

Why Sit En Banc?

STEPHEN L. WASBY*

U.S. courts of appeals seldom provide reasons for granting or denying rehearing en banc. The most likely reason for rehearing en banc is that other judges believe the three-judge panel deciding the case had erred, although rehearing is not sought each time judges disagree with a panel. The formal bases for rehearing a case en banc include the three desiderata of Federal Rule of Appellate Procedure 35—conflict with circuit precedent (intracircuit conflict), conflict with Supreme Court rulings, and presence of an issue of “exceptional importance”—and courts’ rules and general orders. Judges introduce other considerations, such as an intercircuit conflict, institutional concerns about resources necessary to hear a case en banc, and whether a case should proceed directly to the Supreme Court.

This Article presents a detailed description of reasons judges offer each other as they seek to have a case taken en banc or argue against such rehearing after a three-judge panel has filed its decision. The data are drawn from case files in the papers of Judge Alfred T. Goodwin of the Court of Appeals for the Ninth Circuit. He was the court’s en banc coordinator from the early 1970s through 1993 and thus was at the communications node for post-panel activity, which he monitored and directed. Reasons offered for rehearing a case en banc are discussed in terms of the above-noted FRAP categories, intercircuit conflict, and institutional reasons. Given particular attention is the relationship between rehearing a case en banc or letting it proceed quickly to the Supreme Court. Some general arguments by judges against en banc hearing are also presented.

* Professor Emeritus of Political Science, University at Albany, State University of New York. The Author currently resides in Eastham, Massachusetts. This Article was first presented at the meeting of the Law and Society Association in San Francisco, California, on June 3, 2011. The Author wishes to thank Judge Alfred T. Goodwin for access to the materials on which this Article draws and Rory Little for his support. The Author may be contacted at wasb@albany.edu.

TABLE OF CONTENTS

INTRODUCTION.....	748
I. REASONS FOR GOING EN BANC.....	750
A. OVERVIEW	750
B. SPECIFIC REASONS.....	757
1. “The Panel Got It Wrong”.....	757
2. <i>Intracircuit Conflict</i>	764
3. <i>Conflict with the Supreme Court</i>	766
4. “Exceptional Importance”	769
5. <i>Intercircuit Conflict</i>	774
6. <i>Institutional Reasons</i>	780
7. <i>Other Reasons Not to Go En Banc</i>	786
II. EN BANC OR SUPREME COURT.....	789
A. INCREASING THE NUMBER OF EN BANCS	789
B. DEFERRING TO THE SUPREME COURT.....	796
CONCLUSION	801

INTRODUCTION

This Article is an examination of reasons U.S. court of appeals judges offer each other, after a three-judge panel has filed its decision, as they seek to have a case reheard en banc or argue against such rehearing. Although as a formal matter, en banc rehearing is initiated by a petition for rehearing en banc, in practical terms most activity directed to seeking en banc hearing comes from the sua sponte actions of off-panel judges troubled by a panel opinion and the resulting communication among members of the court. We know little about that communication because of lack of access to it, so the opportunity to see the judges’ messages allows us to obtain a view of the activity related to en banc rehearing.

The U.S. courts of appeals sit en banc for a number of reasons, although their opinions do not state reasons for doing so. The principal factors said to explain which panel rulings will receive en banc rehearing are a panel’s overturning a decision by a lower court or agency, a panel member’s filing a dissent, and a panel ruling that runs in a liberal direction.¹ As published dissents from denial of en banc rehearing show,

1. Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 220 (1999). For an examination of the effect of ideology (clearly related to perceptions of whether the panel “got it right”) on whether a court sits en banc and reverses the panel, see Phil Zarone, *Agenda Setting in the Courts of Appeals: The Effect of Ideology on En Banc*

disagreements over issues of rights often serve as a trigger for activity directed toward en banc rehearing. It is clear that the most likely reason is that the judges believe the three-judge panel deciding the case had erred, the converse being not seeking en banc rehearing because of agreement with the panel's result. Yet this is only one reason en banc rehearing is sought. The formal bases include the three desiderata of Federal Rule of Appellate Procedure ("FRAP") 35—conflict with circuit precedent (*intracircuit* conflict), conflict with Supreme Court rulings, and presence of an issue of "exceptional importance"²—and the court's rules and general orders. The judges introduce other considerations, such as possible *intercircuit* conflict and whether a case should be allowed to proceed directly to the Supreme Court. As many of these elements are open textured and provide considerable discretion in application, it is hard to determine to what extent they channel the decision to rehear a case en banc. Yet before we can get to that point, which is not considered in this Article, we need to know what in fact the judges say to each other.

What follows is a highly descriptive initial exploration of reasons judges use in arguing for—or against—en banc hearing. Those reasons are offered in memoranda sent to other members of the court. While the memoranda vary in length, the initial memorandum supporting an en banc call is the equivalent of a short brief, and the judge's clerks may have been involved at least in part in its writing. Likewise, the panel's response—what amounts to a reply brief—is usually extended, prepared after the clerks monitoring the case see the initial memorandum and communicate their views to "their" judge. The further memoranda sent in some cases are of varying lengths, with some quite extensive.

The communications on which this Article is based are drawn from the papers of Judge Alfred T. Goodwin, senior judge of the Court of Appeals for the Ninth Circuit.³ As the court's en banc coordinator from

Rehearings, 2 J. APP. PRAC. & PROCESS 157 (2000) (examining the Fourth Circuit).

2. FED. R. APP. P. 35(b) ("A party may petition for a hearing or rehearing en banc. (1) The petition must begin with a statement that either: (A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or (B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.").

3. The Author reviewed the Goodwin Papers while conducting research for this Article; the unpublished documents cited here are available in the Goodwin Papers, which are held at the Oregon Historical Society, Portland, Oregon. The Author has made every effort to ensure the accuracy of citations to, and quotations from, those documents, but he notes that the editors of the *Hastings Law Journal* have not had the opportunity to review the documents from the Goodwin Papers cited or referred to here.

the early 1970s through 1993, Judge Goodwin was at the communications node for post-panel activity, which he monitored and directed.⁴ In this Article the reasons judges offer, drawn from the extended period of Judge Goodwin's service, are grouped into basic categories—those of FRAP 35 and other matters on which the judges regularly comment. No attempt is made here to evaluate the validity of the claims judges make; the focus is simply on the reasons proffered.

I. REASONS FOR GOING EN BANC⁵

A. OVERVIEW

Determining precisely why a court of appeals has decided to rehear a case en banc—or, infrequently, to hear a case en banc without a panel's first handing down a ruling (an "initial en banc")—is difficult. Orders granting rehearing en banc are not accompanied by a statement of reasons for doing so, and most en banc opinions do not indicate why en banc rehearing has been granted, although there are exceptions. For example, in one case, the en banc court said that

this appeal presents us with a clear conflict in our precedent that gave difficulty to the district court here and would give difficulty to other district courts in the future if we did not address it. For that reason, we voted to convene this en banc court to resolve this appeal⁶

Indeed, one seldom knows from reading the en banc opinion that the court has reheard the case; only West's headnotes allow one to know that a panel heard the case and what its action had been. Nor can one be sure that the issues that are the focus of an en banc court's opinion were those that initially led a judge to call for en banc rehearing, as those questions may have been sorted out and refined during the process

Unless otherwise specified, all those named as senders or recipients of memoranda are or were judges of the Court of Appeals for the Ninth Circuit. "Associates" refers to all judges of the court.

4. For a study of this role, see Stephen L. Wasby, "A Watchdog for the Good of the Order": *The Ninth Circuit's En Banc Coordinator*, 12 J. APP. PRAC. & PROCESS 91 (2011).

5. A preliminary exploration, on which the Author draws in small part, is provided in Stephen L. Wasby, *The Supreme Court and Courts of Appeals En Bancs*, 33 MCGEORGE L. REV. 17, 26–33 (2001) [hereinafter Wasby, *The Supreme Court*], and Stephen L. Wasby, *How Do Courts of Appeals En Banc Decisions Fare in the U.S. Supreme Court*, 85 JUDICATURE 182, 182–83 (2002).

6. *United States v. Washington*, 593 F.3d 790, 797 (9th Cir. 2010). In a footnote, the court explained that it had heard the case en banc before a panel decision was handed down. *Id.* at 797 n.9.

For another exception, see *River of Life Ministries v. Village of Hazel Crest*, where Judge Richard Posner, for the en banc majority, says,

The existence of an intercircuit conflict with respect to the proper test for applying the equal-terms provision [of the Religious Land Use and Institutionalized Persons Act], combined with uncertainty about the consistency of our decisions, persuaded the full court to hear the case in order to decide on a test.

611 F.3d 367, 368 (7th Cir. 2010).

leading to the decision to rehear en banc, like the “issue fluidity” from certiorari to final opinion in the Supreme Court.⁷ And it is important to recognize that the issue that led some judges or a majority of the court to vote to rehear a case en banc may not have been of major concern to counsel, who may not have focused on it. We see this when, after the court had decided to take a case en banc, a judge argued for additional briefing because “[t]he original briefs did not address the issue for which this case was taken en banc” and the issue “was discussed only sketchily” when it arose on a post-appeal motion.⁸ Nor might the lawyers possess the ability to deal effectively with the issue at hand, as we see when, commenting on the possibility that the Supreme Court might modify the panel’s opinion, a judge said, “The pity is that the lawyers probably are not of the quality that will do the case justice.”⁹

In a relatively recent statement, in responding to a motion for clarification, a panel said:

[W]hen a case is heard or reheard *en banc*, the *en banc* panel assumes jurisdiction over the entire case . . . regardless of the issue or issues that may have caused any member of the Court to vote to hear the case *en banc*. If the Court votes to hear or rehear a case *en banc*, the *en banc* panel may, in its discretion, choose to limit the issues it considers. . . . However, the *en banc* panel is under no obligation to do so.¹⁰

Ninth Circuit judges have discussed the question, raised by a judge, whether there was “a procedure to take issues rather than cases en banc,”¹¹ with a colleague responding that the court had “never resolved” the matter but had noted the informal means of taking the case but focusing on the issue of concern.¹² The court had earlier agreed to take issues rather than whole cases en banc “when it was appropriate to do so,” for example, in multi-issue cases where only one issue was contested or potentially en banc worthy.¹³ And another judge making another en banc request said, “If we now have a developed procedure for undertaking

7. See generally Kevin T. McGuire & Barbara Palmer, *Issue Fluidity on the U.S. Supreme Court*, 89 AMER. POL. SCI. REV. 691 (1995).

8. Memorandum from James R. Browning to the limited en banc panel (Aug. 6, 1986), Jensen v. Stangel, 762 F.2d 815 (9th Cir.), *appeal after remand*, 790 F.2d 721 (9th Cir. 1985), and *withdrawn en banc sub nom.* Jensen v. City of San Jose, 806 F.2d 899 (9th Cir. 1986).

9. Memorandum from Alfred T. Goodwin to Associates (Jan. 11, 1982), Ford Motor Co. v. Fed. Trade Comm’n, 673 F.2d 1008 (9th Cir. 1981).

10. Summerlin v. Stewart, 309 F.3d 1193, 1193 (9th Cir. 2002).

11. Memorandum from J. Clifford Wallace to active & senior judges (Oct. 10, 1989), Partington v. Gedan, 880 F.2d 116 (9th Cir. 1989), *vacated*, 497 U.S. 1020 (1990), *remanded to* 914 F.2d 1349 (9th Cir. 1990), and *rev’d en banc and vacated in part*, 923 F.2d 686 (9th Cir. 1991).

12. Memorandum from Stephen Reinhardt to Associates (Oct. 10, 1989), Partington, 880 F.2d 116.

13. Memorandum from J. Clifford Wallace to Associates (May 8, 1978), United States v. Cook, 608 F.2d 1175 (9th Cir. 1977).

en banc on one issue alone, this is an ideal case for that treatment.”¹⁴ Indeed, the en banc court remanded that case to the panel to consider the issues with which it had not dealt.¹⁵

However, the court does focus on issues. This could be seen when, after the case a panel sought to have heard en banc settled,¹⁶ one of the judges who had been on the panel in that case noted that “we have the *same* issue in another case,” and the panel called for en banc in the second case.¹⁷ In dealing with the “need to settle the question whether counsel has rendered effective assistance to his client in a criminal case,” a judge showed that the court needed to consider the *issue* rather than the particular *case* when he suggested that the court take the case under discussion “or, I don’t care which, another case,” because “the best way to do it is to take one or the other, or both . . . in banc.”¹⁸ It is possible for judges to agree on a single issue for which en banc is being sought or opposed, but at other times multiple issues may be under consideration. Thus a judge found one case “complicated . . . because the majority opinion, [the] dissent, the petition for rehearing, and [the] request for an en banc vote all raise different issues,” with “[s]ome issues resulting from *Washington v. Davis*, . . . some . . . independent of it, and some . . . mooted by it.”¹⁹

Judges’ statements during their exchange of memoranda may seem to make clear why those judges favor or oppose en banc, but some judges do not participate in such exchanges. Usually fewer than half send memoranda in any given case. Some judges do not even vote on whether to take a case en banc, even though doing so is the equivalent of a “No” vote because an en banc hearing can occur only if a majority of nonrecused active judges so vote. This leaves one to speculate whether nonvoting results from being away from chambers, forgetting to vote, or being disinterested. Even those who do make statements may have multiple reasons for their votes, and a judge who votes to en banc a case does not necessarily share the reasons offered by the judge who called

14. Memorandum from Shirley Hufstедler to Associates (Feb. 2, 1976), *Confederated Bands & Tribes of the Yakima Indian Nation v. Washington*, 550 F.2d 443 (9th Cir. 1977) (en banc).

15. *Confederated Bands & Tribes*, 550 F.2d at 449.

16. *N.J. Life Ins. Co. v. Bostanian*, No. 88-5815 (9th Cir.).

17. Memorandum from Betty B. Fletcher to Associates (Oct. 10, 1989), *First State Ins. Co. v. W. Inv. & Dev. Corp.*, 895 F.2d 1576 (9th Cir. 1990).

18. Memorandum from Ben C. Duniway to Associates (June 1, 1977), *Cooper v. Fitzharris*, 551 F.2d 1162 (9th Cir.), *aff’d on reh’g en banc*, 586 F.2d 1325 (9th Cir. 1978). The “in banc” spelling was preferred by Judge Duniway and some of his colleagues in the 1970s.

19. Memorandum from Alfred T. Goodwin to Associates (Feb. 21, 1977) (citing *Washington v. Davis*, 426 U.S. 229 (1976)), *Davis v. Cnty. of L.A.*, Nos. 73-3008, 73-3009, 1976 WL 3779 (9th Cir. Oct. 20, 1976), *withdrawn and superseded by* 566 F.2d 1344 (9th Cir. 1977), *vacated sub nom. Cnty. of L.A. v. Davis*, 440 U.S. 625 (1978).

for a vote, as when a judge, saying he would support the en banc call made by a colleague, said he was doing so for other reasons.²⁰ There are even times when a judge calling for en banc says he will vote against it, as when an active judge called for en banc on behalf of his panel colleagues because, as a senior circuit judge and a district judge, they could not do so.²¹

A vote on whether to en banc a case may also differ from the position the judge took during the exchange of memoranda. In one such situation, after voting was completed and the court had agreed to rehear a case en banc, one judge asked the colleague who had made the en banc call, “How can you vote against your own recommendation, especially since your call triggered the expedited extraordinary shortened time procedure?”²² The calling judge’s explanation, which serves to cast light on the difference between disagreeing with an outcome and wishing to have en banc rehearing, was that he had thought the case should have been either heard en banc immediately or sent to the Supreme Court and that he only called for en banc when another judge, also unhappy with the panel ruling, would not agree to expedited proceedings. As the first judge put it, “I called for an en banc vote because I believe that given your desire for a vote a vote should be taken. That is obviously far different than calling for a vote because one believes a case should go en banc.”²³

What *are* the reasons that judges offer when they seek to have a panel’s ruling reheard en banc? A judge commenting on an exchange of memos about taking a case en banc offered a nonexhaustive list of reasons why a case would be reheard en banc that was “merely illustrative of the type of reasons we appear to have gone en banc in the past.”

We take a case en banc if the panel resolved an important legal issue in a manner contrary to established law, if the panel failed to follow Ninth Circuit precedent, if it created an unnecessary conflict another circuit, or perhaps even if it merely adopted a novel and unacceptable principle of law that will cause serious problems for the court or require unnecessary Supreme Court review. We may also go en banc

20. See Memorandum from Stephen Trott to Associates (Aug. 23, 2001), *United States v. Buckland*, 259 F.3d 1157 (9th Cir. 2001), *rev’d en banc*, 277 F.3d 1173 (9th Cir. 2002).

21. Memorandum from Stephen Reinhardt to Associates (July 16, 1986), *United States v. Yarbrough*, 797 F.2d 979 (9th Cir. 1986) (unpublished table decision).

22. Memorandum from Diarmuid O’Scannlain to Stephen Reinhardt & Associates (Sept. 14, 2001), *Buckland*, 259 F.3d 1157.

23. Memorandum from Stephen Reinhardt to Diarmuid O’Scannlain & Associates (Sept. 15, 2001), *Buckland*, 259 F.3d 1157.

because a conflict must be resolved for housekeeping reasons even though the case is of no particular significance.²⁴

Stated more generally and going beyond that statement, reasons why judges want to go en banc include the following:

- They may simply agree, or disagree, with the result reached by the panel;
- While agreeing with the panel's result, they may disagree with the panel opinion;
- They may be persuaded by a panel dissent;
- They may believe that the panel's opinion sets up an intracircuit conflict;
- They may believe that the panel's opinion creates an intercircuit conflict;
- They may believe that the panel's opinion conflicts with or is an improper interpretation of a Supreme Court ruling;
- They may believe that, because of an intervening Supreme Court ruling, circuit precedent must be changed, or at least reexamined;
- Independent of agreement or disagreement with the panel result or opinion, they may believe that the case is, or is not, of sufficient importance to warrant en banc consideration; or
- They may be concerned that the court is taking "too many" cases en banc.

A judge seeking en banc rehearing may combine different elements in a memorandum supporting an en banc call. Such a combination is evident in one judge's complaint that the panel's ruling "contradicts the plain language of the [statute], conflicts with a prior decision of this circuit, and creates a needless intercircuit conflict with all courts of appeals that have addressed the issue"²⁵ and in another that alleged creation of an intercircuit conflict, contravention of a Supreme Court decision, and creation of a conflict within the circuit's own law.²⁶ These assertions came in published dissents, but such combined claims are also regularly found in the judges' prior discussion over taking cases en banc. For example, in the course of arguing that a panel had produced an opinion that conflicted with Ninth Circuit precedent and "also needlessly creates an intercircuit conflict," a judge also claimed that "the decision conflicts with Supreme Court precedent," which he went on to analyze at some length.²⁷ In a labor-election case, a judge stopped the clock, that is,

24. Memorandum from Stephen Reinhardt to Associates (Jan. 26, 1987), *Warren v. Bowen*, 804 F.2d 1120 (9th Cir. 1986), *amended on denial of reh'g* by 817 F.2d 63 (9th Cir. 1987).

25. *Nw. Envtl. Advocates v. City of Portland*, 74 F.3d 945, 948 (9th Cir. 1996) (O'Scannlain, dissenting from denial of rehearing en banc). The panel disposition is at 56 F.2d 959 (9th Cir. 1995).

26. *Indian Oasis-Baboquivari Unified Sch. Dist. No. 40 v. Kirk*, 91 F.3d 1240, 1245 (9th Cir. 1995) (Reinhardt, J., dissenting).

