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COOKING THE BOOKS: THE ART OF JUDICIAL GAMESMANSHIP

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ABSTRACT

The fanfare surrounding Supreme Court reform has reached a new peak, especially after the recent appointments of Justices Gorsuch, Kavanagh, and Barrett, alarming opinions related to voting rights, and the Court's recent shadow docket activities surrounding immigration and reproductive rights. While the Presidential Commission on the Supreme Court of the United States toiled away at meaningless platitudes and empty fixes, an equal—if not more—troubling problem brews below in the United States Court of Appeals: judicial gamesmanship.

This Article explores some of the more elusive gamesmanship tactics the federal circuit courts use to manipulate case outcomes, including en banc gatekeeping, panel assignments, and publication decisions. These tactics, while uncommon, create cause for concern because they utilize ambiguous local rules to cement the majoritarian judicial ideology (both liberal and conservative) of each respective circuit, all while bypassing traditional merit-based arguments on the issues that come before them.

To remedy these tactics, action must be taken. This Article proposes that these issues can be alleviated by removing or limiting the ability of circuit courts to establish local rules and instead establishing nationwide internal operating procedures. Alternatively, or conjunctively, it proposes that there is no longer a need for dedicated geographical circuit courts and that we should consider instituting President Taft's "flying squadron" approach. Last, this Article argues that increased supervision and exposure, like the Civil Justice Reform Act, is needed to prevent future manipulative techniques from sprouting.

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"[I]f you spend all day shuffling words around, you can make anything sound bad."[1]
—Rick Sanchez.

INTRODUCTION

The federal judiciary is equal parts fascinating and frustrating. While the Supreme Court garners the vast percentage of the media spotlight, the federal circuit courts arguably wield more power in shaping the American legal landscape. This is so because circuit courts are functionally the final arbiters of legal disputes.[2] And "[w]ith great power comes great responsibility."[3] Unfortunately, not all circuit judges exercise this power as ethically or impartially as one would expect.[4] Certainly, unethical decisions and abuses of power are rare.[5] Without

1. Zach Laws, *'Rick and Morty': Best Rick Quotes, Ranked Worst to Funniest*, GOLD DERBY (Apr. 23, 2020, 5:33 PM), https://www.goldderby.com/gallery/rick-and-morty-best-rick-quotes-ranked/.

2. *See About the U.S. Courts of Appeals*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals (last visited May 18, 2022) ("The Supreme Court of the United States hears about 100 to 150 appeals of the more than 7,000 cases it is asked to review every year. That means the decisions made by the 12 Circuit Courts of Appeals across the country and the Federal Circuit Court are the last word in thousands of cases.").

3. Darryl Seland, *With Great Power Comes Great Responsibility*, QUALITY MAG. (Apr. 16, 2018), https://www.qualitymag.com/articles/94643-with-great-power-comes-great-responsibility (attributing this quote to "Voltaire, Winston Churchill, and both President Roosevelts. (Sorry, Spidey.)").

4. *See, e.g.*, justicefortexas, *The Fifth Circuit's History of Manipulating It's* [sic] *Panels, One Which We Leveled Directly at the Fifth Circuit in 2019, is Etched into History for All to See and History Is Repeating Itself with This Court*, L. IN TEX. (July 23, 2019), https://lawsintexas.com/the-fifth-circuits-history (noting Judge Benjamin Cameron's allegation that Chief Judge Elbert P. Tuttle of the Fifth Circuit "manipulat[ed] the composition of panels in civil rights . . . cases so as to influence their outcome[s]"); Ronald D. Rotunda, *The Mystery of Case Assignment in the Ninth Circuit*, VERDICT JUSTIA (Dec. 1, 2014), https://verdict.justia.com/2014/12/01/mystery-case-assignment-ninth-circuit (explaining the speculation behind whether panels resolving same-sex marriage cases in the Ninth Circuit were truly randomized); Emily Hoerner & Rick Tulsky, *Pattern of Misstated Facts Found in Opinions of Renowned U.S. Judge Easterbook*, INJUSTICEWATCH (Apr. 4, 2017), https://www.injusticewatch.org/projects/2017/pattern-of-misstated-facts-found-in-probe-of-renowned-federal-judges-opinions/ (quoting Professor Albert W. Alschuler, who stated that "Judge Easterbrook persistently presents wildly inaccurate, made-up statements as unquestionable statements of fact"); Alli Orr Larsen & Neal Devins, Going En Banc: Idea Sheet – Duke Roundtable (June 19, 2021) (on file with author) (questioning recent en banc decisions by the Fourth, Fifth, and Ninth Circuits as a "proactive tool to reach politically salient issues").

5. *See* J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1071 n.225 (2000) (noting that, for example, panel switching is "generally discouraged" even amongst circuit courts where it is permitted);

substantive checks, however, opportunities for abuse will continue to go unnoticed and unmitigated. For judges who do not see judicial gamesmanship as an issue—or worse, for those who recognize it as such and use it as a weapon—the temptation to sculpt legal precedent with manipulative techniques may be too enticing to pass up. Moreover, the tendency in our hyper-partisan age is for gamesmanship to snowball and have ripple effects,[6] something which often negatively impacts those most disenfranchised throughout society.[7]

Though many areas of judicial gamesmanship merit discussion, this Article focuses on some of the more egregious techniques, including (1) en banc procedures, (2) panel compositions, and (3) publication decisions. These areas raise grave concerns about the future of the judiciary. Litigants and attorneys alike should be concerned with the lack of impartiality and end-runs employed in judicial decision-making. To soften these concerns, the Article argues that these manipulation techniques should be prohibited in order to save the sanctity of the federal judiciary. First, this Article contends that circuit courts should not be permitted to enact local rules; rather, all rules governing internal operating procedures should come directly from the Supreme Court or from a select committee of rotating judges appointed by the Supreme Court.[8] Second, and alternatively, this Article posits that many of these issues could be resolved by eliminating circuit courts altogether.[9] It imagines an appellate judiciary with rotating judges instead of strict assignments to dedicated geographical circuits.[10] Finally, this Article proposes increased monitoring and visibility of administrative decisions from circuit courts.[11]

To guide the discussion, this Article proceeds as follows. Part I briefly discusses the history of the judiciary acts, laying the foundation of how we arrived where we are today.[12] Part II explores the techniques circuit

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Todd David Peterson, *Congressional Investigations of Federal Judges*, 90 IOWA L. REV. 1, 12, 25–29 (2004) (discussing the alleged procedural misconduct of Chief Judge Boyce F. Martin's handling of *Grutter v. Bollinger* and noting that "Congress has not, however, regularly investigated individual federal judges outside of the impeachment context").

6. *See* Francesca Gino & Max H. Bazerman, *When Misconduct Goes Unnoticed: The Acceptability of Gradual Erosion in Others' Unethical Behavior*, 45 J. EXPERIMENTAL SOC. PSYCH. 708, 708 (2009) ("[S]tudies show that people are more likely to accept others' unethical behavior when ethical degradation occurs slowly rather than in one abrupt shift.").

7. *See infra* note 237 and accompanying text.

8. *See* discussion *infra* Part III.A.

9. *See* discussion *infra* Part III.B.

10. *See* discussion *infra* Part III.B.

11. *See* discussion *infra* Part III.C.

12. *See* discussion *infra* Part I.

courts can and do use to shape precedent and explains why these techniques are problematic.[13] Part II.A. begins by examining en banc procedures and the ever shrinking role of senior judges.[14] Part II.B dives into what I call "marionette management," that is, how chief judges use local rules to effect the composition of panels and ad hoc intra-circuit court packing.[15] And, Part II.C examines the politics of publishing circuit court decisions.[16] Part III proposes various solutions to curb these issues and potential challenges to these solutions.[17]

I. A BRIEF HISTORY OF THE JUDICIARY ACTS

Before plunging into how circuit courts can manipulate jurisprudence, we must first discuss how these issues came into existence. Our story begins on April 7, 1789, when the Senate appointed the nation's first judiciary committee.[18] Led by then Connecticut senator, and future Chief Justice of the Supreme Court, Oliver Ellsworth, the judiciary committee was responsible for laying the foundation of the federal judiciary via the Judiciary Act of 1789.[19] In addition to establishing state court concurrent jurisdiction over federal questions and guaranteeing the right to trial in the districts where defendants lived, the Judiciary Act of 1789 also extended jurisdiction to federal circuit courts, thereby birthing the "multi-tiered federal court structure" as we know it today.[20] As of the 1789 Act, the "United States circuit courts

13. *See* discussion *infra* Part II.
14. *See* discussion *infra* Part II.A.
15. *See* discussion *infra* Part II.B.
16. *See* discussion *infra* Part II.C.
17. *See* discussion *infra* Part III.
18. *See Senator Ellsworth's Judiciary Act*, U.S. SENATE, https://www.senate.gov/legislative/landmark-legislation/judiciary-act-1789.htm (last visited May 18, 2022) ("[T]he Senate first convened in 1789 . . . . [T]he day after achieving its first quorum, the Senate appointed a committee . . . to draft legislation to shape the national judiciary.").
19. *See id.* (stating that Senator Ellsworth "became the panel's chairman" and that "[o]n July 17, 1789, the Senate enacted its version of [the Judiciary Act of 1789]").
20. *Landmark Legislation: Judiciary Act of 1789*, FED. JUD. CTR., https://www.fjc.gov/history/legislation/landmark-legislation-judiciary-act-1789-0 (last visited May 18, 2022). While the Act of 1789 established district courts, circuit courts, and the Supreme Court, the circuit courts were far more limited in jurisdiction than they are today. *See* Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity "Crisis": Charting a Path for Federal Judiciary Reform*, 108 CALIF. L. REV. 789, 797 (2020) ("The jurisdiction of the circuit courts was limited to cases involving diversity of citizenship, major federal crimes, cases brought by the [federal] government, and larger civil and admiralty cases.").

. . . served as the principal trial courts in the federal system and exercised [only] limited appellate jurisdiction."[21]

Twelve years later, the federal judiciary heard the first calls for reform when the Judiciary Act of 1801 was enacted.[22] "Along with other provisions, the [1801 Act] . . . eliminated the justices' circuit-court duties by creating 16 new judgeships for six judicial circuits."[23] The end of circuit-riding duties came as a response to "concern[s] that justices could rule on appeals of cases they decided in trial court."[24] The 1801 Act, however, was short-lived and was repealed just one year later.[25] "The Judiciary Act of 1802 retained all six circuits established in 1801, but little else from the earlier law . . . ."[26] Between 1802 and 1863, the federal judiciary saw the creation of the Seventh through Ninth Circuits due to increased caseloads and traveling difficulties.[27]

In 1869, during Reconstruction, Congress once again overhauled the federal courts, reestablishing separate judgeships for the circuit courts in an effort to ease the duties of both Supreme Court Justices and district court judges.[28] Fast forwarding to 1891, the federal judiciary saw yet another transformation. The brainchild of New York Senator William Evarts, the Act of 1891 (known as the Evarts Act) "established nine

21. *Landmark Legislation: Judiciary Act of 1789*, *supra* note 20.

22. Melvin I. Urofsky, *Judiciary Act of 1801*, BRITANNICA, https://www.britannica.com/topic/Judiciary-Act-of-1801 (last visited May 18, 2022).

23. *Id.*

24. *Landmark Legislation: Judiciary Act of 1789*, *supra* note 20.

25. *See* Jed Glickstein, *After Midnight: The Circuit Judges and the Repeal of the Judiciary Act of 1801*, 24 YALE J.L. & HUMANS. 543, 549 (2012) (citing RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 45 (1971)) ("On January 6, 1802, Senator John Breckinridge proposed the repeal of the Judiciary Act.").

26. *Packing (and Unpacking) the U.S. Supreme Court: A Brief History*, MSBA (Oct. 13, 2020), https://www.msba.org/packing-and-unpacking-the-u-s-supreme-court-a-brief-history/.

27. *See Landmark Legislation: Eight and Ninth Circuits*, FED. JUD. CTR., https://www.fjc.gov/history/legislation/landmark-legislation-eighth-and-ninth-circuits (last visited May 18, 2022) ("By the 1820s, Congress faced growing demands that [the western states] receive the same access to the courts of the United States as states that were within a circuit. . . . The legislation of 1837 organized the circuits west of the Appalachians to facilitate the travel of the justices through [the] territory . . . ."). *See generally Landmark Legislation: Judiciary Act of 1802*, FED. JUD. CTR., https://www.fjc.gov/history/legislation/landmark-legislation-judiciary-act-1802 (last visited May 18, 2022); *Landmark Legislation: Tenth Circuit*, FED. JUD. CTR., https://www.fjc.gov/history/legislation/landmark-legislation-tenth-circuit (last visited May 18, 2022)

28. *See* U.S. CTS., IN THE BEGINNING: THE FEDERAL JUDICIARY 1789–1891 1, http://www.lb8.uscourts.gov/pubsandservices/histsociety/empire-panel1-beginning.pdf (last visited May 31, 2022) ("In 1869, Congress attempted to reduce the justices' circuit court obligations to one term every two years. They created a circuit judgeship for each of the nine circuits . . . . [But] much of the work had to be handled by the district judges.").

courts of appeals, one for each judicial circuit at the time."[29] The Evarts Act also established additional judgeships for each circuit and eliminated the circuit riding duties of Supreme Court Justices once more.[30] Congress finally cleaned up the mismatch of laws pertaining to the judiciary in 1911.[31] With the newly established courts of appeals, the 1911 Act eliminated the older circuit courts, transferring their cases to the district courts.[32] With the three-tiered federal judiciary established, Congress and the judiciary faced another problem: the backlog of cases in the federal courts. Former President, and then Chief Justice, Taft had initially proposed the appointment of at-large judges, what he called a "flying squadron."[33] This "flying squadron" could be temporarily assigned to the courts of appeals to relieve congestion.[34] Part of Taft's plan included a "conference of judges [that] would serve primarily to assess the caseload of the lower courts[35] and assign the ["flying squadron"] to [the] courts in need."[36] While Taft's "flying squadron" plan[37] ultimately met its demise in Congress, a part of his plan lived on when Congress established an annual conference with the Chief Justice and a chief judge from each circuit to advise on the administrative needs of the federal courts.[38] Later, in 1939, the Administrative Office ("AO") of the U.S.

29. *See The Evarts Act: Creating the Modern Appellate Courts*, U.S. CTS., https://www.uscourts.gov/educational-resources/educational-activities/evarts-act-creating-modern-appellate-courts (last visited May 18, 2022). The Evarts Act first styled the United States Courts of Appeals as "circuit courts of appeals." *See* Marin K. Levy (@marinklevy), TWITTER (Oct. 12, 2021, 9:20 PM), https://twitter.com/marinklevy/status/1448096160686780418?s=11.

30. *See* Menell & Vacca, *supra* note 20, at 801 ("[The Evarts Act] largely released Supreme Court justices from the responsibility of circuit riding.").

31. *See* Amy McKeever, *Why the Supreme Court Ended Up with Nine Justices—And How That Could Change*, NAT'L GEOGRAPHIC (Sept. 20, 2020), https://www.nationalgeographic.com/history/article/why-us-supreme-court-nine-justices.

32. *See id.* ("Subsequent laws reduced the burden of circuit riding on the justices and, in 1911, ended the practice completely, severing the direct tie between the circuit courts and the number of Supreme Court [J]ustices."); *RG 21: Records of the US District Courts for the Eastern District of Texas*, NAT'L ARCHIVES, https://www.archives.gov/fort-worth/finding-aids/rg021-texas-courts (last visited May 18, 2022) ("The Judiciary Act of 1911 abolished the circuit courts as of January 1, 1912, and provided for the transfer of their records and remaining jurisdiction to the district courts.").

33. Marin K. Levy, *Visiting Judges*, 107 CALIF. L. REV. 67, 71 (2019) (noting Taft's proposal). The phrase "flying squadron" is used throughout this article.

34. *See id.*

35. *Landmark Legislation: Conference of Senior Circuit Judges*, FED. JUD. CTR., https://www.fjc.gov/history/legislation/landmark-legislation-conference-senior-circuit-judges (last visited May 18, 2022).

36. *Id.*; Levy, *supra* note 33, at 71.

37. *See* Levy, *supra* note 33, at 71.

38. *See Taft, William Howard*, *in* BIOGRAPHICAL ENCYCLOPEDIA OF THE SUPREME COURT 525 (Melvin I. Urofsky ed., 2006),

Courts was established.[39] The AO provided the judiciary with budgetary and personnel management agencies independent of the executive or legislative branches.[40] The Act of 1939 also "mandated annual circuit conferences at which circuit and district judges would meet with members of the bar to discuss judicial administration"[41] or what is now referred to as the Judicial Conference.[42]

The Judicial Conference also established multiple committees, discrete policy-advisory entities that make recommendations to the Conference.[43] Of particular interest to this Article is the Committee on Rules of Practice and Procedure, which consists of five subcommittees.[44] One of these subcommittees is the Advisory Committee on Appellate Rules.[45] "Prior to 1968, most federal appellate procedures were left to the discretion of the individual U.S. courts of appeals."[46] By the 1960s, attorneys were growing "dissatisfied with the variance in appellate procedure between the judicial circuits . . . [and] [l]itigation had also become more national in scope . . . making compliance with varying procedural rules frustrating."[47] The new Advisory Committee on Appellate Rules eventually led to the creation of the Federal Rules of

https://library.cqpress.com/scc/document.php?id=bioenc-427-18170-979574&v=1b97c674c0ea69d6 (last visited May 18, 2022) ("[The Act of 1922] established a conference composed of the chief justice and the senior judges of the nine circuits, and which empowered Taft, with certain limitations, to reassign district court judges geographically to meet the needs of judicial business.").

39. CONG. RSCH. SERV., RS21847, ADMINISTRATIVE OFFICE OF THE U.S. COURTS: HISTORY, OPERATIONS, AND CURRENT ISSUES 1 (2004) ("The Administrative Office of the United States Courts (AO) was created by Congress in 1939 to provide administrative support to the federal courts.").

40. *See Fellowship Placements*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/fellows/fellowships.aspx (last visited May 18, 2022) ("[The AO] provides program management, legal counsel, legislative services, and administrative support to the federal courts and their policy-making body, the Judicial Conference.").

41. *Landmark Legislation: Administrative Office of the U.S. Courts*, FED. JUD. CTR. https://www.fjc.gov/history/legislation/landmark-legislation-administrative-office-us-courts (last visited May 18, 2022).

42. *See generally About the Judicial Conference*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference (last visited May 18, 2022).

43. *See id.* ("Judicial Conference committees review issues within their established jurisdictions and make policy recommendations to the Conference.").

44. *See id.* (listing the five advisory subcommittees, including the following committees: (1) appellate rules, (2) bankruptcy rules, (3) civil rules, (4) criminal rules, and (5) evidence rules).

45. *See id.*

46. *Rules: Federal Rules of Appellate Procedure*, FED. JUD. CTR., https://www.fjc.gov/history/courts/rules-federal-rules-appellate-procedure (last visited May 18, 2022).

47. *Id.*

Appellate Procedure ("FRAP"), which unified certain practices such as joint appendices.[48] Embedded in the FRAP, however, was an escape valve—Rule 47.[49] Rule 47 permits "[e]ach court of appeals acting by a majority of its judges in regular active service, . . . after giving appropriate public notice and opportunity for comment, [to] make and amend rules governing its practice."[50] While the FRAP created a uniform set of rules amongst the circuit courts, it also left ample space for them to craft local rules and procedures on issues such as en banc hearings, panel compositions (permitting the inclusion or preclusion of senior judges), and the precedential value of published and unpublished opinions.[51]

II. MANIPULATION TECHNIQUES

Like the saying goes, "[w]hen God closes a door, he opens a window, but it's up to you to find it."[52] In our case, the FRAP closed a door in an effort to create uniformity, but federal circuit courts have utilized the Rule 47 window to game the judicial system and shape jurisprudence in unintended ways, the first of which is gatekeeping of the en banc process.

A. *En Banc Gatekeeping*

"Traditionally, 'going en banc' was thought of as a house-keeping chore—used by circuit judges to settle intra-circuit panel disagreements and promote uniformity."[53] As Judge Sutton of the Sixth Circuit has explained, the "traditional grounds for full court review" usually entail "disagreement between the circuits, and . . . important federal

48. *See id.*

49. *See generally* FED. R. APP. P. 47.

50. FED. R. APP. P. 47(a)(1).

51. *See, e.g.*, U.S. CTS., FEDERAL RULES OF APPELLATE PROCEDURE WITH FIFTH CIRCUIT RULES AND INTERNAL OPERATING PROCEDURES (2022), https://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/rules/federalrulesofappellateprocedure [hereinafter 5TH CIR. I.O.P.] (noting specific rules of en banc hearings and rehearings, motions panels, and the precedential value of unpublished opinions before Jan. 1, 1996); Memorandum from U.S. Ct. of Appeals for the Eleventh Cir. (Dec. 1, 2020), https://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/Rules_Bookmark_DEC20.pdf [hereinafter 11TH CIR. I.O.P.] (noting the composition of motions panels, procedure for processing opinions, determinations of when to publish opinions, precedential value of unpublished opinions, and en banc procedures).

52. Jeannette Walls, *Quotable Quote*, GOODREADS, https://www.goodreads.com/quotes/335458-when-god-closes-a-door-he-opens-a-window-but (last visited May 18, 2022).

53. Larsen & Devins, *supra* note 4, at 1.

question[s]."[54] "An en banc case draws on intra-circuit political capital, consumes scarce judicial resources, and diverts the attention of the entire court for just one case."[55] To Judge Sutton, "[a] petition must show that the result will be worth the price."[56] Why then, have "some circuit courts . . . been employing en banc review in an increasing number and range of cases"?[57] The answer may lie in efforts to exert the ideology of the majoritarian make-up of certain circuits.[58]

1. Heads I Win, Tails You Lose: The Power of FRAP 35

While each circuit differs slightly,[59] FRAP 35 permits a "majority of the circuit judges who are in regular active service and who are not disqualified"[60] to order a hearing en banc. Utilizing or preventing en banc rehearing can be a powerful tool in shaping legal precedent,[61] and one used by circuits with either liberal or conservative controlled majorities.[62]

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54. Colter Paulson, *Judge Sutton Explains Why En Banc Review Is So Rare*, SIXTH CIR. APP. BLOG (Dec. 10, 2020), https://www.sixthcircuitappellateblog.com/recent-cases/judge-sutton-explains-why-en-banc-review-is-so-rare/; *see also* FED. R. APP. P. 35(a) ("An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance.").

55. Paulson, *supra* note 54.

56. *Id.*

57. *The Politics of En Banc Review*, 102 HARV. L. REV. 864, 864 (1989); *see also* Debra Cassens Weiss, *Study Finds 'Trump-Era Uptick' in Partisan Voting by En Banc Courts*, ABA J. (Mar. 1, 2021, 9:15 AM), https://www.abajournal.com/news/article/study-finds-trump-era-uptick-in-partisan-splits-and-reversals-on-en-banc-appeals-courts ("The study cites a 'Trump-era uptick' in en banc decisions in which appellate judges vote in blocs largely aligned by the party of the president who appointed them . . . .").

