely difficult to classify to whom and to what extent the court considers the matter exceptionally important.¹⁷⁰

2. En Banc Review of Opinions Directly Conflicting with State Law Precedent

While en banc review can be extremely beneficial, it also comes with great costs.¹⁷¹ For example, the Fifth Circuit Rules seem to discourage filings of suggestions for en banc review.¹⁷² Local Rule 35 of the Fifth Circuit recognizes that “each request for en banc consideration . . . is a serious call on limited judicial resources.”¹⁷³ The corresponding Fifth Circuit internal operating procedure refers to the extraordinary nature of petitions for rehearing en banc and characterizes these suggestions as “the most abused prerogative.”¹⁷⁴ This internal operating procedure also states, however, that “[a] petition for rehearing en banc is an extraordinary procedure that is intended to bring to the attention of the entire court an error of exceptional public importance or an opinion that directly conflicts with prior Supreme Court, Fifth Circuit or *state law* precedent.”¹⁷⁵ No other circuit has a local rule that states that the en banc procedure is appropriate when an opinion directly conflicts with state law precedent. Rather, the Sixth Circuit Rules and the Eleventh Circuit Rules explicitly state that an alleged error in the determination of state law is not appropriate grounds for a rehearing en banc but instead is a matter for panel rehearing.¹⁷⁶

In theory, the Fifth Circuit’s internal operating procedure authorizing en banc review of decisions that directly conflict with state law precedent suggests that the Fifth Circuit has broader discretion in deciding whether to grant en banc review. The Fifth Circuit, the largest circuit after the Ninth Circuit, however, hears very few cases en banc.¹⁷⁷ From 2001 to 2009, for example, the Fifth Circuit heard only 0.08 percent of its total cases en banc.¹⁷⁸ In comparison, the First Circuit, the smallest circuit, heard 0.10 percent of its total cases en banc during the same time period.¹⁷⁹

CIRCUIT, RULES OF PRACTICE 77 (2011), available at <http://www.cafc.uscourts.gov/images/stories/rules-of-practice/rules.pdf> (“A petition for rehearing en banc is rarely appropriate if the appeal was the subject of a nonprecedential opinion by the panel of judges that heard it.”).

170. See Berkus, *supra* note 164.

171. See *infra* Part III.B; see also *supra* Part II.A.4.

172. See 5TH CIR. R. 35.1; 5TH CIR. I.O.P. 35.

173. See 5TH CIR. R. 35.1.

174. See 5TH CIR. I.O.P. 35.

175. See *id.* (emphasis added).

176. See 6TH CIR. I.O.P. 35(a); see also 11TH CIR. R. 35-3.

177. See *supra* note 128.

178. See *id.*

179. See *id.*

3. The Ninth Circuit's "Stringent" Rule

The Ninth Circuit has a local rule that states that “[w]hen the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such conflict is an appropriate ground for petitioning for rehearing en banc.”¹⁸⁰ The Ninth Circuit’s local rule seems to reject using en banc review to maintain intracircuit consistency¹⁸¹ because it requires a panel opinion to directly conflict with an opinion by “another court of appeals”¹⁸² and also requires that the decision substantially affects a rule of national application.¹⁸³

Although the Ninth Circuit Rules seem to limit the types of cases that warrant en banc review, the Ninth Circuit grants en banc review at a significantly higher rate than most other circuits.¹⁸⁴

4. Rules Governing Amicus Curiae Briefs in Connection with Petitions for En Banc Review

Rule 29 of the Federal Rules of Appellate Procedure governs the submission of amicus curiae briefs prior to the issuance of a panel decision.¹⁸⁵ The rule permits governmental parties to file an amicus curiae brief as of right (i.e., “without the consent of parties or leave of court”); all other potential amici, however, “must obtain either consent of all the parties or leave of court to file a brief.”¹⁸⁶

The Eleventh Circuit has adopted additional local rules governing the submission of amicus curiae briefs in support of petitions for rehearing or rehearing en banc.¹⁸⁷ Consistent with Rule 29, governmental parties may file an amicus curiae brief in support of a petition for rehearing or rehearing en banc as of right.¹⁸⁸ However, a nongovernmental entity or an individual must obtain leave of court to file an amicus curiae brief in support of a petition for rehearing or rehearing en banc.¹⁸⁹ The Eleventh Circuit local rules require *court* approval—consent of the parties is not adequate.¹⁹⁰ The

180. See 9TH CIR. R. 35-1.

181. Federal Rule of Appellate Procedure 35(a)(1), however, specifically states that en banc hearings or rehearings can be ordered when “en banc consideration is necessary to secure or maintain uniformity of the court’s decisions.” FED. R. APP. P. 35(a)(1).

182. 9TH CIR. R. 35-1. The Supreme Court has indicated that a conflict between circuits may be an appropriate reason to grant an en banc rehearing, at least when the judges of a circuit express doubt about the correctness of their own circuit’s precedent. See *Groves v. Ring Screw Works*, 498 U.S. 168, 172 n.8 (1990).

183. 9TH CIR. R. 35-1.

184. See *supra* note 128.

185. See FED. R. APP. P. 29(a).

186. See P. Stephen Gidiere III, *The Facts and Fictions of Amicus Curiae Practice in the Eleventh Circuit Court of Appeals*, 5 SETON HALL CIR. REV. 1, 3 (2008) (quoting FED. R. APP. P. 29(a)).

