EN BANC PROCEDURE IN THE FEDERAL COURTS OF APPEALS

Although there are more than three judges in all but one of the circuits,[1] cases in the federal courts of appeals are normally heard and determined by three-judge panels.[2] The panel system enables the courts to cut more effectively into crowded dockets, but at the expense of uniformity. Under such a system, the same court in the form of two different panels may reach contradictory results in cases which appear to be indistinguishable; and since the courts of appeals are often courts of last resort,[3] panel conflict may go unresolved. To secure uniformity, therefore, the courts of appeals have been authorized to sit en banc[4] to resolve panel conflict.

There is little doubt that the en banc procedure, although otherwise useful as a means of bringing particularly important issues to the attention of more judges, was developed for the resolution of intracircuit conflict. The procedure was first sanctioned by the Supreme Court as a means of fulfilling this purpose in *Textile Mills Sec. Corp. v. Commissioner*,[5] after the Courts of Appeals for the Third[6] and Ninth Circuits[7] had split over whether the court had the power to convene itself en banc. Legislative history of the statute authorizing the en banc procedure also indicates that it was designed to achieve intracircuit uniformity.[8]

The en banc procedure has, however, opened up "new complexities in federal practice."[9] The Judicial Code provides:

> Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of

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[1] At present, the composition of the courts of appeals is as follows: District of Columbia Circuit—9; First Circuit—3; Second Circuit—9; Third Circuit—8; Fourth Circuit—5; Fifth Circuit—9; Sixth Circuit—6; Seventh Circuit—7; Eighth Circuit—7; Ninth Circuit—9; Tenth Circuit—6. 28 U.S.C.A. § 44 (Supp. 1961).

[2] 28 U.S.C. § 46(b) (1958).

[3] *E.g.*, Textile Mills Sec. Corp. v. Commissioner, 314 U.S. 326, 335 (1941) (dictum). As compared to 971 certiorari petitions from the courts of appeals filed during fiscal 1960, the Supreme Court granted only 102. 1960-61 ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REP. 226.

[4] 28 U.S.C. § 46(c) (1958).

[5] 314 U.S. 326, 335 (1941) (dictum).

[6] Commissioner v. Textile Mills Sec. Corp., 117 F.2d 62 (3d Cir. 1940), *aff'd*, 314 U.S. 326 (1941).

[7] Lang's Estate v. Commissioner, 97 F.2d 867 (9th Cir.), *certified questions considered*, 304 U.S. 264 (1938).

[8] H.R. REP. No. 1246, 77th Cong., 1st Sess. (1941); *Hearings on S. 1053 Before a Subcommittee of the Senate Committee on the Judiciary*, 77th Cong., 1st Sess. 14-16 (1941).

[9] Western Pac. R.R. Corp. v. Western Pac. R.R., 345 U.S. 247, 274 (1953) (Jackson, J., dissenting).

> the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.[10]

Although it specifies who shall order an en banc proceeding and who shall sit on the court en banc, the statute does not detail any en banc procedure. In *Western Pac. R.R. Corp. v. Western Pac. R.R.*,[11] the Supreme Court, after holding that a litigant cannot compel the full court to formally consider an en banc application and that the statute does not compel any particular en banc procedure, attempted to establish certain en banc requirements: (1) the courts of appeals should make clear to litigants the method by which the court en banc is convened; (2) the decision to sit en banc may be made by the full court, or it may be delegated initially to the hearing panel, although the full court retains the authority to revise the en banc procedure and to withdraw the delegated power; indeed, the courts must constantly consider whether their rules promote the purpose of the en banc statute; (3) litigants should be able to suggest that a particular case is appropriate for en banc determination, but these suggestions should not be treated like motions and should not require formal action by the court; (4) the courts may initiate en banc proceedings sua sponte; (5) whether to rehear a case before the panel or the court en banc are two separate questions which should be considered independently. "[T]he three judges who decide an appeal may be satisfied as to the correctness of their decision. Yet, upon reflection, after fully hearing an appeal, they may come to believe that the case is of such significance to the full court that it deserves the attention of the full court." [12] Perhaps because of the generality of the *Western Pacific* standards and the large area of discretion left to the courts of appeals, en banc procedure throughout the circuits is not entirely consistent with *Western Pacific* and is by no means uniform.

