DUE PROCESS AND EN BANC DECISIONMAKING

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INTRODUCTION

The vast majority of decisions of the United States Courts of Appeals are rendered by three-judge panels. Only a few are decided by all of the circuit judges sitting en banc. Since 2000, the courts of appeals have been deciding about 27,000 cases on the merits each year. In the same period, on average only about seventy-five cases have been decided en banc each year.[1] The paucity of en banc cases belies their significance and the time and attention that are devoted to the decision of whether to have the entire circuit review a panel decision in the first place. According to Federal Rule of Appellate Procedure 35, en banc decisions "are not favored" and are supposed to be limited to establishing uniformity in a circuit or to deciding questions "of exceptional importance."[2] En banc decisions typically get more attention in the legal community and are more likely to be reviewed by the U.S. Supreme Court than are rulings by three-judge panels.[3] And while some

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1. For the twelve-month periods ending on September 30 of 2000, 2001, 2002, 2003, and 2004, the courts of appeals (excluding the Federal Circuit) decided 73, 81, 75, 68, and 59 en banc cases, respectively. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR tbl.S-1 [hereinafter ANNUAL REPORT] (reports for years 2000–2004). The terminations on the merits in the courts of appeals for those years can be found in the same tables. The data reported in these reports may not be the same as the number of en banc cases published in the *Federal Reporter* because the *Federal Reporter* relies on data supplied by each circuit, and different circuits may use different definitions of what counts as one en banc case. For further discussion of this point, see Tracey E. George & Michael E. Solimine, *Supreme Court Monitoring of the United States Courts of Appeals En Banc*, 9 SUP. CT. ECON. REV. 171, 177 & fig.1 (2001).

2. FED. R. APP. P. 35(a)(2).

3. *See infra* Part III.

judges contend that they dislike reviewing litigant petitions for rehearing of panel decisions,[4] many of them nonetheless apparently pay close attention to such petitions, and it is common for judges to issue published opinions concurring in or dissenting from a decision of the full circuit *not* to review a case en banc.[5]

This Article will explore various facets of the decision to review a case en banc.[6] Specifically, Part I addresses whether the votes of the entire circuit on whether to en banc a case should be kept confidential. Part II addresses the related issue of whether judges should publish opinions concurring in or dissenting from the denial of rehearing en banc and, if so, what the content of such opinions should be. Finally, Part III addresses the criteria circuit judges should consider in deciding whether to rehear a case en banc and whether the likelihood of Supreme Court review thereafter should play a role in the decision to rehear.[7]

I. PUBLICIZING VOTES ON PETITIONS FOR REHEARING EN BANC

The en banc rehearing process is triggered either by a litigant filing a petition requesting such an action or by a judge on the circuit requesting that such a rehearing take place.[8] Either way, the votes of the judges on rehearing requests typically are not made public. Although some who have voted for rehearing en banc but who have not prevailed do publish dissents, it cannot be assumed that they constitute all of the judges voting for en banc rehearing. The express position of the Ninth Circuit is that the vote tallies are not made public.[9] The other circuits

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4. Richard S. Arnold, *Why Judges Don't Like Petitions for Rehearing*, 3 J. APP. PRAC. & PROCESS 29 (2001).

5. *See infra* Part II.

6. *See generally* Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837 (1984) (discussing various due process values of procedure in appellate context).

7. There are other due process-like issues pertaining to en banc decisionmaking that are worthy of discussion, but they are beyond the scope of the present Article. Such other issues include, first, what judges should count for the "majority of the circuit judges," the number needed to vote to en banc a case. FED. R. APP. P. 35(a). The circuits had differing positions on this issue, but an amendment to Rule 35(a), which went into effect on December 1, 2005, resolved the dispute. *See Amendments to the Federal Rules of Appellate Procedure*, 228 F.R.D. 267, 324–29 (2005). A second issue is whether *visiting* judges from outside the circuit should constitute the en banc court, as provocatively advocated by Michael Abramowicz. Michael Abramowicz, *En Banc Revisited*, 100 COLUM. L. REV. 1600 (2000). A third issue is whether judges should issue opinions when the en banc court is equally divided. *See* Stupak-Thrall v. United States, 89 F.3d 1269, 1272 (6th Cir. 1996) (Boggs, J., dissenting) (contending that the usual practice is that no opinions should issue but recognizing deviations from that practice).

8. FED. R. APP. P. 35(a)–(b). More precisely, a litigant can petition for rehearing, "but a vote is taken only if one or more judges request it. [Then] there is the vote itself and the exchange of memoranda that precedes it." Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541, 548 (1989).

9. *See* 9TH CIRCUIT ADVISORY COMM. NOTE TO R. 35-1 TO 35-3, pts. (2)–(3) (indicating that orders reporting the result of votes to deny or grant rehearing en banc shall not specify the "vote tally").

have not memorialized rules on this issue, but they all apparently follow the Ninth Circuit position in not routinely reporting such tallies.[10]

Ninth Circuit Judge Stephen Reinhardt has challenged this position. Dissenting from a denial of rehearing en banc in the *Harris v. Vasquez* death penalty litigation, Judge Reinhardt argued that the vote tally should be released.[11] "Whatever the wisdom" of the rule not permitting the release of the tally, which he believed to be "wrong under all circumstances," it "clearly [did] not serve the public interest in death penalty cases."[12] "There are good reasons," he continued, "why history should fully record the judicial votes in death penalty cases."[13] Given the finality and controversy of imposing the penalty, and that "substantial" numbers of judges, albeit not a majority, may vote to rehear a case, he 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."[14] Premised on what he viewed as the evolving nature of public opinion and jurisprudence on the death penalty, he felt that history would "undoubtedly . . . revisit" the topic, and when it does, "the historical record should be full and complete. At that time, as well as now, the people should know whether in the present case we failed to go en banc by an equally divided vote, a closely divided vote, or an overwhelming vote."[15]

