



# *Federal Bar Council*

## *En Banc* Practices in the Second Circuit Time for a Change?

Second Circuit Courts Committee  
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## **En Banc Practices In The Second Circuit—Time For A Change?**

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### **I. Introduction**

The five opinions filed in connection with the Second Circuit’s 2008 *sua sponte* denial of rehearing *en banc* in *Ricci v. DeStefano*, and the 7-6 split revealed by those opinions, focused attention on the standards applied by the Second Circuit in deciding whether to hold *en banc* rehearings.<sup>1</sup> As the opinions reveal, the Second Circuit has a tradition of granting *en banc* rehearing only rarely. In his concurring opinion, for example, Judge Robert A. Katzmann described the “Circuit’s longstanding tradition of general deference to panel adjudication—a tradition which holds whether or not the judges of the Court agree with the panel’s disposition of the matter before it.

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<sup>1</sup> 530 F.3d 88 (2d Cir. 2008). The Second Circuit at times uses the term “*in banc*,” which appeared in earlier versions of Fed. R. App. P. 35. The rule currently uses the term “*en banc*,” and so we use that spelling other than in quoted excerpts from other written work.

Throughout our history, we have proceeded to a full hearing *en banc* only in rare and exceptional circumstances.”<sup>2</sup> In contrast, Chief Judge Dennis Jacobs’ dissenting opinion took the position that using “tradition” as a reason not to grant *en banc* rehearing is a failure to exercise the discretion called for by the applicable rule, Federal Rule of Appellate Procedure 35 (“Rule 35”).<sup>3</sup>

The Federal Court Management Statistics published by the Administrative Office of the United States Courts confirm that the Second Circuit does indeed consider a far smaller percentage of its cases *en banc* than do the other regional circuits. At the same time, the Second Circuit has, at times, made use of an informal “mini-*en banc*” procedure when issuing panel decisions that may conflict with prior panel opinions. These mini-*en banc* decisions state that the panel has circulated the opinion to all active judges prior to filing, and that no judge objected to the decision.

This Committee recognizes both the value of having authoritative *en banc* decisions and the costs of rehearing cases *en banc*. We believe, however, that the Second Circuit should carefully examine how it is exercising the discretion afforded by Rule 35. To the extent that an informal and uncodified “mini-*en banc*” process has displaced regular *en banc* review, we suggest that the Court codify this practice for the benefit of litigants and the public.

## **II. How the Second Circuit Compares to Other Regional Circuit Courts of Appeal**

The Federal Court Management statistics, which reflect reports by the United States courts of appeals, show that the Second Circuit takes what appears to be a unique approach to *en banc* review among the regional courts of appeals. The statistics cannot be viewed as totally authoritative, because, at least for the Second Circuit, they do not accurately capture the number of cases in which *en banc* review occurs. Nevertheless, if the statistics are correct at least within an order of magnitude, the Second Circuit is still an outlier.

### **A. Issues with Official Statistics**

The Federal Court Management statistics compile information about the number of appeals terminated on the merits after oral hearings or submission on briefs, but these statistics appear to be unreliable at least as to *en banc* rulings by the Second Circuit. Classification problems are to be expected: if, for example, a case is heard *en banc* and an opinion handed down, but the case settles before the mandate issues, then it is not clear whether that case would be considered to be “terminated on the merits” in these reports. The Second Circuit’s statistical reports have not been completely reliable due to issues with the data input into the court’s reporting systems,

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<sup>2</sup> *Id.* at 89-90. See also, e.g., Wilfred Feinberg, *Unique Customs and Practices of the Second Circuit*, 14 Hofstra Law Review 297 (1986); Jon O. Newman, *Foreword: In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 Brook. L. Rev. 365 (1984).

<sup>3</sup> 530 F.3d at 93.

particularly before electronic filing of cases was instituted. It may be that with the transition to electronic filing the reporting is already more accurate.

Verifying the accuracy of the reported data can also be tricky because the courts report their data on a rolling 12-month basis, and the date on which an *en banc* opinion was issued does not reveal the date on which the case actually terminated. Further confusion arises because the annual reports compile data based on the federal fiscal year, *i.e.*, October 1 through September 30, rather than based on a calendar year. Finding *en banc* decisions is also harder than might be expected: at least for the Second Circuit, the published opinions typically do not say that the Court considered the matter *en banc* (or even “*in banc*”), but merely list the names of the judges who participated in the opinion (which usually includes all active judges on the date of argument).<sup>4</sup> Moreover, judgments must be made in deciding how to classify data. For example, the Court consolidated *Hayden* and *Muntaqim*,<sup>5</sup> which initially were separate appeals, for *en banc* briefing and argument. Reasonable minds could differ as to whether to count this as one or two cases being disposed of *en banc*.<sup>6</sup>

Notwithstanding all of these issues, it is evident from comparing the official statistics to the *en banc* opinions we were able to locate that at least from September 1999 through September 2010—the latest dates for which published statistics were available—the reported Second Circuit data did not reflect the cases that were actually decided. The table below shows how the reported number of *en banc* cases compares to those actually decided:

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<sup>4</sup> See, e.g., *Brown v. Andrews*, 220 F.3d 634 (2d Cir. 2000) (*en banc*); *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (*en banc*).

<sup>5</sup> *Hayden*, 449 F.3d at 312; *Muntaqim v. Coombe*, 449 F.3d 371 (2d Cir. 2006) (*per curiam, en banc*).

<sup>6</sup> We counted *Hayden* and *Muntaqim* as one *en banc* case, because only one set of briefs was submitted and only one *en banc* hearing held. As it turns out, however, two *en banc* opinions issued, one of which was a *per curiam* opinion concluding that *Muntaqim* lacked standing.

Second Circuit <i>En Banc</i> Decisions		
Year	# of Officially Reported <i>En Banc</i> Decisions	# of <i>En Banc</i> Opinions Found
2000	0	1 <sup>7</sup>
2001	1	0
2002	4	2 <sup>8</sup>
2003	0	0
2004	0	1 <sup>9</sup>
2005	0	0
2006	0	1 <sup>10</sup>
2007	0	1 <sup>11</sup>
2008	0	0
2009	0	1 <sup>12</sup>
2010	0	1 <sup>13</sup>
<b>Total for 2000-2010</b>	<b>5</b>	<b>8</b>

## B. What the Statistics Show

According to the official statistics, in the 11-year period from 2000 through 2010, the twelve regional circuits heard a total of more than 325,000 cases that were terminated on the merits after oral hearings or submissions on briefs. A total of 667 (as reported) to 670 cases (using our Second Circuit data) were heard *en banc* during that same 11-year period—a little over 2/10 of 1% of the total.<sup>14</sup> The average for the Second Circuit was about one-eighth that of the system-wide average: eight cases heard *en banc* out of a total of 27,856 appeals that were terminated on the merits, or less than 3/100 of 1% of the cases.<sup>15</sup>

<sup>7</sup> *Brown v. Andrews*, 220 F.3d 634 (2d Cir. 2000) (*en banc*).

<sup>8</sup> *Iragorri v. United Techs. Corp.*, 274 F.3d 65 (2d Cir. 2001) (*en banc*); *United States v. Thomas*, 274 F.3d 655 (2d Cir. 2001) (*en banc*) (decided December 4, 2001, so in the 2002 reporting cycle).

<sup>9</sup> *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (*en banc*) (decided December 29, 2003, so in the 2004 reporting cycle).

<sup>10</sup> *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (*en banc*) (consolidated with *Muntaqim v. Coombe*, 449 F.3d 371 (2d Cir. 2006) (*per curiam, en banc*)).

<sup>11</sup> *Lin v. United States Dep't of Justice*, 494 F.3d 296 (2d Cir. 2007) (*en banc*).

<sup>12</sup> *United States v. Cavera*, 550 F.3d 180 (2d Cir. 2008) (*en banc*) (decided December 4, 2008, so in the 2009 reporting cycle).

<sup>13</sup> *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (*en banc*) (decided November 2, 2009, so in the 2010 reporting cycle).

<sup>14</sup> We assume for these purposes that the statistics reported by the other circuits are correct.

<sup>15</sup> Using the official statistics of five *en banc* cases would result in an *en banc* rate of less than 2/100 of 1%. Counting *Hayden* and *Muntaqim* as two cases instead of one results in a rate of just over 3/100 of 1%.

