En Banc Revealed: Procedure, Politics, and Privacy

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I. Introduction

The en banc process is complex and perhaps mysterious. Through this process, a majority of judges on a federal court of appeals can vote to rehear a case that its own three-judge panel already decided; thus, rehearing a case en banc allows the court to issue a superseding decision with highly precedential effect. In theory, en banc rehearing allows all of the court’s judges to determine circuit law, rather than just three judges.\(^1\) In the Ninth Circuit, specifically, multiple events must occur before the court will rehear a case en banc. Many of these events are complicated and private, despite the fact that the process is of vital importance to our legal system.

This article discusses three aspects of the en banc process that are worthy of concern. First, internal procedural requirements may overwhelm the underlying rights of the parties. Second, intracircuit politics may cloud a judge’s decision whether to vote to rehear a case en banc. Third, the results of en banc voting are private, leaving it one of the least transparent processes in the legal system.\(^2\) While these concerns are worth noting, they are less problematic than they seem at first glance. As long as circuit judges are responsible with the significant power they hold, some things may be better left mysterious.

II. Origin of the Courts of Appeals

En banc review is only available because appellate level courts\(^3\) exist. In the late eighteenth century, it became clear that there were more legal issues than the six Supreme Court

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\(^1\) See Tracey E. George, *The Dynamics and Detriments of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 244–46 (1999). A noted problem with this view of en banc decisions is that, technically, a panel is considered an agent for the circuit and should make the law that the circuit itself would approve of. However, in a world that does not perform theoretically, that does not always happen. *Id.*

\(^2\) These are just a few of the problems that others have contended exist within the en banc process. For example, “many critics contend that en banc rehearing is a time-consuming, inefficient procedure that fails to serve its intended purpose and too often is abused for political ends.” *Id.* at 213.

\(^3\) Throughout this article, “court of appeals,” “appellate court,” “circuit,” “circuit court,” and “court” refer to the federal courts of appeals. Anytime a district court or the Supreme Court is mentioned, it will be so specified.
Justices could reasonably handle. To remedy that problem, congress passed the Judiciary Act of 1789, which created “Circuit Courts” that performed the functions of both modern day trial and appellate courts. The six justices would “ride” between circuits to sit on panels to hear cases. Each panel was comprised of three judges, one trial judge and two justices.

Just over a decade later, President John Quincy Adams and his congress pushed through the Judiciary Act of 1801. That act, the “law of midnight judges,” created modern circuit-court judgeships; however, President Jefferson eliminated those judgeships the following year.\(^4\) The judiciary largely stayed the same for the next seventy years, until congress passed the Circuit Judges Act of 1869. This act gave each circuit its own judge, freeing the Supreme Court Justices from riding circuit, and providing lower-court judges more time to have trials.

Twenty-two years later, congress passed the Evarts Act of 1891, which created modern courts of appeals. Under the Evarts Act, a panel of three judges would hear each case: one judge was a trial court judge, and the other two were circuit judges. Over the next thirty years, the circuits grew, creating a question of whether three-judge panels were still appropriate. Through the Judiciary Act of 1911, congress conflictingly preserved three judge panels even though the Second, Seventh, and Eighth Circuits each had four active judges.\(^5\) Now that there were more judges on a circuit than there were judges on a panel, it was possible that the all judges on the circuit could sit and hear a case together. Perhaps, theoretically, that all-judge panel could overrule its own three-judge panel—en banc review was possible.

In 1938, the Ninth Circuit, in *Lang’s Estate v. Commissioner of Internal Revenue*, rejected the possibility of en banc review and held that only three judges could sit on a panel at a

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\(^4\) See Marbury v. Madison, 5 U.S. 137 (1803).

\(^5\) There was temporary confusing regarding how to “rotate” judges because the Judicial Code of 1911 stated that “a circuit court of appeals … shall consist of three judges,” but it also authorized four judges in the Second, Seventh, and Eighth Circuits.
time.\textsuperscript{6} Unsurprisingly, the Supreme Court disagreed.\textsuperscript{7} In 1941, the Supreme Court decided \textit{Textile Mills Securities Corporation v. Commissioner of Internal Revenue}, and held that more than three judges could sit on a panel.\textsuperscript{8} It stated that en banc rehearing “makes for more effective judicial administration. Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted.”\textsuperscript{9}