Judge Reinhardt acknowledged that the U.S. Supreme Court does not disclose its votes on certiorari petitions and that the decision whether to grant certiorari would seem to be analogous to the agenda-setting function of the decision to en banc a case.[16] However, he argued that there was not an analogy. First, he observed that the Court follows a rule of four for such petitions, so the votes of only four of the nine Justices are necessary to place a case on the Court's docket.[17] This, he said, "ensures that a decision not to review a case is favored by at least a two-to-one majority."[18] Rules requiring a majority of the circuit to rehear a case en banc, in contrast, "allow a case to go unreviewed even when the vote is tied or there is only a one vote difference."[19] Second, "Justices are free to record their votes in favor of granting certiorari if they so choose."[20] The Ninth Circuit rule allows no such option, though Judge Reinhardt conceded that disclosure of the

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10. It is worth noting, however, that in the Fourth Circuit, at least some published opinions denying rehearing en banc list how all of the judges voted on the petition for rehearing. *E.g.*, Hamdi v. Rumsfield, 337 F.3d 335, 340–41 (4th Cir. 2003) (denying rehearing en banc), *vacated*, 542 U.S. 507 (2004).

11. Harris v. Vasquez, 949 F.2d 1497, 1539–40 (9th Cir. 1991) (Reinhardt, J., dissenting from denial of rehearing en banc).

12. *Id.*

13. *Id.* at 1540.

14. *Id.*

15. *Id.*

16. *Id.* at 1540 n.2.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

tally sometimes "results incidentally from [a judge's] participation in a dissent from a refusal to convene an en banc court."[21]

Subsequently, other Ninth Circuit judges and lawyers weighed in on the controversy. Some disagreed with Judge Reinhardt. For example, Judge J. Clifford Wallace and others have suggested that judges vote for or against rehearing en banc for many reasons, and that such votes "could be misread as reflecting their judgments on the merits of a case."[22] These "misperceptions are sometimes magnified," they continue, "by published dissents from denials of *en banc* review . . . ."[23] Judge Wallace said he does not read such opinions, because "[t]hey express a dissent from a non-opinion of the court . . . . They're like reading editorials after the court has ruled."[24] Judge Alfred Goodwin agreed and added that revealing such votes will mean more work for the judges, because many "'will 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.'"[25]

In contrast, while only Judge Harry Pregerson has joined one of Judge Reinhardt's opinions on the issue, other judges and lawyers have expressed support. Judge Charles Wiggins said that a jurist "'who votes to deny *en banc* should say so explicitly to [sic] that there is no misunderstanding. We should make our public acts public.'"[26] Similarly, some lawyers have said that especially in a large circuit, a close vote on an en banc rehearing petition "could signal a significant intra-circuit conflict and might influence justices on the U.S. Supreme Court to grant *certiorari*."[27] In short, they say, "[t]he Supreme Court should know and we should know where every judge on the Ninth Circuit stands."[28]

Both sides on this issue present plausible arguments, but in the end the supporters of the present Ninth Circuit rule are more convincing. I too am in favor of a presumption of making the actions of governmental officials, judges included, public. However, the presumption of publicity should be rebuttable, and tallies of en banc rehearing votes fall on the side of nondisclosure. Federal courts have long made various aspects of their deliberations secret. Even some public acts are presented in a semi-secret way, like the Supreme Court granting or denying certiorari without revealing the votes of the Justices. Judge Reinhardt is right to point out that the analogy between certiorari and rehearing is not airtight. He could have added that another difference is that the Supreme Court considers thousands of certiorari petitions each Term, while even the very large Ninth Circuit and other

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21. *Id.* Judge Reinhardt reiterated these views in later non-death-penalty cases. *See* Elder v. Holloway, 984 F.2d 991, 1000–02 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of rehearing en banc), *rev'd*, 510 U.S. 510 (1994); Brewer v. Lewis, 997 F.2d 550, 556 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of rehearing en banc).

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

23. *Id.*

24. *Id.* (internal quotation marks omitted).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id*.

circuits presumably consider only several hundred petitions for rehearing en banc each year.[29] However, the number of petitions might increase at the circuit level if counsel knew that their petition would automatically put judges on the record regarding their case. Although these are not trivial numbers, they are nonetheless much lower than the number of certiorari petitions. Therefore, the administrative burden of tallying and reporting votes on the disposition of such petitions would seem to be comparatively light.

However, the other reasons advanced by Judge Reinhardt are not compelling. He first argued for publicizing such votes in a highly charged and celebrated death penalty case and intimated that the proposal could be limited to such cases.[30] However, it is difficult to draw the line between cases in which the votes should be published and cases in which they should not in a principled fashion. Many cases before the U.S. Courts of Appeals confront controversial issues of social policy other than the death penalty. Even those that do not may involve large sums of money or may otherwise be quite important to the litigants in those cases.[31] Moreover, the routine publication of such tallies could harm the collegial atmosphere of a circuit. Multimember appellate courts, as D.C. Circuit Judge Harry Edwards has recently and eloquently argued, should be marked by the airing and consideration of different views in a respectful and professional atmosphere.[32] Disagreement and formalized dissent is part of that process,[33] but institutionalizing all possible disagreements or publicizing heretofore confidential proceedings may be too much of a good thing. Judge Edwards observes that courts exist to provide answers to parties in adversarial litigation, "not a public colloquy among judges."[34]

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29. The number of litigant petitions for rehearing en banc is not published by the Administrative Office. In a study I conducted in the mid-1980s, I obtained such data from the Office, and it showed that the figures ranged, sometimes dramatically, over time and between and within circuits. The numbers ranged from a low of 43 for the First Circuit (in 1985) to 505 in the Ninth Circuit (in 1987). *See* Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. REV. 29, 47 tbl.3 (1988) (covering years 1985, 1986, and 1987). Of course, many of the petitions are perfunctory, *see* Arthur D. Hellman, *Getting it Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals*, 34 U.C. DAVIS L. REV. 425, 443 (2000), and can be disposed of quickly, though the same is probably true of certiorari requests. In any event, the apparently large number of such petitions led to the amendment of Rule 35(a) in 1998 to emphasize that litigant petitions must clearly state why the requirements of the Rule (that is, conflict with prior circuit precedent or the importance of the issue) are met. *See* 16A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3981.2 (3d ed. 1999).