Notably, it appears that one overall trend in the circuit courts is a decline in *en banc* hearings—in both absolute and relative terms—although the numbers are sufficiently small that it is hard to tell if the trend is truly significant. The Second Circuit does not seem to be part of this trend, as the number of cases it has considered *en banc* has remained steady over recent years. The table below sets out the relevant data for the regional circuits as a whole and for the Second Circuit, using for the Second Circuit the actual number of cases that we found rather than the reported numbers:

Total <i>En Banc</i> Cases In All Regional Circuit Courts of Appeal and in the Second Circuit, 2000-2010						
Year	All Circuits # of Cases	All Circuits # of <i>En Banc</i> Cases <sup>16</sup>	All Circuits <i>En Banc</i> Cases as % of Total	Second Circuit # of Cases	Second Circuit # of <i>En Banc</i> Cases Found	Second Circuit <i>En Banc</i> Cases as % of Total
2000	27,516	74	0.269	1,965	1	0.051
2001	28,840	80	0.277	2,036	0	0.000
2002	27,758	75	0.270	1,951	2	0.103
2003	27,009	68	0.252	1,934	0	0.000
2004	27,438	60	0.219	1,777	1	0.056
2005	29,913	56	0.187	2,121	0	0.000
2006 <sup>17</sup>	34,580	66	0.191	3,794	1	0.053
2007	31,717	57	0.180	2,885	1	0.035
2008	29,608	41	0.138	2,859	0	0.000
2009	30,160	48	0.159	3,230	1	0.031
2010	30,914	45	0.146	3,304	1	0.030
<b>11-Year Total</b>	<b>325,453</b>	<b>670</b>	<b>0.206</b>	<b>27,856</b>	<b>8</b>	<b>0.029</b>

In each of 1984, 1989, and 1994, Judge Newman of the Second Circuit wrote an article discussing *en banc* cases in the Second Circuit, reporting the following numbers of *en banc* cases:<sup>18</sup>

Numbers of <i>En banc</i> Cases Heard by the Second Circuit, 1980-1993		
Time Period	Second Circuit # of <i>En Banc</i> cases	Average # of Cases Per Year
1979-83	6	1.2
1984-88	7	1.4
1989-93	6	1.2

<sup>16</sup> Second Circuit numbers are corrected to reflect actual totals.

<sup>17</sup> The Federal Court Management statistics show an anomalous jump in appeals terminated on the merits in the Second Circuit in 2006 (3,794) as compared to 2005 (2,121) or 2007 (2,885). No year before or since has approached the total shown for 2006.

<sup>18</sup> Newman, *supra*, 50 Brook. L. Rev. 365 (1984); Jon O. Newman, *Foreword: In Banc Practice in the Second Circuit, 1984-1988*, 55 Brook. L. Rev. 355, 369 (1989); Jon O. Newman, *Foreword: In Banc Practice in the Second Circuit, 1989-93*, 60 Brook. L. Rev. 491 (1994).

By comparison, in the 11-year span from 2000 through 2010, the Second Circuit heard 8 cases *en banc*, or an average of 0.7 cases per year—down even from the figures that Judge Newman described as “considerably lower” than the other federal regional circuit courts.<sup>19</sup>

The discrepancy between the number of cases taken *en banc* in the Second Circuit and other circuits does not appear to correlate with the total number of cases disposed of on the merits or the number of judges, although certainly some courts—most notably the D.C., Eighth, Ninth, and Tenth Circuits—hear a larger proportion of cases *en banc* than do other circuit courts. The following table shows by circuit the total number of cases disposed of on the merits, the number of judgeships, and the number and percentage of *en banc* dispositions, for the 11-year period from 2000 through 2010:

Number of Cases, Judgeships, and <i>En Banc</i> Cases by Circuit, 2000-2010				
Circuit	Total # of Cases, 2000-2010	Number of Authorized Judgeships	Total # of <i>En Banc</i> Cases, 2000-2010	<i>En Banc</i> Cases as % of Total
DC	6,039	12 <sup>20</sup>	19	0.205
1st	9,773	6	18	0.315
2nd	27,856	13	8 <sup>21</sup>	0.018
3d	23,292	14	36	0.155
4th	29,600	15	47	0.159
5th	45,179	17	71	0.157
6th	28,205	16	61	0.216
7th	16,618	11	33	0.199
8th	22,061	11	76	0.344
9th	62,710	28 <sup>22</sup>	195	0.311
10th	16,299	12	48	0.294
11th	37,821	12	58	0.153
<b>Total</b>	<b>325,453</b>	<b>167</b>	<b>670</b>	<b>0.206</b>

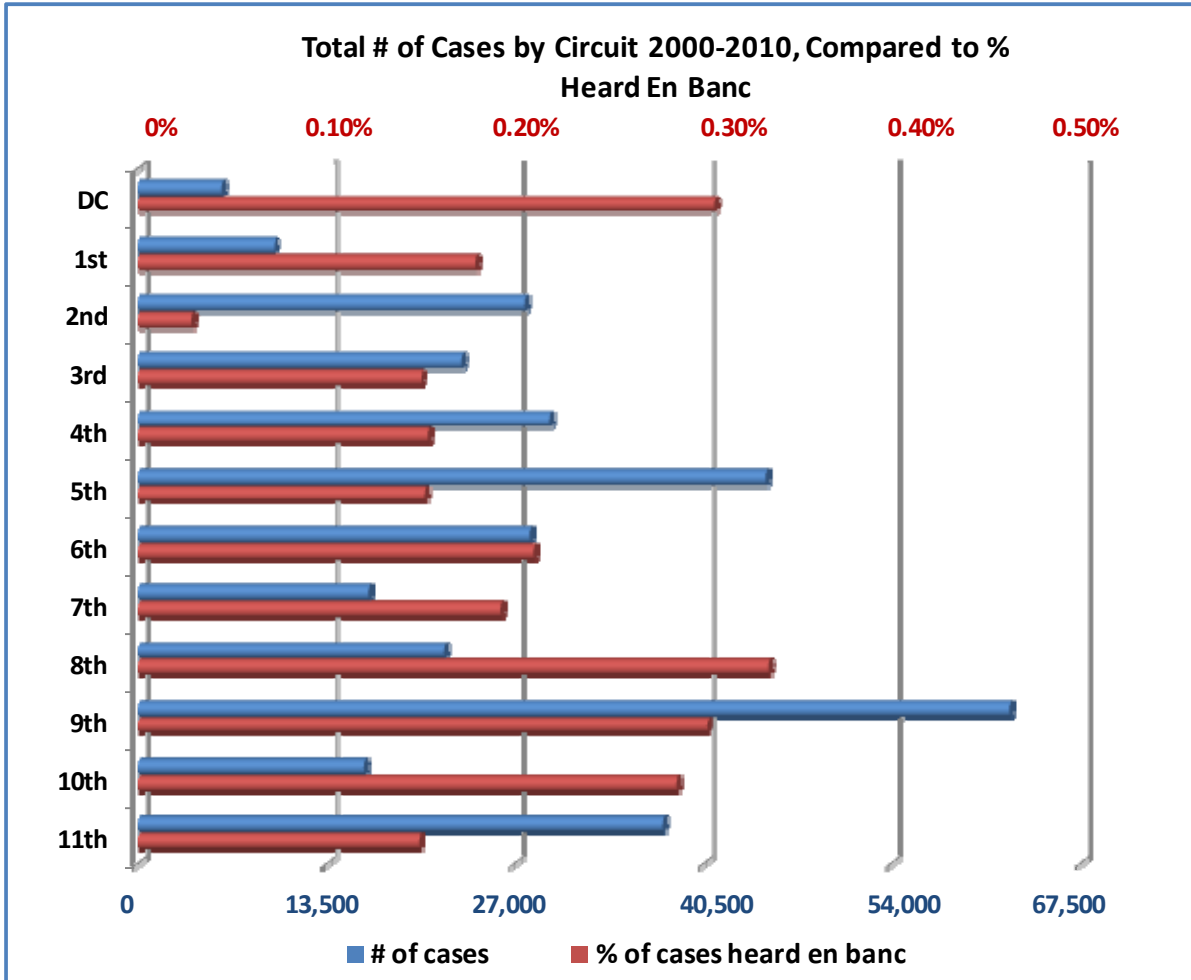
As the table above shows, circuits that handle comparable numbers of cases as the Second Circuit, such as the Third, Fourth, Sixth, and Eighth Circuits, considered several times as many cases *en banc* during the period from 2000 through 2010. Indeed, during that time, the Second Circuit was the only court whose *en banc* total was in the single digits, even though several other circuits dealt with far fewer cases. The chart that follows graphically compares the number of cases by circuit with the percentage of those cases disposed of *en banc*:

<sup>19</sup> Newman, *supra*, 60 Brook. L. Rev. at 491.

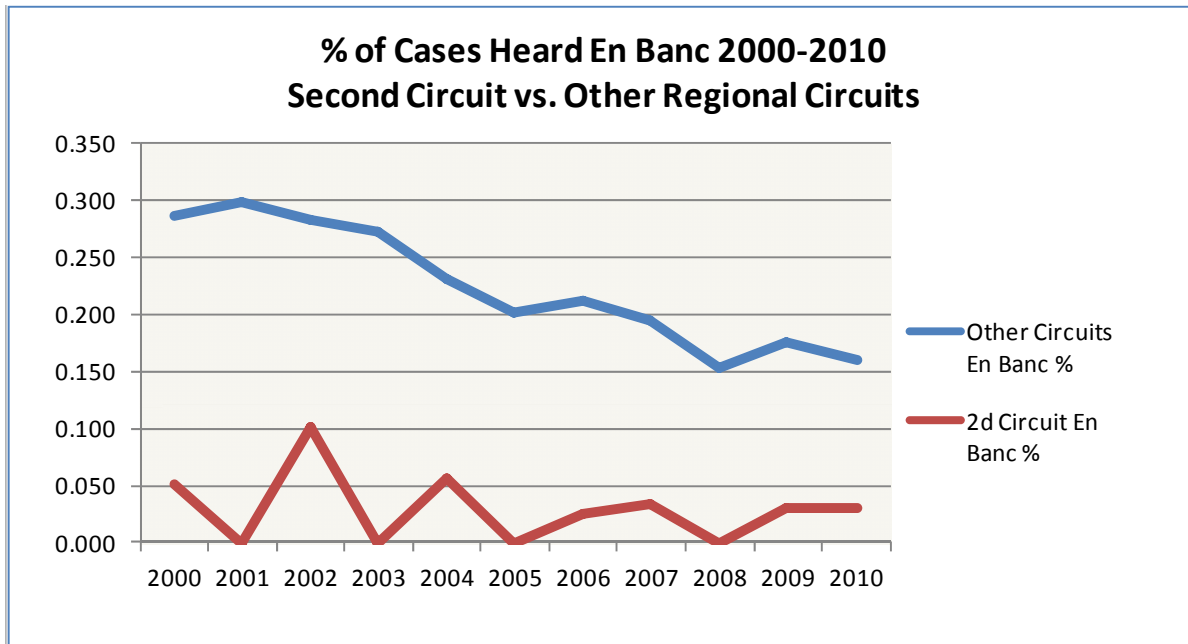
<sup>20</sup> The number of authorized judgeships in the D.C. Circuit was reduced from 12 to 11 in 2007. We use the higher figure since that is the number for the majority of the time period from 2000-2010.