58. *See, e.g.*, Niraj Thakker, *Undue Burden with a Bite: Shielding Reproductive Rights from the Jaws of Politics*, 28 U. FLA. J.L. & PUB. POL'Y 431, 459 (2017) (conducting an in-depth examination of how "the undue burden test . . . enables judges to . . . reach a conclusion based on ideology" in abortion cases).

59. Sarah J. Berkus, *A Critique and Comparison of En Banc Review in the Tenth and D.C. Circuits and* United States v. Nacchio, 86 DENV. U. L. REV. 1069, 1069 (2020) ("Although guided by statute, each circuit likewise relies on federal and local rules in determining the standard for en banc review." (footnote omitted)).

60. FED. R. APP. P. 35(a); *see also* FED. R. APP. P. 35(f) ("A vote need not be taken . . . unless a judge calls for a vote.").

61. *See* Christopher P. Banks, *The Politics of En Banc Review in the "Mini-Supreme Court"*, 13 J.L. & POL. 377, 386 (1997) ("[E]n banc rules that not only became unique to the judicial process of each circuit, but also transformed the en banc process into a mutable, if not capricious, appellate practice in theory as well as in fact.").

62. Some have been less coy with their proposals to manipulate en banc procedures to effect outcomes. *See, e.g.*, Michael Hasday, *Divide and Conquer: How the Democrats Can Maintain Control of the Ninth Circuit*, HARV. L. & POL'Y REV. (Sept. 25, 2019), https://harvardlpr.com/2019/09/25/divide-and-conquer-how-the-democrats-can-maintain-control-of-the-ninth-circuit/ (suggesting a grouping method instead of a random draw to

For example,

> [i]n the Ninth Circuit, the full court (29 active judgeships) votes whether to grant a party's petition (or a judge's request) for an *en banc* rehearing. If a majority . . . grants the petition/request, then the rehearing is performed by a subset panel of 11 judges, comprised of the Chief Judge and 10 additional judges drawn by [a] lot.[63]

Even before President Trump's appointees began to hear cases in the Ninth Circuit, Democratic appointed judges were "reluctant to ask for 11-judge panels to review conservative decisions because the larger en banc panels, chosen randomly, might be dominated by Republicans."[64]

Between 1986 and 1987, "[m]any cases in the District of Columbia Circuit were *en banced* because the conservative majority on the circuit led by then Judge Bork was unhappy with . . . decision[s]."[65] "En banc rehearings . . . occur[red] more frequently as Reagan-appointed majorities apparently resort[ed] to the procedure in order to reverse liberal panel decisions in cases in which neither intracircuit consistency nor issues of exceptional importance [were] at stake."[66]

Anecdotal evidence aside, empirical studies back up the claim of increasing partisan or ideological use of en banc procedures. One study suggests that there is "clear evidence that ideology [has] affected the agenda of the Fourth and Fifth Circuit Courts of Appeals."[67] The study

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avoid minority decisions); Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373, 1381 (2021) ("[W]eaponizing en banc seems to be on the rise in circuits dominated by judges appointed by Democrats, as well as in those dominated by judges appointed by Republicans.").

63. William Yeatman, *Ninth Circuit Review-Reviewed: Is CA9's En Banc Process Driving Disagreement?*, YALE J. REG. (Dec. 10, 2020), https://www.yalejreg.com/nc/ninth-circuit-review-reviewed-is-ca9s-en-banc-process-driving-disagreement-by-william-yeatman/.

64. Maura Dolan, *Trump Has Flipped the 9th Circuit—And Some New Judges Are Causing a 'Shock Wave'*, L.A. TIMES (Feb. 22, 2020, 7:06 AM), https://www.latimes.com/california/story/2020-02-22/trump-conservative-judges-9th-circuit.

65. HERMAN SCHWARTZ, PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION 155 (1988).

66. *The Politics of En Banc Review*, *supra* note 57, at 873–74. *But see* Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. REV. 29, 62–64 (1988) (pointing to other factors that drive en banc decision-making).

67. Phil Zarone, *Agenda Setting in the Courts of Appeals: The Effect of Ideology on En Banc Rehearings*, 2 J. APP. PRAC. & PROCESS 157, 175 (2000). Whether we like to admit it or not, ideology has an effect on how judges decide cases; sometimes it is the main driver. *See, e.g.*, Matt Ford, *Conservatives' Coming War on the Warren Court*, NEW REPUBLIC (Mar. 4, 2019), https://newrepublic.com/article/153208/conservatives-coming-war-warren-court

demonstrated that of 145 en banc decisions between 1995 and 1996, the Fourth Circuit reversed majority liberal panels thirty percent of the time compared to two percent for majority conservative panels.[68] Similarly, in the Fifth Circuit, "8 of 21 (38%) of liberal panel decisions with a dissent were reheard, while *no* conservative panel decisions with a dissent were reheard. Upon rehearing, each of the 8 liberal panel decisions was reversed."[69] A study of the Eighth Circuit noted similar results, which suggests that there is "support for claims that the conservative majority is sometimes using en banc rehearings to overturn liberal panel decisions with which it simply disagrees [, but] . . . a majority of en banc proceedings seem to be serving their traditional purpose."[70]

For those still skeptical, look no further than the recent comprehensive study conducted by Professors Neal Devins and Allison Orr Larsen. Their study empirically demonstrates that the ideological majorities in circuit courts have been "weaponizing en banc" in an effort to "out-muscle the other side."[71]

> From 2018–2020 there was a dramatic and strongly statistically significant spike in both partisan splits and partisan reversals of en banc decisions . . . [and w]hile the rate of going en banc did not change, the level of partisan intensity in the en banc decisions . . . did change.[72]

In fact, Devins and Larsen's data shows that "[a]lmost 35% of en banc decisions in 2018–2020 involved either a partisan reversal or partisan split."[73] The weaponization of en banc is even greater in constitutional cases, in which "[n]ineteen percent of all constitutional cases ended in a partisan split, compared to eleven percent of non-constitutional cases. . . . [And] seventeen percent of all constitutional cases [resulted in] partisan reversal, compared to ten percent of non-constitutional cases."[74]

While FRAP 35 and 28 U.S.C. § 46 give circuit courts a general framework for determining when to hear a case en banc, the courts are free to develop their own local rules and standards to determine which

(quoting Justice Thomas as saying "[t]he liberals made my life miserable for 43 years . . . and I'm going to make their lives miserable for 43 years" (quotation marks omitted)).

68. Zarone, *supra* note 67, at 174 tbl.3.

69. *Id.* at 174.

70. Robert E. Oliphant, *En Banc Polarization in the Eighth Circuit*, 17 WM. MITCHELL L. REV. 701, 749–50 (1991).

71. Devins & Larsen, *supra* note 62, at 1378.

72. *Id.* at 1380.

73. *Id*.

74. *Id.* at 1412.

cases are appropriate for en banc consideration.[75] As FRAP 35 notes, en banc review is generally reserved to (1) "maintain uniformity of the court's decisions," and (2) in cases involving "question[s] of exceptional importance."[76] Both avenues invite subjectivity and the potential for gamesmanship, but the latter is more enigmatic. The Sixth Circuit, for instance, has used the under "maintain uniformity" prong to resolve "conflict[s] between two panel decisions . . . [to] resolv[e] conflicts with Supreme Court precedent[,] or [to] clarify[] areas of general confusion within the circuit."[77]

The "exceptional importance" prong, however, opens the door to gamesmanship. As this term is undefined in FRAP 35,[78] courts are able to further define it under their local rules. The Tenth Circuit, for example, includes the language: "[e]n banc review is an extraordinary procedure intended to focus the entire court on an issue of exceptional *public* importance . . . ."[79] Others, like the D.C. and First Circuits, retain the generic language from FRAP 35,[80] but appear to have interpreted the term to mean cases that "are exceptionally important to the public on a *national* level."[81] And, the Ninth Circuit has uniquely created its own "stringent"[82] interpretation of exceptional importance, only permitting rehearing en banc "[w]hen the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects

75. *See* Berkus, *supra* note 59, at 1069 & n.7.

76. FED. R. APP. P. 35(a)(1)–(2).

77. Pierre H. Bergeron, *En Banc Practice in the Sixth Circuit: An Empirical Study, 1990-2000*, 68 TENN. L. REV. 771, 783 (2001).

78. FED. R. APP. P. 35.

79. 10TH CIR. R. 35.1(A) (emphasis added); *see also* 5TH CIR. R. 35 (noting that a petition for rehearing en banc is "an extraordinary procedure that is intended to bring to the attention of the entire court an error of *exceptional public importance*" (emphasis added)); 11TH CIR. R. 35-3 ("A petition for en banc consideration . . . is an extraordinary procedure intended to bring to the attention of the entire court a *precedent-setting error of exceptional importance* . . . ." (emphasis added)); U.S. CTS., INTERNAL OPERATING PROCEDURES OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT 12 (2018), https://www2.ca3.uscourts.gov/legacyfiles/IOPs.pdf [hereinafter 3RD CIR. I.O.P.] (explaining that a hearing en banc will only be ordered when "the case is of such *immediate importance* that *exigent* circumstances require initial consideration by the full court" (emphasis added)).

80. *Compare* FED. R. APP. P. 35(a)(1)–(2), *with* D.C. CIR. R. 35, *and* 1ST CIR. R. 35. Additionally, the "Second, Fourth, Seventh, [and] Eighth . . . Circuits do not have a local rule altering [FRAP] 35(a)(2)." Alexandra Sadinsky, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 FORDHAM L. REV. 2001, 2019 (2014).

81. Berkus, *supra* note 59, at 1083–84 (emphasis added) (analyzing the D.C. Circuit's decision to review en banc Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach, 495 F.3d 695 (D.C. Cir. 2007) (en banc)).

82. Sadinsky, *supra* note 80, at 2021 (referring to Ninth Circuit's local en banc rule as "stringent").

a rule of *national* application in which there is an overriding need for national uniformity . . . ."[83] Oddly enough, despite this "stringent" rule, "the Ninth Circuit grants en banc review at a significantly higher rate than most other circuits,"[84] which begs the question of how stringent the rule actually is.

The umbrella of the "exceptional importance" prong casts a large shadow, giving cover to circuit courts to grant or deny en banc petitions despite their own proffered definitions of the term. For example, in *Cortez v. McCauley*,[85] a § 1983 excessive force case, the Tenth Circuit did not explain under which prong it decided to hear the case en banc.[86] Instead, the "case appears to [have] present[ed] an issue of judicial administration"[87] rather than one of exceptional importance. And in cases denying en banc review, many courts do not provide a reason at all short of failing to achieve the requisite number of votes.[88]

The issue is that the exceptional importance prong of FRAP 35, combined with the circuit court's local rules, while "taken seriously, . . . are ambiguous."[89] Without a standard or narrow definition of exceptional importance, the circuit courts are free to decide what cases they believe are important and warrant en banc review.[90] And these decisions often depend on the ideological make-up of the circuit itself,[91] issues presented

83. 9TH CIR. R. 35-1 (emphasis added).

84. Sadinsky*, supra* note 80, at 2021.

85. 478 F.3d 1108 (10th Cir. 2007) (en banc).

86. *Id.* at 1112, 1114, 1132–33.

87. Berkus, *supra* note 59, at 1076.

88. *See* Jonathan Stempel, *Insider Trading Conviction of Galleon's Rajaratnam Stands*, 28 WESTLAW J. WHITE-COLLAR CRIME 5 (2013) (noting that "[t]he 2nd Circuit did not give a reason for its decision" rejecting Rajaratnam's request to "have the entire court reconsider it['s opinion] in an 'en banc' review"); Anthony Rollo et al., *Supreme Court Questions Its Jurisdiction in Case About CAFA Jurisdiction*, 18 CONSUMER FIN. SERVS. L. REP. 12, 13 (2014) (explaining that the Tenth Circuit "declined to give any reasons" when it denied "Dart Cherokee's *en banc* petition").

89. Stephen L. Wasby, *The Supreme Court and Courts of Appeals En Bancs*, 33 MCGEORGE L. REV. 17, 24–25 (2001).

90. Indraneel Sur, *How Far Do Voices Carry: Dissents from Denial of Rehearing En Banc*, 2006 WIS. L. REV. 1315, 1324 (2006) ("Although the drafters of Rule 35 apparently believed they were adopting 'rigid standards,' the term[] . . . 'exceptional importance' [is] laden with multiple meanings, thereby vesting judges with wide discretion to decide when the standard[] [is] satisfied and creating room for disagreement among them." (footnotes omitted)).

91. *See* Stephen J. Choi & G. Mitu Gulati, *Trading Votes for Reasoning: Covering in Judicial Opinions*, 81 S. CALIF. L. REV. 735, 738–39 (2008) ("[J]udges tend to vote in a manner consistent with the platform of the party that appointed them.").

in the case,[92] and the make-up of the three judge panel.[93] Ultimately, the meaning of exceptional importance is at the mercy of an evolving sliding scale. On one end, even if a case is of exceptional importance, it is not heard under the guise of judicial economy[94] or for other reasons.[95] On the other end, cases are heard en banc with such frequency that it becomes difficult to say what is not exceptionally important to a circuit. An example of the latter is the Federal Circuit, which "decide[s] more cases en banc than does any other circuit,"[96] and routinely sua sponte orders cases to be heard en banc.[97] The Federal Circuit's frequent use, while admittedly still rare at .30% (during 2001–2009), has been criticized as subverting administrative agency substantive rulemaking.[98]

92. Sur, *supra* note 90, at 1324 ("It may fall under the 'exceptional importance' column if it raises 'an issue on which the panel decision conflicts' with a binding decision of another circuit.").

93. *See, e.g.*, Hailey Konnath, *Full 11th Circ. Will Consider School District's Bathroom Policy*, LAW360 (Aug. 23, 2021, 9:44 PM), https://www.law360.com/articles/1415516/full-11th-circ-will-consider-school-district-s-bathroom-policy (reporting that the Eleventh Circuit decided to rehear the case en banc after a liberal majority panel consisting of Judges Beverly Martin and Jill Pryor held that a "Nease High School graduate was harmed by the school's policy banning him from using the boys' bathroom because he enrolled in the school as [a] female despite his updated . . . status as male" over the "fiery 41-page dissent" of conservative Chief Judge William Pryor); *see also* Eliana Johnson & Shane Goldmacher, *Trump's Down to 3 in Supreme Court Search*, POLITICO (Jan. 24, 2017, 10:43 AM) (noting that President Trump was considering nominating Judge Bill Pryor to replace Justice Scalia); *Where We Stand: Assessing Vacancies and Nominations in the Federal Judiciary—The South*, VETTING ROOM (Aug. 30, 2021), https://vettingroom.org/2021/08/30/where-we-stand-assessing-vacancies-and-nominations-in-the-federal-judiciary-the-south/ ("So far, there has been no nominee to replace [Judge] Martin, who is one of the court's few liberals."); Ian Millhiser, *White House Considering Big Cave to Republicans on Judges*, THINK PROGRESS (Sept. 13, 2013, 3:45 PM), https://archive.thinkprogress.org/white-house-considering-big-cave-to-republicans-on-judges-b4704dba40bb/ (explaining Republican Senators Chambliss and Isakson's opposition to Judge Jill Pryor who was nominated by President Obama).

94. *See* Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981-1990*, 59 GEO. WASH. L. REV. 1008, 1032 (1991) ("Even if a panel decision resolves an issue of exceptional importance[,] . . . it may not be an economical use of the court's time to rehear the case if a majority of the judges do not believe that the panel erred.").

95. *See, e.g.*, Newdow v. U.S. Cong., 328 F.3d 466, 469 (9th Cir. 2003) (Reinhardt, J., concurring in denial of rehearing en banc) ("I disagree with the notion that the importance of an issue is a sufficient reason to take a case en banc, either under the Rule or as a matter of judicial policy. . . . The most reasonable construction of the Rule is that this court should rehear a case en banc when it is both of exceptional importance and the decision requires correction." (emphasis omitted)).

96. Ryan Vacca, *Acting Like an Administrative Agency: The Federal Circuit En Banc*, 76 MO. L. REV. 733, 738 (2011).

97. *See id.* at 739 (discussing frequency that the Federal Circuit sua sponte ordered cases to be heard en banc).

98. *Id.* at 738, 739; *see generally id.* at 744–45 (discussing the Federal Circuit's en banc procedures and how it "acts similarly to an administrative agency").

2. Bypassing the Three Judge Panel

There is also the issue of deciding whether to review en banc *prior to* a three-judge panel issuing an opinion. This is commonly "called 'informal' or 'mini' en banc procedures, whereby panel opinions . . . are circulated for consideration by all active judges on the court before the panel opinion is published."[99] "[I]nformal en banc review has developed in an ad hoc, idiosyncratic way in most circuits with little or no justification."[100] Certainly, informal en banc has its allure and can result in "intracircuit consistency, improved efficiency, and greater collegiality within [a] court,"[101] but these positive aspects are at best a silver lining compared to the dark cloud of disadvantages connected to informal en banc procedures. As Professor Amy Sloan points out, outside of the D.C. and Seventh Circuits, which have written rules on informal en banc procedures,[102] the lack of standards can potentially undermine horizontal stare decisis within a circuit.[103] Moreover, the informal en banc process presents other problems such as:

> [U]se of footnotes to hide the law, potential negative effects on traditionally marginalized groups, diminished collegiality on the court, lack of meaningful opportunity for parties to participate in the process, uncertainty about the weight of informal en banc opinions, and full court endorsement of opinions based on less than thorough review.[104]

99. Michael Stewart, *Breaking the Banc: Informal En Banc Review in the Seventh Circuit*, AM. BAR ASS'N (Dec. 19, 2019), https://www.americanbar.org/groups/litigation/committees/appellate-practice/articles/2019/fall2019-breaking-the-banc-informal-en-banc-review-in-the-seventh-circuit/; *see also* Amy E. Sloan, *The Dog That Didn't Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals*, 78 FORDHAM L. REV. 713, 725 (2009) ("Informal en banc review is a procedure by which one federal circuit court panel circulates an opinion to the full court for acquiescence in an action as a substitute for formal en banc review."). Professor Sloan also notes that the "U.S. Courts of Appeals for the Third, Ninth, Eleventh, and Federal Circuits do not authorize or use" informal en banc procedures. *Id.* at 726.

100. Sloan, *supra* note 99, at 728–29.

101. *Id.* at 741.

102. U.S. CT. OF APPEALS FOR THE D.C. CIR., POLICY STATEMENT ON *EN BANC* ENDORSEMENT OF PANEL DECISIONS (1996), https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20Irons%20Footnote/$FILE/IRONS.PDF; 7TH CIR. R. 40(e).

103. Sloan, *supra* note 99, at 716.

104. *Id.* at 744–45 (footnotes omitted).

More troubling still, is the use of en banc procedures to bypass panel decisions altogether, which effectively permits a liberal or conservative majoritarian circuit court to negate (or instigate) nationwide injunctions or shape areas of the law if they do not like the current make-up of the three judge panel. For example, consider a recent case from the Fourth Circuit. When "President Trump's revised 'travel ban,' which target[ed] six predominantly Muslim nations, . . . dr[ew] intense media scrutiny and legal challenges,"[105] the Fourth Circuit decided to hear the case en banc—bypassing a prior three judge panel.[106] And earlier in 2021, the Sixth Circuit bypassed the traditional three judge panel and granted en banc review of Tennessee's abortion law, which requires a 48-hour waiting period.[107] In fact, "[d]issenting Judge Karen Moore said the en banc majority had endorsed a 'game of procedural hopscotch' by state officials, who sought to avoid review by a three-judge panel because they disliked the panel's composition and its resolution of the stay motion."[108] Of course, both conservative and liberal judges have sought to bypass panels on issues of importance to them, including Judge Moore who "vote[d] to hear a case initially en banc when a federal judge struck down an affirmative action policy at the University of Michigan Law School."[109]

3. "Don't Be Suspicious:"[110] Lack of Voting Accountability

Another gamesmanship problem is the lack of accountability in the en banc voting process.[111] Only the Fourth Circuit publicizes "the vote of each participating judge" when "a poll is requested and hearing or

105. Derek Stikeleather, *Fourth Circuit Weighs "Exceptional Importance" and Possible En Banc Hearing on Travel Ban 2.0*, MD. APP. BLOG (Apr. 7, 2017), https://mdappblog.com/2017/04/07/fourth-circuit-weighs-exceptional-importance-and-possible-en-banc-hearing-on-travel-ban-2-0/.

106. *Labor and Employment Roundup for the Week Ending April 14*, WESTLAW TODAY, Apr. 14, 2017, at 2–3, 2017 WL 1359693 ("The 4th U.S. Circuit Court of Appeals . . . decided to expedite review of a Maryland federal judge's nationwide preliminary injunction blocking part of the 90-day ban on travel to the U.S. from six Muslim-majority countries . . . .").

107. *See* Debra Cassens Weiss, *In Rare Move, Full 6th Circuit Will Hear Initial Arguments in Abortion Case; Dissent Blasts 'Procedural Hopscotch'*, ABA J. (Apr. 13, 2021, 1:33 PM), https://www.abajournal.com/news/article/in-rare-move-full-6th-circuit-will-hear-initial-arguments-in-abortion-case-dissent-sees-procedural-hopscotch.

108. *Id.*

109. *Id.*

110. *Parks and Recreation: Two Funerals* (NBC television broadcast Feb. 17, 2015).

111. Michael E. Solimine, *Due Process and En Banc Decisionmaking*, 48 ARIZ. L. REV. 325, 326–27 (2006) ("The express position of the Ninth Circuit is that the vote tallies are not made public [and that] [t]he other circuits have not memorialized rules on this issue, but they all apparently follow the Ninth Circuit position . . . ."). Likewise, the Eleventh Circuit local rules expressly state that "the identity of the judge will not be disclosed in the order" for a rehearing en banc. 11TH CIR. R. 35.

rehearing en banc is denied."[112] The Fifth and Federal Circuits at least publicize when no poll was requested.[113] And all circuits allow judges to record dissents or concurrences in the voting or polling process.[114] One adamant supporter of publicizing en banc voting tallies was the late Ninth Circuit Judge Stephen Reinhardt who spoke out against the Ninth Circuit's prohibition of en banc polling results, with regard to death penalty cases. In *Harris v. Vasquez*,[115] he explained that "[w]hatever the wisdom of th[e] rule in general . . . it clearly does not serve the public interest . . . ."[116] Judge Reinhardt further explained that "[t]here are good reasons why history should fully record the judicial votes in death penalty cases."[117] "Given the finality and controversy of imposing the penalty, and that 'substantial' numbers of judges . . . may vote to rehear a case, [Judge Reinhardt] contended that the 'fairness and legitimacy' of the process would be enhanced by '[k]nowledge of the actual votes leading to an individual's execution.'"[118] These reasons are likewise applicable to other contentious areas of the law like reproductive rights,[119] gun rights,[120] voting rights,[121] immigration,[122] etc. And other judges have

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112. 4TH CIR. R. 35(b).

