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## **Appellate Procedure - Effect of Recusals on Voting for Rehearing in Banc - Affirmative Vote of Majority of All Circuit Judges in Regular Active Service, Rather Than Majority of Judges Unrecused from Such Vote, Is Required to Grant Rehearing**

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1985]

APPELLATE PROCEDURE—EFFECT OF RECUSALS ON VOTING FOR  
REHEARING IN BANC—AFFIRMATIVE VOTE OF MAJORITY OF ALL  
CIRCUIT JUDGES IN REGULAR ACTIVE SERVICE, RATHER THAN  
MAJORITY OF JUDGES UNRECUSED FROM SUCH VOTE, IS  
REQUIRED TO GRANT REHEARING.

*Lewis v. University of Pittsburgh* (1984)

The United States courts of appeals ordinarily hear and decide cases in panels of three judges.<sup>1</sup> However, these courts have the authority to hear or rehear cases in banc, i.e., by all of the circuit judges in regular active service within the circuit.<sup>2</sup> Section 46(c) of title 28 of the United States Code and rule 35(a) of the Federal Rules of Appellate

1. See Comment, *In Banc Procedures in the United States Courts of Appeals*, 43 *FORDHAM L. REV.* 401, 401 (1974) (courts of appeals normally sit in panels of three judges). Three-judge panels are mandated by statute. See 28 U.S.C. § 46(c) (1982) (cases shall be heard by panel of “not more than three judges”). For the text of § 46(c), see *infra* note 3.

2. See 28 U.S.C. § 46(c) (1982). For the text of § 46(c), see *infra* note 3. The Evarts Act of 1891 created the courts of appeals and provided that such courts would “consist of three judges.” Comment, *supra* note 1, at 402 (citing Evarts Act of 1891, ch. 517, § 2, 26 Stat. 826. (1891)). Section 117 of the Judicial Code of 1911 preserved the three-judge limitation on the federal courts of appeals. Comment, *supra* note 1, at 402 (citing Judicial Code of 1911, ch. 231, § 117, 36 Stat. 1131, 1131 (1911)). Although § 118 of the Judicial Code increased the number of judgeships in three circuits, only one circuit prior to 1938 had ever heard a case with more than three judges sitting. Comment, *supra* note 1, at 402 (citing Judicial Code of 1911, Ch. 231, § 118, 36 Stat. 1131, 1131 (1911)). In 1938, the Ninth Circuit held that § 117 precluded the hearing and consideration of a case by more than three judges. *Lang’s Estate v. Commissioner*, 97 F.2d 867, 869 (9th Cir.), *certified question answered*, 304 U.S. 264 (1938). In the meantime, the Third Circuit began deciding certain cases while sitting in banc. See *Commissioner v. Textile Mills Sec. Corp.*, 117 F.2d 62, 67-71 (3d Cir. 1940) (in banc), *aff’d*, 314 U.S. 326 (1941). The Supreme Court resolved the conflict by holding unanimously in *Textile Mills* that § 118 impliedly amended § 117 so that a United States court of appeals consisting of more than three circuit judges could sit and decide a case in banc. 314 U.S. 326, 331-35.

The exercise of the power to sit in banc has been left to the discretion of the courts of appeals. See *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 259 (1953). Although the courts of appeals are not compelled to adopt any particular procedure in exercising their power to sit in banc, any procedure that is adopted must be “clearly explained, so that members of the court and litigants in the court may become thoroughly familiar with it.” *Id.* at 267. See also *Shenker v. Baltimore & O.R.R. Co.*, 374 U.S. 1, 4-5 (1963) (Third Circuit’s Internal Operating Procedures were properly within that court’s discretion as delineated in *Western Pac. R.R.*).