187. See 11TH CIR. R. 35-6, 35-9.

188. See *id.* R. 35-6.

189. See *id.*

190. See *id.*

local rules also contain requirements on the contents, length, and time for filing of all amicus curiae briefs in support of a petition for rehearing or rehearing en banc.¹⁹¹

The Eleventh Circuit's local rules governing amicus briefs in support of petitions for rehearing or rehearsings en banc are more restrictive than the majority of other circuits.¹⁹² Most other circuits do not have specific local rules governing amicus curiae briefs at the rehearing or rehearing en banc stages, which means that the general requirements of Federal Rule of Appellate Procedure 29(a), which allows filing by consent of all the parties, apply in those circuits.¹⁹³ The D.C. Circuit has the most restrictive local rule at the en banc stage, allowing amicus curiae briefs *only by invitation* of the court.¹⁹⁴

5. Frivolous En Banc Petitions and Rule 11 Sanctions

The Fifth, Eighth, and Federal Circuits have a local rule which cautions litigants not to file frivolous en banc petitions.¹⁹⁵ Their local rules make clear that frivolous en banc petitions that do not meet the standards of Federal Rule of Appellate Procedure 35 may subject the person who signed the petitions, the represented party, or both to Rule 11 sanctions.¹⁹⁶

This is noteworthy because many judges and commentators argue that the en banc procedure is inefficient and a waste of judicial resources because litigants generally file en banc petitions as a matter of course.¹⁹⁷ The Fifth, Eighth, and Federal Circuit local rules seem to be attempting to address this issue.¹⁹⁸

In practice, however, the Federal Circuit hears the most cases en banc proportionately compared to the other circuits, the Eighth Circuit hears the second most cases en banc, and the Fifth Circuit hears the ninth most cases en banc.¹⁹⁹ Thus, it is not clear that the sanction rules effectively deter an

191. *See id.*

192. *See* Gidiere, *supra* note 186, at 4.

193. *See id.* at 4–5.

194. *See* D.C. CIR. R. 35(f).

195. *See* 8TH CIR. R. 35A(2); 5TH CIR. R. 35.1; FED. CIR. R. 35(a)(2).

196. *See* 8TH CIR. R. 35A(2) (“The court may assess costs against counsel who files a frivolous petition for rehearing en banc deemed to have multiplied the proceedings in the case and to have increased costs unreasonably and vexatiously. At the court’s order, counsel personally may be required to pay those costs to the opposing party.”); 5TH CIR. R. 35.1 (“The court takes the view that, given the extraordinary nature of petitions for en banc consideration, it is fully justified in imposing sanctions on its own initiative . . . upon the person who signed the petitions, the represented party, or both, for manifest abuse of the procedure.”); FED. CIR. R. 35(a)(2) (“A petition for hearing or rehearing en banc that does not meet the standards of Federal Rule of Appellate Procedure 35(a) may be deemed frivolous and subject to sanctions.”); *see also* FED. R. CIV. P. 11(c)(1) (“[T]he court may impose an appropriate sanction on any attorney, law firm, or party that violated [Rule 11, which requires a representation of nonfrivolity,] or is responsible for the violation.”).

197. *See* Kaufman, *supra* note 31, at 57.

198. *See* 8TH CIR. R. 35A(2); 5TH CIR. R. 35.1; FED. CIR. R. 35(a)(2).

199. *See supra* note 128.

attorney or litigants' decision of whether to file a petition for an en banc hearing or rehearing.²⁰⁰

C. Unique Idiosyncrasies

Various circuit courts have developed their own unique practices for both choosing en banc cases and for conducting en banc review. While some of these practices are listed in the circuits' local rules, others are not. A couple of examples of unique idiosyncrasies of certain circuits are discussed in turn.

1. The Limited En Banc Court

The Ninth Circuit is the only circuit to formally exercise the limited en banc court option made available by Congress in the Omnibus Judgeship Act of 1978.²⁰¹ The "limited en banc" is not truly "en banc" because it is not the full court. There are currently twenty-seven active-duty judges on the Ninth Circuit,²⁰² but the limited en banc court consists of only eleven Ninth Circuit judges²⁰³—fewer than half of all active judges. The Ninth Circuit's en banc court consists not of all twenty-seven active judges on the circuit, but rather of the chief judge of the Ninth Circuit (or, in the absence of the chief judge, the next most senior active judge) and ten additional judges to be drawn by lot from the active judges of the court.²⁰⁴

Some critics of the limited en banc procedure disfavor it because it could allow a minority view to become the judgment of the full court.²⁰⁵ On the Ninth Circuit, it takes a vote of fourteen judges to hear an appeal of a three-judge decision en banc.²⁰⁶ In theory, the eleven judges on the Ninth Circuit's en banc panel, ten of whom are chosen at random from the full court, may come to a different result than the full court would. This is because six judges, a simple majority of the eleven-member en banc panel,

200. Very few en banc petitions, however, are manifestly frivolous and, therefore, "each judge is burdened with considering each suggestion to the extent necessary to determine whether it is one of those few cases each year that really should be reheard en banc." See Ginsburg & Falk, *supra* note 140, at 1051.

201. See 9TH CIR. R. 35-3; see also Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633 (codified as amended at 28 U.S.C. § 46(c) (2006)) (providing that any federal appellate court with more than fifteen active judges could "perform its en banc function by such number of [judges] . . . as may be prescribed by rule of the court of appeals"). The Fifth and Sixth Circuits also have more than fifteen authorized judgeships but have not availed themselves of the option Congress permitted in the Omnibus Judgeship Act. See 28 U.S.C. § 44(a).