113. 5TH CIR. I.O.P., *supra* note 51, at 35-5 ("If the specified time for requesting a poll has expired . . . the panel's order denying the petition for rehearing en banc must show no poll was requested."); UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT INTERNAL OPERATING PROCEDURES 27 (2022), https://cafc.uscourts.gov/wp-content/uploads/RulesProceduresAndForms/InternalOperatingProcedures/InternalOperatingProcedures.pdf (I.O.P. #14(1)(f) states that "[i]f a poll is initiated and the petition for hearing en banc is denied . . . the clerk will enter an order for the court: (i) Advising that a poll was conducted . . . .").

114. Jeremy D. Horowitz, *Not Taking "No" for an Answer: An Empirical Assessment of Dissents from Denial of Rehearing En Banc*, 102 GEO. L.J. 59, 76 (2013) ("Judges from all circuits draft [dissents from denials of rehearing en banc] . . . .").

115. 949 F.2d 1497 (9th Cir. 1990).

116. *Id.* at 1539–40 (Reinhardt, J., dissenting).

117. *Id.* at 1540.

118. Solimine*, supra* note 111, at 327 (quoting *Harris*, 949 F.2d at 1539–40).

119. *See* Thakker, *supra* note 58, at 467 (explaining the effects of abortion related laws on women and how the Supreme Court's abortion rights standard "gives states free reign to force their conception of spirituality on women seeking an abortion").

120. *See* Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk, and Legal Design: "Red Flag" Laws and Due Process*, 106 VA. L. REV. 1285, 1287 (2020) ("[Gun] regulation[s] intersect[] with constitutional rights and interests in the absence of a criminal conviction.").

121. *See* Keyawna Griffith, *New York Election Laws: Better than Georgia's but not Foolproof*, N.Y.U. J. LEGIS. & PUB. POL'Y (Sept. 20, 2021), https://nyujlpp.org/quorum/griffith-new-york-election-laws/ (explaining the impact of voter suppression tactics in Georgia and frivolous challenges to elections).

122. *See* Ian Millhiser, *The Supreme Court's Enigmatic "Shadow Docket," Explained*, VOX (Aug. 11, 2020, 8:30 AM), https://www.vox.com/2020/8/11/21356913/supreme-court-shadow-docket-jail-asylum-covid-immigrants-sonia-sotomayor-barnes-ahlman (explaining how the Supreme Court's "shadow docket cases are often released without a majority

supported Judge Reinhardt's opinion, including the late Judge Harry Pregerson,[123] and Justice Charles Wiggins of the Washington Supreme Court.[124]

There are, however, proponents of keeping en banc polling results secretive. These proponents, like Professor Michael Solimine, argue that disclosing polling results may increase the number of en banc petitions at the circuit level if parties knew that their petition "would automatically put judges on the record regarding their case[s]."[125] These proponents also argue that "the routine publication of such tallies could harm the collegial atmosphere of a circuit."[126] Last, nondisclosure proponents argue that "routinely publishing vote tallies might also encourage the production of explanatory opinions by the judges involved" and that this "would again sideline judicial resources by forcing judges to spend time writing these additional opinions."[127] For example, Judges J. Clifford Wallace and Alfred Goodwin have argued that "misperceptions are sometimes magnified . . . by published dissents from denials of *en banc review*"[128] and that revealing votes will cause judges to "feel compelled to explain their vote. It will go on and on and it can become distasteful . . . . If there is a need for postmortems, . . . then the place for that is law reviews."[129]

Professor Solimine correctly identifies that both sides present plausible arguments. But the arguments in favor of not publicizing vote tallies for en banc hearings or rehearings are unpersuasive. As to the first argument, given the relatively low levels of petitions for hearings or

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opinion explaining the Court's reasoning" and how such decisions can "effectively lock thousands of immigrants out of the county").

123. *See* Solimine, *supra* note 111, at 328 (noting that "Judge Harry Pregerson . . . joined one of Judge Reinhardt's opinions on the issue" and that "other judges and lawyers have expressed support").

124. *Id.* ("Judge Charles Wiggins said that a jurist 'who votes to deny *en banc* should say so explicitly [s]o that there is no misunderstanding. We should make our public acts public.'" (quoting Steve Albert, *The Ninth Circuit's Secret Ballot*, RECORDER (S.F.), Mar. 3, 1995, at 1)).

125. *Id.* at 329.

126. *Id.*

127. *Id.* at 330; *see also Unpublished Judicial Opinions: Hearing Before the Subcomm. on Cts., the Internet, & Intell. Prop. of the H. Comm. on the Judiciary*, 107th Cong. 13 (2002) (statement of Alex Kozinski, Circuit J., United States Court of Appeals for the Ninth Circuit) ("[A]n en banc call consumes substantial court resources. The judge making the call circulates one or more memos criticizing the opinion . . . . Frequently, other judges circulate memoranda in support or opposition. Many of these memos are as complex and extensive as the opinion itself."); Sur, *supra* note 90, at 1327 ("[A] judge who disfavors rehearing will often write a response to defend the panel.").

128. Solimine, *supra* note 111, at 328 (footnote omitted).

129. *Id.* (citation omitted).

rehearings en banc, a default disclosure rule would not suddenly increase the number of petitions. This is so for two reasons. First, petitions for hearings or rehearings en banc are "not favored and ordinarily will not be ordered."[130] An attorney's reputation with prospective clients or a court—especially one who may frequently practice before a given circuit—is unlikely to risk their reputation or that of their firm, purely to obtain a "gotcha" moment by recording certain judges' vote records.[131] Second, there is the time and cost associated on behalf of the client for filing and preparing for a rehearing en banc.[132] Although there are clients who might pay these additional costs, any reputable attorney with a modicum of adherence to ethics rules would advise their client of the unlikelihood of the petition being granted.[133] Even if the petition were granted, reputable attorneys would advise their clients of the low likelihood of a panel reversal.[134] This low likelihood of success may be why appointed counsel under the Criminal Justice Act[135] are not required

130. FED. R. APP. P. 35(a). Some commentators have noted that certain circuits, like the "D.C. Circuit strongly disfavor[] en banc review." Benjamin Wittes, *Thoughts on Latif #5 — Of En Bancs and Cert Grants*, LAWFARE (Nov. 13, 2011, 12:19 PM), https://www.lawfareblog.com/thoughts-latif-5-en-bancs-and-cert-grants.

131. *See* Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, 65 WASH. & LEE L. REV. 173, 177 (2008) ("A lawyer or firm might not . . . be willing to put into writing its willingness to surrender discretion accorded in the rules because doing so might be sanctionable or might put the firm in disfavor . . . . Reputation is a method for signaling to prospective clients the lawyer's or law firm's flexibility without risk."); Judge Edward M. Ginsburg, *For an Attorney, Reputation is Everything*, LEGALNEWS (Nov. 18, 2014), http://legalnews.com/detroit/1397150 ("Throughout my more than 50 years as a member of the bar, one lesson has stood out as more important than all the others: A good personal reputation is the greatest asset a lawyer possesses.").

132. *See* Tillman J. Breckenridge, *Deciding When to Go Forward: Petitioning for Further Review After Losing a Federal Appeal*, IN-HOUSE DEF. Q., Summer 2010, at 21, 23, https://www.reedsmith.com/-/media/files/perspectives/2010/09/deciding-when-to-go-forward/files/deciding-when-to-go-forward/fileattachment/deciding-when-to-go-forward.pdf (discussing that a petition for rehearing en banc can cost "thousands of dollars").

133. *See* MODEL RULES OF PRO. CONDUCT r. 1.4 cmt. 5 (AM. BAR ASS'N 1983) ("In litigation a lawyer should explain the general strategy and *prospects of success* and ordinarily should consult the client on tactics that are likely to *result in significant expense* or to injure or coerce others." (emphasis added)); *see also* ALEX KOZINSKI & JOHN K. RABIEJ, FEDERAL APPELLATE PROCEDURE MANUAL 160 (2014) (emphasis added) ("In every case the duty of counsel is *fully discharged* without filing a petition for hearing en banc unless the case meets the rigorous requirements of FRAP 35.").

134. *See* Breckenridge, *supra* note 132, at 23 ("It makes no sense to spend thousands of dollars on a petition for rehearing en banc if the case is not worth the money you will have to spend to brief and argue after the petition is granted.").

135. 18 U.S.C. § 3006A(a) ("Each United States district court . . . shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation . . . ."). Addendum Four of the 11th Circuit's local rules "supplements the [Criminal Justice Act] plans of the several district[] [courts] of the [11th C]ircuit." 11TH CIR. R. add. 4 at 1.

to petition for a rehearing en banc unless "in counsel's considered judgment sufficient grounds exist."[136]

Moreover, the argument that a vote tally could erode the collegial atmosphere in the circuit courts is flawed. Professionalism and respect should not depend on another judge's voting record. This argument also assumes that the circuit courts are currently collegial. Recently, a number of circuit court opinions have highlighted just how contentious things have become.[137] Take for example a recent Eleventh Circuit opinion, *Keohane v. Florida Department of Corrections Secretary*,[138] which denied an en banc rehearing in a transgender inmate's case.[139] The merits of the decision aside, both the majority opinion and dissent are full of pot shots, all while claiming that the disagreements were not personal in nature.[140] Next door in the Fifth Circuit, in *June Medical*

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136. 11TH CIR. R. add. 4 at 4.

137. *See, e.g.*, United States v. Bryant, 996 F.3d 1243, 1262 (11th Cir. 2021). In *Bryant*, the majority uses statements such as "our dissenting colleague *quibbles*." *Id.* (emphasis added). And Judge Martin's fiery but well-reasoned dissent calls out the majority's "purposivist analysis" and notes that "my two colleagues in the majority are the only federal appellate court judges in the country to interpret the policy statement in the way they do here." *See id.* at 1268 & n.4 (Martin, J., dissenting); Allison Frankel, *In Barbed Dissents, Trump Appointees Call Out 9th Circuit Colleagues in Immigration Case*, REUTERS (Mar. 25, 2021), https://www.reuters.com/article/legal-us-otc-9thcircuit/in-barbed-dissents-trump-appointees-call-out-9th-circuit-colleagues-in-immigration-case-idUSKBN2BH34V (noting Judge Bumatay's accusation that the majority "ignor[ed] the Constitution and U.S. Supreme Court precedent to manufacture a justification for the groups to sue—improperly appointing themselves . . . as 'Platonic Guardians' of our nation's public policies" and Judge VanDyke's accusation that the majority was "'pulling a stunt' to topple a Trump administration policy they didn't like" and that "the 'mischief' of [the majority's] 'barely disguised shenanigans' will linger"). For an especially recent example of a "less than collegial" writing look no further than Judge Vandyke's recent opinions in two immigration cases. *See generally* Reyes v. Garland, No. 17-70127, slip op. at 26–45 (9th Cir. Aug. 27, 2021) (Vandyke, J., dissenting); Goulart v. Garland, No. 19-72007, slip op. at 16 (9th Cir. Nov. 18, 2021) (emphasis added) (asking why the dissent "would . . . champion charting a completely new and unsupported path of legal reasoning just to avoid the lawful removal of *a convicted burglar*"). Or see Judge Bumatay's accusation that Judge Rawlinson marked government employees as "advancing . . . 'environmental racism.'" Ctr. for Cmty. Action & Env't Just. v. FAA, No. 20-70272, slip op. at 45 (9th Cir. Nov. 18, 2021).

138. 952 F.3d 1257 (11th Cir. 2020).

139. *Id.* at 1279.

140. *See* R. Robin McDonald, *'Good Grief': 11th Circuit Judges Get into Scathing Exchange Over Transgender Inmate*, DAILY REP. (Dec. 3, 2020, 6:00 PM), https://www.law.com/dailyreportonline/2020/12/03/good-grief-11th-circuit-judges-get-into-scathing-exchange-in-fractious-order/ (discussing the contentious opinion). To be fair, Judge Rosenbaum's dissent takes the high road by including an apology in a footnote (though I do not believe she had anything to apologize for). *See id.* (quoting Judge Rosenbaum's footnote, which expresses her respect for her colleagues and her valuation of the court's collegiality).

Services, LLC v. Gee,[141] Judge Higginbotham joined Judge Dennis's dissent from an order denying a rehearing, and the dissent calls out the majority by stating:

> A majority of the en banc court repeats this mistake, apparently content to rely on strength in numbers rather than sound legal principles in order to reach their desired result in this specific case. The important constitutional issues involved in this case deserve consideration by the full court more so than most others for which the court has granted en banc rehearing.[142]

While publicizing en banc voting records certainly offers circuit judges another opportunity to voice their displeasures or air grievances with their fellow judges, it is safe to assume that the "collegiality ship" has long since sailed in certain circuits.[143] Additionally, as Judge Edwards has stated, "[a] high rate of en banc rehearings can be a *symptom* of an absence of collegiality,"[144] not necessarily the cause or a driving factor of declining collegiality. After all, "[o]n a collegial court, the court trusts panels to do their work . . . ."[145] And conversely, en banc rehearing opinions can also give judges opportunities to cross party lines, which could help strengthen collegiality.[146]

Anti-publicization proponents also appropriately argue that vote tally publication *may* result in an increase in explanatory opinions.[147] Their fear of increased expenditure of judicial resources, however, is

141. 905 F.3d 787 (5th Cir. 2018).

142. Order Denying Rehearing En Banc at 3, June Med. Servs. v. Gee, 905 F.3d 787 (5th Cir. 2018) (No. 17-30397) (Dennis, J., dissenting) (emphasis added).

143. As to how and why this occurred could encompass its own article. For now, I will let readers come to their own conclusions as to why contentiousness among the circuit courts has seen an uptick. For some possible explanations consider the sources cited here. *See* Frankel, *supra* note 137; *see also* Adam Liptak, *On Federal Appeals Courts, a Spike in Partisanship*, N.Y. TIMES (Feb. 22, 2021), https://www.nytimes.com/2021/02/22/us/politics/courts-partisanship.html (noting Professors Neal Devins and Allison Orr Larsen's New York University Law Review article "Weaponizing En Banc").

144. Aaron L. Nielson, *D.C. Circuit Review—Reviewed: En Banc Review*, YALE J. REGUL. (Sept. 30, 2017), https://www.yalejreg.com/nc/d-c-circuit-review-reviewed-en-banc-review/ (emphasis added).

145. *Id.*

146. *See, e.g.*, Alaina Lancaster, *'Misguided Attack': 14 Judges Join Dissent to 9th Circuit Denial to Rehear Death Penalty Case*, RECORDER (Feb. 8, 2021, 5:46 PM), https://www.law.com/therecorder/2021/02/08/misguided-attack-14-judges-join-dissent-to-9th-circuit-denial-to-rehear-death-penalty-case/ ("Judge Eric Miller, a President Donald Trump nominee, wrote a separate concurrence . . . joined by seven Clinton- and Obama-nominated judges.").

147. Solimine, *supra* note 111, at 330.

overblown because potential explanatory opinions are not necessarily a waste of resources. As discussed above, en banc hearings and rehearings, while on the rise, are still relatively rare.[148] Further, while judicial economy is an important consideration, it is not as important as advancing the law or guiding current and future litigants on the rationale for en banc determinations, especially when important constitutional issues are at stake.[149] Some have even suggested that "judges should be more aggressive[] [because] *en banc* review is a useful tool"[150] and without it "panels may become too independent of the rest of the court."[151] Time spent drafting explanatory opinions for en banc hearings or denials can guide and instruct litigants as to what issues are important to certain judges and the circuit at large.[152] Further, such decisions allow judges to "act as judicial 'whistleblowers' . . . . If a judge who everyone expects to agree . . . nevertheless dissents, that dissent is a much stronger signal that something inappropriate occurred . . . ."[153]

4. Composition of En Banc Courts: Limiting the Role of Senior Judges

Another avenue for gamesmanship with regard to the composition of en banc courts involves the limitations set on senior judges. 28 U.S.C. § 46(c) provides that:

148. *See* Vacca, *supra* note 96, at 744–45.

149. Judicial economy is often considered less important than other competing considerations. *See, e.g.*, Young v. Bishop Estate, 497 F. App'x 735, 738 (9th Cir. 2012) ("[A] state's generalized interest in judicial efficiency does not qualify as an 'important state interest' under *Younger*[.]"); Craik v. Boeing Co., 37 F. Supp. 3d 954, 963 (N.D. Ill. 2013) ("Judicial economy is important, but it is usually not dispositive alone in a transfer analysis."); Francis v. Goodman, 81 F.3d 5, 8 (1st Cir. 1996) (noting that "judicial economy" is an important consideration, but does "not override" other considerations); United States v. Smith, 422 F.3d 715, 728 (8th Cir. 2005) (Heaney, J., concurring) ("Judicial efficiency is an important concern, but it does not eclipse society's interest in protecting the accused's right to a fair proceeding.").

150. Nielson, *supra* note 144.

151. *Id.*

152. *See, e.g.*, Jared S. Buszin & Harry Sandick, *Dissenting from Order Denying Rehearing En Banc, Judges Voice Concerns About Overbroad Criminal Statutes Enabling Prosecutorial Abuse*, PATTERSON BELKNAP (Feb. 16, 2017), https://www.pbwt.com/second-circuit-blog/dissenting-from-order-denying-rehearing-en-banc-judges-voice-concerns-about-overbroad-criminal-statutes-enabling-prosecutorial-abuse (noting how a dissenting opinion on a petition for rehearing en banc interpreted a circuit split issue on 26 U.S.C. § 7212(a)).

153. Deborah Beim, *Judicial Dissents from Ideological Allies in Lower Court Cases Are More Likely to Lead to En Banc Review*, LSE PHELAN U.S. CENTRE (Sept. 24, 2015), https://blogs.lse.ac.uk/usappblog/2015/09/24/judicial-dissents-from-ideological-allies-in-lower-court-cases-are-more-likely-to-lead-to-en-banc-review/.

> A court [en] banc shall consist of all circuit judges in *regular* active service . . . except that any senior circuit judge of the circuit shall be eligible (1) to participate, at his election and upon designation and assignment pursuant to section 294(c) . . . *and the rules of the circuit*, as a member of an in banc [sic] court reviewing a decision of a panel of which such judge was a member, or (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc [sic] at a time when such judge was in regular active service.[154]

As the Supreme Court explained, "voting on the merits of an in banc [sic] case is quite different from voting whether to rehear a case in banc [sic], which is essentially a policy decision of judicial administration."[155] And while this statement is true, the power of whether to vote to rehear a case can be an important tool in shaping the jurisprudence of a circuit.[156]

One famous example of this is *Grutter v. Bollinger*.[157] In *Grutter*, "a dispute erupted within the Sixth Circuit regarding the procedure used to decide whether initially to hear [the] case en banc."[158] Judge Boggs, who dissented, complained that the court had taken an unusual procedural path that violated the Sixth Circuit's local rules.[159] The crux of his complaint was that, although counsel had previously moved to hear the case en banc, counsel's request "for initial hearing *en banc* was not transmitted to most members of the court for five months."[160] During the five month period, two judges—whose views were allegedly close to Judge Boggs—took senior status[161] and were no longer allowed to participate in the en banc hearing.[162] Essentially, Judge Boggs implicitly accused Chief

154. 28 U.S.C. § 46(c) (emphasis added).

155. Moody v. Albemarle Paper Co., 417 U.S. 622, 627 (1974) (interpreting a prior version of § 46(c)).

156. *See* Marin K. Levy, *The Promise of Senior Judges*, 115 NW. U. L. REV. 1227, 1244 (2021) ("[T]here is the dynamic that exists in the shadow of en banc review—namely, that judges can help shape the law of their circuit by keeping alive the possibility that they might go en banc on a particular matter . . . .").

157. 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003).

158. CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3981.3 n.13 (5th ed. 2021).

159. *See Grutter*, 288 F.3d at 810–11 (Boggs, J., dissenting) (footnote omitted) ("The panel that considered this case prior to, and certainly following, the filing of the present appeals was not constituted in conformity with 6th Cir. I.O.P. 34(b)(2) of this court's rules, or any other rule.").

160. *Id.* at 811.

161. *Id.* at 812 (noting that Judges Norris and Suhrheinrich took senior status during this period).

162. *Id.* at 813.

Judge Martin of delaying and manipulating the court's local rules to tilt the en banc panel in his favor. In response, Judge Moore defended Chief Judge Martin by explaining before taking senior status, either Judge Norris or Judge Suhrheinrich "could have called for a poll to determine whether the case should be heard initially en banc . . . . [And] [i]f there were questions regarding the composition of the hearing panel, then Judge Boggs . . . could have raised those questions through this means at any time."[163]

Because 28 U.S.C. § 46(c) permits circuit courts to fashion local rules on whether senior judges can either: (1) vote to rehear a case en banc or (2) participate in the rehearing if they were part of the original panel, those in the majority have substantial power to shape local rules in such a way that benefits them. Section 46(c)'s flexibility gives circuit courts an extra lever of control over senior judges—especially in recently flipped circuits[164]—further cementing their ideology by effectively silencing senior judges.[165] In 2014, for instance, the eight active judgeships of the D.C. Circuit were evenly divided between Republican and Democratic

163. *Id.* at 757 (Moore, J., concurring). For another timing manipulation example, see Judge Suhrheinrich's separate opinion in *In re* Byrd, 270 F.3d 984, 985 (6th Cir. 2001) ("It is also interesting to note that the Chief Judge has set the deadline for en banc voting as Monday November 5, 2001, at 5:00 p.m . . . . I can only speculate as to the reason why I was denied knowledge of these motions until the eleventh hour."). Likewise, the Eleventh Circuit's recent decision to hold an en banc rehearing on a transgender bathroom case is suspiciously calendared for February 2022 after Judge Martin retired from the Eleventh Circuit on September 30, 2021, though given the make-up of the court, it is likely the panel decision would be overturned by the conservative majority even if she was not retiring. *See* Bill Rankin, *Atlanta-Based U.S. Appeals Court to Rehear Transgender Bathroom Case*, ATLANTA J.-CONST. (Aug. 23, 2021), https://www.ajc.com/news/georgia-news/atlanta-based-us-appeals-court-to-rehear-transgender-bathroom-case/QSSR52T7HRABHB4673OLKYPHWI/ (noting that Judge Martin was on the initial panel, which held in favor of the plaintiff in the case); *En Banc Issues*, U.S. CT. OF APPEALS FOR THE ELEVENTH CIR., https://www.ca11.uscourts.gov/enbanc-cases (last visited May 18, 2022) (listing a tentative argument date of February 2022 for the case of *Adams v. Sch. Bd. of St. Johns Cnty.*); Bill Rankin, *Judge to Leave Atlanta Appeals Court Giving President Biden a Vacancy to Fill*, ATLANTA J.-CONST. (May 18, 2021), https://www.ajc.com/news/atlanta-news/judge-to-leave-atlanta-appeals-court-giving-president-biden-a-vacancy-to-fill/KO4YIGOPBBHH7FAR4JUVEMF4RM/ ("[Judge] Martin . . . said she will retire from the court on Sept. 30 . . . .").

