ARTICLE: The Politics of En Banc Review in the "Mini-Supreme Court"

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LEXISNEXIS SUMMARY: ... Also, an en banc decision too often represents the collective judgment of a court that is either unified or torn apart by partisan politics. ... Part II then examines the politics of en banc review by studying the judicial behavior of the U.S. Court of Appeals for the District of Columbia Circuit, the most important judicial forum for deciding regulatory appeals in the nation. ... The Politics Of En Banc Review ... Indeed, the politics of en banc review in the circuit always has been an integral--and controversial--part of its judicial function simply because the court has always had numerous opportunities to use it as a method to decide cases. ... At bottom, the politics of en banc review in the D.C. Circuit raises the larger question of whether it is possible to achieve the promise of maintaining uniformity and consistency in law through judicial decisionmaking. As a result, judicial politics, as part of the en banc process, affects the finality of circuit court rulings and, ultimately, the ideological direction of public policy as defined by courts. ...

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Introduction

Frank M. Coffin, a veteran judge on the U.S. Court of Appeals for the First Circuit, once remarked that courts sitting en banc "resemble a small legislature more than a court." Judge Coffin's statement truly captures the essence of this exceptional form of judicial review in the federal courts since the en banc process compels all of the judges on a circuit court of appeals to meet at one time for the purpose of not only deciding the merits of an appeal, but often to make judicial policy. In addition, the circuit courts' en banc procedure is controversial. One criticism is that the en banc procedure expends precious judicial resources. Also, an en banc decision too often represents the collective judgment of a court that is either unified or torn apart by partisan politics. Yet, aside from these implications, the en banc process is significant because a vast majority of circuit court decisions are denied review by the United States Supreme Court upon further appeal. As a result, the intermediate appellate court becomes, in effect, the "court of last resort" for most federal litigants and a critical source of legal and public policy formation. This article suggests that the politics of en banc review in the D.C. Circuit, where the court meets as one to make...
ideological decisions during the adjudication of regulatory appeals, is a significant and enduring aspect of judicial behavior because the Supreme Court rarely reviews or reverses these rulings, thereby making them the final word for these litigants. Part I begins this inquiry by briefly outlining the history of en banc review in federal courts and discussing the reasons for its use. Part II then examines the politics of en banc review by studying the judicial behavior of the U.S. Court of Appeals for the District of Columbia Circuit, \(^n9\) the most important judicial forum for deciding regulatory appeals in the nation. \(^n10\) This part of the Article outlines how the D.C. Circuit’s use of the en banc process creates judicial inefficiency and results in politically motivated decisions. Part III analyzes the role of the en banc proceeding and examines the extent to which the en banc process affects whether the D.C. Circuit functions as a court of last resort. This part concludes that the Supreme Court most often declines to review circuit court cases that are decided en banc by the D.C. Circuit. \(^n11\) As a result, en banc proceedings, coupled with the D.C. Circuit’s crucial role in deciding regulatory agency appeals, \(^n12\) have helped to institutionalize the D. C. Circuit as a “‘mini’ supreme court” in administrative law. \(^n13\)

I.
The History Of En Banc Review

The existence of en banc jurisdiction in the federal circuit courts is the result of a historical accident. \(^n14\) In fact, except for the U.S. Supreme Court, "sitting en banc" was never contemplated to be part of Article III jurisprudence, either in theory or in practice. \(^n15\) Rather, panel decisionmaking always has been the traditional form of the federal circuit courts' judicial function. Indeed, three-judge panels were employed by the circuit courts since their inception in 1789. \(^n16\) However, a burgeoning caseload after the Civil War prompted Congress to respond with court reform legislation that changed the structure of the federal judiciary. \(^n17\) This structure was changed through two acts, the \(^[*379]\) Evarts Act of 1891 \(^n18\) and the Judicial Code of 1911. \(^n19\) As a result of these developments "a controversy was born over whether the courts of appeals could sit with more than three judges." \(^n20\)

Specifically, in addition to inaugurating the principle of discretionary review by writ of certiorari in the U.S. Supreme Court, \(^n21\) the Evarts Act created an intermediate tier of "new’ circuit courts of appeals in the federal judiciary. \(^n22\) The new courts were composed of three judges, \(^n23\) and, having assumed the appellate jurisdiction of the "old' circuit courts, these courts became the "court of last resort" for most federal litigants. \(^n24\) While the Evarts Act did not speak directly to the issue of en banc review, the Act helped to lay the foundation for it. However, the Judicial Code of 1911 more directly affected the question of whether the circuit courts of appeals should decide cases by panel or en banc review.

Although the Judicial Code abolished the "old' circuit courts, \(^n25\) the Code carried forward the Evarts Act's three-judge panel \(^[*381]\) requirement. \(^n26\) And, while the three-judge requirement was clear enough, the legislation was less clear as to how courts should hear cases—by panel or en banc. \(^n27\) This uncertainty arose because section 117 of the Judicial Code established three-judge courts, but its companion provision, section 118, created more than three judgeships for the Second, Seventh, and Eighth Circuits. \(^n28\) Considered together, then, the two created an "‘anomalous situation’" and presented a difficult problem of statutory construction regarding both the presumption of panel review and the propriety of en banc sittings. \(^n29\) Since Congress allowed some circuit courts to have more than three judges, it was unclear whether Congress intended whether circuit courts should be restricted to hearing cases only by panel or, conversely, whether en banc review and full court consideration was also permissible. The situation was confused further when Congress created more courts and additional judgeships after 1911 in an effort to resolve the caseload crisis that was, at that time, disrupting judicial efficiency in the federal courts. \(^n30\)

One interpretation that tried to resolve the problem was used by the Ninth Circuit in Lang’s Estate v. Commissioner. \(^n31\) In Lang’s Estate, the court held that en banc review was precluded under section 117 of the Judicial Code. \(^n32\) The court reasoned that in section 117 Congress unambiguously limited the size of the court to just three judges. \(^n33\) As a result, the Ninth Circuit ruled that it was impossible for the court to hear or rehear cases by a larger number of judges; and, more importantly, for reasons of judicial economy, it was better not to permit circuit
courts to convene en banc. n34 Despite the intuitive appeal of the Ninth Circuit's position, other circuit courts confronting the same issue disagreed. For example, the Third Circuit, in Commissioner v. Textile Mills Securities Corp., n35 rejected the Ninth Circuit's interpretation and held that courts possessed authority under the Judicial Code to sit en banc. n36 In that case, after examining the legislative history of sections 117 and 118, the Third Circuit concluded that section 118, as amended by Congress in 1912, amended section 117 by implication. n37 This meant that the size of those circuit courts having more than three judges (i.e., the Second, Seventh, and Eighth Circuits) automatically increased to a number that equaled the maximum number of judges authorized by law. n38 Not only, then, did the Third Circuit's view of the Judicial Code's legislative history have the direct effect of eliminating the anomaly between sections 117 and 118, it also had the indirect effect of permitting the enlarged circuit to make procedural rules authorizing the court to sit en banc when necessary. n39

In light of the inter-circuit conflict, the Supreme Court resolved the statutory ambiguity created by the Judicial Code in [*383] Textile Mills Securities Corp. v. Commissioner. n40 In Textile Mills the Supreme Court directly confronted the question of whether circuit courts of appeals had the power hear cases en banc. In writing for a majority of the Supreme Court, Justice William O. Douglas adopted the Third Circuit's interpretation of the Judicial Code and affirmed that circuit court's decision to convene en banc. n41 While recognizing that sections 117 & 118 were anomalous, the Court gave the conflicting sections of the Judicial Code a flexible interpretation to promote judicial efficiency. n42 Justice Douglas explained that:

Certainly, the result reached makes for more effective judicial administration. Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted. Those considerations are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases. Such considerations are, of course, not for us to weigh in case Congress had devised a system where the judges of a court are prohibited from sitting en banc. But where, as here, the case on the statute is not foreclosed, they aid in tipping the scales in favor of the more practicable interpretation. n43

Thus, the Court reasoned that section 118 only required that the size of the courts of appeals not fall below the number of authorized judgeships. n44 The opinion held that section 117 did not defeat that purpose of section 118 and approved en banc review as an acceptable judicial procedure. n45 With the ruling in Textile Mills, the Supreme Court sanctioned for the first time the use of en banc review in the intermediate tier of the federal courts. n46

Despite the broad grant of authority by the Supreme Court in Textile Mills and its subsequent codification in section 46(c) of the [*384] Judicial Code in 1948, n47 there is no evidence to suggest that circuit courts invoked the en banc procedure to abandon the traditional method deciding cases in panels. n48 If anything, section 46(c) discouraged the use of en banc review by requiring that courts of appeals always employ three-judge panels unless a hearing en banc was ordered by a majority of judges in active service. n49 In short, in section 46(c) Congress reaffirmed the circuit court tradition of adjudicating cases by panel; whereas, en banc sittings were relegated by congressional fiat to be merely an exceptional form of judicial review. n50

Additional requirements in the en banc procedure came shortly after the enactment of section 46(c) when the Supreme Court, in Western Pacific Railroad Corp. v. Western Pacific Railroad Co., n51 limited the circuit courts' discretion to use en banc procedure in a way that unduly diminished a litigant's right to be heard on appeal. The petitioners in Western Pacific, a corporation and its stockholders, sued other corporations on grounds of unjust enrichment. n52 After the district court refused to grant them relief, petitioners appealed to the Ninth Circuit, which affirmed the lower court's decision. n53 After the circuit court denied their request for a rehearing en banc, petitioners challenged the Ninth Circuit's authority to deny litigants the right to a rehearing en banc upon demand under section 46(c) of the Judicial Code. n54 Consequently, on appeal the Supreme Court had to determine what level of discretion the circuit courts possessed under the statute. n55 [*385]

While the Court found in favor of the petitioners by reversing and vacating the case on different grounds, the Court rejected their argument concerning en banc hearings. n56 Instead, the Court held that section 46(c) did not compel the
Ninth Circuit to grant en banc requests at will. Notably, although Western Pacific purported to impose limitations upon the circuit courts' discretion to hear cases en banc, it did not alter the circuit courts' ability to create their own particular en banc procedures. Moreover, the decision did not place any meaningful restrictions upon litigants. To the contrary, by permitting litigants to "suggest" en banc review at will, it encouraged active participation by the parties and made them an integral part of the en banc process. Not surprisingly, circuit courts responded to Western Pacific by promulgating internal written rules and standards governing en banc review, thereby institutionalizing it as a viable tool of judicial procedure for both the bench and bar.

Western Pacific also impacted prospective appellate litigation at the circuit level. First, there was a sharp increase in en banc cases after 1953. Between 1949 and 1953 there were, on average, less than fifteen cases disposed of en banc in each year. Between 1954 and 1964, however, the rate of cases disposed en banc tripled to fifty-one. The second effect of Western Pacific was to diversify the circuit courts' en banc procedures. In the wake of the decision, circuit courts created a variety of en 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. The Federal Rules of Appellate Procedure, adopted by order of the Supreme Court in 1967, attempted to rectify the pervasive problem of non-uniformity in circuit court en banc procedure. Rule 35(a), for example, declares that a majority of circuit judges who are in regular active service can hear (or rehear) an appeal en banc. However, the Rule states that such hearings are not favored and will not ordinarily be granted unless: 1) "consideration by the full court is necessary to secure or maintain uniformity of its decisions," or 2) "when the proceeding involves a question of exceptional importance." In emphasizing that en banc review is the exception and not the rule in circuit court decision-making, Rule 35(a) incorporates some principles established earlier by the Supreme Court in dictum in United States v. American-Foreign Steamship Corp., a case discussing whether retired judges may participate in en banc proceedings under section 46(c).

In American-Foreign Steamship, the Court held that a retired circuit judge may not participate in en banc proceedings since the language of section 46(c) only allows "active" circuit judges to convene en banc. The opinion touted en banc proceedings as a tool to promote the values of judicial efficiency, the finality of decision-making in the circuit courts, and the resolution of intra-circuit conflicts. The Supreme Court also observed that the "principal utility" of en banc courts is to foster circuit court integrity by allowing a majority of judges to control, and therefore, to secure uniformity and continuity in its decision-making. With these concepts in mind, the Court emphasized that en banc courts were unusual proceedings that should not be employed unless "extraordinary circumstances exist that call for [an] authoritative consideration and decision by those charged with the administration and development of the law of the circuit." The Court concluded that the underlying policy of section 46(c) is to allow the active judges on a circuit to "determine the major doctrinal trends of the future."

The Court in American-Foreign Steamship clearly outlines the advantages of en banc proceedings. First, the en banc procedure is limited to "extraordinary circumstances" and, thus, it does not supplant the traditional practice of panel decision-making in circuit courts. Second, it suggests that circuit courts are only supposed to invoke it to resolve intra-circuit conflicts. Third, resolving conflicts, in turn, promotes finality of decisions and allows circuit courts to fulfill their institutional responsibility to make uniform circuit precedent. Fourth, presumably en banc decisions epitomize a court's collective judgment and enhances its judicial legitimacy in reaching a final outcome. And fifth, in close cases en banc review ventilates all of the complex issues in a circuit court before the appeal is heard by the Supreme Court, allowing the high court to perform its own judicial function more competently.
II.

The Politics Of En Banc Review

Ironically, the strengths of en banc review also are the source of its primary weakness as a judicial procedure. Critics typically argue, for instance, that en banc review is counter-productive because it: promotes judicial inefficiency, n83 undermines the finality of panel decision-making, n84 threatens court collegiality, n85 and compromises judicial integrity because the process is too political. n86 Another critique is that the proceeding is impractical. The very concept of the en banc procedure has forced larger circuits, like the Ninth, to resort to using "mini en bancs" n87 as an alternative to engaging in full-blown en banc review procedures. Finally, even in the smaller circuits find the en banc process problematic because they are overwhelmed by an increasing number of rehearing en banc petitions that routinely are filed as a matter of course by counsel. n88 In sum, all of these concerns raise the poignant issue of whether holding en banc courts are really more trouble than their worth. n89

While the aforementioned criticisms are troubling, they are not the most worrisome. Perhaps the most legitimate critique is that en banc review is too political. n90 Judges purportedly abuse the process by overturning panel outcomes that are incongruous with the prevailing ideological view of a court. The political manipulation of the en banc process, it is claimed, is the direct cause for everything that is supposedly wrong with courts: it intensifies internal conflict on a circuit court; it undermines the rule of law; and, it creates uncertainty for litigants, lawyers, and [*389] judges. n91 To be sure, the criticism assumes special relevance in the D.C. Circuit where, notably, en banc review has enjoyed a rich and distinctive history in the circuit. n92 Indeed, the politics of en banc review in the circuit always has been an integral--and controversial--part of its judicial function simply because the court has always had numerous opportunities to use it as a method to decide cases.