<sup>21</sup> Here, we used the number of *en banc* cases we located rather than the reported statistics.

<sup>22</sup> The number of authorized judgeships in the Ninth Circuit was increased from 28 to 29 in [2009]. We use the lower figure since that is the number for the majority of the time period from 2000-2010.



Another way to look at the data is to see how the Second Circuit compares to the average percentage of cases heard *en banc*, by year:



In summary—and not surprisingly, given the court’s often-described tradition of not hearing cases *en banc*—the statistics confirm that the Second Circuit has consistently heard fewer cases *en banc* in both proportional and absolute terms than have any of the other regional Circuits.

### III. A Brief History of *En Banc* Procedure in the Federal Courts

#### A. *En Banc* Decisions in the Federal Courts Prior to Federal Rule of Appellate Procedure 35

*En banc* review is a relatively new phenomenon in the courts of appeal. Congress created the first circuit courts in the Judiciary Act of 1789, under which appellate panels comprised three judges—one circuit judge and two trial judges. The 1869 Judiciary Act provided for one circuit judgeship for each judicial circuit. In the Evarts Act of 1891, Congress created the three-tiered system—district courts, circuit courts, and the U.S. Supreme Court—we have today. Under the Evarts Act, each circuit court received three judgeships, and the Supreme Court was provided with a *certiorari* procedure, which effectively rendered the appellate courts the “court of last resort” for the vast majority of federal litigants. The 1911 Judicial Code provided more than three appellate judgeships for each circuit but made no explicit provision for an *en banc* review process. In the 1920s and 1930s, as caseloads grew, Congress continued to authorize additional judgeships, resulting in an increased potential for inconsistent panel decisions within a circuit, and thereby creating a need for an administrative solution.<sup>23</sup>

<sup>23</sup> See Richard S. Arnold, *Why Judges Don’t Like Petitions for Rehearing*, 3 J. App. Prac. & Process 29, 30-31 (2001).

The issue of *en banc* review first arose in 1937 in the Ninth Circuit. That year, a divided Ninth Circuit panel ruled on an estate tax issue in *Bank of America National Trust & Savings Association v. Commissioner*.<sup>24</sup> Then, one year later, in *Lang's Estate v. Commissioner*,<sup>25</sup> a different panel of the Ninth Circuit faced the same issue, but arrived at a different conclusion. The *Lang's Estate* panel, "faced with the situation where the decision of two judges of the circuit made a precedent for the remaining five," decided to certify the estate tax question to the Supreme Court, rather than overturn the prior panel's decision, effectively averting any kind of *en banc* review.<sup>26</sup>

Two years after *Lang's Estate*, in 1940, the Third Circuit disregarded the Ninth Circuit's *dictum* that a court could not sit *en banc*, and the full court of five judges heard *Commissioner v. Textile Mills Securities Corp.*<sup>27</sup> The Third Circuit concluded that the court had the "power to provide for sessions of the court *en banc*, consisting of all the circuit judges of the circuit in active service."<sup>28</sup> The Supreme Court granted *certiorari* in *Textile Mills* and unanimously affirmed in 1941, a mere 70 years ago, reasoning that *en banc* sittings would "make[] for more effective judicial administration," in that "[c]onflicts within a circuit will be avoided" and "[f]inality of decision in the circuit courts of appeal will be promoted."<sup>29</sup> Congress codified the power of the appellate courts to hear cases *en banc* in 1948.<sup>30</sup>

In a subsequent case, *Western Pac. R. Corp. v. Western Pac. R. Co.*, the Supreme Court observed that the courts of appeals were empowered by statute, but not required, to sit *en banc*.<sup>31</sup> Indeed, a circuit court could "devise its own administrative machinery to provide the means whereby a majority may order such a hearing."<sup>32</sup> Each circuit, therefore, had the discretion to determine whether to grant *en banc* review and to determine the criteria for granting such review. In view of the resulting uncertainty and inconsistency among the courts of appeals with regard to *en banc* review, Congress standardized the practice through the ratification of Federal Rule of Appellate Procedure 35 in 1967.<sup>33</sup>

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<sup>24</sup> 90 F.2d 981 (9th Cir. 1937).

<sup>25</sup> 97 F.2d 867 (9th Cir. 1938).

<sup>26</sup> *Id.* at 869-70.

<sup>27</sup> 117 F.2d 62, 70-71 (3d Cir. 1940) (*en banc*), *aff'd*, 314 U.S. 326 (1941).

<sup>28</sup> *Id.* at 71.

<sup>29</sup> *Textile Mills Secs. Corp.*, 314 U.S. at 334-35 (footnote omitted).

<sup>30</sup> Act of June 25, 1948, ch. 646, § 46(c), 62 Stat. 869, 871 (1949) (codified as amended at 28 U.S.C. § 46(c) (1982)).

<sup>31</sup> See 345 U.S. 247, 250-51 (1953).

<sup>32</sup> *Id.* at 250.

<sup>33</sup> See Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 Wash. L. Rev. 213, 230 & n.94 (1999).

## B. Federal Rule of Appellate Procedure 35

Federal Rule of Appellate Procedure 35 was adopted in response to the Supreme Court's suggestion in *Western Pacific Ry. Corp.* that litigants should be allowed to suggest *en banc* review.<sup>34</sup> The rule was intended from the start to make clear that a suggestion of a party did not require any action by the court.<sup>35</sup>

In its current form, Rule 35 provides that a “majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals *en banc*.” The Rule further provides that *en banc* hearings are “not favored” and “ordinarily will not be ordered” unless:

- (1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions; or
- (2) the proceeding involves a question of exceptional importance.

The rule also requires that a petition for review include an introductory statement setting out why the court should consider the request:

- (1) The petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

The Advisory Committee's Notes to the 1998 Amendment, which added the requirement of the introductory statement, made clear that the point of the statement was to focus the litigant on the “narrow grounds” that in the Committee's view supported *en banc* consideration.<sup>36</sup> The Notes do not further elaborate on the first type of conflict,

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<sup>34</sup> Fed. R. App. P. 35 advisory committee's notes, 1967 Adoption.

<sup>35</sup> *Id.*

<sup>36</sup> The rule has also been amended to address such relatively minor items as whether a response to a suggestion for *en banc* review could be filed (1979, allowing a response only when requested by the court), the timing of a request (1979), the number of copies that must be filed (1994), and the effect of a petition on the timing for filing for a writ of *certiorari* (1998, delaying the deadline for filing the *cert*

in which “consideration by the full court” is needed “to secure and maintain uniformity” of that court’s decisions. The Committee did, however, discuss at some length its observation that “[i]ntercircuit conflicts create problems”:

When the circuits construe the same federal law differently, parties’ rights and duties depend upon where a case is litigated. Given the increase in the number of cases decided by the federal courts and the limitation on the number of cases the Supreme Court can hear, conflicts between the circuits may remain unresolved by the Supreme Court for an extended period of time. The existence of an intercircuit conflict often generates additional litigation in the other circuits as well as in the circuits that are already in conflict.

The Committee recognized that “an en banc proceeding will not necessarily prevent intercircuit conflicts,” but, at the same time, noted that “an en banc proceeding provides a safeguard against *unnecessary* intercircuit conflicts.”<sup>37</sup> Notwithstanding that view, the Committee also noted that it was “not ... the Committee’s intent to make the granting of a hearing or rehearing en banc mandatory whenever there is an intercircuit conflict.”<sup>38</sup> The Committee also emphasized that “the granting of a petition is entirely within the court’s discretion.”<sup>39</sup>

In summary, the Rule places the decision to hold an *en banc* hearing squarely within the discretion of the court to which it is addressed.

#### **IV. Advantages and Disadvantages of Hearing Cases *En Banc***

The Committee recognizes that both advantages and disadvantages accompany having a circuit court hear cases *en banc*. On the one hand, by granting a rehearing *en banc*, a court may be able “to speak in a single voice ... to protect the integrity of circuit law and to reinforce institutional legitimacy by ensuring consistency and conformity in decisionmaking.”<sup>40</sup> On the other hand, there are tangible costs, in terms of both time and money, to both the judiciary and the litigants when the *en banc* review process is

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petition). The 2005 Amendment to Rule 35 made clear that “a majority of the circuit judges who are in regular active service *and who are not disqualified*” (emphasis added) should make the decision on *en banc* review.

<sup>37</sup> Fed. R. App. P. 35 advisory committee’s notes, 1998 Amendment (emphasis added).