In 1948, congress codified the Court’s \textit{Textile Mills} holding in 28 U.S.C. § 46(c).\textsuperscript{10} Section 46(c) requires three-judge panels to hear cases, unless the majority of active circuit judges vote to rehear the case en banc. Initially, Section 46(c) required all active judges to sit on an en banc panel; however, as the circuits grew, that became infeasible. Noting this concern, the Supreme Court, in \textit{Western Pacific Railroad Corporation v. Western Pacific Railroad Company}, found that the circuit courts could establish their own rules and procedures for en banc review.\textsuperscript{11} In a concurring opinion, Justice Felix Frankfurter noted that en banc determinations were appropriate “whenever it seems likely that a majority of all the active judges would reach a different result than the panel” or if the case was “extraordinary in scale . . . because the issues are intricate enough to invoke the pooled wisdom of the circuit.”\textsuperscript{12} Following that decision, the circuits formed their own en banc rules; however, the later-established Federal Rules of Appellate Procedure set forth basic en banc guidelines to ensure minimal cross-circuit uniformity.\textsuperscript{13}

\begin{itemize}
\item \textsuperscript{6} Lang’s Estate v. Comm’r of Internal Revenue, 97 F.2d 867 (9th Cir. 1938).
\item \textsuperscript{7} Textile Mills Secs. Corp. v. Comm’r of Internal Revenue, 314 U.S. 326 (1941).
\item \textsuperscript{8} 314 U.S. 326 (1941).
\item \textsuperscript{9} Id. at 334.
\item \textsuperscript{10} 28 U.S.C § 46(c) (1948).
\item \textsuperscript{11} W. Pac. R.R. Corp. v. W. Pac. R.R. Co., 345 U.S. 247 (1952)
\item \textsuperscript{12} Id. at 270-71.
\item \textsuperscript{13} FED. R. APP. P. 35.
\end{itemize}
III. Appellate Review and En Banc Procedure

The courts of appeals are bound by similar jurisdictional constraints in normal and en banc decisions. Normally, the circuits have authority to hear cases on appeal under 28 U.S.C. § 1291, final decisions, § 1292, interlocutory appeals or issues certified for appeal. When a normal panel hears a case, the district court does not lose its entire underlying jurisdiction. When the court of appeals takes a case en banc, however, it assumes jurisdiction over the entire case pursuant to § 46(c).14

A. The Rule of Mandate

The court of appeals’s final decision in a case is its “mandate.”15 It is unclear where the appellate court’s power to issue a mandate comes from, but it is generally agreed that it is within the court’s inherent powers,16 or within 28 U.S.C.A. § 2106, which authorizes an appellate court to affirm, modify, or vacate any judgment as necessary and just.17 The court of appeals retains jurisdiction until the mandate issues.18

The court’s decision does not become final until 1) the panel issues a decision, 2) the circuit judges determine whether to rehear the case, 3) all appeals have passed, and 4) any circumstances that would delay a final decision have subsided.19 For example, a petition for panel rehearing or rehearing en banc will prevent the court from issuing mandate. An appeal to the Supreme Court for writ of certiorari will do the same. The court of appeals may also stay

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14 Summerlin v. Stewart, 309 F.3d 1193 (9th Cir. 2002).
15 Not to be confused with the court’s opinion, which is its legal reasoning for issuing its mandate.
17 See also Am. Iron and Steel Inst. v. EPA, 560 F.2d 589 (3d Cir. 1977).
18 When a party files a “notice of appeal” that jurisdiction transfers to the appellate court. See In re Thorp, 655 F.2d 997 (9th Cir. 1981).
19 FED. R. APP. P. 41(d).
mandate pending certain motions, such as a motion for a new trial, or for relief from a judgment or order.\textsuperscript{20}

Occasionally, a court of appeals may issue mandate too soon, or circumstances may arise that require the court to recall the mandate.\textsuperscript{21} A court of appeals may only exercise power to recall its mandate in “extraordinary” circumstances, as a “last resort.”\textsuperscript{22} Otherwise, it would be impossible for parties to have confidence in the finality of the court’s decision.\textsuperscript{23} Accordingly, a court of appeals often holds its mandates for extended periods, while the judges work out internal differences-of-opinion regarding how the panel should decide a case.