Earlier studies, in fact, suggest that the D.C. Circuit established itself as a court that was willing, if not eager, to invoke the en banc hearing as a means to resolve appellate disputes. n93 In 1930, for example, when Congress added two additional judges to the (then) extant three-judge Court of Appeals in the District of Columbia, n94 the court shunned the practice of sitting in three-judge panels and, instead, immediately began to sit en banc. n95 At the time, doing so was different from the prevailing practice in the other circuits. n96 In fact, the court did not even hear cases by division until 1938. n97 Thereafter, even though it increased in size, the court distinguished itself by getting into the relatively routine, but time-consuming, habit of circulating its draft opinions in order to determine if a case warranted en banc review. n98

Between 1940 and 1964, the D.C. Circuit heard ninety-two en banc cases, a volume that exceeded the number of en bancs [*391] disposed of in nearly all of the other circuit courts over the same period. n99 For example, the ninety-two cases represented nearly one-fourth of all of the en banc cases heard in the circuit courts. n100 Notably, criminal and administrative law cases constituted the bulk of its en banc hearings. n101 As a result, before 1970, the court's internal practices and its special jurisdiction n102 developed a tradition of meeting en banc frequently. This convention made the D.C. Circuit a leader in terms of the large number of en banc cases heard in all circuit courts. n103 Moreover, even after 1970 the D.C. Circuit continued to employ en banc review often, as a recent inspection of the Annual Reports from the Director of the Administrative Office of U.S. Courts between 1970 and 1995 attests.

Since the Annual Reports include the number of appeals commenced and a compilation of en banc dispositions in all circuit courts, it is possible to assess the D.C. Circuit's en banc activity comparatively and in light of the volume of each courts' docket. Although the D.C. Circuit did not have the most number of en banc dispositions in the federal circuit courts after 1970, it still had a very high percentage of such cases given the size of its docket. Figure 1, for example, is a visual summary of the total number of en banc dispositions in federal circuit courts between 1970 and 1995. During the twenty-six year period, the Fifth Circuit (377), Fourth Circuit (237), and Eighth Circuit (199) had the most en banc dispositions. Table 1, a tabulation of the total number of en banc cases for each circuit over the same period, presents a decade-by-decade compilation of the results. It shows that the total number of en banc courts in the 1970s (545) has increased [*392] [*393] [*394] slightly in the 1980s (859); and that, for the first half of the 1990s,
the level of en banc activity has already surpassed the total volume of similar dispositions reached in the 1970s.

[SEE TABLES IN ORIGINAL]

While the number of en banc cases, standing alone, may seem impressive, in actuality these cases comprise only a fraction of the federal judiciary's caseload. Table 2 reveals that between 1970 and 1995 en banc sittings represented, on average, less than one-half of one percent of the circuit court's docket. The total average of en banc courts has declined from the 1970s (33%) to the 1980s (27%). The data in the Table, however, is inconclusive insofar as making a prediction about whether the average percentage will continue to fall in the 1990s (20%). Nonetheless, it seems safe to say that as the volume of appeals filings in all types of cases commenced in the federal circuit courts steadily increases over time, the percentage of en banc dispositions will continue either to stay the same or decrease due to their relative infrequency.

Moreover, Table 2 and Figure 2 provide more insight as to the circuit courts' en banc docket. While the Fifth, Fourth, and Eighth Circuits had the most number of en banc cases, the Eighth Circuit (43%), the D.C. Circuit (39%), and the Fifth Circuit (35%) were the three courts that led the others in terms of the average percentage of en banc circuit court dispositions. Figure 2, a visual summary of the total average percentages of en banc sittings between 1970 and 1995, is the complete portrayal of en banc activity. It is the percentage, and not the total number, of en banc cases on a court's docket that is the critical measurement assessing the extent to which a court employs the en banc procedure in adjudicating appeals. Indeed, the D.C. Circuit's percentage of en banc cases always has exceeded the total average in the 1970s (55%), 1980s (39%), and 1990s (20%), an occurrence that is only matched by two other circuits.

[SEE TABLES IN ORIGINAL]

Table 3 lists the annual number of en banc dispositions in the circuit courts between 1970 and 1995. If raw numbers are any indication of the politicization of the en banc process, then the D.C. Circuit was particularly politicized in the 1980s. This Table suggests, for instance, that most of the political strife the court experienced in the 1980s occurred in 1983, and between 1988 and 1989, when thirty-five (55%), of its en banc cases were heard. Those three years are noteworthy because they fall within a general range of time when the court's composition began to change rapidly, as President Ronald Reagan appointed a number of conservative judges to the court during his first and second terms of office. The new appointments clearly heightened the partisan conflict on the court, as captured and expressed by the number of en banc cases the D.C. Circuit decided during that time.

The Reagan years brought a marked change to the character of the D.C. Circuit. In 1982, two controversial conservative jurists, Judges Robert Bork and Antonin Scalia, were appointed to the court. Then, in 1983, another conservative, Kenneth Starr, joined the court. Significantly, the 1982 and 1983 appointments of Bork, Scalia, and Starr were the first judges nominated to the circuit by a Republican president since Judge Malcolm Wilkey's appointment by President Richard Nixon in 1970. The new personnel signaled that the court--once dominated by a liberal majority throughout the 1960s and 1970s--was beginning a political transformation from a liberal to a conservative court. Thereafter, between 1985 and 1987, five more conservative judges were appointed: Laurence Silberman, James Buckley, Stephen Williams, Douglas Ginsburg, and David Sentelle. All Republican-appointees, the new judges coalesced into a majority and began to re-evaluate D.C. Circuit jurisprudence from a conservative perspective.

[SEE TABLES IN ORIGINAL]

Hence, as a number of critics have argued, there is little doubt that the membership change caused the en banc process to become more political. As one commentator observed, "the battle over en banc review at the divided D.C. Circuit is one of the most telling developments of the Reagan era." In referring to the 1985-1986 court term,
Judge Patricia Wald lamented that "the most recent en bancs have sharply divided the court." n116 Indeed, in 1986 Judge Wald elaborated on the debilitating effect that the abuse of the en banc process had on the law's stability in the circuit:

Traditionally in our courts of appeals, the en banc process has been utilized to test the correctness of new precedents, as soon as they are issued. What is novel in our circuit right now, perhaps more than in any other circuit, is the increasing resort to en bancs to overrule venerable, heretofore respected circuit precedents. The shift is plainly a symptom of the rapidly changing makeup of the court. n117

[*401] For Judge Wald, many of the "venerable" precedents at risk concerned the reviewability of agency action, access to the court, disclosure of government information and, of course, the types of controversial political issues of the day that invariably divide liberal and conservative appointees on a bench. n118

Although there are a number of examples of the politics of en banc review in the D.C. Circuit in the mid-1980s, n119 one very illustrative case is that of Bartlett v. Bowen, n120 a per curiam ruling that was decided by an en banc court in the summer of 1987, a time when the conservative judges on the court assumed majority control. n121 The en banc review of Bartlett grew out of three panel decisions--Bartlett v. Bowen, n122 Martin v. D.C. Metropolitan Police [*402] Department, n123 and United States v. Meyer n124 --that polarized the Democratic and Republican appointees. Since the panel decisions in Bartlett, Martin, and Meyer are fairly characterized as being the type of results that liberal-minded jurists typically favor and conservatives routinely abhor, n125 it is unsurprising that some scholars thought the court was acting politically when the conservative coalition convened en banc and voted to re-examine the continued viability of the panel decisions. n126

While it may be unremarkable for a full court to assemble to reconsider a panel decision, what makes Bartlett unusual is that it represents a subsequent decision of the D.C. Circuit to change its mind and vacate its earlier orders to rehear, en banc, the panel outcomes in Bartlett, Martin, and Meyers. The abrupt reversal not only exposed ideological rifts between the judges on the circuit on substantive issues, but it also revealed the discordant relations between supposedly like-minded conservative Republican appointees about the proper employment and scope of full court review. Judge Silberman, who presumably changed his mind on the issue of using an en banc court to re-evaluate the panel cases, [*403] broke from the Republican ranks and cast the deciding vote to deny rehearing the cases en banc. n127 Except for Judge Silberman, the rest of the D.C. Circuit divided along party-lines either to concur or dissent from the denial of the rehearings: five Democratic appointees supported the denials, n128 whereas five Republican appointees dissented. n129 In addition to splitting evenly on the issue of whether the panel cases were exceptional enough to merit full court consideration, the division in Bartlett also illustrated that the court was extremely torn over the politicization of the en banc process. This prompted Judge Edwards, in his concurrence denying review, to issue a stern admonishment about its implications:

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. Politicking will replace the thoughtful dialogue that should characterize a court where every judge respects the integrity of his or her colleagues. Furthermore, such a process would impugn the integrity of panel judges, who are both intelligent enough to know the law and conscientious enough to abide by their oath to uphold it. n130

III.