202. See *Circuit Judges: Biographies*, U.S. COURTS FOR NINTH CIRCUIT, http://www.ce9.uscourts.gov/ninthcircuit/circuit_judges.html (last visited Feb. 24, 2014) (listing names of active duty judges on the court).

203. See 9TH CIR. R. 35-3.

204. See *id.*

205. See Pamela Ann Rymer, *The "Limited" En Banc: Half Full, or Half Empty?*, 48 ARIZ. L. REV. 317, 321 (2006).

206. See FED. R. APP. P. 35(a) ("A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc.").

could vote to reaffirm the three judge panel decision that fourteen judges who voted for en banc rehearing would have reversed, thus establishing Ninth Circuit law that a majority of judges on the Ninth Circuit do not support.²⁰⁷ The Ninth Circuit's procedure, however, allows a majority of the court's active judges to force a case decided by a limited en banc court to be reheard by the full court.²⁰⁸ There is no indication that this provision has ever been invoked.

2. The Federal Circuit's Unique Amicus Brief Practice

Rule 29 of the Federal Rules of Appellate Procedure allows for nongovernmental amici curiae to file briefs but requires leave of court or consent of the parties.²⁰⁹ Therefore, except in cases where the court grants leave in its en banc order, "amici curiae first must file a motion for leave or go through the process of obtaining consent of the parties before filing a brief."²¹⁰

Many of the Federal Circuit's en banc orders permit amici curiae to file briefs and, in some cases, "the Federal Circuit specifically invites . . . the [Patent and Trademark Office] to file an amicus brief."²¹¹ This is not the common standard in the other circuits.²¹² The Federal Circuit's practice of inviting amici to file briefs in en banc cases indicates a "stronger attitude of inclusiveness" than that of the other circuits.²¹³

D. Informal Polling

Informal en banc review is a procedure where one "federal circuit court panel circulates an opinion to the full court for acquiescence in an action as a substitute for formal en banc review."²¹⁴ Informal en banc processes usually entail circulating an opinion to the full court with an explanation that the opinion takes an action that would ordinarily require the court to convene en banc.²¹⁵ The opinion includes an "invitation to call for en banc review."²¹⁶ If a majority of the circuit agrees with the panel's opinion or at least does not vote to hear the case en banc, the panel opinion is published.²¹⁷ The panel opinion will include a notation—either in the text of the opinion or in a footnote—that the full court approved of the opinion through informal en banc review.²¹⁸

207. See Rymer, *supra* note 205, at 321–22.

208. See 9TH CIR. R. 35-3.

209. See FED. R. APP. P. 29(a).

210. See Vacca, *supra* note 128, at 743.

211. See *id.*

212. See *id.* at 743–44.

213. See *id.* at 744.

214. See Sloan, *supra* note 30, at 725.

215. See *id.*

216. See *id.* at 726.

217. See *id.*

218. See *id.*

Nine of the thirteen federal circuits have implemented some sort of mini or informal en banc review.²¹⁹ This includes the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits.²²⁰ These circuits have used informal en banc review in various types of circumstances including when a panel addresses a question of first impression, when a panel creates or continues a circuit split, and even when a panel overrules circuit precedent.²²¹ Using informal en banc review to overrule circuit precedent has been criticized for violating the law-of-the-circuit rule and, thus, undermining horizontal stare decisis.²²²

Only the Seventh Circuit and the D.C. Circuit have meaningfully attempted to justify their use of informal en banc review by creating actual governing procedures. The Seventh Circuit authorizes informal en banc review by Local Rule 40(e).²²³ The D.C. Circuit has promulgated a policy statement governing the use of informal en banc review.²²⁴ The remaining circuits who use informal en banc review regularly—the First, Second, Fifth, and Tenth Circuits—have not clearly defined when using informal en banc procedures is appropriate.

1. The Seventh and D.C. Circuits

The Seventh Circuit first used an informal en banc procedure in 1969.²²⁵ In 1976, the Seventh Circuit promulgated Local Rule 40(e), which provides:

A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted. In the discretion of the panel, a proposed opinion which would establish a new rule or procedure may be similarly circulated before it is issued. When the position is adopted by the panel after compliance with this procedure, the opinion, when published, shall contain a footnote worded, depending on the circumstances, in substance as follows: This opinion has been circulated among all judges of this court in regular

219. See Sloan, *supra* note 30, at 726–27.

220. See *id.* The Fourth, Sixth, and Eighth Circuits, however, have rarely used informal en banc procedures and the Sixth Circuit has only used it once—where the decision was later overturned. *Id.* at 729. The Third Circuit specifically disavows any informal en banc procedure in its local rules. See 3D CIR. I.O.P. 9.1 (“It is the tradition of this court that the holding of a panel in a precedential opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a precedential opinion of a previous panel. Court en banc consideration is required to do so.”).

221. See Sloan, *supra* note 30, at 725.

222. See *supra* note 30 and accompanying text.

223. See 7TH CIR. R. 40(e).

224. See generally *Policy Statement on En Banc Endorsement of Panel Decisions*, U.S. CT. APPEALS D.C. CIRCUIT (Jan. 17, 1996), [http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20Irons%20Footnote/\\$FILE/IRONS.PDF](http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20Irons%20Footnote/$FILE/IRONS.PDF).

