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Ideology and En Banc Review

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IDEOLOGY AND EN BANC REVIEW

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En banc decision making has existed in the federal circuit courts of appeals for nearly fifty years. Recently the process has become the focus of attention because it is being used more frequently and allegedly for political purposes. In this Article, Professor Solimine examines the evolution of the en banc process and its costs and benefits. He concludes that legitimate concerns exist concerning courts' use of en banc decision making that best can be addressed by developing objective criteria on which to make the decision to invoke an en banc hearing. Professor Solimine presents suggested criteria that focus on the goal of using the process to address and resolve conflicts in an area of the law and not on a goal of correcting a perceived erroneous judicial decision. Professor Solimine then applies his criteria to en banc decisions rendered between 1985 and 1987 and draws two conclusions. First, his study refutes the belief that Reagan-appointed judges in particular are guilty of politicizing the en banc process. Nonetheless, his study demonstrates that the courts are invoking en banc decision making in cases that do not deserve this treatment. Professor Solimine concludes that circuit courts must develop and use objective criteria to determine whether to en banc a case to protect the role and process of en banc decision making.

I. INTRODUCTION

The en banc[1] decision making procedures of the United States Courts of Appeals seem unlikely candidates for controversy. Normally courts of appeals sit and decide cases in three-judge panels, the decisions of which are deemed to be those of the entire court.[2] On rare occasions, however, amounting to less

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1. "En banc" means "in the bench." Note, *En Banc Review in Federal Circuit Courts: A Reassessment*, 72 MICH. L. REV. 1637, 1637 n.1 (1974) (quoting BLACK'S LAW DICTIONARY 619 (rev. 4th ed. 1968)) [hereinafter MICH. Note]. Since both the relevant statute and rule, *see infra* notes 2 & 4, refer to "in" rather than "en" banc, some writers prefer to use the former version. *E.g.*, Comment, *In Banc Procedures in the United States Courts of Appeals*, 43 FORDHAM L. REV. 401, 401 n.1 (1974) [hereinafter FORDHAM Comment]. However, given its prevalence in the case law and literature, this Article will use the latter convention.

2. 28 U.S.C. § 46 (1982); *see infra* note 22.

than one percent of cases decided on the merits,[3] all of the judges sitting on the court hear cases en banc. These occasions are supposed to be limited to cases resolving intracircuit conflicts between panel opinions or to cases deciding questions "of exceptional importance."[4]

Despite the relative paucity of en banc decisions, the procedure has come under increasing scrutiny and criticism in the past several years. Two circumstances account for this focus on en banc proceedings. The first is the large increase in the federal appellate case load. As it is, federal judges and their staffs are busy enough reading briefs, hearing oral arguments, and writing opinions in the panel process. The en banc process requires the judiciary to engage in another round of written and sometimes oral argument from the litigants. The process places additional burdens on all circuit judges to review the briefs, collegially reach a decision, and write an opinion or opinions. This may result in substantially delaying disposition of cases, undermining the finality of panel decisions, and displacing resources which would otherwise be devoted to non-en banc cases on the appellate court docket. For these reasons alone, some advocate severe curtailment of the en banc procedure.[5]

A second circumstance, the recent shift in composition of the courts, has focused attention on the purported motivations and strategic behavior of the appellate judges deciding cases en banc. Normally a panel decision is subject to en banc review when a majority of eligible circuit judges so votes.[6] This process has now been linked to the ideology of judges appointed during the Reagan Administration who, by the end of the Reagan Presidency, will account for almost one-half of the federal appellate judiciary.[7] By many popular accounts these judges were appointed to serve the Reagan Administration's conservative social and political agenda.[8] Indeed, this perception received powerful expression during the period of the doomed Supreme Court nominations of Judges Robert H. Bork and Douglas H. Ginsburg in 1987.

Bork, Ginsburg, and other Reagan-appointed appellate jurists were said to be using the en banc procedure to review and reverse panel decisions by other, more liberal judges. Merely because they disagreed with the results reached by

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3. *See infra* text accompanying footnotes 68-73.

4. FED. R. APP. P. 35(a); *see infra* note 26. Under FED. R. APP. P. 35(c) & 40(a) litigants have 14 days after a panel decision judgement is entered in which to file an en banc petition. *See also infra* note 27 (not all en bancs involve panel decisions).

5. *E.g.*, Kaufman, *Do the Costs of the En Banc Proceeding Outweigh its Advantages?*, 69 JUDICATURE 7, 57 (1985) (limiting use to "rarest circumstances").

6. 28 U.S.C. § 46(c) (1982); Fed. R. App. P. 35(a).

7. Goldman, *Reagan's Second Term Judicial Appointments: The Battle at Midway*, 70 JUDICATURE 324, 325 (1987); Wermiel, *Full-Court Review of Panel Rulings Becomes Tool Often Used by Reagan Judges Aiming to Mold Law*, Wall St. J., March 22, 1988, at 70, col. 1 (as of March 1988, Reagan had appointed 78 of 168 federal appellate judges). *But see* Bethell, *Reagan's Other Stalled Judgeships*, Wall St. J., Dec. 2, 1987, at 28, col. 4 (predicting difficulty in confirming nominees in last year of Administration).

8. *See* H. SCHWARTZ, PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION 3-9 (1988); Note, *All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Court of Appeals*, 87 COLUM. L. REV. 766, 766-70 (1987) (surveying accounts in the popular press) [hereinafter COLUM. Note]; Coyle, *The Judiciary: A Great Right Hope*, Nat'l L.J., April 18, 1988, at 22.

panels comprising of or dominated by more liberal judges, Reagan-appointed judges were said to be voting indiscriminately for en banc consideration of those decisions.[9] This controversy over en banc decision making was highlighted in a remarkable series of opinions from the United States Court of Appeals for the District of Columbia in 1987. At the time of the opinions, that Circuit consisted of eleven active judges: six appointed by President Reagan (including Bork and Ginsburg), and the balance by Presidents Carter and Johnson. Three decisions had been rendered by panels composed of or dominated by Carter- and Johnson-appointed judges,[10] and each was voted to be reheard en banc by six to five courts, along strict appointive lines.

Some time later, Judge Laurence Silberman, a Reagan appointee, changed his vote to rehear the cases en banc, and the change resulted in reinstatement of the panel decisions.[11] The other Reagan appointees, now in dissent, issued a statement arguing that en banc hearings were necessary because the panel decisions were "clearly wrong" or "at the very least, highly dubious."[12] Judge Harry T. Edwards, a Carter appointee, issued a statement criticizing the dissenters' criteria for en banc review as "self-serving and result-oriented."[13] Implicit

9. *See* Wermiel, *supra* note 7, at 70, col. 2; *see also Response Prepared to White House Analysis of Judge Bork's Record* (Biden Report), *reprinted in* 9 CARDOZO L. REV. 219, 243-44 (1987) (reprinted from Senate Judiciary Committee Consultants, Biden Report, Sept. 2, 1987) (noting Judge Bork's dissent from the District of Columbia Circuit's vacatur of en banc rehearings, see discussion *infra* text accompanying notes 10-16); Pear & Gerth, *Court Choice in Focus: A Portrait of Ginsburg*, N.Y. Times, Nov. 1, 1987, at 34, col. 6 (same analysis for Judge Ginsburg). *But see A Response to the Critics of Judge Robert H. Bork*, 9 CARDOZO L. REV. 373, 386-87 (1987) (reprinted from United States Department of Justice—Office of Public Affairs, 1987) (criticizing focus on Judge Bork's en banc behavior, because views expressed in dissent from denial of rehearing en banc "are of necessity tentative"). The en banc process also seems to be gaining greater attention in the press. *E.g.*, *9th Circuit to Rehear Gay Rights Case*, Nat'l L.J., June 20, 1988, at 6 (commenting on Watkins v. United States Army, 847 F.2d 1362 (9th Cir. 1988) (order granting rehearing en banc)).

10. The three panel decisions were: United States v. Meyer, 810 F.2d 1242 (D.C. Cir. 1987) (3-0 decision; dismissal of information not proper upon a finding of vindictive prosecution), *vacated & reh'g en banc granted*, 816 F.2d 695 (per curiam), *opinion vacated & reh'g en banc order vacated*, 824 F.2d 1240 (D.C. Cir. 1987) (per curiam en banc), *cert. denied*, 108 S. Ct. 1121 (1988); Martin v. D.C. Metro Police Dep't, 812 F.2d 1425 (2-1; summary judgment on issue of immunity inappropriate until plaintiff has opportunity to conduct limited discovery to support claim of unconstitutional motive), *vacated in part & reh'g en banc granted*, 817 F.2d 144 (per curiam), *vacated & opinion reinstated & reh'g en banc order vacated*, 824 F.2d 1240 (D.C. Cir. 1987) (per curiam en banc); Bartlett *ex rel* Neuman v. Bowen, 816 F.2d 695 (2-1; limiting judicial review of constitutional questions under the Medicare Act), *reh'g en banc granted, order of June 8, 1987 reinstated & reh'g en banc vacated*, 824 F.2d 1240 (D.C. Cir. 1987) (per curiam en banc). Review of one of the cases, *United States v. Meyer*, was subsequently denied by the Supreme Court.

11. Statements on the vacation of the en banc rehearings are published at 824 F.2d 1240 (D.C. Cir. 1987). As Judge Silberman observed, the D.C. Circuit on the same day vacated a decision to rehear a fourth case en banc, though no vote was recorded and no concurring or dissenting statements were issued. *Meyer*, 108 S. Ct. at 1246; *see* Mississippi Indus. v. Federal Energy Regulatory Comm'n, 808 F.2d 1525 (D.C. Cir.), *reh'g en banc vacated*, 822 F.2d 1103 (D.C. Cir.), *cert. denied*, 108 S. Ct. 500 (1987). For more recent examples of opinions joined by all judges appointed by Democratic presidents, see Hammon v. Barry, 841 F.2d 426, 427 (D.C. Cir. 1988) (Mikva, J., joined by Wald, C.J., Robinson, R. Ginsburg, & Edwards, JJ., dissenting from order vacating previous order granting rehearing en banc); Center for Auto Safety v. Thomas, 847 F.2d 843, 844 (D.C. Cir. 1988) (en banc) (same judges issuing statement on equally divided vote); Inmates of Occoguan v. Barry, 850 F.2d 796, 796 (D.C. Cir. 1988) (same judges dissenting from denial of rehearing en banc).

12. 824 F.2d at 1247 (dissenting statement filed by Bork, Starr, Buckley, Williams & D. Ginsburg, JJ.).

13. *Id.* at 1242 (Edwards, J., concurring, joined by Wald, C.J., Robinson, Mikva & R. Ginsburg, JJ.).

in their criteria, Judge Edwards continued, was the "view that every time a majority of the judges disagree[s] with a panel decision, they should get rid of it by rehearing the case *en banc*."[14] For his part Judge Silberman readily acknowledged that he "reconsidered his views" and was "now inclined to favor *en banc* only in cases of exceptional importance *to this Circuit*."[15] Pointing to the "increasing number of cases designated for *en banc* rehearing and the considerable strain those cases place, directly and indirectly, on the functioning of the court," he said there was "nothing unusual or improper in the court's reassessment of its *en banc* caseload."[16]

The infighting revealed in the District of Columbia Circuit's opinions thus neatly encapsulates the prevailing criticism of en banc review. The allegation that the en banc procedure unnecessarily drains appellate court resources and improperly allows a politicized majority of a circuit court of appeals to wreak havoc on the usual process of delegating work and according finality to panel decisions subsumes a number of important issues. Are en banc decisions in fact increasing and unduly absorbing appellate court resources? What cases, if any, are appropriate for en banc review? More fundamentally, what is improper about a majority of a circuit court en bancing a panel opinion it concludes was wrongly decided? Finally, is there any evidence that Reagan-appointed judges are voting to en banc cases in any systematic way to overturn "liberal" panel opinions?

This Article explores these questions. Part II of the Article begins by describing the evolution of en banc decision making since it received Supreme Court sanction in the 1940s. That section demonstrates that many of the concerns expressed today over en banc reviews have parallels in earlier decades, albeit in less virulent form. Part II then evaluates the costs and benefits of en banc proceedings, stressing data outlining the relationship between the federal appellate caseload and the number of en banc decisions, and of the number of suggestions for rehearing en banc filed by litigants. Next, on a more theoretical level, Part II explores the alleged politicization of the en banc process and suggests that a circuit court majority's decision to en banc a panel opinion it thinks

14. *Id.* at 1243. For Judge Edwards' earlier views on the subject, see Jolly v. Listerman, 675 F.2d 1308, 1314 (D.C. Cir.) (Edwards, J., dissenting from denial of rehearing en banc) (en banc justified due to "miscarriage of justice" and "extreme misapplication of the law"), *cert. denied*, 459 U.S. 1037 (1982).

15. 824 F.2d at 1246 (Silberman, J., concurring) (emphasis in original).

16. *Id.* Judge Silberman is not alone among the Reagan-appointed judges in questioning the appropriateness of granting en banc review. *See* Rakovich v. Wade, 850 F.2d 1179, 1180 (7th Cir. 1987) (Ripple, J., dissenting from granting hearing en banc) ("Certainly, no member of the court believes, I hope, that an en banc proceeding may be used as a vehicle to permit judges to further their own ideological predilections.").

The recent en banc voting behavior of D.C. Circuit judges has been attributed to the "ideology" of the particular judges. *See, e.g.*, Pierce, *Two Problems in Administrative Law: Political Polarity on the D.C. Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300; Carter, *After Bork, A Rift Widens*, Nat'l L.J., March 28, 1988, p.1. However, D.C. Circuit judges have disagreed in the past on the propriety of en bancing cases. *Compare Jolly*, 675 F.2d at 1310-11 (Robinson, C.J. & R. Ginsburg, J., concurring in denial of rehearing en banc) *with id.* at 1313-14 (Edwards, J., dissenting from denial of rehearing en banc), *cert. denied*, 459 U.S. 1037 (1982); *see also* Church of Scientology v. Foley, 640 F.2d 1335, 1336-42 (D.C. Cir.) (Robinson, Edwards & R. Ginsburg, JJ., dissenting from denial of rehearing en banc), *cert. denied*, 452 U.S. 961 (1981).

wrongly decided is not necessarily improper. Nevertheless, it acknowledges that en bancing cases solely for "political" or personal preferences is indefensible, and that appellate judges ought to follow some objective criteria in deciding to invoke an en banc hearing. Part II of the Article concludes by formulating such criteria, which aim to flesh out the accepted standard that en bancs are only to resolve intracircuit conflicts or issues of particular importance.

Part III of the Article is devoted to an empirical study of recent en banc decision making. The en banc opinions for the years 1985, 1986, and 1987 are examined and, applying the suggested criteria, the study concludes that over one-half of the cases should not have been decided by the full court. Moreover, the study reveals little evidence of ideological bloc-voting by judges in these cases. The study finds only a handful of cases in which Reagan-appointed judges alone provided the votes necessary to overturn a disfavored panel decision. Given the large number of *unanimous* en banc cases, all en banc decisions are noteworthy for the absence of strict party or politically based voting behavior. Nevertheless, the large number of cases unworthy of en banc treatment also suggests that most circuits need to address seriously the criteria they use to decide whether to en banc a panel decision.

II. BACKGROUND AND PRESENT STATUS OF EN BANC DECISION MAKING

A. *Evolution*

The development of the en banc procedure in federal courts of appeals has been discussed in other sources and need only be outlined here.[17] The propriety of en bancing a circuit decision first arose in the 1930s as a conflict between the Ninth and Third Circuits.[18] In 1941 the Supreme Court resolved the conflict in

17. *See generally* R. MARTINEAU, MODERN APPELLATE PRACTICE: FEDERAL AND STATE CIVIL APPEALS 249-51 (1983); C. WRIGHT, LAW OF FEDERAL COURTS 11 (4th ed. 1983); 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3506 at 23-24 (1984); Maris, *Hearing and Rehearing Cases in Banc*, 14 F.R.D. 91 (1954); FORDHAM Comment, *supra* note 1, at 402-05; MICH. Note, *supra* note 1, at 1639-43 (historical overview); Note, *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities*, 40 N.Y.U. L. REV. 563, 569-74 (1965) (historical overview) [hereinafter N.Y.U. Note].

Two issues not addressed by this Article are worth mentioning. First, use of panel and en banc decisions in state appellate courts will not be discussed. On that topic, see N.Y.U. Note, *supra*, at 565-67; Overton, *A Prescription for the Appellate Caseload Explosion*, 12 FLA. ST. U.L. REV. 205, 213 (1984). Second, this Article will not address certain technicalities concerning whether and to what extent appellate judges of senior status can vote to rehear cases en banc and participate in the rehearing, and what vote is necessary if judges disqualify themselves. *See, e.g.*, Arnold v. Eastern Airlines, Inc., 712 F.2d 899 (4th Cir. 1983) (en banc) (effect of recusal of judges), *cert. denied*, 464 U.S. 1040 (1984); FORDHAM Comment, *supra* note 1, at 404 n.30 (which judges can vote). These issues have been largely mooted by statutory amendment, *see* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 205, 96 Stat. 25, 53, (*codified at* 28 U.S.C. § 46(c) (1982)) (permitting senior status judges to participate in rehearings when judge was member of the panel), and individual circuit rules. *E.g.*, 7TH CIR. INT. OP. P. 5(d)(1) (stating that recused judge is excluded from the count to determine whether a majority of non-recused judges have voted to rehear en banc). *But see* United States v. Nixon, 827 F.2d 1019, 1021-22 (5th Cir. 1987) (per curiam) (denying rehearing en banc) (noting split among circuits on disqualification issue), *cert. denied*, 108 S. Ct. 749 (1988). *See generally* Note, *Playing With Numbers: Determining the Majority of Judges Required to Grant En Banc Sittings in the United States Courts of Appeals*, 70 VA. L. REV. 1505 (1984) (outlines intercircuit conflict about the number of judges required to grant an en banc hearing).

18. *Compare* Lang's Estate v. Commissioner, 97 F.2d 867, 869 (9th Cir.) (Judiciary Act of

Textile Mills Securities Corporation v. Commissioner,[19] holding that courts of appeals have inherent power to decide cases en banc.[20] Congress essentially codified the *Textile Mills* decision in 1948 by enacting Judicial Code section 46(c).[21] The provision, as amended, states that cases shall be heard and decided by three-judge panels, unless a majority of the judges in active service order a rehearing by the circuit sitting en banc.[22]

Section 46(c) as enacted in 1948 provides only a procedural framework for en banc decisions; no substantive guidelines were set out to identify *which* cases deserved en banc treatment. Each court of appeals then established guidelines, a step the Supreme Court approved in 1953: "The court [of appeals] is left free to devise its own administrative machinery to provide the means whereby a majority may order [an en banc] hearing."[23] Each circuit promulgated rules governing the procedure for en banc consideration, though only one listed substantive criteria.[24]

Such criteria finally were adopted in Federal Rule of Appellate Procedure 35, promulgated in 1968 under section 46(c) of the Judicial Code.[25] That rule states that parties may file suggestions for rehearings en banc, but they are "not favored" and "ordinarily will not be ordered" except to "secure or maintain uniformity" in decisions, or when the case "involves a question of exceptional importance."[26] In the wake of rule 35, each circuit has repromulgated rules and

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1911, ch. 231, § 117, 36 Stat. 1131 (codified as amended at 28 U.S.C. § 46 (1982)) mandates three-judge panels), *certified question answered on other grounds*, 304 U.S. 264 (1938) *with* Commissioner v. Textile Mills Sec. Corp., 117 F.2d 62, 67-71 (3d Cir. 1940) (en banc) (Sections 117-118 of Judiciary Act of 1911 do not prohibit en banc decisions), *aff'd*, 314 U.S. 326 (1941). The Third Circuit decision was motivated by the need to find a method to resolve intracircuit conflicts other than Supreme Court review. Lowry v. Baltimore & O. R.R., 707 F.2d 721, 734-35 (3d Cir.) (per curiam) (en banc) (Gibbons, J., dissenting), *cert. denied*, 464 U.S. 893 (1983).