<sup>38</sup> It also appears that Rule 35 was further amended prior to its adoption, as the amendment quoted in the comments referred to the panel decision conflicting with the authoritative decisions of “every” other United States Courts of Appeals that had addressed the issue, but the final version of the rule omitted that qualification. The Committee discussed at some length the difference between a decision that created a conflict and one that “simply joins one side of an already existing conflict,” where “a rehearing en banc may not be as important because it cannot avoid the conflict,” but the rule as amended did not reflect that viewpoint.

<sup>39</sup> Fed. R. App. P. 35 advisory committee notes, 1998 Amendment.

<sup>40</sup> George, *supra*, 74 Washington L. Rev. at 218.

undertaken.<sup>41</sup> Moreover, the laudable goal of seeking the circuit's sole voice on an issue "can produce the opposite effect by causing intracourt acrimony, ideological polarization, and lost collegiality."<sup>42</sup>

### A. The Benefits of an Authoritative Decision

One principal advantage of hearing a case *en banc* is for the court to be in a position to issue a single decision that addresses an issue definitively for the circuit, with (presumptively) the weight, authority, and force of the entire court, or at least a majority of it. Such a goal would perhaps be most effective in resolving intracircuit conflicts, which can arise through a number of different circumstances, including the inadvertent oversight of an earlier panel decision or the possibility that different panels may give different weight to a particular Supreme Court decision. Moreover, an intervening or subsequent Supreme Court decision can potentially lead to intracircuit conflicts that may be best resolved through the *en banc* review process. The goal of "speaking with one voice" would additionally be helpful in resolving intercircuit conflicts, which can arise when a panel of the court addresses an issue differently than panels in other circuits. The foregoing rationales are the fundamental bases for granting an *en banc* hearing under Federal Rule of Appellate Procedure 35, which, in pertinent parts, emphasizes either the need "to secure and maintain uniformity of the court's decisions" or the identification of "one or more questions of exceptional importance," the latter including intercircuit conflicts.

Although *en banc* decisions from one circuit are not binding upon other circuits, they may exert greater persuasive influence, particularly if the opinion attracts a strong majority of judges. As one scholar observed in a study of Supreme Court review of federal *en banc* cases, "a circuit court's *en banc* decisions are necessarily more important than panel decisions in terms of their precedential and persuasive value."<sup>43</sup> Language in the federal courts of appeals tends to confirm this intuitive conclusion. For example, in *United States v. Cole*,<sup>44</sup> a Third Circuit panel described a Sixth Circuit *en banc* opinion in *United States v. Ossa-Gallegos*<sup>45</sup> as "thorough" and found its reasoning "persuasive." In *Feit v. Ward*,<sup>46</sup> the Seventh Circuit was "particularly persuaded" by a D.C. Circuit decision, noting that the decision was "a unanimous *en banc* opinion of the court". Similarly, in *United States v. Hartford*,<sup>47</sup> the Fifth Circuit followed an Eighth

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<sup>41</sup> See *id.* & n.22 (noting that there are "material costs such as delay, judicial inefficiency, administrative expense, and attorneys' fees" and citing secondary sources discussing how *en banc* proceedings can be time-consuming, inefficient, and burdensome).

<sup>42</sup> *Id.* at 218.

<sup>43</sup> Tracey E. George & Michael E. Solimine, *Supreme Court Monitoring of the United States Courts of Appeals En Banc*, 9 Sup. Ct. Econ. Rev. 171, 197 (2001).

<sup>44</sup> 567 F.3d 110, 113 (3d Cir. 2009).

<sup>45</sup> 491 F.3d 537 (6th Cir. 2007) (*en banc*).

<sup>46</sup> 886 F.2d 848, 854 n.8 (7th Cir. 1989).

<sup>47</sup> 489 F.2d 652, 658 (5th Cir. 1974).

Circuit *en banc* decision that the court found “particularly persuasive”. Accordingly, and especially in the case of a circuit court with an acknowledged expertise in particular fields of law like the Second Circuit, the court can strive to ensure the consistency and conformity of its panel decision-making process by engaging in the *en banc* review process when necessary.

A corollary to the importance of *en banc* decisions is that *amicus* briefs are more likely to be filed in *en banc* proceedings than in regular panel appeals. This may not be an unalloyed benefit, as it requires the judges to spend additional time on the case, but presumably if the issue is important enough for *en banc* consideration, the benefit of having the additional points of view should outweigh the burden of considering the *amicus* submissions.

While unanimous or near-unanimous *en banc* opinions carry greater weight than panel opinions, *en banc* proceedings also carry the potential for splintering the members of the court, with the jurists issuing multiple opinions. This result is most troubling when there are concurring opinions, which can, ironically, obscure the very purpose of hearing a case *en banc* in the first place. Concurring opinions have the tendency of diluting the force of a majority opinion, and, in at least some cases, no single opinion garners majority support. Thus, *en banc* proceedings may at times generate more uncertainty than provide definitive guidance on an issue.

## **B. The Costs of *En Banc* Hearings**

There is little question that rehearing cases *en banc* imposes significant costs upon the courts and litigants. Most obvious is the delay to the ultimate resolution of the case. Instead of subsequent proceedings occurring after the issuance of the judgment and mandate in connection with an initial panel decision, the briefing, argument, deliberation, and opinion-writing must essentially start anew in the course of *en banc* review. The foreseeable collateral consequences of this delay include increased judicial inefficiency, rising administrative expenses, and additional attorneys’ fees, all of which must be borne by the courts and the litigants.<sup>48</sup> Moreover, frequent *en banc* review may encourage more litigants to file petitions seeking such review, further burdening the judges of the court. Further, significant resources are expended by the Clerk’s Office in organizing and administering *en banc* hearings.<sup>49</sup>

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<sup>48</sup> See Irving R. Kaufman, *Do the costs of the en banc proceeding outweigh its advantages?*, 69 *Judicature* 7, 57 (June-July 1985) (discussing delay due to *en banc* in *United States v. Gouveia*, 704 F.2d 1116 (9th Cir. 1983), *rev’d*, 467 U.S. 180 (1984); see also Newman, *supra*, 55 *Brook. L. Rev.* at 369 (“an in banc requires the time of all thirteen judges, first to consider whether the case merits in banc rehearing, then to read briefs, then to attend oral argument (often on a day when many judges would not otherwise be in New York City), then to participate in the decision-making process, and finally to prepare opinions or at least review carefully one or more opinions of colleagues”).

<sup>49</sup> See also Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 *Harv. L. Rev.* 542, 582-83 (1969) (arguing that the *en banc* process is inefficient and unwise). Local Rules of many of the circuit courts explicitly recognize the costs of dealing with petitions for rehearing *en banc* (although not the rehearing itself). See, e.g., 2d Cir. R. 35.1(d), which allows for imposition of sanctions against a party that files a “frivolous

### C. The Impact on Collegiality of *En Banc* Hearings

The possibility that *en banc* opinions could have an adverse impact on collegiality amongst the appellate jurists was one of the bases for this Committee undertaking an investigation of the state of *en banc* reviews in the Second Circuit. Much secondary literature has discussed how *en banc* proceedings have the potential to polarize courts and threaten collegiality.<sup>50</sup> For example, one author interviewed judges of the Second, Fifth, and D.C. Circuits and observed that “[t]he [*en banc*] procedure can intensify conflict and polarize courts.”<sup>51</sup> In fact, former Chief Judge Jon O. Newman of the Second Circuit wrote a series of three articles, in which he argued that “frequent use of the *in banc* practice surely poses a threat to [collegiality].”<sup>52</sup> Another author interviewed Eighth Circuit judges and noted that “[t]wo judges suggested that *en banc* cases more frequently generate ‘bad feelings’ than do panel cases . . . [which t]hey attributed . . . not to the language contained in *en banc* dissents, but rather to the dynamics of the decisionmaking process in *en banc* cases.”<sup>53</sup>

Not all commentators and judges, however, are in agreement with that view. For example, former Circuit Judge Albert B. Maris of the Third Circuit wrote that his colleagues on the bench “think that [the *en banc*] procedure has been very helpful in maintaining the very high esprit de corps which they enjoy.”<sup>54</sup> Another author interviewed Ninth Circuit judges and concluded that most consider the *en banc* process to be “healthy conflict in an exchange of views.”<sup>55</sup>

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petition for rehearing *en banc*”; 5th Cir. R. 35.1 also allows imposition of sanctions and says, in part, “en banc hearing or rehearing is not favored. Among the reasons is that each request for en banc consideration must be studied by every active judge of the court and is a serious call on limited judicial resources.”

<sup>50</sup> See George, *supra*, at 218 n.23 (citing and quoting secondary sources).

<sup>51</sup> J. Woodford Howard, Jr., *Courts of Appeals in the Federal Judicial System: A Study of the Second, Fifth, and District of Columbia Circuits*, 217 (Princeton Univ. Press 1981).

<sup>52</sup> Newman, *supra*, 55 Brook. L. Rev. at 369. See also Newman, *supra*, 60 Brook. L. Rev. 491; Newman, *supra*, 50 Brook. L. Rev. 365. Judge Irving R. Kaufman, another former judge of the Second Circuit, has also argued that, in his experience, “the negative aspects associated with *en banc* far surpass its purported benefits.” Kaufman, *supra*, 69 *Judicature* at 7.