30. *See supra* notes 11–15 and accompanying text.

31. *Cf.* Thompson v. Calderon, 120 F.3d 1045, 1070 (9th Cir. 1997) (en banc) (Kozinski, J., dissenting) ("The stakes are higher in a death case, to be sure, but the stakes for a particular litigant play no legitimate role in the en banc process."), *rev'd*, 523 U.S. 538 (1998).

32. Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1645 (2003).

33. *Id.* at 1646–47 ("[C]ollegiality may make disagreement more comfortable and more likely, not less.").

34. *Id.* at 1651.

Judge Edwards does not specifically discuss the revelation of vote tallies on petitions for rehearing en banc, but his words indicate that he would take a dim view of the practice. The decision to rehear a case en banc, as proposed in Parts II and III below, should be based on whether it meets the criteria of Federal Rule of Appellate Procedure 35(a). It should not be directly based on the correctness of the resolution on the merits of the case by the panel.

Not only would the public gain very little by the simple recitation of how each judge voted on that narrow issue, but routinely publishing vote tallies might also encourage the production of explanatory opinions by the judges involved. This would again sideline judicial resources by forcing judges to spend time writing these additional opinions. If the case does not go en banc, there seems little purpose to be served by revealing the vote. Moreover, as Judge Reinhardt acknowledged, there is an important gaping exception to the rule against revealing the vote. It is common for judges to issue published opinions concurring in or dissenting from the denial of rehearing en banc, a phenomenon further discussed in the next Part. When those opinions are issued, it often becomes clear how at least some, if not all, of the circuit judges voted.[35] This suggests an alternative method of dealing with the issue, which would be to reveal the vote tally as a whole, but not identify the votes of *particular* judges.

In the end, the rule against revealing such votes is a relatively durable norm with exceptions. The rule in my judgment has not done great damage to en banc decisionmaking, and it probably marginally aids the process by fostering, if only in a small way, the collegial process by permitting some aspects of judicial decisionmaking to remain semi-confidential. Given what ought to be the narrowness of the issue before the circuit at that stage, the public is not disserved by an absence of knowledge of the vote tally, especially given the safety valve of judges occasionally publishing opinions revealing, and explaining their votes in that regard. That process is analyzed next.

II. PREPARING OPINIONS CONCERNING DENIALS OF REHEARING EN BANC

This Part addresses the propriety of the practice of preparing published opinions, typically labeled as concurring or dissenting, to accompany an order denying rehearing en banc.[36] As part of that inquiry, one must consider how often such opinions are issued, the contributions of such opinions to legal discourse, and the appropriate content of such opinions.

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35. This practice does not inevitably reveal the votes of all of the judges who participated in the decision whether to rehear a case en banc. Not all of the judges on either side will always join the opinions in question. Elder v. Holloway, 984 F.2d 991, 1001 n.2 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of rehearing en banc).

36. Sometimes these opinions are labeled in the official reports as "separate statements," but almost always they can be characterized as concurring in or dissenting from the denial of rehearing en banc. Also, I am primarily concerned with such opinions concerning the *denial* of rehearing en banc. Occasionally there are similar separate opinions regarding the *granting* of rehearing en banc. *E.g.*, *Thompson*, 120 F.3d at 1043 (Beezer, J., dissenting from the granting of rehearing en banc).

The issuance of such opinions as a safety valve to a strict rule forbidding the revelation of vote tallies on en banc petitions is not without controversy. Judge James Hill of the Eleventh Circuit, in his own opinion dissenting from a denial of rehearing en banc, questioned whether such opinions should be issued at all. Writing in 1986, he observed that such opinions had "proliferated" in his circuit "to the point where the practice may be said to have become institutionalized."[37] He allowed that the trend might be linked to what he viewed as an increase in the number of opinions dissenting from certiorari denials at the Supreme Court.[38] Noting that "[n]ot all judicial officers have found the latter [to be] appropriate,"[39] Judge Hill argued that "it may be appropriate that a simple order reciting [the denial of rehearing en banc] be the end of the issue."[40] Nonetheless, he filed his own dissent because in his view "the practice of dissenting from such orders [was] now commonly accepted . . . ."[41]

Other jurists have advanced positions similar to that of Judge Hill, expressly or impliedly suggesting that such opinions should not be filed. Judge Wallace, as we have already seen, arguably takes this view,[42] as do other circuit judges.[43] Judge Patricia Wald of the D.C. Circuit disapprovingly suggested that the sometimes "elaborate statements" in dissents from denials of rehearing en banc are "thinly disguised invitations to certiorari."[44]

What should we make of these arguments? First, consider the number of such opinions. Judge Hill may have overstated the proliferation of the opinions in his circuit. As a whole, the Justices on the Supreme Court rarely issue opinions dissenting from denial of certiorari, though there may have been an uptick of such opinions in the 1980s.[45] As for the number of opinions at the circuit level, a study I conducted in the mid-1980s showed that there were a total of fifty-eight published

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37. Isaacs v. Kemp, 782 F.2d 896, 897 n.1 (11th Cir. 1986) (Hill, J., dissenting from denial of rehearing en banc).

38. *Id.*

39. *Id.* (citing Singleton v. Comm'r, 439 U.S. 940, 942 (1978) (opinion of Stevens, J., respecting the denial of certiorari)).

40. *Id.*

41. *Id.*

42. *See supra* notes 22–24 and accompanying text.