19. 314 U.S. 326 (1941).

20. *Id.* at 333-35.

21. Judicial Code and Judiciary Act, Pub L. No. 80-773, § 46(c), 62 Stat. 869, 871-72 (1948) (codified as amended at 29 U.S.C. § 46(c) (1982)).

22. 28 U.S.C. § 46(c) (1982). The statute reads:

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

Id.

23. Western Pac. R.R. Corp. v. Western Pac. R.R. Co., 345 U.S. 247, 250 (1953).

24. MICH. Note, *supra* note 1, at 1641 n.17 (listing and discussing old circuit rules). Only one rule, Fifth Circuit Rule 25(a) repealed in 1968, listed substantive criteria, and they were identical to those found in present Federal Rule of Appellate Procedure 35(a). *Id.*

25. *See supra* note 22; FED. R. APP. P. 35 advisory committee's note.

26. FED. R. APP. P. 35. The rule, in pertinent part, states:

> (a) When Hearing or Rehearing in Banc Will be Ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is

procedures to govern both litigant and judicial procedures for determining whether a panel decision should be en banced.[27] The circuit rules largely replicate the language in rule 35 and do not provide greater specificity regarding the substantive criteria.[28]

Even before rule 35 was promulgated, concerns were expressed over the number of en banc decisions rendered by the circuit courts.[29] These concerns continued into the 1970s[30] and were exacerbated in the late 1970s and early 1980s by the increased caseload in appellate courts[31] and the increasing number of federal appellate judges.[32] Both factors presumably threatened to increase the

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necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) Suggestion of a Party for Hearing or Rehearing in Banc. A party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

Id. 35(a)-(b).

27. *See infra* note 28. From a reading of numerous en banc cases, as well as from reviewing the data outlined *infra* part III (which indicates that 160 out of 224 en banc decisions were preceded by a panel opinion), the paradigmatic situation involves a litigant seeking a rehearing en banc of a panel decision. *See infra* text accompanying notes 182-201. For this reason, that situation was chosen as a point of reference for this Article. It should be noted, however, that an en banc court can be convened in lieu of a three-judge panel (an en banc "hearing"), and that it can be convened after a panel hears a case but before it issues a decision. *See* MICH. Note *supra* note 1, at 1638 n.5. Also, for convenience, this Article refers to petitions or requests for an en banc rehearing, although a strict reading of rule 35 reveals that only "suggestions" for rehearing en banc properly can be offered by litigants. United States v. Buljubasic, 828 F.2d 426, 427 (7th Cir.), *cert. denied*, 108 S. Ct. 67 (1987). The circuits provide that any member of the court can request sua sponte a poll of the circuit judges to determine whether a majority wishes to rehear a panel decision en banc. *E.g.*, 6TH CIR. R. 14(a). Finally, this Article does not address the interesting question of whether an en banc decision can itself be heard (or reheard) en banc. *Compare* Hitchcock v. Wainwright, 777 F.2d 628, 629 (11th Cir. 1985) (per curiam) (en banc) (treated as a petition for rehearing under FED. R. APP. P. 40), *rev'd on other grounds sub nom.* Hitchcock v. Duggar, 107 S. Ct. 1821 (1987) *with id.* at 629-30 (Kravitch & Johnson, JJ., dissenting) (treated under FED. R. APP. P. 35).

28. The individual circuits can "make and amend" their own rules to govern their practice. FED. R. APP. P. 47. Those circuit rules dealing with en banc procedures are: D.C. CIR. R. 15; 1ST CIR. R. 35.1; 2D CIR. R. (pt. II) § 35; 3D CIR. R. 22; 4TH CIR. R. 35; 5TH CIR. R. 35; 6TH CIR. R. 14; 7TH CIR. R. 40(c); 8TH CIR. R. 16; 9TH CIR. R. 35-1 to -3; 10TH CIR. R. 35; 11TH CIR. R. 35-1 to -11. In addition, the circuits sometimes publish their own internal operating procedures (INT. OP. P.); those dealing with en banc procedures are as follows: 1ST CIR. INT. OP. P. X.; 3D CIR. INT. OP. P. VIII; 4TH CIR. INT. OP. P. 35.1; 5TH CIR. INT. OP. P. 35; 6TH CIR. INT. OP. P. 18; 7TH CIR. INT. OP. P. 5; 8TH CIR. INT. OP. P. App. VI(D); 9TH CIR. INT. OP. P. II(E) & (K); 10TH CIR. INT. OP. P. IN BANC PROCEDURE; 11TH CIR. INT. OP. P. 35.

29. N.Y.U. Note, *supra* note 17, at 576-77 (noting lost efficiencies in cases being disposed finally through en banc rather than panel process).

30. Wasby, *Inconsistency in the United States Courts of Appeals: Dimensions and Mechanisms for Resolution*, 32 VAND. L. REV. 1343, 1364-66 (1979) (interviews of Ninth Circuit judges indicated that they thought en banc sittings were less effective in a large court; "active-duty judges were tired of en bancs and want to avoid them"); FORDHAM Comment, *supra* note 1, at 417-18 (time lost and backlogs created); MICH. Note, *supra* note 1, at 1644-45 (extra court and litigant time; impairment of finality of panel decisions); *see also* J. HOWARD, COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS 217 (1981) ("the truth is that most circuit judges regard en bancs as a 'damned nuisance' "); R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 101 (1985) (en banc procedure is "unwieldy").

31. See *infra* text accompanying footnotes 47-78 for fuller discussion.

32. Congressional legislation in 1978 and 1984 increased the number of authorized appellate

number of en banc decisions and such an increase was indeed noted. It was largely for these reasons that the Eleventh Circuit was severed from the Fifth Circuit in 1980.[33] En banc decision making among more than twenty judges (as was true in the old Fifth Circuit) was viewed as unwieldy[34] and litigants were perceived as asking for en banc review at an increasing rate.[35]

The federal appellate judiciary made a number of responses to these concerns. To promote uniformity among panel decisions, the lack of which was thought to be a significant problem,[36] several circuits by rule or case law stated that only en banc courts, not panels of the circuit, could overrule or disagree with another panel of the same circuit, absent an intervening and controlling Supreme Court decision.[37] In another attempt to promote uniformity, several circuits began to circulate draft panel decisions among *all* the judges in order to bring possible conflicts to the attention of the panel.[38] The Seventh Circuit began to use this procedure as a quasi-en banc process to overrule prior panel decisions.[39] With regard to the bar, nine of the circuits amended their rules to

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judgeships by 35 (97 to 132) and 36 (132 to 168), respectively. Act of Oct. 20, 1978, Pub. L. No. 95-486, 3, 92 Stat. 1629, 1632 (codified at 28 U.S.C. 44 (1982); Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 201, 98 Stat. 333, 346-347 (to be codified at 28 U.S.C. 44). Pursuant to 28 U.S.C.A. § 44(a) (West 1987 & Supp.1988), the number of authorized judgeships per circuit is as follows:

Circuits	Number of Judges
District of Columbia	12
First	6
Second	13
Third	12
Fourth	11
Fifth	16
Sixth	15
Seventh	11
Eighth	10
Ninth	28
Tenth	10
Eleventh	12
Federal	12

33. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (codified at 28 U.S.C. § 41 (1982)).

34. H.R. REP. NO. 96-1390, 96th Cong., 2nd Sess. 3, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 4236, 4238.

35. This perception is based on speaking with an admittedly limited sample of federal judges and of lawyers who practice in federal courts. *See infra* text accompanying notes 50-51. This data seems to support the assertion that the absolute number of litigant petitions has risen over the years, but not necessarily that the rate of petitions per cases disposed of on the merits has increased. *Id.*

36. Wasby, *supra* note 30, at 1353-59. *But see* Wasby, *Communication in the Ninth Circuit: A Concern for Collegiality*, 11 U. PUGET SOUND L. REV. 73, 113 (1987) ("intracircuit inconsistency in the Ninth Circuit is not the hot topic of ten years ago").

37. Overton, *supra* note 17, at 215 & nn. 58-59 (listing cases and/or court rules from seven circuits).

38. *See* 3D CIR. INT. OP. P. V.C.; 4TH CIR. INT. OP. P. 36.2; 6TH CIR. INT. OP. P. 14.3; 7TH CIR. R. INT. OP. P. 40(f).

39. *E.g.*, Lester v. City of Chicago, 830 F.2d 706, 713 n.6 (7th Cir. 1987) (a panel decision overruling a prior panel was circulated among all judges and a majority rejected rehearing the issue en banc); Kansas City Term. Ry. v. Jordon Mfg. Co., 750 F.2d 551, 551 n.* (7th Cir. 1984) (same).

require litigants to state and verify expressly why their cases were worthy of en banc treatment.[40] The Ninth Circuit, now the court with the most judges,[41] began to use "mini-en bancs" of eleven judges rather than the entire court.[42] These measures sought to ameliorate the tension between majority rule and the extra demands of the en banc process.

Concern with the purported use of the en banc procedure for "political" purposes also has existed for two decades, though in a less dramatic way than at present. Political scientists, eager to apply the tools of behavioral jurisprudence, produced studies which indicated that Presidents typically filled the lower federal judiciary with individuals of their own political party.[43] Others looked for, and found, fairly consistent voting blocs in panels and en banc courts, the results of which could be characterized with some degree of confidence as liberal or conservative.[44] The Fifth Circuit judges in particular seemed to be cognizant of the partisan potential of en bancs, and believed that by en banc decision making in controversial 1960s school desegregation cases they would give greater authority and legitimacy to their decisions.[45]

Thus, it is misleading to label the current en banc process an ideological phenomenon, as is now the vogue, without further justification and exploration. Perhaps more significant from an historical perspective, however, is that the en banc procedure has survived the buffeting of over three contentious decades rela-

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40. *See* D.C. CIR. R. 15(a)(3); 1ST CIR. R. 35; 3D CIR. R. 22; 5TH CIR. R. 35; 6TH CIR. R. 14(b); 7TH CIR. R. 16(b); 8TH CIR. R. 16(d); 10TH CIR. R. 35.2; 11TH CIR. R. 26(c) & (f).

41. *See supra* note 32.

42. 9TH CIR. R. 25. The rule was authorized by the Omnibus Judgeship Bill of 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629 (codified at 28 U.S.C. § 41 (1982)). *See generally* Bennett & Pembroke, *"Mini" In Banc Proceedings: A Survey of Court Practices*, 34 CLEV. ST. L. REV. 531 (1986) (discussion of the usefulness of mini en banc procedures).

43. The voluminous literature is well summarized in S. GOLDMAN & T. JAHNIGE, THE FEDERAL COURTS AS A POLITICAL SYSTEM 46-47 (3d ed. 1985). *See also* Goldman, *supra* note 7 (discussion of Reagan's attempt to reshape the federal bench by appointing conservative judges). For a somewhat different view, see R. POSNER, *supra* note 30, at 29-31 (suggesting that patronage and merit appointments compete with more overtly "political" appointments). *See also* Solomon, *The Politics of Appointment and the Federal Courts' Role in Regulating America: U.S. Courts of Appeals Judgeships from T.R. to F.D.R.*, 1984 AM. B. FOUND. RES. J. 285 (contending that Franklin Roosevelt administration first began systematic, partisan appointments to the lower federal judiciary).

44. S. GOLDMAN & T. JAHNIGE, *supra* note 43, at 137-40. For a study focusing on voting blocs discovered in the en banc decisions of the D.C. Circuit, see Atkins, *Decision-Making Rules and Judicial Strategy on the United States Courts of Appeals*, 25 W. POL. Q. 626, 626 (1972). *See also* J. GOULDEN, THE BENCHWARMERS: THE PRIVATE WORLD OF THE POWERFUL FEDERAL JUDGES 265 (1974) (briefly discussing same).

Throughout this Article, the terms "liberal" and "conservative" are used as political scientists have operationally defined them for use in studying judicial voting behavior. Briefly, this term means that a "liberal"vote is one that upholds the claims of (*inter alia*) criminal defendants, civil liberty plaintiffs, labor unions and employees, plaintiffs in tort cases, individuals or small businesses against large businesses, and the government in regulation of business. A "conservative" vote is the opposite. For examples of this definitional use, see Goldman, *Conflict on the U.S. Courts of Appeals, 1965-71: A Quantitative Analysis*, 42 U. CIN. L. REV. 635, 642-43 (1973); COLUM. Note, *supra* note 8, at 776-78.

45. *See, e.g.*, J. HOWARD, *supra* note 30, at 205-18 (extensively discusses Fifth Circuit desegregation cases such as Singleton v. Jackson Mun. Separate School Dist., 419 F.2d 1211 (5th Cir. 1969) (en banc), *rev'd*, 396 U.S. 290 (1970)).

tively intact.[46] While the more recent attacks have parallels in prior decades, the criticisms are now more vocal and more likely to have some affect on the bench and the bar. Accordingly, it is appropriate at this point to revisit the two lines of criticism of the modern en banc process.

B. *Functional Critique*

Putting aside the asserted ideological behavior of certain federal judges for a moment, this section briefly surveys the criticism of the en banc process that its costs far outweigh its benefits, and suggests how to evaluate it. The costs of the en banc process have already been alluded to. In the typical case a panel decision receives the full benefit of the litigants' briefing and the three-judge panel's preparation of an opinion or opinions. To then en banc a case, a litigant or one of the members of the court must file a written suggestion for rehearing for all the circuit judges' consideration. If a majority of the court rejects the request, some of the judges may nevertheless issue statements explaining their respective votes.[47]

If a majority of the court grants the request, the case is set for a full round of rebriefing and, sometimes, renewed oral argument. After that, the circuit judges must confer and render their respective opinions. This process, commentators remark, results in fragmented opinions of dubious precedential value,[48]

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46. *Cf.* MICH. Note, *supra* note 1, at 1653-55 (arguing that en bancs should be curbed by eliminating litigant petitions and en bancing only in "rare" cases, and that elimination of the entire process should be considered). Apparently there are no plans to amend rule 35 or make any other significant structural changes. Rather, moral suasion directed to the bench and bar seems to be the order of the day.

One way to limit en bancs would be to curb litigant petitions for rehearing by sanctioning "frivolous" petitions. There is ample precedent elsewhere in the Federal Rules for such sanctions. *E.g.*, FED. R. CIV. P. 11; FED. R. APP. P. 38; SUP. CT. R. 49.2. Given, however, the amount of uncertainty (and litigation) generated by recent attempts to punish such frivolity, it seems prudent to use this as a weapon of the last resort. *See generally* Martineau, *Frivolous Appeals: The Uncertain Federal Response*, 1984 DUKE L.J. 845 (analysis of sanctions and standards for frivolous appeals, and a proposal for a new method of deterrence); Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988) (discussion of procedure and problems of FED. R. CIV. P. 11); Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630 (1987) (discussion of standards necessary for invocation of FED. R. CIV. P. 11). However, on April 1, 1988, the First Circuit promulgated 1ST CIR. R. 35.1 which authorizes sanctions "[i]f a petition for rehearing or for rehearing en banc is found, on its face, to be wholly without merit, vexatious, multifarious, or filed principally for delay." 1ST CIR. R. 35.1.

47. These statements are exemplified by the opinions from the D.C. Circuit discussed in the introduction to this Article. *See supra* text accompanying notes 10-16. In the empirical study of en banc decisions during 1985-87 presented *infra* part III, there are 58 cases in which denial of en banc rehearing was accompanied by an opinion or opinions. *Cf.* Issacs v. Kemp, 782 F.2d 896, 897 n.1 (11th Cir.) (Hill, J., dissenting from denial of rehearing en banc) (criticizing the proliferation of dissenting opinions in various circuits from orders denying en banc rehearing, but issuing his own since the practice is now "commonly accepted"), *cert. denied*, 476 U.S. 1164, *reh'g denied*, Kemp v. Coleman, 478 U.S. 1014 (1986); Cannon v. Kroger Co., 837 F.2d 660, 660 (4th Cir. 1988) (Murnaghan, J., dissenting from denial of rehearing en banc) ("It is indeed unusual, if not extraordinary, for a member of the Fourth Circuit Court of Appeals who disagrees with a panel opinion to continue to fight after rehearing *en banc* has been denied by the majority of the court."). In these and other citations the denial of certiorari or later action by the Supreme Court refers also to the panel decision, if any.

48. Kaufman, *supra* note 5, at 8; MICH. Note, *supra* note 1, at 1646; FORDHAM Comment, *supra* note 1, at 422.

with a concomitant development of acrimony among concurring and dissenting judges.[49]

The decision to en banc also affects how and when judicial resources will be applied to the remaining cases on the docket. Substantial delays can result, not only in rendering the en banc decision itself, but also in other cases not being heard en banc.[50] Moreover, as the finality accorded panel decisions erodes, litigants may react by filing more suggestions for en banc review, even when their cases clearly do not deserve such treatment.[51] This tendency is exacerbated by the absence of any criteria, beyond those provided by rule 35, to help determine which cases deserve, or are likely subjects for, en banc treatment. All these factors burden judges with yet more paperwork.

Despite the hardiness and renewed vigor of these criticisms, the supposed positive attributes of the en banc process have an equally long pedigree. The two ostensible purposes of the process, as embodied in rule 35, are to promote uniformity of law within a circuit and to permit the full complement of judges to pass on cases of "exceptional importance." If three-judge panels are assembled by random selection of the eligible judges,[52] then it seems inevitable that differ-

49. Kaufman, *supra* note 5, at 7 ("such proceedings merely serve to exacerbate conflicts"); *see also* Bartlett *ex rel* Neuman v. Bowen, 824 F.2d 1240, 1343 (D.C. Cir. 1987) (Edwards, J., concurring in denial of rehearing en banc) ("Collegiality cannot exist if every dissenting judge feels obliged to lobby his or her colleagues to rehear the case *en banc* in order to vindicate the judge's position."). Some evidence exists that as the number of judges on a court increases, it becomes increasingly difficult for the judges to consult and negotiate in any meaningful way. *See* R. POSNER, *supra* note 30, at 14, 100 (observing the formula n(n-1)/2 gives the number of links to connect members of a set; 36 for a set of 9, 55 for a set of 11, etc.; the number grows exponentially); Wasby, *supra* note 30, at 1364-66 (overview of the correlation between the size of the court and the need for en banc decisions).

50. Kaufman, *supra* note 5, at 7 ("The interval between oral argument and en banc disposition is five times as great—on average—as that for a panel disposition."); MICH. Note, *supra* note 1, at 1644 & n.35 (reporting similar results from survey of panel and en banc decisions, and also stating that average time between oral argument and opinion filing in panels was lower in the Second Circuit (with one of the lowest en banc rates) as compared to the D.C. Circuit (thought to have a higher rate)).

51. Kaufman, *supra* note 5, at 8; MICH. Note, *supra* note 1, at 1645.

52. Although rules occasionally make reference to the practice, *e.g.*, 8TH CIR. INT. OP. P. § I C 1, apparently no statute or rule *requires* that membership on panels be randomly assigned. Rather, it simply appears to be accepted that one of the duties assigned to a chief judge of a circuit, *see* 28 U.S.C. §§ 45(b) & 46(a) (1982), is to assign circuit judges to panels in an equitable and random fashion. T. MARVELL, APPELLATE COURTS AND LAWYERS: INFORMATION GATHERING IN THE ADVERSARY SYSTEM 106 & nn.10-11 (1978); J. HOWARD, *supra* note 30, at 197; Atkins, *supra* note 44, at 628 & n.8. One easy way to reduce the use of en banc cases in order to control intracircuit uniformity, is to make the panels as representative as possible of the views of the majority of judges on the circuit. Thus non-random selection can result in greater uniformity. Kornhauser & Sager, *Unpacking the Court*, 96 YALE L.J. 82, 90 & n.13, 96 n.18 (1986). Presumably, the reason this view has never been adopted is the potential for tension and animosity among judges and the possiblilty the bold "result-oriented" nature of the enterprise would be unacceptable in our current legal culture.