164. *See* Harry W. Wellford et al., *Sixth Circuit En Banc Procedures and Recent Sharp Splits*, 30 U. MEMPHIS L. REV. 479, 480 (2000) (explaining that "a senior judge sitting on an *en banc* case could provide the deciding vote, particularly in the most recent years when . . . court[s] seem[] to be closely divided in many cases").

165. *See* Mario Lucero, *The Second Circuit's En Banc Crisis*, 2013 CARDOZO L. REV. DE NOVO 32, 39 (2013) (noting that in the Second Circuit "senior judges—who under certain circumstances are eligible to participate in an en banc rehearing—can never vote in the en banc poll, [and] active judges who wish to preserve the holding of the panel opinion may need to use the en banc poll to express their position on the merits . . . .").

nominees.[166] "The presence . . . of four senior Republican judges and only two senior Democratic judges . . . gave the Republicans a mathematical edge in . . . en banc voting control in most cases because a senior judge who participates on a panel may also participate in the en banc vote."[167] Additionally, consider the fact that chief judges have substantial authority over the management of the circuit,[168] including "the participation of senior . . . judges,"[169] and informal agenda setting—which can alter the internal operating procedures of a circuit—and it becomes easy to see how allowing or limiting the role of senior judges in the en banc process can be used to further control ideological preferences of the majority in a circuit.[170]

B. Marionette Management

Gamesmanship techniques are not strictly reserved for en banc procedures. Another arrow in the manipulation quiver resides in what I call "marionette management" of panels themselves, including panel composition manipulation and control over district courts.

1. Pulling Strings: Panel Assignment Manipulation

While "the creation of panels is technically governed by statute,"[171] federal circuit courts have broad flexibility in determining how to create

166. Burt Neuborne, *One-State/Two-Votes: Do Supermajority Senate Voting Rules Violate the Article V Guaranty of Equal State Suffrage*, 10 STAN. J. CIV. RTS. & CIV. LIBERTIES 27, 50 n.102 (2014).

167. *Id.*

168. *See Governances & the Judicial Conference*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/governance-judicial-conference (last visited May 18, 2022) (discussing "Circuit Judicial Councils"). While there is no guarantee that the chief judge of a circuit will share the same party affiliation as the majority of the circuit over which she or he presides, generally the two coincide with the exception of the First, Fourth, Tenth, and Federal Circuits. *Compare Changing Circuit Court Composition*, AM. CONST. SOC'Y (Apr. 21, 2022), https://www.acslaw.org/judicial-nominations/change-in-court-composition/ (noting the current compositions of the circuit courts), *with Current Federal Chief Judges*, BALLOTPEDIA (Apr. 17, 2022), https://ballotpedia.org/Current_federal_chief_judges (listing the current chief judges).

169. *See* Tracey E. George & Albert H. Yoon, *Chief Judges: The Limits of Attitudinal Theory and Possible Paradox of Managerial Judging*, 61 VAND. L. REV. 1, 22 (2008).

170. *See id.* at 33 (noting that former Chief Judge Wald argued that "it is inappropriate to use the chief judge's administrative power to influence outcomes" but that "she acknowledged that it is possible").

171. Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals*, 101 CORNELL L. REV. 1, 7–8 (2015) (citing 28 U.S.C. § 46(b)).

their panels.[172] Most circuit courts employ some sort of random assignment methodology.[173] For example, the Ninth Circuit has stated that "[a]ppellate panels are randomly assigned and . . . result[] from the luck of the draw."[174] The Fourth Circuit, "[i]n assembling argument panels and assigning cases to those panels, . . . uses a computer program . . . ."[175] And the Eleventh Circuit judges are "drawn by lot for the entire court year."[176] Others, like the Third Circuit, have adopted rules requiring the random assignment of judges only in particular cases, such as death penalty cases.[177] Whether these panels are always randomly assigned, however, is something that some scholars—like Professors Marin K. Levy and Adam S. Chilton—have challenged. As Professors Levy and Chilton's empirical study reports, "there are plausible reasons to doubt . . . the assumption that panels are randomly created . . . ."[178]

Certainly, there are non-nefarious reasons for nonrandomized panel assignments.[179] After all, judges have schedule conflicts and the circuit courts must adjust panels accordingly.[180] Circuit courts also have to contend with recusal and cases that return on remand.[181] Additionally, some circuits use people, rather than computers, to create "random" assignments.[182] And unlike computers, humans are notoriously bad at

172. *Id.* at 8.

173. *Id.* at 8, 9 & n.23.

174. JUDICIAL COUNCIL OF THE NINTH CIRCUIT, UNITED STATES COURTS FOR THE NINTH CIRCUIT 2013 ANNUAL REPORT 21 (2014), https://cdn.ca9.uscourts.gov/datastore/judicial-council/publications/AnnualReport2013.pdf.

175. *FAQs—Oral Argument*, U.S. CT. OF APPEALS FOR THE FOURTH CIR., https://www.ca4.uscourts.gov/faqs/faqs-oral-argument (last visited May 18, 2022).

176. Chilton & Levy, *supra* note 171, at 9.

177. 3RD CIR. I.O.P., *supra* note 79, at 20 ("The clerk will use a computer program to randomly select a panel from a pool of all possible three-judge combinations consisting of circuit judges in active service and those judges who have taken senior status and have indicated their willingness to hear death penalty cases.").

178. Chilton & Levy, *supra* note 171, at 18; *see also* Clark L. Hildabrand, *The Curiously Nonrandom Assignment of Sixth Circuit Senior Judges*, 108 KY. L.J. ONLINE 1, 2 (2020) (noting the results of an empirical study and regression analysis that concludes that "judicial assignment on the Sixth Circuit is not random").

179. Parties, like the circuit courts themselves, can have a hand in manipulating panel assignments too. But such practice is rare, especially at the circuit level, due to possible criminal penalties and sanctions. *See* Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 813 n.191, 814 n.195 (2012) (noting that "[s]uch manipulation attempts are rarely seen at the circuit court level" and describing a case where a plaintiff was sanctioned for "violat[ing] the local rule[s] in an attempt to judge-shop").

180. Chilton & Levy, *supra* note 171, at 5–6 & n.13.

181. *See id.*

182. *Id.* at 20.

creating truly random patterns.[183] But, "substantial amounts of discretion erode the randomness of [these] systems."[184] In fact, "[s]ome circuits leave the assignment process to the discretion of a single judge, usually the chief. Others provide opportunities for judges to change panels even after [the] cases have been assigned . . . . [T]herefore, systems of assignment are susceptible to at least some degree of manipulation."[185]

The concern arises where case assignments are manipulated to gain an edge in the make-up of the panel. Certainly, "[m]anipulation of case assignments . . . is likely rare."[186] But without constitutional or statutory protections,[187] litigants and Americans at large,[188] can be left to the mercy of chief judges or the local rules of circuit courts "who are so inclined [to] find ways to affect [panel] assignments."[189] And panel manipulation techniques are plentiful. Aside from the usual suspects, like sudden changes or recusals, chief judges can also strategically leverage district court judges by having these judges sit by designation or, in extreme circumstances, removing judges from cases.[190]

183. *See id.* ("This is because . . . 'humans have difficulties reproducing . . . random patterns, even when they have incentives to do so.'" (quoting Bernd Beber & Alexandra Scacco, *What the Numbers Say: A Digit-Based Test for Election Fraud*, 20 POL. ANALYSIS 211, 218–20 (2012))).

184. *See* J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1041–42 (2000).

185. *Id.* at 1042–43 (footnotes omitted); *see also* STURM COLL. OF L., CIRCUIT PRACTICES 9 (2000), https://www.law.du.edu/images/uploads/neutral-assignment/Neutral_assignment_links.pdf (explaining that "the Second Circuit has a 'liberal policy' allowing judges to switch panels . . . [and] [n]o reason need be given for a trade and the judges exercise the privilege 'frequently'" and noting that the Eleventh Circuit also allows for such changes); *see also Federal Courts—Review by Courts of Appeals—Appeal May be Returned to Panel After Rehearing En Banc Limited to Single Issue*, 77 HARV. L. REV. 767, 768 (1964) ("[T]he outcome of [a] case [could] be manipulated by assignment of judges to the panel, since the views of each circuit judge are now known to the chief judge."); Burke Marshall, *A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform*, 63 TUL. L. REV. 1241, 1243 (1989) (noting accusation against Judges Brown and Tuttle for "panel stacking" in civil rights cases).

186. George & Yoon, *supra* note 169, at 32.

187. *See id.* ("Neither the Due Process Clause nor the Equal Protection Clause . . . nor the statute creating lower federal courts appears to require the random assignment of judges.").

188. *See* Kevin Golembiewski & Jessica Arden Ettinger, *Advocacy Before the Eleventh Circuit: A Clerk's Perspective*, 73 U. MIA. L. REV. 1221, 1227 (2019) ("[T]he composition of a panel can bear on the outcome of an appeal . . . .").

189. George & Yoon, *supra* note 169, at 32.

190. *See* discussion *infra* Parts II.B.2 & 3.

2. Strung Up: Sitting by Designation

28 U.S.C. § 292(a), in accordance with a circuit court's local rules, permits "[t]he chief judge of a circuit [to] designate and assign one or more district judges within the circuit to sit upon the court of appeals . . . whenever the business of that court so requires."[191] Chief judges can tap district court judges in a number of ways to shape judicial precedent. First, district court judges sitting by designation can be used to help drive a circuit court to en banc review.[192] The theory goes that "[i]n the eyes of some circuit judges, the fact that [a] district judge's vote was necessary for [a] judgment might diminish the status of the decision and thus make it more appropriate for review by the full court."[193] This is especially true in "cases involving controversial or high-profile issues—[which] might be unsettling to some judges of the circuit."[194] Second, a district court judge could be leveraged for a strategic vote in a case.[195] "[D]istrict judge[s] may be deferential to his [or her] circuit counterparts and reluctant to vote differently in the form of concurring or dissenting opinions."[196] In effect, these tactics allow for quasi–court packing at the circuit level by chief judges, with little if any recourse by litigants.[197]

Surprisingly, the use of district judges sitting by designation is more common than one might think.[198] Importantly, there are two types of district court judge designations: intracircuit and intercircuit.[199] As the

191. 28 U.S.C. § 292(a).

192. Richard B. Saphire & Michael E. Solimine, *Diluting Justice on Appeal?: An Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals*, 28 U. MICH. J.L. REFORM 351, 374 (1995).

193. *Id.*

194. *Id.*

195. *See id.* at 376.

196. *Id.*

197. Scholars and litigators have also questioned whether it is constitutional for district judges to sit by designation. *See* Bruce D. Greenberg, *District Judges Sitting by Designation on Circuit Courts of Appeal*, N.J. APP. L. (Jan. 4, 2012), http://appellatelaw-nj.com/district-judges-sitting-by-designation-on-circuit-courts-of-appeal/ ("One might question whether it is appropriate, or even constitutional, for a district judge . . . to sit on a Circuit panel."). While beyond the scope of this Article, Professors Saphire and Solimine provide a thorough analysis of this issue. *See generally* Saphire & Solimine, *supra* note 192.

198. *See* Dan Baker-Jones, *Sitting by Designation*, U. HOUS. L. CTR. NOTA BENE (Apr. 25, 2012), http://notabeneuh.blogspot.com/2012/04/sitting-by-designation.html ("[F]or the 12-month period ending June 2011, there were over 200 intercircuit assignments."); Lynne H. Rambo, *High Court Pretense, Lower Court Candor: Judicial Impartiality After* Caperton v. Massey Coal Co., 13 CARDOZO PUB. L. POL'Y & ETHICS J. 441, 489 (2015) ("At the lower court levels, district court judges frequently sit 'by designation' on the courts of appeal under 28 U.S.C. § 292(a).").

199. *About Federal Judges*, U.S. CTS., https://www.uscourts.gov/judges-judgeships/about-federal-judges (last visited May 18, 2022).

names imply, intracircuit designations involve selecting district court judges from within a circuit, whereas intercircuit designations come from outside a circuit.[200] Both types can present opportunities for gamesmanship, but intracircuit designations—perhaps counterintuitively—are a greater cause for concern because of fewer guardrails governing the process. That is not say that intercircuit designations cannot be problematic. Intercircuit assignments are highly restricted under 28 U.S.C. § 292(d) and require a "presentation of a certificate of necessity by the chief judge"[201] of the circuit court to the Chief Justice of the United States, who must then approve the designation.[202] But even this bar seems to be easily surpassed. In 2007, for instance, the Eleventh Circuit issued a panel opinion that included Judge Tom Stagg from the Western District of Louisiana, sitting by designation.[203] At the time, all twelve seats of the circuit were full, so it is tough to say why a certificate of necessity was needed,[204] and some

200. *Id.* ("Judges sitting with another court within their circuit are on an intracircuit assignment . . . . Judges sitting with a court outside of their home circuit are on an intercircuit assignment.").

201. 28 U.S.C. § 292(c).

202. *Id.* § 292(d) ("The Chief Justice of the United States may designate and assign temporarily a district judge of one circuit for service in another circuit . . . ."). Intercircuit assignments are also restricted by the "so-called 'lender/borrower rule' . . . [which] states that 'a circuit that lends active judges may not borrow from another circuit within the same time period of the assignment; a circuit that borrows active judges may not lend within the same period of the assignment.'" Levy, *supra* note 33, at 100 (footnotes omitted).

203. *See* Steve Vladeck, *Can District Court Judges Sit on Other Circuits?*, PRAWFSBLAWG (Oct. 25, 2007, 11:06 AM), https://prawfsblawg.blogs.com/prawfsblawg/2007/10/can-district-ju.html.

204. At the time, the following Judges would have been actively serving: Wilson (2005–present), W. Pryor (1999–present), Tjoflat (1975–2019), Anderson (1981–2009), Edmondson (1986–2012), Dubina (1990–2013), Black (1992–2011), E. Carnes (1992–2020), Hull (1997-2017), Marcus (1997–2019), Birch (1990–2010), and Barkett (1994–2013)—not to mention any senior judges that were also serving at the time. *See Judges*, U.S. CT. OF APPEALS FOR THE ELEVENTH CIR., https://www.ca11.uscourts.gov/judges (last visited May 18, 2022) (listing current and senior judges and giving dates of service) (choose "Hon. Charles R. Wilson" from left sidebar; then return to source cited; choose "Hon. William H. Pryor, Jr." from left sidebar; then return to source cited; choose "Hon. Gerald Bard Tjoflat" from left sidebar; then return to source cited; choose "Hon. R. Lanier Anderson III" from left sidebar; then return to source cited; choose "Hon. J.L. Edmondson" from left sidebar; then return to source cited; choose "Hon. Joel F. Dubina" from left sidebar; then return to source cited; choose "Hon. Susan H. Black" from left sidebar; then return to source cited; choose "Hon. Ed. Carnes" from left sidebar; then return to source cited; choose "Hon. Frank M. Hull" from left sidebar; then return to source cited; choose "Stanley Marcus" from left sidebar; then return to source cited); *Former Federal Judge, Eleventh Circuit*, BALLOTPEDIA, https://ballotpedia.org/Category:Former_federal_judge,_Eleventh_Circuit (last visited May 18, 2022) (listing former judges of the Eleventh Circuit with dates of service) (choose "Stanley Birch" hyperlink; then return to source cited; choose "Rosemary Barkett" hyperlink; then return to source cited). Additionally, it was not until December 2013 when

have questioned whether one was even presented.[205] And in 2003, the Supreme Court invalidated a Ninth Circuit decision because a panel improperly included a district judge from the Northern Mariana Island, sitting by designation.[206]

Conversely, intracircuit assignments are not so constrained. While some constraints do exist, including consent from the chief judge of the district or consent from the judge her- or himself (if a senior judge),[207] these designations are mainly left to the discretion of the chief circuit judge.[208] With such "robust authority"[209] it is possible that a chief circuit judge could tilt panels in favor of any given party or position simply by designating district court judges,[210] who for the reasons stated above may

the Eleventh Circuit was down to eight judges that then Chief Judge Ed Carnes declared an emergency due to a shortage of judges. *See* Will Baude, *Is the Eleventh Circuit in an "Emergency" State?*, WASH. POST (June 12, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/12/is-the-eleventh-circuit-in-an-emergency-state/.

205. *See* Vladeck, *supra* note 203. If past really is prologue, I doubt Justice Roberts gives much, if any, pushback in signing such certificates, nor does it appear that much information needs to be included to garner approval from a Chief Justice. *See, e.g.*, Leary v. United States, 268 F.2d 623, 625 n.4 (9th Cir. 1959).

206. Nguyen v. United States, 539 U.S. 69, 76, 83 (2003).

207. *See* Levy, *supra* note 33, at 99 (citations omitted) ("If the judge being drafted is an active judge, the chief judge of her district must consent. If the drafted judge is senior, the judge herself must consent.").

208. *See* 28 U.S.C. § 292(a); *id.* § 294(c).

209. Levy, *supra* note 33, at 99.

210. By way of example, the conservative-leaning Eleventh Circuit has had a full slate of judges since the Trump administration ended (until Judge Martin's retirement in October 2021), yet has had multiple decisions with an overwhelmingly majority of conservative leaning district and circuit court judges sitting by designation. *See, e.g.*, Whitford v. Sub-line Assocs. Inc., No. 17-13744-V, 2018 WL 7360671, at *1 n.* (11th Cir. Oct. 1, 2018) (including Clinton appointee Judge William T. Moore, Jr. for the S.D. Ga. sitting by designation); Carnley v. McKeithen, 776 F. App'x 648, 648 n.* (11th Cir. 2019) (per curiam) (including Bush appointee Judge L. Scott Coogler for the N.D. Ala. sitting by designation); Paez v. Sec'y, Fla. Dep't of Corrs., 944 F.3d 1327, 1327 n.* (11th Cir. 2019) (mem.) (including Clinton appointee Judge William B. Traxler, Jr. for the Fourth Circuit sitting by designation); McCulley v. Jones, 770 F. App'x 522, 522 n.* (11th Cir. 2019) (per curiam) (including Clinton appointee Judge Richard C. Tallman for the Ninth Circuit sitting by designation); United States v. Kwushue, 735 F. App'x 693, 693 n.* (11th Cir. 2018) (per curiam) (including Bush appointee Judge Susan Webber Wright of the E.D. Ark. sitting by designation); Richardson v. Liberty Life Assurance Co. of Bos., 812 F. App'x 970, 970 n.* (11th Cir. 2020) (per curiam) (including Bush appointee Judge Timothy J. Corrigan of the M.D. Fla. sitting by designation); Sabal Trail Transmission, LLC v. 981 Acres of Land, 812 F. App'x 971, 971 n.* (11th Cir. 2020) (per curiam) (including Bush appointee Judge K. Michael Moore of the S.D. Fla. sitting by designation); United States v. Findley, 806 F. App'x 966, 966 n.* (11th Cir. 2020) (per curiam) (including Trump appointee Judge John Kenneth Bush for the Sixth Circuit sitting by designation); Mayan v. U.S. Att'y Gen., 842 F. App'x 538, 538 n.* (11th Cir. 2021) (per curiam) (including Trump appointee Judge Tilman Eugene Self III of the M.D. Ga. sitting by designation); Zurich Am. Ins. v. S.-Owners

be apprehensive about siding differently than their circuit judge counterparts.[211]

3. Puppeteering the Lower Courts

Circuit courts can also "take[] cases away from district judges . . . in extreme situations."[212] Under 28 U.S.C. § 2106, a federal circuit court "may affirm, modify, vacate, set aside or . . . remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."[213] The circuit courts have interpreted § 2106 to permit them to reassign cases "to different district judges as part of their supervisory authority over the district courts within their circuits."[214] As the Eleventh Circuit has noted, this authority applies to both civil[215] and criminal cases.[216] Typically, four considerations govern a reassignment, the first three of which are: "(1) whether the original judge would have difficulty putting his previous views and findings aside; (2) whether reassignment is appropriate to preserve the appearance of justice; [and] (3) whether reassignment would entail waste and duplication out of proportion to

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Ins., No. 18-12749-JJ, 2019 WL 8440491, at *1 n.* (11th Cir. Dec. 20, 2019) (including Bush appointee Judge Susan Webber Wright for the E.D. Ark. sitting by designation); Lacey v. United States, No. 16-12644, 2019 WL 2152667, at *1 n.* (11th Cir. Apr. 5, 2019) (including Clinton appointee Judge Ronald L. Gilman for the Sixth Cir. sitting by designation); Snac Lite, LLC v. Nuts 'N More, LLC, No. 16-17544-W, 2018 WL 6918954, at *1 n.* (11th Cir. Sept. 13, 2018) (including Reagan appointee Senior Judge Bobby R. Baldock for the Tenth Circuit sitting by designation). Note that Judge Tallman, although appointed by President Clinton, was a Republican. *See* Tal Kopan, *Roberts Names Two New FISA Court Judges*, POLITICO: UNDER THE RADAR (Feb. 7, 2014, 11:09 AM), https://www.politico.com/blogs/under-the-radar/2014/02/roberts-names-2-new-fisa-court-judges-182921 (noting that "Judge Richard Tallman [is] a Republican Clinton appointee").

211. *See* Saphire & Solimine, *supra* note 193, at 376.

212. Maura Dolan, *Trump Has Flipped the 9th Circuit—And Some New Judges Are Causing a 'Shock Wave,'* L.A. TIMES (Feb. 22, 2020, 7:06 AM), https://www.latimes.com/california/story/2020-02-22/trump-conservative-judges-9th-circuit.

213. 28 U.S.C. § 2106.

214. Jonathan D. Colan, *Reassigning Cases on Remand in the Interests of Justice, for the Enforcement of Appellate Decisions, and for Other Reasons That Remain Unclear*, 72 U. MIA. L. REV. 1092, 1094 (2018); *see also* Offutt v. United States, 348 U.S. 11, 18 (1954) (instructing the chief judge of the district court to reassign a criminal case to a different district court judge upon remand).

215. Clark v. Coats & Clark, Inc., 990 F.2d 1217, 1229–30 (11th Cir. 1993) (reassigning a civil case to a different district judge).

216. United States v. Torkington, 874 F.2d 1441, 1446–47 (11th Cir. 1989) (reassigning a criminal case to a different district judge).

gains realized from reassignment."[217] The fourth consideration includes whether the district judge should have recused herself or himself.[218] Like most standards, the discretion to reassign cases is amorphous and is used to varying degrees in each circuit.[219] Notably, only the Seventh Circuit has codified its reassignment practices in a local rule.[220]

While circuit courts "do not make the decision to reassign . . . case[s] lightly,"[221] the lack of any guidance from the FRAP, and the absence of any codified local rule, creates a recipe for strategic reassignments. To be fair, the vast majority of circuit judges inherently recognize this flaw and seldom order reassignment.[222] What is concerning, however, is the attitude of newly appointed circuit judges who seem to discount the sanctity of reassignment and use it to negate the impact of district court judges who hold differing views on contentious issues. Just last year, "Trump appointee Judge Ryan D. Nelson rattled other members of the [Ninth Circuit] when he suggested during a hearing . . . that the 9th Circuit remove a respected San Francisco district judge, Edward M. Chen, from a case."[223] Judge "Nelson complained about [Judge Chen] . . . on a case in which [Judge] Chen imposed an injunction on a Trump plan to take away protected status from many immigrants."[224] While other Ninth Circuit judges were quick to defend Judge Chen and to chastise Judge Nelson's "suggestion [as] 'beginner stuff'"[225] explaining that Judge Nelson "doesn't walk around with caution,"[226] these veterans will not be around forever to prevent abuses of reassignment.[227] Gamesmanship

217. CSX Transp., Inc. v. State Bd. of Equalization, 521 F.3d 1300, 1301 (11th Cir. 2008) (quoting *Torkington*, 874 F.2d at 1447).