I. A Survey of the Circuits [13]

The Court of Appeals for the District of Columbia Circuit, unlike other courts of appeals, does not specifically mention en banc hearings and rehearings in its rules.[14] Nevertheless, the procedure is employed by that circuit and may be invoked at various stages of the litigation. In rare

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[10] 28 U.S.C. § 46(c) (1958).

[11] 345 U.S. 247 (1953).

[12] *Id.* at 262-63.

[13] The First, Fourth, and Seventh Circuits will not be considered. The First Circuit has only three circuit judges. Although the Fourth Circuit does have five circuit judges, the number was only recently increased from three, and as yet there have been no en banc problems. Letter From Hon. Simon E. Sobeloff, Chief Judge, Court of Appeals for the Fourth Circuit, Dec. 27, 1961. The Seventh Circuit has apparently developed no en banc procedure. See Note, 22 Geo. Wash. L. Rev. 482, 487 (1954).

[14] See D.C. Cir. R. 26.

instances, a majority of the active circuit judges may order a case to be heard en banc even before it has been assigned to a panel by the clerk.[15] After assignment to a panel, either a panel judge or a judge not assigned to the case may, at any stage in the case, request a hearing or rehearing en banc by circulating a supporting memorandum to the other active circuit judges and asking them to notify the chief judge of their vote.[16] Such action is often prompted by the draft opinion of the panel which is circulated before filing among the nonsitting judges.[17] The practice of circulating draft opinions enables the other judges to make an informed decision on the en banc question without extensive effort to become acquainted with the issues in the case.[18] This practice has been criticized, however, primarily because it permits judges to whom the litigants were unable to argue their views to exert considerable influence on the disposition of a case. En banc hearings and rehearings may also result from rulings on a party's written motion or petition addressed to all the active circuit judges.[19]

Although it has been said that the Court of Appeals for the Second Circuit never sits en banc,[20] the court does provide for the procedure in its rules. Petitions for rehearing must first be addressed to the original hearing panel,[21] even if counsel intends to apply to the full court.[22] If the panel, either on party suggestion or its own motion, recommends a rehearing en banc, the chief judge polls all of the active circuit judges.[23] In addition, any nonsitting circuit judge may obtain a canvassing of the full court after the panel has denied a rehearing.[24] If there is no request for a vote on an en banc application within seven days, it is automatically denied by the chief judge.[25] Unlike the judges of the District of Columbia Circuit, Second Circuit judges do not circulate opinions to their colleagues before filing.[26] Informal discussion of cases between panel members and

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[15] Comment, *The En Banc Procedures of the United States Courts of Appeals*, 21 U. CHI. L. REV. 447, 451 (1954).

[16] Stephens, *Shop Talk Concerning the Business of the Court*, 20 J.D.C.B.A. 105, 108 (1953).

[17] See Stephens, *supra* note 16, at 109; Note, *supra* note 13, at 485.

[18] "The stage at which *en banc* action is most likely to be undertaken by the court . . . is between the original hearing and the decision by the hearing panel, for it is at this point that the issues presented are brought to the attention of each judge . . . ." Note, *supra* note 13, at 484.

[19] Stephens, *supra* note 16, at 108-09; Comment, *supra* note 15, at 452.

[20] See Lopinsky v. Hertz Drive-Ur-Self Sys., Inc., 194 F.2d 422, 429 (2d Cir. 1951) (concurring opinion); Note, *supra* note 13, at 486-87. *But see* United States v. Gori, 282 F.2d 43 (2d Cir. 1960) for an example of a Second Circuit en banc case.

[21] 2D CIR. R. 25(b).

[22] Letter From Hon. J. Edward Lumbard, Chief Judge, Court of Appeals for the Second Circuit, Dec. 28, 1961.

[23] 2D CIR. R. 25(b).

[24] Letter From Chief Judge Lumbard, *supra* note 21.