Occasionally, some charge that panel assignments are skewed to "pack" panels with favored judges on important cases. This practice allegedly occurred in some civil rights cases in the 1960s. *See* MICH. Note, *supra* note 1, at 1649 n.67 (discussing Armstrong v. Board of Educ., 323 F.2d 333, 352-61 (5th Cir. 1963) (Cameron, J., dissenting), *cert. denied*, 376 U.S. 908 (1964)); Atkins & Zavoina, *Judicial Leadership on the Court of Appeals: A Probability Analysis of Panel Assignment in Race Relation Cases on the Fifth Circuit*, 18 AM. J. POL. SCI. 701 (1974) (finding some evidence for allegation). *But see* J. HOWARD, *supra* note 30, at 232-47 (finding no evidence of panel packing in statistical review of Fifth Circuit cases).

ent panels will, intentionally or not, produce conflicting or arguably conflicting results.[53] Uniformity could be increased, however, were panels to religiously follow the injunction that they not overrule the decisions of a prior panel.[54] The large number of cases, judges, and panels, however, apparently hinders communication and prevents this ideal from being fully achieved.

Aside from the uniformity rationale, some argue the en banc process ultimately improves the circuit's decision making process. This view is based on the belief that, at least to a limit, the involvement and interaction of more judges leads to sounder decisions.[55] Especially when cases are "important," the participation of all the judges may contribute to institutional harmony by permitting the entire court to participate.[56] With regard to outside constituencies, particularly the bar, an en banc decision is assumed to command greater authority and compliance, since it is not simply the product of a three-judge panel.[57] As long as judges use the en banc process sparingly, a circuit can use the process to signal constituencies that it is resolving a particularly important issue.[58]

It is perhaps surprising that the debate over the en banc proceeding has been conducted in largely utilitarian terms. Ironically, some commentators, criticizing the most recent use of the en banc process for its lack of efficiency,[59] are often the first to condemn the use of cost-benefit tests or balancing formulas when interpreting or applying various procedural requirements. The tests, usually associated with the law-and-economics school,[60] are said to be inherently flawed and to give insufficient weight to other values served by the procedure or

53. *See* Beatty v. Chesapeake Center, Inc., 835 F.2d 71, 75 n.1 (4th Cir. 1987) (en banc) (Murnaghan, J., concurring). Reasonable judges can disagree over whether different panel decisions in fact conflict. *See* Klein v. Stop-N-Go, 824 F.2d 453, 453 (6th Cir. 1987) (per curiam) (Krupansky, J., dissenting) (charging that panel majority created an intracircuit conflict and sought to hide its decision by not publishing the decision); *compare* Bartlett *ex rel* Neuman v. Bowen, 824 F.2d 1240, 1247 (D.C. Cir. 1987) (Silberman, J., concurring in denial of rehearing en banc) (favors en banc hearings only for "cases of exceptional importance," this is not such a case), *with id.* at 1249 (joint statement of Bork, Buckley, D. Ginsburg, Starr & Williams, JJ., dissenting from denial of rehearing en banc) (arguing there was a conflict in the panel decisions and the case ought to be heard en banc). A second problem is that the eventual en banc decision may not ultimately decide all issues definitively. MICH. Note, *supra* note 1, at 1646-47.

54. *See supra* text accompanying notes 36-39.

55. R. POSNER, *supra* note 30, at 14, 100; Kornhauser & Sager, *supra* note 52, at 97-98; MICH. Note, *supra* note 1, at 1649. The disadvantage to increasing the number of judges is addressed *supra* note 49.

56. *See* MICH. Note, *supra* note 1, at 1648-49; Wasby, *supra* note 30, at 1364 (in making a "major new policy decision . . . the vast majority of a large court does not wish to be disfranchised"); Wasby, *supra* note 36, at 108 (interviews of Ninth Circuit judges indicate that most view communications about en banc decisions to be a "healthy conflict in an exchange of views").

57. *See* J. Howard, *supra* note 30, at 218; Overton, *supra* note 17, at 219-20; MICH. Note, *supra* note 1, at 1648, 1650.

58. *E.g.*, United States v. Devine, 768 F.2d 210, 210-11 (7th Cir. 1985) (en banc) (per curiam) (case presents "a recurrent problem on which authoritative guidance is necessary . . . . The purpose of this opinion is to serve notice on the bar that the court intends to enforce the rules [concerning length of briefs] strictly."), *cert. denied*, 479 U.S 848, *reh'g denied*, 479 U.S. 1001 (1986).

59. Bartlett *ex rel.* Neuman v. Bowen, 824 F.2d 1240, 1243 (D.C. Cir. 1987) (Edwards, J., concurring in denial of rehearing en banc) ("In fact, the institutional cost of rehearing cases *en banc* is extraordinary."); Kaufman, *supra* note 5, at 7, 8, & 57.

60. *E.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW 517-54 (3d ed. 1986).

the underlying substantive law.[61] Many of the values the en banc process serves are admittedly intangible, while the "costs" in added court time and the like can be more easily measured. Therefore, a pure "efficiency" test may be inappropriate for evaluating en banc decision making.

More generally, the controversy over en banc decision making results from the unsurprising fact that en banc review cannot be all things to all people. As Professor Judith Resnik has observed, no one model of appellate review can at the same time maximize procedural values such as finality, economy, consistency, impartiality, and power concentration.[62] One or more of these values is apt to be maximized at the expense of others.[63] Her analysis applies neatly to the en banc review process: the power it concentrates in the hands of a circuit majority, and the consistency and perceived impartiality it can promote, are at the expense of judicial economy and finality of panel decisions. Thus, ultimately, a pure efficiency analysis is inappropriate because the en banc process is foreordained to fail any test of efficiency. It is nevertheless instructive to examine the data available on en banc decision making. At the very least, this examination will provide some objective benchmarks with which to measure roughly the purported burden of the en banc procedure on the functioning of the federal courts of appeals.

Any assessment of the burden of the en banc process should begin with the overall caseload size of the federal appellate courts. The caseload has seen a period of astonishing growth. The number of cases filed in the courts of appeals grew from less than 4,000 in 1960 to over 30,000 in the mid-1980s, over a 700% increase.[64] In contrast, the number of appellate judges in that period roughly doubled.[65] Though it is now fashionable to dismiss the litigation "explosion" as a myth (because the increases are less startling when viewed in per capita terms),[66] there is no doubt the absolute numbers from the federal appellate courts have reached unprecedented heights and show little sign of lessening.[67]

The data on en banc decisions during this period is less spectacular. During the 1960s and 1970s, the number of en banc decisions averaged about one per-

61. *E.g.*, Town of Newton v. Rumery, 480 U.S. 386, 405 (1987) (Stevens, J., dissenting) ("The interest in vindication of constitutional violations unquestionably outweighs the interest in avoiding the expense and inconvenience of defending unmeritorious claims."); Mullenix, *Burying (With Kindness) the Felicific Calculus of Civil Procedure*, 40 VAND. L. REV. 541, 544-45 (1987) (author "rejects and warns of the incipient Benthamization of civil procedure"); *see also* Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 840 (1984) ("Procedure is a mechanism for expressing political and social relationships and is a device for producing outcomes.").

62. Resnik, *supra* note 61, at 845-59, 874 (values can be in tension).

63. Resnik, *supra* note 61, at 874.

64. R. MARTINEAU, APPELLATE PRACTICE AND PROCEDURE 65-66 (1987); R. POSNER, *supra* note 30, at 63-65; 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 17, § 3506, at 25-26.

65. 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 17, § 3506, at 24-25; 28 U.S.C.A. § 44, Historical and Revision Notes (West 1968 & Supp. 1987) (listing number of authorized judgeships at various times); *supra* note 32.

66. *E.g.*, Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983).

67. R. POSNER, *supra* note 30, at 76; Howard, *Our Litigious Society*, 38 S.C.L. REV. 365, 367 (1987); Marvell, *Caseload Growth—Past and Future Trends*, 71 JUDICATURE 151 (1987). However, according to the latest data presented in Table 2, the *rate* of growth is now falling. *See infra* Table 2.

cent of all cases disposed of on the merits.[68] This pattern continued into the 1980s.[69] As Table 1 indicates, the number of en bancs in this decade has slowly, though somewhat erratically, climbed from 65 in 1980 to 88 in 1987; in 1984, the number rose to 106, and has not reached that figure again. Table 2 is even more instructive. It demonstrates that while the caseload—cases disposed on the merits, and thus commanding the most judicial attention—has inexorably increased, the *rate* of en banc cases has not kept pace. Until 1987, when the caseload only rose 1.63%, the caseload had risen at about 10% per year. In contrast, the percent of those cases en banced not only remained well below one percent, but the percentage was *falling* overall, save for the aberrational year of 1984.

This data lends itself to several straightforward conclusions. On its face, it does not seem that cases which account for about one-half of one percent of an entire caseload constitute an intolerable burden. Nor is there evidence of an abrupt increase in en bancs during the latter years of the Reagan Administration. Much of the increase that exists could simply be due to more cases and more judges. Moreover, large numbers of en bancs seem concentrated in certain circuits: the Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits all reached double figures in the number of en bancs more than once during the seven years presented in the tables.[70] The other circuits are consistently in the single digits, and two—the First and Second—have very small numbers of en banc decisions.[71] Finally, it will be noted that roughly one-fifth of the en bancs were decided on the briefs without the additional burden of oral argument.[72] Rendering en banc decisions on the basis of briefs alone may make such decisions less time consuming.[73]

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68. *See* J. HOWARD, *supra* note 30, at 42, 193 (less than 1% of cases studied in 1965-67 were en bancs); S. GOLDMAN & T. JAHNIGE, *supra* note 43, at 23 (en bancs are "exceedingly rare"); N.Y.U. Note, *supra* note 17, at 564 (1.5% of cases in fiscal 1964), 746 (total of 422 en bancs from 1940 through June 30, 1964, approximately 17 per year); Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 493 n.7 (1975) (in study of non-unanimous decisions from 1965-1971, 202 (less than 1%) were en banc).

69. *See infra* Table 2.

70. See *supra* Table 1 & *infra* Table 2.

71. Second Circuit judges have long been on record as opposing any extensive use of the en banc procedure. *See* J. HOWARD, *supra* note 30, at 218; FORDHAM Comment, *supra* note 1, at 411-16; Kaufman, *supra* note 5, at 7; MICH. Note, *supra* note 1, at 1652.

It is sometimes stated that certain circuits have an inordinate number of en bancs. *See* Kaufman, *supra* note 5, at 7 (Fifth and Ninth); COLUM. Note, *supra* note 8, at 787 n.73 (Fourth, Fifth, and Eleventh). Table 1 confirms that observation.

Rates of en banc decisions per caseload or per judge in each circuit are not presented in Table 1 since the extremely low percentages are not very meaningful. Nevertheless, there is a rough correlation throughout the 1980s between those circuits with the higher case loads (*i.e.*, the Fourth, Fifth, Ninth and Eleventh) and a higher number of en banc decisions. Even here, however, there are anomalies; for example, the Fourth Circuit fluctuated between 18, 6, and 13 en bancs in 1985, 1986, and 1987. The Tenth Circuit had 16 en bancs in 1984, then fell to 4 in 1985. Meanwhile, the Sixth Circuit, which now rivals the Fourth, Fifth, and Eleventh Circuits in number of cases, has never had more than nine per year.

72. *See supra* Table 2.

73. *See* J. HOWARD, *supra* note 30, at 216; FORDHAM Comment, *supra* note 1, at 419-20. For a proposal to eliminate oral argument in most appellate cases, see Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1 (1986). *See also* J. CECIL & O. STIENATRA, DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR

There is also much the tables do not reveal. For example, they do not document the extra judicial and litigant time and resources en banc decisions require, nor the delay they cause. Those sorts of concerns are presumably quantifiable,[74] but are beyond the scope of this study. A new source of data, however, does shed some light on the issues of added time burdens and subsequent delays in decision making. Until the past several years neither the circuits nor the Administrative Office of the United States Courts kept data systematically on the number of suggestions for rehearing en banc filed by litigants.[75] These statistics are now available and are presented in Table 3.

More so than with the raw en banc numbers, comparisons and conclusions must be cautiously drawn here because few definitive statements can be culled from the sparse historical data on suggestions for rehearings en banc.[76] A comparison between the historical and current data does suggest, however, that the number of filings for rehearings en banc has increased, but it does not necessarily indicate the rate of that increase. This conclusion is hardly surprising, given the appellate caseload increase previously documented. Because over twelve percent of disgruntled panel litigants, on the average, file en banc suggestions, however, an added burden seems to have been placed on judges and their clerks, who must read these petitions and evaluate them if a poll of judges is requested.[77] One might also question the strategy or knowledge of the bar in filing so many suggestions, when so few are granted.[78]

More sophisticated and widespread data collection, both in the courts and among lawyers, might reveal greater insights about the burdens and benefits of the en banc procedure. The few statistics collected here suggest that the proce-

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COURTS OF APPEALS (Federal Judicial Center 1987) (study of screening practices, methods, and criterion used to select cases for nonargument disposition; found time savings in those courts that used such methods).

74. *See, e.g., supra* note 50.

75. Interviews with John P. Hehman, Clerk for United States Court of Appeals for the Sixth Circuit (Oct. 21, 1987), and Marjorie B. Waskewich, Administrative Office Appeals Program Analyst (Oct. 22, 1987) (notes on file with the author).

76. Kaufman, *supra* note 5, at 7 (750 suggestions in second Circuit over 5 year period); *see* MICH. Note, *supra* note 1, at 1643 n.23 (256 suggestions in 7th Circuit between Sept. 1, 1969 and Aug. 31, 1973); *id.* at 1644 (135 suggestions in D.C. Circuit in fiscal 1973); N.Y.U. Note, *supra* note 17, at 729-30 n.246 (correspondence with personnel from each circuit indicated that about 10% of defeated panel litigants petitioned for en banc review).

77. FED. R. APP. P. 35(b). Apparently, no data on the number of polls is systemically collected, and it does not appear in Court of Appeals Report Forms JS-30 or JS-34. *Cf.* United States v. Samuels, 808 F.2d 1298, 1299 (8th Cir. 1987) (Lay, C.J., concurring in denial of rehearing en banc) (contending that neither FED. R. APP. P. 35(b) nor 40(a) nor 8TH CIR. LOCAL R. 16(B) gives circuit judges authority to request "a rehearing en banc after a panel opinion has been issued when no party to the litigation has filed a petition for rehearing en banc").

78. Apparently, the only study concerning litigant use of suggestions for rehearing en banc is Uelmen, *The Influence of the Solicitor General Upon Supreme Court Disposition of Federal Circuit Court Decisions: A Closer Look at the Ninth Circuit Record*, 69 JUDICATURE 360, 365 (1986). The author suggests that the Solicitor General will more readily file the suggestion if he can convince a majority of the circuit that the panel decision is likely to be accepted for review and reversed by the Supreme Court; in addition, the Solicitor General may use it as a "threat" to go over the circuit's head if the suggestion is not granted. *Id.* This theory, however, is belied by the study's own data that during 1980-1984 "the 12 courts of appeals denied 81 percent of the *en banc* petitions authorized by the Solicitor General." *Id*; *see also* T. MARVELL, *supra* note 52, at 67-69 (survey of appellate lawyers revealed lack of knowledge of appellate court procedures).

dure is not the *great* burden described by some of its critics, but that the numbers *are* high enough to indicate the value of exploring techniques for mitigating the burdens without crippling the en banc process. One method would be to develop more workable, and perhaps more narrow, criteria to identify cases worthy of en banc review. Before turning to that task, this section explores the related question of when and to what extent a majority of a circuit is justified in forcing an en banc review of a panel ruling simply because it disagrees with the ruling.

C. *Ideological Critique*

The Introduction to this Article noted the allegation that the Reagan-appointed judges have "politicized" the en banc process. This section explores in the abstract what, if anything, is wrong with a President's appointees acting in such a manner. Whether Reagan's appointees in particular have "politicized" the process is addressed in Part III.

As legal scholars have addressed the efficiency concerns in earlier literature on the en banc process, social scientists have studied the political or ideological nature of courts for over two decades. Politics, the political scientists tell us, is the "authoritative allocation of values for a society."[79] This task is the primary responsibility of the executive and legislative branches of government. Whether this conception of political power is appropriate in the judicial branch where it may conflict with the traditional ideal of courts as "applying" the law to individual cases as opposed to "making" the law to achieve results desired by the jurist is a subject of controversy.[80] Although most of the legal community long ago rejected this rigid dichotomy as both descriptively and normatively incomplete, social scientists since World War II have nevertheless examined with great relish how politics has invaded the judicial system.[81]

Many of these studies are remarkable in the extent to which they show that the courts in general, and federal tribunals in particular, usually follow some version of the traditional model of neutral lawmaking. Admittedly, various studies reveal politics in all its glory at play in the federal courts. It is well documented that a President usually appoints federal judges who are members of his own political party,[82] and undisputed that, on the average and over the long term, Republican judges tend to vote more conservatively, and Democratic judges more liberally, on a wide range of issues.[83] However, despite these conclusions, studies of the federal appellate courts reveal that "consensus [is] actu-

79. S. GOLDMAN & T. JAHNIGE, *supra* note 43, at 2; J. HOWARD, *supra* note 30, at 15.

80. S. GOLDMAN & T. JAHNIGE, *supra* note 43, at 26-27.

81. *See, e.g.*, S. GOLDMAN & T. JAHNIGE, *supra* note 43, at 26-27.

82. *See supra* notes 7, 8, 41.

83. *E.g.*, COLUM. Note, *supra* note 8, at 770 ("It is well established that Republican judicial appointees vote differently from their Democratic colleagues."); *see generally supra* note 44 (studies showing voting behavior along party lines).

In the text and elsewhere in this Article, the terms "party judge" and "party- or President-administration appointed judge" are used interchangeably. Although these sets are not identical they are close enough to use for the sake of convenience. Moreover, the reference to "party judge" is probably the more meaningful one: to the extent there is a correlation between party and judicial

Table 1

En Banc Decisions by Circuit

1980-87[a]

CIRCUIT	YEAR							
	1980	1981	1982	1983	1984	1985	1986	1987
District of Columbia	5	5	5	10	3	5	2	4
First	0	0	0	0	2	0	1	1
Second	4	2	1	1	0	1	1	1
Third	5	14	5	5	3	5	5	8
Fourth	7	8	8	6	6	18	6	13
Fifth	24	21	12	11	19	13	18	10
Sixth	4	0	4	3	9	7	5	7
Seventh	5	2	7	8	6	3	7	8
Eighth	6	7	7	5	15	15	9	11
Ninth	3	5	9	4	14	6	5	7
Tenth	2	5	2	3	16	4	12	8
Eleventh	—	14	10	14	8	19	18	0
TOTALS	65	69	74	66	106	85	90	88

[a]Data in tables 1-2 are derived from Annual Reports of the Director of the Administrative Office of the United States Courts (hereinafter cited as AO Report); the "year" in this and other tables refers to the federal fiscal year.

ally more characteristic of circuit courts than conflict."[84] Well over eighty percent of panel decisions in the past several decades have been unanimous—hardly a sign of constant fracture along party or ideological lines.[85] Even those studies which investigated the relationship between judges' political parties and their voting records found partisan identification, at best, weakly correlated with decision making.[86] Thus, data collection by itself provides only uneven support for the charge of unbridled politicization of the federal circuits.