Notwithstanding the discretion accorded courts of appeals, in banc hearings and rehearings are rare. See Harper, *The Breakdown in Federal Appeals*, 70 *A.B.A. J.* 56, 56 (February 1984). Excluding the Federal Circuit, only 66 of the 13,217 cases decided by all of the United States courts of appeals in the year ending June 30, 1983, were granted such rehearing. *Id.*

(908)

Procedure provide that a court of appeals may exercise its power to sit in banc by an affirmative vote of a majority of its circuit judges in regular active service.<sup>3</sup> However, a problem arises when one or more circuit judges disqualify themselves from voting on whether to sit in banc:<sup>4</sup> Should a "majority" of "judges . . . in regular active service" be construed as a majority of all of the circuit judges in active service, or as a majority of only those judges who actually participate in the vote to hear or rehear in banc?<sup>5</sup>

This issue was addressed recently by Judge Adams of the United States Court of Appeals for the Third Circuit in a statement sur petition

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3. 28 U.S.C. § 46(c) (1982); FED. R. APP. P. 35(a). Section 46(c) provides in pertinent part:

Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . , unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. . . . A court in banc shall consist of all circuit judges in regular active service.

28 U.S.C. § 46(c). Section 46(c) is a codification of the Supreme Court's holding in *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326 (1941). See 28 U.S.C. § 46(c) reviser's notes; *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 250-51 (1953). For a discussion of the *Textile Mills* and *Western Pac. R.R.* decisions, see *supra* note 2.

Rule 35(a) provides in pertinent part: "A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc." FED. R. APP. P. 35(a). Like § 46(c), Rule 35(a) is essentially a codification of *Textile Mills*. See Comment, *supra* note 1, at 401 n.1.

Senior circuit judges are not considered circuit judges "in regular active service." See 28 U.S.C. § 294(b) (1982). However, a senior judge is permitted to sit as a member of an in banc court if he was a member of the panel that heard the case initially. See 28 U.S.C. § 46(c).

4. See 28 U.S.C. § 455 (1982). Section 455 requires that a federal justice, judge or magistrate disqualify himself where "his impartiality might reasonably be questioned," or more specifically, where 1) the judge has a personal bias towards a party "or personal knowledge of disputed evidentiary facts concerning the proceeding"; 2) either the judge or a prior associate served as an attorney or as a material witness in the matter; 3) the judge served as an adviser or material witness in the matter pursuant to government employment; 4) the judge or a member of his family has a financial interest in the subject matter of, or in a party to, the proceeding; 5) a member of the judge's family is a party, a lawyer or a witness in the matter. *Id.*

The 1974 amendment to § 455 has sparked criticism, most notably from federal judges, who are subject to the statute's restrictions. See Harper, *supra* note 2, at 57. Some judges, for example, have described the new rules governing judicial disqualification as overreactions to the Watergate scandal and the rejection of Clement Haynsworth's nomination to the United States Supreme Court. See *id.* Another criticism that has been levelled at § 455 is that in certain types of cases, the same circuit judges have been routinely disqualified so that too few judges have remained to grant rehearing in banc. *Id.* at 56-57.

5. Compare *Arnold v. Eastern Air Lines*, 712 F.2d 899 (4th Cir. 1983) (majority of judges who actually participate in vote to hear or rehear in banc), *cert. denied*, 104 S. Ct. 703 (1984), with *Zahn v. International Paper Co.*, 469 F.2d 1033, 1040 (2d Cir. 1972) (majority of all circuit judges in regular active service), *aff'd*, 414 U.S. 291 (1973). See also Harper, *supra* note 2, at 57.

for rehearing in *Lewis v. University of Pittsburgh*.<sup>6</sup> In *Lewis*, two of the ten active judges on the Third Circuit recused themselves from voting on the appellant's petition for rehearing.<sup>7</sup> Of the eight remaining judges who participated in the voting, five voted for rehearing and three voted against it.<sup>8</sup> The Third Circuit's Internal Operating Procedures require an affirmative vote of a majority of all active judges, whether recused or not, in order for rehearing in banc to be granted.<sup>9</sup> Thus, because only five of the six active judges necessary to sustain a petition for rehearing in banc in the Third Circuit voted for rehearing in *Lewis*, the petition was denied.<sup>10</sup>

In a statement sur petition for rehearing, Judge Adams expressed his uneasiness with the "procedural dilemma" revealed by the rejection of the petition.<sup>11</sup> He was troubled that a panel decision supported by only a small minority of the court could, because of recusals, be insulated from in banc reconsideration.<sup>12</sup> Judge Adams recognized that under the Third Circuit's procedure for voting on petitions for rehear-