[25] *Ibid.*

[26] *Ibid.* There does appear to have been one exception. See United States v. Gori, 282 F.2d 43, 44 (2d Cir. 1960), *aff'd*, 367 U.S. 364 (1961), in which draft opinions were circulated when the panel was unable to resolve its own disagreement.

nonsitting judges, however, may to some extent serve the same function as the circulation of draft opinions.[27]

The Third Circuit has both formal rules of court[28] and an informal practice dealing with en banc procedure. The court has occasionally ordered an initial hearing en banc prior to panel assignment, but only in cases of public importance which have attracted much attention.[29] Whether to sit en banc is more frequently determined in the interim between panel argument and filing of an opinion. At that time, a draft opinion is circulated to all active circuit judges; at the request of a majority, the case will be scheduled for en banc rehearing.[30] Rehearing en banc may also be ordered after formal panel decision, usually at the petition of the losing party, although the en banc ruling may be sua sponte.[31] A party's petition is circulated to panel members and nonsitting judges.[32] Panel members are required to vote on whether to grant the petition for rehearing,[33] whereas nonpanel members may vote for or against a rehearing en banc, or they may, and often do, defer to the panel on the desirability of panel rehearing.[34] If four active circuit judges vote for en banc rehearing, it will be ordered by the opinion-writing judge.[35] If four votes are not cast for rehearing en banc, the most that can be achieved is a panel rehearing.[36]

The Fifth Circuit is unique in having a rule of court which delimits the types of cases meriting en banc consideration. To be heard en banc, a case must present novel issues or be one which, if left with the panel, might result in inconsistent decisions within the circuit.[37] En banc requests from a member of the court receive different treatment from petitions by a party; the former are immediately considered by the full court whereas the latter must first go to the panel.[38] Although draft opinions are not cir-

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[27] See Letter From Chief Judge Lumbard, *supra* note 21.

[28] See 3D CIR. R. 4-5, 33.

[29] See Maris, *Hearing and Rehearing Cases in Banc*, 14 F.R.D. 91, 93 (1954); Letter From Hon. John Biggs, Jr., Chief Judge, Court of Appeals for the Third Circuit, Dec. 29, 1961.

[30] See Maris, *supra* note 29, at 93-94; Note, *supra* note 13, at 484.

[31] Maris, *supra* note 29, at 94.

[32] This procedure is followed even though a party in requesting a rehearing does not specifically request rehearing en banc. *Ibid.*

[33] *Id.* at 95.

[34] *Ibid.*; Note, *supra* note 13, at 485.

[35] Letter From Chief Judge Biggs, *supra* note 29. But since there are now eight circuit judges in the Third Circuit, see note 1 *supra*, a vote of five judges will probably be required.

[36] Maris, *supra* note 29, at 95. There seems to be a standard Third Circuit form of disposition for denying rehearings en banc. See, *e.g.*, Brown v. Dravo Corp., 258 F.2d 704, *rehearing denied*, 258 F.2d 709 (3d Cir. 1958), *cert. denied*, 359 U.S. 960 (1959); Bishop v. Bishop, 257 F.2d 495, *rehearing denied*, 257 F.2d 501 (3d Cir. 1958), *cert. denied*, 359 U.S. 914 (1959).

[37] 5TH CIR. R. 25a.

[38] See Letter From Hon. Elbert P. Tuttle, Chief Judge, Court of Appeals for the Fifth Circuit, Dec. 26, 1961. See also 5TH CIR. R. 25a.

culated, informal discussion between panel and nonpanel members is common.[39] As a result of such discussion, a nonsitting judge may ask the chief judge to canvass the court on whether to rehear a case en banc.[40] If en banc rehearing is not then ordered, it may be ordered after panel decision. This order usually results from a party's petition directed to the hearing panel. If the panel unanimously decides against such a hearing, the matter is closed.[41] A majority of the panel is not required, however, to bring the question before the full court—any member of the panel may request a poll of the court by the chief judge.[42] Sittings of the Fifth Circuit en banc seldom exceed two in a year.[43]