**B. En Banc Procedure**

The most common method for the parties to prevent or delay a mandate adverse to their interest is to file a petition requesting that the panel, or circuit, rehear the case pursuant to the Federal Rules of Appellate Procedure. According to these rules, after the three-judge panel publishes its decision, the parties have 14 days to file a petition for rehearing or rehearing en banc.\textsuperscript{24} A petition for rehearing asks the panel to rehear or redecide the case,\textsuperscript{25} while a petition for rehearing en banc asks the court as a whole to override the panel’s opinion.\textsuperscript{26} Some circuits, like the Fifth Circuit, have “informal” en banc procedures where the judges determine whether to rehear the case en banc regardless of whether a party files a petition requesting rehearing.\textsuperscript{27}

\textsuperscript{20} \textit{Fed. R. App. P.} 62(b).
\textsuperscript{21} The decision of an appellate court to recall a mandate is reviewable only for abuse of discretion. Calderon \textit{v.} Thompson, 523 U.S. 538 (1998).
\textsuperscript{22} \textit{See id.} Zipfel \textit{v.} Halliburton Co., 861 F.2d 565 (9th Cir. 1988).
\textsuperscript{23} \textit{Thompson}, 523 U.S. 538.
\textsuperscript{24} \textit{Fed. R. App. P.} 41.
\textsuperscript{25} \textit{Fed. R. App. P.} 40.
\textsuperscript{26} \textit{Fed. R. App. P.} 35.
\textsuperscript{27} \textit{See c.f.} Stephen L. Wasby, \textit{The Supreme Court and Courts of Appeals En Bancs}, 33 McGeorge L. Rev. 17, 21 (2001) (“Some courts of appeals (not including the Ninth Circuit) also have informal en banc procedures, in which, before filing an opinion, a panel circulated it to all the other judges; in some circuits, this is done in particular categories of cases specified by court rule. This practice allows other judges to raise questions about the opinion or to call for en banc rehearing before release of the panel disposition.”).
According to Rule 35 of the Federal Rules of Appellate Procedure, the circuit should only rehear a case en banc if 1) consideration is necessary to secure or maintain uniformity, or 2) the case is of exceptional importance. Technically, that means that a court of appeals could hear the case en banc from the outset, because there is no requirement that a three-judge panel must hear the case before the court can take the case en banc.

The Ninth Circuit’s en banc procedures provide a good example of how the process plays out in real life. In the Ninth Circuit, the external process of requesting en banc review is fairly clear. In order to file a petition for rehearing, the dissatisfied party must file 50 copies of the petition with the court. Those copies are then circulated to all active judges and the senior judges who request it. If the petition makes a strong enough case to catch the eye of the judges, the panel may order the opposing party to respond to the petition and brief whether the court should rehear the case.

The intracourt portion of the Ninth Circuit’s en banc process is more complicated. If a judge, who was not on the original panel, takes interest in the case, she can request “5.4(b) Notice,” named for Rule 5.4 of the Federal Rule of Appelate Procedure. That request requires the judges on the panel to inform the rest of the active judges on the circuit whether they vote to rehear the petition themselves. If the panel decides not to rehear the case, any judge can then send a “Stop Clock Notice,” which stays the mandate until the judges determine whether to rehear the case. Once a stop-clock notice occurs, interested judges often exchange memorandums with the entire court regarding whether the panel should amend its initial opinion and what the merits of an en banc hearing would entail. From there, any judge can “call” the case en banc,

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28 FED. R. APP. P. 35.
29 9th Cir. R. 5.3 (amendment of disposition; proposal by judge) & 5.4(c)(3) (rehearing en banc).
30 9th Cir. R. 5.4(c)(1) (rehearing en banc) & 5.5(a) (procedure after supplemental briefing).
which is essentially a request that all active judges vote on whether they believe the court should rehear the case en banc.

Once a case is called, all active judges are (normally) given a two-week period in which to submit their vote.\(^\text{31}\) In order for the case to actually “go” en banc, a majority of active judges must vote “yes.” During the voting period, judges may vote “yes,” “no,” or refrain from voting. A failure to vote is considered a silent no because it is a detriment to reaching “yes” votes by the majority. Perhaps the most notable aspect of the the voting process is that it is completely private—the count and the identity of the voters is not disclosed to the public.\(^\text{32}\)

If the majority of active judges vote not to hear the case en banc, jurisdiction remains with the three-judge panel and the panel then issues an order denying the petition. Each judge has the option to dissent from the court’s denial to rehear the case, though it is rare. For example, in *Cooper v. Brown*, four judges dissented because it was an “extremely close vote” and “public disclosure is important.”\(^\text{33}\)