6. 725 F.2d 910 (3d Cir. 1983), *reh'g and reh'g in banc denied*, 725 F.2d 928 (3d Cir. 1984) (Adams, J., statement sur petition for rehearing), *cert. denied*, 105 S. Ct. 266 (1984). In *Lewis*, a black woman brought an employment discrimination action under title VII of the Civil Rights Act of 1964 and under 42 U.S.C. §§ 1981, 1983, against the University of Pittsburgh and its bookstore, alleging that she had not been promoted because of her race. 725 F.2d at 912 (citing title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (1976) and 42 U.S.C. §§ 1981, 1983 (1976)). The district court entered judgment for the defendants based on the jury's finding that plaintiff had not been denied promotion on account of race. *Id.* at 914. A Third Circuit panel, one judge dissenting, affirmed the lower court's decision, holding that 1) title VII and the civil rights statutes all require a showing of "but for" causation in employment discrimination suits; 2) it was not enough for plaintiff to show that race was a "substantial" or "motivating" factor leading to defendant's decision not to promote her; and 3) the jury was properly instructed on the correct test to be employed in determining employment discrimination, notwithstanding that the instructions referred to race in terms of "the determinative factor." *Id.* at 920.

The plaintiff filed a petition for rehearing which the court denied. *Id.* at 928 (Adams, J., statement sur petition for rehearing). See *infra* notes 7-10 and accompanying text. Pursuant to the denial of rehearing in banc, Judge Adams, the dissenting judge in the panel decision, issued a statement sur petition for rehearing discussing the particular Third Circuit procedural rule which had caused plaintiff's petition to be denied. 725 F.2d at 928-30 (Adams, J., statement sur petition for rehearing).

7. 725 F.2d at 929 (Adams, J., statement sur petition for rehearing). Judge Aldisert (now Chief Judge) and Judge Weis recused themselves.

8. *Id.* at 928 (Adams, J., statement sur petition for rehearing). Judges Adams, Gibbons, Higginbotham, Sloviter, and Becker voted to grant rehearing in banc, while then Chief Judge Seitz and Judges Hunter and Garth opposed the petition. *Id.*

9. 3d CIR. INTERNAL OPERATING P. 9B(4). Procedure 9B(4) provides that "rehearing in banc shall be ordered only upon the affirmative votes of a majority of the circuit judges of this court in regular active service."

10. 725 F.2d at 929 (Adams, J., statement sur petition for rehearing).

11. *Id.* at 928 (Adams, J., statement sur petition for rehearing).

12. *Id.* at 929 (Adams, J., statement sur petition for rehearing).

ing in banc, a judge who disqualifies himself is in effect counted as a vote against rehearing.<sup>13</sup>

After discussing the goal of intracircuit uniformity underlying the current practice,<sup>14</sup> Judge Adams noted that 28 U.S.C. § 46(c) could be construed as excluding disqualified judges from the quorum from which a majority vote is determined.<sup>15</sup> He also examined the recent trend among United States courts of appeals to grant in banc consideration upon an affirmative vote of a majority of nonrecused judges.<sup>16</sup> How-

13. *Id.* at 928 (Adams, J., statement sur petition for rehearing). Judge Adams reasoned that under the Third Circuit's approach each recusal of a judge reduces the number of votes needed to *deny* a petition for rehearing in banc, but has no effect on the number required to grant such rehearing. *Id.* at 929. Thus, disqualification has the effect of a vote for denial. The consequence of this effect, Judge Adams posited, was that a panel decision supported by only a small minority of the court could be insulated from reconsideration in banc. *Id.*

14. *Id.* Judge Adams explained that the main reason for the Third Circuit's procedure was that "it insures that major developments in the law of the Circuit reflect the participation of all members of the Court." *Id.* Judge Adams hypothesized that if recused judges were not counted as part of the quorum, and five of the 10 active judges of the Third Circuit were disqualified from a particular case, settled law of the circuit could be overturned by an affirmative vote of as few as three members of the 10-member court. *Id.* Such a result, Judge Adams argued, would be contrary to Congress' and the Third Circuit's goal of intracircuit uniformity, which underlies the authorization of in banc procedures. *Id.* & nn. 2-4 (citing H.R. REP. No. 1246 (to accompany H.R. 3390), 77th Cong., 1st Sess. (1941); *Hearings on S.1053 Before a Subcommittee of the Senate Judiciary Committee*, 77th Cong., 1st Sess. 14-16 (1941), and quoting 3d CIR. INTERNAL OPERATING P. 8C introductory explanation).