En banc procedure in the Sixth Circuit is difficult to discern. The court's rule seems to be no more than a restatement of the statute which authorizes the courts of appeals to sit en banc,[44] and it has been said that the Sixth Circuit "has no rule or policy on this matter . . . ."[45] Circulation of draft opinions among nonsitting judges apparently does not give them the right to request en banc consideration; they can only make suggestions which the opinion writer may accept or disregard.[46] All petitions for rehearing—by the panel or en banc—are directed to the hearing panel. The cases reveal that hearing panels either cannot or will not recommend a vote of all the judges on whether to rehear a case en banc. One panel has said, "with regard to rehearings en banc, where the appeal is decided by a regular court of appeals, consisting of three judges only, a petition to rehear will not be considered by the court en banc . . . ."[47] There is reason to believe that in practice, if not in theory, the Sixth Circuit has practically eliminated the en banc process[48] and left the federal statute unimplemented.[49]

The Eighth Circuit rarely sits en banc, perhaps because the court is so "closely-knit" and differences of opinion do not often occur.[50] A court

[39] See Letter From Chief Judge Tuttle, *supra* note 38.

[40] Apparently, a nonsitting judge may also communicate directly with his colleagues on the question. *Ibid.*

[41] See *ibid.*

[42] *Ibid.*

[43] Note, *supra* note 13, at 486.

[44] *Compare* 6TH CIR. R. 3(1) *with* 28 U.S.C. § 46 (1958).

[45] Note, *supra* note 13, at 487. According to Chief Judge Miller, the court has never sat en banc during his sixteen years of service. Letter From Hon. Shackelford Miller, Jr., Chief Judge, Court of Appeals for the Sixth Circuit, Jan. 8, 1962.

[46] See *ibid.*

[47] National Bank v. Wayne Oakland Bank, 252 F.2d 537, 544 (6th Cir.), *cert. denied*, 358 U.S. 830 (1958); *accord*, Northwest Airlines, Inc. v. Glenn L. Martin Co., 229 F.2d 434 (6th Cir. 1955) (per curiam); NLRB v. Cambria Clay Prod. Co., 229 F.2d 433 (6th Cir. 1955).

[48] "We have occasional requests for an in banc rehearing when the losing party feels that our ruling is out of line with the ruling in another circuit or that it has incorrectly applied a ruling of the Supreme Court. We do not grant such an in banc rehearing." Letter From Chief Judge Miller, *supra* note 45.

[49] 28 U.S.C. § 46(c) (1958); see Western Pac. R.R. Corp. v. Western Pac. R.R., 345 U.S. 247, 260-61 (1953).

[50] Letter From Hon. Harvey M. Johnsen, Chief Judge, Court of Appeals for the Eighth Circuit, Jan. 19, 1962.

rule provides that rehearings, by panel or by the court en banc, will be granted only when it can be shown that the court overlooked "some controlling matter of law or fact." [51] A majority of the active judges may designate a case for en banc hearing before it is assigned to a panel,[52] but it is not clear whether judge or litigant initiates such a step.

Unique to the Eighth Circuit is an automatic procedure for en banc consideration when a panel undertakes to overrule a fairly recent decision of another panel.[53] When a litigant requests a rehearing en banc, the request, like petitions for panel rehearing, must be submitted to the panel.[54] The full court will not consider the matter unless upon recommendation of a majority of the panel,[55] unlike the Fifth Circuit in which the request of only one panel member is necessary to bring the question to the attention of the full court.[56]

In the Ninth Circuit, regardless of whether en banc consideration is requested after a case is assigned to a panel or after formal panel decision, the panel makes the initial ruling on the advisability of en banc hearing or rehearing.[57] Although draft opinions are not circulated, the request for en banc consideration may come from a nonsitting judge.[58] If a majority of the panel decides that the case is appropriate for en banc consideration, the panel asks the chief judge to withdraw assignment of the case to it. This request is ruled on by all of the active judges. An affirmative response results in en banc consideration; a negative response returns the case to the panel.[59]

It is not uncommon in the Ninth Circuit for a request for rehearing en banc to be made simultaneously with a petition for panel rehearing.[60] This practice makes it difficult to separate the two very different questions of whether to rehear a case and whether rehearing should be by panel or en banc.[61] Panel judges may be satisfied with the correctness of their

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[51] 8TH CIR. R. 15(a).

[52] See Comment, *supra* note 15, at 453.

[53] Letter From Chief Judge Johnsen, *supra* note 50.