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voting behavior, the correlation is stronger to the judge's party than to the party of the administration under which he or she was appointed. COLUM. Note, *supra* note 8, at 771.

84. J. HOWARD, *supra* note 30, at 3; *see id.* at 184-85.

85. S. GOLDMAN & T. JAHNIGE, *supra* note 43, at 164-65; Goldman, *supra* note 68, at 493; *cf.* Atkins & Green, *Consensus on the United States Courts of Appeals: Illusion or Reality?*, 20 AM. J. POL. SCI. 735, 738 (1976) (actual lack of consensus not necessarily reflected in rate of dissent); Songer, *Consensual and Nonconsensual Decisions in Unanimous Opinions of the United States Courts of Appeals*, 26 AM. J. POL. SCI. 225, 238 (1982) (same).

86. J. HOWARD, *supra* note 30, at 173-75, 182; Goldman, *supra* note 68, at 496 & n.19, 505; Goldman, *Voting Behavior on the United States Courts of Appeals, 1961-1964*, 60 AM. POL. SCI. REV. 374, 380-83 (1966). Models linking judicial decision making with case characteristics and/or judges' attributes can be established. *See generally* Aliotta, *Combining Judges' Attributes and Case Characteristics: An Alternative Approach to Explaining Supreme Court Decisionmaking*, 71 JUDICATURE 277 (1988) (correlation between political party identification, prestige of education. political experience and prior judicial experience and particular judicial viewpoints); S. GOLDMAN & T. JAHNIGE, *supra* note 43, at 147-48. The link between party identification *alone*, however, and judicial voting patterns is a relatively weak one. Aliotta, *supra*, at 280.

Table 2

En Banc Decisions: Totals and Percentages in 1980-87[a]

Year	Number of En Banc Decisions with Brief and Oral Argument	Number of En Banc Decisions Submitted Solely on Briefs	Total En Banc Decisions	Total Caseload	% Increase in Caseload	% of Caseload Heard En Banc
1980	45	20	65	10,598		.613
1981	52	17	69	11,980	13.04	.576
1982	68	6	74	12,327	2.89	.600
1983	56	10	66	13,217	7.22	.499
1984	95	11	106	14,327	8.40	.739
1985	76	9	85	16,369	14.25	.519
1986	71	19	90	18,199	11.18	.494
1987	73	15	88	18,502	1.63	.476

[a]Terminations on the merits.

Careful attention to the voting of the circuit judges President Reagan has appointed also casts doubt on the charge. One study has observed that despite the purported extreme political views of Reagan-appointed judges, the high rate of consensus and the low visibility of many cases "militate against radical ideological change at the court of appeals level."[87] The study concluded that Reagan appointees have voted essentially like other Republican-appointed judges.[88] A similar study of the appellate judiciary has found that while Reagan-appointed jurists typically voted more conservatively than Democratic appointees, their voting patterns "differed very little from those of other Republican judges."[89] It suggested that various factors, such as adherence to judicial restraint and moderation of views, may account "for these surprising results."[90]

The en banc studies support the finding that historically, as now, en banc decisions have accounted for less than one percent of court of appeals decisions.[91] They also indicate that en bancs exhibit more ideological clashes than do panel decisions. Over the years, for example, only about twenty percent of en banc decisions have been unanimous.[92] Some judges have stated en banc pro-

87. Gottschall, *Reagan's Appointments to the U.S. Court of Appeals: The Continuation of a Judicial Revolution*, 70 JUDICATURE 48, 50 (1986).

88. *Id.* at 53-54.

89. COLUM. Note, *supra* note 8, at 779. This study also noted that 96% of the decisions during the period under review (1985-86) were unanimous. *Id.* at 789 n.77.

90. COLUM. Note, *supra* note 8, at 791.

91. *See supra* text accompanying note 68.

92. Atkins, *supra* note 44, at 632 (citing R. RICHARDSON AND K. VINES, THE POLITICS OF FEDERAL COURTS 125 (1970)). For more recent data, see *infra* text accompanying notes 182-201 and tables four and six.

One reader of an earlier draft of this Article commented that the lower rate of unanimity of en

Table 3[a]

Number of Litigant Filed Suggestions for En Banc Rehearing by Circuit

1985-87

Circuit	1985		1986	1987
	Total # Filed	% of Caseload[b]		
District of Columbia	223	(45.60%)	122 (17.25%)	185 (19.15%)
First	43	(7.62%)	65 (11.50%)	100 (15.36%)
Second	95	(7.38%)	120 (9.88%)	56 (4.59%)
Third	365	(26.31%)	320 (24.92%)	273 (22.63%)
Fourth	153	(9.85%)	154 (8.83%)	106 (6.29%)
Fifth	202	(10.18%)	202 (9.65%)	196 (8.94%)
Sixth	171	(9.71%)	174 (9.70%)	197 (8.93%)
Seventh	135	(11.89%)	200 (16.18%)	156 (13.74%)
Eighth	167	(13.19%)	194 (14.76%)	222 (15.86%)
Ninth	317	(14.43%)	318 (12.06%)	505 (19.37%)
Tenth	96	(10.53%)	50 (4.24%)	80 (6.43%)
Eleventh	278	(15.13%)	345 (14.16%)	270 (13.40%)
TOTALS	2,245	(13.71%)	2,264 (12.44%)	2,346 (12.67%)

[a]I wish to thank Marjorie B. Waskewich, Appeals Program Analyst, Administrative Office of the United States Courts, for providing me with the unpublished data which is the source of the raw numbers in this Table. The percentages were calculated from the unpublished data and the merit termination figures from each circuit available in the AO Reports.

[b]As % of cases terminated on the merits.

ceedings were the *least* cohesive,[93] and one writer has concluded that en bancs "tap, and more accurately reflect, the basic ideological disagreements within the court."[94] On the other hand, one study of Reagan-appointed circuit judges demonstrated that "in en banc cases, there was no consistent evidence that Reagan judges were more ideologically extreme" than their Republican colleagues in those cases.[95]

The point of this excursion into the political science literature is two-fold. First, it should remind the critics who charge the Reagan appointees with polit-

banc, as compared to panel, decisions is a statistical artifact. On a panel of three judges, two will almost always agree on something even if all three reach decisions by flipping coins. Accordingly, the rate of dissent on a panel is given by the rate of dissent of any single judge. If each judge on the panel goes along with any given colleagues 90% of the time, panels will be unanimous in 90% of the cases. The probability of unanimity falls as the size of the court increases. *See* Kornhauser & Sager, *supra* note 52, at 99-100 (discussing Supreme Court voting behavior when determining whether to grant certiorari). For example, applying a 90% agreement rate to a circuit with 9 judges yields a probability of unanimity of 0.9 to the seventh power, or 48%. The latter percentage falls even more drastically if a lower disagreement rate is assumed. Therefore, a lower rate of unanimity among en banc decisions is to be expected. Perhaps it is surprising that 18% of the en banc cases in the sample were unanimous. *See infra* Table 6.

93. J. HOWARD, *supra* note 30, at 205-07 (interviews of circuit judges).

94. Atkins, *supra* note 44, at 638.

95. COLUM. Note, *supra* note 8, at 784.

ical use of the en banc process of the danger of throwing stones from glass houses. Scores of studies document that both Republican and Democratic circuit judges vote fairly consistently on liberal or conservative value scales (although the correlation is not strong). Ideological voting works both ways. Second, and more importantly, these studies should simultaneously serve to quiet the rising chorus over the purported ideological use of the en banc procedure. If circuit court decision making is characterized largely by consensus and unanimous opinions, and if en bancs make up only tiny percentages of the caseload, then the debate over the current en banc procedure seems disproportionate to the problem.

These observations return us, however, to the basic complaint over the political use of an en banc rehearing. Statements abound in the literature[96] and case law[97] that "mere" disagreement with a panel decision is insufficient to support an en banc rehearing, although this conclusion is rarely explained or defended. Indeed, case law statements that disagreement with a panel decision *is* sufficient are equally abounding.[98] Nor does rule 35 on its face seem to prohibit disagreement per se as a criterion for en bancing the panel decision.[99]

Moreover, powerful arguments exist to support the "disagreement" criterion. All multi-member tribunals operate on the basis of majority rule. Historically the concept of a circuit sitting en banc followed rather than preceded the creation of those courts, and until the 1930s the circuits did not have more than three judges each (and hence did not need the en banc device).[100] But at least with the benefit of hindsight, panels can be seen simply as a matter of conven-

96. *See* FORDHAM Comment, *supra* note 1, at 409.

97. Walters v. Moore-McCormack Lines, Inc., 312 F.2d 893, 894 (2d Cir. 1963) (en banc) ("[m]ere disagreement, or likelihood of disagreement, with the panel decision, has not generally been regarded as sufficient reason for a further hearing"); Church of Scientology v. Foley, 640 F.2d 1335, 1341 (D.C. Cir.) (per curiam) (Robinson, Edwards & R. Ginsburg, JJ., dissenting from denial of rehearing en banc), *cert. denied*, 452 U.S. 961 (1981). For more recent examples, drawn from the cases coded for part III of this Article, see Bartlett *ex rel* Neuman v. Bowen, 824 F.2d 1240, 1243 (D.C. Cir. 1987) (Edwards, J., concurring in denial of rehearing en banc); Noxell Corp. v. Firehouse No. 1 Bar-B-Que Restaurant, 774 F.2d 1180, 1180 (D.C. Cir. 1985) (Wald, J., concurring in denial of rehearing en banc) (concurring despite belief decision does not represent a correct construction of applicable law); United States v. Singleton, 763 F.2d 1432, 1432 (D.C. Cir. 1985) (Edwards, J., concurring in denial of rehearing en banc) (although he "find[s] it difficult to subscribe to the panel's decision").

98. *E.g.*, E. O. Lelsz v. Kavanagh, 815 F.2d 1034, 1035 (5th Cir.) (Reavley, J., dissenting) ("refusal to correct and clarify the panel opinion"), *cert. dismissed*, 108 S. Ct. 44 (1987). Sometimes the "merely" incorrect standard is coupled with language drawn from rule 35. Leving v. CMP Publications, Inc., 753 F.2d 1341, 1343 (5th Cir. 1985) (Rubin, J., dissenting from denial of rehearing en banc) ("the panel erred"); *see, e.g.*, Vinson v. Taylor, 760 F.2d 1330, 1330-32 (D.C. Cir. 1985) (Bork, J., dissenting from denial of rehearing en banc) (panel decision was "plainly wrong" and created an intracircuit conflict), *aff'd sub nom.* Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986); Bartlett *ex rel* Neuman v. Bowen, 824 F.2d 1240, 1247 (D.C. Cir. 1987) (statement of Bork, Starr, Buckley, Williams, & D. Ginsburg, JJ., dissenting from denial of rehearing en banc) (panel decisions were "clearly wrong" and involved issues "of exceptional importance"); International Olympic Committee v. San Francisco Arts & Athletics, 789 F.2d 1319, 1320 (9th Cir. 1986) (Kozinski, J., dissenting from denial of rehearing en banc) (panel erred and "the result reached threatens a potentially serious and widespread infringement of personal liberties"), *aff'd sub nom.* San Francisco Arts & Athletics Inc. v. United States Olympic Comm., 107 S. Ct. 2971 (1987).

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

100. N.Y.U. Note, *supra* note 17, at 569-74.

ience to permit the full circuit to decide more cases;[101] they are not free actors, but rather representatives of the circuit.

Professors Lewis Kornhauser and Lawrence Sager have recently analyzed how multi-member courts can act consistently and coherently.[102] One model of uniform decision making is that of representation where, in their terminology, the "active group, a small subset of the reference group, is expected to reach a result that emulates the result that would be reached by another group (the reference group) if the latter undertook to decide the matter."[103] The "principal measure of performance in a representative decision making process," they continue, is "the tendency of the active decision making group to arrive at results that would have been reached by the process' reference group."[104]

While Kornhauser and Sager do not specifically address en banc decisions, their analysis applies usefully to that process. If the reference group (the full circuit) has no ability or only a limited ability to review decisions of the active group (the panel), and the active group is randomly selected, then the decision making method fails to be one of representation. To fulfill the goals of the representation model, we permit a majority of the full circuit to overrule the panel, if and when it so desires. An "incorrect" panel decision seems to be the best, not the worst, reason for the circuit to act in a representation model. Judge Henry Friendly in his discussion of the social science evidence outlined above, has suggested, in a related context, that if there really were voting blocs on the federal circuits, en bancs should be used more, not less; otherwise, a minority of the judges could control the law of the circuit.[105] It is also worth noting that the Supreme Court always sits en banc,[106] although there is apparently no constitutional or statutory prohibition to the Court sitting in panels.[107] Presumably, one reason for this practice is to prevent active groups (panels) of the Supreme Court from committing error.

The problem with the representational model is that it proves too much. If the model is fully enforced, every decision of a circuit should be en banced to

101. R. POSNER, *supra* note 30, at 12.

102. Kornhauser & Sager, *supra* note 52.

103. Kornhauser & Sager, *supra* note 52, at 89.

104. Kornhauser & Sager, *supra* note 52, at 91. Kornhauser and Sager also discuss judgment and preference aggregation as models of group decision-making. *Id.* at 84-89. The measure of performance of these models is, respectively, "accuracy: the tendency of a group decision-making process to reach 'correct' results," and "authenticity," which they define as "the ability of a particular process to reflect correctly the preferences of the members of the decision-making group." *Id.* at 91. Both goals are served by the en banc process. It promotes "accuracy" by increasing the number of decision makers, which increases the likelihood that the court will reach a correct result (as defined by judgment aggregation). *See id.* at 98; *infra* text accompanying notes 111-12. Likewise, "authenticity," similar to the representation model, will more likely result from the improved quality of deliberation from a larger panel. Kornhauser & Sager, *supra* note 52, at 96 n.18.

105. Friendly, *Of Voting Blocs, and Cabbages and Kings*, 42 U. CIN. L. REV. 673, 675 (1973); *see also* Atkins, *supra* note 44, at 626 (rotating panels facilitate expression of minority views).

106. R. POSNER, *supra* note 30, at 11.

107. Such a proposal was considered and rejected by the Freund Report in 1972. *See* Federal Judicial Center, *Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573, 580-89, 611 (1972).

avoid the risk of error among panels.[108] This places paramount value on representation. At least implicitly, the drafters of rule 35 appeared to give equal or greater weight to values such as panel finality and judicial economy. Had they thought otherwise, the drafters presumably would not have placed any substantive limits on the process, as they did in developing the rule. Thus, one can argue that a panel's "mere error" is *not* enough to en banc the decision, unless it creates an intracircuit conflict or involves an issue of "exceptional importance."

Moreover, allowing limitless en banc review fosters a mode of judicial decision making condemned by most legal discourse, or at least identified as a purportedly inescapable and presumably unfortunate phenomenon. In current legal scholarship, judges thought to be applying neutral principles of law in a principled fashion stand buffeted, on opposite sides of the political spectrum, by the Critical Legal Studies adherents and the law-and-economics school, both of whom argue in part that judges act, to varying degrees, on personal preferences.[109] Many judges vehemently deny this charge.[110] Professors Kornhauser and Sager appear to side at with the aspirations of the judges, observing that "[m]ost jurisprudential theories of adjudication consider adjudication, at least implicitly, to be the rendering of a judgment rather than the expression of a judicial preference."[111] A preference "speaks only to [the judge's] own values and advantage;" in contrast, a "judgment advances a 'truth,' that is, a proposition to which all other right-thinking persons who may confront the issue must adhere."[112]

Despite the skepticism of Legal Realism and its progeny, judgment aggregation and principled decision making remain the great quest of the legal community. This quest can be carried on in a sophisticated manner, as it has been in constitutional law. In that sphere, few if any defend the propriety of a judge relying only on her own preferences or values in reaching a decision.[113] En banc review without limits or guidelines would inject a heavy dose of capriciousness into the appellate process. Since, as a practical matter, all decisions will not be en banced, litigants and judges could only guess what panel opinions will receive

108. Beatty v. Chesapeake Center, Inc., 835 F.2d 71, 74 n.* (4th Cir. 1987) (en banc) (Winter, C.J., concurring).

109. *See* Kornhauser & Sager, *supra* note 52, at 84 n.3 (summarizing both schools of thought, with appropriate citations); R. POSNER, *supra* note 60, at 505-06 (developing economic approach); *see also* Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1 (1986) (arguing ultimate similarity in conclusions of both schools of thought).

110. Edwards, *Public Misperceptions Concerning the "Politics" of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619, 634-35 (1985) (most cases decided in a "principled fashion"); *e.g.*, Friendly, *supra* note 105, at 677 (incorrect to assume "that judges regularly vote on ideological lines; it is only in the closest cases that such attitudes may tip the balance"); Rubin, *Does Law Matter? A Judge's Response to the Critical Legal Studies Movement*, 37 J. LEGAL ED. 307, 307-08 (1987) ("My conclusions are that legal doctrine is a real force, judges follow it, and they decide all but a small fraction of the cases that come before them in accordance with what they perceive to be the controlling legal rules.").

111. Kornhauser & Sager, *supra* note 52, at 84 n.3.

112. Kornhauser & Sager, *supra* note 52, at 85.

113. For sharp criticism of such judicial actions, see J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 44-48 (1980); R. POSNER, *supra* note 30, at 203-05. Explicit advocacy of judges relying solely on their own values seems quite rare. J. ELY, *supra*, at 44 n.7.

en banc treatment. Absent any objective criteria, the selection of cases for en banc review will simply become a function of the judge's personal agenda.[114]

The two criteria found in rule 35 attempt to save us from this prospect. Awaiting further examination is how objective or principled these criteria are, and how can they be made more so. Despite some difficulties,[115] it seems fairly easy to identify conflicting panel decisions within a circuit. But how are cases of "exceptional importance" to be identified? That ambiguous criterion eventually could collapse into one of personal preference vague enough to include even "mere" erroneous decisions by a panel. Indeed, one circuit judge has said privately, with tongue only slightly in cheek, that he knows an "exceptionally important" decision when he sees one. Some writers despair of ever being able to produce more objective factors, and accordingly call for drastic curtailment of the en banc process.[116] The project, however, is not an impossible one, and it is addressed in the following section.

D. *Toward Principled Criteria for Selecting Cases Worthy of En Banc Review*

Any appellate court system that establishes discretionary review of cases presents a problem of which cases to review. The courts of appeals hear most of their cases by way of litigants' right to appeal; the en banc procedure, a type of second tier review within the same court, is discretionary. Likewise, almost all of the cases the Supreme Court hears are the product of discretionary, selective review.[117] Lately there has been much interest in the Supreme Court's burgeoning caseload and the problems it faces in only selecting about three percent of its docketed cases for plenary review.[118] A survey of some of the proposed solutions to those problems serves to illustrate the analogous issues faced in limiting en banc review.

Supreme Court Rule 17 ostensibly governs Court selection of cases. It is remarkably similar to Federal Appellate Rule 35. The Court's rule states that the Court will exercise its certiorari jurisdiction to resolve conflicts between the circuits or between federal appellate courts and a state court of last resort, or to decide "an important question of federal law which has not been, but should be,

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114. *See* S. ESTREICHER & J. SEXTON, REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS 107 (1986) ("The lack of case selection criteria not only muddles the Court's role but also aggravates the ever-present inclination of the Justices to conceive of the case selection process in political terms."). For a summary and discussion of the political science literature which purports to document this inclination, see S. GOLDMAN & T. JAHNIGE, *supra* note 43, at 103-07. For judicial comment, see Falwell v. Flynt, 805 F.2d 484, 489 (4th Cir. 1986) (Winter, C.J., dissenting from denial of rehearing en banc) ("Why, when the court has freely granted rehearings in banc in recent years in many less significant cases, it declines to do so here, is inexplicable."), *rev'd on other grounds*, 108 S. Ct. 876 (1988).