15. 725 F.2d at 929-30 (Adams, J., statement sur petition for rehearing) (citing 28 U.S.C. § 46(c) (1982)). For a discussion of § 46(c), see *supra* note 3. Judge Adams observed that the phrase, "judges . . . in regular active service," presumably was intended to have the same meaning in both sentences of the statute. 725 F.2d at 929 (Adams, J., statement sur petition for rehearing). More specifically, Judge Adams noted that under the second sentence of the statute, a court sitting in banc cannot include recused judges. *Id.* Consequently, he explained, reference in the first sentence to a majority of the "judges . . . in regular active service" could similarly be construed to exclude disqualified judges. See *id.* at 929-30 (Adams, J., statement sur petition for rehearing). Thus, he concluded, the first sentence of § 46(c) could conceivably mean "judges . . . in regular active service [who are not disqualified in a particular case]." *Id.* (bracketed phrase by Judge Adams).

16. 725 F.2d at 930 (Adams, J., statement sur petition for rehearing). Judge Adams noted that this new approach has been adopted by the Fourth, Seventh, Eighth, and Ninth Circuits. *Id.* (citing *Arnold v. Eastern Air Lines*, 712 F.2d 899 (4th Cir. 1983) (vote of five judges in favor of rehearing in banc, four judges against, and one disqualified constitutes order for rehearing in banc by majority of circuit judges in regular active service for purposes of § 46(c)), *cert. denied*, 104 S. Ct. 703 (1984); *Ford Motor Co. v. Federal Trade Comm'n*, 673 F.2d 1008, 1012 n.1 (9th Cir. 1982) (Reinhardt, J., dissenting) (under Ninth Circuit's "limited en banc rule," rehearing is granted only when votes are cast in favor of such rehearing by majority of active members of court who are not disqualified from voting), *cert. denied*, 459 U.S. 999 (1982); 8TH CIR. R. 16(a) ("A majority of the judges of this Court in regular active service who are actively participating in the affairs of the court and who are not disqualified in the partic-

ever, Judge Adams concluded that this new approach was not a better alternative to the traditional approach maintained by the Third Circuit.<sup>17</sup> He noted his concern with the lack of uniformity among the courts of appeal as to which approach to use,<sup>18</sup> and suggested that either Congress or the Supreme Court provide "definitive guidance" at an early occasion in order to resolve the intercircuit conflict.<sup>19</sup>

In reviewing Judge Adams' statement sur petition for rehearing, it is submitted that whether each circuit should decide for itself what constitutes a majority in voting on petitions for a hearing or rehearing in banc, or whether the Supreme Court or Congress should decide the matter, depends on the need for intercircuit uniformity. On the one hand, divergent views among the circuits would seem to defeat the federal judicial system's goal of uniform procedure.<sup>20</sup> On the other hand, the United States courts of appeals maintain distinct, individual internal operating procedures concerning a number of administrative matters which do not appear to have caused any prejudice to litigants in the federal circuits.<sup>21</sup>

The better position, it is suggested, is to allow each circuit to decide for itself what constitutes a majority for purposes of voting on in banc petitions. The Supreme Court has held that the procedures employed in the exercise of the power to sit in banc rest in the discretion of the individual courts of appeals.<sup>22</sup> In addition, the fact that both the tradi-

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ular case or controversy may order a hearing or rehearing en banc."); Announcement of Amended Seventh Circuit Operating Procedures (April 18, 1983) ("A simple majority of the voting active judges is required to grant a rehearing en banc.").

17. 725 F.2d at 930 (Adams, J., statement sur petition for rehearing). Judge Adams stated: "While I acknowledge that sound reasons have been advanced to support this new trend, I am not persuaded that it represents the ideal accommodation of the conflicting demands of fairness to the individual litigant and stability in a circuit's decisional law." *Id.*

18. *Id.*

19. *Id.* Judge Adams noted that "the current lack of uniformity among the circuits on this important issue creates the appearance of rights determined by happenstance." *Id.* He added that the Third Circuit should not use its rulemaking power to adopt the new trend. *Id.*

20. The goal of uniformity in the federal judiciary is illustrated by Congress' adoption of uniform rules. See, e.g., FED. R. CIV. P.; FED. R. CRIM. P.; FED. R. EVID.; FED. R. APP. P. These rules, it is submitted, insure that a litigant in federal court receives equal procedural protections regardless of the federal court in which his action is filed. As a result, federal court litigants have clear notice of the procedures to which they are subject, and are discouraged from "forum shopping."