The Courts Of Last Resort

As the per curiam, en banc ruling in Bartlett implies, politically motivated en banc decisionmaking registers overt conflict on circuit courts and undermines the court's credibility. Unquestionably, there are a number of pernicious
effects of en banc review, and most of them flow from the inability of the court to agree on the outcome of a case or the direction that the law should take. When an en banc court fails to agree, the result can have a devastating impact upon the law and intra-court relationships. In some cases, conflict between judges in an en banc case may result in irreconcilable differences that lead to more disagreements in later panel decisions and, sometimes, open defiance of en banc precedent. In other cases, en banc courts produce evenly split decisions, which do nothing to resolve conflict in precedent or clarify the law.

At bottom, the politics of en banc review in the D.C. Circuit raises the larger question of whether it is possible to achieve the promise of maintaining uniformity and consistency in law through judicial decisionmaking. As a result, judicial politics, as part of the en banc process, affects the finality of circuit court rulings and, ultimately, the ideological direction of public policy as defined by courts. Stability and consistent decisions, it will be recalled, was a primary justification for legitimizing en banc review in the Supreme Court's Textile Mills decision in 1941. In that ruling the Court noted that en banc decisionmaking is an efficient procedure of judicial administration where conflicts would be minimized and not created, and finality of decision, and not indecision, would ensue. Most significantly, however, en banc review permitted the circuit courts to fulfill their institutional role as the courts of last resort in the federal judiciary in most cases.

Even though the Court in Textile Mills did not foresee that convening en banc intensified (rather than muted) judicial conflict, the Court did correctly understand that en banc review inevitably affects whether the circuit courts are the final reviewing authority for litigants involved in en banc cases. One means to test that effect is to determine how often D.C. Circuit en banc rulings were undisturbed by the Supreme Court upon further appellate review. In perhaps the most comprehensive account of the court's en banc decision-making ever compiled, Judge Douglas Ginsburg listed all of the cases, that were decided en banc in the D.C. Circuit in a ten year period spanning 1981-1990. A close inspection of the cases reveals two important facts about en banc review and the finality of circuit court decisions. First, the study shows that there were very few unanimous decisions, which in turn implies conflict and disharmony among the judges. Indeed, of sixty-one cases, only sixteen were unanimously decided, and the balance contained at least one dissenting opinion. In fact, six of the forty-seven non-unanimous cases (12.8%) were decided by one vote, and two decisions (4.4%) were the product of an evenly divided court. The majority of en banc cases surely epitomizes an inability to agree; the strife, in all likelihood, results in even more uncertainty in the law and, of course, less finality of decision in the future.

More importantly, a survey of the subsequent case history of each en banc case discloses that the Supreme Court, in the vast majority of cases, does not disturb the outcome reached by the courts of appeals sitting en banc. Of the sixty-one cases in the Ginsburg-Falk sample, twenty-five decisions were appealed to the Supreme Court. Of these cases, only three were reversed and one was vacated, whereas eighteen cases were denied certiorari, and the remaining three decisions were affirmed. Hence, in over eight out of ten cases, the circuit court's en banc decision ultimately remained the final decision for those litigants involved. And, it is significant to note that the litigants in the remaining thirty-six en banc cases did not appeal at all from the D.C. Circuit, constructively making the circuit the last word on legal policy in those cases as well.

The latter point is especially salient because the extent to which the Supreme Court generally superintends circuit court decisionmaking is significant in comprehending en banc review and its impact on the circuit courts' judicial role. Since the Court grants certiorari infrequently, the judicial role lower courts play in defining and making legal policy becomes even more important. The implications of limited review in both en banc and panel cases are clear: the D.C. Circuit is transformed into "the court of last resort" in its most dominant area of agenda and decisionmaking after 1970--administrative law.

Figures 3, 4, 5 and 6 were compiled to evaluate the extent to which the Supreme Court supervised D.C. Circuit decisionmaking generally and in administrative law appeals. In order to place the Court's treatment of the D.C. Circuit in full context, Figure 3 is portrait of the certiorari grant and denial rate of all circuit court appeals (including the D.C. Circuit) between 1970 and 1995. It shows that the Supreme Court grants certiorari infrequently while, conversely,
denying it often. Indeed, in this twenty-six-year period, on average, the Supreme Court granted certiorari less than 4\% of the time, whereas it denied it more than 70\% of the time.  

With respect to the D.C. Circuit, Figure 4 shows that the Supreme Court superintended the court in Washington more closely, at least insofar as the grant rate suggests. Between 1970 and 1995, on average the Supreme Court granted certiorari in the D.C. Circuit in 9.5\% of the cases, whereas it denied it 72.7\% of the time. While the denial rate of certiorari petitions emanating from the D.C. Circuit (72.7\%) is a little higher than the overall denial rate of all the circuits combined (70.1\%), the D.C. Circuit's grant rate (9.5\%) was also higher than the overall grant rate from all courts (3.8\%). A careful inspection of the data reveals that the Burger Court had a more discordant relationship with the D.C. Circuit, as illustrated by the fact that the high court granted certiorari 11.9\% of the time between 1970 and 1985, while it denied it at a rate of 70.6\%. Although the Rehnquist Court denied certiorari from the D.C. Circuit at a comparable level (in regard to the Burger Court' rate) of 76.4\%, the Supreme Court after 1985 granted certiorari petitions much less frequently (only 5.4\%) than its predecessor.

When the Supreme Court's certiorari treatment of D.C. Circuit regulatory appeals is considered in Figures 5 and 6, a similar, although slightly more variable pattern emerges. As Figure 5 shows, between 1970 and 1995, certiorari petitions involving regulation cases coming from the D.C. Circuit were granted (on average) relatively frequently at 15.3\%, whereas they were denied 65.5\% of the time. Figure 6, though, discloses the impact of the presidential appointing process on the grant and denial rate of certiorari regarding D.C. Circuit administrative appeals. What is particularly revealing in Figure 6 is the change in the denial and grant rates as the composition of the D.C. Circuit became increasingly conservative with the addition of judges appointed by Presidents Reagan and Bush. In the years prior to President Reagan's first three appointments (1970-1981), the Supreme Court granted certiorari to D.C. Circuit regulatory appeals 23.5\% of the time and denied it in only 73.1\% of these cases. However, after a number of Republican-appointed judges began to sit on the bench (after 1982), the Supreme Court granted certiorari to D.C. Circuit regulatory appeals in only 13.4\% of the cases and denied it 87.5\% of the time.

This data is solid evidence that the Supreme Court not only has largely permitted circuit courts to be the courts of last resort for most federal litigants, but also that it has allowed the D.C. Circuit to define the scope of legal policy in administrative law between 1970 and 1995. While the Supreme Court' grant rate was, relatively speaking, elevated with regard to the D.C. Circuit compared to the overall average in all cases (9.5\% compared to 3.8\%) and regulatory appeals (15.3\% compared to 12.4\%), the denial rate for appeals from the D.C. Circuit in all cases and regulatory appeals (72.7\% and 65.5\% respectively) still indicates that the Court opts to 'affirm' (through certiorari denials) D.C. Circuit decisions a clear majority of the time. Additionally, the data makes a clear distinction between how the Supreme Court treated D.C. Circuit certiorari petitions before and after the appointment of conservative judges on both courts. One theory explaining the dynamic in the grant rates is that an ideological rift began to form between a D.C. Circuit that was relatively liberal in composition and a Supreme Court that was increasingly conservative in composition. But then, as the D.C. Circuit became politically transformed and more conservative in its membership, the Supreme Court became more tolerant of the policymaking emanating from that circuit court and that led to a decline in the certiorari grant rate, especially after 1985.