225. See *United States v. Brown*, 411 F.2d 930, 934 n.5 (7th Cir. 1969).

active service. (No judge favored, or A majority did not favor) a rehearing en banc on the question of (e.g., overruling *Doe v. Roe*.)²²⁶

The cases that employ the Seventh Circuit's informal en banc procedure do not explain or justify why it is used; rather, they contain a version of the footnote required by Rule 40(e) along with a citation to the local rule.²²⁷

The D.C. Circuit first used an informal en banc procedure in 1977.²²⁸ In *Irons v. Diamond*,²²⁹ decided four years later, the D.C. Circuit formalized the use of informal en banc review. The Court, faced with two inconsistent decisions, overruled one decision and, in doing so, stated in a footnote: "The foregoing part of the division's decision, because it resolves an apparent conflict between two prior decisions, has been separately considered and approved by the full court, and thus constitutes the law of the circuit."²³⁰

Since then, the D.C. Circuit began using the "so-called *Irons* footnote[]" in cases that would ordinarily require en banc review.²³¹ The circuit expanded the range of justifications for using the *Irons* footnote procedure, including: to extend or limit earlier panel decisions,²³² to reject dicta,²³³ and to overrule decisions deemed incorrect.²³⁴

On January 17, 1996, in an apparent attempt to standardize the use of the *Irons* footnote procedure, the D.C. Circuit promulgated a "Policy Statement on *En Banc* Endorsement of Panel Decisions" identifying the types of cases where the *Irons* footnote procedure was acceptable.²³⁵ The policy statement expressly acknowledges that the procedure is a substitute for formal en banc review and may be called for when "the circumstances of the case or the importance of the legal questions presented do not warrant the heavy administrative burdens of full *en banc* hearing."²³⁶ The policy statement notes the type of cases where the informal en banc procedure is appropriate:

- (1) resolving an apparent conflict in the prior decisions of panels of the court;
- (2) rejecting a prior statement of law which, although arguably dictum, warrants express rejection to avoid future confusion;

226. 7TH CIR. R. 40(e).

227. See, e.g., *Spiegla v. Hull*, 371 F.3d 928, 942 n.7 (7th Cir. 2004); *United States v. Mitrione*, 357 F.3d 712, 718 n.2 (7th Cir. 2004), *vacated on other grounds*, 543 U.S. 1097 (2005); *Gibson v. West*, 201 F.3d 990, 994 n.3 (7th Cir. 2000).

228. See *United States v. Sheppard*, 569 F.2d 114 (D.C. Cir. 1977).

229. 670 F.2d 265 (D.C. Cir. 1981).

230. See *id.* at 268 n.11.

231. See Sloan, *supra* note 30, at 735.

232. See *Londrigan v. FBI*, 722 F.2d 840, 844-45 (D.C. Cir. 1983).

233. See *U.S. Dep't of Navy v. Fed. Labor Relations Auth.*, 952 F.2d 1434, 1439 n.5 (D.C. Cir. 1992).

234. See *In re Sealed Case No. 97-3112*, 181 F.3d 128, 145 (D.C. Cir. 1999) (en banc) (Henderson, J., concurring).

235. See *Policy Statement on En Banc Endorsement of Panel Decisions*, *supra* note 224.

236. See *id.*

(3) overruling an old or obsolete decision which, although still technically valid as precedent, has plainly been rendered obsolete by subsequent legislation or other developments; and

(4) overruling a more recent precedent which, due to an intervening Supreme Court decision, or the combined weight of authority from other circuits, a panel is convinced is clearly an incorrect statement of current law.²³⁷

The D.C. Circuit is the only circuit to explicitly state that it uses the informal en banc procedure in cases where formal en banc review is appropriate, but not important enough to be granted.²³⁸ It is also the only circuit to articulate specific guidelines governing the informal en banc procedure's application.²³⁹

2. The First, Second, Fifth, and Tenth Circuits

The informal en banc procedures of the First, Second, Fifth, and Tenth Circuits are purely a product of case law.

The First Circuit first used an informal en banc procedure in 1990.²⁴⁰ In *Gallagher v. Wilton Enterprises*,²⁴¹ decided two years later, the First Circuit attempted to justify the use of informal en banc review in a footnote:

Because this case required us to reexamine [an earlier circuit precedent], we would ordinarily have convened the en banc court. We have, however, in rare instances, where it has become reasonably clear that a prior precedent of this court was erroneously decided or is no longer good law, achieved the same result more informally by circulating the proposed panel opinion to all the active judges of the court for pre-publication comment. While this practice is to be used sparingly and with extreme caution, we have employed it in the special circumstances of this case, with the result that the entire court has approved the overruling of [the earlier circuit precedent] on the point at issue.²⁴²

The First Circuit frequently cites *Gallagher* as a justification for implementing informal en banc review.²⁴³

The Second Circuit first used an informal en banc procedure in 1966.²⁴⁴ Since then, the Second Circuit has used the procedure regularly.²⁴⁵ While

237. *Id.*

238. *See* Sloan, *supra* note 30, at 736.

239. *See id.* at 745.

240. *See* United States v. Bucuvalas, 909 F.2d 593 (1st Cir. 1990).

241. 962 F.2d 120 (1st Cir. 1992).

242. *Id.* at 124 n.4 (citation omitted).

243. *See, e.g.,* Educadores Puertorriqueños en Acción v. Hernández, 367 F.3d 61, 67 n.2 (1st Cir. 2004); Crowe v. Bolduc, 365 F.3d 86, 89 n.1 (1st Cir. 2004).