<sup>53</sup> Douglas O. Linder, *How Judges Judge: A Study of Disagreement on the United States Court of Appeals for the Eighth Circuit*, 38 Ark. L. Rev. 479, 487 (1985). See also Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. Rev. 29, 39 (1988) (citing the possibility that *en banc* decisionmaking would lead to “acrimony among concurring and dissenting judges” as a weakness of the process); Stephen Wermiel, *Reagan and the Courts: Full-Court Review of Panel Rulings Becomes Tool Often Used by Reagan Judges Aiming to Mold Law*, Wall St. J., Mar. 22, 1988, available at 1988 WL-WSJ 475907 (quoting D.C. Circuit Chief Judge Patricia Wald’s contention that *en banc* review “heighten[s] tensions” among judges).

<sup>54</sup> Albert Branson Maris, *Hearing and Rehearing Cases In Banc*, 14 F.R.D. 91, 96-97 (1954).

<sup>55</sup> Stephen L. Wasby, *Communication in the Ninth Circuit: A Concern for Collegiality*, 11 U. Puget Sound L. Rev. 73, 108 (1987). See also Solimine, *supra*, at 40 (arguing that “[e]specially when cases are ‘important,’ the participation of all the judges may contribute to institutional harmony by permitting the entire court to participate”); Note, *En Banc Review in Federal Circuit Courts: A Reassessment*, 72

## V. The Second Circuit's Approach to Hearing Cases *En Banc*

The Second Circuit heard its first appeal *en banc* 63 years ago, in 1956.<sup>56</sup> Between 1979 and 1983, the Second Circuit voted to hear six cases *en banc*, including the historic Pentagon Papers case, *United States v. New York Times*,<sup>57</sup> which it heard *en banc* in the first instance without first assigning it to a three-judge panel. The court also heard two additional cases *en banc* pursuant to the statutory requirements of the Federal Elections Campaign Act.<sup>58</sup> From 1984 through 1988, the court heard seven cases *en banc*, and six in the period from 1989 to 1993.<sup>59</sup> More recently, the court appears to have taken an even more restrictive approach to granting *en banc* review, as in the 11-year period from 2000 through 2010, the court heard only eight cases *en banc*—a decline from an average of about 1.2 cases per year from 1979 through 1993 to a rate of about 0.7 cases per year from 2000 through 2010.

The significantly lower *en banc* rate in the Second Circuit compared with its sister circuits raises at least two questions: first, why is the rate so much lower; and second, how exactly is the Second Circuit applying the standard set forth in Rule 35 for consideration of *en banc* petitions.

### A. The “Mini En Banc” Procedure

One explanation for the small number of cases heard *en banc* by the Second Circuit may be the informal procedure its judges follow of circulating cases to each other before issuance of a panel opinion in cases that might otherwise merit *en banc* review. For example, in the recent *The Shipping Corp. of India* admiralty case, the court reversed circuit precedent by deciding that electronic fund transfers (EFTs) being processed by a bank in New York were not attachable property of the defendant and therefore could not be the basis for vesting jurisdiction in the Southern District of New York.<sup>60</sup> In order to reach that holding, the court also concluded that an earlier case had to be overturned.<sup>61</sup> Writing for a unanimous panel, Judge Cabranes “readily acknowledge[d] that a panel of our Court is ‘bound by the decisions of prior panels until such time as they are overruled either by an *en banc* panel of our Court or by the Supreme Court,’ ... and thus that it would ordinarily be neither appropriate nor possible for us to reverse an existing Circuit precedent.” But, he explained, “[i]n this case ... we have circulated this opinion to all active members of this Court prior to filing and have

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Mich. L. Rev. 1637, 1649, 1651 & n.67 (1974) (observing, based upon circuit judges' survey responses, that “[i]nstitutional harmony may be advanced by permitting judges to participate in important cases about which they have strong feelings,” but concluding that this alone would not justify an *en banc* rehearing).

<sup>56</sup> Newman, *supra*, 50 Brook. Law R. at 371.

<sup>57</sup> 444 F.2d 544 (2d Cir.) (*en banc*), *rev'd*, 403 U.S. 713 (1971)

<sup>58</sup> Newman, *supra*, 55 Brook. L. Rev. at 371-72

<sup>59</sup> Newman, *supra*, 55 Brook. L. Rev. at 356; Newman, *supra*, 60 Brook. L. Rev. at 491.

<sup>60</sup> *The Shipping Corp. of India v. Jaldhi Overseas PTE Ltd*, 585 F.3d 58, 60-61 (2d Cir. 2009).

<sup>61</sup> *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 262 (2d Cir. 2002).

received no objection.”<sup>62</sup> As he further explained in a footnote, “We refer to this process as a ‘mini-*en banc*.’”

This “mini-*en banc*” process has been in effect informally for many years. As Judge Newman wrote in 1984, it is “not the normal practice in the Second Circuit” to circulate proposed panel opinions to non-panel judges, but it does occur from time to time:

However, on infrequent occasion, a proposed panel opinion is circulated when the panel members deem it especially appropriate for all members of the court to have an opportunity to see and comment on it prior to issuance. This has occurred twelve times in the past five years in the Second Circuit. The fact of prior circulation was not always noted in the opinion.<sup>63</sup>

Indeed, it appears that at least in recent years the Second Circuit has not been shy about using the mini-*en banc* procedure. In his series of law review articles on *en banc* practices of the Second Circuit, Judge Newman documented use of the mini-*en banc* procedure 12 times in the period from 1979 through 1983 and the same number again from 1984 through 1988, and 11 times in the period from 1989 through 1993.<sup>64</sup> From 1988 to the present, the Court’s opinions show that panel opinions were circulated among the active judges approximately 70 times—roughly three times per year.

The mini-*en banc* process does appear to serve some of the purposes underlying Rule 35, at least where there is unanimity among the active judges. In many instances, the mini-*en banc* process appears to have been motivated by intervening Supreme Court authority or a statutory amendment that the panel felt overruled prior panel opinions in some way.<sup>65</sup> In other cases, the panel circulated decisions that explicitly or

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<sup>62</sup> *Shipping Corp.*, 585 F.3d at 67 (citations omitted).

<sup>63</sup> Newman, *supra*, 50 Brook. L. Rev. at 381-82. Judge Newman cites the following cases in which circulation to the full court was noted: *Trapnell v. United States*, 725 F.2d 149, 155 (2d Cir. 1983); *B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 717 (2d Cir. 1983); *United States v. Roglieri*, 700 F.2d 883, 887 n.2 (2d Cir. 1983); *United States v. Ingredient Technology Corp.*, 698 F.2d 88, 99 (2d Cir.), *cert. denied*, 103 S. Ct. 3111 (1983); *Maiorino v. Branford Sav. Bank*, 691 F.2d 89, 94 n.\* (2d Cir. 1982); *Mitsui & Co. v. American Export Lines, Inc.*, 636 F.2d 807, 821 n.\* (2d Cir. 1981); *Grimes v. United States*, 607 F.2d 6, 17 n.10 (2d Cir. 1979); *Boothe v. Hammock*, 605 F.2d 661, 665 n.5 (2d Cir. 1979).

<sup>64</sup> Newman, *supra*, 50 Brook. L. Rev. at 372; Newman, *supra*, 55 Brook. L. Rev. at 357; Newman, *supra*, 60 Brook. L. Rev. at 493.

<sup>65</sup> See, e.g., *In re Zarnel*, 619 F.3d 156, 168-69 (2d Cir. 2010) (overruling earlier 2003 panel conclusion based on U.S. Supreme Court decision in *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006)); *Frontera Res. Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Rep.*, 582 F.3d 393, 399-400 (2d Cir. 2009) (noting circulation of opinion where *Rep. of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), “arguably cast sufficient doubt on *Texas Trading [& Mill. Corp. v. Fed. Rep. of Nigeria]*, 647 F.2d 300 (2d Cir. 1981),] to justify its overruling by [the] panel”); *Caiozzo v. Koreman*, 581 F.3d 63, 66 (2d Cir. 2009) (noting circulation of opinion “because this decision effectively overrules prior decisions of [the] Court,” in light of *Farmer v. Brennan*, 511 U.S. 825 (1994)); *United States v. Huezco*, 546 F.3d 174 (2d Cir. 2008); *Appel v. Spiridon*, 531 F.3d 138, 139-40 (2d Cir. 2008) (opinion circulated where existing

at least arguably overruled prior circuit opinions, even without an intervening Supreme Court decision or change in statute.<sup>66</sup> In a smaller number of cases, a panel has circulated an opinion apparently based on the potential interest of the full court, even if the opinion did not purport to overrule any prior authority.<sup>67</sup> In at least one case, *Arbor*

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precedent overruled in light of *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591 (2008)); *United States v. Regalado*, 518 F.3d 143, 146-47 (2d Cir. 2008) (per curiam) (opinion circulated in light of *Kimbrough v. United States*, 552 U.S. 85 (2007), and *Gall v. United States*, 552 U.S. 38 (2007), where prior Second Circuit opinion in *United States v. Castillo*, 460 F.3d 337 (2d Cir. 2006), "may have been over-read or misread"); *United States v. Parkes*, 497 F.3d 220, 230 (2d Cir. 2007) (circulating opinion that abrogated *United States v. Fabian*, 312 F.3d 550 (2d Cir. 2002), in light of intervening Supreme Court decisions); *United States v. Garcia*, 413 F.3d 201, 205 n.2 (2d Cir. 2005) (circulating opinion in light of *United States v. Booker*, 543 U.S. 220 (2005)); *United States v. Crosby*, 397 F.3d 103, 105 n.1 (2d Cir. 2005) (same); *Schulz v. I.R.S.*, 395 F.3d 463, 465 n.1 (2d Cir. 2005) (overruling prior circuit precedent in light of *United States v. Bisceglia*, 420 U.S. 141 (1975)); *Adeleke v. United States*, 355 F.3d 144, 155 (2d Cir. 2004) (circulating opinion abrogating prior decision whose conclusion had been rejected by the Supreme Court in *Kosak v. United States*, 465 U.S. 848 (1984)); *United States v. Walker*, 353 F.3d 130, 134 n.2 (2d Cir. 2003) (circulating opinion that arguably departed from prior circuit decisions due to statutory amendment); *Taylor v. Vt. Dept. of Educ.*, 313 F.3d 768, 786 n.13 (circulating opinion in light of *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002)); *New Pacific Overseas Group (U.S.A.) Inc. v. Excal Int'l Dev. Corp.*, 252 F.3d 667, 670 n.1 (2d Cir. 2001) (circulating opinion overruling prior decisions in light of *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198 (1999)).