43. *See* Rocha Vigil v. City of Las Cruces, 119 F.3d 871, 871 (10th Cir. 1997) (separate opinion of Porfilio, J., on denial of rehearing en banc); Cannon v. Kroger Co., 837 F.2d 660, 660 (4th Cir. 1988) (Murnaghan, J., dissenting from denial of rehearing en banc). Judge Edwards might be added to the list. *See supra* notes 33–35 and accompanying text.

44. Patricia Wald, *The D.C. Circuit: Here and Now*, 55 GEO. WASH. L. REV. 718, 719 (1987).

45. It is reported in *Hart & Wechsler's The Federal Courts and the Federal System* that dissents from denial of certiorari were increasingly common in the 1970s and 1980s, but the authors attribute the increase to the proclivity of Justices Douglas (in the 1970s) and White (in the 1980s) to register such dissents and to the frequent practice of Justices Brennan and Marshall to dissent from denials in death penalty cases in the same period. RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1600 & n.4 (5th ed. 2003); *see also* David M. O'Brien, *A Diminished Plenary Docket: A Legacy of the Rehnquist Court*, 89 JUDICATURE 134, 136–37 (2005) (documenting falling numbers of dissents from denial of certiorari from 1981 to 2003).

opinions of dissents from denial of rehearing en banc over a three-year period.[46] The numbers ranged from ten in the Third, Ninth, and D.C. Circuits, to none in the First and Tenth Circuits.[47] To obtain more recent data, I examined the number of published opinions concurring in or dissenting from denial of rehearing en banc in the past five-and-one-half years, and the results are found in Table 1.[48] As it indicates, all of the circuits are generating such opinions, ranging from a low of two in the Third and Tenth Circuits, to the teens in the Fourth (fifteen) and Eleventh Circuits (fourteen), to thirty-seven in the Ninth Circuit.

Table 1
Published Opinions on Rehearing En Banc
January 1, 2000–July 1, 2005

	Cases with only dissenting opinion(s)	Cases with only concurring opinion(s)	Cases with both dissenting and concurring opinions	TOTAL
First Circuit	3	0	0	3
Second Circuit	3	0	1	4
Third Circuit	2	0	0	2
Fourth Circuit	3	2	10	15
Fifth Circuit	10	0	1	11
Sixth Circuit	3	0	1	4
Seventh Circuit	7	0	0	7
Eighth Circuit	3	0	0	3
Ninth Circuit	32	0	5	37
Tenth Circuit	2	0	0	2
Eleventh Circuit	5	0	9	14
D.C. Circuit	5	1	1	7
Federal Circuit	8	0	0	8
TOTAL	86	3	28	117

46. Solimine, *supra* note 29, at 65 tbl.5.
47. *Id.*
48. The data was compiled by computer searches of the Westlaw federal courts database. The searches used, and the list of cases found, is available from the Author.

Without more longitudinal data, it is difficult to place these numbers in context. That said, the numbers across and within each circuit do not seem especially large, when spread out over more than four years. Still, it is striking that the largest number by far is from the Ninth Circuit. The most straightforward explanation would be that the Ninth Circuit has the most of everything of the circuits: the most judges, the largest number of decisions, and the most requests to decide cases en banc, all of which will inevitably generate more opinions concurring in or dissenting from denial of rehearing en banc.[49] The geographic dispersion of the large number of judges on the circuit, and their ideological backgrounds, may generate norms that lead to the judges filing more of such opinions.[50] The Ninth Circuit has a high number of published opinions on the merits with dissents, so it is no shock that there are more dissents in other types of dispositions.[51] Also, the controversy over the limited en banc procedure[52] in the Ninth Circuit may contribute to the proliferation of opinions dealing with the procedure.

Next, consider the propriety of filing such opinions at all. It is said by some that such opinions are (or should be) meaningless because they concern a decision by the entire circuit *not* to proceed further with a case; that they may adversely impact collegiality; and, in the end, that they may be little more than unseemly politicking by a judge, unhappy with the result of a panel, to persuade the Supreme Court to review the case.[53] These reasons are not without weight, but they do not persuade me that there should be a blanket rule against the issuance of such opinions. They are not true advisory opinions because they are usually the result of the adversarial process, that is, motions under Rule 35. It is not as if a judge, unhappy with a decision by a panel of which the judge is not a member, sends an essay to that effect to be published in the pages of the *Federal Reporter* (though it could be sent to a law review). Nor do I think it inappropriate for a

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49. *See* JONATHAN MATTHEW COHEN, INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS 76–78 tbl.4 (2002) (summarizing published decisions from all of the circuits from 1990 to 2000); COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, FINAL REPORT 27 tbl.2-9 (1998) (summarizing the population, size, composition, and number of judgeships of all the circuits).

50. COHEN, *supra* note 49, at 161; Edwards, *supra* note 32, at 1674–76; Arthur D. Hellman, *Breaking the Banc: The Common-Law Process in the Large Appellate Court*, 23 ARIZ. ST. L.J. 915, 979–81 (1991); *cf.* David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 U. CIN. L. REV. 817, 828–29 (2005) (discussing ideological differences among Democratic and Republican appointees to the Ninth Circuit).

51. COHEN, *supra* note 49, at 102 tbl.6 (comparing numbers and percentage of published opinions with dissents in the D.C., Seventh, and Ninth Circuits from 1990 to 2000).

52. For discussion of the Ninth Circuit's limited en banc procedure, see Hellman, *supra* note 30, at 435, 454–62; Pamela Ann Rymer, *The "Limited" En Banc: Half Full, or Half Empty?*, 48 ARIZ. L. REV. 317 (2006).