21. See, e.g., 3d CIR. INTERNAL OPERATING P.

22. *Shenker v. Baltimore & O.R.R. Co.*, 374 U.S. 1, 4-5 (1963); *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 259 (1953). For a discussion of *Shenker* and *Western Pacific*, see *supra* note 2. The Supreme Court has not relied on any statutory authority in holding that the determination of the procedures for exercising the power to sit in banc rested with the courts of appeals. See *Western Pacific*, 345 U.S. at 259; *Shenker*, 374 U.S. at 4-5. It is therefore

tional and the new approaches possess fair and reasonable justifications weakens the argument that uniformity is crucial.<sup>23</sup> Finally, regardless of the approach adopted by a court of appeals for determining what constitutes a majority, in banc hearings and rehearings are rare occurrences<sup>24</sup> and have always been intended to be utilized only under extraordinary circumstances.<sup>25</sup>

While autonomy in determining each circuit's operating procedures is desirable, increasing criticism directed at both methods of determining a majority for purposes of section 46(c) may force Congress to attempt adoption of a uniform solution. In fashioning such a solution, Congress would have to squarely face the two interpretations of what constitutes a majority for purposes of section 46(c). Under the traditional approach endorsed by several of the courts of appeals, a petition for hearing or rehearing in banc may be granted only by an affirmative vote of a majority of all of the circuit judges in regular active service within the circuit, whether or not any such judges have been disqualified.<sup>26</sup> The trend in other circuits is to grant in banc consideration upon

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suggested that the holdings in these cases merely expressed the Court's belief that the circuits should be free to fashion their own rules for internal procedure without unnecessary Supreme Court intervention, provided that such procedures do not exceed constitutional or statutory authority, or otherwise conflict with congressional action. Thus, it is submitted that the Supreme Court's holding should not be interpreted as a bar to congressional intervention in the matter.

The Supreme Court has not addressed the issue in the more than 20 years since *Shenker* was decided, and the Court does not appear willing to change its position of deference to the circuits. See Harper, *supra* note 2, at 59. See also *In Re American Broadcasting Cos.*, 104 S. Ct. 538 (1983), *denying mandamus to Clark v. American Broadcasting Cos.*, 684 F.2d 1208, 1226 (6th Cir. 1982).

23. For a discussion of the justifications for both approaches, see *supra* notes 13-14 & *infra* notes 26-27.

24. See Harper, *supra* note 2, at 56 (discussing rare number of instances in which federal courts of appeals have granted hearing or rehearing in banc).

25. *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960). See *infra* note 26.

26. See, e.g., *Clark v. American Broadcasting Cos.*, 684 F.2d 1208, 1226 (6th Cir. 1982) (rehearing in banc denied where five judges voted in favor of petition, four judges voted against and one was disqualified), *mandamus denied sub nom.*, *In Re American Broadcasting Cos.*, 104 S. Ct. 538 (1983); *Copper & Brass Fabricators Council, Inc. v. Department of Treasury*, 679 F.2d 951 (D.C. Cir. 1982), *reh'g denied*, unpublished order No. 81-2091 (D.C. Cir. Aug. 3, 1982) (rehearing in banc denied where five judges voted in favor of rehearing, three judges voted against and two did not participate); *Zahn v. International Paper Co.*, 469 F.2d 1033, 1040 (2d Cir. 1972) (petition for rehearing in banc denied where four judges voted in favor of rehearing, three voted against and one was disqualified), *aff'd*, 414 U.S. 291 (1973). The First Circuit's position is unclear. See *United States v. Martorano*, 620 F.2d 912, 920 (1st Cir. 1980) (vote by majority of three regular active judges to grant rehearing in banc is all that § 46(c) requires), *cert. denied*, 449 U.S. 952 (1980).