218. *See* 28 U.S.C. § 455; *Torkington*, 874 F.2d at 1446 ("If the trial judge should have recused himself and the case is remanded, it should be remanded with the direction that it be reassigned to a different district judge." (citing Parker v. Connors Steel Co., 855 F.2d 1510, 1524 (11th Cir. 1988))).

219. *See* Toby J. Heytens, *Reassignment*, 66 STAN. L. REV. 1, 18 tbl.1 (2014) (detailing the frequency with which each circuit reassigns on remand and noting that in 2012, the Seventh Circuit used reassignment the most frequently, followed by the Ninth Circuit).

220. *See id.* at 11 ("The only court of appeals to have [addressed reassignment via local rule] is the Seventh Circuit, whose Circuit Rule 36 divides the universe of cases before it into two categories . . . .").

221. Howe v. City of Akron, 801 F.3d 718, 757 (6th Cir. 2015); *see also Torkington*, 874 F.2d at 1447 ("We do not order this case reassigned lightly.").

222. *See* Heytens, *supra* note 219, at 18 tbl.1 (showing that outside the Seventh and Ninth Circuits, the number of reassignments ranges from four to sixty-one).

223. Dolan, *supra* note 64.

224. *Id.*

225. *Id.*

226. *Id.*

227. *See* BARRY J. MCMILLION, CONG. RSCH. SERV., R43426, U.S. CIRCUIT AND DISTRICT JUDGES: PROFILE OF SELECT CHARACTERISTICS 2, 11 (2017) ("A plurality [of active U.S. circuit court judges] (26.3%) are 70 years or older.").

tactics aside, reassignments come with their own costs, such as increased delays as the new judge gets up to speed.[228] Whether this issue will become a larger problem remains to be seen, but to ignore the propensity for abuse would be foolish. And—at the very least—codification of reassignment rules would benefit parties by providing a "clearer understanding of the circumstances . . . giv[ing] rise to reassignment orders"[229] and could prevent situations like the Ninth Circuit experienced.

C. Publish or Perish

When going en banc is not an option, or when panel compositions are not in the majority's favor, there lies yet another way for circuit courts to shape jurisprudence by less scrupulous means: the use of published and unpublished decisions and quid pro quo opinion swapping. The former relies on strategic timing and the latter relies on bargaining power in case disposition negotiations.

1. Withholding Decisions: Publication Racing

FRAP 32.1 requires all federal courts to designate opinions "as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like."[230] But "each circuit can also adopt local rules that govern the publication of decisions in the circuit, as well as the citation to unpublished decisions."[231] As one might expect, publication rules vary

228. *See, e.g.*, 17 NO. 11 FED. DISCOVERY NEWS 3 (Oct. 2011) (noting that after reassignment in Rimbert v. Eli Lilly & Co., 647 F.3d 1247 (10th Cir. 2011), the "new judge required additional time to familiarize herself with the case"). There are, of course, other related problems to reassignment such as tactics used by litigants in divisional judge shopping and district court judges who refuse to follow circuit court orders, but these are outside the scope of this Article. *See* Jacqueline Thomsen, *'Discretion Is Not Unfettered': 6th Circuit Pulls Trial Judge Off Case for Refusing to Follow Its Ruling*, NAT'L L.J. (Sept. 14, 2020, 6:17 PM), https://www.law.com/nationallawjournal/2020/09/14/discretion-is-not-unfettered-sixth-circuit-pulls-trial-judge-off-case-for-refusing-to-follow-their-ruling/ (describing a recent case in which the Sixth Circuit reassigned a criminal case to a different district judge when the original district judge refused to resentence the defendant); *see generally* Alex Botoman, *Divisional Judge-Shopping*, 49 COLUM. HUM. RTS. L. REV. 297 (2018) (exploring the issue of divisional judge shopping by litigants); Ryan J. Owens & Ryan C. Black, *The Supreme Court Must Stop the Trend of Judge-Shopping*, HILL (Mar. 5, 2020, 4:02 PM), https://thehill.com/opinion/judiciary/484703-the-supreme-court-must-stop-the-trend-of-judge-shopping (describing "liberal and conservative groups [that] have identified district court judges who might be included to enjoin presidents' policy agendas").

229. Colan, *supra* note 214, at 1129.

230. FED. R. APP. P. 32.1(a)(i).

231. Deborah L. Heller, *To Cite or Not to Cite: Is That Still a Question?*, 112 L. LIBR. J. 393, 406 (2020).

wildly between the circuits.[232] Because "later panels in a particular circuit must follow the decisions of previous panels in the same circuit[,] . . . the practice in several circuits [is to] informally circulat[e] precedential opinions to all judges for comment."[233] And generally, "[w]hen a circuit court announces a rule via unpublished opinion . . . that opinion is given much less weight by other courts,"[234] including district courts from within the circuit and future panels of the same circuit.[235] But what happens when a circuit is faced with two cases revolving around the same issue in which one panel constitutes a liberal majority and the other has a conservative majority?[236] Simple: a race to publication.

Consider the hypothetical of two competing § 1983 cases.[237] Imagine a conservative leaning circuit that generally supports qualified immunity, which has two nearly identical cases.[238] Once these cases are decided they would establish whether an officer violated someone's constitutional right, and thus would set up precedent for future cases

232. *See id.* at 407 ("Some [circuits] provide a laundry list of criteria to consider before making a publication decision. Others barely mention the publication process.").

233. Mead, *supra* note 179, at 797 (first citing 3D CIR. I.O.P. 5.5.4; then citing 3D CIR. I.O.P. 5.7; and then citing 6TH CIR. I.O.P. 206).

234. Mead, *supra* note 179, at 826 (citing Epperson v. Ent. Express, Inc., 242 F.3d 100, 106 n.5 (2d Cir. 2001)); *see also* 11TH CIR. R. 36-2 ("Unpublished opinions are not considered binding precedent . . . .").

235. *See, e.g.*, United States v. Master, 614 F.3d 236, 239 n.2 (6th Cir. 2010) (making "an independent determination of whether [a] search violated the Fourth Amendment" because a prior case was unpublished, and thus not precedential).

236. *See* Bryan J. De Tray, *Prometheus Unbound: Shaking Off the Shackles of Unpublished Opinion as Precedent*, 50 APR FED. LAW. 30, 33 (2003) (asking "whether opinions that do create new law are sometimes withheld from publication for ideological or political reasons").

237. Mead, *supra* note 179, at 824 n.268 ("Scholars have argued that certain litigation groups—including minorities, convicted defendants, prisoners, aliens, and pro se plaintiffs—are more likely to have their cases decided via an unpublished opinion." (citation omitted)).

238. This hypothetical is inspired from judges that have gone on the record claiming that sometimes "political reasons [and ideology] influence the decision about whether to publish." De Tray, *supra* note 236, at 33 (statements of Judges Smith and Parker of the Fifth Circuit). It also draws on *Steward Health Care Systems, LLC v. Saidara*, a recent opinion from the Fifth District Court of Appeals of Texas in which "[a] Dallas appellate justice . . . accused his colleagues of preventing the release of a panel opinion . . . saying his fellow justices manipulated court procedures in an attempt to change a decision they disagreed with." No. 05-19-00274-CV, 2021 WL 3707995 (Tex. App. Aug. 20, 2021); Kate Buehler, *Dallas Justice Alleges Ploy to 'Eviscerate' GOP Judge's Vote*, LAW360 (Aug. 23, 2021, 8:26 PM), https://www.law360.com/legalethics/articles/1415315. While not a federal circuit court opinion, it highlights the notion that timing and manipulation can allegedly occur. *See generally Steward Health Care Sys., LLC*, 2021 WL 3707995.

that the right was clearly established.[239] Suppose Panel 1 is comprised of two liberal judges and one conservative judge, and Panel 2 is comprised of all conservative judges. Panel 2 is opposed to finding that a constitutional violation occurred in their case, whereas Panel 1 wants to hold that a constitutional violation did occur. Panel 2's case, however, is heard after Panel 1's. What then, is to stop the conservative judge in Panel 1 from stalling the decision process to allow Panel 2 to issue a published decision,[240] thereby forcing Panel 1's hand—or setting up an en banc situation in which the conservative majority would still likely get its way? Turns out, not much, as there are generally no deadlines imposed by any local rules at the circuit court level.[241]

2. Logrolling & Strategic Publication

Finally, there are the gamesmanship tactics of judicial logrolling and strategic publication. "Logrolling is the exchange of votes between judges. It captures the idea of 'I'll vote for your decision if you vote for mine.'"[242] It also includes situations where "panel members . . . engage in strategic bargaining: the majority agrees to moderate the reasoning of the opinion in exchange for unanimity, and the panel then publishes one opinion."[243] "[S]trategic publication . . . resolve[s a] case without publishing [an] opinion and thus avoid[s] establishing any binding legal precedent."[244] While some judges strictly condemn these practices,[245] such condemnation is not enough to prevent them from occurring.[246]

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239. *See* Pearson v. Callahan, 555 U.S. 223, 231 (2009) ("The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights . . . .'").

240. *See* Sloan, *supra* note 99, at 719 n.30 (noting that the Third and Sixth Circuit internal rules that make reported panel opinions binding on subsequent panels and requiring en banc consideration to overrule a published panel decision).

241. Unlike district courts, circuit courts are not bound to the reporting requirements mandated by the Civil Justice Reform Act. *See* 28 U.S.C. § 476 (requiring the director of the Administrative Office to prepare a semiannual report that discloses the number of motions and bench trials that have been pending for more than six months, and the number of cases that have not been terminated within three years after filing).

242. F. Andrew Hessick & Jathan P. McLaughlin, *Judicial Logrolling*, 65 FLA. L. REV. 443, 449 (2013).

243. Ben Grunwald, *Strategic Publication*, 92 TUL. L. REV. 745, 759 (2018).

244. *Id.*

245. RICHARD A. POSNER, OVERCOMING LAW 126 (1995) (stating that "vote trading by judges is condemned"); *see also* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 106 (1991) ("[U]nder prevailing ethical norms judges cannot engage in the sort of logrolling that legislators commonly employ.").

246. *See* Choi & Gulati, *supra* note 91, at 772 (summarizing the results of a statistical study and concluding that "we have initial evidence suggesting that judges bargain over opinion writing"); Grunwald, *supra* note 243, at 760–61 (noting that "a number of judges

Logrolling has some perceived benefits, like creating a cohesive majority opinion or to improve the content of legal rules,[247] but these practices come at cost both to the judiciary and to litigants. As Professor Andrew Hessick and Jathan McLaughlin explain, logrolling (1) "raises the concern that courts are not fulfilling their judicial role because they [are] deciding cases based on negotiation instead of application of the law," (2) "raises [the] ethical concern that judges [are] making decisions in exchange for a benefit in another case," (3) "may result in inequalities among the judges in the decision making process," and (4) "may reduce the quality of decision produced by the courts."[248] Another danger of logrolling is that it "may lead to more, not less, partisanship in the reasoning of . . . opinions."[249] Vote swapping may be a way to avoid a dissent, which "avoid[s] signaling a 'red flag' to a higher court."[250] Avoiding a dissent may also give a judge the opportunity to "obtain control over the authorship of the opinion" and permit she or he to tilt or "adjust the reasoning more toward [the original] dissenter's preferred position."[251]

Likewise, strategic publication is a double edged sword.[252] On one hand, "a unanimous unpublished decision takes far less time to write than a divided and published one"[253] and a strategic publication gives judges in the minority a way to "prevent[] the panel from establishing undesirable precedent."[254] Conversely, unpublished decisions mask the

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have publicly acknowledged that [strategic publication] happens" and giving examples from D.C. Circuit Judge Patricia Wald and Justice Thomas). *But see* ROBERT A. CARP & RONALD STIDHAM, THE FEDERAL COURTS 177 (2d ed. 1991) ("[T]here is virtually *no* evidence for [logrolling] in the judiciary. Bargaining does indeed take place, but it is more subtle and does not involve vote-swapping."); Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 106, 112 (2001) (finding no statistically significant correlation between panel ideology and publication decisions).

247. *See generally* Evan H. Carminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2315–31 (1999) (explaining that judges might engage in logrolling to "forge a supermajority coalition such as a unanimous opinion" or to create clearer legal doctrines); Hessick & McLaughlin, *supra* note 242, at 450 (noting that other possible benefits include "better outcomes overall" and a "means for resolving cases in which a majority cannot agree on the appropriate disposition").

248. Hessick & McLaughlin, *supra* note 242, at 453.

249. Choi & Gulati, *supra* note 91, at 741.

250. *Id.* (punctuation omitted).

251. *Id.*

252. *See* Grunwald, *supra* note 243, at 760 ("For the majority, the incentives are similar to the incentives to bargain over reasoning . . . .").

253. *Id.*

254. *Id.*

possibility of meaningful review by the Supreme Court,[255] even though they often "carry the hallmarks of opinions that merit publication."[256] The concern here is stagnation in the law. Consider our § 1983 hypothetical again, only this time there is not a race for publication because the cases are different.[257] Assume in Panel 1 there are two conservative judges and one liberal judge. The liberal judge wants to find in favor of the party that suffered the constitutional violation, but the two conservative judges are opposed. In Panel 2, the panel composition is reversed, but the liberal judge and at least one of the conservative judges are present in both panels. These two overlapping judges could make the following agreement: in Panel 1, the conservative judge will vote with the liberal judge in exchange for neither panel's opinion being published, again preventing any precedent from being established. While a positive outcome for the injured party in Panel 1, this allows further stagnation of the qualified immunity doctrine in the particular circuit.[258]

While stopping logrolling and strategic publication may be difficult—and perhaps impossible as discussed below—recognizing the issue is a step in the right direction of securing the public's faith in the judiciary. While some have argued that logrolling may be permissible in certain situations, such as split decisions and to "trade votes on the rationales underlying decisions when that trade does not affect the outcome of the case,"[259] such distinctions create a slippery slope and erode confidence in the judicial system. Unanimity masks actual disagreement and prolongs—and possibly prevents—resolutions by the Supreme Court. Whether this outcome is good or bad depends, in part, on one's view of the Supreme Court. But intra-circuit disagreement shines a light on

255. *See* Morgan Hazelton et al., *Sound the Alarm? Judicial Decisions Regarding Publication and Dissent*, 44 AM. POL'Y RES. 649, 651–54 (2016) (explaining that review is less likely for unpublished decisions).

256. Grunwald, *supra* note 243, at 761.

257. *See infra* Part II.C.1.

258. This is an example of when gamesmanship is not all problematic. There are obvious tensions between transparency and permitting room for individual acts of justice. The choice between the two is a tough call, but I favor transparency. In the long run transparency best advances the law and hopefully decreases the need for individual acts of justice. Take two recent highly questionable grants of qualified immunity decisions from the Fifth Circuit, which were overturned by the Supreme Court. *See* The Editorial Board, *Hold Rogue Police Accountable: Supreme Court Needs to Be Clear About Qualified Immunity*, USA TODAY, https://www.usatoday.com/story/opinion/todaysdebate/2021/09/02/supreme-court-qualified-immunity-reversals-louder-police-misconduct/8195106002/ (Sept. 2, 2021, 10:37 AM) (noting the Supreme Court's reversals in Taylor v. Rojas, 141 S. Ct. 52 (2020) and McCoy v. Alamu, 141 S. Ct. 1364 (2021)). Had these opinions been unpublished it is unlikely that they would have garnered the Supreme Court's attention.

259. Hessick & McLaughlin, *supra* note 242, at 486.

difficult legal questions and can lead to en banc resolution[260] or a legislative solution,[261] both of which may help advance the law rather than leaving litigants in a state of perpetual confusion.

III. PROPOSALS AND RECOMMENDATIONS

As former Attorney General Janet Reno once said, "[u]nless we try to reform, to make things better . . . we will never bring about change."[262] And unlike the infamous Taylor Swift lyric, we know we have problems and I do think we can solve them.[263] To accomplish reform, I propose a variety of solutions, including: (1) centralizing all local rules,[264] (2) eliminating judicial assignments to particular circuit courts, and (3) increasing transparency into judicial decisions—both substantive and

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260. *See* David C. Soutter, Comment, *Constitutional Law—Third Circuit Holds First Amendment Protects Off-Campus Internet Speech from School Discipline—*Layshock ex rel. Layshock v. Hermitage School District*, 650 F.3d 205 (3d Cir. 2011)*, 45 SUFFOLK U. L. REV. 1341, 1343 (2012) (noting that the Third Circuit "opt[ed] to rehear" cases involving student First Amendment rights for speech made off-campus on the internet "to resolve [an] apparent intra-circuit split"); Tracey E. George & Michael E. Solimine, *Supreme Court Monitoring of the United States Court of Appeal En Banc*, 9 SUP. CT. ECON. REV. 171, 181 (2001) ("An en banc case may be convened to resolve an intracircuit split . . . ."). *Cf.* Wisniewski v. United States, 353 U.S. 901, 902 (1957) (indicating that "[i]t is . . . the task of a Court of Appeals to decide all properly presented cases coming before it").

261. *See* Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 422 (2010) ("The point here is that judicial dissensus may be an additional trigger for legislative overrides, as override legislation tends to focus on areas marked by circuit splits or significant intra-circuit disagreement." (citation omitted)).

262. *The Criminal Justice System: Towards the 21st Century*, 1 DUKE J. GENDER L. & POL'Y 41, 42 (1994).

263. *Cf.* TAYLOR SWIFT, *Bad Blood*, *on* 1989 (Big Mach. Recs., 2014) ("Now we got problems. And I don't think we can solve them.").

264. My proposal to centralize all local rules stems from two different concerns. First, local rules among the circuit courts have become "overly complex, very different, and even inconsistent, or are quite difficult to find, comprehend, and satisfy."' Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1182 (2005) (citation omitted). Knowledge of these local rules can give tactical advantages to certain parties and increase costs for litigants, both of which can ultimately shape the law. *See id.* (noting both critiques). Second, and my chief concern, is to prevent gamesmanship. Limiting ambiguous rules and rules that allow significant discretion would help prevent gamesmanship, and this is what my proposals—albeit imperfectly—seek to accomplish. *See supra* Part II. There may be a middle ground approach, which would nationalize some rules while allowing limited experimentation by the circuit courts on particular issues—such as informal en banc procedures (if we continue to permit the practice). *See infra* Part III.A.2. My fear, however, is that by leaving open a window we would once again return to where we are now. Perhaps, under the flying squadron approach, rules could be conditionally approved and tested in individual circuits to preserve experimentation. *See infra* Part III.B.

administrative. While not a panacea, and not without their own critiques, these solutions may help reinvigorate confidence in our judicial system.

A. Ditching Local Rules

One solution to the gamesmanship problems that have arisen from the flexibility of FRAP 35 and 47 is to disband local rules altogether, creating uniform internal operating procedures and local rules. Uniformity, of course, is only part of the solution and raises the question: what should be included in a uniform set of internal operating procedures?

1. Implementation Methodology

Before getting into the specifics, it may prove useful to devise a mechanism to implement a centralized or uniform system of internal operating procedures. One method may be to have the circuit courts and the Judicial Conference survey all "local requirements and abolish or modify any strictures that they deem conflict with or duplicate federal rules or statutes."[265] Another, or possibly concurrent, approach would be legislative.[266] That is, allow lawmakers to amend the FRAP in a way that "rectif[ies] local procedure proliferation or at least moderate[s] the additional fragmentation of federal appellate practice" or "treat peculiar local complications."[267] Given the current state of affairs of Congress,[268] it is perhaps more feasible to implement my proposal via the Judicial Conference approach. This approach would also be more palatable to the legal community considering our profession's staunch support of self-regulation.[269]

265. Carl Tobias, *A Note on the Neutral Assignment of Federal Appellate Judges*, 39 SAN DIEGO L. REV. 151, 154–55 (2002).

266. *See infra* Part III.A.2.

267. Tobias, *supra* note 265.

268. *See* Daniella Diaz & Ryan Nobles, *GOP Rep. Chip Roy Says He Wants '18 More Months of Chaos and the Inability to Get Stuff Done'*, CNN (July 7, 2021, 1:26 PM), https://www.cnn.com/2021/07/07/politics/chip-roy-democratic-obstruction-2022/index.html (reporting that "Rep. Chip Roy of Texas revealed in a video circulating online that he wants to jam Democrats' legislative goals so Republicans can win the 2022 midterms"); Evan Bayh, *The Misunderstood Reason Congress Can't Get Its Job Done*, HILL (Mar. 13, 2018, 2:15 PM), https://thehill.com/blogs/congress-blog/politics/378144-the-misunderstood-reason-congress-cant-get-its-job-done ("Today, even when thoughtful, bipartisan ideas are available Congress remains deadlocked.").

269. *See* Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1149 (2009) (noting that even the Preamble to the ABA Model Rules of Professional Conduct "maintains an emphasis on the importance of self-regulation" (citation omitted)).

2. Proposed Uniform Internal Operating Procedures & Rules

Whether through the congressional approach or via the Judicial Conference, implementation of the following uniform procedures and rules may alleviate the ails described above.

a. Charting En Banc Procedures

To eliminate some of the issues involved with the en banc process I propose a uniform rule which would specifically detail the en banc process, including: (1) defining the phrase "exceptional importance," (2) elimination of the informal en banc process, (3) publication of voting decisions, and (4) allowing certain senior judges to participate in en banc decisions.

i. Defining "Exceptional Importance"

As discussed above, the main issue with the current "exceptional importance" prong of FRAP 35 is that its definition is ambiguous, such that it has effectively "authorize[d] a majoritarian use of en banc rehearings."[270] But, as Justice Frankfurter once observed, "[r]ehearings are not a healthy step in the judicial process; surely they ought not to be deemed a normal procedure."[271] Perhaps the easiest solution would be to eliminate the exceptional importance prong altogether and allow the Supreme Court to decide which issues are exceptionally important. The risk here is that some cases that would otherwise obtain additional review through en banc may never receive it because the Supreme Court only grants cert on a limited basis.[272]

For those uncomfortable with elimination of exceptional importance prong, Justice Frankfurter's guidance at least "suggests that a more rigorous test of 'exceptional importance' is required."[273] Some courts and scholars have suggested that an "exceptionally important" case is one in which the original panel's opinion was "clearly erroneous."[274] But this standard is too narrow and

270. Zarone, *supra* note 67, at 165.

271. Western Pac. R. Corp. v. Western Pac. R. Co., 345 U.S. 247, 270 (1953).

272. *Supreme Court Procedure*, SCOTUSBLOG, https://www.scotusblog.com/supreme-court-procedure (last visited May 18, 2022) ("Of the 7,000 to 8,000 cert. petitions filed each Term, the court grants cert. and hears oral argument in only about 80.").