Judges vote “no” for many reasons, and often times they take efforts to avoid rehearing.\(^\text{34}\) In the first place, judges exchange internal memorandums discussing problems with the panel’s initial opinion and providing suggestions for improvements. The case of *Pinard v. Clatskanie School District 6J*\(^\text{35}\) appears to be indicative of internal avoidance. Shortly after the panel issued its original decision, it issued an amended opinion that included a new footnote to clarify a portion of its opinion. The panel did not explain its addition, but it appears likely that the court’s internal dialogue prompted the amendment in lieu of rehearing.

\(^{31}\) 9th Cir. R. 5.5(b) (procedure after supplemental briefing).
\(^{32}\) The judges are aware of who voted and what their vote was.
\(^{33}\) 510 F.3d 870 (9th Cir. 2007).
\(^{34}\) Sometimes, the judges do not even have to “avoid” hearing a case en banc—it can just become moot.
\(^{35}\) 467 F.3d 755 (9th Cir. 2006).
If the majority of active judges vote to hear the case en banc, the Chief Judge randomly selects a new, larger, panel to join him in rehearing the case. The parties then re-argue their case in front of the new panel. After argument, the en banc panel conferences, where the judges present their opinions in order of seniority. From there, the senior judge in each portion of the opinion (majority, concurrence, dissent) assigns the writing responsibility. After each portion is written and approved, the final opinion is published. The mandate does not issue until the time for appeal to the Supreme Court expires, or Supreme Court denies the petition for writ of certiorari.

IV. Unique Aspects of En Banc Rehearings in the Ninth Circuit

Although the en banc process is relatively similar throughout all the circuits, the Ninth Circuit provides an interesting example of how the process plays out. The Ninth Circuit is the largest of all the federal circuits, it has 29 active judgeships, and 18 senior judges. As of the most recent statistics, the Ninth Circuit has over 16,000 appeals pending before it each year—that is over 550 appeals for each active judge. Further, each active judge is expected to hear oral argument at least eight times per year. Due to the large caseload, each three-judge panel may be comprised of two circuit judges, either active or senior, and one district court judge.

Within such a large circuit, stare decisis—following the law of previous decisions on the same issue—is especially important when considering how intracircuit precedent functions. In 36

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36 The panel sits in the circuit’s largest courtrooms, most often in San Francisco.
38 Four of which are currently empty.
39 Judges become “senior” when they choose to do so. Senior Judges only receive their full salary if their age plus their years of service equal 80 (commonly known as the rule of 15). Senior judges can still hear cases, though they normally do so less frequently than active judges.
40 CASELOAD STATISTICS, supra note 37.
41 9th Cir. R. 3.2 (assignment of judges to calendars). In order to manage such a large caseload, the Ninth Circuit’s Commissioner is permitted to issue ministerial, non-dispositive orders, such as those regarding fees. Further, before the cases even are assigned to a judge, staff attorneys summarize the cases, and assign them “weights” based on the type of case and its complexity.
Hulteen v. AT&T Corporation, an en banc Ninth Circuit panel noted the importance of stare decisis in reversing a panel decision that ignored directly controlling precedent.\(^{42}\) That is why all published Ninth Circuit opinions are binding on later Ninth Circuit panels.\(^{43}\) That is obvious, but it is less well known that the Ninth Circuit purposefully clusters cases together to efficiently hear similar issues at the same time. The first case that resolves a particular issue controls, thus, all the other clustered cases are held pending the final draft of the initial opinion. This is especially practical when many petitioners challenge the same aspect of a new law.

In the Ninth Circuit, there are minimal ways that parties can avoid intracircuit stare decisis. First, if the panel’s decision was “fundamentally inconsistent” with Ninth Circuit precedent, the parties can petition for panel rehearing.\(^{44}\) Second, the parties can petition for rehearing en banc, essentially arguing that precedent exists but it is incorrect, or the law should be clarified. Third, if unsuccessful with the first two, the parties can petition the Supreme Court for writ of certiorari.