53. For an excellent discussion of analogous reasons (save for the last one in the text) for Justices not dissenting from denials of certiorari, see Singleton v. Comm'r, 439 U.S. 940, 942–46 (1978) (opinion of Stevens, J., respecting denial of certiorari). *See also supra* note 35.

judge to suggest the court take the case if litigants present it with that opportunity.[54] That, after all, is the next step in the process, and the judge may sincerely feel that the legal system would benefit from further clarification of legal issues presented in the panel decision.[55] Moreover, these separate opinions can serve, like a dissent from a panel decision,[56] as a constraint on the behavior of the balance of the circuit by, for example, highlighting a panel decision some judges wish to leave intact even though it might seem to deserve en banc resolution.

Do these opinions add to the development of the law? There are some indications that such opinions can make such a contribution. Consider just the Ninth Circuit. If there were a rule prohibiting such opinions, we would be deprived of what I consider the most colorful of such opinions, that of Judge Alex Kozinski dissenting from the denial of rehearing en banc in the well-known intellectual property case brought by *Wheel of Fortune* hostess Vanna White.[57] In the august pages of the *Federal Reporter*, Judge Kozinski, in the course of a characteristically entertaining and informative discussion of the law, reprints a picture of Ms. White next to one of Ms. C3PO, the robot that allegedly infringed her right of publicity.[58]

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54. *E.g.*, Nunes v. Ashcroft, 375 F.3d 810, 818 (9th Cir. 2004) (Reinhardt, J., dissenting from denial of rehearing en banc) ("The Supreme Court should grant certiorari in this matter."). I further discuss the relationship between the en banc nature (or lack thereof) of the circuit decision and the Court's certiorari policy in Part III below.

55. The decision to file such an opinion to induce the Supreme Court to review the case might be conceptualized as a form of strategic behavior. The judge may disagree with the outcome of the panel decision and may not sincerely believe that the requirements of Rule 35(a) are met, but the judge nonetheless dissents from denial of rehearing en banc to try to get the Supreme Court to review and reverse the case. *Cf.* Virginia A. Hettinger et al., *Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals*, 48 AM. J. POL. SCI. 123, 126, 135 (2004) (discussing how dissents from a panel decision might be used strategically, including as a signal to the Court to highlight a case worthy of being granted certiorari, but not specifically discussing opinions accompanying orders denying rehearing en banc). There is not a tight fit between the strategic model and all of the judicial behavior in question here. Putting aside complicated issues of whether strategic judicial behavior necessarily is normatively bad in all of its manifestations, *see* Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297 (1999), a circuit judge may sincerely feel that the case should be reheard en banc and that the state of the law would benefit from court review. An example of a sincere dissent might be Judge Reinhardt's opinions in the *Harris* litigation, since his views on the merits were more likely to prevail before the en banc Ninth Circuit than before the Supreme Court. *See* Harris v. Vasquez, 949 F.2d 1497, 1539 (9th Cir. 1991) (Reinhardt, J., dissenting from denial of rehearing en banc). Sincerity would be better evidenced if such opinions routinely discussed the Rule 35(a) criteria, which not of all them do, as I discuss below.

56. *See* Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and the Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2173–74 (1998). The ability of the circuit to go en banc is the most powerful such constraint, but there are relatively few en banc decisions overall, so the constraint does not seem robust. Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1006, 1010 (2005). This is not to say that monitoring of panel decisions, outside the en banc process, is impossible. *See infra* note 76 and accompanying text.

57. White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1512 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing en banc).

58. *Id.* at 1522–23.

Both inside and outside the Ninth Circuit, there are examples of less colorful cases that nonetheless feature extended, interesting, provocative, and sometimes scholarly discussions of the legal issues before a panel in opinions accompanying the order to deny rehearing en banc.[59] Perhaps the quasi-advisory nature of such opinions contributes to their creativity.

There are more objective indicia of the contributions such opinions can make. For example, cases that generate opinions concurring in or dissenting from denials of rehearing en banc are more likely to be appealed to the Supreme Court, and the Court is more likely to grant review of such cases.[60] The same is true of appeals of en banc decisions themselves, as discussed in Part III. Perhaps more relevant to the present discussion, in those cases the Court frequently makes reference to such opinions. Sometimes it is simply a bland reference to the opinions below when the Court describes the procedural posture of a case. In other instances, the Court will cite and rely on the substantive discussion found in such opinions.[61] Likewise, it is not uncommon for scholarly literature[62] or the popular

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59. *See, e.g.*, Landell v. Sorrell, 406 F.3d 159, 160–79 (2d Cir. 2005) (containing opinions concurring in and dissenting from denial of rehearing en banc in a case involving constitutionality of campaign finance laws), *cert. granted*, 126 S. Ct. 36 (2005); Schiavo *ex rel.* Schindler v. Schiavo, 404 F.3d 1270, 1271–82 (11th Cir. 2005) (containing opinions concurring in and dissenting from denial of rehearing en banc in a case involving a variety of constitutional and statutory issues raised by the Terri Schiavo Act, Pub. L. No. 109-3, 119 Stat. 15 (2005)); Silveira v. Lockyer, 328 F.3d 567, 568–92 (9th Cir. 2003) (containing opinions dissenting from denial of rehearing en banc in a case involving the Second Amendment).

60. *See* Solimine, *supra* note 29, at 65 tbl.5 (reporting that of fifty-eight cases from 1985 to 1987 in which dissents from denials of rehearing en banc were rendered, certiorari was sought in twenty-nine cases and granted in eleven cases). In the 117 cases from 2000 to 2005 examined for this Article, certiorari was sought in 84 cases and granted in 26 cases. Among recent high profile cases that the Court decided on the merits that were the subject of opinions concerning the denial of rehearing en banc were: *Rompilla v. Beard*, 125 S. Ct. 2456 (2005) (adequacy of counsel in capital case); *Johnson v. California*, 543 U.S. 499 (2005) (equal protection challenge to racially segregating prisoners); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (constitutionality of "under God" in the Pledge of Allegiance); and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (legality of detention of American citizen accused of terrorism as an enemy combatant in wake of September 11 attacks).