[54] 8TH CIR. R. 15(e); *cf.* Magidson v. Duggan, 219 F.2d 946 (8th Cir. 1955) (per curiam).

[55] Letter From Chief Judge Johnsen, *supra* note 50.

[56] See note 42 *supra* and accompanying text. It is difficult to evaluate these two approaches in the absence of data concerning results in practice. If it is unlikely that after a two-to-one panel decision one of the majority will side with the dissenter in seeking a rehearing en banc, then the procedure of the Eighth Circuit will result in less use of the en banc process than that of the Fifth Circuit. But there may be merit in a practice which leaves the full court free of the question unless a dissenter can convince at least one member of the majority of the necessity of a rehearing en banc.

[57] 9TH CIR. R. 23. "[O]nce a case has been assigned to a particular panel it thereafter belongs to that panel exclusively and must reach its final determination through the judgment of that three-man division alone." Note, *supra* note 13, at 487.

[58] There is reason to believe that requests from litigants are generally unsuccessful. Yet, as the Supreme Court indicated, the litigant is often the one most likely to be aware of reasons justifying en banc treatment. Western Pac. R.R. Corp. v. Western Pac. R.R., 345 U.S. 247, 261 (1953).

[59] 9TH CIR. R. 23.

[60] See William H. Banks Warehouses, Inc. v. Watt, 205 F.2d 44 (9th Cir.), *remanded in light of the Western Pacific case*, 345 U.S. 932 (1953).

[61] See Western Pac. R.R. Corp. v. Western Pac. R.R., 345 U.S. 247, 262-63 (1953).

decision and deny panel rehearing; but they may recommend rehearing en banc because of panel conflict or the importance of the particular case.[62] Generally, a Ninth Circuit panel handles both issues in one opinion,[63] but this does not mean that the panel has failed to make the needed separation. In denying a rehearing en banc on remand of the *Western Pac. R.R. Corp. v. Western Pac. R.R.* case,[64] the panel was concerned with the possibility that rehearing en banc might be justified although panel rehearing would serve no purpose,[65] which suggests that the court appreciated the different issues involved.[66]

In one case,[67] a Ninth Circuit panel, upon petition for rehearing en banc, reversed its own decision while denying the rehearing, in effect making a redetermination without an actual rehearing. As the dissent pointed out, until a rehearing is formally granted, the opposing party has no knowledge of the grounds on which it is sought.[68] The court acted, therefore, after being shown only one side of the question.[69]

The Tenth Circuit has a rule of record which provides that all applications for hearing or rehearing en banc will be considered by all the active circuit judges, and, in accordance with the federal statute,[70] an application is granted only if approved by a majority of the judges.[71] The request need not come from a party but may be sua sponte.[72]

The rule of record is apparently less important than the informal approach adopted by the Tenth Circuit judges. Draft opinions are circulated, and if a nonsitting judge comments on the substance of a proposed opinion, consideration is given to whether the case should be heard en banc.[73] Rehearing en banc may be ordered even though the panel is "fairly certain" of its decision.[74] The distinction between rehearing en banc and panel rehearing is recognized. There seems to be a certain attitude in the

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[62] *Ibid.*

[63] See William H. Banks Warehouses, Inc. v. Watt, 205 F.2d 44 (9th Cir.), *remanded*, 345 U.S. 932 (1953).

[64] 206 F.2d 495 (9th Cir. 1953).

[65] The court denied the rehearing en banc because there was no intracircuit conflict and the case was not sufficiently significant. These are the appropriate tests for en banc rehearing as opposed to panel rehearing. *Cf.* Western Pac. R.R. Corp. v. Western Pac. R. R., 205 F.2d 374, 376 (9th Cir. 1953) (concurring opinion).

[66] Although a panel may in one opinion deny both panel rehearing and rehearing en banc, it has been argued that the panel may only decide the en banc question after it has decided to grant a rehearing. The result of such an interpretation of the Ninth Circuit rule would mean that if a panel decided that panel rehearing was not justified, it could not proceed to the question of the propriety of reconsideration by the full court. Ly Shew v. Dulles, 219 F.2d 413, 421 (9th Cir. 1954) (dissenting opinion).

[67] Ly Shew v. Dulles, 219 F.2d 413 (9th Cir. 1954).