Conclusion

In all likelihood, the Supreme Court will continue to grant certiorari less and deny it more in the future with respect to
regulatory appeals coming from the D.C. Circuit. By and large, Figures 4, 5 and 6 reflect the ideological compatibility between the D.C. Circuit and the Supreme Court, since both courts have turned to the right in recent years. Significantly, then, as more appeals, including those that are the product of en banc courts, are sent to the Supreme Court by way of certiorari, the D.C. Circuit will invariably employ its judicial politics and be the final say regarding important issues pertaining to national regulation. Indubitably, the D.C. Circuit will remain a leader among the circuits in making legal policy decisions in regulatory cases, a role that will only continue to expand so long as the two highest courts in the land remain ideological friends, and not foes. As a result, Joseph Goulden's words suggesting that the D.C. Circuit is a "mini' supreme court" in administrative law seems more accurate as time elapses.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure Appeals En Banc Determinations Civil Procedure U.S. Supreme Court Review General Overview

FOOTNOTES:

n1. En banc courts are those sitting with the full membership of the court convened. See Black's Law Dictionary 526 (6th ed. 1990).


n3. 28 U.S.C. 46(c) (1988) authorizes en banc review if a majority of circuit judges in regular active service order it. The Federal Rules of Appellate Procedure state that en banc review should ordinarily be ordered only if it is necessary to obtain uniformity in decision-making or if the case is one of "exceptional importance." Fed. R. App. P. 35. The courts of appeals have generally adopted these criteria by local rule. See, e.g., D.C. Cir. R. 35(c).


n6. See Figure 4, infra, which summarizes the rate of certiorari of circuit courts between 1970 and 1995.

n8. If both certiorari and a rehearing en banc are denied, then the circuit court's panel judgment becomes the final word on the matter, a fact that also may have profound policy implications.

n9. Politicization of the en banc process also has allegedly occurred in other circuit courts. See, e.g., Steve Albert, The Ninth Circuit's Secret Ballot; Some Judges Want to Reconsider the Private Nature of Votes for En Banc Review, Recorder, Mar. 3, 1995, at 1 (discussing the use of dissents from en banc denials as an ideological tool in the Ninth Circuit); Bruce Fein & William Bradford Reynolds, Liberals Conceal True Agenda In Their Attacks on En Banc Review, Manhattan Lawyer, April 10, 1989, at 10 (observing that some conservative judges in 7th, 9th, and D.C. Circuits are advocating more use of en banc reviews); Ann Woolner, Tug of War Gets Intense, Legal Times, May 30, 1988, at 34 (discussing en banc judicial politics of the Sixth Circuit).


n11. See infra notes 161-164 and accompanying text.


n15. See id.

n16. Judiciary Act, ch. 21, 1 Stat. 73 (1789). The Judiciary Act of 1789 established thirteen district courts and three circuit courts. The circuit courts, which had both original and appellate jurisdiction, were staffed by "panels" of two Supreme Court Justices riding circuit and the judge of the district where the court session was held. Id.; see also Steven Bennett & Christine Pembroke, "Mini' In Banc Proceedings: A


n22. See id. The First Judiciary Act of 1789 created the Supreme Court, the circuit courts, and the district courts. While district courts were staffed by its own district judge, circuit courts had no judges of their own. See supra note 16. The Evarts Act reformed the judiciary by establishing an intermediate tier of federal courts known as "circuit courts of appeals," which heard appeals in the nine existing circuits. Act of March 3, 1891, ch. 517, 2, 26 Stat. 826. The original circuit courts, which were not abolished by the Act, were stripped of their appellate jurisdiction which in turn made them a federal trial court along with the district courts. Id. at 4, 26 Stat. 826.

n23. Act of March 3, 1891, ch. 517, 2, 26 Stat. 826. The Act authorized three types of judges to hear appeals in the circuit courts: the circuit justice (a Supreme Court justice who "rode" circuit), the circuit judge (a judge assigned to hear cases in the new circuit court), and the district court judge (judges designated by the court to hear cases in the circuit). Id. The circuit court of appeals bench was staffed primarily by two circuit court judges in the three-judge courts; the third place on the bench was ordinarily filled by a district judge, but Supreme Court justices were also eligible to sit on panels. Id.; see also Neil D. McFeeley, En Banc Proceedings in the United States Courts of Appeals, 24 Idaho L. Rev. 255, 255-56 (1987-88).


n27. See McFeeley, supra note 23, at 256.


n30. Id. at 256-57.

n31. 97 F.2d 867 (9th Cir. 1938).

n32. Id. at 869-70 n.2.

n33. Id. at 869. The court, in dicta, based its conclusion on its interpretation of section 2 of the Evarts Act (from which section 117 of the Judicial Code was derived). Since section 2, like section 117, fixed the number of judges in the circuit courts of appeal at three, the Ninth Circuit asserted that the court is "not enlarged to a four-judge or five or more judge court because there are now more circuit judges competent to participate in its sessions." Id. at 869-70 n.2.

n34. Specifically, the Ninth Circuit maintained that enlarging the judicial capacity to hear cases with more judges would lead to the "embarrassment of an evenly divided court" in those circuit courts with an even number of judges; and, it would paradoxically create more work for judges when Congress intended to reduce the workload with the creation of additional judgeships. Id. at 869-70 n.2.

n35. 117 F.2d 62 (3rd Cir. 1940), aff'd 314 U.S. 326 (1941).
n36. Id. at 71.

n37. Id.

n38. Id. at 70.

n39. Id. at 70-71. Critical to the court's rationale in this regard is the conviction that the Act of Jan. 13, 1912, ch. 9, 37 Stat. 52, which amended section 118 of the Judicial Code, was designed to answer the dispositive question of whether circuit court judges were ex officio judges of the circuit courts of appeals in those circuits with more than three judges. Id. That issue is important because the Judicial Code, upon its effective date, abolished the existing circuit courts that housed the circuit court judges that could sit on those courts. If circuit court judges, which now had no court to sit on because of the Code's abolishment of their courts, were intended by Congress to be ex officio judges, then it is plausible to conclude, as the Third Circuit did, that they ought to sit on the three-judge circuit court of appeals that was created by section 117 of the Judicial Code. Id. at 69. More significantly, this view allows for the possibility that section 118, as amended (specifying that the circuit court judges constitute the judges of the circuit court of appeals), changes by implication section 117 (mandating three-judge courts). This then provides the basis for arguing that Congress intended that the size of the circuit court should expand to the number of judges allowed by law and, concomitantly, that the judges have inherent authority to make rules that determine the manner in which they should hear cases in light of the amendatory Act's silence on the issue. See id. at 70-71.

n40. 314 U.S. 326 (1941).

n41. See id. at 327, 333.

n42. Id. at 334-35.

n43. Id.

n44. Id. at 330-31.
n45. Id. at 331-36 ("And so we reach the question as to whether the avowed purpose of 118 was defeated by 117. We do not think it was." Id. at 331).


n47. See 28 U.S.C. 46 (1988); Alexander, supra note 17, at 573; Egger, supra note 14, at 478. Textile Mills was codified in 1948 when Congress comprehensively rewrote Title 28.

n48. Between 1949 and 1953 the courts of appeals disposed of an average of less than 15 cases per year through the en banc procedure. See Alexander, supra note 17, at 573.