In contrast, avoiding stare decisis is easier in other circuits. For example, the Seventh Circuit does not require an en banc decision to change circuit law. According to their rules, a three-judge panel can change the law if they circulate the opinion to all active judges, assuming the majority of active judges do not vote to hear it en banc.\(^{45}\)

Stare decisis assumes that the decisions that a panel makes will represent the will of all of the judges on the circuit; however, this is not always the case, not even in the en banc context. The most salient feature of the Ninth Circuit’s en banc rehearings is that they are not truly en banc. In other words, the entire circuit does not sit to rehear a case. In this circuit, only 11

\(^{42}\) 498 F.3d 1001, 1009 (9th Cir. 2007) (en banc), rev’d, 556 U.S. 701 (2009).
\(^{43}\) 9th Cir. R. 4.1(a) (prevention of conflicts).
\(^{44}\) See Miller v. Gammie, 335 F.3d 889 (9th Cir. 2003) (en banc).
\(^{45}\) 7th Cir. R. 40(e) (petitions for rehearing).
randomly chosen judges sit on an en banc panel—less than half of all active judges. It would be administratively, and physically, impractical to have all 29 judges sit to rehear one case.\textsuperscript{46} One of the more interesting implications of these smaller en banc panels is that an en banc decision could, theoretically, not represent the opinion of the circuit. For example, if the majority of active judges, 15, vote to rehear the case en banc, it is possible that none of those 15 judges could end up on the 11-judge panel. This creates the opportunity for intracircuit conflicts, not to mention internal political debates. If something like that were to occur, the Ninth Circuit could, theoretically, hold a full-circuit hearing.\textsuperscript{47}

The Ninth Circuit’s partial-en banc rehearing has prompted federal legislators to propose splitting the circuit. Senator Conrad Burns, criticized the “luck-of-the-draw approach to the development of circuit law”\textsuperscript{48} by stating, “the purpose of the en banc court is to establish the law of the circuit by a majority of all the judges, not by a simple majority of a subset of judges randomly chosen, whose decision may not be representative.”\textsuperscript{49} Critics of the Ninth Circuit’s process emphasize “the importance of the en banc mechanism for maintaining intracircuit consistency” and complain that with such small en banc panels, there is no way the Ninth Circuit can fulfill its en banc duties.\textsuperscript{50} According to those critics, if the circuit was split, en banc panels would not be a random draw of less than half the judges on the circuit. That is questionable; however, it is clear that at least for now, the Ninth Circuit is whole, and the en banc procedure must be considered in its present form.

\textsuperscript{46} Eric J. Gribbin, \textit{California Split: A Plan to Divide the Ninth Circuit}, 47 DUKE L.J. 351, 378–79 (1997) (“even the staunchest advocates of the Ninth Circuit’s en banc system admit that assembling a full rehearing would be an incredibly lengthy administrative undertaking”).


\textsuperscript{48} Gribbin, \textit{supra} note 46, at 378–79.

\textsuperscript{49} Id.

\textsuperscript{50} Id. at 379.
V. Concerns Regarding the En Banc Review Process

There are three notable aspects of the current en banc review process that are worthy of concern. First, the intracourt procedures can shift focus from the rights of the parties to the intricacies of deadlines. Second, internal politics may cause judges to vote differently than they otherwise would. Third, the en banc voting results are perhaps unnecessarily secret. At the end of the day, some of these problems are inherent in the process and can only be mitigated by a mindful judiciary; however, a little transparency cannot hurt.

A. Internal Procedure Over Substantive Rights

Procedural rules can often take precedent over substance, for example, a statute of limitations may extinguish a meritorious claim merely because of the date. Intracourt en banc rules; however, are different from those in statutes. These internal rules govern stop-clock notices, en banc calls, and voting. Their enforcement is up to the discretion of the circuit’s own judges. For example, if a judge misses a deadline, the other judges are well within their power to allow a late en banc call.\(^{51}\) This flexibility is especially important because cases that reach the courts of appeals—especially those that a judge may want to call en banc—likely involve salient legal issues with important implications.