61. For examples and discussion of both types of Court references to such opinions, see Stephen L. Wasby, *The Supreme Court and the Courts of Appeals En Bancs*, 33 MCGEORGE L. REV. 17, 52–54, 63–64 (2001). Recent examples of reliance on the substantive discussion in such opinions are *Johnson*, 543 U.S. at 513–14; *id.* at 547 (Thomas, J., dissenting); *Hamdi*, 542 U.S. at 526. A counterexample of sorts might be a long and scholarly opinion dissenting from denial of rehearing en banc below *not* being cited or discussed by any of the Justices when the case is decided by the Court. *See, e.g.*, Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611 (2005) (omitting mention of Allapattah Servs., Inc. v. Exxon Corp., 362 F.3d 739, 740–75 (11th Cir. 2004) (Tjoflat, J., dissenting from denial of rehearing en banc)). The Court can also rely on such opinions even if not from the opinion below. *See, e.g.*, United States v. Booker, 543 U.S. 220, 236 (2005) (citing United States v. Rodriguez, 73 F.3d 161, 162–63 (7th Cir. 1996) (Posner, J., dissenting from denial of rehearing en banc)).

press[63] to discuss such opinions. One dramatic example of the latter was discussions of such opinions rendered by D.C. Circuit Judges Robert Bork and John Roberts when they were nominated to the Supreme Court.[64]

People both inside and outside the legal community are reading these opinions, and therefore they are contributing to legal discourse. But does the production of these opinions come at a high cost to the legitimacy of the panel opinion or of the collegiality of a circuit as a whole? The answer is that it depends. The constant filing of such opinions would arguably impair both legitimacy and collegiality, and it is a difficult judgment on what would be too much in this context.[65] Indeed, harshly worded wrangling over one case or a small set of cases could lead to those results.[66] However, overall the filing of *some* such opinions periodically is not a sign of institutional failure. It can be a healthy way for judges to communicate with each other (and the public) on issues that may recur.[67] Much will depend on the norms of writing, rate of publication of decisions, how often en

62. *See, e.g.*, John C. Eastman, *A Fistful of Denial: The Supreme Court Takes a Pass on Commerce Clause Challenges to Environmental Laws*, 2003–2004 CATO SUP. CT. REV. 469, 477–82.

63. *See, e.g.*, Adam Liptak, *2 Reporters Suffer Another Court Setback*, N.Y. TIMES, Apr. 20, 2005, at A18 (discussing *In re* Grand Jury Subpoena, Judith Miller, 405 F.3d 17, 17 (D.C. Cir. 2005) (Tatel, J., concurring in denial of rehearing en banc)).

64. *See* Solimine, *supra* note 29, at 31 n.9 (giving examples for Bork); Neil A. Lewis, *An Ultimate Insider with a "Midwest Calm,"* N.Y. TIMES, July 20, 2005, at A1, A17 (discussing Rancho Viejo, LLC v. Norton, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing en banc)).

65. *See* Bartlett v. Bowen, 824 F.2d 1240, 1243 (D.C. Cir. 1987) (Edwards, J., concurring in denial of rehearing en banc) ("Collegiality cannot exist if every dissenting judge feels obliged to lobby his or her colleagues to rehear the case *en banc* in order to vindicate that judge's position."). For further discussion of Judge Edwards' views, see Edwards, *supra* note 32, at 1679–80; Solimine, *supra* note 29, at 31–32.

66. An example would be the Sixth Circuit. It does not have a history of rehearing a high number of cases en banc or of issuing many opinions with denials of rehearing en banc. The circuit has averaged six en banc cases from 2000 to 2004, *see* ANNUAL REPORT, *supra* note 1, and a total of four of the latter opinions in the same period, *see* tbl.1. But in recent years some dissents in panel decisions, dissents in en banc decisions, and concurring and dissenting opinions from denials of rehearing en banc have been characterized by abnormally harsh language and sharp exchanges. *See, e.g.*, Memphis Planned Parenthood, Inc. v. Sundquist, 184 F.3d 600, 601–05 (6th Cir. 1999) (Keith, J., dissenting from denial of rehearing en banc); *id.* at 607–08 (Batchelder, J., separate statement on denial of rehearing en banc). In the same case, one judge criticized a dissenting opinion because it revealed the votes of all of the judges on the rehearing petition. *Id.* at 605–07 (Boggs, J., separate statement on denial of rehearing en banc). For further discussion of en banc cases in the Sixth Circuit, see Harry W. Wellford et al., *Sixth Circuit* En Banc *Procedures and Recent Sharp Splits*, 30 U. MEM. L. REV. 479 (2000); Adam Liptak, *Order Lacking on a Court: U.S. Appellate Judges in Cincinnati Spar in Public*, N.Y. TIMES, Aug. 12, 2003, at A10.

67. COHEN, *supra* note 49, at 139.

banc hearings are convened, and levels of formal and informal consultation in that circuit.[68]

While the issuance of such opinions should not be abandoned or curtailed, their content should be more constrained than they typically are currently. As already noted, Rule 35 lists the reasons to rehear a case en banc: to establish uniformity within a circuit or to decide a case of "exceptional importance." Granted, these criteria are not self-defining or always of easy application, but my focus here is to give reasons to take a panel decision en banc. Prior research demonstrates that fewer than one-half of en banc decisions, or of opinions concurring in or dissenting from denials of rehearing en banc, stated why the case deserved en banc treatment.[69] In my view, the primary focus of the latter set of opinions should be on why the case should be reviewed en banc, specifically citing to the rationales provided in Rule 35. The opinions should not engage in a lengthy discussion of the merits. The merits can be discussed, preferably briefly, but only insofar as it bears on the application of the Rule 35 criteria. That is, or should be, the focus of the briefing on the Rule 35 criteria.[70] The time to fully address the

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68. For a discussion of the concept of norms to characterize the culture of particular circuits, see Mitu Gulati & C.M.A. McCauliff, *On* Not *Making Law*, LAW & CONTEMP. PROBS., Summer 1998, at 157.