273. Zarone, *supra* note 67, at 166.

274. *See id.* (citing Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. Rev. 29, 48 (1988)).

> [r]hearings en banc are not appropriate where the effect is simply to interpose another review by an enlarged Court of Appeals between decisions by a conventional three-judge court . . . . Delay, cost, and uncertainty . . . are each increased by an additional appeal to a hybrid intermediate court.[275]

Another approach is to define exceptionally important cases as those that "involve the creation of law rather than the application of settled law to the facts of a case."[276] This approach has several advantages because it affects more than merely the interests involved in the case but also "avoids subjective and time-bound determinations of importance."[277] There is, however, one drawback to the "law creation" definition. "As Professor Solimine has pointed out, no two cases are identical, and anytime settled law is applied to a new set of facts[,] the court could be said to be engaging in 'law creation.'"[278] The solution is to clarify that the "law creation" test exclusively means the development of "major doctrinal trends,"[279] rather than application of settled law to new facts. This raises two questions: (1) whether the major doctrinal trends are relegated to the circuit at issue or nationally, and (2) what is a major doctrinal trend?

The answer to the first question depends upon whether we keep the status quo or employ a radical departure of circuit courts. As I discuss below, the original justification for dedicated circuit courts is no longer as strong as it once was.[280] Thus, if we were to revitalize President Taft's "flying squadron" approach then the major doctrinal trends would be national in scope. If, however, we decide to keep the circuit courts as they are, then the scope could also include major doctrinal trends within the circuit itself.

The second question is trickier, but "it is possible . . . to insist that there is a discernable scale of case-types in terms of probable fitness for en banc rehearing."[281] I suggest that a major doctrinal trend is one that

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275. *Western Pacific*, 345 U.S. at 273–74 (Jackson, J., dissenting); *see also* United States v. Rosciano, 499 F.2d 173, 174 (7th Cir. 1974) (per curiam) ("The function of en banc rehearings is not to review alleged errors for the benefit of losing litigants."); Arnold v. E. Air Lines, Inc., 712 F.2d 899, 914 (4th Cir. 1983) (Phillips, J., dissenting) ("[I]t cannot be gainsaid that in practical terms the standard for invoking the en banc rehearing procedure remains . . . whatever a sufficient majority of active circuit judges in a particular case considers it to be.").

276. Zarone, *supra* note 67, at 166.

277. *Id.* at 167.

278. *Id.* (citation omitted).

279. *Id.*; United States v. Am. Foreign S.S. Corp., 363 U.S. 685, 690 (1960).

280. *See infra* Part III.B.1.

281. *See* Arnold v. E. Air Lines, Inc., 712 F.2d 899, 914 (4th Cir. 1983) (Phillips, J., dissenting).

deals with a "difficult or novel constitutional issues having potentially wide application,"[282] creates a new standard or rule, or applies a new standard for the first time.[283] As the late Judge James Phillips of the Fourth Circuit once wrote, a major doctrinal question is one that "announces, abandons, []or clarifies . . . legal principle[s,] . . . . lays down . . . precedent likely to provide helpful guidance either to the district courts in exercising discretion or to [the circuit] court in reviewing exercises of discretion in future cases of general comparability."[284] To be sure, this definition could be manipulated by a majoritarian wing of a circuit, but it at least narrows the guardrails and makes blatant partisan en banc rehearing a more difficult endeavor. And when combined with my suggestion to publicize en banc votes, could help dampen ardent partisan use of en banc procedures by pure majoritarian rule.

ii. Eliminating or Limiting Informal En Banc

As explained above, the costs of informal en banc review outweigh its advantages.[285] Thus, a unified version of internal operating procedures should prohibit the practice like the Third, Ninth, Eleventh, and Federal Circuits do.[286] Additionally, as Professors Alexandra Sadinsky and Amy Sloan explain, informal en banc procedures are unfair to litigants because they "reduce meaningful opportunities for parties to participate in the [en banc] process[,] . . . create uncertainty about the weight of informal en banc opinions, [and] allow full endorsement of opinions based on less than thorough review."[287] As Judge Karen Henderson of the D.C. Circuit explained, while informal en banc procedures provide "an expedient device to reconcile inconsistent circuit holdings" it does so "without any of the safeguards or formalities attending the en banc

282. *Id.* at 903 n.3. (majority opinion).

283. *See, e.g.*, United States v. Martorano, 620 F.2d 912, 919 (1st Cir. 1980) (applying the "reasonable doubt . . . [of] judge's impartiality" standard from *United States v. Cowden*, 545 F.2d 257, 265 (1st Cir. 1976) and further explaining that "the mere fact that a judge entertains a motion for new trial in a case over which he presided initially does not reasonably call into question his impartiality."); *see also* Robert C. Clark, *Major Changes Lead Us Back to Basics*, 31 J. CORP. L. 591, 592–93 (2006) (identifying major trends in legal doctrine in corporate law like: (1) hostile takeovers and defenses, (2) corporate governance changes, (3) the rise of limited liability companies, (4) federalization of corporate law litigation, and (5) regulatory concerns about executive compensation); Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1077 (9th Cir. 2010) (en banc) (explaining that the court "took the case en banc to resolve questions of exceptional importance regarding the scope and application of the state secrets doctrine").

284. *Arnold*, 712 F.2d at 917 (Phillips, J., dissenting).

285. *See infra* Part II.A.2.

286. *See* Sloan, *supra* note 99 and accompanying text.

287. *See* Sadinsky, *supra* note 80, at 2028 (citation omitted).

process."[288] Rather than hide behind an elusive en banc process, it would be more beneficial to simply "invoke the en banc mechanism expressly authorized . . . by the Federal Rules of Civil Procedure."[289]

If there must be some sort of informal en banc procedure, it should be used in only narrow and prescribed circumstances. The D.C. Circuit's "Irons footnote"[290] and the court's 1996 policy statement[291] may provide a workable framework here. The D.C. Circuit's stated use of informal en banc procedures is limited to "overrul[e] a more recent precedent which, due to an intervening Supreme Court decision . . . a panel is convinced is clearly an incorrect statement of current law."[292] This limited exception could become the uniform rule and we could also require courts utilizing the rule to notify the parties to allow for limited briefing on whether the more recent precedent was clearly incorrect.[293] This would provide for some expediency, procedural safeguards, and formalities in the regular en banc process. We could potentially limit the Irons informal en banc procedure further by allowing its use only when the Supreme Court's decision came from another circuit's court, not when the case returns to a circuit on remand.[294]

iii. Publicizing En Banc Voting

The next aspect of my proposal is to publicize en banc voting like the Fourth Circuit. This would appease critics who believe that publication of vote tallies will result in the proliferation of opinions—thereby stymying judicial resources— and create a uniform internal operating procedure should include limiting instructions for these types of opinions.

First, "if the panel opinion already contains a dissent [or concurrence], the author of a potential [dissent or concurrence] should first satisfy herself that her proposed opinion contains unique arguments that the panel [dissent or concurrence] neglected to include."[295] This

288. *In re* Sealed Case, 181 F.3d 128, 146 n.5 (D.C. Cir. 1999) (Henderson, J., concurring).

289. *Id.* (citing FED. R. APP. P. 35).

290. Irons v. Diamond, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981).

291. *Sealed Case*, 181 F.3d at 146 (Henderson, J., concurring) ("To impose some order on *Irons* footnote use, the court promulgated a 'policy statement' in 1996 setting out specific circumstances . . . [for its use.]").

292. *Id.* (citations omitted).

293. *See id.*; Wasby, *supra* note 89, at 21 (emphasis added).

294. *See* Wasby, *supra* note 89, at 22 (noting that such a process may be merited when the "Supreme Court's action has come in a case from another circuit . . . but when the new Supreme Court development takes place in a case from the very circuit which now has to decide how to proceed on remand, the panel which has handled the case can more easily recognize the inevitable effect on circuit law without the need for en banc activity").

295. Horowitz, *supra* note 114, at 91 (emphasis added).

restriction "would help ensure that only those . . . [dissents or concurrences] offering a distinct contribution to legal discourse make it into the pages of the Federal Reporter."[296] Specifically, any opinion (including dissents or concurrences) should primarily focus on the reason for granting or denying the petition to hear or rehear a case en banc. The opinion should explicitly mention what prong(s) of FRAP 35 the court is relying upon and why the decision meets that prong.[297] To the extent that publicizing voting would encourage more opinions,[298] litigants and attorneys would all benefit from a clearer understanding of a given court's reasoning as this may help drive future decisions to seek or abstain from petitions to hear or rehear cases en banc. Thus, by potentially increasing work on the front end, the circuit courts could save judicial resources in the future.

Second, all decisions to hear or rehear cases en banc could come with a disclaimer that the opinion is not precedential, like those used for memorandum dispositions or unpublished cases.[299] This would aid both litigants and the lower courts from having to guess what force, if any, a denial or grant of hearing or rehearing en banc opinion may have.[300]

Together, these limiting instructions provide the best of both worlds: (1) "the potential utility of . . . [en banc related opinions] and a pragmatic recognition that . . . '[A]sking federal appellate judges to refrain from publishing their deeply felt views in favor of institutional coherence and finality just does not work[,]'"[301] and (2) a floodgate to prevent confusion and waste of judicial resources.

296. *Id.*

297. *See, e.g.*, Citizens for Resp. and Ethics in Wash. v. Trump, 971 F.3d 102, 102 (2d Cir. 2020) (mem.) (Cabranes, J., dissenting) ("We have missed an opportunity to address en banc a 'question of exceptional importance,' regarding the limits of judicial power under Article III of the Constitution in addressing a constitutional claim against a President.").

298. *But see* Horowitz, *supra* note 114, at 93 (suggesting that "announcing voting alignments on en banc calls could reduce the impetus for writing a separate . . . [denial of rehearing en banc] in every significant case a judge believes was decided wrongly").

299. *Id.* at 92–93 (explaining the benefits of disclaimers for dissents and concurrences in en banc denials of rehearings).

300. *Compare* Debra P. v. Turlington, 654 F.2d 1079, 1086 n.* (5th Cir. 1981) (Tjoflat, J., dissenting) ("This commentary . . . has no legal implications for the interpretation and application of . . . [the case]; that decision must stand on its own. The commentary of the panel judges has no precedential significance despite its appearance as well-intentioned judicial gloss."), *with* Gupta v. McGahey, 737 F.3d 694, 699 (11th Cir. 2013) (Martin, J., dissenting) ("I dissent to the denial of en banc review because I am concerned about the potential implications of the panel opinion.").

301. Horowitz, *supra* note 114, at 96 (quoting Marsha S. Berzon, *Introduction*, 41 GOLDEN GATE U. L. REV. 287, 297 (2011)).

iv. Senior Judge Participation

Barring any revisions to 28 U.S.C. § 46, there are three main ways to unify the circuit courts' use of senior judges in votes for en banc hearings or rehearings:[302] (1) prohibit their participation,[303] (2) permit their participation in accordance with 28 U.S.C. § 46(c),[304] or (3) permit some other sort of limited review. Starting with the first option, there is some allure to the outright prohibition of senior judges' participation in en banc hearings or rehearings. This would provide a bright-line rule that would negate the impact of judges nominated by former presidents, therefore reflecting a circuit court that more closely aligns with the current philosophies of the country.[305] It also prevents situations, like in the First Circuit, where there might be senior judges that:

> regularly sit in the court's panels . . . [but who] are "out of step" with the present majority view of the active judges, [and] the panel majority may not "match" with the views of the majority of

302. *See* Michael Ashley Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. PITT. L. REV. 805, 852–53 (1993) ("The ambiguity of the term 'regular active service' in combination with the Supreme Court's ruling[s] . . . has led courts of appeals to promulgate inconsistent internal operating rules and procedures relating to their en banc powers.").

303. *See* Mark D. Passler, *Product-by-Process Patent Claims: Majority of the Court of Appeals for the Federal Circuit Forgets Purpose of the Patent Act*, 49 U. MIAMI L. REV. 233, 235 n.11 (1994) (noting that in 1994 the Federal Circuit only utilized active judges to consider en banc actions).

304.

> A court in banc [sic] shall consist of all circuit judges in regular *active* service, . . . except that any senior circuit judge of the circuit shall be eligible (1) to participate, at his election and upon designation and assignment pursuant to section 294(c) . . . as a member of an in banc [sic] court reviewing a decision of a panel of which such judge was a member, or (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc [sic] at a time when such judge was in regular active service.

28 U.S.C. § 46(c) (emphasis added).

305. Assuming one believes that appellate judges actually hold beliefs that align with the majority of the country, and that the beliefs of the president who appointed them are current or popular. *See* Adam Liptak, *Supreme Court Says Judges Are Above Politics. It May Hear a Case Testing That View.*, N.Y. TIMES (Sept. 16, 2019), https://www.nytimes.com/2019/09/16/us/politics/supreme-court-judges-partisanship.html ("Supreme Court justices insist that politics plays no role in their decision-making. But their voting patterns and the titanic partisan confirmation battles for seats on the court tell a different story."); Danielle Root, Jake Faleschini & Grace Oyenubi, *Building a More Inclusive Federal Judiciary*, CTR. FOR AM. PROGRESS (Oct. 3, 2019), https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary/ ("Judges are human beings who hold biases and prejudices like everyone else.").

the court's active judges, the ones who vote on whether to take a case en banc.[306]

This approach, however, would be improper for two reasons. First, it seemingly contradicts the will of Congress because the language of § 46(c) is permissive.[307] If Congress wanted to prohibit senior judge participation outright, arguably it would have said so explicitly.[308] And "[w]hen Congress speaks, the courts must listen: so our constitution mandates."[309] Second, this approach discounts the important value that senior judges can provide. Recognizing this, the Supreme Court has hinted that outright prohibition is not the preferred approach.[310]

A modified version of the second approach may be the better option.[311] When senior judges are qualified to participate en banc under 28 U.S.C. § 46(c), they must be given the option to participate in the en banc voting process. Should a senior judge elect to participate, their vote effectively increases the number of required votes needed to obtain a simple majority. Conversely, if a senior judge elects not to participate then this would decrease the total number of votes required to hear or rehear case en banc. This better coincides with the congressional intent

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306. Stephen L. Wasby, *A Look at the Smallest Circuit*, 43 SUFFOLK U. L. REV. 417, 434 (2010). For those adamant about preventing these "out of step" situations, the better approach would be to impose term limits for federal appellate judges, which would eliminate the problem altogether. *See* Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397, 455 n.300 (1999) ("If, as it appears, the Supreme Court is to continue to limit its role and allow the intermediate courts to sit as courts of last resort for many purposes, it follows that circuit judges, too, should be limited to fifteen-year terms in performing that role.").

307. *See* 28 U.S.C. § 46(c).

308. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring) ("It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred . . . ."); *see also* Judge Robert Bruce King, *Robert C. Byrd and the Fourth Circuit Court of Appeals*, 108 W. VA. L. REV. 607, 627 n.116 (2006) (noting that Congress once prohibited the participation of senior judges for rehearings en banc but reversed that prohibition in 1982).

309. UMG Recordings, Inc. v. MP3.com, Inc., 109 F. Supp. 2d 223, 225 (S.D.N.Y. 2000); *see also* Pryba v. United States, 498 U.S. 924, 925 (1990) (mem.) (White, J., dissenting) ("Congress' intent is being frustrated in those circuits which adhere to the narrower view . . . ." (citation omitted)).

310. *See* Moody v. Albemarle Paper Co., 417 U.S. 622, 626–27 (1974) (noting that "[s]enior judges provide a judicial resource of extraordinary value by their willingness to undertake important assignments 'without economic incentive of any kind'" and explaining how senior judges can sit on an en banc court under 28 U.S.C. § 46(c)).

311. This is essentially a twist on the Sixth Circuit's rule which "requires an affirmative vote for rehearing by an 'absolute majority'—i.e., a majority of all the active circuit judges who are eligible to vote . . . not the number qualified to hear the case." Stein, *supra* note 302, at 816, 853 (quoting 6TH CIR. INTER. OPER. R. 20.7 (1990)).

behind § 46(c) and the Supreme Court's decision in *Moody v. Albemarle Paper Co.*[312] It also reduces the incongruence of allowing a senior judge to participate in a panel decision but not to have a voice in a decision to rehear the case en banc.

The third approach, which has been employed by some circuits, is to utilize senior judges for informal en banc review.[313] As discussed above, I believe that informal en banc review is improper. That said, under my approach for limited informal en banc review, I propose permitting senior judges to participate in the process like I describe in the second approach. This again maintains adherence to the scope of congressional intent and avoids issues with "out-of-step" judges.[314]

While not used frequently, there is a possible fourth approach: what I dub the "formal acknowledgement approach." This approach utilizes the guardrails of approach two but permits the involvement of non-qualified senior judges informally.[315] Here, senior judges would not have a formal vote but would be permitted to review the original panel decision and provide input to any qualified judge with a formal vote.[316] Essentially, this creates a hybrid of formal and informal en banc procedures, permitting senior judges to lobby voting judges for their vote.[317] The acknowledgment aspect comes from a decision in the Second Circuit, in which Judge Peter Hall hints that he was speaking for himself and his co-judges from an original panel decision who were unable to vote due to their senior status.[318] It also permits senior judges to write a brief explanation or statement on which way they would vote, if they were permitted to do so.[319] Because such statements provide an avenue for

312. *See* 28 U.S.C. § 46(c); *Moody*, 417 U.S. at 626–27.

313. *See* Stein, *supra* note 302, at 857 n.257 ("Provision is made for circulating the suggestions to members of the panel despite the fact that senior judges on the panel would not be entitled to vote on whether a suggestion will be granted." (quoting FED. R. APP. P. 35 notes of advisory committee on appellate rules)).

314. *See* Wasby, *supra* note 306. I do, however, favor the Third Circuit's approach to allow senior judges who "do not have a vote en banc . . . [to] choose to receive circulating opinions" as this ensures senior judges can stay "in-step" with the court. *See* 3RD CIR. I.O.P., *supra* note 79, at 9.

315. By non-qualified, I mean senior judges excluded under 28 U.S.C. § 46(c).

316. *See infra* notes 318–19 and accompanying text.

317. *See supra* note 307 and accompanying text.

318. *See* European Cmty. v. RJR Nabisco, Inc., 783 F.3d 123, 124 (2d Cir. 2015) (mem.) (Hall, J., concurring) ("As Judges Leval and Sack, being senior judges, have no vote on whether to grant rehearing in banc, I write independently in support of denial of the petition.").

319. *See, e.g.*, Anderson v. Neven, 974 F.3d 1119, 1119 (9th Cir. 2020) (mem.) (Tashima, J.) ("Because, as a senior judge, I am prohibited from voting on whether to hear or rehear a case en banc, I file this separate statement. For the reasons briefly and succinctly stated

senior judges to voice their opinions and persuade eligible judges or further shape the discussion of why the case should or should not be heard en banc without violating 28 U.S.C. § 46(c) in plain view, this approach should also be permitted in a uniform operating procedure.

b. Panel Randomization & Designation Assignments

To curb panel manipulation and disruption at the district court level, a unified internal operating procedure should include randomized panels and designation assignments via computerized modeling. This includes random case assignments to the panels and could also include some sort of weighting methodology to ensure particular panels are not saddled with the same types of cases.[320] Moreover, the modeling program should be the same for every circuit, not a standalone program developed specifically for a circuit.[321] The program would include parameters for (1) scheduling conflicts, (2) accommodations for senior judges,[322] (3) adjustments to ensure that judges do not sit on the same panels too frequently,[323] (4) equalization of workload, and (5) equalization of sittings by location. Essentially, the program should draw from the best of the current varied programs. The unified internal operating procedures

therein, I agree wholeheartedly with Judge Wardlaw's opinion concurring in the denial of rehearing en banc.").

320. One caveat to the random case assignments might be for death penalty cases. Without opining on whether the death penalty should even be permissible, these cases should stick with the same panel to avoid fluctuations, or perhaps skip straight to en banc. *See* Jonathan P. Kastellec, Race, Context, and Judging on the Court of Appeals: Race-Based Panel Effects in Death Penalty Cases 1–2 (Oct. 6, 2020) (unpublished manuscript) (on file with author) (explaining how the addition of woman or minority judges in a panel can "significantly increase the likelihood of a liberal decision by the panel"). Support for skipping to en banc in death penalty cases stems from circuits, like the Eleventh, that permit a single judge to grant or deny a certificate of appealability, which severely limits death row prisoners in their ability to seek rehearing. *See* Petition for Rehearing at 4–5, Tomlin v. Patterson, 141 S. Ct. 200 (2020) (No. 19-7127) (noting the Eleventh Circuit's rules for certificates of appealability).

321. *Cf.* Chilton & Levy, *supra* note 171, at 10 ("[T]he Tenth Circuit assignment of judges to argument panels is done 'randomly using a software program developed by the court' . . . ." (citation omitted)). The Tenth Circuit's software system, for example, could become the universal model adopted by all circuits.

322. *See* Alison Frankel, *How Federal Circuits Can Create Judicial Vacancies Without Help from Congress—New Paper*, REUTERS (Jan. 19, 2021, 7:02 PM), https://www.reuters.com/article/us-otc-senior/how-federal-circuits-can-create-judicial-vacancies-without-help-from-congress-new-paper-idUSKBN29O2SO (explaining that in certain circuit courts, senior judges are permitted to "specify where they will hear cases" and may "request specific dates to hear cases").

323. *See* Chilton & Levy, *supra* note 171, at 9 (noting that the Fifth Circuit's computer program accounts for this).

would also require mandatory use of the program, regardless of case type.[324]

The program, in tandem with a unified internal operating rule, could also be used to combat issues related to the use of district judges sitting by designation.[325] As for the internal operating rule, further clarification of 28 U.S.C. § 292(a)'s "whenever the business of that court so requires" language is needed.[326] Due to the lack of a formal policy from any circuit,[327] I envision a rule that utilizes district court judges when certain parameters are met. For example, when there is a judicial emergency[328] and a limited number of invited designations within the first years of recently confirmed district judges.[329] The program could be set with these parameters and truly randomize when and how district court judges sit by designation, further preventing panel manipulation techniques.

A single randomized computer program is preferable for multiple reasons. First, mandatory use of the program ensures litigants nationwide greater assurance that the panel is truly the "luck of the draw," rather than one that has been "gerrymandered" in one direction or another. This would work to rebuild some confidence in the circuit courts and minimize allegations of the politicization of panels—especially in contentious constitutional cases. Second, a nationwide program has

324. *See supra* note 177 and accompanying text.