The case of Thomas Thompson is a prime example of what can happen when internal deadlines are draconically enforced. In 1997, Thomas Thompson was executed because judges on the Ninth Circuit failed to allow a late en banc call.\(^{52}\) On June 19, 1996, a Ninth Circuit panel denied Thompson’s federal habeas corpus petition. On August 5, 1996, Thompson filed a petition for panel rehearing or rehearing en banc. An unnamed judge requested 5.4(b) notice, which means that the panel must notify the full circuit when it ruled on Thompson’s petition. In


\(^{52}\) Thompson v. Calderon, 120 F.3d 1045 (9th Cir. 1997) (en banc), rev’d, 523 U.S. 538 (1998).
this case, the panel waited four months to inform the court that it voted to deny the petition for rehearing. That notice triggered a 14-day period where any judge could make a formal en banc call. The 14 days passed and, for unknown reasons, the judge who requested the 5.4(b) notice did not issue a stop clock notice or call the case en banc.53

Two months later, on March 6, 1997, the panel amended its complaint and again denied a request for further proceedings.54 Approximately 16 days later, Judge Stephen Reinhardt requested the ability to make a late en banc call. He later explained that he “presumed that . . . the panel would be willing to grant an extension of time to any judge requesting one, in line with the uniform past practice within our court” and noted that he missed the call deadline due to confusion when his law clerks transitioned.55 The judge who initially requested 5.4(b) notice supported Judge Reinhardt’s request. The panel refused to allow the late en banc call, which in light of previous circuit courtesy, shocked Judge Reinhardt.56

The mandate issued, and 30 days later, Senior Judge Joseph Farris requested to recall the mandate and call the case en banc. The panel similarly denied his request, but the Chief Judge scheduled a circuit-wide vote regarding whether Judge Farris could recall the mandate.57 The court was later informed that Thomas was petitioning the state court for relief, thus the court postponed the en banc vote while the state court action was pending.58 The California Supreme Court denied Thompson’s petition and Thompson filed a request with the Ninth Circuit to recall the mandate, which the panel denied. The Chief Judge then reactivated Judge Farris’s en banc

53 Reinhardt, supra note 51, at 330.
54 Id. at 332.
55 Id.
56 Id. at 332–33 (“For the first time of which I am aware, a panel of our court took the extraordinary step of refusing a request by a judge of the court for an extension of time in which to call for rehearing en banc.”).
57 Id. at 334–35
58 Id. at 335
call. Oral argument regarding whether to recall the mandate occurred four days before Thompson’s scheduled education, and the judges voted to recall the mandate and reverse the panel. Judge Alex Kozinski wrote a scathing dissent to the reversal, which publicized the internal workings of the court, and explained the procedural errors and missed deadlines.

The government appealed the Ninth Circuit’s en banc decision, and the Supreme Court then granted its petition for writ of certiorari. In Supreme Court’s decision, it reversed the Ninth Circuit, largely agreeing with Judge Kozinski’s dissent. The Court stated that the Ninth Circuit’s actions were a “grave abuse of discretion” and found that the en banc hearing was invalid because it was too late, and offended justice, comity, and finality.

Judge Reinhardt described the Supreme Court’s decision as “a shock to many, both for its hostile, indeed vituperative, tone and for the unprecedented restrictions it placed on the authority of the federal courts to correct their own errors—particularly in cases in which errors result in the most drastic consequence possible.” He noted that the Supreme Court had never before ruled that a court of appeals erred in recalling mandate, let alone one where the court was trying to avoid an unconstitutional execution. According to Judge Reinhardt, the Supreme Court cost Thompson his life because it emphasized the Ninth Circuit’s internal procedural rules over the constitutional rights of the defendant. At the end of the day, it was clear that Thompson did not receive a fair trial, and the Court dismissed the constitutional violations without disagreeing they occurred.

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59 Id.
60 Id. at 337–38.
62 Reinhardt, supra note 51, at 313.
63 Id. at 342.
64 Id. at 343
65 Id. at 314
66 Id. at 319–20.
Thompson illustrates the worst-case scenario of what can happen when internal en banc policies are taken to their max. Judge Reinhardt aptly described the conflict:

This response was remarkable. For the first time of which I am aware, a panel of our court took the extraordinary step of refusing a request by a judge of the court for an extension of time in which to call for rehearing en banc. It refused our request even though no one questioned our explanation that the failure to make a timely en banc call was due to nothing more than human error or some other miscalculation or malfunction. Finally, it did so even though the error was one made by members of the court—not by the petitioner or his attorney—and the result would be that the full court would be deprived of the opportunity to review the panel’s decision that a person should die. I was, frankly, shocked by the cold-blooded and uncollegial response of my colleagues.67

The reason the Thompson case is so striking is not just because of its story, but also because it is so rare.68 Judges need to treat each other like humans, and be sensitive to the rights of the parties. Perhaps the Supreme Court overreacted—as many have claimed they did—but the Court’s justification of finality was not unwarranted. Procedure and deadlines have a place and are important; however, when dealing with internal requirements that can be flexible without prejudice, those requirements do not justify ignoring extreme constitutional violations. Stories like this are truly worst-case scenarios, and although they aptly highlight potential flaws in the en banc process, they should not be overemphasized to create needless fear.