n49. 28 U.S.C. 46 (1988). What constitutes a "majority" of judges in "active service" has been problematic in light of the variety of interpretations that exist in the circuit courts. See Note, supra note 46, at 1505.

n50. Note, supra note 46, at 1507-08.


n52. Id. at 249.

n53. Western Pac. R.R. Corp. v. Western Pac. R.R. Co., 197 F.2d 994, 997, 1006 (9th Cir. 1951), aff'g, 85 F. Supp. 868 (N.D. Cal. 1951).

n54. Western Pacific, 345 U.S. at 249.

n55. More precisely, the petitioner's contested the court's second denial of a request for rehearing en banc on the basis that the circuit court's first decision (to deny a rehearing en banc after the circuit court affirmed the district court) was in contravention of section 46(c) of the Judicial Code. Id. at 250.
n56. Id. at 267-68.

n57. Id. at 267.

n58. Id. at 259.

n59. Western Pacific, 345 U.S. at 267-68.

n60. Id. at 261, 267-68.

n61. Id. at 267-68.

n62. Alexander, supra note 17, at 574. The implications of having litigants easily employ "suggestions" for en banc hearings are profound. In 1995, for example, there were 4,063 petitions for rehearing en banc filed in all the circuit courts (excluding the Federal Circuit). Of that number, the Ninth (21.29%), Fourth (18.95%), Eighth (10.80%), Eleventh (9.84%), and Third (9.60%) Circuits had the highest percentage of rehearings en bancs. Admin. Office of U.S. Courts, Statistics Div., Petitions for Rehearings Filed (En Banc)-10/01/94 Through 9/30/95 (unpublished table, on file with author).

n63. See A. Lamar Alexander, Jr., En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities (Part II), 40 N.Y.U. L. Rev. 726, 729 (1965) ("The result of the decision has been the institutionalization in circuit practice of counsels' petitions for en banc consideration."); Judah I. Labovitz, En Banc Procedure in the Federal Courts of Appeals, 111 U. Pa. L. Rev. 220, 221 (1962) ("En banc procedure throughout the circuits is not entirely consistent with Western Pacific and is by no means uniform."); Peter Michael Madden, Comment, In Banc Procedures in the United States Courts of Appeals, 43 Fordham L. Rev. 401, 403 (1974) ("After this decision [Western Pacific], each circuit developed rules concerning the in banc procedure.").

n64. Alexander, supra note 17, at 573.

n65. Id. at 574.
n66. See Labovitz, supra note 63, at 221; Madden, supra note 63, at 403.

n67. Egger, supra note 14, at 478.

n68. Madden, supra note 63, at 405 n.40.

n69. See Egger, supra note 14, at 478 (observing that the nonuniformity of en banc procedures among the circuits was reduced by the adoption of Rule 36 in 1967); Madden, supra note 63, at 403 (“Rule 35 of the Federal Rules of Appellate procedure eliminates much of the inconsistency.”).


n73. American-Foreign Steamship Corp., 363 U.S. at 691.

n74. Id. at 689.

n75. Id. at 689-90.

n76. Id. at 688.
n77. Id. at 690 (quoting American-Foreign Steamship, 265 F.2d 136, 155 (2d Cir. 1959)).

n78. American-Foreign Steamship, 363 U.S. at 689.

n79. Id.; see also Douglas H. Ginsburg & Donald Falk, The Court En Banc: 1981-1990, 59 Geo. Wash. L. Rev. 1008, 1022-23 (1991) (arguing that rehearing cases en banc is advantageous because it allows the court to maintain consistency in the law by minimizing all conflicts - intra-circuit, inter-circuit, or between the circuit and the Supreme Court).


n82. Kaufman, supra note 4, at 7.

n83. See id. En banc reviews are inefficient because they are the "most time consuming and inefficient device in the appellate judiciary's repertoire." Id.

n84. See id. Critics argue that en banc decisionmaking undermines, rather than promotes, finality in outcomes. Id. at 8. Not only is there a constant risk that a panel's ruling could be upset by an en banc court, but there also is the problem of not fulfilling litigants' expectations of reaching a final judgment by panel decisions. Id.

n85. See Note, supra note 5, at 880 & nn.80-81. The uncertainty of en banc review also undermines the harmony of a circuit court since judges deciding cases on panels resent having their work undone by a majority of the court. Id.

n86. See id. at 880 & nn.82-84. Regardless of the importance of the case, or whether the panel outcome conflicts with precedent, a majority of judges may manipulate en banc review by voting to convene the full court so that an ideologically disfavored panel decision may be overturned. See Solimine, supra note 5, at 30-31.
n87. Congress, by statute, recognized the legitimacy of mini en bancs in 1978. See Act of Oct. 20, 1978, Pub. L. No. 95-486, 6, 92 Stat. 1629, 1633; see also Egger, supra note 14, at 479. A "mini' en banc consists of a proceeding where less than the full court meets to decide a case that ordinarily would be decided by the whole court. Bennett & Pembroke, supra note 16, at 532. While "mini' en banc procedures vary, they typically involve less judicial manpower and no oral argument, and result in less opinions. See id. The D.C. Circuit's mini en banc procedure, informally (that is, not by rule) inaugurated with the case of Irons v. Diamond, 670 F.2d 265 (D.C. Cir. 1981), is a process by which an opinion is circulated to the full court in an effort to resolve conflicts among the judges and among circuit precedent. See Bennett & Pembroke, supra note 16, 550-51. If successfully invoked, a so-called "Irons footnote" is inserted into the opinion which states, "the foregoing part of the division's decision, because it resolves an apparent conflict between two prior decisions, has been separately considered and approved by the full court, and thus constitutes the law of the circuit." Irons, 670 F.2d at 268 n.11. However, the Irons footnote mini en banc procedure has seen limited use. See Bennett & Pembroke, supra note 16, at 550-51 & nn.98-103 (observing that by 1986 the court had used the procedure only 4 times).

n88. See Kaufman, supra note 4, at 7. Judge Irving Kaufman, a Second Circuit judge and critic of the en banc process, observed that even though his court voted in only 27 en banc polls in the preceding five year period, the circuit nonetheless "endured more than 750 petitions for rehearing en banc during that same period." Id. (emphasis omitted). Attorney Neil McFeeley, in his comprehensive study of en banc proceedings, criticized litigants and counsel for abusing the "limited role of rehearing en banc." McFeeley, supra note 23, at 273. The problem is that "many consider [rehearings en banc] simply another level of appeal and submit suggestions for rehearing en banc as a matter of course," a practice that often violates court-sanctioned rules of practice. Id. Perhaps in recognition of the problem, the local rules of the D.C. Circuit require that suggestions for en banc consideration be accompanied by a separate statement either elucidating the exceptional import of the case or, where pertinent, listing the U.S. Supreme Court or federal circuit precedent that purportedly conflicts with the panel's decision. See D.C. Cir. R. 35(c).

n89. See generally 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, 829-60 (1993) (detailing the most prevalent criticisms of en banc review and concluding "that the underlying institutional costs that commentators impute to en banc review are greatly overstated," id. at 860).

n90. Note, supra note 5, at 866.

n91. Id. at 879-81; cf. Patricia M. Wald, Changing Course: The Use of Precedent in the District of Columbia Circuit, 34 Clev. St. L. Rev. 477, 486 (observing that the en banc process has been used "to overrule venerable, heretofore respected circuit precedents").

n92. See infra note 93.


n95. See Note, The Power of a Circuit Court of Appeals to Sit En Banc, 55 Harv. L. Rev. 663, 666 n.16 (1942).

n96. See Alexander, supra note 63, at 571 & n.60.

n97. Ginsburg & Falk, supra note 79, at 1010.