325. To be clear, I favor permitting district court judges to sit by designation in limited circumstances, as I have outlined below. District court judges can offer support in actual judicial emergencies (i.e., when there are an overabundance of cases *and* unfilled circuit judge slots). I am less concerned about permitting newly appointed district court judges to sit by designation to orient and educate them with the circuit, as this can be accomplished through informational training or meetings, rather than through actual cases. I do, however, see the benefit of appellate experience for new district court judges to better understand their role and impact. *See infra* note 329 and accompanying text.

326. 28 U.S.C. § 292(a).

327. *See* Saphire & Solimine, *supra* note 192, at 361 ("Every circuit indicated that it had no formal policy regarding district judges sitting by designation.").

328. A circuit court judicial emergency is defined as "any vacancy in a court of appeals where adjusted filings per panel are in excess of 700; OR any vacancy in existence more than 18 months where adjusted filings are between 500 to 700 per panel." *Judicial Emergency Definition*, U.S. CTS., https://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies/judicial-emergency-definition (last visited May 18, 2022). As of the time of writing this Article, the Second Circuit would qualify for district court judges to sit by designation under my proposal. *See Judicial Emergencies for September 2021*, U.S. CTS., https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2021/09/emergencies (last updated Sept. 1, 2021) (listing the vacancies of Judges Peter W. Hall and Denny Chin as judicial emergencies in the Second Circuit).

329. *See* Saphire & Solimine, *supra* note 192, at 361–62 ("[F]unctions thought to be served by district [court] judges sitting by designation . . . [include] orient[ing] and educat[ing] newly appointed . . . judges . . . [and] to deal aid in dealing with the heavy workload of the appellate court.").

taxpayer saving benefits and efficiencies baked in, which could be significantly enhanced if the judiciary were to utilize existing interagency information technology government-wide contracts.[330] Moreover, a nationwide computer program is more in line with IT-related procurement policies in the other branches of government.[331] Third, this sort of program could cut down on the administrative work of the circuit courts and chief judges. In short, this plug-and-play approach would allow the circuit courts to focus less on administrative scheduling issues and more on writing opinions and hearing oral arguments.

c. Reassignment Rules

As explained above, only the Seventh Circuit has codified any rules with respect to case reassignments for district judges on remand from the circuit.[332] A unified internal operating procedure could combine the Seventh Circuit's rule with the four factors listed by the Eleventh Circuit.[333] The unified rule would require that upon remand for a new trial, cases "shall be reassigned by the district court for trial before a judge other than the judge who heard the prior trial unless the remand order directs or all parties request that the same judge retry the case."[334] When a case is returned outside of trial (i.e., interlocutory appeals and appeals from motions for summary judgment), the default rule would require remand to the same district judge but would allow reassignment if, and only if, the circuit court considered in its written opinion

330. For example, the General Services Administration ("GSA") already manages Government Wide Acquisition Contracts ("GWACs") that have various IT contractors who could develop such a program. *See Government Acquisition Contracts (GWACs)*, U.S. GEN. SERV. ADMIN., https://www.gsa.gov/technology/technology-purchasing-programs/governmentwide-acquisition-contracts-gwacs (last visited May 18, 2022) ("The federal government can buy cost-effective, innovative solutions for information technology (IT) requirements through [GWACs]."). These GWACs also provide an opportunity for certified 8(a) small disadvantaged (minority-owned businesses) and Service-Disabled, Veteran-Owned Small Businesses ("SDVOSBs") to participate in the bidding and development process. *See id.*

331. *See, e.g.*, *Contract Vehicles*, CDC, https://www.cdc.gov/contracts/about-cdc-contracts/vehicles.html (last visited May 18, 2022) (noting the Department of Health and Human Services' "priority to reduce acquisition administrative costs and [to] develop long-term, mutually beneficial partnerships with best-in-class providers of products and services" by using GSA's "federal strategic sourcing initiative"). *See generally* Memorandum from U.S. Chief Acquisition Off. Anne R. Rung & U.S. Chief Info. Off. Tony Scott to the Heads of Dep'ts and Agencies (June 2, 2016) (on file with the White House) (noting the benefits and efficiencies of strategic sourcing of IT related products and services).

332. *See supra* Part II.B.3.

333. *See* Toby J. Heytens, *Reassignment*, 66 STAN. L. REV. 1, 18 tbl.1 (2014); *see also* United States v. Torkington, 874 F.2d 1441, 1446–47 (11th Cir. 1989).

334. 7TH CIR. R. 36.

"(1) whether the original judge would have difficulty putting his [or her] previous views and findings aside; (2) whether reassignment is appropriate to preserve the appearance of justice; . . . (3) whether reassignment would entail waste and duplication out of proportion to gains realized from reassignment[;]"[335] and (4) whether the original judge should have recused her or himself.[336]

Furthermore, in reassignment situations, the district courts could make use of the randomized computer program for panel assignments. The chief judge of the district could direct the clerk to run the program to randomly reassign the case to another district court judge to further eliminate any appearance of impropriety. Of course, in smaller districts or in districts with multiple vacancies, variations may need to be made, but on the whole such a system could make reassignments more streamlined and less prone to manipulation.

d. Publication Rules & Opinion Deadlines

Last, the unified internal operating procedures should include a rule that outlines when opinions are published and should set opinion deadlines to prevent publication races. The Ninth Circuit's rule, which utilizes seven criteria, could serve as a possible framework. Thus, under the new rule:

> A written, reasoned disposition shall be designated as [published opinion] if it:
>
> (a) Establishes, alters, modifies or clarifies a rule of federal law, or
>
> (b) Calls attention to a rule of law that appears to have been generally overlooked, or
>
> (c) Criticizes existing law, or
>
> (d) Involves a legal or factual issue of unique interest or substantial public importance, or

335. CSX Transp., Inc. v. State Bd. of Equalization, 521 F.3d 1300, 1301 (11th Cir. 2008) (quoting *Torkington*, 874 F.2d at 1447).

336. *See* 28 U.S.C. § 455; *Torkington*, 874 F.2d at 1446 ("If the trial judge should have recused himself and the case is remanded, it should be remanded with the direction that it be reassigned to a different district judge." (citing Parker v. Connors Steel Co., 855 F.2d 1510, 1524 (11th Cir. 1988))).

(e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or

(f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or

(g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression.[337]

Under this rule, there would be more predictability as to when cases are likely to published, and it would minimize some of the pressure of publication racing. That said, more must be done to combat publication racing.

To assist in the fight against publication racing, the unified rules could create opinion deadlines. Such an idea is not out of the norm. After all, district courts are guided by the Civil Justice Reform Act[338] and the Speedy Trial Act.[339] Even the Supreme Court "has voluntarily embraced a series of internal rules designed to put pressure on its members to issue rulings sooner rather than later."[340] To borrow an accounting term, the circuit courts could utilize a "first in, first out"[341] approach for cases that meet the publication criteria above and would affect other pending case—like with our competing § 1983 cases hypothetical. The main drawback to this approach, however, is that it unfairly punishes parties in the later heard panel by forcing them to wait while the first panel publishes its opinion. Another, more preferable approach, would be mandatory sua sponte consolidation[342] of cases in situations that meet the above criteria

337. 9TH CIR. R. 36-2.

338. *See* 28 U.S.C. § 476 (requiring the director of the AO to prepare a semiannual report that discloses the number of motions and bench trials that have been pending for more than six months, and the number of cases that have not been terminated within three years after filing).

339. *See* 18 U.S.C. § 3161 (setting time limits for criminal cases).

340. Richard J. Lazarus, *The (Non)Finality of Supreme Court Opinions*, 128 HARV. L. REV. 540, 557 (2014).

341. *Accounting Terminology Guide—Over 1,000 Accounting and Finance Terms*, N.Y. SOC'Y OF CPAS, https://www.nysscpa.org/professional-resources/accounting-terminology-guide#sthash.bWqQUTd0.dpbs (last visited May 18, 2022) (defining the phrase as an "accounting method of valuing inventory under which the costs of the first goods acquired are the first costs charged to expense. Commonly known as FIFO").

342. *See* Mary Phelan D'Isa, *Does Heck's "Favorable Termination" Requirement Bar Section 1983 Claims Challenging State Parole Procedures?*, 3 PREVIEW OF U.S. SUP. CT.

and Rule 42 of the Federal Rules of Civil Procedure.[343] And, to keep things fair, any consolidation would automatically go to the first panel to decide both cases. This not only has the benefit of stopping publication racing, it also maximizes judicial economy by allowing one panel to focus on identical or similar issues at one time and frees the other panel to hear another case.[344] Of course, the circuit courts could also rely on parties to file a motion to consolidate,[345] but this practice alone would not prevent all publication races because it would be impractical for parties to be aware of all other cases pending before the court which might meet such publication and consolidation standards. Likewise, it is unfair to put all the pressure on circuit judges—who might not be aware of all pending cases—especially on particularly busy circuits. Thus, there should also be a "lookback period" for parties to seek panel reassignment when they later catch that the issue in their case was also pending with another panel in a case filed at a similar time. Alternatively, parties should be able to petition for publication or de-publication to serve as a check on panel decisions affected by the publication racing process.

B. Eliminating Circuit Courts: The Return of the Flying Squadron

Aside from implementing national internal operating procedures and rules, another more radical approach would be to disband circuit assignments altogether and to implement President Taft's "flying squadron" approach.[346] That is, rather than having circuit judges assigned to a specific circuit, circuit judges would receive cases from all over the country and function as judges-at-large.[347] While

CASES 151, 153 (2004) ("The Sixth Circuit then decided *sua sponte* to rehear" a case en banc and to "consolidate it with [a party's] case and a third appeal."); 11TH CIR. I.O.P., *supra* note 51, at 56 (noting that under "11th Cir. R. 12-2 . . . [t]he clerk may, at the time of docketing or thereafter, notify the affected parties that it has determined, sua sponte, that consolidation of appeals is either required by statute or is in the interest of judicial economy, such as when multiple appeals raise the same or similar issues, and shall direct the parties in the notice to file written objections, if any, to the proposed consolidation within 14 days of the notice").

343. *See* FED. R. CIV. P. 42(a) ("If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions . . . .").

344. Endress v. Gentiva Health Servs., Inc., 278 F.R.D. 78, 81 (E.D.N.Y. 2011) (noting that "the Second Circuit has explained that in assessing whether consolidation is appropriate, 'a district court should consider both equity and judicial economy'").

345. *See, e.g.*, D.C. CIR. R. 3(b) (explaining the D.C. Circuit's rule for consolidated appeals).

346. *See* Levy, *supra* note 33, at 71.

347. *See id.*

unconventional,[348] such an approach, either used by itself or in tandem with uniform rules, would go a long way at reducing gamesmanship tactics by popping ideological power bubbles in certain circuits. Allow me to explain why the traditional circuit model is outdated and how a modernized version of President Taft's flying squadron proposal would work.

1. Why the Traditional Circuit Model Is Outdated

It never made sense to me why—at the federal level—federal law differed depending upon the circuit court's geographic location. For example, why certain police conduct results in clearly established law in the Ninth circuit but the same exact conduct does not in the Eleventh Circuit.[349] Or, why the standard for probable cause in the D.C. Circuit differs from probable cause in the Fourth Circuit.[350] Congress recognized this disjunction, at least implicitly, in the first Judiciary Act of 1789 because it provided for circuit riding of Supreme Court justices.[351] "[C]ircuit riding was intended to bring about greater uniformity of federal law."[352] Moreover, circuit riding—and uniformity—were intended to

348. Other "unconventional" approaches have also been preferred. While outside the scope of this Article, other scholars have suggested the opposite approach: splitting circuits even further. *See* Michael Abramowicz, *En Banc Revisited*, 100 COLUM. L. REV. 1600, 1608 (2000) (noting that some scholars have suggested "split[ting] bloated circuits, such as the Ninth, into two or more pieces" like what was done in 1981 to the Fifth Circuit to create the Eleventh Circuit). Others have proposed a National Court of Appeals or National En Banc Court, which would in essence "resolve intercircuit conflicts" and "manage the certiorari docket of the Supreme Court." *See id.* at 1611; *see also* Todd E. Thompson, *Increasing Uniformity and Capacity in the Federal Appellate System*, 11 HASTINGS CONST. L. Q. 457, 474 (1984) (noting a proposal for "a National En Banc Court"). My proposal builds on these ideas with the benefit of not having to create an additional court.

349. *See* Tyler Finn, *Qualified Immunity Formalism: "Clearly Established Law" and the Right to Record Police Activity*, 119 COLUM. L. REV. 445, 450–52 (2019) (noting that "a circuit split all but guarantees qualified immunity" and that "[n]o court of appeals has articulated a cogent definition of clearly established law that it applies consistently").

350. *See* Corbin Houston, *Probable Cause Means Probable Cause: Why the Circuit Courts Should Uniformly Require Officers to Establish Probable Cause for Every Element of an Offense*, 2016 U. CHI. LEGAL F. 809, 809–10 (2016) (explaining that some circuits "hold that an officer need not establish probable cause for each element of an offense to make a warrantless arrest . . . . [while other circuits] hold that probable cause must extend to every element of an offense").

351. *See* Judiciary Act of 1789, ch. 20, §§ 2–3, 1 Stat. 73; *see also* Steven G. Calabresi & David D. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV. 1386, 1390–91 (2006).

352. *See* Levy, *supra* note 33, at 92; *see also* The Hon. David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1717 (2007) ("[C]ircuit riding enhanced the uniformity of federal law, which was an important consideration in light of the nation's less than satisfactory experience under the Article of Confederation.").

"increase the public's sense of the legitimacy of the federal judiciary."[353] Circuit riding, of course, came with its own problems. First, there was an issue with the review structure because the Justices "would hear cases on appeal that some members of [the] Court had previously heard below."[354] Second, "circuit riding was burdensome and even dangerous in light of the difficult travel conditions during the formative years of the nation[.]"[355]

Like the collapse of circuit riding by Supreme Court Justices, the creation of the federal circuit courts of appeal created an environment where circuit judges spend their time "cloistered in [offices and courthouses within their circuits] . . . making decisions and issuing opinions on some of the most important issues of the day"[356] all the while fueling the argument that the judiciary is "arguably the most remote and secretive branch of government."[357] Furthermore, the structure of the federal appellate system created a fundamental uniformity problem, and "the inherent flaws in this structure . . . [has led to] the inevitable emergence of conflicting decisions of law."[358]

One solution to this uniformity problem, which would have the added benefit of negating many of the gamesmanship issues outlined above, would be to detach federal appellate judges from circuit assignments entirely. Unlike circuit riding by the Supreme Court Justices, a "flying squadron" of federal appellate judges would evade the review structure problem because these judges would not later hear the case at the Supreme Court.[359] Additionally, the travel-related issues that plagued the Justices are no longer a great concern. Circuit judges routinely travel between states for hearings, and the COVID-19 pandemic has proven that it is possible to conduct virtual hearings,[360] bypassing the need to travel entirely.

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353. Levy, *supra* note 33, at 93 n.206 ("[A] substantial portion of the Justices' time while riding circuit was spent on the 'assimilation of state and local values . . . .'" (quoting PETER GRAHAM FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 8 (1973))).

354. *Id.* at 93–94.

355. Stras, *supra* note 352, at 1712.

356. *Id.* at 1711.

357. *Id.*

358. Todd E. Thompson, *Increasing Uniformity and Capacity in the Federal Appellate System*, 11 HASTINGS CONST. L. Q. 457, 458 (1984)

359. *See* Levy, *supra* note 33, at 71.

360. *See Courts Deliver Justice Virtually Amid Coronavirus Outbreak,* U.S. CTS. (Apr. 8, 2020), https://www.uscourts.gov/news/2020/04/08/courts-deliver-justice-virtually-amid-coronavirus-outbreak ("Federal circuit . . . courts are utilizing multiple audio and video conferencing technologies to host oral arguments . . . remotely.").

Such a proposal comes with additional benefits. Due to the gridlock in Congress and delay in any additional judgeships,[361] the flying squadron approach would create a flexible appellate judiciary, which could adapt by utilizing judges where they are needed most—that is, where caseloads are highest.[362] It may also diminish collegiality issues and the public's perception of the judiciary, much like circuit riding did for the Supreme Court.[363]

To be sure, there are drawbacks with this approach. Circuit judges may not want to travel. And having judges dedicated to jurisdiction over a small number of states creates some expertise and familiarity with the local laws and state court decisions from those states. In a "flying squadron"-like approach, this expertise would give way to a system of generalists, albeit not overnight. Neither of these drawbacks, however, outweigh the positives associated with my proposal. In fact, these drawbacks may even create additional benefits. For example, judges who grow weary of traveling may decide to retire sooner, which could act as a de facto term limit. And judges may enjoy the freedom of living elsewhere in the county without being tethered to a particular state.[364] As to the loss of expertise of local or state law, this concern is minimal. Only about 7.5% of appeals commenced are diversity appeals.[365] Judges are certainly savvy enough to apply the laws of different states,[366] have well-qualified

361. *See* Todd Ruger, *Lawmakers in Both Parties Push to Add Judges to Overworked Federal Courts*, ROLL CALL (Mar. 16, 2021, 6:00 AM), https://www.rollcall.com/2021/03/16/lawmakers-in-both-parties-push-to-add-judges-to-overworked-federal-courts/ (reporting on a bipartisan push to add district court judges but noting that Congress has not added many judgeships since 1990).

362. *See* Abramowicz, *supra* note 348, at 1604 (noting that "courts of appeals have been unable to cope with an ever-increasing case load" and that some have criticized the solution of adding additional judges to combat the issue). Even with my proposal, added judgeships are still likely needed. *See generally* Merritt McAlister, *Rebuilding the Federal Circuit Courts*, 116 NW. U. L. REV. 1 (forthcoming 2022) (arguing that Congress should engage in lower court reform by adding judges to the most under-resourced federal appellate courts).

363. *See* Stras, *supra* note 352, at 1712 (explaining that circuit riding "led to a 'relationship of camaraderie and respect' between the Justices and local citizens, judges, and members of the bar" and that "[t]he accessibility of the Justices to the general public was one of the chief reasons why circuit riding was not formally abolished until 1911").

364. *See* 28 U.S.C. § 44(c) ("[E]ach circuit judge shall be a resident of the circuit for which appointed at the time of his appointment and thereafter while in active service.").

365. *Table B-1A, Civil and Criminal Appeals Commenced, Terminated, and Pending, by Circuit and Nature of Proceeding, in Appeals Arising from the U.S. District Courts During the 12-Month Period Ending September 30, 2018*, U.S. CTS. (Sept. 18, 2018), https://www.uscourts.gov/sites/default/files/data_tables/jb_b1a_0930.2018.pdf (noting that of the 37,488 total appeals filed in the twelve-month period ending September 30, 2018, only 2,807 were cases involving diversity jurisdiction).

366. To a certain extent, the circuit courts of appeals already do this with issues like choice of law provisions. *See, e.g.*, Star Indem. & Liab. Co. v. Rolls-Royce Corp., 725 F. App'x

law clerks to assist in research, and can rely on certified questions to state supreme courts.[367] Further, my proposal does not detach circuit staff attorneys who would remain as specialists for particular states within the current jurisdictions,[368] nor does it disband district judges from sitting by designation to assist on particularly thorny issues that may require some sort of expertise.

2. The Flying Squadron Proposal

The next question is how the "flying squadron" of judges would work. My proposal is an amalgam of the National Court and Visiting En Banc proposals into a more permanent structural reform of the court system, without the need to add an additional court. It is premised on a theory already in practice today: judicial interchangeability. As Professor Levy stated, "[d]espite the fact that Article III judges hold particular seats on particular courts, . . . [h]undreds of judges 'visit' other courts each year and collectively decide thousands of appeals."[369] This proposal takes the concept of visiting judges and turns it into the norm rather than the exception.

My proposal modifies President Taft's by focusing only on circuit judges. It would allow the Chief Justice, in consultation with the annual conference, to assign circuit judges where they are needed most, based on metrics such as upcoming cases, current back logs, and vacancies. Circuit judges would be free to live wherever they like and would travel for oral argument, when needed. Circuit judges could also be assigned to multiple circuits at once or to one circuit for a set time period. All assignments would be made through the randomized computer program. The Chief Justice would merely allocate the number of circuit judges needed in a particular circuit during a particular term.

592, 593–94 (9th Cir. 2018) (mem.) (reversing the district court when it found that Arizona's choice of law rules applied rather than Texas's). The same can be said for patent cases. *See, e.g.*, Speedco, Inc. v. Estes, 853 F.2d 909, 914 (Fed. Cir. 1988) ("State and federal courts often are required to interpret and apply laws from outside their respective jurisdictions in order to decide specific issues in cases properly before them.").

367. Bennett Evan Cooper, *Certifications of Questions of Law to State Supreme Courts*, REUTERS (Jun. 22, 2021, 3:46 P.M.), https://www.reuters.com/legal/legalindustry/certification-questions-law-state-supreme-courts-2021-06-22/.

368. *See* 28 U.S.C. § 715(a) ("The chief judge of each court of appeals, with approval of the court, may appoint a senior staff attorney . . . ."); *see also Staff Attorney's Office*, U.S. CT. OF APPEALS FOR THE ELEVENTH CIR., https://www.ca11.uscourts.gov/staff-attorneys-office (last visited May 18, 2022) ("Finally, a specialized team tracks legal issues as they develop in the U.S. Supreme Court and the Eleventh Circuit.").

369. Levy, *supra* note 33, at 67.

Additionally, the selection and role of chief judges would change. Any circuit judge who meets the eligibility criteria of 28 U.S.C. § 45(a)(1) would be eligible to sit as a chief judge.[370] Chief judges would serve a one-year term and would be randomly assigned through the computer program used to assign panels.[371] Chief judges would primarily be tasked with record keeping of the metrics described above and reporting these metrics to the annual conference on a monthly or quarterly basis. They would also retain their ability to tap district court judges to sit by designation in accordance with the procedures outlined above and upon approval from the Chief Justice or Justice assigned to a particular circuit.

En bancs would also draw from a pool of circuit judges across the country.[372] Again, using the randomized computer program, circuit judges from across the country could be selected to sit on en banc panels. The caveat is that the judges from the original panel should be included on any en banc panel like most circuits currently do today, along with the current chief judge.[373] This has the added benefit of maintaining a uniform number of judges for en banc panels throughout the country rather than the differing sized panels that we have now.[374] As for sua sponte calls for en bancs, those votes would be comprised of the judges who were assigned to the circuit at the time the panel decision was decided.

370. "The chief judge of the circuit shall be the circuit judge in regular active service who is senior in commission of those judges who— (A) are sixty-four years of age or under; (B) have served for one year or more as a circuit judge; and (C) have not served previously as chief judge." § 45(a)(1)(A)–(C).

371. Currently, 28 U.S.C. § 45 mandates a term of seven years. *See* § 45(a)(3)(A). Given the nature of my proposal's shifting circuit make-up, this length no longer makes sense. Assuming circuit judges are assigned to a particular circuit for a one-year term, it makes more sense to have the chief judge serve for the same length of time. This also increases the chances for other judges to become chief judges, further diluting any entrenched power by one ideology.