<sup>66</sup> See, e.g., *Huezo*, 546 F.3d at 180 (noting circulation, and holding that the use of "not overwhelming evidence" and "slight evidence" formulations for the government's burden of proof in conspiracy cases "should be discontinued"); *id* at 184 (Newman, J., concurring) (noting circulation again, and stating the panel's unanimous view that the "slight" or "not overwhelming" formulations "are incorrect, entered federal jurisprudence improvidently, have been routinely repeated without consideration of their infirmity, and should be discarded"); *United States v. Abad*, 514 F.3d 271 (2d Cir. 2008) (circulating opinion clarifying, and perhaps partially overruling, *United States v. Sorrentino*, 72 F.3d 294 (2d Cir. 1995)); *United States v. Brutus*, 505 F.3d 80, 86-87 & nn. 3, 5 (2d Cir. 2007) (circulating opinion that resolved the tension between two prior Second Circuit opinions from 1976 and 2006); *Slayton v. Amer. Exp. Co.*, 460 F.3d 215, 227-28 & nn. 12, 13 (2d Cir. 2006) (opinion circulated that overruled prior Second Circuit decisions, in agreement with decisions of other circuit courts); *United States v. Gonzalez*, 420 F.3d 111, 132 & n.18 (2d Cir. 2005) (circulating opinion that "might ... be seen as a departure from" earlier rulings); *Tesser v. Bd of Educ.*, 370 F.3d 314, 320 n.3 (2d Cir. 2004) (circulating opinion where prior "decisions and their progeny are in tension" with rule stated in opinion); *Zerilli-Edelglass v. New York City Transit Auth.*, 333 F.3d 74, 81 n.7 (2d Cir. 2003) (circulating opinion where prior decisions adopted conflicting standards of review for district court decisions to deny equitable tolling); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 355 & n.13 (2d Cir. 2000) (circulating opinion resolving possible conflict between prior circuit decisions); *Hernandez v. Conriv Realty Assocs.*, 182 F.3d 121, 122 n.1 (2d Cir. 1999) (circulating opinion conflicting with holding of prior decision in the same matter).

<sup>67</sup> See, e.g., *United States v. Mincey*, 380 F.3d 102, 103 n.1 (2d Cir. 2004) (circulating opinion addressing criminal sentencing questions while an en banc certif<sup>67</sup> *Shipping Corp.*, 585 F.3d at 67 (citations omitted).

<sup>67</sup> Newman, *supra*, 50 Brook. L. Rev. at 381-82. Judge Newman cites the following cases in which circulation to the full court was noted: *Trapnell v. United States*, 725 F.2d 149, 155 (2d Cir. 1983); *B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 717 (2d Cir. 1983); *United States v. Roglieri*, 700 F.2d 883, 887 n.2 (2d Cir. 1983); *United States v. Ingredient Technology Corp.*, 698 F.2d 88, 99 (2d Cir.), *cert. denied*, 103 S. Ct. 3111 (1983); *Maiorino v. Branford Sav. Bank*, 691 F.2d 89, 94 n.\* (2d Cir. 1982); *Mitsui & Co. v. American Export Lines, Inc.*, 636 F.2d 807, 821 n.\* (2d Cir. 1981); *Grimes v. United States*, 607 F.2d 6, 17 n.10 (2d Cir. 1979); *Boothe v. Hammock*, 605 F.2d 661, 665 n.5 (2d Cir. 1979).

*Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, a panel opinion was amended in response to a petition for rehearing *en banc*, even after the petition for rehearing by the panel had been denied.<sup>68</sup>

If every opinion that was subject to the mini-*en banc* procedure in the Second Circuit had instead been the subject of a full *en banc* rehearing, the Second Circuit's *en banc* rates could approach those of some of the other circuits, depending on how one tabulates the number of *en banc* and mini-*en banc* cases in each circuit. In these cases, where the active judges appear to be in unanimous agreement even without further briefing or argument by the litigants, it is admittedly doubtful that much would be gained from the time and expense involved in a full *en banc* rehearing. This is particularly so when the overruling of prior precedent is necessitated by an intervening Supreme Court ruling or statutory amendment.

This mini-*en banc* procedure does not, however, explain all differences between the Second Circuit and its siblings. The Seventh Circuit, for example, follows a similar procedure, which it explains in its local rules:

#### CIRCUIT RULE 40. Petitions for Rehearing

(e) *Rehearing Sua Sponte before Decision*. A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en

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<sup>67</sup> Newman, *supra*, 50 Brook. L. Rev. at 372; Newman, *supra*, 55 Brook. L. Rev. at 357; Newman, *supra*, 60 Brook. L. Rev. at 493.

<sup>67</sup> See, e.g., *In re Zarnel*, 619 F.3d 156, 168-69 (2d Cir. 2010) (overruling earlier 2003 panel conclusion based on U.S. Supreme Court decision in *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006)); *Frontera Res. Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Rep.*, 582 F.3d 393, 399-400 (2d Cir. 2009) (noting circulation of opinion where *Rep. of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), “arguably cast sufficient doubt on *Texas Trading [ & Mill. Corp. v. Fed. Rep. of Nigeria]*, 647 F.2d 300 (2d Cir. 1981),] to justify its overruling by [the] panel”); *Caiozzo v. Koreman*, 581 F.3d 63, 66 (2d Cir. 2009) (noting circulation of opinion “because this decision effectively overrules prior decisions of [the] Court,” in light of *Farmer v. Brennan*, 511 U.S. 825 (1994)); *United States v. Huezco*, 546 F.3d 174 (2d Cir. 2008); *Appel v. Spiridon*, 531 F.3d 138, 139-40 (2d Cir. 2008) (opinion circulated where existing precedent overruled in light of *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591 (2008)); *United States v. Regalado*, 518 F.3d 143, 146-47 (2d Cir. 2008) (per curiam) (opinion ication of related questions to the Supreme Court was pending); *United States v. Carrillo*, 229 F.3d 177, 186 & n.6 (2d Cir. 2000) (noting that it was unnecessary to consider the continuing authority of prior circuit precedents under the facts of the particular case, but nonetheless noting circulation of the opinion and all judges’ agreement); *In re FCC*, 208 F.3d 137 (2d Cir. 2000) (circulating opinion announcing rule concerning the rejection of an appearance by counsel, where such appearance may provoke a judge’s recusal); *In re Flannery*, 183 F.3d 143, 149 (2d Cir. 1999) (circulating case concerning application of rules regarding attorney discipline for failure to prosecute a criminal appeal).

<sup>68</sup> 493 F. 3d 110 at 183 n. 1 (2d Cir. 2007) (amended July 12, 2007) (“After due consideration of Plaintiffs-Appellants’ petition for rehearing, which is denied, we have *sua sponte* amended our opinion.”); see also *Arbor Hill Concerned Citizens Neighborhood Ass’n v. County of Albany*, 522 F. 3d 182 (2d Cir. 2008) (amended again on April 10, 2008, after which rehearing *en banc* was denied).

banc the issue of whether the position should be adopted. In the discretion of the panel, a proposed opinion which would establish a new rule or procedure may be similarly circulated before it is issued. When the position is adopted by the panel after compliance with this procedure, the opinion, when published, shall contain a footnote worded, depending on the circumstances, in substance as follows:

This opinion has been circulated among all judges of this court in regular active service. (No judge favored, or, A majority did not favor) a rehearing en banc on the question of (e.g., overruling *Doe v. Roe*.)

The Third Circuit takes the opposite view from the Seventh Circuit: it circulates drafts of all “precedential opinions and not precedential opinions that are not unanimous” to all active judges, thereby permitting any non-panel member to request *en banc* consideration.<sup>69</sup> Further, the Third Circuit specifically disavows any “mini-*en banc*” procedure:

It is the tradition of this court that the holding of a panel in a precedential opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a precedential opinion of a previous panel. Court en banc consideration is required to do so.<sup>70</sup>

The contrasting rules of the Third and Seventh Circuits have no discernable effect on their *en banc* rates: the Third Circuit, which requires *en banc* rehearing to overturn a prior opinion, actually has a slightly lower *en banc* rate than does the Seventh Circuit, which allows for the “mini-*en banc*” procedure, and both have *en banc* rates more than five times higher than the Second Circuit.<sup>71</sup>

Even though the Second Circuit’s rate of “*en banc*” consideration increases when mini-*en banc* decisions are taken into account, the informal mini-*en banc* process does differ in important respects from the *en banc* process provided by Rule 35. The informal nature of this practice results in some loss of transparency. Litigants and potential *amici* generally have no notice of mini-*en banc* consideration, for instance, and there is no apparent mechanism for litigants to address arguments being discussed behind the scenes. Indeed, it is likely that relatively few litigants or the public are even aware of the mini-*en banc* process, since there is no mention of the process in the local rules, the court’s publicly-available Internal Operating Procedures, or indeed anywhere else on the court’s website. Yet the court obviously does not intend to keep its “mini-*en banc*” procedure secret, since it is mentioned in so many cases and at least some law review articles. The Committee believes information about this process should be incorporated into the local rules so that it is not limited to those who happen to do in-depth research

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<sup>69</sup> 3d Cir. I.O.P. 5.5.4 (2010).