27. Memorandum from J. Clifford Wallace to active & senior judges (Mar. 4, 1993), *United States*

asked for a suspension of deadlines for en banc calls so the panel could reconsider its work, “because the opinion is arguably in conflict with Supreme Court and Ninth Circuit precedent,” with intercircuit matters further implicated because an earlier Ninth Circuit ruling utilized by the present panel drew on a Fifth Circuit case.²⁸ Although in a later memo the calling judge made clear that his “major concern is to keep Ninth Circuit law intact,” he added the claim of intercircuit conflict.²⁹ This judge also combined claims in a case concerning the law of search and seizure, saying that “the decision conflicts with Supreme Court precedent and with our own. It also needlessly creates an intercircuit conflict.”³⁰

These multiple elements may be interwoven. Claims of intercircuit conflict are related to other elements, as when an intercircuit conflict is said to be mirrored by intracircuit divisions.³¹ The mixture of intra- and intercircuit conflict claims is illustrated in two cases in which the panel itself made a sua sponte en banc call before issuing its ruling. In a drug-conspiracy case, briefs and oral argument had convinced the panel “that Ninth Circuit opinions are in conflict.”³² Although not the basis for the panel’s en banc call, intercircuit conflict was also implicated because the Ninth Circuit cases cited to a Fifth Circuit ruling based on that circuit’s doctrine, which conflicted with the Ninth Circuit’s, and because, as the panel noted, “This circuit stands alone in its interpretation” of the relevant statute.³³ Then in an immigration case, when the panel had sought en banc hearing because of an intracircuit conflict, a judge who had sat on the allegedly conflicting case suggested it could be distinguished, but in so doing, introduced mention of an existing intercircuit conflict.³⁴

Because piling claim on claim may create a stronger position than would a focus on only one element, it is not unusual to find a panel dissenter or off-panel judge combining a complaint about an intercircuit conflict with objections to other sins committed by the panel majority. We see this in a dissent to an en banc court’s holding that materiality is an element of the offense of making a false statement in a matter within

v. Mota, 982 F.2d 1384 (9th Cir. 1994).

28. Memorandum from J. Clifford Wallace to panel (Oct. 8, 1992), *Am. W. Airlines v. Nat’l Mediation Bd.*, 969 F.2d 777 (9th Cir. 1992).

29. Memorandum from J. Clifford Wallace to panel (Jan. 19, 1993), *Am. W. Airlines*, 969 F.2d 777.

30. Memorandum from J. Clifford Wallace to active & senior judges (Mar. 4, 1993), *Mota*, 982 F.2d 1384.

31. See *In re Yochum*, 89 F.3d 661, 666 (9th Cir. 1996) (“This intra-circuit conflict mirrors the circuit split.”).

32. Memorandum from panel to Associates (Feb. 9, 1993), *United States v. Shabani*, 993 F.2d 1419 (9th Cir. 1992), *rev’d*, 513 U.S. 10 (1994).

33. *Id.*

34. Memorandum from Mary M. Schroeder to Associates (July 7, 1992), *Butros v. INS*, 990 F.2d 1142 (9th Cir. 1993) (en banc).

a government agency's jurisdiction. In that dissent, Judge Alex Kozinski, calling the majority's opinion a "tsunami," stated,

It's not every day, after all, that we provoke a conflict with every other regional circuit, defy Supreme Court authority, implicitly overrule several lines of our own case law—thereby creating a spiderweb of secondary circuit conflicts—and pave the way for successful habeas petitions for scores, perhaps hundreds, of prisoners convicted of a broad range of federal crimes.³⁵

Judge Kozinski also, in calling for en banc rehearing in another case in which the panel allowed a suit by people injured while attempting to steal wire on a former military installation, said the panel had handed down "a most remarkable ruling," which was "not merely unsupported by the facts of this case or by legal authority" but also "offends common sense and disconnected the rule of law from standards of morality" and "shocks the conscience."³⁶

With litanies like these, one is surprised not to see claims of crimes against man and nature, and they make it appear that a judge may be throwing mud at the wall in the hopes that some will stick. They also reinforce the notion that many such claims are used as rhetorical devices. Indeed, a judge's overblown rhetoric may scare off colleagues and definitely prompts rejoinders. While another judge agreed that the latter case should have been heard en banc, he drafted a separate opinion to note "that the failure of a circuit to take a case en banc does not necessarily presage the early fall of the Republic."³⁷

While some judges focus more on one (or some) of the reasons for going en banc and may pay particular heed to specific areas of the law in which they are more likely to think that their colleagues have "gone wrong," often the reasons given for—or against—en banc rehearing are used to support the judge's own position, with a reason used to seek en banc rehearing in one case but used as a shield against taking en banc other rulings the judge likes. This was well captured in a doggerel by the late Judge Joseph Sneed, entitled *All One Needs to Know About En Banc Memos*:

35. *United States v. Gaudin*, 28 F.3d 943, 955 (9th Cir. 1994) (Kozinski, J., dissenting). Despite the hyperbole, the Supreme Court, which listens not infrequently to Judge Kozinski, affirmed. *See United States v. Gaudin*, 515 U.S. 506 (1995).

36. Memorandum from Alex Kozinski to Associates (June 19, 1987), *Henderson v. United States*, 734 F.2d 483 (9th Cir. 1984), *amended and superseded by* 784 F.2d 942 (9th Cir. 1986), *withdrawn and superseded in part by* 827 F.2d 1233 (9th Cir. 1987), *and withdrawn and superseded by* 846 F.2d 1233 (9th Cir. 1988). The citations indicate that the panel revised the opinion multiple times. Although the calling judge at one point circulated a dissent from denial of rehearing en banc, the panel's changes apparently led him not to file it.

37. Alfred T. Goodwin, Draft opinion dissenting from denial of rehearing en banc (undated), *Henderson*, 734 F.2d 483.

Your case is an abomination
 To our fair part of this great nation,
 Banishment by en banc it must be,
 Your mess the Supremes must never see.
 But my great case, vital and profound,
 Addresses issues in ways so sound
 Which the wise Supremes will not ignore,
 So let not your en banc block their door.
 Our en banc memos do so opine,
 First when your case and then next when mine.³⁸

B. SPECIFIC REASONS

We now turn to examine more closely some of the basic categories of reasons proffered for—or against—hearing a case en banc. We begin with claims that the panel erred (“got it wrong”) and then turn to elements of FRAP 35—intracircuit conflict, conflict with the Supreme Court, and “exceptional importance”—before turning to intercircuit conflict and institutional reasons for not proceeding en banc. This is followed by discussion of some general reasons offered for not taking cases en banc. The last Part of this Article focuses on the relationship between rehearing cases en banc and their progress toward the Supreme Court.

I. “The Panel Got It Wrong”

The most likely reason for rehearing en banc is that judges do not like the panel’s ruling. As Justice Antonin Scalia stated to the Commission on Structural Alternatives for the Federal Courts of Appeals (the “White Commission”), en banc review was intended “to correct and deter panel opinions that are pretty clearly wrong.”³⁹ Whatever else judges may assert, their memoranda supporting en banc rehearing “almost invariably argue that the panel opinion is erroneous.”⁴⁰ And in their published dissents from denials of en banc rehearings, judges speak most often to the substance of the panel’s ruling; they argue that, for one or another reason, the panel erred.⁴¹ Arthur Hellman has

38. Memorandum from Joseph Sneed to Associates (Nov. 10, 1987). He commented: “An idle mind (a sometime benefit of senior status) is a doggerelist’s workshop. The poor lines below do not beggar truth, however. Don’t get me wrong—I enjoy reading memoranda that reflect passionate outrage.” *Id.*

39. Letter from Justice Antonin Scalia to Justice Byron White, Comm’n on Structural Alternatives for the Fed. Courts of Appeals (Aug. 21, 1998).

40. Arthur D. Hellman, *Getting It Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals*, 34 U.C. DAVIS L. REV. 425, 455 n.104 (2000).

41. For a clear published statement about “getting it wrong,” see the comment of Sixth Circuit Judge Jeffrey Sutton: “With all respect to the panel majority, this case was not decided correctly.” *Mitts v. Bagley*, 626 F.3d 366, 366 (6th Cir. 2010) (Sutton, J., concurring in denial of rehearing en banc).

indicated that this occurs both for panel rulings that favor individual rights *and* for those favoring the government.⁴²

When off-panel judges debate with the panel over the correctness of interpretation of statutes or constitutional provisions or question a rule the panel has adopted, they really are saying the panel “got in wrong,” even though they do not do so *in haec verba*. In a sentencing case, a judge calling for en banc thought the panel had interpreted the statute in a way that “frustrates the congressional intent behind those provisions,”⁴³ and another judge, supporting the call, said “the majority’s interpretation . . . destroys the delicate balance between the legislative, executive and judicial roles in sentencing.”⁴⁴ However, a judge opposed to en banc rehearing in that case found no ambiguity in the statute and “nothing odd or irrational about the majority’s reading of Section 4205.”⁴⁵ When, in addition to saying that the panel was wrong, judges add other reasons for en bancing a case, such as the presence of an intracircuit or intercircuit conflict, it may be just another way of saying “This is a *really* bad decision” and that the panel “got it *very* wrong.” The centrality of “the panel got it wrong” is seen in a law clerk’s suggestion that, despite the importance of the securities case at issue, “unless you disagree with the result, this is not a reason for rehearing.”⁴⁶

Examples of language indicating that a judge calling for en banc believed the panel “got it wrong” are numerous. Thus a panel majority’s decision was said to make “bad law which is sure to haunt us for many years.”⁴⁷ This was echoed by the panel’s dissenter in response to the majority’s defense of its opinion even though he had not voted in the panel to rehear the case en banc: “I predict that if allowed to stand, [this case] will come back to haunt us . . . for lack of standards.”⁴⁸ A panel in a case concerning a life sentence with or without parole was said to have “applied an incorrect standard,”⁴⁹ and another judge objected that a panel opinion adopted a standard that placed too high a burden on the government.⁵⁰ To say that “[s]trong policy considerations are at war with

42. Hellman, *supra* note 40, at 449.

43. Memorandum from William Canby to Associates (July 30, 1986), *United States v. Gwaltney*, 790 F.2d 1378 (9th Cir. 1986).

44. Memorandum from Warren Ferguson to Associates (Aug. 4, 1986), *Gwaltney*, 790 F.2d 1378.

45. Memorandum from Alex Kozinski to Associates (Aug. 8 1986), *Gwaltney*, 790 F.2d 1378.

46. Memorandum from Barbara Reeves, Law Clerk, to Alfred T. Goodwin (Nov. 8, 1973), *Manor Drug Stores v. Blue Chip Stamps*, 492 F.2d 136 (9th Cir. 1973), *rev’d*, 421 U.S. 723 (1975).

47. Memorandum from Cynthia Holcomb Hall to Associates (Nov. 15, 1988), *Keith v. Volpe*, 858 F.2d 467 (9th Cir. 1988).

48. Memorandum from William Norris to Associates (Dec. 1, 1988), *Keith*, 858 F.2d 467. He later supported the en banc call.

49. Memorandum from William Canby to Associates (Jan. 20, 1993), *Payne v. Borg*, 982 F.2d 335 (9th Cir. 1982).

50. Memorandum from Alex Kozinski to Associates (Mar. 27, 1973), *United States v. Vasquez-*

the majority's conclusion"⁵¹ is yet another version of "they got it wrong." So is the comment, by a former district judge who had handled a case similar to the one then before him for en banc consideration, that "several of my lawyer and non-lawyer knowledgeable friends insist that it is a misguided decision," although the judge conceded this "lends very little to the persuasiveness of en banc consideration."⁵²

Another type of panel error can be seen when a judge called for en banc hearing because, while he thought "the majority has correctly stated the law," he believed it "then has completely misapplied it."⁵³ In an interesting twist in the same case, the panel author, after considering memoranda from the panel dissenter and several off-panel colleagues, recognized the problem they had posed and said that "en banc hearing might not be a bad idea, if only to establish clarity."⁵⁴ And in a case about an adult-entertainment zoning ordinance, a judge calling for en banc, beyond disputing the substance of the panel's ruling, objected to its use of an unpublished disposition in the case, saying that the court's own rules required publication because the ruling was clarifying the law.⁵⁵ Also complaining in an en banc call about the use of an unpublished disposition was a judge who, in addition to being concerned about a rule application, said there was also "an important issue as to whether we should dispose of capital appeals in unreasoned dispositions, at least when significant legal issues may be present."⁵⁶

The result orientation of en banc calls can be seen in the use by that judge, who elsewhere stated that all capital cases should receive en banc treatment,⁵⁷ of the term "injustice" in relation to panel holdings.⁵⁸ And one can also see judges defending their own previous rulings—with latter panels not "getting it right"—when the judges of an earlier panel felt a later panel had undone their work and thus called for en banc rehearing

Chan, 978 F.2d 546 (9th Cir. 1992). In another instance of piling on "wrongs," he added that the panel "has done much more than merely bollix its review of the facts" but had produced "a terrible idea" in addition to being "inconsistent with the precedents of the Supreme Court and this court."

51. Memorandum from Alex Kozinski to Associates (June 19, 1987), *Henderson v. United States*, 734 F.2d 483 (9th Cir. 1984).

52. Memorandum from J. Blaine Anderson to Associates (June 25, 1987), *Henderson*, 734 F.2d 483.

53. Memorandum from Procter Hug, Jr. to Associates (Aug. 7, 1995), *Roy v. Gomez*, 55 F.3d 1483 (9th Cir. 1995), *rev'd en banc*, 81 F.3d 863 (9th Cir. 1996), *vacated sub nom.* *California v. Roy*, 519 U.S. 2 (1996). Judge Hug said he found it "frustrating" to have to make an en banc call here.

54. Memorandum from Alfred T. Goodwin to Associates (Aug. 21, 1995), *Roy*, 55 F.3d 1483.

55. Memorandum from William Norris to Associates (Apr. 19, 1983), *Playtime Theatres v. City of Tacoma*, 694 F.2d 723 (9th Cir. 1982) (unpublished table decision).

56. Memorandum from Stephen Reinhardt to Associates (Sept. 15, 2000), *United States v. Zuno-Arce*, 209 F.3d 1095 (9th Cir. 2000), *amended by* 245 F.3d 1108 (9th Cir. 2001).

57. In the early 1970s, there were many calls to take Selective Service cases, particularly those involving conscientious objectors (C.O.s) en banc.

58. Memorandum from Stephen Reinhardt to Associates (Sept. 15, 2000), *Zuno-Arce*, 209 F.3d 1095.

because they had “unanimously concluded precisely the opposite of what the panel has now held,” with nothing having taken place since—“no intervening statute, Supreme Court decision, or en banc decision of this court” to call their ruling into question.⁵⁹ In short, we were right and they are wrong—plus we were first.

One could assume that a judge’s panel dissent would indicate that this judge believed the panel “got it wrong,” so basing an en banc call on that dissent is a way of saying the panel was wrong. At times the en banc call simply points to the dissent as the call’s basis.⁶⁰ For example, a judge indicated that he would base his en banc call on lack of consistency with circuit precedent, “for reasons that Judge Koelsch states in his dissent.”⁶¹ And the judge calling for en banc on the validity of the Hawaii Land Reform Act said, “When contrasted with Judge Ferguson’s excellent dissent, the majority opinion seems clearly wrong.”⁶² Likewise, a judge relying on the panel dissent in his call said, “Judge Nelson’s excellent dissent leaves me with nothing more to say in support of my call.”⁶³ In another case, a judge calling for en banc said a panel member’s partial dissent “makes the point better than I could, and there is no point repeating his position here”—although he did go on to raise and discuss an additional point.⁶⁴

Some judges think, however, that simply pointing to the panel dissent as the basis for an en banc call is insufficient to satisfy the General Order 5.2(b)⁶⁵ language “with a memorandum setting forth the reasons” for the call.⁶⁶ This could be because a panel dissent might focus solely on that particular case and not indicate larger problems with circuit precedent or focus on a particular issue which others thought en banc-worthy. And, although judges do base en banc calls on a panel

59. Memorandum from William Fletcher, Harry Pregerson & Ronald Gould to Associates (May 10, 2006), *United States v. Novak*, 441 F.3d 819 (9th Cir. 2006), *vacated en banc and remanded*, 476 F.3d 1041 (9th Cir. 2007).

60. For example, “I call for an en banc vote based on Judge O’Scannlain’s dissent in this case.” Memorandum from Harry Pregerson to Associates (June 12, 1992), *Jordan v. Gardner*, 953 F.2d 1137 (9th Cir. 1992), *aff’d en banc*, 986 F.2d 1521 (9th Cir. 1993); see Memorandum from William Canby to Associates (June 17, 1992), *Jordan*, 953 F.2d 1137 (“And we should right the wrong so eloquently described by Judge O’Scannlain.”).

61. Memorandum from Shirley Hufstедler to Associates (Oct. 7, 1975), *Wiren v. Eide*, 542 F.2d 757 (9th Cir. 1976).

62. Memorandum from William Norris to Associates (June 1, 1983), *Midkiff v. Tom*, 702 F.2d 788 (9th Cir. 1983), *rev’d sub nom. Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

63. Memorandum from William Norris to Associates (Dec. 22, 1986), *Hughes v. Idaho State Bd. of Corrections*, 800 F.2d 905 (9th Cir. 1986).

64. Memorandum from William Canby to Associates (July 30, 1986), *United States v. Gwaltney*, 790 F.2d 1378 (9th Cir. 1986).

65. U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, GENERAL ORDERS, Order 5.2(b) (2008).

66. Memorandum from Robert Boochever to Associates (Oct. 8, 1982), *Ronwin v. State Bar of Ariz.* 686 F.2d 692 (9th Cir. 1981).

dissent, they may go further, as one judge did in saying that, while he agreed with the dissenter's concerns, "I write to emphasize my own concerns," which he then enumerated.⁶⁷

Yet a judge who dissents from a panel opinion does not necessarily seek to have the case reheard en banc. At times, the dissenter might vote for panel rehearing but not for en banc rehearing, an indication that not all cases thought erroneously decided are believed worthy of en banc rehearing. Conversely, a case might be thought worthy of en banc rehearing but not of panel rehearing.⁶⁸ In other instances, the dissenter might not initially seek en banc rehearing but later might join other judges who have done so. In one case that later reached the Supreme Court, the panel had been divided, and the majority opinion's author transmitted to his court colleagues a message from the dissenting judge, who did not, at that time, "intend to activate an en banc vote, because I have spoken my piece in dissent," but who stated that, should someone else seek to take the case en banc, "I would join in an affirmative en banc vote."⁶⁹ The possible disjuncture between panel dissent and (not) seeking rehearing en banc is also made clear in the observation by the panel majority's author that, while he had written many dissents, he had requested en banc rehearing in only two, one of which he regretted even though his position was adopted by the en banc court.⁷⁰ His stance about not voting for en banc came from the "teaching" of a late judge "that we should not take cases en banc simply because we disagree with the results by the panel majorities."⁷¹ Given that en banc rehearing is not sought in all cases in which a judge disagrees with the result, it is perhaps not surprising that judges are selective in seeking en banc rehearing and that they look for cases that they think are the "more appropriate vehicle for . . . reconsideration of the rule in general," even if it means shifting an en banc call from one case to another.⁷²

What response can be made when judges seek en banc rehearing because the panel "got it wrong"? One is that the judge calling for en

67. Memorandum from Charles Wiggins to Associates (June 25, 1986), *Jensen v. City of San Jose*, 806 F.2d 899 (9th Cir. 1986) (en banc).

68. See this comment by a staff attorney: "Whether the case should be given rehearing en banc is perhaps a closer question than whether reconsideration by the panel is warranted." Memorandum from Norm Vance, Civil Motions Attorney, to panel (Oct. 21, 1986), *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 823 F.2d 1349 (9th Cir. 1987) (en banc).

69. Memorandum from James R. Browning to Associates (Nov. 9, 1973), *Manor Drug Stores v. Blue Chip Stamps*, 492 F.2d 136 (9th Cir. 1973) (reporting the views of Judge Shirley Hufstедler).