B. Intra-Circuit Politics and Agenda Setting

Former First Circuit Judge Frank M. Coffin once remarked that courts sitting en banc “resemble a small legislature more than a court.”69 In that vein, complaints of judges ruling based on their own ideology rather than the law are anything but new. The Ninth Circuit, especially, fields these complaints on a regular basis regarding its “liberal” bias.70 Political

67 Id. at 333.
68 Judge Reinhardt said, “the action by the panel was in fact more than unusual; it was unprecedented.” Id. at 340.
preferences and ideologies are present in every decision—even at the panel level—thus at the en banc level, the effect is amplified.

Unfortunately, there is little evidence to support such criticisms. One of the few areas where quantitative evidence concerning ideology in the en banc process exists is whether circuit judges improperly engage in “agenda setting.” The “agenda setting” theory claims that the issues (or cases) that do not make the “agenda” (en banc docket) remain out of the public spectrum.71 Thus, because circuit judges have their pick of the cases they take en banc, they may contribute to “agenda setting.”72

In 2000, Phil Zarone gathered data from the Fourth and Fifth Circuits regarding which cases they chose to take en banc, and whether the subsequent en banc panel reversed the original panel. He then analyzed the data in order to determine whether it appeared that either circuit was ideologically “agenda setting.” Although his study did not cover the Ninth Circuit, his results are informative.

In the Fourth Circuit, 30% of liberal panel decisions with a dissent73 were reheard en banc, whereas only 6% of conservative panel decisions with a dissent were reheard.74 Further, each of the liberal decisions reviewed was reversed, while only 33% of conservative decisions were reversed.75 In the Fifth Circuit, 38% of liberal panel decisions with a dissent were reheard.

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71 See Phil Zarone, Agenda Setting in the Courts of Appeals: The Effect of Ideology on En Banc Rehearings, 2 J. APP. PRAC. & PROC. 157 (2000). Concern regarding agenda setting reached its height in the late 1980s, when there was discussion regarding whether President Reagan appointed judges were abusing the en banc process in order to promote a conservative agenda. See, e.g. Michael E. Solimine, Ideology and En Banc Review, 67 N.C. L. REV. 29 (1988).

72 One of the countervailing measures to politics in the judiciary is stare decisis, which can make it difficult to determine whether actual precedent or politics is the driving force behind a decision to vote to rehear a case en banc. See Zarone, supra note 71, at 158.

73 See id. at 158. (“The measures proposed in this article are premised on the notion that ideological voting is more likely to be found in cases in which there is a dissenting opinion. The presence of a dissent suggests that the law governing a case may have been unclear, or that settled law could have been applied differently to a specific set of facts.”).

74 Id. at 173.

75 Id.
and no conservative panel decisions were reheard.\textsuperscript{76} Each liberal panel decision was reversed.\textsuperscript{77} At first glance, it appears that both the Fourth and Fifth Circuits were “agenda setting” to ensure conservative values prevailed; however, Mr. Zarone did not believe that was truly the case.

Just because more liberal decisions were called en banc and reversed, that does not mean that the circuits were using the en banc process inappropriately. If the cases were selected for review because they were exceptionally important or rehearing was necessary to resolve an intracircuit conflict, then rehearing en banc was proper regardless of ideology.\textsuperscript{78} According to Mr. Zarone, in the Fifth Circuit, the cases heard en banc “shaped the law of the circuit” and reversed liberal panels in “a manner that developed the law of the circuit,” which is the point of en banc review.\textsuperscript{79} Similarly, in the Fourth Circuit, the cases qualified as “exceptionally important.”\textsuperscript{80} A final review of both circuits showed that, although ideology was a factor in agenda setting, the cases reheard were nonetheless appropriate for en banc review.\textsuperscript{81} Further, and especially in the Fourth Circuit, en banc cases overturning liberal panels often did so with the vote of some of the circuit’s most liberal members.\textsuperscript{82}

These findings do not “suggest that judges ignore precedent and vote according to their ideological preferences, because the evidence of ideological voting occurred in a narrow subset of cases where, presumably, precedent was either vague or not on point.”\textsuperscript{83} Thus, it seems that there is a reasonable chance that this problem is overstated and perhaps not something worth concern. Accordingly, as long as judges ensure that the cases they vote to rehear en banc are appropriate for en banc review; political preference is an insubstantial concern.