115. *See supra* note 53 (judges disagree as to whether panel decisions conflict).

116. J. HOWARD, *supra* note 30, at 217-18 (summarizing interviews of circuit judges); MICH. Note, *supra* note 1, at 1648 & n.63.

117. *See generally* Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L. J. 62 (1985) (examining discretionary restrictions on appeal as of right and suggesting such appeals be abandoned for certain types of cases).

118. S. ESTREICHER & J. SEXTON, *supra* note 114, at 1; Hellman, *Case Selection in the Burger Court: A Preliminary Inquiry*, 60 NOTRE DAME L. REV. 947, 948-52 (1985); *see also Statistical Recap of Supreme Court's Workload During Last Three Terms*, 57 U.S.L.W. 3074 (July 26, 1988).

settled by this Court."[119] Finding this rule to be "indeterminate," Professors Samuel Estreicher and John Sexton recently suggested a "managerial model" for case selection.[120]

In brief, their model encompasses the following. In a federal system of courts, some disuniformity of decisions is expected, tolerable, and sometimes even beneficial (because an issue can "percolate" and undergo thorough analysis in lower courts).[121] Like any good manager, Estreicher and Sexton continue, the Court must delegate federal law adjudication to lower federal and state courts, and only on rare occasions should the Court step in and make a correction or adjustment.[122] They divide these occasions into a "priority" docket and a "discretionary" docket. The former includes cases involving intolerable intercircuit conflicts, direct conflict with Supreme Court precedent, resolution of vertical federalism disputes, interbranch disputes, and interstate disputes.[123] A "discretionary" docket includes cases that can serve as vehicles for the development of federal law or involve interference with federal executive responsibility, the Court's supervisory power, or incorrect consideration of a federal issue.[124] Cases that do not fall into one of these categories, absent further reasons, should not be reviewed.[125]

These criteria should not be utilized by the courts of appeals in deciding whether to en banc cases. Rather, they are illustrative of attempts to give principled content to gatekeeping criteria. An analogous effort, however, can and should be made with respect to Federal Appellate Rule 35. One should begin by reviewing the purposes and functions of the federal courts of appeals. It is widely acknowledged that these courts serve both an "error correction" and a "law development" function.[126] In the former role the courts of appeals correct a trial court's error in applying settled law to fairly routine fact situations. Law development involves something more—the creation or extension of law in new factual areas, or the interpretation of vague federal constitutional or statutory provisions. By definition, law creation will almost always apply to more cases than the case immediately under consideration.[127]

The function of courts of appeals can serve as a starting point for objectively selecting which panel decisions deserve en banc treatment. In particular they aid in solving the "mere disagreement" conundrum.[128] The ultimate issue,

119. SUP. CT. R. 17.

120. S. ESTREICHER & J. SEXTON, *supra* note 114, at 43.

121. S. ESTREICHER & J. SEXTON, *supra* note 114, at 48.

122. S. ESTREICHER & J. SEXTON, *supra* note 114, at 50-52.

123. S. ESTREICHER & J. SEXTON, *supra* note 114, at 52-62.

124. S. ESTREICHER & J. SEXTON, *supra* note 114, at 62-69.

125. S. ESTREICHER & J. SEXTON, *supra* note 114, at 69-70.

126. S. ESTREICHER & J. SEXTON, *supra* note 114, at 4-5, 56; Hellman, *supra* note 118, at 959-60. The Supreme Court should rarely serve an error correction role. S. ESTREICHER & J. SEXTON, *supra* note 114, at 4-5 & 56.

127. *See, e.g.*, R. MARTINEAU, *supra* note 17, at 19-21; R. MARTINEAU, *supra* note 73, at 5-30; R. POSNER, *supra* note 30, at 12-13; Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 551-54 (1969); Resnik, *supra* note 61, at 868.

128. *See supra* text accompanying notes 96-113.

we now see, is what one means by "error." If the panel error is one requiring correction in the application of settled law to more-or-less routine factual situations, then the need to impose the burdens of en banc review is scarcely justified. Even if the panel is wrong, it only affects the individual litigants. On the other hand, if the error is perceived to be one of law creation, then it will affect many cases and en banc review can be justified. When one reviews the en banc case law, it turns out that many,[129] though not all,[130] judges understand this difference. Indeed, the dissenters in the District of Columbia Circuit opinions referred to both the error of the panels *and* the importance of the issues to the Circuit.[131]

While helpful, labeling the court's role in a case as one of correcting an error or developing the law is ultimately unsatisfactory. At the outset, it seems too easy to accomplish. Any two cases are rarely identical, and even applying settled law to those cases might suggest that the law is being extended or restricted, and thus applicable to more than one case. Expressed another way, at a high level of generality, one can very easily assert that a purportedly incorrect panel decision involves law creation rather than an error in application of law. Likewise, someone unhappy with a panel decision could easily convert it into an intracircuit conflict by claiming that the second panel, by law creation, departed from a prior panel.

Moreover, rule 35 seems to require something more than reference to law creation. The rule refers both to securing and maintaining "uniformity of deci-

129. *See supra* note 97; Serpas v. Schmidt, 827 F.2d 23, 40 (7th Cir. 1987) (Easterbrook, J., dissenting from denial of rehearing en banc) ("The questions of principle glossed over by the panel's opinion are far more important than the outcome of this case, and they are worth the extra judicial time necessary to get them right."), *cert. denied*, 108 S. Ct. 1075 (1988); Rakovich v. Wade, 850 F.2d 1179, 1180 (7th Cir. 1987) (Ripple & Cudahy J.J. dissenting from grant of rehearing en banc) (rehearing en banc should not be granted since case is a "fact-specific adjudication of civil liability imposed by a jury verdict."); Grandstaff v. City of Borger, 779 F.2d 1129, 1130 (5th Cir. 1986) (Higginbothom & Jones, JJ., concurring in denial of rehearing en banc) (panel was wrong but the decision was "responsive to a unique fact situation."), *cert. denied*, 107 S. Ct. 1364 (1987); *see also* Church of Scientology v. IRS, 792 F.2d 153, 155 n.1 (D.C. Cir. 1986) (en banc) (Scalia, J.) ("[A]ppellate review serves a dual purpose: the correction of legal error and the establishment of legal rules for future guidance. Only the latter is ordinarily worthy of the attention of the full court."), *aff'd*, 108 S. Ct. 271 (1987); Dahl v. Pinter, 794 F.2d 1016, 1016 (5th Cir. 1986) (Jones, J., dissenting from denial of rehearing en banc) (panel decided issue of law, not merely applying settled law to facts), *vacated and remanded*, 108 S. Ct. 2063 (1988); Easterbrook, *Agreement Among the Justices: An Empirical Note*, 1984 SUP. CT. REV. 389, 390 ("The Court's main function is to settle disputes about legal principles .... We would like to know whether today's dissent shows a separate rationale (and thus augurs differences in future cases) or stems from circumstances peculiar to the case.").

130. *See supra* note 98; see also United States v. Singleton, 763 F.2d 1432, 1434 (D.C. Cir. 1985) (Wright, J., dissenting from denial of rehearing en banc) (stresses importance of case to individual criminal defendants); Church of Scientology v. Foley, 640 F.2d 1335, 1341 n.46 (D.C. Cir.) (Robinson, Edwards & R. Ginsburg, JJ., dissenting from denial of rehearing en banc) ("In the exceptional case, however, an en banc rehearing may be appropriate to cure gross individual injustice."), *cert. denied*, 452 U.S. 961 (1981).

131. *See supra* text accompanying notes 10-16; Bartlett *ex rel.* Neuman v. Bowen, 824 F.2d 1240, 1247 (D.C. Cir. 1987) (joint statement of Bork, Starr, Buckley, Williams & D. Ginsburg, JJ., dissenting from denial of rehearing en banc) ("Each [case] involves an issue of exceptional importance and, as we demonstrate below, each received a panel resolution that we think is clearly wrong, and is, at the very least, highly dubious.").

sions" and the need to decide "a question of *exceptional* importance."[132] It does not simply refer to conflicts among panel decisions, nor simply "important" issues. Those criteria are qualified: the first states that "consideration by the full court is necessary to secure or maintain uniformity," suggesting that panel conflicts are to be neither discovered lightly, nor necessarily resolved by the full court even if uncovered.[133] Similarly, the use of the word "exceptional" implies that "important" decisions abound via law creation, but only the uniquely important ones ought to be en banced.[134] For these reasons, a somewhat more detailed explication of the rule 35 criteria is necessary, a task the following paragraphs undertake.

1. Intracircuit Conflicts

Given the rule followed in most circuits that one panel cannot overrule an earlier panel from the same circuit,[135] one would expect the uniformity criterion of rule 35 rarely to be employed. Apparently, lack of uniformity is still perceived to be a problem, generated by the increasing number of judges and cases within each circuit.[136] Intracircuit communication is also hampered by the large number of opinions filed and limited publication rules.[137] Moreover, the vagueness of many areas of federal law such as fourth amendment probable cause issues[138] is likely to lead to different results in factually similar cases.

As suggested above, however, it is relatively easy to divine conflict between two or more panel decisions, especially if conflict is desired or expected. There

132. FED. R. APP. P. 35 (emphasis added).

133. *Id.*

134. *Id.* Some might argue that absolving fact specific cases from en banc treatment removes a powerful incentive for a randomly selected panel to reach the decision which would have been reached by the full circuit. Absent this *ex ante* deterrent, the idiosyncrasies of the panel and the effect of random selection are magnified. Moreover, a circuit arguably should be concerned with the use, by panels, of major premises (i.e., settled law) in order to maintain uniformity of panel reasoning. *See* Serpas v. Schmidt, 827 F.2d 23, 34-40 (7th Cir. 1987) (Easterbrook, J., dissenting from denial of rehearing en banc), *cert. denied*, 108 S. Ct. 1075 (1988); Beatty v. Chesapeake Center, Inc., 835 F.2d 71, 74-75 (4th Cir. 1987) (en banc) (Murnaghan, J., concurring); Easterbrook, *supra* note 129, at 390.

Admittedly, regardless of the ultimate result, the *reasoning* of a panel in a fact-specific case can have precedential effect. *Cf.* Maltz, *The Nature of Precedent*, 66 N.C.L. REV. 367, 376-83 (1988) (both doctrine and underlying precedent create precedent). Further there is merit to the argument that a litigant should not have to be subject to the vagaries of a panel when the full circuit would have reached another result. Beatty v. Chesapeake Center, Inc., 835 F.2d 71, 75 n.1 (4th Cir. 1987) (en banc) (Murnaghan, J., concurring) ("It is distasteful to me to see the work of the court take on the guise of a roulette wheel operated by chance."). Justice to individual litigants perhaps should not always be sacrificed to the economies of never en bancing "law-application" cases. *See supra* text accompanying notes 128-32. *Cf.* Patterson v. McLean Credit Union, 108 S. Ct. 1419, 1421 (1988) (per curiam) (ordering reargument) (discussing "abiding rule that it treat all litigants equally"). These factors must be used, if at all, with great caution, since it is difficult to distinguish cases which should be en banced, and those that should not. Otherwise, the only constant is the voting behavior of a majority of the circuit, which this Article argues is not, by itself, a sufficient reason to en banc a panel decision.

135. *See supra* text accompanying note 37.

136. *See* Wasby, *supra* note 30, at 1353 (reporting interviews of Ninth Circuit judges). *But cf.* MICH. Note, *supra* note 1, at 1647 & n.55 (survey of judges from each circuit indicated that uniformity was a secondary concern to importance in making a decision to en banc).

137. S. ESTREICHER & J. SEXTON, *supra* note 114, at 133.

138. R. POSNER, *supra* note 30, at 19; Wasby, *supra* note 30, at 1357-59.

is no magic formula to identify valid intracircuit conflicts that deserve en banc resolution. Addressing a similar issue, Professors Estreicher and Sexton suggested that *inter*circuit conflicts subject to Supreme Court review should be only those that are direct and intolerable, that lead to shopping among circuits for a forum, or inhibit planning in the absence of a nationally binding rule.[139] In addition conflicts on a particular point may be permitted to "percolate" among the circuits prior to resolution, because the percolating exploration of different factual and legal approaches will ultimately aid the Supreme Court if and when it resolves the conflict.[140]

Similar criteria could help identify intolerable intracircuit conflicts. If panels purport not to overrule or disregard prior panel decisions, then explicit conflicts should be few indeed,[141] but through accident or design, conflicts can arise within a circuit. A true conflict, as defined here, involves express holdings—not dicta or alternative rulings—in an area of law creation, as best as can be determined. In the intracircuit context, where forum shopping is not an issue, explicit disagreement would mean two or more lines of decision that are irreconcilable and confusing to both district courts and appellate panels. This confusion may not become clear until the issue percolates within the circuit, at both the trial and appellate levels, and unless the disagreement is explicit, the "conflict" should not be resolved until and unless it becomes intolerable.

Two examples can serve to illustrate how apparent intracircuit-circuit conflicts do not and need not result in en banc resolution. For years there has been some uncertainty in the Sixth Circuit as to which test applies under the Age Discrimination in Employment Act (ADEA).[142] Early cases held that ADEA plaintiffs could not recover unless they could show that age "made a difference" in the adverse employment decision.[143] Later panels, however, held that ADEA cases should be governed by the same shifting burden-of-proof standards used in Title VII cases.[144] To the extent this "conflict" was even acknowledged, it was variously said that the tests were simply two ways of stating the same principle, or that different types of proof might call for different tests.[145] The "conflict" is apparently troublesome but not intolerable at the district court level; for exam-

139. S. ESTREICHER & J. SEXTON, *supra* note 114, at 57.

140. S. ESTREICHER & J. SEXTON, *supra* note 114, at 48.

141. Those circuits, however, that do not by rule or case law require one panel to follow earlier panels may experience more explicit conflicts, though stare decisis may ameliorate the problem.

142. 29 U.S.C. §§ 621-34 (1982).

143. Laugesen v. Anaconda Co., 510 F.2d 307, 317 (6th Cir. 1975).

144. *See* 42 U.S.C. § 2000e (1982), *applied in* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Chappell v. GTE Prods. Corp., 803 F.2d 261, 265-66 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 1375 (1987); Wilkins v. Eaton Corp., 790 F.2d 515, 520 (6th Cir. 1986); Williams v. Caterpillar Tractor Co., 770 F.2d 47, 51-52 (6th Cir. 1985) (Krapansky, J., concurring); Kendall v. Hoover Co., 751 F.2d 171, 174 (6th Cir. 1984); Davis v. Combustion Eng'g., Inc., 742 F.2d 916, 920 (6th Cir. 1984).

145. Simpson v. Midland-Ross Corp., 823 F.2d 937, 940-42 (6th Cir. 1987) (review on case-by-case basis); Merkel v. Scovill, Inc., 787 F.2d 174, 177 (6th Cir. 1986) (review on case-by-case basis), *cert. denied*, 479 U.S. 990 (1987); LaGrant v. Gulf & Western Mfg. Co., 748 F.2d 1087, 1090-91 (6th Cir. 1984) (depends on type of evidence); Blackwell v. Sun Elec. Corp., 696 F.2d 1176, 1179-81 (6th Cir. 1983) (review on case-by-case basis); Rose v. National Cash Register Corp., 703 F.2d 225, 277 (6th Cir. 1983) ("slightly different formulations"), *cert. denied*, 464 U.S. 939 (1984).

ple, in the Southern District of Ohio several district judges incorporate both tests into jury instructions or their own decisions.[146] Continued percolation of this issue may show the conflict to be real, necessitating en banc review, or it may show that both judges and the bar find the present approach to be acceptable.[147] A second example comes from the Seventh Circuit. In 1985 Judge Richard Posner wrote an opinion proposing and applying a mathematical formula to determine whether district judges should grant preliminary injunctions.[148] A dissenting judge on that panel opined that this new test differed from prior Seventh Circuit cases.[149] Later and different panels held that Judge Posner's formula was simply another, more sophisticated statement of the traditional equity standards that govern issuance of injunctions.[150] There was said to be no inconsistency in the various panel decisions. Despite some voices to the contrary,[151] the "conflict" apparently has never become intolerably confusing either to district courts or the Seventh Circuit itself. The "conflict" has not been "resolved" via the en banc process and probably never will be.

A final issue under the rubric of intracircuit uniformity arises when a panel produces a confusing opinion, produces three opinions, or cannot reach a result. Even if the issues involved are not necessarily of "exceptional importance," en banc resolution seems appropriate to serve both litigants and intracircuit harmony.[152] In those rare cases where this happens en banc review is an appropriate corrective tool under the uniformity criterion of rule 35.[153]

2. Questions of Exceptional Importance

Some ways to identify panel decisions of genuine "exceptional importance" have already been suggested.[154] Such decisions are usually the product of law creation; that is, they formulate legal principles which will apply to a variety of factual scenarios that are likely to recur in many cases at the district and appellate court level. If a decision creates law, the majority of the circuit is entitled to examine the issue presented de novo. The case law sometimes reflects this un-

146. *See* Strong v. Xenia City Schools, No. C-3-86-407 (S.D. Ohio 1986) (on file with author) (*Laugesen* language used in jury instructions due to existence of direct evidence of age discrimination); Dunn v. Dayton Multi-Punch, C-3-82-110 (S.D. Ohio 1982) (on file with author) (jury instructions include both tests).

147. Some judges still find the divergent approaches troubling and apparently would opt for a single, clearer standard. Klein v. Stop-N-Go, 824 F.2d 453, 453 (6th Cir. 1987) (Krupansky, J., dissenting); Blackwell v. Sun Electric Corp., 696 F.2d 1176, 1187-88 (6th Cir. 1983) (Krupansky, J., dissenting); Locke v. Commercial Union Ins. Co., 676 F.2d 205, 207-08 (6th Cir. 1982) (Jones, J., dissenting).

148. American Hosp. Supply Corp. v. Hospital Prods. Ltd., 780 F.2d 589, 593 (7th Cir. 1986).

149. *Id.* at 604, 609 (Swygert, J., dissenting).

150. Lawson Prod., Inc. v. Avnet, Inc., 782 F.2d 1429, 1432-34 (7th Cir. 1986); Brunswick Corp. v. Jones, 784 F.2d 271, 274 n.1 (7th Cir. 1986). Even Judge Posner seems to agree. Centurion Reinsurance Co. v. Singer, 810 F.2d 140, 143 (7th Cir. 1987) (majority opinion written by Posner, J.).

151. *E.g.*, Mullenix, *supra* note 61, at 551-56.

152. FORDHAM Comment, *supra* note 1, at 416-17; N.Y.U. Note, *supra* note 17, at 592-93.

153. *E.g.*, Central States S.E & S.W. Areas Pension Fund v. Kraftco, Inc., 799 F.2d 1098, 1104 (6th Cir. 1986) (en banc) (reviewing panel which produced three opinions), *cert. denied*, 107 S. Ct. 1291 (1987). This was the only such case found in the sample discussed *infra* Part III.

154. *See supra* text accompanying notes 123-36, 139-40.

derstanding of en banc importance.[155]

As with the issue of circuit uniformity, further delineation of what is or is not exceptionally important beyond general statements of law creation is not likely to be terribly fruitful. Nevertheless, case law suggests some further explication of the "importance" criterion. Before turning to that, however, two arguments casting doubt on the usefulness of the importance criterion should be addressed. First, the Second Circuit has developed the approach that the more important the case, the *less* deserving of en banc review it is. The reasoning is that truly important cases will be resolved by the Supreme Court.[156] Whatever merit this idea had when it first arose in the 1960s, it seems little justified today. The Supreme Court has great difficulty in deciding which cases among its burgeoning caseload to review; many "important" cases presumably go unreviewed. Thus, it is no longer tenable, if it ever was, to shift en banc responsibility to the Supreme Court.[157] This factor should no longer be exclusively used.