244. *See* United States v. Malafronte, 357 F.2d 629 (2d Cir. 1966); United States v. Freeman, 357 F.2d 606 (2d Cir. 1966).

245. *See, e.g.,* Shipping Corp. of India v. Jaldhi Overseas PTE, 585 F.3d 58, 67 (2d Cir. 2009) (“We readily acknowledge that a panel of our Court is ‘bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court,’ and thus that it would ordinarily be neither appropriate nor possible for us to reverse an existing Circuit precedent. In this case, however, we have circulated this

many opinions state that they have been circulated to all active members of the court, no case has established “the procedure or its acceptable uses.”²⁴⁶

The Fifth Circuit first used an informal en banc procedure in 1984, in *Affholder, Inc. v. Southern Rock, Inc.*²⁴⁷ In *Affholder, Inc.*, the Fifth Circuit attempted to justify the use of the informal en banc procedure:

Mindful of the law of the circuit rule, which forbids one panel to overrule another save when a later statute or Supreme Court decision has changed the applicable law, this opinion has been considered not only by all members of the panels in those [opinions that have been overruled] but also by all judges in active service who were not members of those . . . panels.²⁴⁸

Since *Affholder, Inc.*, the Fifth Circuit has noted its policy of treating informal circulation of an opinion as equivalent to formal en banc review.²⁴⁹

The Tenth Circuit first used an informal en banc procedure in 1984.²⁵⁰ Since then, the Tenth Circuit has regularly implemented informal en banc review. While opinions that use the informal en banc procedure note that the opinion was circulated because it overrules prior decisions and that all or a majority of the judges agreed with the disposition on the particular question of law, no case has established the procedure for its use or its acceptable uses.²⁵¹

3. Critiquing Informal En Banc Review

A major question is whether informal en banc procedures are fair. While the Supreme Court has not commented on informal en banc processes, at least one scholar has argued that use of informal en banc review creates several problems, including that it may (1) undermine the principle of horizontal stare decisis, (2) create potential negative effects on traditionally marginalized groups, (3) diminish collegiality on the court, (4) reduce meaningful opportunities for parties to participate in the process, (5) create uncertainty about the weight of informal en banc opinions, or (6) allow full endorsement of opinions based on less than thorough review.²⁵²

Judge Karen L. Henderson, of the D.C. Circuit, argues that the D.C. Circuit’s informal en banc procedure—the “*Irons Footnote*”—has “serious flaws.”²⁵³ This is because it does not have “any of the safeguards or

opinion to all active members of this Court prior to filing and have received no objection.” (quoting *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004)).

246. See Sloan, *supra* note 30, at 730–31.

247. 746 F.2d 305 (5th Cir. 1984).

248. *Id.* at 311.

249. See Sloan, *supra* note 30, at 731–32.

250. See *EEOC v. Gaddis*, 733 F.2d 1373 (10th Cir. 1984).

251. See Sloan, *supra* note 30, at 734.

252. See *id.* at 744–45. For a more detailed discussion of the arguments made against using informal en banc review, see *id.* at 744–64.

253. See *In re Sealed Case No. 97-3112*, 181 F.3d 128, 146 n.5 (D.C. Cir. 1999) (en banc) (Henderson, J., concurring).

formalities attending the *en banc* process.”²⁵⁴ Judge Henderson further argues that allowing a three-judge panel to decide a question that would normally require full court consideration without the full court having the benefit of further briefing or argument is not consistent with “[r]easoned decisionmaking and stare decisis.”²⁵⁵ Due to the informal *en banc* process, parties do not have the opportunity to rebrief or reargue the case.²⁵⁶ Rather, the decision is based on the panel’s proposed opinion and whatever justification the panel provides.²⁵⁷

III. THE BENEFITS AND BURDENS OF EN BANC REVIEW

Both advocates and critics of *en banc* review recognize that advantages and disadvantages accompany having a circuit court hear and rehear cases *en banc*. To determine why there is such a discrepancy in the use of the *en banc* procedure in the various circuits, it is helpful to understand the policy implications of using *en banc* review.

This Part outlines the positive and negative aspects of the formal *en banc* procedure. Part III.A summarizes the key arguments made for promoting the *en banc* process. Part III.B summarizes the criticisms and disadvantages of the *en banc* process.

A. *The Benefits of En Banc Review*

There are many important reasons for a circuit to convene *en banc*. For instance, a “rehearing *en banc* allows the full court to maintain consistency in the case law—intracircuit, intercircuit, or between the circuit and the Supreme Court.”²⁵⁸ It allows the full court to address issues of great importance.²⁵⁹ And it is the sole means by which the court as a whole can ensure that decisions by its panels are in line with circuit preferences.²⁶⁰

In *United States v. American-Foreign Steamship Corp.*,²⁶¹ the Supreme Court outlined many of the advantages of *en banc* proceedings. First, because *en banc* courts “are convened only when extraordinary circumstances exist,” they make “for more effective judicial administration” where “[c]onflicts within a circuit will be avoided” and “[f]inality of decision in the circuit courts of appeal will be promoted.”²⁶² These considerations are important because in the existing “federal judicial system [the courts of appeals] are the courts of last resort in the run of ordinary cases.”²⁶³

254. *Id.*

255. *Id.*

256. *Id.*

257. *See id.*

258. *See* Ginsburg & Falk, *supra* note 140, at 1022–23.

259. *See id.* at 1023.

260. *See id.*

261. 363 U.S. 685 (1960).