\textsuperscript{76} Id. at 174
\textsuperscript{77} Id.
\textsuperscript{78} Id. at 175–76.
\textsuperscript{79} Id. at 176.
\textsuperscript{80} Id. at 178–79.
\textsuperscript{81} Id. at 176–78
\textsuperscript{82} Id. at 186–67.
\textsuperscript{83} Id. at 189.
C. Confidential Voting Results

Perhaps the most modern problem with the en banc process is the lack of transparency. The public does not know whether a vote occurs, which judges vote when a vote does occur, which way judges vote, nor the final count of the votes. Although previous attorneys, professors, and authors have largely ignored this issue, the upcoming generation is likely to be more concerned with judicial transparency, including the behind-the-scenes of the en banc process.

One option to solve this problem would be to publicize everything. “Everything” would truly mean “everything”—including internal memorandums regarding whether to call a case en banc, as well as memorandums discussing each judge’s particular view of the law. It may even include intrachambers material suggesting how a certain judge may vote or decide an en banc case. Transparency to that extent is not transparency: it is inappropriate exposure. Judges need the ability to communicate with each other without judgment. They also need the flexibility to change their opinion if convinced by a fellow judge. Such publication would likely discourage judges from putting their thoughts on paper, which would just make the process inefficient.

On the other hand, it is important not to overlook the fact that circuit judges have life appointments. The specific goal of life appointment is to avoid the political pressures that come with publicized legal decisions. Article Three judges were purposefully given the ability to make decisions that the public may not agree with—that is a fundamental part of the checks-and-balances engrained in the constitution. However, just because judges have life appointments does not mean they are insulated from public opinion, nor that public opinion of the judiciary is

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84 This problem is sometimes mitigated when judges write dissents or concurrences to denials of rehearing en banc. These opinions have public authors, and those judges have the ability to say whatever they want about the case. Similarly, in Thompson, privacy was at least partially eliminated by Judge Kozinski’s dissent.
85 After an extensive search, I was able to find practically no articles opining on the privacy of en banc voting results.
86 U.S. CONST. ART. III. This is often different at the state appellate level, where courts have similar en banc procedures, but the judges do not have life appointment.
irrelevant. The public must trust their judges, and publicizing internal communications without the benefit of true context could likely shake that trust.

Short of exposing internal communications, the next option would be to simply publicize the identity and votes of the judges. This, however, has the opposite problem: it ignores the reasons behind the vote. Judges call cases en banc not necessarily because the judge disagrees with the holding, but maybe because the holding was simply confusing or the judge wants the entire circuit to affirm the decision and solidify the precedent. Similarly, calling cases, or not calling cases, can be a tactical decision to gain a favor, or encourage the Supreme Court to hear the case. While legal scholars and attorneys may understand this distinction, it is something that the public may not appreciate. Maintaining confidence in the judiciary is of extreme importance, and making a complex process transparent may cause more harm than good. At the end of the day, the people like their judges how they like their juries: always correct. It is must easier to be “always correct” if details remain secret.

The judiciary should consider a compromise: keeping the identity of voters private, but publicizing the final vote count for all cases are called en banc. This limited information will give the public confidence that the judiciary is not trying to hide, yet it still protects judges from unnecessary exposure. Further, it provides a picture of what issues are in flux, and that may help attorneys know when they are treading on unsteady ground, scholars know what hot-topics are, and sister-circuits determine how they should proceed in cases that involve similar issues.

At the core, it is vital that the public trust circuit judges and allow them the freedom necessary to make proper decisions. With this compromise, judges remain free to vote and communicate without the threat of public misunderstanding or retaliation, but the public is aware of the circuit’s general behavior and disposition toward certain issues.
VI. Conclusion

The en banc process is complex and imperfect, but it works. Although procedure can sometimes cloud substance, it rarely has disastrous consequences. Similarly, political agenda setting in determining what cases to hear en banc is over exaggerated and perhaps not always improper. The secrecy of the voting process is also less problematic than it may appear at first glance, though there is room for improvement. As long as court of appeals judges keep the en banc process in perspective and use it appropriately, it will serve its purpose.