A second argument suggests that courts should consider if other circuits have addressed the issue. If one or more have, and the panel has *followed* the trend of the other circuits, then the circuit should be reluctant to en banc the panel decision. The reason is that if the other circuits have considered the issue (perhaps by en banc), it has already been explored by other judges and the additional resources of en banc are less necessary.[158] On the other hand, if the panel

155. *See, e.g.*, Aguillard v. Edwards, 778 F.2d 225, 227 (5th Cir. 1985) (Gee, J., dissenting from denial of rehearing en banc) ("I await with interest the application of this new mode of constitutional analysis to other statutes."), *aff'd*, 107 S. Ct. 2573 (1987); Johnson v. Heckler, 776 F.2d 166, 167 (7th Cir. 1985) (Easterbrook, J., dissenting from denial of rehearing en banc) (en banc review "affects tens of thousands of administrative law cases every year and deserves review independently"), *vacated and remanded sub. nom.* Bowen v. Johnson, 107 S. Ct. 3202 (1987); McCray v. Abrams, 756 F.2d 277, 278 (2d Cir. 1985) (Winter, J., dissenting from denial of rehearing en banc) (panel decision "affects the manner in which juries are selected in every criminal case in the state or federal courts within this circuit"), *cert. granted and remanded*, 478 U.S. 1001 (1986).

156. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1021 (2d Cir. 1973) (Mansfield, J., concurring in denial of rehearing en banc), *vacated and remanded*, 417 U.S. 156 (1974); *see also* Kaufman, *supra* note 5, at 57. *But see* IBM v. United States, 480 F.2d 293, 304 (2d Cir. 1973) (en banc) (Timbers, J., dissenting) *cert. denied*, 416 U.S. 979 (1974).

This rationale is occasionally mentioned in other circuits. *E.g.*, Bartlett *ex rel.* Neuman v. Bowen, 824 F.2d 1240, 1247 (D.C. Cir. 1987) (Silberman, J., concurring in denial of rehearing en banc) ("The question will surely eventually be resolved by the Supreme Court and, in the meantime, I doubt very much whether the work of this court will be seriously affected by our refusal to rehear the case.").

The likelihood of the Supreme Court deciding that case, or resolving the issue presented by the case, is not a wholly irrelevant factor. If the likelihood is strong, especially if the Court has granted review to a case raising the same issue then en bancing the panel decision seems unnecessary. *Cf.* Archie v. City of Racine, 847 F.2d 1211, 1227-29 (7th Cir. 1988) (en banc) (Ripple, J., dissenting) (court should not decide case until Supreme Court has rendered a decision in a similar case); Wolfe v. E.F. Hutton & Co., 800 F.2d 1032 (11th Cir. 1986) (en banc), *vacated*, 107 S. Ct. 3205 (1987) (whether securities act claims are subject to arbitration; issue was in conflict among the circuits at time of *Wolfe* and was eventually resolved by Supreme Court in Shearson/American Express v. McMahan, 107 S. Ct. 2332 (1987)); Hall v. City of Santa Barbara, 813 F.2d 198, 209-11 (9th Cir. 1986) (Schroeder, J., dissenting from denial of rehearing en banc) ("takings" issue addressed by Supreme Court in three cases in 1987). *See generally* FORDHAM Comment, *supra* note 1, at 415-16 (discussing the issue of "importance" and Supreme Court's resolution of "important" cases; MICH. Note, *supra* note 1, at 1652 (criticizing *Eisen & Carlisle v. Jacquelin*).

157. N.Y.U. Note, *supra* note 17, at 581-82.

158. *See* R. POSNER, *supra* note 30, at 256 (suggesting that other circuits be followed in situation described, though not mentioning en banc issue). *But see* Riddle v. Secretary of Health & Human

has not followed the other circuits, then en banc review may be appropriate.

Some suggest that cases of importance to *that* circuit are appropriate for en banc review. "Cases of importance" would be those that recur frequently in a circuit or are of particular significance to litigants or the bar generally in the circuit. Thus, certain types of cases are sometimes said to be important to a certain circuit: securities regulation in the Second;[159] admiralty in the Fifth;[160] labor or antitrust in the Sixth or Seventh;[161] immigration or copyright/entertainment in the Ninth;[162] and administrative law in the District of Columbia.[163] Judge Silberman of the District of Columbia Circuit mentioned this as a particularly appropriate factor to consider when deciding whether to en banc a case.[164] This factor, while useful, should not be carried too far, because by itself it would justify en bancing *all* of those cases within the circuit. The regional importance should only be considered in conjunction with other indicia of importance.[165]

Other authorities mention governance of the bar or the integrity of the judicial process as other factors to consider in selecting what cases to en banc.[166] Questions of how *attorneys* litigate cases before trial and appellate tribunals obviously affect all non-*pro se* cases and seem apt for en banc treatment. Given the apparent paucity of these types of cases, en banc treatment should not unduly drain the courts' resources. Once again, bar governance ought to be considered

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Servs., 817 F.2d 1238 (6th Cir.) (panel decision followed other circuits), *rehearing en banc granted*, 823 F.2d 164 (6th Cir. 1987).

159. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968) (en banc), *cert. denied*, 394 U.S. 976 (1969).

160. Hagerty v. L. & L. Marine Services, Inc., 797 F.2d 256 (5th Cir. 1986) (Jolly, J., dissenting from denial of rehearing en banc) (Jones Act); *see also* Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314 (5th Cir. 1985) (en banc) (working conditions at a ship-building company), *cert. denied*, 478 U.S. 10 (1986).

161. Lingle v. Norge Div. of Magic Chef, Inc., 823 F.2d 1031 (7th Cir. 1987) (en banc) (labor preemption), *rev'd*, 108 S. Ct. 1877 (1988); Illinois *ex rel.* Hartigan v. Panhandle Eastern Pipe Line Co., 852 F.2d 891 (7th Cir. 1988) (en banc) (antitrust case); Crounse Corp. v. ICC, 787 F.2d 1031, 1032 (6th Cir.) (Jones & Merritt, JJ., dissenting from denial of rehearing en banc) (antitrust), *cert. denied*, 479 U.S. 890 (1986).

162. Contreras-Aragon v. I.N.S., 852 F.2d 1088 (9th Cir. 1988) (en banc); International Olympic Comm. v. San Francisco Arts & Athletics, 789 F.2d 1319, 1323 n.4 (9th Cir. 1986) (Kozinski, J., dissenting from denial of rehearing en banc) (copyright case), *aff'd*, 107 S. Ct. 2971 (1987).

163. Securities Indus. Ass'n. v. Comptroller, 765 F.2d 1196, 1198 (D.C. Cir. 1985) (Scalia, J., dissenting from denial of rehearing en banc) (per curiam), *cert. denied*, 474 U.S. 1054 (1986).

164. *See supra* text accompanying note 15.

165. *See generally* N.Y.U. Note, *supra* note 17, at 587-88 (where a region is a significant locus of certain activity, that circuit's decision on such activity may have national importance). Another caveat is that "regional importance" should mean affecting the entire circuit, *or* arising from one state primarily but affecting the whole region or the nation, or recurring in the circuit. Securities regulation cases in the Second Circuit, which arise almost exclusively from New York City, would be an example of this second type. Issues clearly affecting only *one* state would normally not. *See In re* Air Crash Disaster Near New Orleans 821 F.2d 1147, 1169 n.38 (5th Cir. 1987) (en banc) (stating that en banc court will not review panel's resolution of one state's conflicts of law issue); Jackson v. Johns Manville Sales Corp., 750 F.2d 1314, 1329 (5th Cir. 1985) (en banc) (Rubin, J., concurring) ("I think that diversity cases should not be reheard en banc."), *cert. denied*, 478 U.S. 1022 (1986).

166. *See In re* Discipline of Ashton, 769 F.2d 168, 169 (3d Cir. 1985) (Adams, J., dissenting from denial of rehearing en banc) (bar governance); MICH. Note, *supra* note 1, at 1654-55; *see also supra* text accompanying note 56.

only in conjunction with other factors to decide whether to en banc a panel decision.

The list of cases not covered by these factors is a long one, and it should be if limits on en bancing are to be meaningful: factually unique cases involving mere correction of errors; "controversial," or "big" cases;[167] or cases that strike a judge as creating a particular injustice.[168] Even if a case is particularly compelling for the litigants, involves large sums of money, or seems especially interesting or noteworthy to the judge, these factors *alone* should not be determinative. Otherwise, the judge's personal agenda will be projected upon rule 35. This standard would preclude, for example, automatically en bancing death penalty or abortion cases.[169]

3. Intercircuit Conflicts

Deciding whether and when to resolve intercircuit conflicts is an issue of great interest to the Supreme Court. It can also be relevant to en bancing a panel decision which creates or perpetuates such a conflict. Authority exists for the proposition that circuits should en banc such panel decisions.[170] Indeed the Ninth Circuit has a rule that expressly permits en bancing when the panel decision creates an intercircuit conflict.[171] Other writers, though, suggest that one circuit should not en banc simply because another circuit has reached a different result.[172]

On balance the en banc process can play a useful role in aiding the Supreme Court to resolve intercircuit conflicts. The language of rule 35 is no obstacle;

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167. *See* N.Y.U. Note, *supra* note 17, at 590.

168. *Compare* United States v. Samuels, 808 F.2d 1298, 1299-1300 (8th Cir. 1987) (Lay, C.J., concurring in denial of rehearing en banc) (panel reversal of conviction of man who threatened to kill President did not meet rule 35 criteria) *with id.* at 1302 (Fagg, J., dissenting from denial of rehearing en banc) (panel reversal appropriate for rehearing en banc).

169. *But see* MICH. Note, *supra* note 1, at 1649 & n.71 (suggesting that "cases involving sensitive political issues" should be en banced). As the Note correctly concludes, *id.* at 1650-51, this criterion is far too vague to be justifiable. *See also* S. ESTREICHER & J. SEXTON, *supra* note 114, at 69 (every death penalty case should not automatically be reviewed by the Supreme Court).

170. *E.g.*, Hall v. City of Santa Barbara, 813 F.2d 198, 209-11 (9th Cir. 1987) (Schroeder, J., dissenting from denial of rehearing en banc), *cert. denied*, 108 S. Ct. 1120 (1988); Pangilinan v. INS, 809 F.2d 1449, 1450-55 (9th Cir. 1987) (Kozinski, J., dissenting from denial of rehearing en banc), *rev'd*, 108 S. Ct. 2210 (1988); Christian Science Reading Room v. City & County of San Francisco, 807 F.2d 1466, 1467-78 (9th Cir. 1986) (Norris, J., dissenting from denial of rehearing en banc), *cert. denied*, 479 U.S. 1066 (1987); EEOC v. Franklin & Marshall College, 775 F.2d 110, 122 (3d Cir. 1985) (Adams, C.J., dissenting from denial of rehearing en banc); Uviedo v. Steves Sash & Door Co., 760 F.2d 87, 88-89 (5th Cir. 1985) (Rubin, J., dissenting from denial of rehearing en banc), *cert. denied*, 474 U.S. 1054 (1986); Wilsey v. Eddingfield, 780 F.2d 614, 617-20 (7th Cir. 1985) (Posner, J., dissenting from denial of rehearing en banc), *cert. denied*, 475 U.S. 1130 (1986); Financial Instit. Employees Local No. 1182 v. NLRB, 750 F.2d 757, 758 (9th Cir. 1985) (Kennedy, J., dissenting from denial of rehearing en banc).

171. 9TH CIR. R. 12(b).

172. Browning v. Clerk, United States House of Representatives, 793 F.2d 380, 381 (D.C. Cir. 1986) (R. Ginsburg, J., concurring in denial of rehearing en banc); *cf.* Freeman v. Rideout, 826 F.2d 194, 195 (2d Cir. 1987) (Oakes, J., dissenting from denial of rehearing en banc) (panel decision should be reviewed because it creates an intracircuit-circuit conflict, despite fact that it followed another circuit), *cert. denied*, 108 S. Ct. 1273 (1988); R. POSNER, *supra* note 30, at 256-57 (due to burdens of en banc proceeding, does not "agree with the suggestion that a circuit should not be permitted to go into conflict with another circuit except in an en banc proceeding").

while it does not refer to *inter*circuit conflict, surely the "exceptional importance" criterion is malleable enough to cover certain issues of both circuit *and* national importance. Intercircuit conflict certainly is and remains a problem for the Supreme Court. In recent years almost one-third of its docket has consisted of such cases,[173] and many other intercircuit conflicts go unreviewed by the Court.[174]

The problem of intercircuit conflicts does exist; the issue is whether the en banc process should explicitly exist to undertake the task of resolving the problem. Arguably it can, if panels are in fact en banced only along the lines previously suggested in this Article. Sensible use of objective criteria should leave enough room on the "natural" en banc docket to relieve pressure on the Supreme Court to resolve intercircuit conflicts. It may not be cost-beneficial, however, to require any circuit to en banc before permitting a panel to create a conflict with another circuit.

Judge Posner persuasively argues that one circuit's panel decision should not trigger ripples of en banc decisions in other circuits if the other circuits wish to disagree.[175] Given the understandable reluctance of most judges to en banc, other circuits making a subsequent decision will have incentives not to create conflicts. One might think this to be a useful incentive to lessen such conflicts, but conflicts are not necessarily bad. There is no *a priori* reason a first circuit's decision is correct, and en bancing all circuits that wish to disagree in the future will diminish the aforementioned benefits of circuit percolation. As Judge Posner suggests, these concerns can be met by *requiring* a circuit to en banc to create a conflict, but only when at least three other circuits have decided the issue the same way.[176] This should be added as a final factor in deciding whether to en banc a panel decision.[177]

F. *Stating the Reasons for En Banc Review*

A final prescriptive device suggested by some is to require en banc courts to state *why* an en banc, rather than a panel decision, is necessary.[178] Perhaps this would temper the unjustified use of the device, since it would open to criticism by the legal community those en banc decisions lacking genuine justification or stating only contrived bases. One judge suggested to me, however, that such a requirement is likely to have little impact. Purportedly "justifiable" reasons to en banc any given panel are fairly easy to concieve, he said, and for years the Supreme Court has not been giving reasons for review in many of its opinions.[179]

I am not as pessimistic as the judge. Requiring written reasons would po-

173. Hellman, *supra* note 118, at 1015.

174. S. ESTREICHER & J. SEXTON, *supra* note 114, at 137-52.

175. R. POSNER, *supra* note 30, at 256-57.

176. R. POSNER, *supra* note 30, at 256-57.

177. *See* S. ESTREICHER & J. SEXTON, *supra* note 114, at 59, 124-25; N.Y.U. Note, *supra* note 17, at 593-95.

178. MICH. Note, *supra* note 1, at 1655.

179. Hellman, *supra* note 118, at 1011.

tentially force judges to develop a consistent set of principles to govern the grant or denial of en banc review. Surely the bland statement that the issue is "important" will no longer be sufficient. If a principal restraint on judicial error is the requirement of written decisions, then it should have a curative effect on unprincipled use of the en banc process.[180] Therefore, an explicit statement of reasons to en banc should be required by circuit rule or suggested by the chief judge of each circuit.

III. EN BANC DECISION MAKING IN THE REAGAN ERA

A. *Purpose and Methodology*

As we have seen, the contemporary concern with the en banc process is driven by the asserted number of cases which are, but should not be, en banced, and the claimed use or threat of the process by conservative judges. An examination of a sample of recent en banc decisions can empirically test both concerns. Compiling the votes of Democratic and Republican appointed circuit judges in each decision can determine if the Reagan appointees are reversing liberal panel decisions. Likewise, subjecting these decisions to a set of criteria explicating the demand of rule 35 can help determine which cases were, but should not have been, en banced. The latter function can also be served by examining *unanimous* en banc decisions, which would not reveal ideological cleavage. Finally a review of opinions concurring in or dissenting from decisions *not* to en banc a panel decision can shed light on judges' own criteria for invoking the process.[181]

The sample for the present study consisted of all the published en banc opinions rendered by the circuit courts from January 1, 1985, through December 31, 1987.[182] One hundred eighty-three nonunanimous decisions, forty-one unanimous en banc cases, and fifty-eight cases having opinions concurring in or dissenting from decisions not to en banc a case comprise the sample. Certain data was collected from each decision or opinion: the issue presented, the result of the en banc decision, the President who appointed the en banc judges, the judges' votes, Supreme Court disposition of the case (if any), and the length of the en banc opinion. Finally, I reviewed each decision or opinion and applied

180. *See* Arkansas Writers' Project, Inc. v. Ragland, 107 S. Ct. 1722, 1730-32 (1987) (Scalia, J., dissenting); MICH. Note, *supra* note 1, at 1655.

181. Other measures of the functional and ideological concerns can be devised, such as examining whether the cases subject to litigants' suggestions for rehearing are worthy of en banc review, and the votes thereon, but they are beyond the scope of this study.

182. The authors of the Columbia Note collected a sample of non-unanimous panel and en banc decisions from 1985 to 1987, covering 752 F.2d to 807 F.2d. COLUM. Note, *supra* note 8, at 773-75. I am grateful to the authors of that study for providing me with a list of the en banc decisions covered. Letter from Timothy Tomasi and Jess Velona to Michael Solimine (Oct. 19, 1987) (on file with author). In order to complete the sample described in the text, my research assistants and I reexamined volumes 752 to 807, and carried the collection forward through 835 F.2d.

1985 was chosen as a base year for study because the Reagan-appointed judges only then started to appear in significant numbers on the appellate courts. COLUM. Note, *supra* note 8, at 773 n.44. In addition, unlike the Columbia study, I did not code en banc decisions from the Federal Circuit, since that court has never figured prominently in the current debate discussed in this Article.

the criteria developed above for rule 35 to determine whether the case should have been en banced.

The last inquiry is admittedly somewhat subjective in nature.[183] For the convenience of the reader, I attach an Appendix to this Article giving the citations of the decisions or opinions coded, the circuit of each, and my rating of the case concerning its suitability to en banc review. Readers are invited to examine the cases and reach their own conclusions.

B. *Results*

1. Ideology as a Predictive Variable

Table 4 presents the information derived from the nonunanimous en banc cases in the sample. The data do not support the charge that the Reagan-appointed judges are using the en banc procedure as an ideological tool. Out of 183 cases, only nine show Reagan-appointed judges voting a straight appointive line to overrule a liberal panel decision, with all Democratic-appointed judges dissenting.[184] The vast majority of the cases—the remaining ones—involved mixed voting patterns: majority and/or dissenting opinions consisting of Republican *and* Democratic judges. Admittedly, of this subsample of 174 cases, over half (100) did involve straight appointive line dissents. In other words the dissents (but not the majority opinions) consisted solely of judges of one appointive party. There were 36 such Republican dissents and 64 such Democratic dissents, though most involved just one to three dissenting judges.[185] However, when the 41 unanimous en banc cases are added to these figures, the data refute the charge that the en banc process has become a vehicle for ideological voting.

A somewhat different picture is presented by the 58 cases in which en banc

183. This problem of rater bias is unavoidable, and would have been exacerbated by delegating the task to research assistants. *See* S. ESTREICHER & J. SEXTON, *supra* note 114, at 79-80 (discussing rater bias); Easterbrook, *supra* note 129, at 391-92 (perils of delegation).