[68] *Id.* at 416-17 (dissenting opinion).

[69] *Ibid.*

[70] 28 U.S.C. § 46(c) (1958).

[71] 10TH CIR. R. 20(7).

[72] *Ibid.*

[73] Letter From Hon. Alfred P. Murrah, Chief Judge, Court of Appeals for the Tenth Circuit, Dec. 27, 1961.

[74] *Ibid.*

circuit that cases which deserve en banc consideration may be "intuitively" discovered without resort to formal procedure.[75] Such an approach may indicate an appreciation of the en banc process, but is unlikely to provide adequate guidance for litigants.

II. Litigant Request for En Banc Consideration

The courts of appeals are divided on the question of whether requests by a litigant for hearing or rehearing en banc should first be heard by the hearing panel, or should go directly to the full court. The practice of one group of courts which delegates to the panel an unreviewable power to deny en banc consideration is unsatisfactory.[76] The source of the panel conflict which the en banc process was designed to resolve is not always a doctrinal clash between panels; conflict may arise because one panel sees a distinction between two results which the litigant and perhaps the remainder of the court cannot accept as valid. In such a situation, it is undesirable to permit those judges already convinced of the validity of the distinction to determine that issue conclusively.

When a litigant's request for en banc consideration is immediately brought to the attention of the full court, nonsitting judges still receptive to adversary argument may then participate in a final decision of the en banc question. However, if no method is developed to screen petitions, litigant request may become pro forma and burdensome for the full court. To diminish possible abuse, a court rule might be adopted which requires a concise statement by the litigant in support of a claim of panel conflict to which the panel could append appropriate comments or recommendations. Such a procedure would ensure that nonsitting judges have the issue concisely framed with all necessary facts before them.

The *Western Pacific* proposal[77] that litigants be able to suggest en banc determination without petitioning for formal court action is impractical, particularly when such requests are disposed of by the full court. Formal procedure established by court rule is necessary to regulate the flow of en banc demands from litigants and to adequately inform them of when and under what circumstances such demands are appropriate.

In all circuits, a litigant may seek an en banc sitting before the panel has made a formal decision. Yet until such decision, there is no overt conflict which the litigant can show to justify convening the full court. And if the case is one which has attracted enough public attention to warrant initial full court hearing, this is normally apparent at the time the case first reaches the court of appeals. In the absence of any other justification, therefore, the litigant should not be permitted to seek an en banc

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[75] *Ibid.*

[76] See Western Pac. R.R. Corp. v. Western Pac. R.R., 345 U.S. 247, 272 (1953) (Frankfurter, J., concurring).

[77] *Id.* at 262.

sitting after a case has been assigned to a panel but before it has been formally decided.

Although generally a litigant should be able to seek a hearing or rehearing en banc only if there is intracircuit conflict, other reasons might be sufficient in certain cases. When a case which has attracted much publicity or which involves a large sum of money [78] first reaches the court of appeals but has not yet been assigned to a panel, a litigant should be able to petition for en banc hearing on the theory that in important cases more judges are needed to increase the probability of a correct decision. Most of the circuits already provide such a procedure, although it is rarely used, probably because these cases are by their very nature uncommon. Because of their uniqueness, the cases should be easily recognizable by the court; therefore, preliminary petitions would not unduly impose on judicial time, particularly if pro forma denials are used.

In some cases, the en banc procedure could be simplified by eliminating the need for litigant request. One circuit already has a rule which provides for automatic rehearing en banc in certain cases.[79] Often, an opinion writer has stated that although the panel may not agree with the reasoning being expressed therein, it is bound by the decision of a prior panel of the same circuit until that decision is overruled by the court en banc.[80] When two of the three panel members in a given case feel similarly constrained, the case should be automatically referred to the full court to resolve this latent conflict and prevent any future overt panel conflict. In addition, a panel may determine that two earlier panel decisions have already created a conflict, and, if the panel is willing to certify to that effect, the case might be sent to the full court without any party petition. In fact, the practice might parallel the federal statutory procedure for certification of questions of law from the courts of appeals to the Supreme Court.[81] Federal certification was originally used only when there was a division of opinion of the circuit court judges.[82]

III. Particular Problems of En Banc Procedure

A. Judges Other Than Active Circuit Judges

One problem which sometimes complicates en banc procedure concerns the status of judges other than active circuit judges—district court judges temporarily assigned to circuit duty [83] and retired circuit judges.[84] These

[78] See *id.* at 270-71; 5TH CIR. R. 25a.