<sup>70</sup> *Id.* at 9.1.

<sup>71</sup> In the years 2000-2010, the Third Circuit, with 14 judges, heard 36 cases *en banc* out of 23,292 total dispositions, for a rate of 0.155%; the Seventh Circuit, with 11 judges, heard 33 cases *en banc* out of 16,618 total dispositions, for a rate of 0.199%.

or stumble across it in some published opinion or article—particularly as the process may operate to displace the formal *en banc* procedure codified at Rule 35. As shown by the Seventh Circuit’s local rule, it would not be difficult for the Second Circuit to set out the “mini-*en banc*” procedure in a local rule or publicly available internal operating procedure, and the Committee recommends that the court do so.

## **B. How the Second Circuit Exercises the Discretion Afforded By Rule 35: the *Ricci* Case**

A second question raised by the significantly lower *en banc* rate in the Second Circuit is whether the Second Circuit is applying Rule 35 in the same way as the other circuits to its review of *en banc* petitions. As discussed earlier, Rule 35 clearly commits the question of whether a case should be reviewed *en banc* to the discretion of the appellate judges. But if all of the courts are applying the same standard, why are the outcomes so different?

The three concurring and two dissenting opinions in the *Ricci* case—all of the opinions were either concurrences or dissents from the form order denying rehearing—may help to explain the Second Circuit’s outlier status, as they express varying views of what it means to exercise discretion under Rule 35.

Judge Katzmann’s short concurring opinion, joined in by the majority of voting judges and thus perhaps the most significant, emphasized the “Circuit’s longstanding tradition of general deference to panel adjudication—a tradition which holds whether or not the judges of the Court agree with the panel’s disposition of the matter before it.”<sup>72</sup> After reference to the circuit’s history of “proceed[ing] to a full hearing *en banc* only in rare and exceptional circumstances,” Judge Katzmann noted that the Supreme Court had before it a petition for *certiorari*, and he took the position that “the district court’s opinion, the panel’s per curiam opinion, and opinions concurring with and dissenting from the decision denying rehearing *en banc*” together “sharply defined” the issues so that the Supreme Court could decide whether to grant *certiorari*.

Judge Calabresi’s separate concurring opinion referred to the court’s “purely discretionary power to review this case *en banc*.” In his view, *en banc* review would be “particularly inappropriate” because the parties had not addressed what he saw as a key issue before either the district court or the panel:

Difficult issues should be decided only when they must be decided, or when they are truly well presented. When they need not be decided—and rehearing *en banc* is always a matter of choice, not necessity—it is wise to wait until they come up in a manner that helps, rather than hinders, clarity of thought. That is not so in this case.<sup>73</sup>

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<sup>72</sup> *Ricci*, 530 F.3d at 88-89. Judges Pooler, Sack, Sotomayor, and B.D. Parker are shown as joining Judge Katzmann’s concurrence. In addition, Judge Calabresi’s concurrence says, “I join entirely Judge Parker’s opinion concurring in the denial of a rehearing *en banc*.” *Id.* at 88.

<sup>73</sup> *Id.*

The last of the concurring opinions, by Judge Parker and joined in by four other judges, disputed the view taken in Judge Cabranes' dissent that *en banc* review was needed because controlling authority was otherwise lacking.<sup>74</sup>

Essentially, the *Ricci* opinions in favor of denying *en banc* give four reasons for doing so:

- tradition (Judge Katzmann);
- the opinions issued with the denial of *en banc* review sharply define the theories so that the Supreme Court can decide whether to grant *certiorari*, the petition for which had already been filed (Judge Katzmann);
- the decision is “purely discretionary” and review should not be granted where the parties have not addressed the key issue (Judge Calabresi);
- contrary to the assertion of the dissenters, controlling authority is not lacking (Judge Parker).

On the dissenting side, Judge Cabranes, joined by five other judges, would have granted rehearing *en banc* because “[t]his appeal raises important questions of first impression in our Circuit—and indeed, in the nation—regarding the application of the Fourteenth Amendment's Equal Protection Clause and Title VII's prohibition on discriminatory employment practices.”<sup>75</sup> In his view, the case presented exactly the kind of question of “exceptional importance” that warranted *en banc* review under Rule 35.<sup>76</sup>

Chief Judge Jacobs joined Judge Cabranes' dissent and also submitted a strongly-worded dissent for which he did not solicit concurrences.<sup>77</sup> His opinion characterized Judge Calabresi, who had joined in all three of the concurring opinions, as “saying, in effect, that when it comes to *in banc* review, discretion should be leavened by caprice. As applied to this case, that means that there might be discretionary grounds for denying *in banc* review were it not already foreclosed by tradition.”<sup>78</sup> Judge Jacobs then raised the issue of what it means for the court to exercise its discretion, arguing that the “occluded view” taken by Judge Calabresi “runs counter to the criteria set down for our guidance in Rule 35.”<sup>79</sup> In particular, he pointed out that “the decision to grant or deny *in banc* review is like any other discretionary

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<sup>74</sup> *Id.* at 90-92. Judges Calabresi, Pooler, Sack and Sotomayor joined Judge Parker's concurrence.

<sup>75</sup> *Id.* at 93. Chief Judge Jacobs and Judges Raggi, Wesley, Hall, and Livingston joined Judge Cabranes' dissent from the denial of rehearing *en banc*.

<sup>76</sup> *Id.* at 94.

<sup>77</sup> *Id.* at 92.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 93. In a footnote, Judge Jacobs also dispatched the argument that the court was limited to “particular legal theories advanced by the parties,” taking the position that the court instead “retains the independent power to identify and apply the proper construction of governing law.” *Id.* at 92, n.2.

decision in the sense that discretion should be exercised, not elided or stuck in a default position.”<sup>80</sup>

Judge Jacobs echoed the position taken in the 1998 Advisory Committee notes to Rule 35, pointing out that *en banc* review could help to avoid unnecessary intercircuit conflicts by ensuring that a decision on an issue of exceptional importance that might divide the circuits could in fact “command a majority vote of the appeals court as a whole.”<sup>81</sup> He noted that “[i]f issues are important enough to warrant Supreme Court review, they are important enough for our full Court to consider and decide on the merits,” although he conceded that *en banc* rehearing might not be warranted, even on important issues, if most of the judges on the Circuit concurred with the panel opinion. But, he concluded, “to rely on tradition to deny rehearing in banc starts to look very much like abuse of discretion.”

### C. The Validity of the *Ricci* Rationales for Denying *En Banc* Rehearing

The Committee shares the view articulated by Judge Jacobs in *Ricci* that the language of Rule 35, and not simply circuit tradition, must govern the Second Circuit’s decisions on petitions for *en banc* review. The vast difference in *en banc* rates between the Second Circuit and all of its peers indicates that something different is happening when the judges of the Second Circuit consider whether to grant *en banc* review. If the difference in *en banc* rates is explained by the Court’s mini-*en banc* procedure, then the Court should make that procedure explicit. The Committee does not believe that the cases decided by the Second Circuit are any less difficult, or any less important, than those decided by other circuits, so that cannot explain the difference in the *en banc* rates. Clearly—and as is explicitly admitted in Judge Katzmann’s opinion in the *Ricci* case and in Judge Newman’s law review articles—the court’s tradition places a heavy thumb on the scale when the judges of the Second Circuit are weighing whether to grant *en banc* review.

As we have noted, Rule 35 provides only that *en banc* review ordinarily will not be granted unless *en banc* consideration is necessary to secure or maintain uniformity of the court’s decisions or the proceeding involves a question of exceptional importance. The rule does not set forth any other standards for the exercise of the Court’s discretion. However, as the Second Circuit has recognized in other contexts, “it is ... legal error for a court to take the unusual step of expressly abdicating the discretion that it has been duly entrusted by law to exercise.”<sup>82</sup>

We agree with the concern expressed by Judge Jacobs in *Ricci* that the reliance on tradition alone to deny rehearing *en banc* borders on an abuse of discretion. It is difficult to understand why a “tradition” of not granting *en banc* review should be

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *United States v. Campo*, 140 F.3d 415, 418-19 (2d Cir. 1998). *Cf. Foman v. Davis*, 371 U.S. 178, 182 (1962) (the “outright refusal to grant [leave to amend a complaint] without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion ....”).

considered a valid reason in and of itself for denying review. Tradition may, of course, be the result of concerns for cost or collegiality, or a preference for achieving the purposes of Rule 35 through other means—all of which are presumably legitimate factors for the court to consider. It certainly is not obvious, however, that collegiality is actually enhanced by avoiding *en banc* proceedings, if heated disputes are simply displaced to the court’s denials of rehearing *en banc*.