262. *Id.* at 689.

263. *Id.* (quoting *Textile Mills Corp. v. Comm’r*, 314 U.S. 326, 334–35 (1941)).

Second, because not every case is one where “extraordinary circumstances exist,” the en banc procedure does not replace the traditional practice of having three-judge panels hear and decide cases where there is no conflict within the circuit and, thus, the en banc procedure is not a waste of time and judicial resources.²⁶⁴

Third, en banc decisions presumably represent the court’s collective judgment and secure uniformity in the circuit because all the active circuit judges have the opportunity to determine the “major doctrinal trends of the future for their court.”²⁶⁵

Scholars have advanced other arguments for promoting the use of en banc review. A serious advantage is that, although they are not binding on other circuits, en banc decisions may exert greater persuasive influence on other circuits.²⁶⁶ The Third, Fifth, and Seventh Circuits, for example, have verified that this is often true.²⁶⁷

Having the courts of appeals sit en banc may also be helpful to the Supreme Court.²⁶⁸ First, “[f]or cases in which the justices would be likely to be asked to consider a panel’s ruling, an en banc hearing might resolve the case and make Supreme Court review unnecessary.”²⁶⁹ Second, for those en banc cases of which the Supreme Court does grant review, the en banc decision “would also provide assurance that the doctrinal rule announced by the courts of appeals was held by a majority of that court’s judges.”²⁷⁰ And, finally, because en banc rehearings allow more complete consideration (since more judges are present) and provides perspective not available to the panel, en banc decisions “present the Supreme Court with a wider range of interpretation than a three-judge panel would . . . provide,” which “would make the justices better informed in deciding to grant review and then in developing their own ruling.”²⁷¹

The en banc procedure is a useful tool to deal with the agency problem that results from delegating cases to three judge panels.²⁷² The agency problem is this: “the members of any given three-judge panel could potentially be outliers who have different dispositions, biases, and preferences and do not decide a case in the same way as the full circuit

264. *Id.* at 689–90.

265. *See id.* at 690 (quoting *United States v. Am.-Foreign S.S. Corp.*, 265 F.2d 136, 155 (2d Cir. 1958)).

266. *See* SECOND CIRCUIT COURTS COMM., *supra* note 25, at 12.

267. *See* *United States v. Cole*, 567 F.3d 110, 113 (3d Cir. 2009) (describing a Sixth Circuit en banc opinion as “thorough” and finding its reasoning “persuasive”); *Feit v. Ward*, 886 F.2d 848, 854 n.8 (7th Cir. 1989) (stating that the court was “particularly persuaded” by a “unanimous *en banc* opinion” of the D.C. Circuit); *United States v. Hartford*, 489 F.2d 652, 658 (5th Cir. 1974) (following an Eighth Circuit en banc decision that the court found “particularly persuasive”).

268. *See* Stephen L. Wasby, *The Supreme Court and Courts of Appeals En Bancs*, 33 MCGEORGE L. REV. 17, 30 (2001).

269. *Id.*

270. *Id.* at 31.

271. *Id.*

272. *See* Tom S. Clark, *A Principal-Agent Theory of En Banc Review*, 25 J.L. ECON. & ORG. 55, 55–56 (2009).

would.”²⁷³ En banc review, however, allows the full circuit to review decisions made by three-judge panels.²⁷⁴

Additionally, the en banc process is useful because, due to the discretionary nature of the Supreme Court’s writ of certiorari, a vast majority of circuit court decisions are denied review by the Supreme Court upon further appeal and thus the circuit courts are functionally a “court[] of last resort” in the majority of cases.²⁷⁵

B. *The Negative Aspects of En Banc Review*

Critics contend that en banc rehearings are overly time consuming and inefficient, that they fail to “serve their intended purpose,” and they are “too often abused for political ends.”²⁷⁶

Judge Irving R. Kaufman, a former Second Circuit judge, criticized the en banc procedure for being inefficient.²⁷⁷ Because petitions for an en banc rehearing are routinely filed as a matter of course by counsel, each circuit receives a very large number of petitions.²⁷⁸

Judge Kaufman argued that the amount of time that it takes to review the abundance of petitions amounts to a waste of judicial resources.²⁷⁹ From 1981 to 1986, for example, every Second Circuit judge examined over 750 petitions for rehearing en banc, yet the circuit voted in only twenty-seven en banc polls.²⁸⁰ This increases delays in the court.²⁸¹

Judge Kaufman argued that these inefficiencies and delays are heightened when rehearings en banc are actually granted which, in turn, burden the judiciary and the litigant—who has to wait even longer for the final resolution of the case.²⁸² Delays result because the “[e]n banc opinions must be written and circulated among the members of the en banc court; invariably they spark a blizzard of memoranda in an effort to forge a

273. *Id.* at 57.

274. *See id.*

275. *See* Textile Mills Corp. v. Comm’r, 314 U.S. 326, 334–35 (1941).

276. *See* George, *supra* note 52, at 213.

277. *See* Kaufman, *supra* note 31, at 7 (detailing the costs of en banc proceedings and the burden they place on federal courts). Judge Kaufman was a judge in the Southern District of New York from 1949 to 1961 and a judge on the Second Circuit from 1961 to 1987. *See History of the Federal Judiciary*, FED. JUD. CENTER, http://www.fjc.gov/history/home.nsf/page/tu_rosenberg_bio_judge_kaufman.html (last visited Feb. 24, 2014).

278. *See supra* note 31 and accompanying text.