n98. Stephens, supra note 93, at 109. Also, in 1954 all courts then permitted judges to order a hearing en banc at any time before the ruling issued. However, judges who did not sit on the panel could not vote en banc because they would be unfamiliar with the case. Only four courts--the Third, Fifth, Ninth, and D.C. Circuit--had a process by which judges could freely consult with one another about cases, thus increasing the chance of en banc review. Comment, supra note 93, at 451-52.

n99. See Alexander, supra note 63, at 746-49 app.V. Between 1960 and 1964, only one circuit, the Third Circuit, handled more en banc cases at 124. See id.

n100. Id.

n101. Id. Of the 92 en banc cases, 48 were criminal cases and 22 were administrative appeals; otherwise, there were 13 private civil cases, seven U.S. civil cases, and two original proceedings. Id.

n102. Moreover, scholars have noted that the volume of en banc cases in the circuit was large as a result of its unique jurisdiction. See Alexander, supra note 63, at 571 n.60. The court's jurisdiction was unique since it acted as a federal court with local state court jurisdiction until 1970. For an in-depth discussion of the court's history and special jurisdiction, see Jeffrey Brandon Morris, The Second Most Powerful Court: The United States Court of Appeals for the District of Columbia Circuit (1972) (unpublished Ph.D. dissertation, Columbia University) (on file with the author).

n103. See Alexander, supra note 63, at 746-49 app.V.

n105. See supra Table 1.

n106. See supra Table 2. Of the twelve courts listed in Table 2, only the Fourth and Eighth Circuits also have exceeded the average percentage for each of the three decades listed. See supra Table 2.

n107. A total of 64 en banc dispositions transpired during the 1980s in the D.C. Circuit. See Table 3.

n108. See infra notes 109-13 and accompanying text.


n110. See Judicial Staff Directory, supra note 109, at 642; see also Banks, supra note 10, at 94 tbl.2.1.

n111. See Banks, supra note 10, at 94 tbl.2.1.

n112. Banks, supra note 10; see also Morris, supra note 98.

n113. Judges Laurence Silberman and James Buckley joined the court in 1985; Judges Stephen Williams and Douglas Ginsburg were appointed in 1986, and Judge David Sentelle was placed on the bench in 1987. See Judicial Staff Directory, supra note 109, at 643-45.

n114. See, e.g., Schwartz, supra note 5, at 155 (“Many cases in the District of Columbia Circuit were en banced because the conservative majority on the circuit led by Judge Bork was unhappy with the decision <elip>.”). In referring to several instances where the D.C. Circuit employed the en banc process politically in the 1986-87 period, one commentator remarked that:

The en banc decisions from the D.C. Circuit in the last few years reflect deep ideological divisions on that court. En banc hearings now occur more frequently as Reagan-appointed majorities apparently resort to the procedure in order to reverse liberal panel decisions in cases in which neither intracircuit consistency nor issues of exceptional importance are at stake.
Note, supra note 5, at 873-74. But see Solimine, supra note 5, at 70 (arguing that the author's empirical analysis of en banc decision-making in the circuit courts supports the conclusion that Reagan-appointed judges were not using ideology for the purpose of overturning panel outcomes they disfavored).


n116. Wald, supra note 91, at 486 n.29.

n117. Id. at 486 (emphasis added).

n118. See id. at 486 n.29, 482 n.19 (discussing access to appellate review and relation of the Freedom of Information Act to IRS confidentiality statutes). For example, Judge Wald opined that, "in the high visibility cases, involving controversial social or "moral" issues, [the judges'] differences in judicial philosophy, on the proper role of the courts in a democratic society, do emerge front and center." Id. at 479. Wald also "believes that some judges have definite "agendas" for changing the law in certain areas, such as restricting access to the federal courts, and that they diligently pursue these agendas at every opportunity." Id. See also Patricia M. Wald, The D.C. Circuit: Here and Now, 55 Geo. Wash. L. Rev. 718, 719 (1987) ("Two doctrinal issues dominate the court right now: standing and statutory interpretation. Both issues implicate the larger separation of powers debate looming over American jurisprudence."); Wald, supra note 12, at 532 ("Since [Heckler v. Chaney, 470 U.S. 821 (1985)] came down, debate has raged within our circuit about how far the doctrine of unreviewability of agency inaction should extend.").

n119. One of the best examples is the political debate between the court's liberal and conservative wings of the D.C. Circuit and resulted in a 5-5 en banc tie occurred in Center for Auto Safety v. Thomas, 847 F.2d 843 (D.C. Cir. 1988) (en banc) (per curiam), in which the issue was whether certain litigants had standing to challenge the enforceability the Corporate Average Fuel Economy (CAFE) standards. See also Hotel & Restaurant Employees Union, Local 25 v. Smith, 846 F.2d 1499 (D.C. Cir. 1988) (en banc) (per curiam) (in which the court, evenly split along party lines, disagreed on issues relating to standing and ripeness).

n120. 824 F.2d 1240 (D.C. Cir. 1987) (en banc) (per curiam). The decision also contained a fourth order pertaining to the case of Mississippi Indus. v. F.E.R.C., 808 F.2d 1525 (D.C. Cir. 1987), which was also the subject of an earlier decision to rehear the original panel decision en banc. 824 F.2d at 1246.

n121. Note, supra note 5, at 869.

n122. 816 F.2d 695 (D.C. Cir. 1987). In Bartlett, the court ruled that the federal courts had jurisdiction to hear a dispute involving the denial of Medicare benefits ($ 286) to a Christian Science practitioner's estate. Id. at 697. The district court initially dismissed the action on the grounds that the court was barred, under the provisions of the Medicare Act, to hear claims involving reimbursement of moneys that did not
exceed $1,000. Id. at 696-97. On appeal, a divided D.C. Circuit panel reversed and remanded. Id. at 695. Judge Harry T. Edwards, for the majority, not only held that the Medicare Act did not preclude judicial review of the plaintiff’s claims, but also that the court, on separation of powers grounds, should rule upon the constitutional issues raised in the plaintiff’s complaint. Id. at 697. In dissent, Judge Robert Bork vehemently disagreed and argued that the jurisdictional provisions of the Medicare Act should be narrowly construed, which thus restricted access to the court. Id. at 711. That is, since Congress clearly intended not to provide an exception to the statutory prescribed amount in controversy requirement, the plaintiff, in Judge Bork’s view, did not have the right to maintain a lawsuit in federal court. Id.

n123. 812 F.2d 1425 (D.C. Cir. 1987). In Martin, the court ruled that a political protester could sue federal police even though they ordinarily enjoy legal immunity from such claims. Id. at 1438. The district court had held, inter alia, that the police had a qualified immunity against liability for constitutional torts. See id. at 1427-29. On appeal, a divided panel for the D.C. Circuit vacated and remanded the case. Id. at 1438. Judge Ruth Bader Ginsburg, for the court, interpreted pertinent Supreme Court and circuit precedent as permitting the plaintiff to have an opportunity to overcome an assertion of qualified immunity with proof that the police knowingly acted with an unconstitutional purpose, in violation of his civil rights. Id. at 1433. As a result, the court reserved judgment on the qualified immunity issue so that the plaintiff could conduct limited discovery and be afforded the chance to amend his complaint in accordance with the new facts, if any, that were disclosed and supported his claims. Id. at 1433, 1438. Judge Kenneth Starr dissented in part. Id. at 1439. He contended that the court misconstrued its own precedent which, in his view, did not permit the plaintiff to engage in further discovery; as such, the immunity defense was properly asserted and barred the court from hearing the lawsuit. Id.