70. Memorandum from Walter Ely to Associates (Oct. 17, 1978), *United States v. Deal*, 587 F.2d 956 (9th Cir. 1978).

71. *Id.*

72. Memorandum from Stephen Reinhardt to Associates (Sept. 15, 2000), *United States v. Zuno-Arce*, 209 F.3d 1095 (9th Cir. 2000), *amended by* 245 F.3d 1108 (9th Cir. 2001).

banc is simply seeking a different result. In one case in which the panel dissenter had said in an en banc call that the majority “establishes dangerous precedent, striking at the very heart of the protections afforded by the Fourth Amendment,”⁷³ the panel author’s rejoinder was that the calling judge “overstates the importance of that part of the majority opinion that he dislikes and understates the importance of that part he likes.”⁷⁴ In another case, when an off-panel judge noted the calling judge’s “extrapolated parade of horrors” and hoped the panel “sees through this fire and brimstone approach and rejects his effort to get the . . . panel (or an en banc panel) to reach his own desired result,”⁷⁵ the panel pushed back by saying that the conflicts to which the caller had pointed “are based on an extravagant misinterpretation of our opinion” (saying in effect that the challenger had “got it wrong”) and by asserting that “convening an en banc court to address . . . disagreement with the *result* reached in our opinion would be . . . a poor use of eleven judges’ time.”⁷⁶ Likewise, in another case in which the calling judge had made a strong, multipronged attack on the panel’s opinion, the panel responded that it had only remanded for determinations on several key matters and had “decided none of the principal issues about which the government and [the] Judge . . . complain.”⁷⁷

Another response is that disagreement with a panel result does not warrant having an en banc. A judge who disagrees with a panel ruling could nonetheless vote against en banc rehearing because, as a Sixth Circuit judge stated the matter, “No one thinks a vote against rehearing en banc is an endorsement of a panel decision.”⁷⁸ Illustrative of this view is a Ninth Circuit judge’s observation, “I do not feel the majority opinions so clearly wrong as to warrant en banc reconsideration,”⁷⁹ and another commented, “To date, merely bad law has not made questions en-banc-worthy.”⁸⁰ These remarks were but other statements of the idea that the court could not rehear en banc each case some thought wrongly

73. Memorandum from Cecil Poole to Associates (Dec. 31, 1986), *United States v. Freitas*, 800 F.2d 1451 (9th Cir. 1986).

74. Memorandum from Joseph Sneed to Associates (Jan. 8, 1987), *Freitas*, 800 F.2d 1451.

75. Memorandum from Cecil Poole to all judges (Mar. 30, 1993), *United States v. Vasquez-Chan*, 978 F.2d 546 (9th Cir. 1992).

76. Memorandum from panel to Associates (Apr. 12, 1993), *Vasquez-Chan*, 978 F.2d 546.

77. Memorandum from Dorothy W. Nelson to Associates (July 3, 1987), *Henderson v. United States*, 734 F.2d 483 (9th Cir. 1984).

78. *Mitts v. Bagley*, 626 F.3d 366, 370 (6th Cir. 2010) (Sutton, J., concurring in denial of rehearing en banc).

79. Vote memorandum from Walter Ely (Sept. 26, 1976), *Harmsen v. Smith*, 542 F.2d 496 (9th Cir. 1976).

80. Memorandum from Alfred T. Goodwin to Associates (Feb. 24, 1977), *Davis v. Cnty. of L.A.*, Nos. 73-3008, 73-3009, 1976 WL 3779 (9th Cir. Oct. 20, 1976), *withdrawn and superseded by* 566 F.2d 1344 (9th Cir. 1977), *vacated sub nom. Cnty. of L.A. v. Davis*, 440 U.S. 625 (1978).

decided. In also opposing an en banc call, Judge James Browning stated that he thought the problems to which Judge Goodwin, who had called for en banc, referred “are no more difficult or important than dozens of others that constantly face the court.”⁸¹ The distinction between disagreeing with a case result and supporting en banc hearing is quite clear in the statement by one of the court’s then senior members, who wrote, “Ordinarily I would not call for a hearing in banc merely because I felt that a panel’s distinction of a previous decision of ours would not hold water. If we all started doing that, we would drown in a sea of in bancs.”⁸² And if simple disagreement with a panel’s result or holding was not by itself enough to warrant en banc rehearing, how much less so when the disagreement was over dictum in a panel ruling? As one judge put it, increased caseload meant that “an en banc on dicta is a luxury this court can ill afford.”⁸³

The converse of seeking en banc rehearing to correct panel error is *not* rehearing cases en banc because of agreement with the result. However, that is only part of the reason, for as we have just seen, judges do not call for en banc rehearing each and every time they disagree with the panel’s result. As Hellman has observed, even “the fact that the panel’s result would not prevail in the full court does not necessarily mean that the case will go en banc.”⁸⁴ Some judges may not care about the panel’s ruling one way or the other; that is, rulings can be said to fall within their “zone of indifference.” Others may disagree with the panel’s ruling but not have much passion about it, as when “they believe that the panel opinion, although perhaps erroneous, is not important enough to warrant en banc correction.”⁸⁵ We see this when, in a case which relied on a prior circuit ruling, a judge demonstrated that possible disagreement with a ruling would not be enough to lead him to initiate en banc activity. He said he would “shed no tears” if the Supreme Court or the circuit were to reverse the earlier case, but he “would ask someone else to do the hatchet work.”⁸⁶

81. Memorandum from James R. Browning to Associates (Apr. 25, 1973), *United States v. Price*, 474 F.2d 1223 (9th Cir.), *reh’g denied*, 484 F.2d 485 (9th Cir. 1973).

82. Memorandum from Ben C. Duniway to Richard Chambers (June 27, 1973), *Deep v. United States*, 497 F.2d 1316 (9th Cir. 1974). He thought this case different because of a concern stated by the Solicitor General in supporting rehearing en banc.

83. Memorandum from Thomas Tang, Betty Fletcher & Stephen Reinhardt to Associates (Apr. 13, 1992), *United States v. Powell*, 936 F.2d 1056 (9th Cir.), *amended and superseded by* 955 F.2d 1206 (9th Cir. 1991).

84. Arthur D. Hellman, *Precedent, Predictability, and Federal Appellate Structure*, 60 U. PITT. L. REV. 1029, 1049 (1999).

85. Hellman, *supra* note 40, at 454.

86. Memorandum from Alfred T. Goodwin to Associates (Mar. 1, 1979), *Walker v. Loggins*, 608 F.2d 731 (9th Cir. 1979). The earlier case was *Bittaker v. Enomoto*, 587 F.2d 400 (9th Cir. 1978).

2. *Intracircuit Conflict*

A not uncommon claim in calls for en banc rehearing is that a direct conflict exists between a present panel ruling and prior circuit precedent. The importance of such claimed intracircuit conflict to the question of en banc rehearing is evident in explanations by judges on both sides of going en banc. One who opposed an en banc call said, "I have some doubt about the result, but there is no conflict with any other decision of our court,"⁸⁷ and one who supported en banc, while arguing that the court was, "in good conscience, bound to take a case en banc when necessary to secure and maintain uniformity of our decisions," felt compelled to note that "apparently there is no case squarely in conflict" with the case, with no one having found another Ninth Circuit ruling that "reaches the astonishing result reached."⁸⁸

A claim of intracircuit conflict sometimes takes the form that two panels ruling on the same issue have produced results in conflict, or at least in tension, with each other. Thus, in an immigration case in which "firm resettlement" elsewhere was said to bar asylum, the judge initiating en banc proceedings called the panel's ruling "the clearest possible case of a panel violating directly controlling precedent in order to reach a result it desires" and added that it "creates the paradigmatic conflict necessitating en banc review," making the ruling "indeed a poster-child both for how a panel may not act and for when the court must go en banc."⁸⁹ If conflict is not head-on, nonetheless a panel may be said to have inadequately distinguished its case from previous ones, thus leaving an intracircuit conflict with which the full court must deal. More serious is the claim that the panel has gone further and "overruled" a previous decision or even "improperly" done so.⁹⁰ Part of these arguments is that a latter panel's ruling said to be contrary to an earlier one would introduce "instability" in circuit precedent.⁹¹

Other examples of claimed intracircuit conflict are legion, perhaps because it appears to be the most frequently cited reason for an en banc call. For example, a ruling on reasonable suspicion to support a Border Patrol investigatory stop was challenged as "in direct conflict with prior

87. Memorandum from James R. Browning to Associates (Oct. 27, 1975), *United States v. Hall*, 543 F.2d 1229 (9th Cir. 1976) (en banc).

88. Alfred T. Goodwin, Draft opinion dissenting from denial of rehearing en banc (undated), *Henderson v. United States*, 734 F.2d 483 (9th Cir. 1984).

89. Memorandum from Stephen Reinhardt to Associates (Dec. 20, 2005), *Maharaj v. Gonzales*, 416 F.3d 1088 (9th Cir. 2005), *rev'd en banc*, 450 F.3d 961 (9th Cir. 2006).

90. Memorandum from William Fletcher, Harry Pregerson & Ronald Gould to Associates (May 10, 2006), *United States v. Novak*, 441 F.3d 819 (9th Cir. 2006), *vacated en banc and remanded*, 476 F.3d 1041 (9th Cir. 2007). The case said to have been overruled was *United States v. Jackson*, 229 F.3d 1223 (9th Cir. 2000).

91. Memorandum from William Fletcher to judges (July 11, 2006), *Novak*, 441 F.3d 819.

circuit precedent,”⁹² and in another border-search case, the calling judge said, “I do not believe the majority opinion can be reconciled with” three Ninth Circuit cases, as the dissenter had pointed out.⁹³ Another judge, who believed the panel opinion “conflicted with prior decisions of this court,” called for en banc rehearing after the panel revised its opinion, because “the conflicts remain.”⁹⁴ In a case on the Clean Water Act conviction of a sewage-treatment plant manager, a judge stated his concern “that the decision does not seriously address a prior decision with which it may be inconsistent.”⁹⁵ And still another judge said that a panel ruling on a city adult-entertainment zoning ordinance had “applied a test . . . that conflict[s] with the test applied by the Supreme Court . . . and by the Ninth Circuit in two cases.”⁹⁶ In a Federal Rule of Civil Procedure 11 case, a judge had “collected . . . from a stack of recent slip opinions” to show that panels were going in different directions as to sanctions for misconduct on appeal, which led him to “conclude that the law of this circuit is in a state of confusion.”⁹⁷

Although intracircuit conflict is alleged most often by an off-panel judge, apparent conflict or tension between two or more previous cases might lead a panel trying to reconcile those conflicting cases to seek en banc hearing of their case to undo the confusion. A panel dealing with copyright liability found an intracircuit conflict between the case they thought controlling and subsequent cases.⁹⁸ Another panel that found a “disagreement between the panels’ approaches” thought en banc was necessary to reevaluate a prior rule, particularly as there was “sufficient confusion about the status of our circuit’s law in this area that our court should be concerned.”⁹⁹ The author of another panel’s proposed opinion reported that the panel “could not reconcile the holdings” in two cases¹⁰⁰

92. Memorandum from Cynthia Holcomb Hall to Associates (Mar. 12, 1993), *United States v. Rodriguez*, 976 F.2d 592 (9th Cir. 1992), *amended on denial of reh’g* by 997 F.2d 1306 (9th Cir. 1993).

93. Memorandum from Shirley Hufstedler to Associates (Oct. 7, 1975), *Wiren v. Eide*, 542 F.2d 757 (9th Cir. 1976).

94. Memorandum from J. Clifford Wallace to active & senior judges (Mar. 31, 1992), *United States v. Powell*, 936 F.2d 1056 (9th Cir.), *amended and superseded* by 955 F.2d 1206 (9th Cir. 1991).

95. Memorandum from Andrew Kleinfeld to Associates (Dec. 23, 1993), *United States v. Weitzenhoff*, 1 F.3d 1523 (9th Cir. 1993).

96. Memorandum from William Norris to Associates (Apr. 19, 1983), *Playtime Theatres v. City of Tacoma*, 694 F.2d 723 (9th Cir. 1982) (unpublished table decision).

97. Memorandum from Charles Wiggins to Associates (Sept. 29, 1989), *Partington v. Gedan*, 880 F.2d 116 (9th Cir. 1989).

98. Memorandum from panel to all active judges (Aug. 23, 1993), *Subafilms v. MGM-Pathe Commc’ns Co.*, 988 F.2d 122 (9th Cir. 1993) (unpublished table decision), *vacated in part and remanded en banc*, 24 F.3d 1088 (9th Cir. 1994).

99. Memorandum from Betty B. Fletcher to Associates (Aug. 31, 1989), *First State Ins. Co. v. W. Inv. & Dev. Corp.*, 895 F.2d 1576 (9th Cir. 1990).

100. Memorandum from Robert Beezer to Associates (July 6, 1993), *N. Star Alaska v. United States*, 1 F.3d 967 (9th Cir.), *remanded en banc*, 9 F.3d 1430 (9th Cir. 1993).

and, after messages from one judge saying that the court had agreed “that an en banc call should be made when opinions by our court cannot be reconciled,”¹⁰¹ did call for en banc consideration. However, another judge, arguing that “panel opinions in conflict with earlier decisions should be taken en banc,” did not think the court should pick and choose the way the Supreme Court did: “We should not use our in banc machinery where direct conflicts exist . . . as if it were a certiorari process.”¹⁰²

A frequent response to a claim of intracircuit inconsistency is that the cases can be distinguished. Dealing with a request for initial en banc presented to a motions panel, a staff attorney said of the argument that two earlier cases were inconsistent, “I submit that the two cases could be distinguished by the fact that they each involve different types of casino transactions.”¹⁰³ Responding to another en banc call, the author of the panel majority’s per curiam opinion said the majority was “satisfied that the distinction we have drawn between this case and [another]” was adequate, but he went on to “recognize that it might well be argued that it is not.”¹⁰⁴ He then made the interesting offer that if the members of the panel in the other case then being considered on the issue “think we have dealt unfairly with” that case, the present panel majority would join in an en banc call.¹⁰⁵ One judge put well the question of whether conflicts really exist when, in responding to an en banc call, he said one issue in the “en banc problem” was “whether we have created an intra-circuit conflict of precedent, or whether judges who disagree with the decision perceive a conflict when none exists,” adding, “The panel majority believes no conflict exists.”¹⁰⁶

3. *Conflict with the Supreme Court*

FRAP 35’s second consideration for en banc rehearing is possible conflict between a circuit ruling and the Supreme Court. Judges seeking en banc hearing often claim that a panel has ignored the high court’s rulings or failed to follow its dictates. A typical claim is that a panel

101. Memorandum from Betty B. Fletcher to Associates (June 12, 1993), *N. Star Alaska*, 1 F.3d 967.

102. Memorandum from Joseph Sneed to Associates (May 9, 1977), *J.R. Simplot Co. v. U.S. Dist. Ct.*, Nos. 76-1893, 76-1995, 1976 WL 3826 (9th Cir. Nov. 12, 1976).

103. Memorandum from Beth Levine to Alfred T. Goodwin (Nov. 22, 1982), *Desert Palace, Inc. v. Comm’r of Internal Revenue*, 698 F.2d 1229 (9th Cir. 1982) (unpublished table decision).

104. Memorandum from James R. Browning to Associates (July 18, 1974), *United States v. Vielguth*, 502 F.2d 1257 (9th Cir. 1974).

105. *Id.*

106. Memorandum from Alfred T. Goodwin to Associates (Aug. 21, 1995), *Roy v. Gomez*, 55 F.3d 1483 (9th Cir. 1995), *rev’d en banc*, 81 F.3d 863 (9th Cir. 1996), *vacated sub nom. California v. Roy*, 519 U.S. 2 (1996).

ruling was “inconsistent with the precedents of the Supreme Court.”¹⁰⁷ Such a direct conflict was claimed when the panel said a district judge had abused his discretion by declining to allow a defendant to swear his own oath. Prior to calling for en banc, a judge said, “The majority’s reading of the First Amendment is . . . at odds with recent Supreme Court precedent,”¹⁰⁸ specifically *Employment Division v. Smith*.¹⁰⁹ In another case, in asking a panel to call for a party’s response to a suggestion for rehearing en banc (“SREB”), en banc coordinator Judge Goodwin said both the panel opinion and the petition made it “appear that we may be in conflict with Supreme Court cases cited by the government.”¹¹⁰ And another judge called for en banc hearing because “the majority opinion cannot be squared with” three Supreme Court opinions.¹¹¹ Still another en banc call contained the claim that en banc rehearing was needed, in part, “to be in accord with Supreme Court precedent.”¹¹²

A direct statement of conflict came as part of an en banc call in an attorney’s fee case, in which a judge said, as to a case the Supreme Court had decided after the panel’s ruling, “The decision is contrary to *Kentucky v. Graham*.”¹¹³ What followed was disputation between this judge, who had dissented on the panel, and the panel author, with others involved, as to whether the Supreme Court had in fact done what the dissenter claimed.¹¹⁴ And in an antitrust case that was eventually decided en banc, the judge calling for en banc rehearing said that the panel decision “deviates substantially from established Supreme Court and Ninth Circuit antitrust doctrine and seriously erodes the integrity of antitrust law in general,”¹¹⁵ and a colleague who supported the en banc call was later to say, with respect to an amended opinion in the case, that it “continues to apply incorrect premises to . . . antitrust analysis—

107. Memorandum from Alex Kozinski to Associates (Mar. 27, 1973), *United States v. Vasquez-Chan*, 978 F.2d 546 (9th Cir. 1992).

108. Memorandum from J. Clifford Wallace to active & senior judges (Oct. 16, 1982), *United States v. Ward*, 973 F.2d 730 (9th Cir.), *amended and superseded by* 989 F.2d 1015 (9th Cir. 1992).

109. 494 U.S. 872 (1990).

110. Memorandum from Alfred T. Goodwin to Associates (Sept. 29, 1976), *NLRB v. Electro-Vector, Inc.*, 539 F.2d 35 (9th Cir. 1976).

111. Memorandum from Shirley Hufstедler to Associates & senior judges (Oct. 23, 1973), *Adams v. S. Cal. Nat’l Bank*, 492 F.2d 324 (9th Cir. 1973).

112. Memorandum from Procter Hug, Jr. to Associates (Aug. 7, 1995), *Roy*, 55 F.3d 1483.

113. Memorandum from John Noonan to Associates (Oct. 27, 1986) (citing *Kentucky v. Graham*, 473 U.S. 159 (1985)), *Sw. Marine, Inc. v. Campbell Indus.*, 806 F.2d 898 (9th Cir. 1986), *reh’g denied*, 811 F.2d 501 (9th Cir. 1987).

114. *E.g.*, Memoranda from Stephen Reinhardt to Associates (Oct. 29, 1986 & Dec. 12, 1986), *Sw. Marine*, 806 F.2d 898.

115. Memorandum from William Norris to Associates (Aug. 28, 1987), *RC Dick Geothermal Corp. v. Thermogenics, Inc.*, 827 F.2d 407 (9th Cir. 1987), *aff’d en banc*, 890 F.2d 139 (9th Cir. 1989).

premises that directly conflict with principles enunciated by the Supreme Court.”¹¹⁶

A judge may suggest not that the panel has reached a result in conflict with the Supreme Court but rather that the panel’s ruling was “a fundamental misapplication” of a Supreme Court ruling,¹¹⁷ for example, when two judges said the panel had misapplied the Freedom of Information Act as the Supreme Court had recently interpreted it.¹¹⁸ The calling judge likewise may dispute a panel’s apparent broadening of a Supreme Court ruling, for example, in calling a panel opinion “an unwarranted expansion of *Miranda*,” coupling this with a claim of conflict with a Supreme Court ruling applying *Miranda*.¹¹⁹ In another case involving an accident caused by a drinking off-duty soldier, a panel dissenter, while not making a claim of direct conflict with the Supreme Court, made an en banc call because “the majority incorrectly applied the policy underlying *Feres v. United States*.”¹²⁰ This drew the response that the panel “recognized that *Feres* did not control on these facts, but properly reasoned that the nonintervention rationale of *Feres* should bar any attempt to establish the military’s liability other than based on state law as required by the [Federal Torts Claims Act].”¹²¹ If conflict with Supreme Court decisions was one problem thought to warrant en banc rehearing, so was failure to address relevant Supreme Court rulings, as we see when a judge said a colleague’s general disquisition “cannot compensate for the failure to discuss *Stanford v. Texas* and *Stanley v. Georgia*,”¹²² or when a judge in another case said the panel’s “opinion does not consider an important Supreme Court case.”¹²³

116. Memorandum from J. Clifford Wallace to active & senior judges (Dec. 17, 1988), *RC Dick Geothermal Corp.*, 827 F.2d 407.