279. *See supra* note 31 and accompanying text. This view is shared by many circuit court judges. For example, according to Judge Harry T. Edwards of the D.C. Circuit, getting the entire court together to hear one case en banc is very costly because it “burdens judges who already are carrying a large backlog of cases, and it substantially delays the case being reheard, often with no clear principle emanating from the *en banc* court.” *See* Bartlett *ex rel.* Neuman v. Bowen, 824 F.2d 1240, 1243 (D.C. Cir. 1987) (Edwards, J., concurring). Judge Edwards was a judge on the D.C. Circuit from 1980 to 2005. *See Harry T. Edwards*, U.S. CT. APPEALS D.C. CIRCUIT, <http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL++Judges++HTE> (last visited Feb. 24, 2014).

280. Kaufman, *supra* note 31, at 7.

281. *Id.*

282. *Id.*

consensus.”²⁸³ Judge Kaufman emphasized that the delay “occasioned by the en banc proceeding is startling” because “[t]he interval between oral argument and en banc disposition is five times as great—on average—as that for a panel disposition.”²⁸⁴

Judge Kaufman also argued that en banc decisions often lead to inconsistency.²⁸⁵ This is because an en banc decision frequently “produces either a majority opinion that was crafted in a purposefully vague manner to forge a consensus within the court, or a litany of diverging opinions, injecting a degree of uncertainty into the law.”²⁸⁶ This, he said, “deprives the judicial process of its quintessential elements of stability and order” and, thus, splintered en banc decisions often generate more uncertainty.²⁸⁷

Furthermore, Judge Kaufman argued that en banc proceedings threaten the “institutional integrity of the appellate court and the three-judge panel.”²⁸⁸ This is because en banc proceedings send the message that “decisions reached by three-judge panels are not final, but represent merely one step on an elongated appellate ladder.”²⁸⁹

Other critics have argued that en banc rehearings are often abused for political ends.²⁹⁰ The argument is that there are ideological motivations behind the decision to grant en banc review—namely, judges abuse the en banc process by overturning panel outcomes that are at odds with the prevailing ideological view of the court.²⁹¹ This is troublesome because it intensifies internal conflict on a circuit court, threatens collegiality between judges, and creates the danger of polarizing courts.²⁹² And “[w]hen ideological preferences begin to dominate judicial decisionmaking, polarization and instability result.”²⁹³ According to Judge Harry T. Edwards, collegiality is essential to judicial decisionmaking, and when en banc review is used to advance ideological ends, it will encourage open politicking among judges.²⁹⁴ This “[p]oliticking will replace the thoughtful dialogue that should characterize a court where every judge respects the integrity of his or her colleagues.”²⁹⁵ Additionally, using en banc review to advance ideological ends questions the integrity of panel judges “who are both intelligent enough to know the law and conscientious enough to abide by their oath to uphold it.”²⁹⁶

283. *Id.*

284. *Id.*

285. *See id.* at 8.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *See* Christopher P. Banks, *The Politics of En Banc Review in the “Mini-Supreme Court,”* 13 J.L. & POL. 377 (1997); Note, *supra* note 112, at 864.

291. *See* Note, *supra* note 112, at 879.

292. *See id.* at 879–80.

293. *See id.* at 880.

294. *See* Bartlett *ex rel.* Neuman v. Bowen, 824 F.2d 1240, 1243 (D.C. Cir. 1987).

295. *Id.*

296. *Id.* at 1243–44. Not all commentators and judges, however, agree with the view that en banc hearings threaten collegiality. For example, Judge Albert B. Maris of the Third

Another critique is that the en banc procedure is impractical.²⁹⁷ En banc review was recognized to allow the full court to convene to hear or rehear a particular case.²⁹⁸ However, larger circuits, like the Ninth Circuit, are forced to sit as a limited en banc court, where less than the full court meets to decide a case that normally would be decided by the full court, as an alternative to engaging in full-blown en banc review.²⁹⁹

Finally, critics point out that the en banc process lacks judicial transparency. This is because “[t]he public does not know whether a vote occurs, which judges vote when a vote does occur, which way judges vote, nor the final count of the votes.”³⁰⁰

IV. REDEFINING EN BANC REVIEW

This Part enunciates a new standard that should be adopted for en banc review: to obtain en banc review, a judge must request en banc consideration (i.e., litigants should no longer have the ability to petition for en banc review) and the judge’s suggestion must be affirmatively voted on by a lower threshold of the active circuit judges (i.e., the now-required majority vote of active-duty judges should be reduced).

The current en banc regime is confusing and problematic. Courts and commentators have suggested a variety of reforms to the en banc procedure. The first reform, which many circuits use, is some type of informal en banc procedure.³⁰¹ These types of procedures are inadequate because they do not allow litigants to further brief the court and they lack adequate opportunity for notice and comment.³⁰²

It may be beneficial to require all circuits to publish their en banc procedures, including these types of informal decisionmaking procedures, in their circuit rules. However, this would not respond to the criticism that the en banc procedure is time consuming, inefficient, fails to serve its intended purpose, and is too often abused for political ends.³⁰³

In adopting an adequate reform, the litigant’s interest in securing adequate review of his or her case must be balanced against the need to preserve limited judicial resources. En banc review provides another opportunity for a person to obtain a favorable ruling because it gives a person another chance to have their case heard.³⁰⁴ However, en banc review is rarely obtained,³⁰⁵ and tightening the standard required to obtain

Circuit wrote that his colleagues on the bench “think that [the en banc] procedure has been very helpful in maintaining the very high esprit de corps which they enjoy.” See Albert Branson Maris, *Hearing and Rehearing Cases In Banc*, 14 F.R.D. 91, 96 (1954).