[79] See note 53 *supra* and accompanying text.

[80] Mallory v. United States, 259 F.2d 801 (D.C. Cir. 1958); Thompson v. Thompson, 244 F.2d 374 (D.C. Cir. 1957); United States v. United States Vanadium Corp., 230 F.2d 646 (10th Cir.), *cert. denied*, 351 U.S. 939 (1956).

[81] See 28 U.S.C. § 1254(3) (1958).

[82] See 2 Stat. 159 (1802).

[83] District court judges may be assigned to circuit duty by the chief judge of a circuit pursuant to 28 U.S.C.A. § 292 (Supp. 1961).

[84] Retired circuit judges may, if they desire, be assigned to judicial duties within their circuit. 28 U.S.C.A. § 294 (Supp. 1961).

judges are presently excluded from sitting on the court en banc. The en banc statute specifically limits the en banc court to active circuit judges [85] and thereby obviously excludes district court judges. Because of the ambiguity of "active" in certain situations, it was necessary for the Supreme Court to determine that a retired circuit judge cannot sit on the court en banc even if he heard the case as a panel member before retirement.[86] Basically, uniformity is the goal of the en banc process. Changes in the composition of a court often bring changes to the law which undermine uniformity. Naturally, court changes resulting from illness, death, or retirement are unavoidable, but changing composition should not be encouraged by permitting judges who may not be sitting when the same issue arises again [87] to participate in a conclusive en banc determination.

District court judges and retired circuit judges also create a problem when they indirectly participate in the en banc process by sitting on a panel with the unreviewable power to deny en banc rehearing. In the one case in which the issue arose, the propriety of district court judges sitting on such panels was upheld.[88] However, the statute commits the en banc power—the power to sit en banc and the power to determine when to sit en banc—to active circuit judges only.[89] If district court judges and retired circuit judges should not sit on the court en banc, they should not be allowed to sit on a panel with the power to preclude full court decision. The impropriety of allowing the panel which decided the case to conclusively determine the en banc issue has been discussed; [90] permitting judges other than active members of the circuit to participate in that determination aggravates an already unsatisfactory situation.

B. The Evenly Divided En Banc Court

Another en banc problem arose recently in a Second Circuit case in which the en banc court was evenly divided on the merits after a panel had reversed the trial court.[91] The full court determined that the split decision en banc had the effect of affirming the trial court.[92] A split decision by an en banc court cannot ensure the uniformity normally resulting from en banc

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[85] 28 U.S.C. § 46(c) (1958).

[86] United States v. American-Foreign S.S. Corp., 363 U.S. 685 (1960). This decision was anticipated by the Judicial Conference which urged legislation which would have permitted retired circuit judges to sit on the en banc court. See 1959 ANN. REP. OF THE JUDICIAL CONFERENCE 9-10; H.R. 5255, 87th Cong., 1st Sess. (1961).

[87] A district judge may not be assigned to circuit duty the next time an en banc hearing is sought, and a retired circuit judge may have terminated his voluntary service.

[88] Western Pac. R.R. Corp. v. Western Pac. R.R., 206 F.2d 495, 497 (9th Cir. 1953).

[89] See Western Pac. R.R. Corp. v. Western Pac. R.R., 345 U.S. 247, 261 (1953).

[90] See text accompanying note 76 *supra*.

[91] Drake Bakeries, Inc. v. Local 50, Am. Bakery Workers, 294 F.2d 399 (2d Cir.), *aff'd*, 370 U.S. 254 (1962).

[92] *Ibid.* The propriety of this en banc procedure was not ruled on by the Supreme Court. 370 U.S. at 255 n.1.

decision since any change in the composition of the court may alter the result of a similar case in the future. Correctness of decision in the particular case becomes, therefore, more significant than the goal of uniformity, and in theory, correctness of decision is more apt to occur when the view of a majority of the judges who have heard the case prevails. Affirming the panel in this case would have given conclusive weight to the votes of the original panel members. But by affirming the trial court, the Second Circuit reached the result supported by a majority consisting of one-half of the active circuit judges and the district court judge who originally heard the case.