The underlying rationale for the traditional view is that in banc consideration is designed to insure that crucial questions regarding the law of the circuit are decided by a majority of the full court so that intracircuit uniformity is pre-

an affirmative vote of a majority of only the nonrecused judges.<sup>27</sup>

served. See *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689-90 (1960). In *American-Foreign*, the Supreme Court, per Justice Stewart, stated:

The principal utility of determinations by the courts of appeals in banc is to enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby secure uniformity and continuity in its decisions, while enabling the court at the same time to follow the efficient and time-saving procedure of having panels of three judges hear and decide the vast majority of cases as to which no division exists within the court.

*Id.* (quoting Maris, *Hearing and Rehearing Cases In Banc*, 14 F.R.D. 91, 96 (1954) (explaining Third Circuit's procedure)). Justice Stewart added: "*En banc* courts are the exception, not the rule. They are convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit." 363 U.S. at 689.

Similar policy reasons were articulated in the *Zahn* decision. In *Zahn*, a petition for rehearing in banc was denied where only three of the eight judges of the Second Circuit in regular active service had voted to deny rehearing. 469 F.2d at 1040. Four judges had voted in favor of the petition, while one judge had disqualified himself. *Id.* In an opinion supportive of the policy which resulted in the denial of the petition in *Zahn*, Judge Mansfield argued that § 46(c) and Rule 35(a) are designed to achieve intracircuit uniformity by assuring that crucial questions concerning the law of the circuit will be decided by the vote of a majority of the full court rather than by a three-judge panel. *Id.* at 1041 (Mansfield, J., on petition for rehearing en banc). For the text of § 46(c) and of Rule 35(a), see *supra* note 3. Judge Mansfield argued further that the Second Circuit's strict majority requirement curtailed the court's ever-increasing workload by preventing a minority of the members of the court from compelling reconsideration in banc. *Id.*

27. See, e.g., *Arnold v. Eastern Air Lines*, 712 F.2d 899 (4th Cir. 1983) (vote of five judges in favor of rehearing in banc, four judges against and one disqualified constitutes order for rehearing in banc by majority of circuit judges in regular active service for purposes of § 46(c)), *cert. denied*, 104 S. Ct. 703 (1984); *Ford Motor Co. v. Federal Trade Comm'n*, 673 F.2d 1008, 1012 n.1 (9th Cir. 1982) (Reinhardt, J., dissenting) (under Ninth Circuit's "limited en banc rule," rehearing is granted only when votes are cast in favor of such rehearing by majority of active members of court who are not disqualified from voting); 8TH CIR. R. 16(a) ("A majority of the judges of this court in regular active service who are actively participating in the affairs of the court and who are not disqualified in the particular case or controversy may order a hearing or rehearing en banc."); Announcement of Amended Seventh Circuit Operating Procedures (Apr. 18, 1983) ("A simple majority of the voting active judges is required to grant a rehearing en banc.").

The new trend was discussed at length by the Fourth Circuit in the *Arnold* decision. 712 F.2d at 899-912. Interpreting a 1963 United States Supreme Court decision, the Fourth Circuit concluded that courts of appeals, when voting on requests for rehearing in banc, may select for themselves whether a majority vote shall be based on a quorum consisting of all judges in regular active service, including those disqualified for purposes of the particular case, or on a quorum consisting of only those judges in regular active service who have not been so disqualified. 712 F.2d at 902 (citing *Shenker v. Baltimore & O.R.R. Co.*, 374 U.S. 1 (1963)). For a discussion of *Shenker*, see *supra* note 2. The dissent in *Arnold* disputed the majority's interpretation of *Shenker*. 712 F.2d at 909-12 (Widener, J., concurring and dissenting). According to the dissent, the Supreme Court in *Shenker* had merely affirmed the Third Circuit's decision below that an absolute majority was required to order rehearing in banc. *Id.* at 909 (Widener,

J., concurring and dissenting). Moreover, Judge Widener explained that because the factual situation in *Arnold* was identical to that presented in *Shenker*, the Supreme Court had had the opportunity to endorse the *Arnold* majority's position, but had chosen not to do so. *Id.* at 909-10 (Widener, J., concurring and dissenting). Finally, because adoption of the *Arnold* majority's position would have changed the outcome in *Shenker*, Judge Widener reasoned that the Supreme Court had effectively rejected that position. *Id.* It should be noted, however, that *Shenker* was decided before recusals became a chronic problem and before the debate arose over the two views. For a discussion of the history of the recusal problem, see *supra* note 4 and accompanying text. Thus, it is submitted that *Shenker* is not helpful in resolving the issue.