184. The nine cases are: Perry v. Leeke, 832 F.2d 837 (4th Cir. 1987) (en banc), *cert. granted*, 108 S. Ct. 1269 (1988); Doe v. United States, 821 F.2d 694 (D.C. Cir. 1987) (en banc); Teague v. Lane, 820 F.2d 832 (7th Cir. 1987) (en banc), *cert. granted*, 108 S. Ct. 1106 (1988); Britton v. South Bend Community School Corp., 819 F.2d 766 (7th Cir.) (en banc), *cert. denied*, 108 S. Ct. 288 (1987); Jersey Central Power & Light Co. v. FERC, 810 F.2d 1168 (D.C. Cir. 1987) (en banc); Hamilton v. Nix, 809 F.2d 463 (8th Cir.) (en banc), *cert. denied*, 107 S. Ct. 3270 (1987); Jenkins by Agyei v. State of Missouri, 807 F.2d 657 (8th Cir. 1986) (en banc), *cert. denied*, 108 S. Ct. 70 (1987); Dixon v. Nationwide Mut. Ins. Co., 800 F.2d 422 (4th Cir. 1986) (en banc); Perry v. F.B.I., 781 F.2d 1294 (7th Cir.) (en banc), *cert. denied*, 479 U.S. 814 (1986). One should note that the Fourth Circuit *Perry* case was en banced without a prior panel decision, 781 F.2d 1294, and the *Dixon* case from the same circuit involved two issues, only one of which was decided on straight-appointive lines. *Dixon*, 800 F2d 422.

Volumes 835 to 840 of the Federal Reporter (Second) contain 15 non-unanimous and one unanimous en banc decisions. Of these 16, two are the result of appointive line voting. In Wolfe v. Department of Health & Human Serv., 839 F.2d 768 (D.C. Cir. 1988) (en banc), the majority was made up of Reagan appointees while the dissenters had been appointed by Presidents Johnson and Carter. In Burch v. Apalachee Community Mental Health Services, Inc., 840 F.2d 797 (11th Cir. 1988) (en banc), Democratic appointees constituted the majority while Republican appointees made up the dissenters. The *Burch* decision is the only case discussed or listed in this article in which Democratic appointees made up the majority in a straight appointive vote.

185. There were 73 cases in the sample which fell into this category. Of these, 26 involved a single dissent (12 Republican; 14 Democratic); 27 involved 2 dissents (7 Republican; 20 Democratic); and 20 involved 3 dissents (7 Republican; 13 Democratic).

Table 4

Non-Unanimous En Banc Decisions, 1985-1987

Circuit	#[a]	# of Cases With Appointive Line Votes	Average Length	Justified Yes	Justified No	Cert.[c] Granted Yes	Cert.[c] Granted No	Reasons Given
DC	8	8	29.8	4	4	1	3	1
First	3	2	13.0	1	2	0	2	1
Second	2	0	16.0	2	0	0	1	0
Third	15	2	18.8	3	12	3	6	5
Fourth	28	15	8.0	10	18	6	10	6
Fifth	25	14	16.0	13	12	8	11	7
Sixth	12	4	13.75	6	6	1	7	1
Seventh	11	5	15.7	3	8	3	3	1
Eighth	26	17	12.7	13	13	5	14	4
Ninth	12	7	15.3	5	7	2	5	3
Tenth	11	6	15.8	6	5	0	6	1
Eleventh	30	20	16.0	11	19	9	15	15
TOTALS	183	100	13.10[b]	77	106	38	83	45

[a]each opinion counted as one case

[b]weighted average

[c]cases in which review was sought; as of July 1988 (end of 1987 Supreme Court Term).

review was denied and which were accompanied by concurring or dissenting opinions. Of this subsample, only 13 dissents involved a mix of Democratic- and Republican-appointed judges; 31 consisted solely of GOP appointees, and 14 solely of Democratic appointees (see Table 5).

The data as a whole seem to refute the notion that en banc decision making is driven solely by the ideology of the voting judges. If that hypothesis were true, one would expect a far greater incidence of straight appointive line voting. Indeed, the lack of evidence of widespread ideological voting is even more remarkable in light of the numbers of Reagan-appointed judges on the circuits. At the beginning of the sample, in April of 1985, only the Seventh Circuit consisted of a majority of Reagan-appointed judges (although four other circuits consisted of a majority of judges appointed by earlier Republican Presidents). By early 1987 four circuits consisted of Reagan majorities, while four others consisted of Republican majorities.[186] Assuming that the Reagan- and earlier Republican-

186. This information is gathered from volumes 752 and 806, respectively, of Federal Reporter (Second).

appointed judges vote similarly,[187] one predicting largely ideological voting would expect a large number of straight appointive-line en bancs, rather than only nine. One might also expect a sharp increase in the number of en banc decisions, which, as we have seen,[188] is not the case.

On the other hand, the high incidence of apparent ideological voting on opinions dissenting from en banc rehearing is somewhat inconsistent with the balance of the sample. The deviation in this smaller sample might be explained in a number of ways. Perhaps reflecting concerns over the propriety of publicly registering such dissents at all,[189] the number of these opinions remains small compared to the total number of en banc decisions and of litigant suggestions for rehearing. The size of this subsample may magnify certain voting patterns. Some judges of both appointive groups may simply be more willing to vent disagreement.[190] Any conclusions from this subsample must be drawn cautiously, since circuit judges are not required to publicly register such dissents and, indeed, few judges do so. The votes that *are* public from *all* of the judges—those on en banc decisions—are more indicative of the ideological posture of the circuit courts. By that measure, such posturing has not dominated en banc voting in the Reagan era.

2. Suitability for En Banc Review

A second purpose for compiling the sample was to obtain some sense of those cases to which courts have granted en banc review and to test these cases against the criteria for rule 35 developed earlier in this Article: such as intracircuit uniformity (to resolve genuine panel conflicts) and issues of exceptional im-

CIRCUIT	COMPOSITION OF COURTS	
	Jan. 1985	Jan. 1987.
D.C.	3 Reagan judges out of 10	6 of 11
First	1 of 5(and 1 other Republican judge)	2 of 6(1)
Second	4 of 11(3)	7 of 13(2)
Third	1 of 10(5)	3 of 10(1)
Fourth	3 of 11(3)	3 of 11(3)
Fifth	5 of 14(1)	6 of 13(1)
Sixth	4 of 11(2)	8 of 15(2)
Seventh	5 of 9(2)	6 of 10(2)
Eighth	3 of 9(1)	5 of 10(1)
Ninth	4 of 25(5)	8 of 26(5)
Tenth	0 of 5(1)	4 of 9(1)
Eleventh	0 of 12(4)	1 of 12(4)

187. *See supra* text accompanying notes 88-90.

188. *See supra* text accompanying notes 68-69 & Tables 1 & 2.

189. Issacs v. Kemp, 782 F.2d 896, 897 n.1 (11th Cir.) (Hill, J., dissenting from denial of rehearing en banc) (advocating a "simple order reciting" the denial), *cert. denied*, 476 U.S. 1164 (1986); Wald, *The D.C. Circuit: Here and Now*, 55 GEO. WASH. L. REV. 718, 719 (1987) ("the elaborate statements by dissenting members when en banc is denied . . . have been described, probably accurately, as thinly disguised invitations to certiorari"). *But see* S. ESTREICHER & J. SEXTON, *supra* note 114, at 122 (calling for "publishing the Justices' votes on decisions to grant or deny review").

190. *See* J. HOWARD, *supra* note 30, at 205; *see also* Brennan, *In Defense of Dissent*, 37 HASTINGS L.J. 427 (1986) (concludes that dissenting opinions serve an important purpose); Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 804-11 (1982) (discussing value of dissenting opinions); Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227, 248-58 (describing instances of vigorous dissent in Supreme Court history).

Table 5

Dissents from Denials of Rehearing En Banc, 1985-1987

Ciucuit	#[a]	# of Cases With Appointive Line Votes	Average Length	Justified Yes	Justified No	Cert.[d] Granted Yes	Cert.[d] Granted No
D.C.	10	9	5.2	4	6	2	3
First	0	0	0	0	0	0	0
Second	2	1	2.5	1	1	1	2
Third	10	9	2.3	4	6	2	5
Fourth	1	1	6.0	0	1	1	0
Fifth	9	6	3.0	4	5	2	3
Sixth	2	2	1.5	0	2	0	2
Seventh	4	4	4.5	3	1	1	1
Eighth	6	4	2.8	3	3	1	1
Ninth	10	8	6.0	3	7	2	1
Tenth	0	0	0	0	0	0	0
Eleventh	4	4	2.6	0	4	1	2
TOTALS	58[c]	48	3.8[b]	23	35	11	18

[a]each order denying rehearing en banc counted as one case, even if there was more than one dissent or concurrence.

[b]weighted average; dissents only coded.

[c]excludes four cases having only concurring opinion(s), and one case dissenting from granting of rehearing en banc. See Appendix.

[d]cases in which review was sought; as of July 1988 (end of 1987 Supreme Court Term).

portance (largely meaning regional importance or affecting many cases). The author read each case in the sample and determined if en banc review was justified based on his application of these criteria. Although this classification was both subjective and difficult, this type of effort is necessary to better understand the en banc behavior of the circuit judges.[191]

Table 4 presents the relevant data from the nonunanimous sample of en

191. For a discussion and defense of the methodology of a similar survey, see S. ESTREICHER & J. SEXTON, *supra* note 114, at 76-80.

Another method of evaluating the rationality of a decision to en banc a case would be to study the citations to an en banc opinion. If the number of citations is one idicia of an opinion's precedential value then truly important en banc cases should be cited more often than non-justified en banc decisions. *See* R. POSNER, *supra* note 60, at 510.

As a partial test of this theory, the author used SHEPARD'S FEDERAL CITATIONS (6th ed. Supp 1985-87, pt.2) to shepardize the earliest 20 cases coded as "justified," and the earliest 20 not coded as "justified." See Appendix for a list of these cases. The results were that the mean average for the justified cases was 19.6 citations, while the mean average for the unjustified category was 20.1 citations. These figures would seem to disprove the hypothesis until two "not justified" cases are factored out, each with an extraordinarily high number of citations: Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985) (en banc), *rev'd sub nom.* Lockhart v. McCree, 476 U.S. 162 (1986) (163 citations) (exclusion of certain jurors in death penalty case) and Brooks v. Kemp, 762 F. 2d 1383 (11th Cir. 1985) (en banc), *vacated and remanded*, 478 U.S. 1016 (1986) (92 citations) (jury instructions and

banc cases. Over one-half of these cases were classified as not appropriate for en banc review.[192] No particular trend is apparent from the gross data. All circuits seem guilty of inappropriate voting for en bancs. Rather than laboriously defending the classification scheme on an individual basis, the following paragraphs will emphasize recurrent illustrations of the criteria at work, and some cases that seem uniquely *in*appropriate for en banc review.

Many of the cases placed in the unjustified column seem little more than exercises in "error correction"[193] or law development in narrow or esoteric areas.[194] One recurrent problem is that of an issue affecting only one state or even one city. On its face such a case does not qualify for en banc review by the "regional importance" criterion, but that determination is little comfort to the residents of that state or city. Certainly, the importance of a case would seem to increase as the size and population of the affected geographic area increases. Reflecting a presumption that cases affecting only one state or city should not be en banced (absent other reasons), most of the cases of this type were classified as not justified.[195]

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prosecutor's comments on sentencing phase of death penalty case). The 18 remaining "not justified" cases have a mean average citation rate of 8.1, considerably below that of the "justified" category.

192. Of the nine straight-appointive voting cases, *see supra* text accompanying note 184, the author classified three as justified and six as not justified.

193. *E.g.*, Aldridge v. Baltimore & O. R.R., 814 F.2d 157 (4th Cir. 1987) (en banc) (seemingly routine case under the Federal Employers' Liability Act), *vacated and remanded*, 108 S. Ct. 2812 (1988); Holmes v. Bevilacqua, 794 F.2d 142 (4th Cir. 1986) (en banc) (seemingly routine case of racial employment discrimination); Dracos v. Hellenic Lines, Ltd., 762 F.2d 348 (4th Cir.) (en banc) (subject matter jurisdiction over suit by Greek plaintiff against Greek defendant), *cert. denied*, 474 U.S. 945 (1986); Martin v. Heckler, 773 F.2d 1145 (11th Cir. 1985) (en banc) (seemingly routine attorneys' fees case).

194. *E.g.*, Bhandari v. First Nat'l Bank of Commerce, 829 F.2d 1343 (5th Cir. 1987) (en banc) (42 U.S.C.A. § 1981 and alien discrimination); United States v. Kozminski, 821 F.2d 1186 (6th Cir. 1987) (en banc) (elements of involuntary servitude of retarded workers), *aff'd*, 108 S. Ct. 2751 (1988); Beisler v. Comm'r, 814 F.2d 1304 (9th Cir. 1987) (en banc) (taxation of retired football player's retirement benefits); Bissonette v. Haig, 800 F.2d 812 (8th Cir. 1986) (en banc) (application of Posse Comitatus Act, 18 U.S.C. § 1385, to private suit), *aff'd per curiam for lack of a quorum*, 108 S. Ct. 1253 (1988); Friedman v. Board of County Comm'rs, 781 F.2d 777 (10th Cir. 1985) (en banc) (whether a county's public use of latin cross and Spanish motto "With This We Conquer" violated First Amendment), *cert. denied*, 476 U.S. 1169 (1986); Troy v. City of Hampton, 756 F.2d 1000 (4th Cir.) (en banc) (right to jury trial under Veterans Reemployment Rights Act), *cert. denied*, 474 U.S. 864 (1985); *In re* Grand Jury Matter (Gronowicz), 764 F.2d 983 (3d Cir. 1985) (en banc) (subpoena of author of book), *cert. denied*, 474 U.S. 1055 (1986); *cf.* Jenkins v. Missouri, 807 F.2d 657 (8th Cir. 1986) (en banc) (school desegregation case classified as unjustified but arguably a controversial case for which an authoritative statement is appropriate), *cert. denied*, 108 S. Ct. 70 (1987); *see supra* text accompanying notes 126-27.

195. *E.g.*, Toombs v. Manning, 835 F.2d 453 (3d Cir. 1987) (en banc) (sovereign immunity under Pennsylvania law in a diversity action); Leaman v. Ohio Dep't of Mental Retardation & Developmental Disabilities, 825 F.2d 946 (6th Cir. 1987) (en banc) (interpretation of Ohio Court of Claims Act), *cert. denied*, 108 S. Ct. 2844 (1988); Hill v. City of Houston, 789 F.2d 1103 (5th Cir. 1986) (en banc) (city ordinance prohibiting the opposing, molesting, or interrupting of a policeman, with no indication that there were similar ordinances elsewhere), *aff'd*, 107 S. Ct. 2502 (1987); First Amendment Coalition v. Judicial Inquiry & Review Bd., 784 F.2d 467 (3d Cir. 1986) (en banc) (Pennsylvania constitutional provision restricting access to review board records). Virtually all of the numerous death penalty cases from the Fifth and Eleventh Circuits fell into this category, since they involved the statutes or procedures of one state. *See also supra* notes 159-63 (certain circuits tend to hear a higher proportion of certain types of cases). *But see* McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc) (death penalty case addressing proof to demonstrate racial bias in sentencing; coded as justified), *aff'd*, 107 S. Ct. 1756 *reh'g denied*, 107 S. Ct 3199 (1987).

Other cases seemed entirely appropriate for en banc review. Many involved procedural issues applicable to a wide spectrum of civil and criminal cases.[196] Other issues, such as those concerning the awarding of attorneys' fees and settlements, also impact a wide variety of cases and are only now being fully developed in the case law.[197] Not every case having wide-ranging impact should necessarily be en banced, but these types of cases seem generally to be appropriate vehicles for the process.[198] As the law addressed in these cases develops, en banc treatment may become less appropriate. Still other cases involved genuine issues of regional or subject-matter importance to the particular circuit,[199] or

196. *E.g.*, Litman v. Massachusetts Mut. Life Ins. Co., 825 F.2d 1506 (11th Cir. 1987) (en banc) (ability to waive right to new trial), *cert. denied*, 108 S. Ct. 700 (1988); United States v. Ford, 824 F.2d 1430 (5th Cir. 1987) (en banc) (ability of magistrate to preside over jury selection), *cert. denied*, 108 S. Ct. 741 (1988); *In re* Air Crash Disaster Near New Orleans, 821 F.2d 1147 (5th Cir. 1987) (en banc) (whether state or federal law of forum non conveniens applies in diversity cases); Stewart Org., Inc. v. Ricoh Corp., 810 F.2d 1066 (11th Cir. 1987) (per curiam) (en banc) (whether state or federal law controlled validity of contractual forum selection clauses), *aff'd*, 108 S. Ct. 2239 (1988); Archie v. Christian, 808 F.2d 1132 (5th Cir. 1987) (en banc) (magistrate's power to conduct jury trial over objection by defendant); Bryant v. Ford Motor Co., 832 F.2d 1080 (9th Cir. 1987) (en banc) (effect of "Doe" plaintiffs on citizenship in diversity cases); Henry v. City of Detroit Manpower Dep't, 763 F.2d 757 (6th Cir.) (en banc) (appealability of denial of appointment of counsel in Title VII case), *cert. denied*, 474 U.S. 1036 (1985); *see also* Thomas v. Capital Sec. Services, Inc., 836 F.2d 866 (5th Cir. 1988) (en banc) (construction of amended FED. R. CIV. P. 11).

197. On attorneys' fees, see, e.g., Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987) (en banc) (imposing sanctions on attorneys who initiate frivolous appeals); Nephew v. City of Aurora, 830 F.2d 1547 (10th Cir. 1987) (en banc) (awarding attorneys' fees to civil rights plaintiff who only recovered nominal damages), *cert. denied*, 108 S. Ct. 1269 (1988); Procup v. Strickland, 792 F.2d 1069 (11th Cir. 1986) (per curiam) (en banc) (restrictions on filing by pro se plaintiff); Duncan v. Poythress, 777 F.2d 1508 (11th Cir. 1985) (en banc) (whether an attorney who is a pro se plaintiff can recover attorney's fees), *cert. denied*, 475 U.S. 1129 (1986); Kelly v. Metropolitan County Bd. of Educ., 773 F.2d 677 (6th Cir. 1985) (en banc) (recovering attorneys' fees in civil rights case), *cert. denied*, 474 U.S. 1083 (1986). On settlement, see, e.g., Auer v. Kawasaki Motors Corp., 830 F.2d 535 (4th Cir. 1987) (en banc) (whether state or federal law controls interpretation of release in diversity action); *cert. denied*, 108 S. Ct. 1076 (1988); *see also* Solimine, *Enforcement and Interpretation of Settlements of Federal Civil Rights Actions*, 19 RUTGERS L.J. 295, 296-97 (1988) (over one-half of federal civil actions end in consent decrees or settlement agreements).

198. The following cases were classified as "not justified": Skevofilax v. Quigley, 810 F.2d 378 (3d Cir.) (en banc) (jurisdiction over garnishment to enforce judgment), *cert. denied*, 107 S. Ct. 1956 (1987); Runyan v. Nat'l Cash Register Corp., 787 F.2d 1039 (6th Cir.) (en banc) (validity of general release in age discrimination case by lawyer-plaintiff; facts seem unique), *cert. denied*, 478 U.S. 850 (1986); Little Rock School Dist. v. Pulaski County Special School, 787 F.2d 372 (8th Cir.) (en banc) (fees for intervenors in school desegregation case; facts seem unique), *cert. denied*, 476 U.S. 1186 (1986); *see also* Martin v. Heckler, 773 F.2d 1145 (11 Cir. 1985) (en banc) (seemingly routine attorneys' fees case); cases cited *supra* note 193.