In some cases involving split decisions it might be best to certify the disputed question to the Supreme Court. When circuit judges are evenly divided over a particular question of law which raises an important federal issue, the question is probably ripe and suitable for Supreme Court resolution. The cases in which an even division might occur would be rare[93] and therefore not burdensome for the high Court.

C. Limitation of Issues

May a rehearing en banc be limited to certain issues or must it be a rehearing of the entire case? In *Herzog v. United States,*[94] a panel rejected several claims of error by the defendant and affirmed his conviction. Because of possible conflict with an earlier panel decision, the court granted a rehearing en banc on the one issue pertinent to the possible conflict. Without resolving that issue, on the ground that any possible error on the issue was non-prejudicial, the court en banc affirmed the trial court. In response to the dissent's contention that the court en banc could not limit itself to only one of the many issues presented to the panel,[95] the chief judge in a concurring opinion analogized to the Supreme Court practice of limiting issues on certiorari and argued that the court en banc had the same power.[96] Although the court of appeals en banc should be able to limit the issues before it so as to decide only those questions on which there was panel conflict, the certiorari analogy is not entirely apt. There is a fundamental distinction between the relationship of the court en banc to a panel and that of the Supreme Court to lower courts. Because it is reviewing decisions of inferior courts, the Supreme Court has greater flexibility in disposing of cases than have the courts of appeals sitting en banc. In addition to reversing or affirming, it may remand the case; therefore, when it limits its consideration to certain issues, its decision can be integrated into the lower court decision of other issues in the case on remand. But there is no statutory indication that the courts of appeals

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[93] At present, only three circuits have an even number of active circuit judges. 28 U.S.C.A. § 44 (Supp. 1961).

[94] 235 F.2d 664 (9th Cir.), *cert. denied,* 352 U.S. 944 (1956).

[95] *Id.* at 668. (Stephens, J., dissenting).

[96] *Id.* at 668-69. (Denman, C.J., concurring).

sitting en banc are superior tribunals to the panels and may therefore remand cases to them. The purpose of en banc rehearings is not panel supervision but resolution of panel conflict.

IV. Expanded Use of the En Banc Court

Hearings and rehearings en banc are not peculiar to the federal courts of appeals. State supreme courts often sit en banc,[97] and for purposes other than the resolution of panel conflict. Perhaps, therefore, use of the en banc process in the federal courts of appeals might also be expanded.

In one case in the Ninth Circuit, a party moved for a rehearing en banc on the grounds of intercircuit conflict.[98] The court rejected the motion, possibly because it felt that such a conflict could be resolved by the Supreme Court. Actually, conflict between circuits might be a sufficient justification for a rehearing en banc, especially since the court en banc might so redetermine the case as to erase the former intercircuit conflict and thereby ease the burden on the Supreme Court. Even if en banc rehearing failed to remove the conflict, at least it would persuasively indicate that the case merited Supreme Court consideration.

The use of the en banc procedure might also be expanded to cover more cases whose interest transcends that of the litigants. Decision by the full court of controversial disputes which arouse public feeling and involve fundamental policies would not only increase the probability of correct determination, but would also enhance the acceptability of the judicial ruling in the community.

V. Conclusion

Because the judicial workload is generally increasing, sittings en banc must remain the exception and panel decision the rule. But there are certain cases which require a determination en banc to resolve panel conflict and to utilize the full strength of the court to ensure a sound decision. Thus, en banc procedural rules must be geared to facilitate recognition and disposition of these appropriate cases without undue procedural complexity.

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[97] See, *e.g.*, Cal. Const. art. VI, § 2; Ala. Code tit. 13, §§ 10-13 (1958); Iowa Code Ann. §§ 684.1-.3 (1950).

[98] Stamphill v. Johnston, 136 F.2d 291 (9th Cir.), *rehearing denied*, 136 F.2d 292 (9th Cir.) (per curiam), *cert. denied*, 320 U.S. 766 (1943).