117. Memorandum from Alex Kozinski to Associates (Aug. 31, 1992), *United States v. Goland*, 897 F.2d 405 (9th Cir. 1990), *aff’d*, 959 F.2d 1449 (9th Cir. 1992), and *reh’g denied*, 977 F.2d 1359 (9th Cir. 1992).

118. Memorandum from Eugene A. Wright & Cynthia Holcomb Hall to Associates (Apr. 1, 1992), *Fed. Labor Relations Auth. v. U.S. Dep’t of the Navy*, 958 F.2d 1490 (9th Cir. 1992).

119. Memorandum from J. Clifford Wallace to active & senior judges (Oct. 27, 1992) (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)), *Commonwealth of the N. Mariana Islands v. Mendiola*, 976 F.2d 475 (9th Cir. 1992). The case noted was *Duckworth v. Eagen*, 492 U.S. 195 (1989).

120. Memorandum from Harry Pregerson to Associates (Dec. 15, 1985) (citing *Feres v. United States*, 340 U.S. 135 (1950)), *Louie v. United States*, 776 F.2d 219 (9th Cir. 1985).

121. Memorandum from Eugene A. Wright to active circuit judges (Dec. 17, 1985) (citing *Feres*, 340 U.S. 135), *Louie*, 776 F.2d 219.

122. Memorandum from William C. Norris to Associates (May 4, 1987) (citing *Stanford v. Texas*, 379 U.S. 476 (1965); *Stanley v. Georgia*, 393 U.S. 819 (1968)), *United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987).

123. Memorandum from J. Clifford Wallace to panel, active & senior judges (May 5, 1986), *Christian Science Reading Room Jointly Maintained v. City of S.F.*, 784 F.2d 1010 (9th Cir. 1986), *amended by* 792 F.2d 124 (9th Cir. 1986), and *reh’g denied*, 807 F.2d 1466 (9th Cir. 1986).

In a different aspect of relations between the Supreme Court and the courts of appeals, there are also disputes about whether the circuits should follow the Supreme Court until it changes the law, rather than altering the law before Supreme Court action, and arguments *against* rehearing en banc have been based on the futility of obtaining a change in the Justices' position. As to the former, when the case before the Ninth Circuit panel involves an issue in which the Supreme Court, in a case from another circuit, has overturned the Ninth Circuit precedent the panel was otherwise expected to apply, the question is whether, with the Supreme Court having trumped circuit precedent, the court must sit en banc to change the circuit's own law, or whether the panel by itself could recognize the obvious and make clear the intervening Supreme Court ruling's effect on circuit law. That a panel has overruled a prior circuit ruling does not, said one judge, require en banc hearing if a Supreme Court ruling has led to the panel's decision:

The panels of this court have for a long time felt free to state that decisions of this court have, in substance, been overruled by decisions of the Supreme Court of the United States. . . . Panels should still feel free to do it when they are convinced that this is the effect of subsequent Supreme Court decisions.¹²⁴

However, he had doubts whether the overruling was clear and thus favored rehearing en banc.

We should note that the same question arises when a new statute or new rules seem to supersede prior circuit precedent: Should the court of appeals sit en banc to incorporate these new provisions into its precedent even if a panel's ruling doing so contravenes prior court rulings? As one judge observed to his panel colleagues, "Congress . . . , and not the panel . . . , abolished the common-law rules of evidence in this circuit and an en banc court is not necessary to effectuate Congress' goal."¹²⁵ Or, as former Chief Judge Richard Chambers remarked to a panel for which he was the opinion author, "As I understand it, we do not need en banc when the change is dictated by an official amendment of the rules or by an intervening statute."¹²⁶

4. "Exceptional Importance"

One criterion for hearing a case en banc is its "exceptional importance," which fits well with FRAP 35's advice that en banc

124. Memorandum from Ben C. Duniway to Associates & senior judges (Sept. 20, 1982), *Garner v. United States*, 501 F.2d 228 (9th Cir. 1972).

125. Memorandum from Herbert Choy to panel (Apr. 19, 1978), *United States v. Grajeda*, 570 F.2d 872 (9th Cir.), *withdrawn per curiam*, 587 F.2d 1017 (9th Cir. 1978).

126. Memorandum from Richard Chambers to panel (Nov. 2, 1981), *Pettibone v. Cupp*, 666 F.2d 333 (9th Cir. 1982).

rehearing “is not favored and ordinarily will not be ordered.”¹²⁷ That parties to a case think a matter is important *for them* does not necessarily mean they see it as of broad importance for the court, as we see when they file a petition for rehearing (“PFR”) to overturn the result but do not seek en banc rehearing. Although panel dissenters often vote against rehearing en banc,¹²⁸ the fact that panel members occasionally vote to deny a PFR but support the en banc suggestion is evidence that judges see a larger issue in a case independent of the result, indicating a belief that the issue requires the court’s broader consideration.

When a judge states a substantive reason apart from disagreement with the panel’s result for taking a case en banc, that reason can be considered an implicit statement of the case’s importance, as when a judge said an attorney’s fee order “will affect adversely our future consideration of statutory attorney’s fee cases,”¹²⁹ or, as another judge put it, the case would “muddy the law pertaining to the EAJA [Equal Access to Justice Act].”¹³⁰ However, in many instances, a judge calling for en banc begins with words like, “I want to explain why I view this as an issue of exceptional importance worthy of en banc review.” For example, a judge began his memo supporting en banc by saying that the case, on procedures necessary before grand jury information could be shared with assisting agency investigative personnel, “presents issues of critical importance to the operation of the grand jury system.”¹³¹

In a case on sentencing for drug transactions, in which the dispute was over whether there was intracircuit inconsistency, another judge referred to “this important issue which affects every person convicted and sentenced in this circuit.”¹³² Calling for en banc review of a ruling on an adult-entertainment zoning ordinance, a judge began by saying that he “believe[d] the case raises two questions of considerable importance” relating to standards to be used in such cases, and he argued further that the court’s decision “should contribute to the body of case law on the subject for guidance of other cities and counties in the Ninth Circuit.”¹³³

127. FED. R. APP. P. 35(a).

128. That Judge Norris did so in *Keith v. Volpe*, 833 F.2d 850 (9th Cir. 1987), was noted by Judge Goodwin’s law clerk, Mark Gimpel, in flagging a contention made in the petitioner’s PFR. His undated message to the judge can be found on the face of a memorandum conveying a General Order 5.4(b) notice. See Memorandum from Mary Schroeder to Associates (Oct. 27, 1998).

129. Memorandum from Charles Wiggins to Associates (July 25, 1986), *Jensen v. Stangel*, 762 F.2d 815 (9th Cir.), *appeal after remand*, 790 F.2d 721 (9th Cir. 1985), and *withdrawn en banc sub nom. Jensen v. City of San Jose*, 806 F.2d 899 (9th Cir. 1986) (en banc).

130. Memorandum from Alex Kozinski to Associates (June 26, 1986), *Jensen*, 762 F.2d 815.

131. Memorandum from J. Clifford Wallace to Associates (Mar. 23, 1977), *J.R. Simplot Co. v. U.S. Dist. Ct.*, Nos. 76-1893, 76-1995, 1976 WL 3826 (9th Cir. Nov. 12, 1976).

132. Memorandum from Robert Beezer to Associates (May 6, 1989), *United States v. Fernandez-Angulo*, 863 F.2d 1449 (9th Cir. 1968).

133. Memorandum from William Norris to Associates (Apr. 19, 1983), *Playtime Theatres v. City of*

One could see the same self-evident importance of the case in the comment by a judge seeking panel rehearing rather than en banc hearing that “the case is far reaching in its effect, and I believe the Supreme Court ought to take it on its importance alone.”¹³⁴ Yet another example is provided by the case on whether American “names” in Lloyd’s of London could sue in U.S. courts or had to follow a forum-selection clause designating British courts. An intercircuit split the panel had caused received the most attention, but one judge observed, “This is an important case in the area of commercial law,” adding that “it is particularly important in this area of international commerce that the rules rest primarily either on treaties or contracts.”¹³⁵

While some judges argue at length for the importance of cases they wish reheard en banc, at other times they seem to think the importance obvious, as when, in a case later to reach the Supreme Court, a judge, noting that the panel had “invalidate[d] a major piece of social reform legislation,” the Hawaii Land Reform Act, said, “The importance of the case seems self-evident.”¹³⁶ In a memorandum seeking comments prior to calling for en banc hearing on a panel opinion vacating a Federal Trade Commission order finding an auto deal in violation of repossession and resale practice rules, a judge said, “This is unquestionably an opinion of unusual significance” which he thought would have “a . . . seriously harmful effect upon the ability of all administrative agencies to function properly.”¹³⁷ Likewise, one might assume that panel judges seeking en banc hearing believe a case satisfies the “importance” criterion as when they thought, for example, in seeking en banc hearing, the outcome was controlled by a circuit case which “cannot be reconciled with the Sentencing Guidelines.”¹³⁸ And sometimes the exceptional importance argument is implicit, as when a judge argued for retaining a key provision of the federal child-pornography statute and the protections it provided, which required striking down a Ninth Circuit case that was in the way and that had led the panel to its result.¹³⁹ Likewise implicit but

Tacoma, 694 F.2d 723 (9th Cir. 1982) (unpublished table decision).

134. Memorandum from Richard Chambers to Associates (Dec. 5, 1977), *United States v. Fannon*, 556 F.2d 961 (9th Cir. 1977), and *United States v. Gumerlock*, 556 F.2d 1106 (9th Cir. 1978), *aff’d on reh’g en banc*, 590 F.2d 794 (9th Cir. 1979).

135. Memorandum from Joseph Sneed to Associates (July 9, 1997), *Richards v. Lloyd’s of London*, 107 F.3d 1422 (9th Cir. 1997), *withdrawn and superseded en banc* by 135 F.3d 1289 (9th Cir. 1998).

136. Memorandum from William Norris to Associates (June 1, 1983), *Midkiff v. Tom*, 702 F.2d 788 (9th Cir. 1983), *rev’d sub nom. Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

137. Memorandum from Stephen Reinhardt to Associates (Jan. 7, 1982), *Ford Motor Co. v. FTC*, 673 F.2d 1008 (9th Cir. 1981).

138. Memorandum from panel to Associates (Mar. 2, 1990), *United States v. Castro-Cervantes*, 911 F.2d 222 (9th Cir.), *amended and superseded* by 927 F.2d 1079 (9th Cir. 1990).

139. Memoranda from Alex Kozinski to Associates (Apr. 8, 1993 & May 17, 1993), *United States v. X-Citement Video*, 982 F.2d 1285 (9th Cir. 1992), *rev’d*, 513 U.S. 64 (1994).

nonetheless clear was an en banc call which spoke of broad, “sharp disagreement” within the court over Rule 11—“clearly a division of thought . . . as to the usefulness and even the meaning” of the rule.¹⁴⁰

Rather than being assumed or implicit, the “exceptional importance” basis of an en banc call can be elaborated, as in a case involving male guards’ searches of female prisoners. The case was said to raise “significant legal issues” and to be one which “clearly has the potential for national impact which could have serious adverse effects on the mental health and well-being of thousands of women prisoners throughout our prison system.”¹⁴¹ Another judge, who agreed with both the majority’s inability to distinguish the guard-inmate contact in the same case from that approved previously and with the panel dissenter’s position on the inappropriateness of that contact, thought the case appropriate for en banc hearing because it “might offer a fine opportunity to revisit our case law in this areas” and was a “fine en banc case—that is, one where we can truly straighten out our thinking and the law.”¹⁴² In a case on sanctions imposed on a law firm for misleading statements, a judge supported en banc because “[t]his is an extremely important area in this day and age for our profession, for the judicial system, and for society.”¹⁴³ That he did so although “[a]t this point I take no position on the merits of the controversy”¹⁴⁴ is an indication that “importance” for en banc purposes could be independent of a judge’s preferred result.

The “exceptional importance” criterion is, of course, quite subjective. This is evident in a judge’s statement that this criterion was one of two key criteria for granting en banc hearing. Commenting on the failure of an en banc vote, he said, “Unfortunately for the treasury, and possibly for the caseloads of the district courts, a majority of our judges did not believe that a rehearing en banc was of exceptional importance.”¹⁴⁵ Judges also have varying thresholds a case must reach to be “exceptionally important.” For some, unless one or more of the specific elements of FRAP 35—intra- or intercircuit conflict or conflict

140. Memorandum from John Noonan to Associates (Sept. 1, 1989), *Townsend v. Holman Consulting Corp.*, 862 F.2d 318 (9th Cir. 1988) (unpublished table decision), *consolidated with* 881 F.2d 788 (9th Cir. 1989), *vacated on reh’g en banc*, 914 F.2d 1136 (9th Cir. 1990), *and amended and superseded en banc by* 929 F.2d 1358 (9th Cir. 1990).

141. Memorandum from Harry Pregerson to Associates (June 19, 1992), *Jordan v. Gardner*, 953 F.2d 1137 (9th Cir. 1992), *aff’d en banc*, 986 F.2d 1521 (9th Cir. 1993).

142. Memorandum from Ferdinand Fernandez to all judges (June 19, 1992), *Jordan*, 953 F.2d 815.

143. Memorandum from J. Blaine Anderson (Dec. 10, 1986), *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986), *reh’g denied*, 809 F.2d 584 (9th Cir. 1987).

144. *Id.*

145. Alfred T. Goodwin, Draft opinion dissenting from denial of rehearing en banc (undated), *Henderson v. United States*, 734 F.2d 483 (9th Cir. 1984).

with the Supreme Court—is present, the case by definition is not sufficiently important for en banc treatment. Yet other cases are thought to be of such general importance that they should be reheard regardless of the absence of conflict. Some think particular types of cases, such as capital cases, are always considered especially important and thus serious candidates for en banc hearing. Such a stance, however, was vigorously protested in one capital case with the comment that “[u]nless this court adopts a policy that all capital cases are to be heard en banc, there has been no stated reason here.”¹⁴⁶ And most judges calibrate importance on a case-by-case basis, seen in the comment that “cases of lesser importance have been taken en banc”¹⁴⁷ as well as in a judge’s agreement with the sentiments of those advocating en banc rehearing but still not thinking the case should be reheard en banc.¹⁴⁸

Are there matters believed to be clearly *not* of “exceptional importance”? In complaining, “We seem to be voting more and more frequently on en banc calls in which a principal issue is en banc worthiness,” a judge suggested that if an issue “is unlikely to arise in our circuit more frequently than every few decades,” it might not merit en banc rehearing.¹⁴⁹ He said the case before him was “clearly devoid of en banc worthiness” and didn’t “seem to give rise to any issue of overriding importance,” but those statements are, of course, conclusory.¹⁵⁰ When something very particular underlies the concern of those who would rehear a case en banc, the response is that the case did not require such rehearing. Thus, when only a defendant’s proper sentence is at issue, en banc rehearing is not thought necessary.¹⁵¹ And when a trial judge had found an original complaint and a supplemental complaint related, thus allowing consideration of the latter, the panel opinion author, objecting to the en banc call, said that the rule of civil procedure at issue “has been with us for fifty years” and argued that “the system ain’t broke,” so “[w]e

146. Memorandum from J. Clifford Wallace to active & senior judges (Mar. 2, 1987), *Woratzek v. Ricketts* 808 F.2d 1322 (9th Cir. 1986), *withdrawn and superseded by* 820 F.2d 1450 (9th Cir. 1987).

147. Memorandum from Joseph Sneed to Associates (Jan. 9, 1980), *In re Gustafson*, 619 F.2d 1354 (9th Cir. 1980), *aff’d*, 650 F.2d 1017 (9th Cir. 1981).

148. *See, e.g.*, Memorandum from Joseph Sneed to Associates (Aug. 7, 1978), *United States v. Seawall*, 583 F.2d 416 (9th Cir. 1978); *see also* Memorandum from James R. Browning to Associates (Apr. 3, 1973), *Lau v. Nichols* 483 F.2d 791 (9th Cir. 1972) (“I vote against en banc, although as of now I would be inclined to agree with [District] Judge [Irving] Hill [who dissented on the panel] and Judge Hufstedler [who called for en banc] on the merits.”), *rev’d*, 414 U.S. 563 (1974).

149. Memorandum from Stephen Reinhardt to Associates (Dec. 14, 1988), *Keith v. Volpe*, 833 F.2d 850 (9th Cir. 1987).

150. *Id.*

151. Memorandum from Charles Wiggins to Associates (May 22, 1991), *United States v. Anderson*, 895 F.2d 641 (9th Cir. 1990), *vacated en banc and remanded*, 942 F.2d 606 (9th Cir. 1991).

should not convene eleven judges to restructure Rule 15(d) in order to bring about the reassignment of particular litigation.”¹⁵²

5. *Intercircuit Conflict*¹⁵³

An *intercircuit* conflict created by a panel is not one of FRAP 35’s *separate* desiderata for en banc hearing, but it is another reason offered for en banc rehearing, and the absence of an *intercircuit* conflict has likewise been proffered as a basis for *not* hearing a case en banc. The version of Rule 35 in effect since December 1, 1998, “has incorporated *intercircuit* conflict as an example of a matter that may be of exceptional importance and therefore grounds for rehearing en banc.”¹⁵⁴ For some judges, *intercircuit* conflicts are sufficiently important that a case causing one is “en banc-worthy,” and even the *possibility* of an *intercircuit* conflict has been used to argue that the court should go en banc.¹⁵⁵ A claim of *intercircuit* conflict is a potent weapon for a judge seeking to have a case reheard en banc because its presence is an important criterion for the Supreme Court’s selection of cases,¹⁵⁶ making it more likely the Justices will grant certiorari. If no *intercircuit* conflict exists but a panel’s disposition would appear to create one, taking the case en banc might resolve the matter without creating the conflict, thus reducing the probability that the Supreme Court would grant review.

The view that *intercircuit* conflict is sufficiently important for en banc hearing was earlier embodied in several circuits’ rules indicating that an *intercircuit* conflict regarding a rule of national application was a basis for taking a case en banc. The Ninth Circuit rule “provided for possible en banc rehearing if the *intercircuit* conflict substantially affected a rule of national application in which there is an overriding need for national uniformity.”¹⁵⁷ However, some Ninth Circuit judges, particularly J. Clifford Wallace, believed strongly that the presence of *intercircuit* conflict was reason enough for an en banc rehearing and sought to mandate it in those circumstances because of the importance of maintaining national uniformity of law. The court declined to adopt such

152. *Id.* The problem arose in part because Ninth Circuit Judge Harry Pregerson, who had initially had the case below as a district judge, had retained it while serving on the court of appeals.

153. Some material used here is drawn from Stephen L. Wasby, *Intercircuit Conflicts in the Courts of Appeals*, 63 MONT. L. REV. 119 (2002), which also includes treatment of dialogue within the court of appeals concerning *intercircuit* conflicts.

154. JUDITH A. MCKENNA ET AL., CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS 22 (2000).

155. *Espinoza-Gutierrez v. Smith*, 109 F.3d 551, 554 (9th Cir. 1997) (Kozinski, J., dissenting from denial of rehearing en banc) (“A direct conflict with another circuit doesn’t yet exist, but one may be on the horizon.”).

156. *See* SUP. CT. R. 10.