372. This is similar to the Ninth Circuit's en banc procedure but on a much larger scale. *See, e.g.*, 9TH CIR. R. 35-3 ("The en banc court, . . . shall consist of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the Court. In the absence of the Chief Judge, an 11th active judge shall be drawn by lot, and the most senior active judge on the panel shall preside.").

373. The Ninth Circuit's rules, for example, do not guarantee that a judge from an original panel will sit en banc. *See id.*

374. Each circuit does not have the same number of judges, thus the size of each en banc panel differs. For example, the Ninth Circuit's en banc panels consist of eleven judges. *See id.* Conversely, the First Circuit only has six active judgeships. *See United States Court of Appeals for the First Circuit*, BALLOTPEDIA, https://ballotpedia.org/United_States_Court_of_Appeals_for_the_First_Circuit (last visited May 18, 2022) ("[T]he First Circuit . . . [has] six judicial positions.").

As explained above, President Taft's flying squadron was initially a solution proposed to deal with congested courts.[375] Taft's flying squadron "granted the Chief Justice authority to transfer judges from overstaffed districts in one circuit to understaffed districts in other circuits."[376] Taft justified this alteration of federal judiciary "by explaining, '. . . there has been introduced in a limited way the practice of using judges from one circuit and one district in another, and there is no reason why this principle should not be extended.'"[377] While some circuits have perhaps solved their congestion problems, it is safe to say that congestion and judicial backlogs still remain[378] and visiting judges are still used fairly regularly.[379] Thus, even the original justification of Taft's proposal still faintly lives on today.

This new flying squadron, together with a national internal operating procedure, would solve many of the gamesmanship problems above. No longer would circuits be stuck with majoritarian composures of one ideology. Rather, the makeup of the circuits would be fluid and dynamic. This dilution of concentrated majoritarian power should appeal to those on both sides of the political aisle because my proposal would disband ideological supermajorities such as those of the liberals in the Ninth Circuit and the conservatives in the Fifth and Eleventh Circuits. Certainly, there will be cases in which panels, and even en banc panels,

375. *See* Levy, *supra* note 33, at 71; *see also Landmark Legislation: Conference of Senior Circuit Judges*, FED. JUD. CTR. (Sept. 14, 1922), https://www.fjc.gov/history/legislation/landmark-legislation-conference-senior-circuit-judges ("Taft proposed the appointment of at-large judges . . . that could be assigned temporarily to congested courts.").

376. Justin Crowe, *The Forging of Judicial Autonomy: Political Entrepreneurship and the Reforms of William Howard Taft*, 69 J. POL. 73, 73 (2007).

377. Alexandra M. Michalak, "I Love Judges, and I Love Courts:" Chief Justice William H. Taft and Reform in the Federal Judiciary, at 36 (May 2021) (Senior honors thesis, University of Louisville College of Arts & Sciences) (on file with ThinkIR: The University of Louisville's Institutional Repository), https://ir.library.louisville.edu/cgi/viewcontent.cgi?article=1346&context=honors.

378. *See* Madison Alder, *Ninth Circuit Poses Sticking Point for Lower Court Expansion (1)*, BLOOMBERG L. (Mar. 15, 2021, 12:55 PM), https://news.bloomberglaw.com/banking-law/ninth-circuit-poses-sticking-point-for-lower-court-expansion (reporting that Rep. Darrell Issa of California introduced legislation to add additional circuit court seats due to "a huge backlog of appeals"); Maggie Jo Buchanan & Stephanie Wylie, *It Is Past Time for Congress to Expand the Lower Courts*, CTR. FOR AM. PROGRESS (July 27, 2021), https://www.americanprogress.org/issues/courts/news/2021/07/27/501738/past-time-congress-expand-lower-courts/ (arguing, in part, that expansion of the lower courts is needed due to an average wait time of two years in civil cases and noting that "the country's population has grown by nearly a third since the 1990 expansion without any significant growth of the judiciary").

379. *See* Levy, *supra* note 33, at 67 ("Hundreds of judges 'visit' other courts each year and collectively help decide thousands of appeals.").

will be lopsided ideologically, but this would happen less frequently than it does today.[380]

There is also the problem of how to deal with precedent from the existing circuits. While any published opinion made by a flying squadron panel would become precedential nationally, any prior published opinion from a particular circuit would remain intact until it was overruled. Basically, this adopts the approach of the Eleventh Circuit when it split from the Fifth Circuit in 1981.[381] Over time, the hope is that areas of the law will no longer be fragmented based purely on geography. To be sure, this could cause an uptick in en banc panels when dealing with sensitive constitutional issues, but perhaps this is not bad thing as it could signal to the Supreme Court that its involvement is needed.

C. Watching the Watchmen

To ensure that these proposals effectuate change, and to prevent further erosion of public trust, more must be done to monitor the circuit courts. Certainly, there are some safeguards in place, but these methods are wanting. For example, federal circuit judges are subject to impeachment,[382] but this is basically unheard of.[383] And, chief judges are

380. Perhaps the computer program could also account for ideology based on the political party that appointed the circuit judge. *See* Thakker, *supra* note 58, at 460 ("Judges adopt the political ideologies of the Presidents that nominate them."); Maggie Jo Buchanan, *Trump's Ideological Judges Have Led to Politicized Courts*, CTR. FOR AM. PROGRESS (Oct. 23, 2020), https://www.americanprogress.org/article/trumps-ideological-judges-led-politicized-courts/ (noting former President Trump's appointments and their shared ideologies). *See generally* Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in Cycles of Constitutional Time*, 98 TEX. L. REV. 215 (2019) (tracing the Republican Party's use of judicial appointments to entrench policy positions). This could create more balanced panels, but ideologies shift over time, and there is no guarantee that any judge shares the same ideology as the President who appointed them. *See, e.g.*, Adam Bonica & Maya Sen, *Estimating Judicial Ideology*, 35 J. ECON. PERSPECTIVES 97, 113 fig.2 (2021) (showing that the estimated ideological preferences of judges appointed by President Gerald Ford are nearly an even split between conservative and liberal).

381. *See* Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) ("We hold that the decisions of the . . . Fifth Circuit . . . , as that court existed on September 30, 1981, . . . shall be binding as precedent in the Eleventh Circuit . . . .").

382. *See Impeachment of Federal Judges*, BALLOTPEDIA, https://ballotpedia.org/Impeachment_of_federal_judges (last visited May 18, 2022) ("Though it does not expressly state in the Constitution that judges may be impeached and removed from office, they fall under the label of 'Civil Officers' in Article II, Section 4 [of the U.S. Constituion]." (footnotes omitted)); U.S. CONST. art. III, § 1 ("The judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . .").

383. *See Impeachment of Federal Judges*, *supra* note 382. (noting that the U.S. Constitution does not expressly permit impeachment of federal judges and that only fifteen judges have been impeached).

empowered to establish circuit judicial councils to monitor misconduct.[384] But why let the proverbial fox guard the henhouse? This is why some sort of increased monitoring from outside the judiciary is needed.[385] To accomplish this end, I envision a two-prong methodology: (1) the establishment of a national federal judiciary oversight committee or power to the General Accountability Office to monitor the judiciary, and (2) an increase in publicity and transparency into judicial decision-making.

1. Federal Judicial Qualification Commission

The first prong of my proposal is to establish a federal judicial qualification commission ("JQC") or to provide oversight authority to the General Accountability Office ("GAO"). The newly formed federal JQC or the GAO would establish reporting requirements consistent with the proposals above and subject to the metrics discussed further below. It would also function as a quasi-inspector general, aimed at preventing ethical and internal operating procedure violations. For those asking whether there is authority to do this, the answer is yes. Congress already has "oversight authority . . . based on obtaining information that will assist it in the legislative process with respect to matters within its constitutional purview."[386] And Congress has extended this power with regard to downward departures from the Sentencing Guidelines in the

384. *See A Journalist's Guide to the Federal Courts*, U.S. CTS., https://www.uscourts.gov/statistics-reports/judges-and-judicial-administration-journalists-guide (last visited May 18, 2022) ("The chief judge also may appoint a special committee of judges to investigate . . . allegations . . . . While it is not common, the council can take disciplinary action . . . .").

385. This monitoring is separate from the Judicial Conduct and Disability Act, which permits any person to file a complaint against a federal judge alleging that said judge engaged in "conduct prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 351(a). It is also separate from the judiciary's internal Strategic Plan for the Federal Judiciary, which employs oversight mechanisms to monitor legal and ethical rules. *See Administrative and Oversight Accountability*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/judicial-administration/administrative-oversight-and-accountability (last visited May 18, 2022) ("Accountability is a core value of the federal Judiciary, as stated in the [Strategic Plan for the Federal Judiciary], encompassing: . . . self-enforcement of legal and ethical rules . . . .").

386. ELIZABETH B. BAZAN & MORTON ROSENBERG, CONG. RSCH. SERV., RL32935, CONGRESSIONAL OVERSIGHT OF JUDGES AND JUSTICES 4 (2005).

Feeney Amendment[387] and through the Civil Justice Reform Act.[388] Even former Chief Justice Rehnquist, who questioned the constitutionality of the Feeney Amendment, recognized that "Congress has a legitimate interest in obtaining information which will assist in the legislative process[,]" including "the collection of information about . . . practices employed by federal judges throughout the country."[389]

By monitoring the activity and adherence to the new national internal operating procedures, the JQC or GAO can use the data it gathers to enact or approve new rules under the Rules Enabling Act.[390] Moreover, increased external oversight may provide Congress with a better understanding of where substantive law making is needed, like "[d]isagreements with court interpretations of statutes."[391] And it may provide Congress with data required to create or abolish federal courts, approve new judgeships, and further define the jurisdiction of the circuit courts.[392] That said, some judicial involvement is necessary in this effort. As former Chief Justice Rehnquist said: "'[J]udges are bound to respect' the Congressional perspective on questions of judicial administration, the respect should run in both directions. 'Consultation with the judiciary' he said will improve the process and the product."[393]

387. David P. Mason, Note, *Barking up the Wrong Tree: The Misplaced Furor over the Feeney Amendment as a Threat to Judicial Independence*, 46 WM. & MARY L. REV. 731, 737 (2004) (citing PROTECT Act, Pub. L. No. 108-21 § 401(m), 117 Stat. 650 (2003) (codified in scattered sections of 18, 28, 42, and 47 U.S.C.)). This Feeney Amendment was part of the PROTECT Act, which among other things, "require[ed] reporting on departure practices." *Id.* Portions of the Feeney Amendment, which "virtually prohibit judges from [downward departures]" have been found unconstitutional. *See* United States v. Grigg, 442 F.3d 560, 562, 564–65 (7th Cir. 2006) ("Although we must hold today that § 3553(b)(2) cannot constrain the discretion of a district courts to impose a sentence outside the range recommended by the Sentencing Guidelines, we nevertheless believe that district courts . . . ought to give respectful attention to Congress' view that crimes such as Mr. Grigg's are serious offenses deserving serious sanctions.").

388. 28 U.S.C. § 476(a).

389. William Rehnquist, Chief Just., U.S. Sup. Ct., Remarks of the Chief Justice before the Federal Judges Association Board of Directors Meeting (May 5, 2003), http://www.supremecourt.gov/publicinfo/speeches/sp_05-05-03.html.

390. *See* §§ 2071–77 (describing the rules of conduct that federal courts can impose within their respective courts and the processes that federal courts must follow to promulgate those rules).

391. THE CONSTITUTION PROJECT, OVERSIGHT OF FEDERAL JUDGES 185, 187, https://archive.constitutionproject.org/wp-content/uploads/2017/05/Chapter-14.pdf.

392. *See* U.S. CONST. art. III, § 1; Sheldon v. Sill, 49 U.S. 441 (1850).

393. Linda Greenhouse, *Chief Justice Attacks a Law as Infringing on Judges*, N.Y. TIMES (Jan. 1, 2004), https://www.nytimes.com/2004/01/01/us/chief-justice-attacks-a-law-as-infringing-on-judges.html.

2. Increased Transparency & Adverse Publicity: CJRA 2.0

A former co-clerk of mine once joked that the difference between God and federal judges is that God does not think he is a federal judge. All joking aside, the point is that the vast majority of judges care about their reputations.[394]

> Reputation is crucial in many arenas, and judging is no exception. A judge with a good reputation will enjoy the esteem of his friends and colleagues and may have chances for advancements to higher courts . . . . A judiciary with a poor reputation, in contrast, will find itself starved of both resources and respect [and people generally care what other people think about them].[395]

The second prong plays on this aspect of human nature and utilizes it for good. It involves publicizing judicial decisions—both substantive and administrative—to a far greater extent by applying the principles behind the Civil Justice Reform Act ("CJRA") to circuit courts. The purpose of the CJRA, introduced by then Senator Biden, was to "'reduc[e] . . . delays . . . by substantially expanding the availability of public information about backlogs in undecided motions.' In other words, the idea was to name and shame judges with many pending motions."[396] Under an expanded version of the CJRA in my proposal, circuit judges would be required to (1) report how long appeals have been pending, (2) publicize en banc vote tallies, and (3) report backroom decision-making. All this data would be reportable to the new federal JQC or GAO and shareable to the public.

First, to combat the publication race debacle, I suggest that we apply a reporting requirement for the circuit courts. Like federal district courts, circuit courts would be required to report the status of any pending

394. *See, e.g.*, Jonathan Ringel, *Atlanta Federal Judge Levels Mountain of Motions After a Year on 'Top' of National List*, DAILY REPORT (July 6, 2020, 12:17 PM), https://www.law.com/dailyreportonline/2020/07/06/atlanta-federal-judge-levels-mountain-of-motions-after-a-year-on-top-of-national-list/ (noting how Judge Mike Brown of the N.D. Ga. "eliminated [a] backlog that for a year dogged him as the federal jurist carrying the most civil case motions pending more than six months").

395. Nuno Garoupa & Tom Ginsburg, *Reputation, Information and the Organization of the Judiciary*, 4 J. COMP. L. 228, 228 (2009).

396. Zuckerman Spaeder LLP, *When Will the Judge Decide My Motion? Insight from the Civil Justice Reform Act*, JD SUPRA (May 11, 2021), https://www.jdsupra.com/legalnews/when-will-the-judge-decide-my-motion-3933949/ (quoting R. Lawrence Dessem, *Judicial Reporting Under the Civil Justice Reform Act: Look, Mom, No Cases!*, 54 U. PITT. L. REV. 687, 691 (1993)).

appeal biannually and any cases on appeal that have not been resolved for longer than three years.[397] Of course the circuit court deadlines need not be the same as the district courts,[398] but the underlying principle behind the deadlines is the same: adverse publicity to encourage timely resolution of appellate decisions,[399] which would have the potential added benefit of limiting gamesmanship behind publication decisions.[400]

Second, to further curb manipulation of the en banc process, data related to en banc decisions, including voting results, should be published and categorized based on the main subject area(s) of the cases. In addition to requiring substantive reasoning in en banc hearing/rehearing decisions themselves, reporting of this data will help guide Congress in future legislative decisions. The collection of this data may also help Congress and the public identify abuses of the en banc process, as discussed above. Similar to reporting publication deadlines, collection and publication of this data could also shine a light on judges who manipulate the process simply to bypass a panel which may rule unfavorably to their ideological position. Categorizing en banc voting data may also prove useful to the Supreme Court in deciding which cases should be granted cert.[401]

Lastly, I propose that we publicize backroom decisions and compromises made in publication decisions to curb judicial logrolling. While judges and their staff are to be given a certain amount of confidentiality in their decision-making, it seems odd that "they do not

397. *See* 28 U.S.C. § 476(a).

398. Conversely, there is no reason why the same deadlines could not be imposed. Timelines for resolutions of appeals vary across the circuits and there is no reason why litigants in one circuit should be forced to wait on average longer than others simply because the case was filed in a different part of the country. *See* Marcia Ernst, *How Long Will a Civil Appeal in the Eleventh Circuit Typically Take?*, SMITH GAMBRELL RUSSELL, https://sgrlaw.com/how-long-will-a-civil-appeal-in-the-eleventh-circuit-typically-take/ (last visited May 18, 2022) (noting that the median time from a notice of appeal to a decision in the Eleventh Circuit was 9.7 months but was 25.5 months in the Ninth Circuit).

399. *See* Charles G. Geyh, *Adverse Publicity as a Means of Reducing Judicial Decision-Making Delay: Periodic Disclosure of Pending Motions, Bench Trials and Cases Under the Civil Justice Reform Act*, 41 CLEV. ST. L. REV. 511, 524, 527 (1993) (noting that "[c]hief circuit judges underscored the significance of adverse publicity.").

400. While data has fluctuated over the years, the CJRA does appear to have a positive impact on timely resolution of cases in district courts. *See March 2020 Civil Justice Reform Act*, U.S. CTS., https://www.uscourts.gov/statistics-reports/march-2020-civil-justice-reform-act (Mar. 31, 2020) ("The total number of motions pending more than six months . . . dropped by 811 motions from . . . September 30, 2019, to . . . March 31, 2020."); *see also supra* note 378.

401. *See* Solimine, *supra* note 111, at 339 ("[B]ecause en banc cases are almost always important in some sense, those cases are the ones the [Supreme] Court is more likely to place on its agenda. Empirical studies have supported [this] proposition.").

publicize the compromises they strike in producing majority opinions."[402] "There is a general consensus that courts should not operate according to secret rules. Among other things, having a transparent decision-making process and providing candid explanations for decisions demonstrates respect for the public, develops public trust, and increases accountability."[403] While judicial logrolling should be ethically prohibited, I understand that such a prohibition could be easily skirted. Thus, to discourage judicial logrolling, the national internal operating rules would require judges to report whether their vote was made based on the merits or in exchange for something else. To encourage candor from circuit judges, any discussions about the resolution of a case should be recorded or transcribed and provided to the JQC or GAO to confirm the accuracy of the reporting. To preserve confidentiality, the recording or transcript would be available only to the members of the JQC or GAO and disclosure or unauthorized reproduction of such recordings would come with civil, or even criminal, penalties.[404]

To be sure, publication of logrolling through a CJRA-like report may further erode the public's waning support of the judiciary, but not disclosing decisions reached on acquiescence and deal brokering merely maintains the status quo,[405] which likewise leads to speculation and distrust. By pulling back the curtain, the public—and Congress—will be able to determine what "issue[s are] important enough to warrant forging deals,"[406] such that appropriate legislative decisions can be made in response.

402. Hessick & McLaughlin, *supra* note 242, at 492.

403. *Id.* at 491.

404. I realize this proposal is radical, especially in light of the fact that several circuits—much less the Supreme Court—are uncomfortable with even video recordings of oral arguments. But federal courts have found ways to protect filings and information through sealed dockets and *in camera* review. *See* FED. R. CIV. P. 5.2(d); Chris Young, *In Response to Reporters Committee Letter, US Supreme Court Says It Plans to Issue New Rule on Sealing Records*, REPS. COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/supreme-court-record-sealing-rule/ (Oct. 7, 2020). If the courts are serious about transparency, then audio recordings or transcriptions of the decision-making process should be subject to oversight under the protections I have outlined above. Inter-chamber discussions with law clerks, however, should remain completely confidential. And these backroom discussions could also be protected by an exception under the Freedom of Information Act.

405. *See* Hessick & McLaughlin, *supra* note 242, at 492 ("But it seems more likely that disclosure would result in a loss of public support for the judiciary . . . not disclosing logrolling would essentially maintain the status quo.").

406. *Id.* at 492 n.234.

CONCLUSION

Perhaps these issues are not as grievous as I paint them out to be. After all, even the flattest pancake has two sides.[407] Certainly, these proposals are extreme and would face significant pushback. But that does not mean that these issues should be permitted to fester. To do so would allow a papercut to transform into gangrene. At the very least, pushing the conversation on these issues serves to better the judiciary. As former Justice Brandeis once wrote, "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman."[408]

While the public's attention is squarely focused on the Supreme Court, it is only a matter of time before they become aware of the growing problem in the federal circuit courts,[409] which given their finality, is the much more pressing problem. Rumblings that "the courts have gotten too powerful relative to other branches . . . [and] undermine democracy"[410] could lead to diminished respect for circuit court rulings. The "judiciary relies on the consent of other branches [and the public] in order to assert itself."[411] Without that consent, our entire three-branch system of

407. Dr. Phil (@DrPhil), TWITTER (July 13, 2015, 6:24 PM), https://twitter.com/drphil/status/620720364264370176?lang=en ("No matter how flat you make a pancake, it's got two sides.").

408. Buckley v. Valeo, 424 U.S. 1, 67 (1976) (quoting LOUIS BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 62 (Nat'l Home Library Found. ed., 1933)),

409. Recent news articles suggest that, in certain cases, the public is becoming more aware. *See, e.g.*, Zoe Tillman & Matt Berman, *Texas's Six-Week Abortion Ban is Back on After an Appeals Court Paused a Judge's Injunction*, BUZZFEED NEWS, https://www.buzzfeednews.com/article/zoetillman/texas-fifth-circuit-reproductive-rights-abortion-ban (Oct. 8, 2021, 10:27 PM) (highlighting the recent administrative stay granted by the Fifth Circuit over Judge Pittman's preliminary injunction and noting Judge James Ho's involvement on the panel as "one of the most vocally anti-abortion judges in the country" and the "deeply conservative majority" of the Fifth Circuit); David G. Savage & Maura Dolan, *With Trump Appointees, Supreme Court Delivers 9th Circuit Another Year of Reversals*, L.A. TIMES (July 13, 2021, 10:58 AM), https://www.latimes.com/politics/story/2021-07-13/with-trump-appointees-9th-circuit-suffers-another-year-of-reversals-at-supreme-court ("Trump's 9th Circuit picks appeared to have played a significant role this year by pressing for internal review of rulings they didn't like[;] . . . 'The 9th Circuit is historically more liberal on immigration . . . cases,' [Erwin Chemerinsky] said.").

410. Dylan Matthews, *The Supreme Court Is Too Powerful and Anti-Democratic. Here's How We Can Scale Back Its Influence*, VOX (Sept. 29, 2020, 9:10 AM), https://www.vox.com/policy-and-politics/21451471/supreme-court-justice-constitution-ryan-doerfler; *see also* Kim R. Holmes, *Has the Supreme Court Become Too Powerful?*, HERITAGE FOUND. (Feb. 25, 2016), https://www.heritage.org/crime-and-justice/commentary/has-the-supreme-court-become-too-powerful ("We have allowed the courts—the Supreme Court, in particular—to become too powerful.").

411. John Elias, *Private: "Federal Courts Have No Army or Navy"*, AM. CONST. SOC'Y (Dec. 10, 2004), https://www.acslaw.org/?post_type=acsblog&p=1223.

government self-implodes.[412] In the end, some shuffling of words in the Federal Rules of Appellate Procedure has created a self-inflicted wound on the federal circuit courts. And while this sounds bad, it does not have to be, so long as some action is taken to correctly balance the books.

412. *Id.* ("Because its orders are not self-executing, the judiciary relies on the consent of other branches in order to assert itself. And popular vigilance is the only way to make those branches cooperate when they're not inclined to.").