As for the rationale that the multiple opinions issued in connection with the denial of rehearing *en banc* are sufficient to delineate the issues so that the Supreme Court could decide whether to grant *certiorari* (on a petition that had already been filed), the Committee has two concerns. First, if rehearing is denied there is no opportunity for the parties to brief or argue the issues on rehearing, so there is no means for the parties to address the concerns that the court may have. Further, as Judge Newman has noted, even “[t]he opinion of an equally divided court of appeals [sitting *en banc*] might well be useful to the Supreme Court in deciding whether to grant *certiorari*.”<sup>83</sup> Second, in a time when the Supreme Court grants only a tiny fraction of the *certiorari* petitions presented to it and places fewer cases on its docket, the Second Circuit cannot anticipate that the Supreme Court will take any particular case and thereby produce the kind of authoritative decision that a strong *en banc* decision might otherwise provide. Third, as discussed below, the willingness of the prestigious Second Circuit to hear “questions of exceptional importance” *en banc* can provide significant guidance to other appellate and district courts.

#### **D. Areas in Which the Second Circuit May Have Particular Influence**

As mentioned above, one benefit of hearing a case *en banc* is that the decision is likely to have more influence on courts outside the Second Circuit. We see two areas in particular—securities and immigration law—where the Second Circuit has particular expertise and thus could lend guidance to other courts.

##### **1. The Potential Influence of Second Circuit *En Banc* Decisions in Securities Law**

The Second Circuit’s historical reluctance to consider cases *en banc* may be worth revisiting in areas, such as securities law, where other courts recognize this court’s expertise.

The Third Circuit has observed, for instance, that the Second Circuit is one “with especial expertise in matters pertaining to securities,” and Justice Blackmun once described the Second Circuit as the “Mother Court” for securities law.<sup>84</sup> A recent law review article described “[t]he phenomenon of taking Second Circuit securities decisions

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<sup>83</sup> Newman, *supra*, 60 Brook. L. Rev. at 501.

<sup>84</sup> See *SEC v. Kasser*, 548 F.2d 109, 115 (3d Cir. 1977); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting)

as authoritative even outside the Second Circuit is well documented,” and collecting supporting authorities.<sup>85</sup>

In light of both the Second Circuit’s acknowledged expertise in securities law and the more persuasive and authoritative nature of *en banc* decisions generally, the Committee believes the court may wish to consider the broader purposes that could be served by delivering a greater number of *en banc* decisions in securities law.

Such opinions may, for instance, provide a de facto equivalent to Supreme Court authority for district courts and courts of appeals nationwide, particularly on issues that the Supreme Court may be more reluctant to address due to its increasingly scarce docket space or its more limited technical expertise in this field. Scholars have noted that rulings by courts of appeals “deemed to enjoy expertise in a particular subject matter” “may have the effect of foreclosing further percolation [of an issue] because of the deference other courts will accord the ruling.”<sup>86</sup> *En banc* opinions by these same courts could be expected to enjoy even greater deference. To the extent such deference eliminates inter-circuit conflicts or renders them immaterial, these issues may become less “*cert* worthy” or otherwise ripe for the Supreme Court’s attention.<sup>87</sup> Before he was appointed to the district court bench in Connecticut, Mark Kravitz speculated that the Supreme Court’s denial of *certiorari* in a PSLRA pleading case indicated its willingness to permit an unresolved circuit split where the Second Circuit had “carefully analyzed and addressed” the issue, with the belief that the conflict “may resolve itself”.<sup>88</sup> Thus, increased attention to securities law by the full court may carry broad value by both freeing up valuable space on the Supreme Court’s docket, and by building a far richer body of authority in securities law than the Supreme Court could generate on its own.

## 2. The Potential Influence of Second Circuit *En Banc* Decisions in Immigration Law

Immigration is another area in which the Second Circuit’s expertise may warrant a greater willingness to hear cases *en banc*. Since 2001, the Second Circuit has seen an extraordinary increase in the number of appeals from the Board of Immigration Appeals (“BIA”), a sub-division of the Department of Justice. The BIA decides administrative appeals from the nation’s immigration judges, and appeals from the BIA are taken directly to the courts of appeals.<sup>89</sup> In 2001, 170 BIA appeals were filed with the Second Circuit.<sup>90</sup> Nationally, filings of appeals of BIA decisions climbed 153% from

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<sup>85</sup> Frederick Schauer, *Authority and Authorities*, 94 Va. L. Rev. 1931, 1948 & n.57 (2008).

<sup>86</sup> Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court’s Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 728 n.171 (1984).

<sup>87</sup> *See id.*

<sup>88</sup> Mark R. Kravitz, *Development in the Second Circuit 1999-2000*, 33 Conn. L. Rev. 945, 986 (2001)

<sup>89</sup> 8 U.S.C. § 1252.

<sup>90</sup> 2004 Annual Report, Chief Judges’ Report.

2001 to 2002, and another 99% from 2002 to 2003.<sup>91</sup> Due to venue provisions in the immigration law, most of these increases were felt in the Second and Ninth Circuits.<sup>92</sup> In 2005, the Second Circuit received 4,568 immigration appeals, over half of the court's docket.<sup>93</sup> According to the Second Circuit's 2005 Annual Report, about 75% of the immigration appeals pending in the Second Circuit were filed by petitioners of Chinese national origin and claimed asylum based on China's family planning policies.

To handle this immense influx of cases, in 2005, for the first time, the Second Circuit instituted a Non-Argument Calendar. Pursuant to Local Rule 34.2, BIA appeals in which a party seeks review of a claim for asylum, withholding of removal, withholding or deferral of removal under the Convention Against Torture, or a motion to reopen or reconsider a claim for asylum or withholding, are reviewed by Staff Attorneys and placed on the Non-Argument Calendar unless the court orders otherwise.

Due to the large number of BIA appeals in the Second Circuit, the similarity of issues, and the Second Circuit's use of the Non-Argument Calendar, increased use of *en banc* decisions in this area could provide necessary guidance and clarity to the BIA, staff attorneys, and litigants. This could, in turn, potentially lead to a reduction in the number of BIA appeals to the Second Circuit.

For example, in 2007, the Second Circuit, sitting *en banc*, held in *Lin* that the unambiguous text of the immigration statute that provided refugee status to applicants who had undergone forced abortions or involuntary sterilization did not provide automatic eligibility to the spouse, boyfriend, or fiancé of such a person.<sup>94</sup> This decision overruled prior Second Circuit precedent that had relied upon a prior decision of the BIA which held that such automatic eligibility extended to spouses, although the BIA had also held that automatic eligibility did not extend to boyfriends or fiancés. Shortly thereafter, in *Shi v. Attorney General*,<sup>95</sup> the Third Circuit ordered the Department of Justice to address whether it adhered to the BIA's interpretation or joined the Second Circuit's construction of the law. In response to this request, the Attorney General directed the BIA to refer to him its decision in *Shi* for review pursuant to 8 C.F.R. § 1003.1(h)(1)(i) and, in 2008, the Attorney General issued a decision abrogating the BIA's prior rule and adopting the Second Circuit's position.<sup>96</sup> This position has since been adopted by every other circuit that has addressed the issue.<sup>97</sup> Further, a search in Westlaw shows that the *Lin* decision has since been cited in over 600 cases.

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> 2005 Annual Report, Chief Judges' Report.

<sup>94</sup> *Lin v. United States Dep't of Justice*, 494 F.3d 296 (2d Cir. 2007).

<sup>95</sup> No. 06-1952, 2007 U.S. App. LEXIS 17927 (3d Cir. July 27, 2007).

<sup>96</sup> See *Matter of J-S-*, 24 I&N. Dec. 520 (A.G. 2008).

<sup>97</sup> See *Ni v. Holder*, 613 F.3d 415 (4th Cir. 2010); *Yu v. Att'y Gen.*, 568 F.3d 1328, 1332-33 (11th Cir. 2009); *Jin v. Holder*, 572 F.3d 392, 397 (7th Cir. 2009); *Lin-Zheng v. Att'y Gen.*, 557 F.3d 147, 157 (3d Cir. 2009) (*en banc*); see also *Dong v. Holder*, 587 F.3d 8 (1st Cir. 2009).

Thus, the Second Circuit's willingness to hear this "question of exceptional importance" *en banc* resulted in a nationally-accepted definitive construction of the law without Supreme Court review.

## **VI. Conclusion**

The Committee believes that the Second Circuit is correct to grant *en banc* review only rarely. Yet the discrepancy between the rate at which the Second Circuit hears cases *en banc* and the rate at which its sister courts grant such review leads inescapably to the conclusion that the Second Circuit is applying its discretion in a systematically different fashion than the other courts. The use of the "mini-*en banc*" procedure may be one reason for the lower frequency of *en banc* review, but if the court is to rely on that procedure then it should increase transparency by letting practitioners know that it may choose to do so. Amending the local rules to include reference to the "mini-*en banc*" procedure would be a simple matter.

In addition, this Committee is concerned that the court is using the debate over whether *en banc* review should be granted as a substitute for actual consideration *en banc*, and that it is at least occasionally leaving issues unresolved for anticipated Supreme Court consideration when it should instead first consider the cases as a full court.

The Committee appreciates the burden on the Court of rehearing cases *en banc*. Nevertheless, the Committee is of the view that reliance on "tradition" should not be used as a means of avoiding granting *en banc* consideration in those cases where the "mini-*en banc*" procedure is not employed and, as Rule 35 recites, *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions, or the proceeding involves a question of exceptional importance.

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