n124. 810 F.2d 1242 (D.C. Cir. 1987). In Meyer, which concerned the allegedly vindictive prosecution of political protesters arrested by federal police outside the White House in 1985, the D.C. Circuit affirmed the district court’s ruling that dismissed all charges. Id. at 1243. Judge Abner Mikva, writing for a unanimous court, interpreted Supreme Court precedent to hold that prosecutorial vindictiveness may be proven by a presumption, rather than a finding of actual, vindictiveness. Id. at 1246-49. As a result, since the facts of the complaint showed that the prosecution filed more charges against protesters who elected to go to trial in an effort to prove their innocence (instead of paying a nominal fine and avoiding further criminal prosecution), the court ruled that the district court correctly dismissed the charges filed against the protesters. Id. at 1249.

n125. In each case, plaintiffs were given the right to sue or maintain legal actions against governmental officials in federal courts using liberal interpretations of governing statutory texts or common law.

n126. See, e.g., Note, supra note 5, at 865. But see Solimine, supra note 5, at 30-33 (discrediting the claim that Reagan appointees acted politically).

n127. See Bartlett, 824 F.2d at 1241.

n129. Judges Robert Bork, Kenneth Starr, James Buckley, Douglas H. Ginsburg, and Stephen Williams voted in dissent. 824 F.2d at 1241, 1247. These judges were all Republican appointees. See supra notes 109-10.

n130. Bartlett, 824 F.2d at 1243-44.

n131. This problem is not a new one. As one commentator lamented decades ago: “The inability of some circuits to agree more successfully in en banc decisions has seriously limited the effectiveness of the proceedings.” See Alexander, supra note 17, at 583.

n132. For example, the famous D.C. Circuit case of Mallory v. United States, 259 F.2d 801 (D.C. Cir. 1958) (addressing the admissibility of confessions in criminal prosecutions) falls into this category since the en banc precedent created in Mallory was subsequently ignored by later panels who fundamentally disagreed with the original decision. Alexander, supra note 17, at 583 & n.122.

n133. See, e.g., Alexander, supra note 17, at 585 n.125 (observing, in 1965, that the D.C. Circuit had an evenly divided court in four of seventeen en banc cases). For other examples where the en banc court split evenly, see Hotel & Restaurant Employees Union, Local 25 v. Smith, 846 F.2d 1499 (D.C. Cir. 1988) (en banc) (4-4 decision on issue of justiciability); Ginsburg, Feldman & Bress v. Federal Energy Admin., 591 F.2d 752 (D.C. Cir. 1978) (en banc) (4-4 decision on disclosure under the Freedom of Information Act, 5 U.S.C. 552). See also Egger, supra note 14 (discussing the problem of en banc ties in administrative law cases).

n134. Judge Laurence Silberman made a similar point in his concurrence in Bartlett, where he intimated that convening an en banc court would be mostly “superfluous” where the Supreme Court was probably going to grant certiorari in an en banc disposition involving an issue of national importance. Bartlett, 824 F.2d at 1246.

n135. See supra text accompanying note 41.


n137. Id. at 335.

n138. See id. (“Those considerations are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases.”).
As Ginsburg and Falk observed, there are a number of difficult methodological problems in trying to collect en banc cases, either manually or by computer. Ginsburg & Falk, supra note 79, at 1048 n. 217. For some of the research in this article, several LEXIS searches, performed in the DCCIR sub-file of the GENFED library between 1970 and 1993, were run to collect a sample of en banc cases. Although 195 case citations were generated, the list was imperfect because LEXIS failed to pick up cases that the author knew were en banc cases through prior research. The problems with obtaining a reliable sample base with LEXIS lends support to the view that judges, who have intimate knowledge of cases and easy access to retrieve them in a court are in a more advantageous position to obtain the most accurate listing of en banc cases in a particular court.

Actually, Ginsburg and Falk listed 63 cases. Two cases (numbers 14 (table case) & 32 (unpublished)) were excluded from the analysis due to the manner in which they were disposed. The exclusion of these two cases lowers the total to 61.

This survey was performed via the Insta-Cite™ feature of Westlaw.


n149. See infra Figure 3; Peter L. Strauss, One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action, 87 Colum. L. Rev. 1093, 1105-16 (1987).

n150. See supra notes 12-13 and accompanying text.

n151. Including pending cases from the prior fiscal year (FY 1969-94), the total number of certiorari petitions filed in the Supreme Court from all circuits (excluding the Federal Circuit) between 1970 and 1995 equaled 103,258. Of those petitions, 3,912 were granted (3.79%) and 72,387 were denied (70.10%). See infra Figure 3; 1970-1995 Dir. Admin. Office U.S. Cts. Ann. Rep. tbl.B-2.

n152. Including pending cases from the prior fiscal year (FY 1969-94), the total number of certiorari petitions filed in the Supreme Court from the D.C. Circuit between 1970 and 1995 equaled 3,364. Of those petitions, 320 were granted (9.51%) and 2,446 were denied (72.71%). See supra Figure 4; 1970-1995 Dir. Admin. Office U.S. Cts. Ann. Rep. tbl.B-2.


n154. See id.

n155. See id.

n156. Including pending cases from the prior fiscal year (FY 1969-84), the total number of certiorari petitions filed in the Supreme Court from the D.C. Circuit between 1970 and 1985 equaled 2,124. Of those petitions, 253 were granted (11.91%) and 1,499 were denied (70.57%). See 1970-1995 Dir. Admin. Office U.S. Cts. Ann. Rep. tbl.B-2.

n158. Including pending cases from the prior fiscal year (FY 1969-1994), the total number of certiorari petitions regarding administrative law appeals filed in the Supreme Court from the D.C. Circuit between 1970 and 1995 equaled 911. Of those petitions, 139 were granted (15.3%) and 597 were denied (65.5%). See 1970-1995 Dir. Admin. Office U.S. Cts. Ann. Rep. tbl.B-2.; Figure 6, supra.

n159. Including pending cases from the prior fiscal year for FY 1969 (but excluding pending cases from all other prior fiscal years), the total number of certiorari petitions regarding administrative law appeals filed in the Supreme Court from the D.C. Circuit between 1970 and 1981 (in 1982, President Reagan made his first D.C. Circuit appointment, see text accompanying notes 109-10 supra) equaled 387. Of those petitions, 19 (23.5%) were granted and 283 (73.1%) were denied. See supra Figure 6.

n160. Including pending cases from the prior fiscal year for FY 1969 (but excluding pending cases from all other prior fiscal years) the total number of certiorari petitions relative to administrative law appeals filed in the Supreme Court from the D.C. Circuit between 1982 and 1995 equaled 359. Of those petitions, 48 (13.4%) were granted and 314 (87.5%) were denied. See supra Figure 6.

n161. See supra notes 152-156.

n162. See supra note 159 & Figure 6.

n163. See supra notes 154, 159.

n164. See supra Figures 4 & 5, Figure 6.

n165. See infra note 162-63 and accompanying text.

n166. See Banks, supra note 10, at 237-42.
n167. Specifically, the increased level of tolerance is easily explained in light of the fact that the Supreme Court also turned to the right as Presidents Reagan and Bush had several opportunities to fill vacancies on the high court with conservative appointments. Reagan's first appointment, Justice Sandra Day O'Connor in 1981, was arguably an early sign that the Court was destined to become more conservative in the 1980s. Thereafter, the retirements of Chief Justice Warren Burger (1986) and Associate Justice Lewis J. Powell (1987) provided Reagan with the unique opportunity to elevate not only Associate Justice William H. Rehnquist to the chief justiceship (1986), but also to appoint former Judge Antonin Scalia of the D.C. Circuit (1986) to the high court. When Justice Anthony Kennedy, another Reagan appointee, joined the Court in 1988, the political transformation of the Supreme Court was complete. Moreover, Reagan's three appointments were joined on the Court after two Bush judicial selections--Justice David Souter and Justice Clarence Thomas--were nominated and confirmed for judicial service in 1990 and 1991, respectively. See David M. O'Brien, Storm Center: The Supreme Court in American Politics 13-16 (3d ed. 1993).

n168. See Goulden, supra note 12, at 252.