157. MCKENNA ET AL., *supra* note 154, at 22 n.12.

a rule—perhaps because if a case were going to go to the Supreme Court, the en banc process would add another year—but did for a while have a rule requiring a panel creating an intercircuit conflict to so notify the court.¹⁵⁸

Under this regime, when a government petition for rehearing alleged an intercircuit conflict, Judge Wallace wrote to his colleagues, “Our General Orders indicate that if the suggestion contains as one of its grounds the allegation that the opinion initiates a conflict with another court of appeals, the panel is to advise us,” and therefore, “[i]t is incumbent upon the panel to advise the court of this alleged conflict.”¹⁵⁹ And when the Supreme Court, in reversing a Ninth Circuit decision, noted that an intercircuit conflict between the Ninth Circuit and another court of appeals was implicated in the case although not the basis of the Supreme Court’s reversal, on remand the Ninth Circuit sat en banc for further consideration of the case.¹⁶⁰ The Ninth Circuit has since added procedures by which staff attorneys in the court’s Case Management Unit monitor certain types of cases, including those in which the panel expressly disagrees with another circuit, and notify the entire court about them.¹⁶¹ Thus it is unnecessary for a panel to advise colleagues of the conflict, but Judge Wallace’s point is met.

Among examples of intercircuit conflict offered as a basis for en banc rehearing was a panel’s call for en banc to overrule a Ninth Circuit case “that is in conflict with our sister circuits.”¹⁶² On an important Rule 11 question, a judge supporting en banc rehearing said that two

158. For the practice in another circuit, see this note in a Fifth Circuit case: “In accordance with Court policy, this opinion, being one which initiates a conflict with the rule declared in another circuit, was circulated before release to the entire Court, and rehearing en banc was voted by a majority of the non-recused judges in active service.” *Riley v. St. Luke’s Episcopal Hosp.*, 196 F.3d 514, 516 n.* (5th Cir. 1999).

159. Memorandum from J. Clifford Wallace to all judges (Dec. 17, 1992), *Soler v. Scott*, 942 F.2d 597 (9th Cir. 1991), *vacated sub nom. Sivley v. Soler*, 506 U.S. 969 (1992). At times, there was disagreement over the rule, for example, whether it applied when an intercircuit conflict had not been alleged by litigants.

160. The case is *United States v. Jose*, where the Justices stated in their per curiam opinion, “We express no opinion on the merits of the underlying dispute. The matter, indeed, is one that implicates an intercircuit conflict.” 519 U.S. 54, 56 (1996). On remand, Judge Hall, after noting this language, wrote, “In light of this intercircuit conflict, we decided sua sponte to consider the merits of this case en banc,” an instance of stating the reason for an en banc hearing. *United States v. Jose*, 131 F.3d 1325, 1327 (9th Cir. 1997) (en banc). And, on the merits, the Ninth Circuit decided to agree with the ruling of the court of appeals with which it had earlier disagreed: “Upon reconsideration, we agree with the Fifth Circuit’s reasoning and holding,” thus overruling earlier Ninth Circuit cases that had relied on earlier (and later overruled) Fifth Circuit decisions. *Id.* at 1329.

161. See David R. Thompson, *The Ninth Circuit Court of Appeals Evaluation Committee*, 34 U.C. DAVIS L. REV. 365, 373 (2000).

162. Memorandum from panel to Associates (Nov. 12, 1992), *United States v. Atkinson*, 990 F.2d 501 (9th Cir. 1993) (en banc).

rules the panel had stated, in addition to being “new to this circuit,” were “contrary to and go considerably beyond, authority in other circuits.”¹⁶³ Another judge, challenging a ruling in a pair of U.S. Sentencing Guidelines cases, said that they “create a split between our circuit and the only other circuit to have decided the issue.”¹⁶⁴ And a judge who had earlier called for en banc rehearing on the retroactivity of the Civil Rights Act of 1991 complained when again before court was “a holding contrary to six other circuits,” because “[t]he opinion is more than simply incorrect; it simultaneously creates an unnecessary inter-circuit split and robs us of the opportunity to resolve case law within the Ninth Circuit.”¹⁶⁵

Intercircuit conflict claims play out in the court’s actions in a variety of ways. One example is a case involving Canadian citizens’ appeal from a ruling upholding a summons for records held by their U.S. bank; the summons was issued by the IRS at the request of Revenue Canada under the tax treaty.¹⁶⁶ Early in its opinion, the panel majority, which reversed, noted that the Second Circuit “has suggested that the international character of treaty requests counsels against judicial intervention” and noted that the government had urged the court to adopt the Second Circuit’s position.¹⁶⁷ However, the author distinguished the Second Circuit case on the grounds that Congress had changed the law after the summons there.¹⁶⁸ Judge Eugene Wright, dissenting, said that the panel had created an intercircuit conflict by rejecting the Second Circuit position without a “sound basis.”¹⁶⁹ He felt the Second Circuit’s ruling was not undercut by the subsequent statute, “was consistent with current law,” and also “shows a healthy respect for the United States’ responsibilities under an international treaty.”¹⁷⁰ Not surprisingly, later discussion within the court of appeals pivoted on the Second Circuit case,

163. Memorandum from Pamela Rymer to all active judges (Oct. 10, 1989), *Townsend v. Holman Consulting Corp.*, 862 F.2d 318 (9th Cir. 1988), *vacated on reh’g en banc*, 914 F.2d 1136 (9th Cir. 1990), *and amended and superseded en banc* by 929 F.2d 1358 (9th Cir. 1990).

164. Memorandum from William Norris to Associates (Oct. 13, 1992), *United States v. Sanchez*, 967 F.2d 1383 (9th Cir. 1992), and *United States v. Harrison-Philpot*, 978 F.2d 1520 (9th Cir. 1992) (earlier opinion withdrawn by 971 F.2d 244 (9th Cir. 1992)).

165. Memorandum from Robert Beezer to Associates (Mar. 8, 1993), *Estate of Reynolds v. Martin*, 985 F.2d 470 (9th Cir.), *reh’g denied*, 994 F.2d 690 (9th Cir. 1993). He also noted that “[e]very other circuit court to consider the issue has either rejected retroactive application of the 1991 Act, or follows a previous in-circuit case holding the same.” *Id.* He was to dissent from denial of en banc rehearing joined by three other judges. *Estate of Reynolds v. Martin*, 994 F.2d 690 (9th Cir. 1993).

166. *Stuart v. United States*, 813 F.2d 243, 245 (9th Cir. 1987).

167. *Id.* at 247.

168. *Id.* at 249–50.

169. *Id.* at 253 (Wright, J., dissenting).

170. *Id.* at 253.

and Judge Wright's dissent became the basis for others' support for rehearing en banc.¹⁷¹

Intercircuit conflicts also played a role in post-panel activity potentially leading to en banc rehearing in a case involving the Indian Gaming Regulatory Act ("IGRA"). The panel, while disagreeing with the Second Circuit's use of legislative history, agreed with its result and thus did not see an inter-circuit conflict, as the Second Circuit's opinion dealt only with a "judicial gloss" on a case with international ramifications, while in the present case Congress had imposed "a mandate of the legislature" which courts were not free to ignore and which the Second Circuit had not had to confront.¹⁷² However, four judges who dissented from the denial of rehearing en banc thought the panel had decided the issue at hand "incorrectly, in a manner that conflicts with the Second Circuit's interpretation of the same statutory language," which was "a conclusion precisely opposite" that by the Ninth Circuit panel. Acknowledging that the Second Circuit's "approach is supported by the Eighth Circuit," they thought the Second Circuit had "much the better overview of IGRA."¹⁷³

In a dispute over treatment of a religious display, a judge, arguing that the Ninth Circuit panel had created an inter-circuit split, referred to an Eleventh Circuit case.¹⁷⁴ A few days later the judge wrote that the Eleventh Circuit had taken its panel ruling en banc, which "attests to the importance of rehearing *Kreisner* as a full court," and she pointed out as well that two other circuits "have addressed this precise question and have reached the opposite conclusion as the *Kreisner* majority."¹⁷⁵ Then, in the middle of the debate over whether to rehear the case en banc, the Supreme Court handed down *Lamb's Chapel*,¹⁷⁶ which the dissenter believed, "if anything, reinforces my dissent,"¹⁷⁷ but the panel majority judges asserted it "resolves the inter-circuit conflict that long preceded it" and further contradicted the claim that the panel had created a circuit split.¹⁷⁸

171. A law clerk indicated agreement with Judge Wright: "The majority attempts, vainly, to distinguish this case from a 2nd Cir. Case coming down the other way. We're creating an inter-circuit conflict for no good reason." Memorandum from Miriam Reed, Law Clerk, to Alfred T. Goodwin (May 19, 1987), *Stuart*, 813 F.2d 243.

172. *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1252-53 (9th Cir. 1994).

173. *Id.* at 1252-53, 1253 n.1 (Canby, J., dissenting from denial of rehearing en banc).

174. Memorandum from Dorothy W. Nelson to Associates (June 11, 1993) (memorandum not in file), *Kreisner v. San Diego*, 988 F.2d 883 (9th Cir. 1993).

175. Memorandum from Dorothy W. Nelson to Associates (June 15, 1993), *Kreisner*, 988 F.2d 883.

176. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

177. Memorandum from Robert Boochever to Associates (June 15, 1993), *Kreisner*, 988 F.2d 883.

178. Memorandum from Dorothy W. Nelson & Alex Kozinski to Associates (June 15, 1993), *Kreisner*, 988 F.2d 883.

A panel may defend its ruling as correct despite a claimed circuit split but more often will suggest that its opinion can be distinguished from other circuits' decisions. Another tack is to suggest that "the split existed before our decision was filed," with "divided panels and en banc reconsiderations . . . common"—so that altering the panel's ruling "will not create national uniformity."¹⁷⁹ Presence of intercircuit conflict is also used to argue against rehearing en banc. En banc coordinator Judge Goodwin

point[ed] out that if there is in fact a conflict among the circuits, the . . . case would seem to be a good one for solution by the Supreme Court, and further rumination by this court may not be cost effective, in terms of delay and en banc resources.¹⁸⁰

Thus, the norm that, in the interest of nationally uniform law, intercircuit conflicts should not be created by judges wishing to avoid having their rulings reviewed may create a pragmatic brake on the creation of such conflicts. Even when an existing intercircuit conflict removes the pressure of being the court creating a conflict, the court, by "weighing in" on the issue and lining up on one side of the conflict, may increase the likelihood that the Justices will perceive that the conflict is of sufficient importance to warrant granting certiorari.

If many judges wish to avoid intercircuit conflict, the contrary view of some is that one should not hesitate to create intercircuit conflicts by taking a case en banc; that is, one should take a case en banc to *create* a conflict. One judge said he "always took the view that we should not hesitate to create splits if we thoughtfully and carefully concluded that [another] Circuit was wrong," doing so to "hold the Supreme Court's toes to the fire," to force the Justices to deal with an issue.¹⁸¹ This argument is that, if a court of appeals creates an intercircuit conflict, the Supreme Court is more likely to grant certiorari because an en banc ruling that is part of an intercircuit conflict situation makes the issue even more visible.¹⁸²

179. Memorandum from Betty B. Fletcher to other judges & Associates (Aug. 26, 1992), Fed. Labor Relations Auth. v. U.S. Dep't of the Navy, 958 F.2d 1490 (9th Cir. 1992).

180. Memorandum from Alfred T. Goodwin to active judges (Apr. 21, 1982), *United States v. Brock*, 667 F.2d 1311 (9th Cir. 1982). Judges argue against expending resources on an en banc sitting if the Supreme Court is going to decide an issue regardless of whether the lower court has sat en banc. See discussion *infra*.

181. Email from Alfred T. Goodwin to Stephen L. Wasby (July 29, 1999, 13:23 EDT); Conversation between Alfred T. Goodwin and Stephen L. Wasby (Oct. 10, 1999). He observed that with the Supreme Court's relatively light docket, "I was never convinced . . . that we had a public duty to hold en bancs to lighten their burden." He added, "[S]ome of our number actually found it intellectually stimulating to challenge the Supreme Court from time to time," although, he added, they "usually were rewarded by a Nine Zip reversal."

182. H.W. PERRY, *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1991), the leading treatment of Justices' consideration of factors used in granting certiorari, fails to

Thus a judge might *seek* intercircuit conflicts, perhaps out of the belief that the correct position was one stated by another court of appeals. A judge who recognized that “we run the risk that the en banc panel would agree with the . . . dissents” in the Eighth Circuit and in the case before the Ninth Circuit, “thereby creating a conflict in the circuits,” added, “But that is not a sin,” and recounted how in an earlier case, despite warnings from Judge Wallace, such a conflict had been created—“with the Supreme Court upholding the Ninth Circuit position.”¹⁸³ In another case, that same judge noted that the Ninth Circuit ruling in the *Wong* U.S. Sentencing Guidelines case¹⁸⁴ “brings the Ninth Circuit into line with four other circuits, two of which . . . decided the issue en banc” so that “I cannot as yet claim a conflict in the circuits as a reason for taking *Wong* en banc,” but he nonetheless wished to join “a number of impassioned dissents” in those other cases, as he was “not hesitant to create an intercircuit conflict” to “provide a vehicle for the Court to address the festering question” at issue.¹⁸⁵ As he put it directly, “Because of the exceptional importance of this issue, I have no reluctance to put pressure on the Supreme Court by creating a conflict in the circuits” because the matter “has ‘percolated’ in the circuits long enough [and] it is time for the Supreme Court to resolve it once and for all.”¹⁸⁶ Illustrating the position that court of appeals judges have to make choices concerning intercircuit conflicts, he declared that “the Ninth Circuit should step up to the plate and take our cuts at playing a leadership role.”¹⁸⁷

In another case that raised questions about Guidelines sentences, a judge in the panel’s majority who had become “unsure” because of the panel dissent and en banc memoranda said he would *not* take the case en banc just to bring the circuit “into conformity with other circuits,” but he thought the Ninth Circuit’s participation in an intercircuit conflict “may result in a decision by the Supreme Court resolving this difficult question.”¹⁸⁸ Responding, the judge calling for en banc rehearing disagreed about forcing the Supreme Court’s hand—“I do not think we

discuss whether en banc rulings provide a “signal” used by the Supreme Court, so the discussion here is speculative.

183. Memorandum from William Norris to Associates (Aug. 12, 1986), *United States v. Gwaltney*, 790 F.2d 1378 (9th Cir. 1986). The case to which he referred was *Paulsen v. Comm’r of Internal Revenue*, 716 F.2d 563 (9th Cir. 1983), *aff’d*, 469 U.S. 131 (1985).

184. *United States v. Wong*, 2 F.3d 927 (9th Cir. 1993).

185. Memorandum from William Norris to Associates (Sept. 24, 1993), *Wong*, 2 F.3d 927.

186. *Id.*

187. In a footnote, he added, “While I agree that we should generally be cautious about creating conflicts in the circuits, we should avoid being overly cautious.” *Id.*

188. Memorandum from Charles Wiggins to Associates (Aug. 7, 1990), *United States v. Anderson*, 895 F.2d 641 (9th Cir. 1990), *vacated en banc*, 942 F.2d 606 (9th Cir. 1991).

should compel the Supreme Court to take our case”—and instead wished the court to rehear the case en banc to join the other circuits, which he believed “are correct on the merits.”¹⁸⁹

In all of this, one must question whether the intercircuit conflicts to which judges point are “real” or are (simply) used as a rhetorical device to gain advantage, as happens in certiorari petitions to get the Supreme Court’s attention. The claimant may believe that a conflict actually exists or there may be a colorable argument of a conflict in rulings, but exaggeration is likely, with the opposing party left to debunk the claim by showing that cited cases are inapposite or distinguishable. At times the claim seems to be little more than a mask for dislike of the panel’s proposed result rather than one made to protect the principle of uniformity in national law. That many calls for rehearing en banc are made by judges known to be at one end of the ideological spectrum or the other gives further credence to the notion that those calls are something of a cover for result orientation. We see some of this in en banc rehearing calls by one of the circuit’s more liberal judges. This judge felt that two U.S. Sentencing Guidelines cases “create a split between our circuit and the only other circuit to have decided the issue,”¹⁹⁰ and that panel rulings in two Superfund cases concerning legal fees as part of clean-up costs “create a circuit split” with the Eighth and Sixth Circuits. In the latter instance, the judge called for en banc “in the hopes of sparing the Supreme Court some unnecessary work . . . resolving the conflict with the Sixth and Eighth Circuits.”¹⁹¹ The panel majority responded that they “were unable to accept the Eighth Circuit’s shallow analysis of this statutory interpretation problem. Thus, the conflict was unavoidable.”¹⁹²

6. Institutional Reasons

Apart from conflicts and whether the panel “got it wrong,” matters of institutional concern are injected into consideration of whether the court should rehear a case en banc. Maintaining a single court may be the broadest concern. A judge with a reputation for generally resisting en bancs had “gradually become convinced that if we are to maintain the institutional integrity of the court as one court and not as a sense of

189. Memorandum from Stephen Reinhardt to Associates (Aug. 8, 1990), *Anderson*, 895 F.2d 641.

190. Memorandum from William Norris to Associates (Oct. 13, 1992), *United States v. Sanchez*, 967 F.2d 1383 (9th Cir. 1992), and *United States v. Harrison-Philpot*, 978 F.2d 1520 (9th Cir. 1992).

191. Memorandum from William Norris to Associates (Mar. 31, 1993), *Key Tronic Corp. v. United States*, 984 F.2d 1025 (9th Cir. 1993), *aff'd in part and rev'd in part*, 511 U.S. 809 (1994), and *Stanton Rd. Assocs. v. Lohrey Enters.*, 984 F.2d 1015 (9th Cir. 1993).

192. Memorandum from Arthur Alarcon to Associates (Apr. 1, 1993), *Key Tronic*, 984 F.2d 1025, and *Stanton*, 984 F.2d 1015.

separate panels each going its own way . . . , we have to use in bancs more.”¹⁹³ That the court was a single entity and not simply individual judges was repeated more than fifteen years later when a judge calling for en banc pointed out that one judge whose opinion he was now challenging had authored the court’s three earlier opinions on the subject at issue, almost explicitly stating the concern that one judge should not make the law of the court but that the whole court should speak as an en banc court.¹⁹⁴

The matter of whether the court acted as a whole or as a series of separate panels was also raised in connection with the multiplicity of Selective Service (usually Conscientious Objector (C.O.)) cases the court heard in the early 1970s, when a judge reminded his colleagues, “*This is supposed to be one court,*” with a panel’s decision “*a decision by this court . . . which we are all bound to follow, whether we like it or not*” and complained of “a tendency on the part of this court, in certain types of cases, to draw distinctions without differences in order to reach a particular result.”¹⁹⁵

Justice Sandra Day O’Connor, who suggested several times at Ninth Circuit judicial conferences that the Ninth Circuit sit en banc more frequently, was expressing an institutional view in saying that an en banc proceeding would provide the Supreme Court with a broader perspective on a case. This argument was somewhat mirrored, although used against rehearing en banc in a particular case, by an earlier judge who voted against en banc because “[t]he outstanding opinions—majority and dissenting—capture the issue capably and at length.”¹⁹⁶ He added that an en banc “substitute” opinion would “add the prestige of the full court and . . . some individualized views,” but for him that “does not provide an impelling necessity” for en banc hearing.¹⁹⁷

A broader perspective could also be provided on an issue that was the subject of en banc proceedings if the court simultaneously took en banc more than one case on the same subject. When more than one case involving the same issue is in play, institutional rules may affect which case should be the focus of an en banc call—which has precedence,

193. Memorandum from Ben C. Duniway to Associates (July 16, 1973), *United States v. Wade*, 489 F.2d 258 (9th Cir. 1973).

194. Memorandum from Charles Wiggins to Associates (Aug. 9, 1989), *Partington v. Gedan*, 880 F.2d 116 (9th Cir. 1989), *vacated*, 497 U.S. 1020 (1990), *remanded to* 914 F.2d 1349 (9th Cir. 1990), and *rev’d en banc and vacated in part*, 923 F.2d 686 (9th Cir. 1991).