199. *E.g.*, Arcoren v. Peters, 829 F.2d 671 (8th Cir. 1987) (en banc) (due process rights before repossession of cattle), *cert. denied*, 108 S. Ct. 1290 (1988); Lingle v. Norge Div. of Magic Chef, Inc., 823 F.2d 1031 (7th Cir. 1987) (en banc) (preemption by federal labor law of state law retaliatory discharge claim under collective bargaining agreement), *rev'd*, 108 S. Ct. 1877 (1988); Jersey Central Power & Light v. FERC, 810 F.2d 1168 (D.C. Cir. 1987) (en banc) (whether FERC must hold evidentiary hearings to determine if ordered rates are just and reasonable); Equilease Corp. v. M/V Sampson, 793 F.2d 598 (5th Cir.) (en banc) (unpaid insurance premiums give rise to maritime liens under Federal Maritime Lien Act), *cert. denied*, 479 U.S. 984 (1987); Stapleton v. Westmoreland Coal Co., 785 F.2d 424 (4th Cir. 1986) (en banc) (clarification of Fourth Circuit law on black lung claims), *rev'd sub nom.* Mullins Coal Co. V. Proctor, O.W.C.P., 108 S. Ct. 427 (1987); Church of Scientology v. IRS., 792 F.2d 153 (D.C. Cir. 1986) (en banc) (scope of Freedom of Information Act disclosure), *aff'd*, 108 S. Ct. 271 (1987); Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314 (5th Cir. 1985) (en banc) (asbestos litigation not a proper area for creation of federal common law), *cert. denied*, 478 U.S. 1022 (1986); Oman v. Johns-Manville Corp., 764 F.2d 224 (4th Cir.) (en banc) (asbestos claims by shipyard workers not cognizable in admiralty), *cert. denied*, 474 U.S. 971 (1985).

other recurring issues in oft litigated substantive areas.[200]

Tables 5 and 6 present virtually identical information from the subsamples of unanimous en banc decisions and dissenting opinions from denials of rehearing en banc. As with the nonunanimous cases, the number of justified en bancs constituted less than one-half of the sample. Examples of classification from each sample are found in the footnote.[201]

Some may find this analysis unsatisfactory. In particular, some may accuse it of underestimating the amount of law development taking place in my "not justified" category. Others might argue that if these opinions were analyzed more thoroughly then intracircuit or intercircuit conflicts would reveal themselves, or the "importance" of the issues would be clearer, and the number of

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200. *E.g.*, Nishiyama v. Dickson County, 814 F.2d 277 (6th Cir. 1987) (en banc) (scope of substantive due process violation under 42 U.S.C. § 1983); Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (3d Cir.) (en banc) (application of Age Discrimination Act in Employment in discriminatory discharge case), *cert. dismissed*, 108 S. Ct. 26 (1987); Wilson v. Beebe, 770 F.2d 578 (6th Cir. 1985) (en banc) (various recurring issues in 42 U.S.C. § 1983 suits); Carrier v. Hutto, 754 F.2d 520 (4th Cir. 1985) (per curiam) (en banc) (habeas corpus cases involving attorney error), *rev'd sub nom.* Murray v. Carrier, 477 U.S. 478 (1986).

201. a) With regard to unanimous cases: *Justified*: United States v. Jackson, 825 F.2d 853 (5th Cir. 1987) (en banc) (checkpoint as equivalent of a border search), *cert. denied*, 108 S. Ct. 711 (1988); Lirette v. N.L. Sperry Sun, Inc., 820 F.2d 116 (5th Cir. 1987) (en banc) (removal of Jones Act claim to federal court); Atonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987) (en banc) (whether disparate impact or disparate treatment test applies to Title VII attack on subjective employment criteria), *cert. granted*, 108 S. Ct. 1293 (1988); United States v. Cruz-Valdez, 773 F.2d 1541 (11th Cir. 1985) (en banc) (sufficiency of evidence in seizure of drug-running vessel), *cert. denied*, 475 U.S. 1049 (1986).

Not justified: Victorian v. Miller, 813 F.2d 718 (5th Cir. 1987) (en banc) (if violation of Food Stamp Act is cognizable under § 1983; unique); Universidad Cent. De Bayamon v. NLRB, 793 F.2d 383 (1st Cir. 1986) (en banc) (jurisdiction of NLRB over private university in Puerto Rico; unique); Bretz v. Kelman, 773 F.2d 1026 (9th Cir. 1985) (en banc) (malicious prosecution under 42 U.S.C. § 1983; not a recurring issue in 42 U.S.C. § 1983 suits).

b) With regard to opinions accompanied by dissents from denial of rehearing en banc:

Justified: Goodman v. Lukens Steel Co., 777 F.2d 113 (3d Cir. 1985) (statute of limitations in §§ 1981, 1983 suits), *aff'd*, 107 S. Ct. 2617 (1987); Uviedo v. Steves Sash & Door Co., 760 F.2d 87 (5th Cir. 1985) (per curiam) (definition of "prevailing party" for awarding attorneys' fees), *cert. denied*, 474 U.S. 1054 (1986).

Not justified: Hall v. City of Santa Barbara, 813 F.2d 198 (9th Cir. 1986) (zoning ordinance and "takings" clause; likely to be resolved by the Supreme Court), *cert. denied*, 108 S. Ct. 1120 (1988); Aguillard v. Edwards, 778 F.2d 225 (5th Cir. 1985) (state "creation theory" statute for schools; unique), *aff'd*, 107 S. Ct. 2573 (1987); Levine v. CMP Publications, 753 F.2d 1341 (5th Cir. 1985) (libel case).

As listed in the Appendix, I classified two of the three cases in the D.C. Circuit trilogy as "not justified," Martin v. D.C. Metropolitan Police Dep't, 812 F.2d 1425 (D.C. Cir. 1987) (lack of direct inconsistency between panel decisions) and U.S. v. Meyer, 810 F.2d 1242 (D.C. Cir 1987) (relatively unique facts), *vacated*, 816 F.2d 695 (en banc), *cert. denied*, 108 S. Ct. 1121 (1988), and *Bartlett* as "justified." Bartlett *ex rel* Neuman v. Bowen, 824 F.2d 1240 (D.C. Cir. 1987). I agree with Judge Silberman's reasons for not voting to en banc Martin v. D.C. Metropolitan Police Dep't, 812 F.2d 1425 (D.C. Cir. 1987) (lack of direct inconsistency between panel decisions) and U.S. v. Meyer, 810 F.2d 1242 (D.C. Cir 1987) (relatively unique facts), *vacated*, 816 F.2d 695 (en banc), *cert. denied*, 108 S. Ct. 1121 (1988). *Bartlett*, at 1246-47 (Silberman, J.). I side with the dissenter's view of *Bartlett ex rel Neuman v. Bowen*, because in the D.C. Circuit "at least, it will have great impact on benefits legislation. Indeed, it will probably draw claimants to litigate here." *Bartlett*, at 1248 (Bork, Starr, Buckley, Williams & D. Ginsburg, JJ dissenting from denial of rehearing en banc). The latter reasons are especially relevant for a circuit that spends much time on administrative law, in which the issue of limitations on judicial review for denial of government benefits remains a contentious one.

"not justified" cases would be much less than one-half of the current en banced cases.

This criticism is not without force, but its persuasive value is considerably diminished by the failure of the decisions themselves to explain why en banc treatment was necessary. The "importance" of a case is not always apparent to readers of the opinions. Tables 4 and 6 indicate that only about one-third of the opinions explicitly stated why the circuit was deciding the case en banc.[202] As argued in Part II of this Article, requiring judges to justify en banc review of a panel decision, as litigants are required to do in their suggestions for en banc rehearing, would be an appropriate restraining force on the indiscriminate use of en banc review.[203] Had the sample of cases been more forthright in explaining compliance with rule 35, then the "not justified" category may have been much smaller. The failure to do so in the vast majority of opinions in the sample may explain the relatively small percentage of "justified" cases.[204]

Reasonable people can disagree over whether a particular case is worthy of en banc treatment. Yet such reasonable disagreements do not destroy the utility of the criteria discussed above or those that might be developed by others. Lawyers and judges are ostensibly trained to apply principles of law to a wide variety of factual situations. The same process applies to the interpretation and application of rule 35. Viewed in this light the data reveal that all the circuit judges need to take a harder look at the numbers and types of cases they select for en banc review.

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202. Particularly troubling for their lack of explanation were several cases from the sample, less than one page each, that simply indicated that the en banc majority or dissent was adopting the majority or dissenting opinion in the panel. *See, e.g.*, Warren v. Halstead Industries, Inc., 835 F.2d 535 (4th Cir. 1988) (per curiam) (en banc), *cert. denied*, 108 S. Ct. 2872 (1988); Little Rock School Dist. v. Pulaski Co. Special School, 787 F.2d 372 (8th Cir.) (en banc), *cert. denied*, 476 U.S. 1186 (1986); Zemonick v. Consolidation Coal Co., 796 F.2d 1546 (4th Cir. 1986) (en banc), *cert. denied*, 479 U.S. 1018 (1987); Bruester v. Bordenkercher, 767 F.2d 81 (4th Cir. 1985) (en banc).

203. *See supra* text accompanying notes 179-81.

204. Three other observations about the opinions in the sample deserve brief mention here. First, the average length in pages (each partial page was counted as one) of the nonunanimous en banc decisions was 13.1; leading the way with a 29.8 average was the D.C. Circuit. The average number for the unanimous cases was 8.6 pages, and that for the opinions concurring in or dissenting from a rehearing denial was 3.8 pages. These figures compare to the average length of published panel opinions of 5.4 pages in the 1980s, although the D.C. Circuit was reported to be averaging over 13 pages in this period. R. POSNER, *supra* note 30, at 118. The time required to produce and circulate these longer opinions reflects the burdens of the en banc process. Second, some critics of the process have raised the prospect of equally-divided decisions. *See* MICH. Note, *supra* note 1, at 1646 n.50. The sample revealed only nine cases (listed in the Appendix) that were evenly divided. This small percentage of the total cases en banced seems to be a minor problem, not sufficient to affect a judgment about the en banc process.

Last, Tables 4, 5, and 6 reveal the Supreme Court disposition of certiorari petitions from the cases studied. Overall petitions were submitted in about one-third of the cases and about one-half of these were granted. This rate is much higher than the 3% rate observed for all petitions to the Court. *See supra* text accompanying note 118. This difference confirms historical evidence of en bancs. J. HOWARD, *supra* note 30, at 67-68; N.Y.U. Note, *supra* note 17, at 591-92 & 746-49. If the filing or granting of a certiorari petition is an indication of the case's "importance," to litigants or to the Court, then the rates found in the sample might suggest that en bancs overall deal with more important issues than the average appellate case. It may also suggest that *all* the en bancs should not be so characterized. The low rate of certiorari filing and granting in unanimous cases perhaps confirms Judge Patricia Wald's observation that dissenting opinions are signals to the Supreme Court to take the case. Wald, *supra* note 189, at 719.

Table 6

Unanimous En Banc Decisions, 1985-1987

Circuit	#[a]	Average Length	Justified Yes	Justified No	Cert.[c] Granted Yes	Cert.[c] Granted No	Reasons Given
D.C.	2	12.0	1	1	0	0	1
First	2	6.0	0	2	1	0	0
Second	0	0	0	0	0	0	0
Third	2	6.0	1	1	0	0	1
Fourth	1	5.0	0	1	0	0	0
Fifth	7	6.4	5	2	0	2	4
Sixth	2	11.5	1	1	0	1	0
Seventh	2	2.0	2	0	0	0	1
Eighth	2	9.0	0	2	0	0	0
Ninth	8	9.75	3	5	1	0	3
Tenth	5	9.5	2	3	1	1	4
Eleventh	8	10.1	3	5	2	3	5
TOTALS	41	8.6[b]	18	23	5	8	20

[a]each opinion counted as one case

[b]weighted average

[c]cases in which review was sought; as of July 1988 (end of 1987 Supreme Court Term)

IV. CONCLUSION

The process of en banc decision making by the federal courts of appeals constitutes a significant and prevalent problem for students of procedure on and off the bench. Since en bancing began almost five decades ago, critics have argued that its concrete costs far outweigh its putative benefits. More recently the en banc process has purportedly been used indiscriminately as an ideological tool of circuit judges appointed by the Reagan Administration to reverse disfavored panel decisions.

This Article has subjected these functional and ideological criticisms to both a theoretical and empirical critique. The ideological criticism has some merit; the usual process of delegating most authority to three-judge panels would be greatly undermined by permitting judges to en banc merely to correct errors, one of the functions of appellate review. However, en bancing some limited areas of law development, the other function of intermediate appellate courts, is appropriate. The data set failed to show that Reagan-appointed judges were consistently, or even often, voting in the way described. As for the functional criticism, the total number of en banc decisions in this decade does not seem inordinate, though it masks the burdens placed on judges and their staffs wading through an increasing number of litigant suggestions for rehearing en banc. The data set also demonstrated that judges of all political persuasions are

guilty of en bancing not necessarily too many cases, but cases not deserving of the treatment.

These modest concerns will be magnified if the circuit courts do not take it upon themselves to channel constructively the en banc process. One of several appropriate ways to do this would be to formulate and apply explicit principles to en banc cases in a consistent manner. Generally, these principles should emphasize law development rather than mere error correction. Specifically, the principles should focus on resolving intolerable intracircuit conflicts, significant intercircuit conflicts, and cases involving issues that recur in a particular circuit or will affect many other cases. Only then will federal judges be faithful to the mandates of rule 35 and the process of en banc decision making.

APPENDIX

1. Nonunanimous En Banc Decisions (Table 4)

Citation		Circuit	Justified Y=Yes N=No
835 F.2d	453	3	N
835	71	4	N
834	1179	5	Y
834	898	11	Y
834	380	4	Y
832	1504	10	N
832	1080	9	Y
832	837	4	N
831	946	11	N
831	493	4	N
830	1547	10	Y
830	912	8	N
830	924	8	Y
830	535	4	Y
830	476	3	N
829	1343	5	N
829	671	8	Y
828	1446	10	N
827	779	DC	N
826	1074	DC	N
826	310	5	N
825	946	6	N
825	1506	11	Y
824	1430	5	Y
824	847	11	N
823	1349	9	N
823	1031	7	Y
821	1186	6	N
821	694	DC	Y
820	1378	4	N
821	1147	5	Y
820	832	7	Y
819	766	7	N
819	1342	6	N
819	558	5	N
818	791	11	N
817	947	2	Y
817	762	DC	N
816	1428	10	N
816	1277	8	N
814	1304	9	N
814	893	3	Y
814	157	4	N
811	257	4	N
811	190	3	N
810 F.2d	1168	DC	Y
810	1066	11	Y
810	378	3	N
809	702	11	N
809	702	11	N
809	463	8	N
809	339	6	N
808	132	5	Y
808	363	5	N
807	657	8	N
807	236	1	N
806	899	9	Y
806	817	8	Y
805	682	7	N
804	837	4	N
802	1293	11	N
802	948	7	N
802	731	4	Y
802	296	8	Y
802	296	8	Y
800	1280	4	N
800	812	8	N
800	787	8	N
800	535	6	Y
800	422	4	N
799	1423	10	Y
798	499	DC	Y
787	1511	9	Y
797	1164	3	N
797	632	8	N
797	170	4	N
796	1546	8	N
795	668	3	N
795	1400	8	N
795	415	5	N
794	142	4	N
793	1110	9	Y
793	706	5	N
793	598	5	Y
792	1069	11	Y
792	153	DC	Y
790	1174	5	Y
790	1193	5	Y

Citation		Circuit	Justified Y=Yes N=No
789 F.2d	1244	7	N
789	1103	5	N
789	722	9	N
789	438	7	N
789	26	DC	N
788	1300	8	Y
787	1039	6	N
787	372	8	N
785	424	4	Y
784	1479	11	N
784	467	3	N
784	299	8	N
783	541	5	Y
783	1296	5	Y
782	855	10	N
782	513	5	Y
782	416	3	N
781	1458	11	N
781	1294	7	N
781	792	10	Y
781	777	10	N
781	1067	5	Y
781	394	5	N
781	238	2	Y
780	475	5	N
780	1268	5	N
781	1102	4	N
779	1492	11	N
778	404	8	Y
777	628	11	Y
777	1508	11	Y
776	942	11	N
775	933	8	N
774	1495	11	Y
773	1528	11	Y
773	1479	8	Y
773	1145	11	N
773	1087	10	N
773	798	7	N
773	677	6	Y
773	488	3	N
772	1410	7	N
772	1078	3	N
772	982	1	Y
771	143	6	Y
770	1514	11	N
770	578	6	Y
770 F.2d	57	6	N
769	1488	11	N
769	289	5	Y
768	525	3	Y
767	752	11	N
767	81	4	N
765	944	10	Y
765	412	4	N
764	1404	11	N
764	1400	11	N
764	983	3	N
764	558	9	N
764	224	4	Y
763	1560	7	Y
763	942	8	N
763	757	6	Y
763	1115	10	N
762	1496	11	N
762	1480	11	N
762	1383	11	N
762	1137	1	N
762	348	4	N
761	1348	9	Y
761	1227	8	Y
760	887	8	Y
760	590	5	N
759	1353	9	N
759	1171	4	N
759	327	4	Y
758	226	8	N
757	557	3	N
756	1483	11	N
756	1000	4	N
756	994	4	Y
756	323	4	N
754	1111	4	Y
754	520	4	Y
753	1499	9	N
753	877	11	Y
752	1515	11	Y
752	1293	8	N
752	1261	8	Y
752	1019	5	Y
752	903	3	Y
751	1008	9	N
750	1314	5	Y

2. Unanimous Cases (Table 6)

Citation		Circuit	Justified Y=YesN=No
835 F.2d	732	10	Y
834	673	7	Y
832	1528	11	N
829	546	5	N
825	853	5	Y
824	1146	DC	N
822	1477	10	N
820	1354	1	N
820	350	11	N
820	116	5	Y
819	124	5	Y
816	1448	10	N
816	899	3	Y
813	718	5	N
812	593	10	N
810	1477	9	Y
803	1103	11	Y
802	1539	9	N
800	1032	11	N
799	1098	6	Y
798	1356	11	N
793	1072	9	N
793	383	1	N
791	681	9	Y
788	1512	11	Y
784	706	5	Y
784	665	5	Y
783	1082	DC	Y
778	1352	9	N
778	1318	8	N
776	250	10	Y
773	1541	11	Y
773	1436	4	N
773	1032	9	N
773	1026	9	N
769	1350	9	Y
768	210	7	Y
763	165	3	N
762	1449	11	N
759	524	6	N

3. Dissents From Denials of Rehearings En Banc (Table 5)

Citation		Circuit	Justified Y=Yes N=No
833 F.2d	1271	9	Y
833	250	11	N
827	23	7	Y
826	194	2	N
824	1240	DC	2N,1Y
817	1333	8	Y
815	1034	5	Y
813	198	9	N
811	501	9	N
811	247	3	N
809	1449	4	N
809	584	9	Y
809	530	8	Y
808	1298	8	N
808	1063	5	N
807	1466	9	N
807	643	7	N
806	1122	DC	N
806	1115	DC	Y
806	642	6	N
805	484	4	N
798	632	3	N
797	580	8	N
797	256	5	Y
794	1016	5	N
794	388	8	Y
793	514	3	N
793	304	DC	N
793	222	9	N
790	1355	9	N
789	1319	9	Y
783	42	3	N
787 F.2d	1031	6	N
782	896	11	N
781	1550	11	N
781	1325	9	N
780	614	7	Y
779	1129	5	N
778	623	11	N
778	225	5	N
777	113	3	Y
776	166	7	Y
775	110	3	Y
769	1323	8	N
769	168	3	Y
768	503	3	N
765	1196	DC	Y
763	1432	DC	N
760	1330	DC	Y
760	87	5	Y
759	489	5	Y
758	83	3	N
756	277	2	Y
753	1341	5	N
753	262	3	Y
752	694	DC	N
Concurring Opinion(s) Only:			
806 F.2d	281	DC	
793	380	DC	
778	878	DC	
777	1130	6	
774	1180	DC	

4. Equally Divided En Banc Decisions

Citation		Circuit
832 F. 2d	664	1
827	1498	11
822	642	7
795	22	4
783	476	4
764	1279	8
762	73	8
761	1259	8
758	143	4