The *Arnold* court next analyzed § 46(c) and held that the vote of a majority of the undisqualified circuit judges in regular active service was sufficient to order rehearing in banc. 712 F.2d at 901. To legitimize its break with tradition, the Fourth Circuit noted that its holding rested on a construction of § 46(c), whereas courts that adhered to the traditional approach relied exclusively on policy considerations. *Id.* at 904 (citing *Zahn v. International Paper Co.*, 469 F.2d 1033 (2d Cir. 1972), *aff'd*, 414 U.S. 291 (1973)). For a discussion of the inapplicability of § 46(c) to the resolution of the issues involved here, see *infra* notes 32-35 and accompanying text.

The court further argued that a disqualified judge under the traditional approach in effect counts as a vote against rehearing, thereby affecting the outcome of the case sought to be reheard in contravention of Congress' intent in enacting the rules for disqualification of federal judges. 712 F.2d at 904-05. See 28 U.S.C. § 455 (1982) (rules governing disqualification of federal judges). For a discussion of the federal judge disqualification statute, see *supra* note 4. However, as the dissent in *Arnold* noted, under the new approach advocated by the majority a disqualified judge in effect counts as a vote in favor of rehearing. See 712 F.2d at 912 (Widener, J., concurring and dissenting). This is because a single recusal from a pool of 10 voting judges would reduce the number of votes required to grant a petition for rehearing in banc while having no effect on the number required to deny the petition. See *id.* Thus, under the new approach adopted by the *Arnold* majority, a recused judge could still affect whether the case would be reheard despite his not participating in the vote, and therefore, neither the traditional nor the new approach can be fully reconciled with Congress' intent to prevent recused judges from affecting the cases in which they are disqualified. See *id.* See also 28 U.S.C. § 455 (1982).

It should be noted that, notwithstanding Judge Widener's analysis in *Arnold*, a recusal (or multiple recusals) under the new approach will tend to have a more equitable effect on the number of votes required to grant or deny a petition for rehearing than under the traditional approach. Moreover, as the table below indicates, the effect of recusals under either approach varies depending on whether the circuit is composed of an odd or even number of judges. Under the traditional approach, the number of affirmative votes required to grant in banc consideration remains constant regardless of the number of recusals, while the number of votes necessary to deny consideration decreases by one for each recusal (except that in odd-numbered circuits, the "single decrease per recusal" begins with the second recusal). Under the new approach, the number of votes required to grant in banc consideration decreases by one for every two recusals (in odd-numbered circuits, the "single decrease per two recusals" begins with the second recusal), while the number of votes required to deny consideration decreases at the same rate (except that in even-numbered circuits, the "single decrease per two recusals" begins with the second recusal). These general rules are illustrated in the table below.

Although both approaches are plagued with inequities,<sup>28</sup> it is submitted that in light of policy considerations the traditional view is the better view. In banc consideration is designed to allow a majority of the full court to overrule aberrant panel decisions to maintain intracircuit

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UNDER TRADITIONAL APPROACH

No. of Recusals	10 Judges in Circuit		13 Judges in Circuit	
	No. of Votes to Grant	No. of Votes to Deny	No. of Votes to Grant	No. of Votes to Deny
0	6	5	7	6
1	6	4	7	6
2	6	3	7	5
3	6	2	7	4

UNDER NEW APPROACH

No. of Recusals	10 Judges in Circuit		13 Judges in Circuit	
	No. of Votes to Grant	No. of Votes to Deny	No. of Votes to Grant	No. of Votes to Deny
0	6	5	7	7
1	5	5	7	6
2	5	4	6	6
3	4	4	6	5
4	4	3	5	5
5	3	3	5	4

One further point raised by the dissent in *Arnold* deserves mention. Judge Widener noted that the 1973 Judicial Conference had submitted to Congress proposed legislation amending § 46(c) so as to follow the new trend. 712 F.2d at 911 (Widener, J., concurring and dissenting) (citing 1973 *Reports of the Proceedings of the Judicial Conference of the United States* 47). According to Judge Widener, Congress' failure to incorporate the proposal in subsequent amendments to § 46(c) indicates its refusal to recognize the position of the proponents of the new view. *Id.*