195. Memorandum from Ben C. Duniway to Associates (May 1, 1972), *United States v. Cantero*, 471 F.2d 1190 (9th Cir. 1972), and *United States v. Sigler*, 471 F.2d 1191 (9th Cir. 1972). He mentioned search and seizure as another such area.

196. Memorandum from Oliver M. Koelsch to Associates (Mar. 7, 1973), *Lau v. Nichols*, 483 F.2d 791 (9th Cir. 1973), *rev’d*, 414 U.S. 563 (1974).

197. *Id.*

whether one is precedential and the other not, and the like. When two related U.S. Sentencing Guidelines cases were under consideration, it was suggested that the court wait until the panel that had withdrawn its opinion concluded its work so that both cases could be taken en banc because, as one judge put it, “I think an en banc court would benefit from considering two cases in tandem.”¹⁹⁸ And when several judges were communicating about reconciling cases on the rules on suppression of evidence, then-Judge Anthony Kennedy suggested that, as “[s]ix active judges already are involved in exchange of correspondence on these cases, which present a significant and recurring issue, [i]t would appear to be the most efficient use of our resources to take the cases en banc as soon as possible.”¹⁹⁹

A view in tension with the “institutional integrity” argument is that panels should retain autonomy to decide a case without en banc review of that decision by those who simply dislike the result; this is related to the general notion of not en bancing a case simply because one disagrees with the panel. In a recent statement, a Sixth Circuit judge pointed to “a tension that occasionally arises on the courts of appeals between two objectives: (1) deciding cases correctly and (2) delegating to panels of three the authority to decide cases on behalf of the full court.”²⁰⁰ He went on to say that it would be “odd to think of the delegation of decision authority to panel of three as nothing more than an audition” (for en banc rehearing).²⁰¹ A Ninth Circuit panel author arguing against an en banc call made by a panel dissenter said, “Some respect must be accorded to the principle of panel autonomy,”²⁰² and an off-panel judge, in voting against en banc, appended to his vote the comment, “I agree . . . that the policy of panel autonomy is the controlling factor in this particular case.”²⁰³ (The effort to take the case en banc failed.) When a judge called for en banc to challenge what he thought was the panel’s overruling of a prior opinion and said, “the opinion deals rather presumptuously with the opinion of another panel of this court” (which he called “significant and well-reasoned”),²⁰⁴ the panel author turned the

198. Memorandum from William Norris to Associates (Oct. 29, 1992), *United States v. Sanchez*, 967 F.2d 1383 (9th Cir. 1992), and *United States v. Harrison-Philpot*, 978 F.2d 1520 (9th Cir. 1992).

199. Memorandum from Anthony Kennedy to Associates (June 27, 1978), *United States v. Grajeda*, 570 F.2d 872 (9th Cir.), *withdrawn per curiam*, 587 F.2d 1017 (9th Cir. 1978).

200. *Mitts v. Bagley*, 626 F.3d 366, 366 (6th Cir. 2010) (Sutton, J., concurring in denial of en banc rehearing).

201. *Id.* at 370.

202. Memorandum from Herbert Choy to Associates (Oct. 12, 1978), *United States v. Deal*, 587 F.2d 956 (9th Cir. 1978).

203. Memorandum from Anthony Kennedy to Associates (undated), *Deal*, 587 F.2d 956 (explaining his vote on rehearing in *Deal*).

204. Memorandum from Harry Pregerson to Associates (Jan. 13, 1987), *Warren v. Bowen*, 804

dispute into one of “whether a panel can choose the grounds on which it will reach its decision or whether the full court will take up the task of editing the content of panel opinions.”²⁰⁵

Institutional concerns are among the “pragmatic reasons” that former Chief Judge Patricia Wald of the District of Columbia Circuit has said help explain “why an obviously frustrated judge will not follow the en banc route.”²⁰⁶ Perhaps the most frequently offered institutionally related reason is that en bancs require a significant expenditure of judicial resources, including time to prepare for argument, argument itself, and the conference following, and preparation and circulation of opinions. One Ninth Circuit judge said that, as a district judge he had heard that “en bancs were too cumbersome and time-consuming,” yet he thought them too important “for us to use ‘management difficulty’ and ‘time consuming’ as excuses to minimize the process.”²⁰⁷ However, judges keep in mind that granting en banc rehearing is “among the most serious non-merits determinations an appellate court can make” because it “may have the effect of vacating a panel opinion that is the product of a substantial expenditure of time and effort by three judges and numerous counsel.”²⁰⁸

Judges might believe it not worth the court’s time and energy to rehear a case because of the required additional in-chambers work necessary to decide the case and the possible disruption of calendars caused by having to bring together judges who live scattered throughout the circuit, although en banc courts can be held when the judges gather for their periodic administrative court meetings.²⁰⁹ Arguing against en banc rehearing—in a case that ultimately did go to the Supreme Court—the panel author spoke of the length of time that en banc consideration of the serious issues would consume, beyond the extended time (seventeen months) the panel had devoted to it. Writing on June 3, 1983, he noted that two cases, argued en banc on December 18, 1981, and June 15, 1982, “are still with us” and that the case before him had “issues no easier of solution or less provocative.”²¹⁰ One can add the argument that

F.2d 1120 (9th Cir. 1986), *amended on denial of reh’g* by 817 F.2d 63 (9th Cir. 1987).

205. Memorandum from Alex Kozinski to Associates (Jan. 22, 1987), *Warren*, 804 F.2d 1120.

206. Patricia Wald, *Changing Course: The Use of Precedent in the District of Columbia Circuit*, 34 CLEV. ST. L. REV. 477, 482 (1986) (quoted by Hellman, *supra* note 84, at 1049).

207. Memorandum from J. Blaine Anderson to Associates (May 22, 1978), *United States v. Cook*, 608 F.2d 1175 (9th Cir. 1977).

208. *Bartlett ex rel. Newman v. Bowen*, 824 F.2d 1240, 1242 (D.C. Cir. 1987) (per curiam) (Edwards, J., concurring in denial of rehearing en banc, in a situation in which court majority revoked its previous grant of en banc rehearing).

209. The Ninth Circuit has resisted allowing judge participation in en banc hearings by videoconferencing.

210. Memorandum from Arthur Alarcon to Associates (June 3, 1983), *Midkiff v. Tom*, 702 F.2d 788 (9th Cir. 1983), *rev’d sub nom. Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

the court has too many en banc cases, thus affecting its work, particularly its judges' ability to keep up with panel opinions. As one judge put it in the case just discussed, "I would not put this on our en banc plate unless and until we have licked that plate cleaner than previously appears to be the case."²¹¹

Judge Douglas Ginsburg of the District of Columbia Circuit has noted that even panelists who also serve on the en banc court "may need substantially to repeat their preparation" because of the lapse of time since initial panel consideration, and "they may have to start almost from scratch if the parties have submitted new briefs for the rehearing," particularly if the en banc court is to consider matters not before the panel.²¹² Moreover, although the author of the en banc court's opinion may be able to draw on the prior panel ruling or on the opinion of the panel dissenter, even more time may be consumed in en banc opinion preparation because the draft disposition must be circulated to more judges, each of whom may wish to communicate, so that "[a]t each step the opinion writer must accommodate multiple, sometimes conflicting, suggestions."²¹³

While not directly in opposition to en banc hearing, but fitting comfortably with the notion that rehearing en banc should be avoided because of its burden on resources, is the suggestion that a panel could make changes in precedent without en banc rehearing. Yet in courts that do not utilize pre-filing circulation of opinions to the whole court or informal en banc procedures,²¹⁴ attempting to avoid en banc rehearing in this fashion can produce strong reaction. When a panel wanted to overrule a precedent on the basis that circuit precedent "has been made obsolete" by the adoption of the Federal Rules of Evidence,²¹⁵ there was debate within the court on whether to use a shortcut procedure. One objecting judge called it "short-change" rather than a "short-cut."²¹⁶ The suggestion was then made that if no one asked for en banc, a footnote be included stating, "To the extent this opinion expresses views inconsistent with" an earlier ruling, and also stating that "it should be noted that this

211. Memorandum from Joseph Sneed to Associates (Oct. 16, 1978), *United States v. Deal*, 587 F.2d 956 (9th Cir. 1978).

212. Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981-1990*, 59 GEO. WASH. L. REV. 1008, 1018-19 (1991).

213. *Id.* at 1019.

214. See Michael Kanne, *The "Non-Banc En Banc": Seventh Circuit Rule 40(e) and the Law of the Circuit*, 32 S. ILL. U. L.J. 611, 618 (2008). The D.C. Circuit appends a footnote (the "Irons footnote") indicating use of its procedure of circulating within the entire court to resolve conflicts. See *Irons v. Diamond*, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981); see also Ginsburg & Falk, *supra* note 212, at 1015.

215. Memorandum from Alfred T. Goodwin to panel (Sept. 28, 1977), *United States v. Cook*, 608 F.2d 1175 (9th Cir. 1977).

216. Memorandum from J. Blaine Anderson to Associates (May 22, 1978), *Cook*, 608 F.2d 1175.

opinion has been circulated to all the judges of this court, no judge has called for en banc consideration” so that “accordingly, this opinion may be considered to be the preferred view of the court.”²¹⁷ This set off a further outcry, initially from some senior judges, with one saying that when the question was “Which is the better rule? . . . That judgment . . . should be [made] by the court en banc.”²¹⁸

Some institutional aspects of the decision whether to hear a case en banc may have been different in the Ninth Circuit when the court had only eleven and then thirteen judges rather than its present twenty-eight because matters could be handled more informally. Thus when a judge who had sought en banc rehearing over a particular issue found he had to recuse, the suggestion was made that another case on that issue be found so that the judge could “participate directly in the consideration and decision of the issue he wishes to raise.”²¹⁹ Earlier in the same case, one saw that the smaller court also appeared to operate on the basis that if a panel asked for en banc, such rehearing should be automatic. As one judge put it, “Since the panel wants this case taken en banc, there is really no alternative.”²²⁰

There are also external institutional concerns about the larger judicial system beyond the court of appeals itself. There are disputes over the extent of the effect of a ruling, with those seeking en banc emphasizing the extent of the effect, while the panel might attempt to minimize the number of other cases to be affected. There is also the stated need to provide guidance for the district courts whose judges would have to apply court of appeals rulings. Some judges, particularly those with prior (state or federal) trial court experience, would express concern about the difficulties a panel’s ruling would create for the district courts. Thus in supporting en banc hearing, one judge who had state trial court experience said in a case on waiver of counsel, “The opinion as written puts an unfair and unreasonable burden on trial court judges,” and “The district judges are entitled to more guidance.”²²¹ This concern about the law to be applied by district judges was also evident in the statement that “we share a collegial responsibility with the judges of the

217. Memorandum from Alfred T. Goodwin to all active judges (Apr. 28, 1978), *Cook*, 608 F.2d 1175.

218. Memorandum from Charles Merrill to Associates (Apr. 27, 1978), *Cook*, 608 F.2d 1175.

219. Memorandum from James R. Browning to Associates (July 19, 1974), *Deere & Co. v. Sperry Rand Corp.*, 513 F.2d 1131 (9th Cir. 1975) (per curiam). The recused judge suggested that another judge be drawn to replace him on the panel, which would continue with the case, and that suggestion was adopted.

220. Memorandum from James R. Browning to Associates (Feb. 26, 1974), *Deere*, 513 F.2d 1131.

221. Memorandum from Eugene A. Wright to Alfred T. Goodwin (Apr. 26, 1973), *United States v. Price*, 474 F.2d 1223 (9th Cir.), *reh’g denied*, 484 F.2d 485 (9th Cir. 1973).

district court, without whose cooperation we could not get any work done.”²²²

7. *Other Reasons Not to Go En Banc*

Attempts to modify panel opinions are at times efforts to avoid en bancs. When judges suggest ways of resolving their concerns, the implication is sometimes that if matters are not resolved, an en banc call will follow. Or a judge who has called for en banc might suggest that if the panel would add a few words to its opinion, the case could be reconciled with another case with which it was said to conflict, thus obviating the need for en banc hearing.²²³ As one judge put it, “It does seem to me that we should be able to reconcile the . . . opinions without an en banc hearing.”²²⁴ Explaining his request for a delay in the proceedings, a judge said that “[t]he only reason” for his request “was to give the panel an opportunity . . . to modify the opinion in such a manner as might spare us the necessity for another en banc hearing.”²²⁵ Another way of resolving a case short of taking it en banc, and offered as a reason against en banc hearing, would be that the panel would grant panel rehearing to deal with the issues posed.

Efforts to resolve disagreement short of an en banc do not always succeed. In one such instance, upon receiving what he called an “overwhelmingly persuasive” memo (by Judge Charles Wiggins) supporting an en banc call, a judge wrote, “I strongly recommend that the panel retreat and save all of us the burdens of en banc consideration.”²²⁶ The panel did not retreat, with the panel majority “believ[ing] that we decided the attorney’s fee question correctly,” so it was “not moved by Judge Wiggins’ suggestion that we disregarded precedent.”²²⁷ The panel then explained why the issue was one of first impression, not previously decided in the circuit or the Supreme Court.²²⁸

There are other reasons why judges, even if displeased with particular panel outcomes, do not vote to rehear such cases en banc. It is

222. Memorandum from John Noonan to Associates (Sept. 1, 1989), *Townsend v. Holman Consulting Corp.*, 862 F.2d 318 (9th Cir. 1988), *vacated on reh’g en banc*, 914 F.2d 1136 (9th Cir. 1990), and *amended and superseded en banc* by 929 F.2d 1358 (9th Cir. 1990).

223. One such case was *United States v. Giese*, which did proceed to an en banc vote, which failed. 569 F.2d 527 (9th Cir. 1978), *amended and reh’g denied*, 597 F.3d 1170 (9th Cir. 1979).

224. Memorandum from Walter Ely to panel & Associates (May 2, 1978), *United States v. Grajeda*, 570 F.2d 872 (9th Cir.), *withdrawn per curiam*, 587 F.2d 1017 (9th Cir. 1978).

225. Memorandum from Walter Ely to Associates & James Carter (June 1, 1976), *United States v. Pacheco-Ruiz*, 549 F.2d 1204 (9th Cir. 1976).

226. Memorandum from J. Blaine Anderson to Associates (June 25, 1986), *Jensen v. City of San Jose*, 806 F.2d 899 (9th Cir. 1986) (en banc).

227. Memorandum from Harry Pregerson to Associates (July 3, 1986), *Jensen*, 806 F.2d 899.

228. *Id.*

possible that the court would do all the work associated with an en banc rehearing only to come out the same way as the panel or that the process “may yield a decision that . . . has little implication beyond the facts of the case being reheard.”²²⁹ This is related to the objection that hearing the case en banc wouldn’t matter. In a case on the “exculpatory ‘no’” defense, a judge said that even if an en banc court would rewrite the law on the subject, the defendant “could not have successfully invoked the . . . defense in any event,” and he reminded his colleagues that former Chief Judge Chambers “used to warn us about taking off without a pay load.”²³⁰ Another judge similarly opined that “En Banc would not settle the problem,” calling the matter “a job for Super Court.”²³¹

At other times, en banc consideration of a particular case is thought to be premature, or the issue may already be under consideration in a case that has proceeded further and could provide the opportunity for en banc if there is interest. Similarly, if the Supreme Court has already granted certiorari in another circuit’s case posing the issue, proceeding with an en banc court would not make sense.²³² More generally, action in another case—one either in the en banc process or in which en banc rehearing is being considered—might be likely to resolve concerns that either a party or an off-panel judge has raised. On the other hand, that the court had the opportunity to take a case raising an issue en banc but had not done so might be used to argue against doing so now; in short, if the court had already considered whether a case was worthy of en banc treatment and had decided in the negative, it need not repeat the discussion. Likewise, it could be argued that en banc was not necessary when a case like the one being challenged had been taken to the Supreme Court and the Justices had denied certiorari.²³³

Another situation in which en banc was said not to be appropriate was the revision of an opinion in light of a Supreme Court ruling that had come down while the panel was awaiting a Ninth Circuit en banc ruling in another case. While the panel dissenter called for en banc after a several-paragraph order commenting on how the case then stood, with the author conceding that the opinion was not “untidy,” a judge (also the en banc coordinator) argued against en banc and urged the panel

229. Ginsburg & Falk, *supra* note 212, at 1020.

230. Memorandum from J. Clifford Wallace to active & senior judges (Nov. 19, 1987), *United States v. Olsoway*, 819 F.2d 930 (9th Cir.), *superseded by* 836 F.2d 439 (9th Cir. 1987).

231. Post-it note from Alfred T. Goodwin on law clerk memorandum (Nov. 27, 1989), *Franklin v. Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989).

232. Memorandum from Beth Levine, Motions Attorney, to Alfred T. Goodwin (June 16, 1982), *New Jersey v. United States*, 706 F.2d 1533 (9th Cir. 1983).

233. Memorandum from Beth Levine, Motions Attorney, to Alfred T. Goodwin (Apr. 28, 1982), *Int’l Ass’n of Machinists and Aerospace Workers v. Boeing Co.*, 694 F.2d 723 (9th Cir. 1982) (unpublished table decision).

majority “to strike out the obviously unnecessary and dissonant language.”²³⁴ He said that “[r]ewriting a butchered opinion to clean up after an intervening Supreme Court decision is not good en banc business,”²³⁵ and the case was returned to the panel to be amended.

Still another type of response to an en banc request is that the calling judge’s concerns should be addressed not in the courts but outside them. This objection was raised in the school desegregation case concerning Chinese-speaking elementary school children in San Francisco who were made to attend classes taught only in English. Responding to the en banc call—by Judge Shirley Hufstедler, later Secretary of Education—that raised equal protection issues, another judge said he was “in complete agreement that this is a worthy cause” but he could not agree “that it is grist for the judicial mill or that it would be wise to stretch the equal protection clause so as to activate the courts.”²³⁶ In another instance, concerning court sanctions for filing frivolous documents on appeal, it was argued that the matter raised by the case should be resolved elsewhere, but within the court system. A judge sought en banc because the panel had improperly applied Rule 11, intended for the district courts, to the court of appeals, but he said that this was a matter to be incorporated in the court’s local rules, which were considered by the circuit’s Advisory Committee on Rules.²³⁷ The judge urged that the case be taken en banc to overrule prior cases *and* that “we then refer the issue of sanctions for misconduct occurring before our court to the local Advisory Committee.”²³⁸

Whatever substantive reasons judges offer for or against rehearing en banc, they may also engage in strategic thinking, trying to consider the likely outcome of en banc hearing. For example, a judge on a panel dealing with whether shoplifting impugned a witness’s veracity was “uncertain whether on an en banc roll call this would be the court’s position.”²³⁹ A panel, in determining whether or not to initiate en banc activity, realized that an en banc call was not likely to succeed and decided not to move forward with a call. Judge Goodwin, in a memo to his file, said that Senior Judge John Kilkenny, the panel dissenter in a

234. Memorandum from Alfred T. Goodwin to Associates (Feb. 24, 1977), *Davis v. Cnty. of L.A.*, Nos. 73-3008, 73-3009, 1976 WL 3779 (9th Cir. Oct. 20, 1976), *withdrawn and superseded by* 566 F.2d 1344 (9th Cir. 1977), *vacated sub nom.* *Cnty. of L.A. v. Davis*, 440 U.S. 625 (1978).

235. *Id.*

236. Memorandum from Charles Merrill to Associates (Feb. 23, 1973), *Lau v. Nichols*, 483 F.2d 791 (9th Cir. 1972), *rev’d*, 414 U.S. 563 (1974).

237. Memorandum from Charles Wiggins to Associates (Sept. 29, 1989), *Partington v. Gedan*, 880 F.2d 116 (9th Cir. 1989).