69. Solimine, *supra* note 29, at 63 tbl.4, 69, 70 tbl.6 (reporting the results of a study of en banc decisions and opinions dissenting from denial of rehearing en banc from 1985 to 1987). Granted, judges probably do discuss the Rule 35 criteria with some frequency in their internal discussions and memoranda when a vote on a petition for rehearing en banc is requested. *See* Hellman, *supra* note 8, at 549. It is then curious that more of those discussions do not make their way into the officially published opinions.

70. A related issue is whether and to what extent new factual or legal arguments should be raised at the stage of granting or denying rehearing en banc, and what new such arguments, if any, ought to be discussed by opinions concurring in or dissenting from denial of rehearing en banc. On the Fourth Circuit, Judge Michael Luttig has argued that it is inappropriate for such a concurring opinion to shore up a panel opinion by presenting, for the first time, new factual or legal arguments. *See* Hamdi v. Rumsfeld (*Hamdi IV*), 337 F.3d 335, 362 (4th Cir. 2003) (Luttig, J., dissenting from denial of rehearing en banc), *vacated*, 542 U.S. 507 (2004); Jones v. Buchanan, 325 F.3d 520, 538 (4th Cir. 2003) (Luttig, J., dissenting). I think Judge Luttig is correct to criticize this practice for being unfair to the litigants, given the limits imposed by Rule 35 on the briefing process, and to sound judicial decisionmaking, as it can in effect require that the panel opinion be read in light of the subsequent opinions. *See, e.g.*, Johnson v. California, 543 U.S. 499, 549 (2005) (Thomas, J., dissenting) (contending that a new legal issue was introduced for first time at rehearing stage below by judges in an opinion dissenting from denial of rehearing en banc); *cf.* Adrian Vermeule, *Judicial History*, 108 YALE L.J. 1311 (1999) (discussing the interpretative significance of materials produced contemporaneously with judicial opinions). The more appropriate course would be to petition the original panel to rehear the case under Federal Rule of Appellate Procedure 40. That said, how often this phenomenon takes place can be in the eye of the beholder, *see, e.g.*, *Hamdi IV*, 337 F.3d at 349–51 (Traxler, J., concurring in denial of rehearing en banc) (presenting the opinion of a member of the original panel that denies charges by Judge Luttig), and while it is unusual, it is not unheard of for new arguments or additions to the record to be made, under limited circumstances, sometime during the appellate process. *See* ROBERT J. MARTINEAU ET AL., APPELLATE PRACTICE AND PROCEDURE 760–65 (2d ed. 2005); Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269 (1999).

merits of the case and the correctness of the panel decision's result is when, and if, rehearing en banc is granted, and the case is rebriefed and argued on the merits. Aside from protecting more trees from the need to fill the pages of the *Federal Reporter*, this approach has the advantage of dispelling the charge that such opinions are advisory opinions by judges, perhaps signaling the Supreme Court to take the case. Following a norm of expressly limiting the use of such opinions to stating why a case is appropriate for en banc determination could encourage principled decisionmaking by circuit courts on that issue.[71]

A good model is Judge Hill's aforementioned opinion in *Isaacs v. Kemp*. There, dissenting from a denial of rehearing en banc, Judge Hill stated that the case could "clarify an area of constitutional law that is presently murky," thus addressing (if somewhat obliquely) the Rule 35 criteria and further emphasizing that he was not presuming that the panel had reached the incorrect result.[72] He went on to discuss the merits for several pages but only to accentuate what he viewed as the murkiness of the law at issue.[73] Limiting the content of opinions in this way would come at a slight cost to legal discourse, but the benefits of more tightly focusing the appropriate judicial inquiry at the stage of deciding whether to rehear a case en banc would outweigh that cost.

III. EN BANC REVIEW AND SUPREME COURT REVIEW

Determining whether the criteria of Rule 35(a) have been met—maintaining "uniformity" within the circuit or addressing a "question of exceptional importance"—has not lacked controversy. The first factor has been the least contentious. It is usually not that difficult to determine whether there is an intracircuit conflict of panel decisions, and often judges themselves will note the problem.[74] A corollary to this situation occurs when a judge in a case, obliged to follow the precedent set by an earlier panel decision,[75] nonetheless disagrees with it and calls for the present case to be reviewed en banc to eliminate the precedential value of the earlier opinion.[76]

The "exceptional importance" criterion has proven to be more intractable. Even with the use of the adjective, the term has a subjective quality. As previously argued, the best way to apply the term is to emphasize the law development, as opposed to error correction, function of appellate courts. Exceptionally important cases should be those that apply to many factual scenarios that are likely to recur at the district and appellate level in the circuit or are of significance to the bar and the

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71. Solimine, *supra* note 29, at 60–61.

72. Isaacs v. Kemp, 782 F.2d 896, 897 (11th Cir. 1986) (Hill, J., dissenting from denial of rehearing en banc).

73. *Id.* at 898–900.

74. Solimine, *supra* note 29, at 54–56.

75. *Id*. at 36.