Proponents of the new trend have presented a number of arguments to rebut the traditionalists' basic premises. First, it has been argued that it is more important that crucial issues receive in banc consideration than that the vote of a single judge could block such consideration. Comment, *supra* note 1, at 420 (citing *IBM v. United States*, 480 F.2d 293, 305 (2d Cir. 1973) (Timbers, J., dissenting), *cert. denied*, 416 U.S. 995 (1974)). See also *Zahn*, 469 F.2d at 1042 (Timbers, J., dissenting) ("It is especially unfortunate here where the [traditional] rule operates to permit a *minority* of the active judges of the Court to deny en banc reconsideration of one of the more pressing issues of our day.") (emphasis by Judge Timbers). Moreover, in the absence of rehearing in banc, the law of the circuit is being shaped by a minority of the court, namely, a three-judge panel. See Note, *Federal Jurisdiction and Practice*, 47 ST. JOHN'S L. REV. 339, 346 (1972). Finally, although the alternative to the traditional rule permits a minority of the full court to order rehearing in banc, the decision to order such rehearing is not a decision on the merits of the case. See *id.*; Comment, *supra* note 1, at 423.

28. For a discussion of the inequities of the two approaches, see *supra* notes 26-27 and accompanying text.

uniformity.<sup>29</sup> The new trend not only defeats this underlying purpose of hearings and rehearings in banc, but it could allow one minority (a majority of those judges who have not been disqualified) to overrule the decision of another (the panel which presided over the case initially) on the merits of a case.<sup>30</sup>

Although section 46(c) may be construed to support the emerging view, it is submitted that the statute sheds little light on the problem.<sup>31</sup> The statutory analysis employed by the Fourth Circuit in *Arnold* and by Judge Adams in *Lewis* is logical,<sup>32</sup> but it is doubtful that such analysis reflects congressional intent in enacting section 46(c).<sup>33</sup> Congress could not have anticipated the problem created by recusals when it enacted section 46(c) because recusals did not become a chronic occurrence until many years later.<sup>34</sup> Thus, it is submitted that the statute should not be used as a definitive guide to resolving the problem of what constitutes a "majority" for purposes of voting on a petition for rehearing in banc.

In conclusion, there does not appear to be a solution to the problem of determining what constitutes a majority for purposes of section 46(c) that does not present both advantages and disadvantages. Commentators have criticized both of the methods currently used.<sup>35</sup> Although the courts of appeals are also divided over which method is more appropriate,<sup>36</sup> it is submitted that the choice of method properly should be left to the discretion of the individual circuits,<sup>37</sup> and that divergent views among the circuits would cause no substantial prejudice to litigants.<sup>38</sup> In light of the need for uniform decisional law within each circuit, it is further submitted that of the two methods currently em-

29. See *supra* note 26.

30. While a vote on a petition for rehearing in banc is not a vote on the merits, those judges who recuse themselves from the vote on the petition are indicating that they have some conflict of interest which will disqualify them from participating in the in banc hearing. Accordingly, only the nonrecused judges who voted on the petition will vote on the merits of the case. Thus, for example, where a court of appeals of 10 active judges votes four to three in favor of rehearing in banc, with three recusals, the in banc court will comprise the same seven voting judges. In such a hypothetical case, an "in banc" decision, which can be overturned only by a contrary ruling by the Supreme Court, conceivably could be made by only four of the 10 active judges of the circuit.

31. For the text of § 46(c), see *supra* note 3.

32. See *supra* note 15 and accompanying text.

33. For a discussion of the legislative intent underlying § 46(c), see *supra* notes 2-3 & 14.

34. See *supra* note 4.

35. For a discussion of the merits of the two approaches, see *supra* notes 26-30 and accompanying text.

36. See *supra* notes 26-27 and accompanying text.

37. For a discussion of the suggestion that each circuit retain the discretion to decide which method to use, see *supra* note 22 and accompanying text.

38. See *supra* notes 24-25 and accompanying text.

ployed by the courts of appeals, the traditional method is preferable.<sup>39</sup>

*Neal J. Blaher*

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<sup>39</sup>. For a discussion of the advantages of the traditional approach, see *supra* notes 26-27.