297. See Banks, *supra* note 290, at 388.

298. See *supra* Part I.A.2.

299. See 9TH CIR. R. 35-3; see also *supra* Part II.C.1.

300. See Stecker, *supra* note 20, at 17.

301. See *supra* Part II.D.

302. See *supra* notes 256–62 and accompanying text.

303. See *supra* Part III.B.

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

305. See *supra* note 128 and accompanying text.

en banc review would likely not impact the probability of a person obtaining it.

An extreme structural reform is necessary to respond to the criticisms of the en banc procedure. The most promising reform would be to no longer allow a litigant to petition for en banc review and instead only allow the suggestion to be raised by a judge sua sponte.³⁰⁶ This would directly respond to the critics' assertion that the en banc process is an inefficient use of judicial time,³⁰⁷ and would also free up judicial resources to review decisions by three-judge panels that are worthy of en banc review.³⁰⁸ As the Fifth Circuit's local rules indicate, "frequently [en banc] rehearings granted result from a request for en banc reconsideration by a judge of the court rather than a petition by the parties."³⁰⁹ Thus, since petitions by litigants are rarely granted the burden on litigants may not be that dramatic.

With en banc petitions no longer being filed as a matter of course by counsel,³¹⁰ circuit judges will likely hold in much higher esteem a judge's suggestion that a case be reviewed en banc.³¹¹ And the requirement that only a judge may suggest a hearing or rehearing en banc may actually result in a better selection of cases to receive en banc review because those cases truly deserving en banc review will no longer be lost among a pile of routine petitions filed by counsel.³¹²

This reform, however, would require overruling part of the *Western Pacific* decision³¹³ where the Supreme Court said that a circuit court must give a litigant the opportunity to suggest to the court "that a particular case is appropriate for consideration by all the judges."³¹⁴ The benefits that would be obtained—e.g., freeing up judicial time and resources, decreasing delays in the disposition of a case, and enhancing judicial transparency throughout the en banc process³¹⁵—outweigh the negative impact on the litigant.

To deal with the enhanced burden on the litigant that would arise by barring litigants from petitioning for en banc review, the circuits should adopt an approach where less than a majority of active-duty judge's votes are required to garner en banc review.³¹⁶ This would require amending Federal Rule of Appellate Procedure 35.³¹⁷

306. See *supra* note 113 and accompanying text.

307. See *supra* notes 277–89 and accompanying text.

308. See *supra* notes 268–80 and accompanying text.

309. See 5TH CIR. I.O.P. 35.

310. See *supra* note 278 and accompanying text.

311. See *supra* Part II.D.

312. See *supra* note 278 and accompanying text.

313. See *supra* notes 91–95 and accompanying text.

314. See *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 250 (1953).

315. See *supra* Part III.B.

316. See *supra* Part I.B.

317. See FED. R. APP. P. 35(a) ("A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc.").

Some commentators have suggested that Rule 35 should be changed to require the approval of a *supermajority* to activate en banc review.³¹⁸ Commentators suggest that this would “blunt the effects of shifting majorities voting largely on ideological grounds.”³¹⁹ This reform should be rejected because (1) while it may respond to the criticism that en banc review is too often abused to further political ends, it still does not respond to the argument that the en banc procedure is an overly time consuming, inefficient procedure,³²⁰ and (2) by requiring the affirmative vote of a supermajority of active-duty judges there will be a decrease in the total number of en banc hearings by making it harder to obtain the adequate number of votes.

The importance of en banc review outweighs the potential for political abuse—as judges “are both intelligent enough to know the law and conscientious enough to abide by their oath to uphold it”³²¹—and therefore, the number of votes required to obtain en banc review should be lessened. The Supreme Court, for example, only requires the affirmative vote of four justices to grant certiorari, which is less than a simple majority of the justices.³²² Because the decision to grant en banc review can be as important as the writ of certiorari it should also require less than a majority of active-duty judges’ votes.

Therefore, to make the en banc process more efficient, a reform that one, requires a judge to request en banc consideration rather than a procedure that allows litigants to petition for en banc review and two, requires a lower number of votes to activate en banc review, should be adopted.

CONCLUSION

The federal courts of appeals are permitted to sit en banc to hear a case or rehear a case decided by a three-judge panel. Every circuit has local rules that permit it to sit en banc and detail its en banc procedure. However, en banc review is rarely invoked across all the circuits. Critics contend that en banc review is an inefficient, overly costly procedure that rarely serves its intended purpose. Despite its downsides, there are certain cases that require a decision by the full court to resolve panel conflict and to ensure sound circuit law—like Gregory Wilson’s case, where the Sixth Circuit law time barring his claim was overturned in a later case. Thus, to minimize the burden on the courts and to ensure that proper cases are heard en banc a rule should be adopted where judges may call for an en banc hearing or rehearing *sua sponte*, but litigants are precluded from petitioning for en banc review. Additionally, to determine whether a certain case should be heard en banc, the number of votes needed should be less than a majority of all active-duty judges on the circuit court.

318. See Note, *supra* note 112, at 883.

319. See *id.*

320. See *supra* Part III.B.

321. See *supra* note 281 and accompanying text.

322. See 36 C.J.S. *Federal Courts* § 378 (2003).