76. Some circuits follow the easier practice of circulating the second panel opinion to the circuit, prior to its release, to ask if any judges object to the overruling of a prior panel decision, absent rehearing en banc. *Id.*; *see also*, *e.g.*, Russ v. Watts, 414 F.3d 783, 784 n.1 (7th Cir. 2005). There are numerous other methods used by the circuits to obtain consensus between panel and off-panel judges. *See* Hellman, *supra* note 29, at 435–38.

public in that particular circuit (and perhaps not others). Merely disagreeing with the panel decision should not trigger en banc review. That position would undermine the finality of panels and finds no warrant in the language or purpose of Rule 35 as properly understood.[77]

What weight does the Supreme Court give to the fact that a decision on which certiorari is sought was en banc? Theoretically, two views are possible.[78] On one hand, because all circuit judges constitute an en banc court, the Court might afford more deference to that collective decision, reasoning that an entire circuit is less likely to diverge from the correct outcome, as the Court perceives it. On the other hand, because en banc cases are almost always important in some sense, those cases are the ones that the Court is more likely to place on its agenda. Empirical studies have supported the latter proposition. Certiorari is sought, and granted, more often in cases that were en banc below as compared to cases that were not revisited en banc.[79] In contrast, once certiorari is granted, the Court has not given en banc cases any particular deference in resolving the merits. Overall, they have been reversed about as often as other cases.[80]

Do, or should, the courts of appeals take into account the likelihood of Supreme Court review in deciding whether to rehear a case en banc? There appear to be at least three articulated positions. One is that a case likely to be reviewed should *not* be reheard en banc, since it will be reviewed anyway and en banc review will simply delay the process.[81] A second position is that a panel decision should be reviewed en banc if Supreme Court review is *unlikely*, but the case is still important to a circuit, and en banc review is the last chance for judges to

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77. Solimine, *supra* note 29, at 48–51, 56–59. I thus disagree with the recent statement of Judge Reinhardt that under Rule 35, courts "should rehear a case en banc when it is *both* of exceptional importance *and* the decision *requires correction*." Newdow v. U.S. Cong., 328 F.3d 466, 469 (9th Cir. 2003) (Reinhardt, J., concurring in denial of rehearing en banc), *rev'd sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004). Judge Reinhardt thinks that the exceptional importance factor, standing alone, would create "an impractical and crushing burden" on circuits since many panel decisions would apparently qualify. *Id.* at 470. For the reasons stated in the text, the importance factor, properly applied, is a barrier to a large number of cases being reheard en banc. A circuit judge need not decide if the panel decision is incorrect before legitimately voting to rehear the case en banc. Judge Reinhardt's position puts the cart before the horse.

78. George & Solimine, *supra* note 1, at 181.

79. *Id.* at 182, 195–96.

80. Stephen L. Wasby, *How Do Courts of Appeals En Banc Decisions Fare in the U.S. Supreme Court?*, 85 JUDICATURE 182 (2002) (reporting a study of en banc cases from 1969 to 1998); Wasby, *supra* note 61, at 72; *see also* Kevin M. Scott, *Understanding Judicial Hierarchy: Reversals and the Behavior of Intermediate Appellate Judges*, 40 LAW & SOC'Y REV. 163, 184 (2006) (discussing differing signals that might be sent to the Supreme Court by the en banc status of a case where review is sought).

81. *See* George & Solimine, *supra* note 1, at 181; Solimine, *supra* note 29, at 57 (discussing the Second Circuit's approach to en banc review); *see also* Albert, *supra* note 22, at 1 (quoting Judge Goodwin's statement that if "it is clear the case will end up before the Supreme Court sooner or later, it may save judicial resources to deny the rehearing *en banc* and let the parties seek *cert* at the Supreme Court immediately").

weigh in.[82] A third position is that important cases, even those likely to be reviewed by the Court, ought to be reviewed en banc as well. The argument here is that important cases are just that and deserve full treatment by the circuit, even if subsequent Supreme Court review is likely.[83]

The last of these views is the most persuasive. The courts of appeals should decide whether the Rule 35 criteria have been met, regardless of the likelihood of subsequent Supreme Court review. What is important for Rule 35 purposes may not be the same for what the Court regards as important for its own, nationwide agenda. There is no guarantee that the losing side of the panel decision will have the energy or financial resources to pursue Court review (not that seeking en banc review is cost-free). Nor is there a guarantee that the Court will review a case, given that it reviews only a tiny percentage of the cases on its docket, and many "important" cases undoubtedly go unreviewed. In short, if the Rule 35 criteria are met, the case should be reheard en banc, and the Supreme Court chips should fall where they may.[84]

CONCLUSION

En banc decisionmaking presents a rich opportunity for scholars to study litigant and judicial behavior. This is due to the complexities of the process to decide whether to review a panel decision, the deciding of the en banc case itself, and the possibility of Supreme Court review thereafter.[85] This Article has explored several aspects of this process from both empirical and normative perspectives. On the latter, this Article concludes that while bright-line resolutions are neither possible nor necessarily desirable, the most appropriate way to resolve the three main issues addressed are as follows: (1) the courts of appeals should not routinely reveal the vote tallies on the decision to rehear a case en banc; (2) judges should not be discouraged from preparing published opinions concurring in or dissenting from denials of rehearing en banc, but they should focus on the criteria found in Rule 35 instead of the correctness of the panel's decision; and (3) judges should not take into account the possibility of Supreme Court review in the decision to en banc a case.

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82. There are fewer explicit examples of this position. It can be inferred from cases like *White v. Samsung Electronics America, Inc.* 989 F.2d 1512, 1521 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing en banc) (suggesting that Ninth Circuit's importance in intellectual property cases supports en banc rehearing).

83. *See, e.g.*, Grutter v. Bollinger, 288 F.3d 732, 773 (6th Cir. 2002) (en banc) (Clay, J., concurring); *cf.* Newdow v. U.S. Cong., 328 F.3d 466, 482 (9th Cir. 2003) (O'Scannlain, J., dissenting from denial of rehearing en banc) (suggesting that "[p]erhaps the Supreme Court will have the opportunity to correct" the panel decision), *rev'd sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004). Some Supreme Court Justices have, at least indirectly, taken this position by occasionally suggesting that a case below should have received en banc review. *See* George & Solimine, *supra* note 1, at 181; Hellman, *supra* note 29, at 433; Wasby, *supra* note 61, at 184.

84. For discussion of these points, see George & Solimine, *supra* note 1, at 181; Solimine, *supra* note 29, at 57.

85. In addition to other sources cited in this Article, see Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213 (1999).