238. *Id.*

239. Memorandum from Ozell Trask to panels (Nov. 22, 1977), *United States v. Cook*, 608 F.2d 1175 (9th Cir. 1979).

case on governmental officer immunity, and he agreed with another judge that the Supreme Court was likely to take the issue, but added, “I did not call for a vote on taking the case en banc because I was reasonably certain that we wouldn’t be able to get seven votes” (the majority at the time).²⁴⁰ In a different case with another senior judge, Judge Goodwin agreed that “the hostility of some of our judges to Rule 11, in combination with a tendency of some of our judges to apply Rule 11 expansively, is creating intracircuit conflict and confusion for district judges,” but he was unsure whether the intracircuit conflict the panel dissenter had noted “is clear enough to pick up 14 votes for an en banc,” the majority necessary in the now-larger court.²⁴¹

II. EN BANC OR SUPREME COURT

Whether to rehear a case en banc or instead to forego rehearing so the case can go directly to the Supreme Court is a matter about which judges argue. The matter likely does not arise in most cases, but some judges use the argument that en banc rehearing should be declined because the Supreme Court will have to—or is likely to—resolve the issue or case before them. Judges make comments to the effect that if the Supreme Court believed the Ninth Circuit had relied on a case mistakenly or wished to disavow that case, the Court would be likely to take the case, and thus rehearing the case en banc would simply delay the filing of a certiorari petition by the losing party. Such arguments are, of course, disputed by those seeking en banc treatment, although sometimes it is simply argued that *some* action be taken, promptly, to resolve a case, whether it be en banc rehearing or “letting the case go.” For example, a panel dissenter argued that, rather than take more time revising an opinion, which would require a revision of the dissent, “everyone would be better if this case were either taken en banc immediately or sent on its way to the Supreme Court where it is likely to end up in any event.”²⁴²

A. INCREASING THE NUMBER OF EN BANCs

If courts of appeals followed the suggestion made by Justice O’Connor and others that they sit en banc more often in matters likely to

240. Memorandum from Alfred T. Goodwin to file (undated), *Imbler v. Pachtman*, 500 F.2d 1301 (9th Cir. 1974), *aff’d*, 424 U.S. 409 (1976).

241. Memorandum from Alfred T. Goodwin to Joseph Sneed (Aug. 29, 1989), *Townsend v. Holman Consulting Corp.*, 862 F.2d 318 (9th Cir. 1988), *vacated on reh’g en banc*, 914 F.2d 1136 (9th Cir. 1990), *and amended and superseded en banc by* 929 F.2d 1358 (9th Cir. 1990).

242. Memorandum from Joseph Sneed to Associates (Apr. 11, 1988), *Duro v. Reina*, 821 F.2d 1358 (9th Cir.), *superseded by* 851 F.2d 1136 (9th Cir. 1987), *rev’d*, 495 U.S. 676 (1990).

reach the Supreme Court,²⁴³ circuit precedent might move closer to the Supreme Court's views, making further review unnecessary. This rationale can be seen when Ninth Circuit judges argue that a case should be heard en banc for reasons of practicality because the Supreme Court would be saved the time of announcing the likely outcome. An en banc decision would also provide assurance that the appeals court's doctrinal rule was approved by its majority or at least that more than the three panel members (with the panel likely to include a senior judge, district judge, or a judge visiting from another circuit) had participated in developing it. In advocating en banc rehearing, a judge said that he was "distressed that a panel, with only one active judge participating, would now reject [the court's previous] standard for effectiveness of counsel."²⁴⁴ Because en banc courts are often divided, their opinions might also present the Justices with a range of interpretations wider than those from a three-judge panel. It would make sense for the courts of appeals to sit en banc if the Supreme Court were to turn away most en banc dispositions or to affirm many of those it did review. However, an en banc disposition calls greater attention to a case, providing a cue or signal for the Justices, thus making the grant of review more likely.²⁴⁵

Do court of appeals judges agree with the Justices about sitting en banc more often? If en banc rehearing is supposed to be an institutional means to relieve pressure on the Supreme Court but appears not to benefit the lower court, why go en banc? Sometimes judges think the court should do so. In one case, the government's suggestion for en banc rehearing, filed with the Solicitor General's approval, had contained a claim that the case was decided on the luck of the (panel) draw. Said a judge, who was not usually disposed to en banc hearings, "I would hate to see *Deep* taken to the Supreme Court on cert. on that ground. We ought to straighten it out ourselves," because otherwise, he suggested, the Supreme Court might develop a new ground for granting certiorari—

243. See *supra* notes 196–97 and accompanying text.

244. Memorandum from J. Clifford Wallace to Associates (May 4, 1977), *Cooper v. Fitzharris*, 551 F.2d 1162 (9th Cir. 1977), *aff'd on reh'g en banc*, 586 F.2d 1325 (9th Cir. 1978).

245. Hellman reports that from 1991 to 1998, certiorari was sought from half of the Ninth Circuit's en banc rulings, with ten of forty-eight petitions being granted. Hellman, *supra* note 40, at 441. Certiorari was sought in three-fifths of the cases where a call for en banc rehearing did not succeed, with the ratio of grants only one in seven. *Id.* at 445. In the sixty cases in which an off-panel judge circulated a memo about the case but no en banc vote resulted, certiorari was granted in only six. *Id.* A study of three circuits makes clear that certiorari petitions were filed in a much higher portion of en banc rulings in all court of appeals cases, and also found that the court of appeals having sat on en banc was one factor significantly related statistically to the grant of certiorari. See Tracey E. George & Michael E. Solimine, *Supreme Court Monitoring of the United States Courts of Appeals En Banc*, 9 SUP. CT. ECON. REV. 171, 185 tbl.1, 195–96 (2001). A study by the Author demonstrated that, among cases in which review was granted, en banc rulings were more likely to be reversed than were panel rulings. See Wasby, *The Supreme Court*, *supra* note 5, at 66.

intracircuit conflict.²⁴⁶ Although Judge Goodwin ordinarily preferred to let cases go to the Supreme Court without en banc hearing, in an immigration case he felt otherwise. As a member of the panel, he had dissented, saying the case was controlled by a Supreme Court ruling that had reversed one of his earlier rulings.²⁴⁷ After another judge called for en banc, Judge Goodwin said, “Ordinarily I would be willing to let the Supreme Court reverse as in some of our other immigration cases when we didn’t follow Supreme Court precedent,” but here he thought instead that “we should do some of our own housekeeping and not force the Supreme Court to maintaining consistency of decisions within the Circuit.”²⁴⁸

However, en banc was often not Judge Goodwin’s preference when the alternative was to let the case go to the Justices. “I was never convinced,” he said, “that a court taking 80 cases a year was so overworked that we had a public duty to hold en bancs to lighten their burden.”²⁴⁹ Given courts of appeals’ important institutional concern of bringing cases to conclusion, an en banc hearing delays the arrival at the Supreme Court of a case likely to reach there in any event. The Ninth Circuit’s longtime en banc coordinator has said that

losing an *en banc* request can be the best thing for litigants in some cases. “If we take a case *en banc*, it will spend another year in our court. . . . If it is clear the case will end up before the Supreme Court sooner or later, it may save judicial resources to deny the rehearing *en banc* and let the parties seek *cert* at the Supreme Court immediately.”²⁵⁰

And at another time, he said, “To go en banc is to create a one-year delay in the case for the parties and burns up judicial resources,” to which he added, “If the Supreme Court is going to take it, let’s let them get at it,”²⁵¹ as en banc would “delay for another year,” during which time the parties could not obtain relief.²⁵² This view is reinforced by the comment by a Fourth Circuit judge, who said that after a panel’s decision, “some further not insignificant amount of time [two to three months] will pass before the case is actually argued before the *en banc* court,” with more time (and more time than in preparation of panel opinions) elapsing while opinions are prepared.²⁵³

246. Memorandum from Ben C. Duniway to Richard Chambers (June 27, 1973), *United States v. Deep*, 497 F.2d 1316 (9th Cir. 1974).

247. *INS v. Wang*, 622 F.2d 1341 (9th Cir. 1980), *rev’d*, 450 U.S. 139 (1981).

248. Memorandum from Alfred T. Goodwin to all active judges (Apr. 16, 1986), *Saldana v. INS*, 762 F.2d 824 (9th Cir. 1985).

249. Steve Albert, *The Ninth Circuit’s Secret Ballot*, RECORDER (S.F.), Mar. 3, 1995, at 1.

250. *Id.* at 10 (quoting Alfred T. Goodwin).

251. Interview with Alfred T. Goodwin in Sisters, Or. (Oct. 11, 1999).

252. Interview with Alfred T. Goodwin in Pasadena, Cal. (Jan. 25, 2000).

253. “There is . . . every reason to believe that it might take longer given the statistically greater

The Supreme Court's taking a case or the likelihood it would do so reinforces the argument of those willing to leave the matter to the Court, who would forego en banc so the Justices could rule. In a note to himself, a judge said, "I guess if the case is wrong, the Supremes will take it," and later he told his colleagues, "I plan no further activity in this case, and will leave it to the Supreme Court to decide whether we have erred."²⁵⁴ In a somewhat more complex situation, the Justices had granted certiorari, vacated, and remanded ("GVR") a case. The panel dissenter, who at first called for en banc because "The majority . . . has treated the Supreme Court's order as something to be endured rather than treated seriously,"²⁵⁵ later withdrew the call because he had begun to be "a little bit disturbed over the increase in calls for en banc" and, most relevant here, because if he were correct in his view of the case, "the Supreme Court will probably take care of the force of its remand order without any en banc by us."²⁵⁶ Commenting on the Supreme Court order, a Goodwin law clerk said, "If the majority is incorrect, I'd let the S.C. tell them. [*Engle v. Isaac* is so fuzzy that I'd prefer to let that Court explain its parameters," while another observed, "This is what happens when the Supremes waffle and refuse to hand down a clear rule of law."²⁵⁷

Some judges have gone further, *hoping* the Justices would take up the matter. Chief Judge Chambers had said earlier that the issues in a case "cannot be long delayed in resolution by the Supreme Court," which—not the Ninth Circuit—was the ultimate authority.²⁵⁸ A later judge said he hoped "the *Apprendi* zoo" would be taken by the Supreme Court to help resolve whether a judge rather than a jury could increase a penalty above the statutory maximum.²⁵⁹ Wanting a prompt answer, he said "we should *not* delay the inevitable word from the infallibles by reviewing [the case] en banc even if we might believe it is wrong."²⁶⁰ As

likelihood of multiple writings . . ." *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 211 F.3d 853, 860 (4th Cir. 2000) (Luttig, J., dissenting from denial of hearing en banc).

254. Note on memorandum from Alfred T. Goodwin (Sept. 29, 1976), *NLRB v. Electro-Vector, Inc.*, 539 F.2d 35 (9th Cir. 1976).

255. Memorandum from Cecil Poole to Associates (June 7, 1983), *Myers v. Washington*, 702 F.2d 766 (9th Cir. 1983). The earlier Ninth Circuit opinion in this case, *Myers v. Washington*, 646 F.2d 355 (9th Cir. 1981), was vacated and remanded by *Washington v. Myers*, 456 U.S. 921 (1982).

256. Memorandum from Cecil Poole to Associates (June 22, 1983), *Myers*, 646 F.2d 355.

257. Post-it note attached to General Order 5.4(b) Notice (citing *Engle v. Isaac*, 456 U.S. 107 (1982)), *Myers*, 646 F.2d 355.

258. *United States v. Price*, 484 F.2d 485, 487 (9th Cir. 1973) (Chambers, C.J., concurring in denial of rehearing en banc). He added: "But about every other Monday we get proof that we are not the ultimate authority." *Id.*

259. Memorandum from Stephen Trott to Associates (Aug. 22, 2001) (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)), *United States v. Buckland*, 259 F.3d 1157 (9th Cir. 2001), *rev'd en banc*, 277 F.3d 1173 (9th Cir. 2002).

260. *Id.*

“[t]he circuits are split,” he added, if the Ninth Circuit let the case become final, “the Court will have to act.”²⁶¹ Countering, another judge said, “The problem . . . with the ‘straight to the High Court’ approach is that it leaves the question open for a long period.”²⁶² Another judge’s “hesitancy in joining in suggesting that we en banc” a case, he said, “rests on my hope that the Supreme Court grants certiorari,” with the petition already having been filed.²⁶³ The author of an opinion, responding to another judge’s serious questioning of the opinion, said the panel “hope[d] the Supreme Court will take the case and narrow it down as much or as little as it sees fit” and that “[i]f the language of the opinion was too broad (too quick and dirty), the Supreme Court knows how to water it down.”²⁶⁴

In other instances, judges went further still to opine that the Justices *would* grant review. In one case, Chief Judge Chambers, saying there was a good chance the Supreme Court would take a case, disagreed with his colleagues that there was a higher likelihood of the case going to the Supreme Court if the Ninth Circuit heard it en banc.²⁶⁵ In yet another case, on use of the *Allen* (or “dynamite”) charge,²⁶⁶ a judge stated, “With all of the furor over this subject and considering the Circuit conflicts, it is quite likely that the Supreme Court would accept certiorari and undertake a reexamination,” although he also realized that “this is somewhat risky and others may have a better feel for it.”²⁶⁷ Another case provides further illustration of the argument that en banc rehearing delays arrival of a case at the Supreme Court, although it is an instance in which a conservative judge may well have been seeking a conservative result. The judge said the court should consider whether it was wise to delay possible Supreme Court review by taking the case en banc: “This appears to me a case that the Supreme Court will want to take a look at. To me, it has all the earmarks of a case in which certiorari will be granted. By en bancing, we merely delay final review.”²⁶⁸ Another judge, favoring

261. *Id.*

262. Memorandum from Michael Daly Hawkins to Associates (Aug. 22, 2001), *Buckland*, 259 F.3d 1157. He added, “I recognize that ‘the fault is not in ourselves, but in our Supremes!’” *Id.*

263. Memorandum from Joseph Sneed to Associates (Jan. 26, 1979), *Walker v. Loggins*, 608 F.2d 731 (9th Cir. 1979).

264. Memorandum from Alfred T. Goodwin to Associates (Jan. 11, 1982), *Ford Motor Co. v. Fed. Trade Comm’n*, 673 F.2d 1008 (9th Cir. 1981).

265. Vote explanation by Richard Chambers (Mar. 4, 1976), *United States v. Portillo-Reyes*, 529 F.2d 844 (9th Cir. 1975). “I do not,” he said, “belong to the school that believes there is a better chance to get the case into the Supreme Court because we took it en banc.” *Id.*

266. *See Allen v. United States*, 164 U.S. 492 (1896).

267. Memorandum from J. Blaine Anderson to Associates (Aug. 3, 1978), *United States v. Seawell*, 583 F.2d 416 (9th Cir. 1978).

268. Memorandum from Eugene A. Wright to Associates (Dec. 8, 1977), *United States v. Fannon*, 556 F.2d 961 (9th Cir. 1977), and *United States v. Gumerlock*, 556 F.2d 1106 (9th Cir. 1978), *aff’d on*

en banc and thus wanting the same outcome as the first judge, said that relying on a grant of certiorari was a “rather risky” course and called attention to Supreme Court rulings “where the circuit conflict has gone on for years before they finally decide to take a case and resolve it.”²⁶⁹

Yet debate also occurs about whether the Supreme Court would grant review. When a judge asserted, “It seems likely that the Supreme Court will grant certiorari in one or more of the cases” on the question before the court,²⁷⁰ another judge argued to the contrary, finding “no guarantee” that the Supreme Court would resolve the pending issue.²⁷¹ Beyond that, said the latter judge, even were cert granted, “this should not prevent us from giving this issue the type of consideration that it deserves and that the other circuits have afforded it.”²⁷² In another case, on prosecutorial immunity, a judge suggested not only that the Supreme Court would take the case but also speculated “that sooner or later the Supreme Court may follow the views expressed by Judge Kilkenney in his dissenting opinion,” which he said was “a pretty good petition for certiorari.”²⁷³ In a file memo, another judge said, “I believe that the Supreme Court will undoubtedly vacate this position, if not now, at some time in the future.”²⁷⁴ And yet another judge, while agreeing with a panel dissent in another case, thought it better to wait for a case with the issue (basing founded suspicion for a car stop on a radio dispatch) “squarely on point,” but he then added, “If [the case] is as bad as some of us fear it is, maybe the Supreme Court will take a swipe at it during the next term.”²⁷⁵

In discouraging the use of en banc hearings, Chief Judge Chambers espoused the Second Circuit’s view that if a case was important enough for en banc rehearing, it was important enough for the Supreme Court to take it, so the court of appeals should let the case go to the Justices without the further delay that en banc rehearing would cause.²⁷⁶ In one case, a judge, while not agreeing with the panel, nonetheless voted not to en banc the case because of “[t]he Chambers-Kaufman view of the economics of court time,” which he stated as “if a case is as bad as en

reh’g en banc, 590 F.2d 794 (9th Cir. 1979).

269. Memorandum from J. Blaine Anderson to Associates (Dec. 19, 1977), *Fannon*, 556 F.2d 961, and *Gumerlock*, 556 F.2d 1106.

270. Memorandum from Betty B. Fletcher & Dorothy W. Nelson to Associates (Aug. 26, 1992), *Fed. Labor Relations Auth. v. U.S. Dep’t of the Navy*, 958 F.2d 1490 (9th Cir. 1992).

271. Memorandum from Cynthia Holcomb Hall (Sept. 10, 1992), *Fed. Labor Relations Auth.*, 958 F.2d 1490.

272. *Id.*

273. Memorandum from Ben C. Duniway to Associates (Sept. 17, 1974), *Imbler v. Pachtman*, 500 F.2d 1301 (9th Cir. 1974), *aff’d*, 424 U.S. 409 (1976).

274. Memorandum from Alfred T. Goodwin to file (undated), *Imbler*, 500 F.2d 1301.

275. Memorandum from Alfred T. Goodwin to Associates (Nov. 15, 1976), *United States v. Robinson*, 536 F.2d 1298 (9th Cir. 1976).

276. Interview with Alfred T. Goodwin in Sisters, Or. (June 22, 2009).

banc voters think it is, the Supreme Court in its infinite wisdom will strike it down,” although he recognized “that it may be defective prophecy.”²⁷⁷ We see more of Chief Judge Chambers’ views in his dissent from the order granting en banc in a border-search case in which he felt strongly that en banc rehearing would impede the case’s arrival at the Supreme Court.²⁷⁸ He again spoke on the matter when he wrote, “I do think the situation is such that we should get our rulings out promptly so the Supreme Court can take our cases.”²⁷⁹ To facilitate that, he even suggested announcing decisions with opinions to follow, a suggestion with which Judge Herbert Choy agreed “if this will expedite getting the matters to the Supreme Court.”²⁸⁰ As Chief Judge Chambers was to remark a bit later, “All I wanted was for panel to take various cases [and] get them decided and on the way to the Supreme Court,” particularly where, in his view, “in this *Almeida-Sanchez* chaff, we have never been anything but a way station.”²⁸¹ However, colleagues rejected that specific idea,²⁸² although some seemed to agree that the Supreme Court would have the last word.²⁸³ Also during consideration of these multiple border-search cases, another of the court’s more senior judges suggested that one panel should make a decision on the effect of the *Almeida-Sanchez* case on searches at fixed and temporary checkpoints, with the other

277. Memorandum from Alfred T. Goodwin to Associates (May 24, 1977), *J.R. Simplot Co. v. U.S. Dist. Ct.*, Nos. 76-1893, 76-1995, 1976 WL 3826 (9th Cir. Nov. 12, 1976). The “Kaufman” is former Second Circuit Chief Judge Irving Kaufman.

278. As he stated it,

None of the earmarks of the normal case for en banc are here. It is inescapable that the Supreme Court will decide the questions here. They are too big and too far reaching for that Court to ignore them. This en banc hearing results in about a three-months’ delay in the case getting to the Supreme Court. Meanwhile, two or three district courts are almost choked with the retroactive question.

Bowen v. United States, 485 F.2d 1388, 1388–89 (9th Cir.) (Chambers, C.J., dissenting from grant of en banc rehearing), *vacated*, 413 U.S. 915 (1973), *appeal after remand*, 500 F.2d 960 (9th Cir. 1974) (en banc), *aff’d*, 422 U.S. 916 (1975). In his inimitable style, he ended, “Taking this case en banc is simply flying off into the air without a payload.” *Id.*

279. Memorandum from Richard Chambers to Associates (Jan. 25, 1974), *Bowen v. United States*, 500 F.2d 960 (9th Cir. 1974) (en banc), *aff’d*, 422 U.S. 916 (1975).

280. Memorandum from Herbert Choy to Associates (Jan. 28, 1974), *Bowen*, 500 F.2d 960.

281. Memorandum from Richard Chambers to Associates (Apr. 9, 1974) (discussing *United States v. Almeida-Sanchez*, 452 F.2d 459 (9th Cir. 1971), *rev’d sub nom. Almeida-Sanchez v. United States*, 413 U.S. 266 (1973)), *Bowen*, 500 F.2d 960.

282. See the comment of Judge J. Clifford Wallace, “I do not think it looks well for our court to have a matter under submission as long as this, and then file an order indicating that an opinion will follow later, when we could have done so long ago.” Memorandum from J. Clifford Wallace to Associates (Jan. 30, 1974), *Bowen*, 500 F.2d 960.

283. See, for example, Judge Goodwin, writing to a judge in another circuit: “I do think the Supreme Court is going to have to straighten this out.” Letter from Alfred T. Goodwin to Reynoldo Garza, Judge, S.D. Tex. (June 24, 1974).

panels to follow that ruling, and if the Supreme Court “doesn’t like our solution it can change it.”²⁸⁴

B. DEFERRING TO THE SUPREME COURT

To let cases go to the Supreme Court rather than decide them en banc may shed work but may also exhibit lower court deference to its superiors. Another facet of this deference, which allows the lower court to shepherd its resources, is putting in abeyance cases involving issues the Justices are considering, including deciding whether to grant review. If the Supreme Court has granted certiorari in a case from another circuit with the same or a related issue as the one before the panel, the panel is likely to wait until the Justices decide the matter. The court of appeals would stay its hand, let the government seek cert, and “no doubt they will ultimately be governed by what the Supreme Court does in cases in which it has granted cert.”²⁸⁵ The en banc coordinator, dealing with a request for en banc consideration of two sets of cases, said in one case that there was “a peripheral question,” a wiretap issue, not reached in the cases at issue but disposed of in yet another case, that “is now before the Supreme Court,” so it was “probably not necessary for us to proceed further with [that] question until we hear from the Supreme Court.”²⁸⁶

During en banc activity, there are disputes as to whether a panel should file its opinion or wait for a Supreme Court decision. One judge “raise[d] the question whether we should delay the vote on the en banc request until the Supreme Court decides *McCready* [a 4th Circuit case] or reject the en banc request now, on the theory that should we decide the issue incorrectly the Supreme Court will shortly correct our error,”²⁸⁷ and another judge argued that if the Ninth Circuit and Fourth Circuit cases “are really much the same, . . . [w]e should probably defer the en banc vote. The Supreme Court, in all likelihood, will decide *McCready*” shortly.²⁸⁸ Disagreement about delaying the en banc vote came from a

284. Memorandum from Ben C. Duniway to Associates (Aug. 31, 1973) (regarding *United States v. Almeida-Sanchez*, 452 F.2d 459 (9th Cir. 1971)); see Stephen L. Wasby, *Court of Appeals Dynamics in the Aftermath of a Supreme Court Ruling*, 42 GOLDEN GATE U. L. REV. 5 (2011).

285. Memorandum from Ben C. Duniway to Associates & senior judges (Mar. 27, 1973), *United States v. Chavez*, 478 F.2d 512 (9th Cir. 1973), *aff'd in part and rev'd in part*, 416 U.S. 562 (1974), and *United States v. King*, 478 F.2d 494 (9th Cir. 1973).

286. Memorandum from Alfred T. Goodwin to Associates, Talbot Smith, Judge, E.D. Mich., & James Burns, Judge, D. Or. (Mar. 29, 1973), *United States v. Sacco*, 491 F.2d 995 (9th Cir. 1974), and *United States v. Smith*, 534 F.2d 334 (9th Cir. 1976) (unpublished table decision).

287. Memorandum from Stephen Reinhardt to active judges (Apr. 14, 1982), *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378 (9th Cir. 1982), *vacated*, 460 U.S. 1007 (1983), *appeal on remand*, 740 F.2d 739 (9th Cir. 1984). The Supreme Court decided *Blue Shield of Virginia v. McCready* two months later, 457 U.S. 465 (1982).

288. Memorandum from J. Blaine Anderson to Associates (Apr. 19, 1982), *Ostrofe*, 670 F.2d 1378.

judge who had earlier pointed out that if (then) Judge Kennedy's panel dissent position was adopted by a Seventh Circuit panel that had asked for a copy of the Ninth Circuit ruling, "the Supreme Court may have an early occasion to review the question" posed in the cases.²⁸⁹ Yet he said that the Supreme Court's decision "is likely to use general language and broad principles which will not mandate a particular result" in the case before the Ninth Circuit, although he did add that he had "never believed that our en banc vote should turn upon whether or not the Supreme Court is likely to take a particular case," and he "would therefore not suggest that any judge vote against en banc on the theory the Supreme Court will correct our error, if error there is."²⁹⁰ Then another judge, pointing out that the present issue "seems to be before the Supreme Court," asked, "If so, why should we invest our resources [in an en banc rehearing]?"²⁹¹ (The en banc vote failed badly.)

In a situation in which panels were not being consistent in holding the Board of Immigration Appeals to the Ninth Circuit's analysis and one case embodying that analysis had been taken by the Supreme Court, a suggestion was made that the court's panels sit back until the Supreme Court decided the matter. Although a different judge sought en banc to resolve circuit inconsistency, the requests to await the Supreme Court's decision increased, with a judge, seconded by another, suggesting, "We could not possibly hear this case en banc before the Supreme Court hears *Cardoza-Fonseca*" nor decide it before the Supreme Court decided it, and so should not rehear the present case en banc.²⁹² Another judge chimed in to say, "By holding the matter in abeyance we obviate the need for a vote by the entire court on an issue which in all probability will be decided by the Supreme Court."²⁹³ Given the option as to whether to en banc the case or hold it for the Supreme Court, all but one judge voted for the latter, with the one judge believing the Supreme Court ruling "will *not* have any bearing on the decision" before the Ninth Circuit.²⁹⁴ On suggestion by the en banc coordinator that the panel "avoid

289. Memorandum from James R. Browning to Associates (Apr. 13, 1982), *Ostrofe*, 670 F.2d 1378.

290. Memorandum from James R. Browning to Associates (Apr. 21, 1982), *Ostrofe*, 670 F.2d 1378.

291. Comment on ballot from J. Clifford Wallace (Apr. 28, 1982) (voting to defer), *Ostrofe*, 670 F.2d 1378.

292. Memorandum from Mary M. Schroeder to Associates (Aug. 26, 1986), *Saenz v. INS*, 792 F.3d 144 (9th Cir. 1986) (unpublished table decision); Memorandum from James R. Browning to Associates (Sept. 9, 1986), *Saenz*, 792 F.3d 144. The Supreme Court's decision in *INS v. Cardoza-Fonseca* can be found at 480 U.S. 421 (1987).

293. Memorandum from Robert Boochever to panel & Associates (Sept. 3, 1986), *Saenz*, 792 F.3d 144.

294. Memorandum from Jerome Farris to active judges (Sept. 12, 1986), *Saenz*, 792 F.3d 144.

the necessity of further en banc proceeding,²⁹⁵ a view seconded by a couple of other judges, the panel remanded so as to avoid an en banc vote.

One case illustrates the mixing of the previously discussed claim that the panel's ruling conflicts with Supreme Court precedent with deferral of action until the Supreme Court decides a pending case, followed by renewal of the initial claim.²⁹⁶ An off-panel judge, who initially stopped the clock, asserted that the appellant had not presented his claim to the state courts and thus had not exhausted his state remedies before seeking federal habeas.²⁹⁷ Although the claim of conflict with the Supreme Court was not prominent in his memos to the panel, he claimed that not only was there a conflict with circuit precedent but also that the Supreme Court's ruling in *Duncan v. Henry* had not been followed.²⁹⁸

The judge and the panel exchanged numerous memoranda over two months until, in preparing a further response, the author of the panel's opinion reported awareness that another Ninth Circuit case raising roughly the same issue and coming from the same state, *Reese v. Baldwin*,²⁹⁹ had been granted review by the Supreme Court.³⁰⁰ The panel author, stating that "[b]ecause the Supreme Court rarely grants cert on 9th Circuit cases to affirm them," suggested that the en banc consideration be deferred until after the Supreme Court's ruling, adding that as the defendant was already serving life terms, "[d]elay is of little or no consequence."³⁰¹ Should the Supreme Court hold to the "rigorous and mechanistic view of procedural default that is being urged by the State Oregon," he said, "a lot of judge and lawyer time might [otherwise] be wasted on briefing."³⁰² Agreement was reached in late November 2003 to defer matters.

Three months later, the Supreme Court decided the case, reversing the Ninth Circuit³⁰³ and "holding that a petitioner had not 'fairly presented' his federal claim . . . to a court by mentioning federal constitutional amendments in his petition" and that "an issue was not fairly presented to a state supreme court if that court had to read lower

295. Memorandum from Alfred T. Goodwin to Associates (Mar. 11, 1987), *Saenz*, 792 F.3d 144.

296. *Lounsbury v. Thompson*, 340 F.3d 998 (9th Cir. 2003), *superseded by* 374 F.3d 785 (9th Cir. 2004).

297. Memorandum from Melvin Brunetti to Associates (Sept. 11, 2003), *Lounsbury*, 340 F.3d 998.

298. Memorandum from Melvin Brunetti to Associates (Sept. 25, 2003) (citing *Duncan v. Henry*, 513 U.S. 364 (1995)), *Lounsbury*, 340 F.3d 998.

299. *Reese v. Baldwin*, 282 F.3d 1184 (9th Cir. 2002), *rev'd*, 541 U.S. 27 (2004).

300. *Baldwin v. Reese*, 538 U.S. 1056 (2003) (granting certiorari).

301. Memorandum from Alfred T. Goodwin to panel & Melvin Brunetti (Nov. 26, 2003), *Lounsbury*, 340 F.3d 998.

302. *Id.*

303. *Baldwin v. Reese*, 541 U.S. 27 (2004).

court opinions or papers in order to find the claim.”³⁰⁴ While the law clerk to the author of the panel opinion said the new Supreme Court decision “does not directly conflict” with the present case, it did cause a problem for the panel’s opinion because it “falls in line with other cases demanding an explicit statement of a claim in a petition in order to fairly present it to a court.”³⁰⁵

Without waiting to hear from the panel, the off-panel judge returned to the fray, calling for en banc while saying, “I think it is clear that even the amended opinion goes outside the Supreme Court’s and our own circuit’s jurisprudence,” to which he added that the ruling “has explicitly precluded such a loose interpretation of the exhaustion requirement.”³⁰⁶ The panel then engaged in internal discussion as to how to proceed. The author at first said about the Supreme Court ruling, “Now having the benefit of that decision, it appears that a respectable argument can be made to reject the en banc call’s arguments and circulate a memo to the full court defending the opinion,” although he conceded that an opposite reading was possible.³⁰⁷ After a suggestion from another panel member, the panel, while adhering to its belief that the Supreme Court ruling did affect the *result* the panel had reached,³⁰⁸ asked the en banc caller to withdraw the call so that the original opinion could be withdrawn and a new, amended opinion substituted.³⁰⁹ With the off-panel judge not persuaded, the case proceeded to an en banc vote, in which en banc rehearing failed to achieve a majority of nonrecused active judges.

In deciding whether to let a case proceed to the Supreme Court without en banc rehearing, court of appeals judges at times have had to take into account lawyers’ strategizing about reaching the Supreme Court. When cases invalidating state laws could still reach the Supreme Court on appeal, a lawyer might not want the court to reconsider such rulings en banc. Commenting on the efforts by a state’s new lawyer (Professor Lawrence Tribe) to withdraw the state’s already-filed PFR and suggestion for rehearing en banc, a judge said, “The message I get is that Tribe knows he has a winner and would rather savor his victory in

304. Memorandum from Lika, Law Clerk, to Alfred T. Goodwin (Mar. 2, 2004), *Baldwin*, 541 U.S. 27.

305. *Id.*

306. Memorandum from Melvin Brunetti to Associates (Mar. 8, 2004), *Lounsbury*, 340 F.3d 998.

307. Memorandum from Alfred T. Goodwin to panel (Mar. 9, 2004), *Lounsbury*, 340 F.3d 998.

308. “To the contrary, we believe that some of the reasoning in *Reese* supports our conclusion, and nothing in the opinion directly addresses the problem in *Lounsbury*.” Memorandum from panel to Melvin Brunetti (Mar. 26, 2004), *Lounsbury*, 340 F.3d 998.

309. Memorandum from Alfred T. Goodwin to Melvin Brunetti & Associates (Mar. 29, 2004), *Lounsbury*, 340 F.3d 998.

the Supreme Court than in the Ninth Circuit.”³¹⁰ However, the judge still wanted en banc rehearing because, if it were granted and the en banc court upheld the state law, the Supreme Court’s jurisdiction would be discretionary and the Justices might “let an en banc opinion by our court stand as the last word on the issue,” as it had with a First Circuit ruling on a Puerto Rico land law.³¹¹ The panel author objected to taking a case en banc on the basis of speculation about a litigant’s goals and also objected to taking a case en banc to remove a state’s appeal right.³¹²

In addition, at least some judges have been willing at times to leave lawyers to their possible use of certiorari. A judge who argued against taking en banc the San Francisco schools case (involving Chinese-speaking students in English-only classes) had among his reasons the availability of the Supreme Court: “The question presented is certainly novel, the contrary view is well expressed in [the panel] dissenting opinion, and if the decision is contrary to Supreme Court authority, a question that I think is at least arguable, the appellants have their remedy via the certiorari route.”³¹³ (The Supreme Court did grant review and reversed.) Likewise, in a case on the taking of fingernail scrapings, a judge concerned about a case originating in his home state of Oregon said to a fellow Oregon member of the court that one option might be “to just have the mandate go down and have the Attorney General of Oregon try to get the Supreme Court to take certiorari and review the case.”³¹⁴ He added that might be “the best course to follow” because the Supreme Court seemed to have “no hesitation whatever in reviewing Ninth Circuit cases,”³¹⁵ something that was to become more visible and quite a matter of controversy in succeeding years.

And in another case, a liberal member of the court declined to join the panel dissenter and erstwhile liberal colleague Shirley Hufstедler in supporting en banc because he felt the party that would petition for certiorari, the FDIC, had “stature” that put it “in a better position than most parties to obtain review.”³¹⁶ Another judge, voting the same way, said the well laid-out positions of the panel author and dissenter would lead the FDIC “almost surely [to] get” certiorari if it sought it, which it

310. Memorandum from William Norris to Associates (June 1, 1983), *Midkiff v. Tom*, 702 F.2d 788 (9th Cir. 1983), *rev'd sub nom. Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

311. *Id.*

312. Memorandum from Arthur Alarcon to Associates (June 3, 1983), *Midkiff*, 702 F.2d 788.

313. Memorandum from Ben C. Duniway to Associates & senior judges (Feb. 28, 1973), *Lau v. Nichols*, 483 F.2d 791 (1973), *rev'd*, 414 U.S. 563 (1974).

314. Memorandum from Alfred T. Goodwin to John Kilkenny, *Murphy v. Cupp*, 461 F.2d 1006 (9th Cir. 1972), *rev'd*, 412 U.S. 291 (1973).

315. *Id.*

316. Vote explanation by Walter Ely (Sept. 28, 1976), *Harmsen v. Smith*, 542 F.2d 496 (9th Cir. 1976).

would do if en banc were denied.³¹⁷ He added, “This is the kind of question that ought to be settled by the Supreme Court,” and granting en banc would mean the case “won’t even be ripe to send to the Supreme Court for another year.”³¹⁸ And in the Hawaii land-reform case, in arguing against en banc hearing, the panel author suggested that a state court case with the same issues and parties would be taken to the Supreme Court by those parties and, commenting on his own court’s slow pace, said, “At the rate we have moved on this matter up to now, the Hawaiian Supreme Court’s decision may well reach the Supreme Court before our work is done.”³¹⁹ However, the Ninth Circuit’s case was the one the Supreme Court decided.

If letting attorneys for the litigants petition for certiorari is one way to get cases to the Supreme Court, another way may be statements by the court of appeals’ own judges. Dissent within a panel can catch the attention of the Justices or of the clerks in the “cert pool,” but dissent from denial of rehearing en banc does so even more obviously. When a judge carries disagreement with a panel ruling to the point of writing a dissent from the court’s declining to take the case en banc, that writing can be seen as intended not so much for the judge’s colleagues—as the judge will have made the same arguments to them in the (unsuccessful) effort to obtain en banc rehearing—as for external audiences, most particularly the Supreme Court. The frequent use of such dissents annoys some other members of the Ninth Circuit, and in one instance, a judge complained that they “prolong[] argument” and “exacerbate[] divisions,” because the practice “improperly serves the function of a cert petition, a task better left to counsel.”³²⁰

CONCLUSION

This examination of reasons offered by judges for why a court of appeals should (re)hear cases en banc or should not do so is based primarily on communications among Ninth Circuit judges preserved in the case files of Judge Alfred T. Goodwin, the court’s long-time en banc coordinator. From it, we obtain a richer picture of judges’ within-court communication. In particular, we see the judges’ reasons for acting in the period after a three-judge panel has decided a case and as the court communicates about, and struggles with, taking a case to en banc rehearing. The reasons offered, while of course differing in their

317. Vote explanation by Ben C. Duniway (Sept. 30, 1976), *Harmsen*, 542 F.2d 496.

318. *Id.*

319. Memorandum from Arthur Alarcon to Associates (June 3, 1983), *Midkiff v. Tom*, 702 F.2d 788 (9th Cir. 1983), *rev’d sub nom. Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

320. Memorandum from Harry Pregerson to Associates (Jan. 30, 1987), *Sw. Marine, Inc. v. Campbell Indus.*, 806 F.2d 898 (9th Cir. 1986), *reh’g denied*, 811 F.2d 501 (9th Cir. 1987).

application to particular cases, remain basically the same over the more than twenty-year period covered here; more recent cases would show the same types of reasons offered, both for en banc hearing and against it. We find that judges often use multiple reasons rather than just a single one in making en banc calls, but the most fundamental, and most frequently used, reason is that in some way the panel erred and “got it wrong,” most often in ways specific to the case.

We also see frequent use of the three desiderata stated in FRAP 35. The first is that there is an intracircuit conflict because the present opinion runs into or up against prior circuit precedent, which the panel attempts to distinguish, and at times panels themselves call for en banc hearing because they see a conflict between a purportedly controlling case and their view of the law. The second is conflict with rulings of the Supreme Court or allegations of misapplication of those rulings. And the third and the most open-ended is that the case is of “extraordinary importance,” something that can subsume the first two criteria, although the implication is that something more is necessary. Courts of appeals often add as another desideratum, one not separately stated in FRAP 35 although indicated there as a matter of importance, intercircuit conflicts, something many judges try to avoid or at least inveigh against, while some think each circuit should speak for itself, letting the Supreme Court resolve any circuit conflicts.

Institutional considerations, particularly that en banc sittings consume valuable court resources, are yet another part of the mix of reasons to oppose taking a case en banc, often added to a recitation of the previously stated reasons. As part of the argument for shepherding resources for panel rather than en banc work, one finds the particular view that cases should not be taken en banc if they are going to go to the Supreme Court in any event, especially if it is likely the Justices will accept them for review, and that rehearing a case en banc simply extends the time before a case going to the Supreme Court arrives there. In this context, we are able to see a little-known aspect of court of appeals decisionmaking, their deference to the Supreme Court, as the judges suspend action until the Supreme Court has decided cases that would aid in disposition of their own caseload, including cases being considered for en banc rehearing.
