# Defining the "Majority" Vote Requirement in Federal Rule of Appellate Procedure 35(a) for Rehearings En Banc in the United States Courts of Appeals

*Report to the Judicial Conference*
*Advisory Committee on Appellate Rules*

Marie Leary

Federal Judicial Center

February 2002

# Contents

# I. Introduction

## A. Background

Federal Rule of Appellate Procedure 35(a) and section 46(c) of Title 28 of the United States Code both require a vote of "[a] majority of the circuit judges who are in regular active service" to hear a case en banc.[1] However, neither Rule 35(a), section 46(c), nor any other provision defines whether judges who are disqualified,[2] recused,[3] or otherwise unavailable (e.g., because of illness or personal circumstances) are to be included when calculating the majority of circuit judges needed to hear a case en banc.

Furthermore, it appears that neither Congress nor the U.S. Supreme Court have provided definitive guidance on the appropriate interpretation of the majority requirement of section 46(c).[4] Congress did not define the word "majority" when it enacted section 46(c) in 1948:[5] "There is no indication that the use of the word 'majority' in 46(c) is anything more than a general prescription of the means by which judges may order en banc hearings."[6] In 1973, the Judicial Conference pro-

---

1. Fed. R. App. P. 35(a) provides in 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 en banc." Fed. R. App. P. 35(a). Section 46(c) provides in 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." 28 U.S.C. § 46(c) (1982).

2. All federal judges, including justices of the U.S. Supreme Court, are disqualified from sitting in cases where their impartiality reasonably may be questioned, including situations where the judge has a personal or family financial interest in the proceeding, has personal knowledge of evidentiary facts, or has acted as counsel or a witness in the matter. 28 U.S.C. § 455(b) (1988).

3. Recusal differs from disqualification in that recusal is a voluntary abstention.

4. *See* James J. Wheaton, Note, *Playing With Numbers: Determining the Majority of Judges Required to Grant En Banc Sittings in the United States Courts of Appeals*, 70 Va. L. Rev. 1505 (1984); Thomas J. Waters, Note, *The En Banc Requirements of 28 U.S.C. § 46(c): What Constitutes a Majority in the Event of a Recusal or Disqualification?*, 11 J. Legis. 373 (1984).

5. The House Report generally referred to preserving the Supreme Court's holding in Textile Mills Sec. Corp. v. Commissioner of Internal Revenue, 314 U.S. 326 (1941), as the limited purpose for the new section. H.R. Rep. No. 306, 80th Cong., 1st Sess. A6–A7 (1947). The Court in *Textile Mills* held that notwithstanding the three-judge panel limitation, a court of appeals sitting en banc could properly consist of a greater number of judges. 314 U.S. at 333.

6. Wheaton, *supra* note 4, at 1513. *See also* Waters, *supra* note 4, at 383 ("The House Report to the 1948 amendment clearly demonstrates that Congress did not intend to consider how a majority was to be determined in the event of a recusal or disqualification.").

posed an amendment to section 46(c) that would have "[made] clear that a majority of the judges in regular active service who are entitled to vote should be sufficient to en banc a case," and would have excluded recused judges when determining what constitutes the majority of circuit judges necessary to convene en banc.[7] A bill including the Conference proposal died without hearings or other action.[8] In September 1984, the Judicial Conference rescinded its 1973 proposal and suggested that each court of appeals clearly describe its en banc voting procedures by formulating a standard that would make litigants aware of the definition of "majority" that applied in that court.[9]

Only three Supreme Court cases[10] have addressed the procedural requirements of 28 U.S.C. § 46(c), and of these only one, in 1963, came close to deciding the section 46(c) majority requirement issue. In *Shenker v. Baltimore & Ohio Railroad Co.*, after a three-judge panel of the Third Circuit reversed the district court, the full court of appeals denied a petition for a rehearing en banc pursuant to a poll that yielded four votes to rehear the case en banc, two votes to deny, and two abstentions.[11] The Supreme Court upheld the court of appeal's decision to deny rehearing en banc even though four of the six circuit judges *voting* favored en banc rehearing.[12] The Court concluded that it was clearly within the court of appeal's discretion to require a ma-

---

7. Administrative Office of the U.S. Courts, 1973, Reports of the Proceedings of the Judicial Conference of the United States (1974).

8. *See* Wheaton, *supra* note 4, at 1516–17 & n.68 ("[T]he inaction of Congress with regard to the 1973 Judicial Conference proposal renders its legislative history inconclusive; although Congress took no action to reject the absolute majority interpretation, neither did it endorse that reading of the statute."). Congress amended Section 46 twice, once in 1978 (*see* Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1629 (codified in scattered sections of 28 U.S.C.)), and again in1982 (*see* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified in scattered sections of 28 U.S.C.)). In both instances the majority requirement issue of section 46(c) was not addressed, but since the amendments focused on different topics (i.e., creating additional judgeships to ease the growing caseload of federal courts and clarifying the appropriate role for senior circuit judges in rehearings en banc), it does not support a conclusion that Congress was satisfied with the status quo. *See* Waters, *supra* note 4, at 385–88.

9. *Judicial Conference Moves a Wide-Ranging Agenda at Fall Meeting*, Third Branch (Administrative Office of the U.S. Courts), Nov. 1984, at 3.

10. Textile Mills Sec. Corp. v. Commissioner of Internal Revenue, 314 U.S. 326 (1941) (Court held that circuit courts of appeals are not limited to sitting in three-judge panels where the court is sitting en banc); Western Pacific R.R. Case, 345 U.S. 247 (1953) (Court held that while a circuit court could not restrict a litigant's access to the en banc procedure, no applicant had the right to compel a circuit judge to consider such an en banc petition formally); Shenker v. Baltimore & Ohio R.R. Co., 374 U.S. 1 (1963).

11. *Shenker*, 374 U.S. at 4.

12. *Id.* at 5 ("For this Court to hold otherwise would involve it unnecessarily in the internal administration of the Courts of Appeals.").

jority of all the active judges of the court to grant rehearing en banc.[13] Thus, five of the eight active judges would have had to vote in favor of rehearing the case en banc. In refusing to adopt a particular definition of "majority" in *Shenker* and by denying certiorari in another appellate court case that would have required the Court to decide whether recused judges must be counted when calculating a majority,[14] it seems that the Supreme Court has allowed each court of appeals to choose for itself which rule it will follow.[15] Thus, this lack of controlling Supreme Court authority or congressional action or legislation has left the definition of the majority requirement up to the individual courts of appeals, which have adopted inconsistent rules and procedures as to how they determine whether to hear a case en banc.[16]

Recently, an opinion by Judge Carnes of the Eleventh Circuit in *Gulf Power Co. v. Federal Communications Commission*,[17] examined the important intercircuit variations in the proper definition of the majority requirement. At the time the court voted whether to rehear *Gulf Power Co.*, five of the twelve judges in active status were disqualified, and thus only seven judges voted.[18] The court of appeals uses an absolute majority interpretation of Federal Rule of Appellate Procedure 35(a). That is to say, an en banc rehearing requires the votes of a majority of all active circuit judges on the court at the time of the poll, including disqualified judges. The en banc rehearing was denied, even though six of the seven judges voting voted for the rehearing. Judge Carnes thought that *Gulf Power Co.* was a "good example of why the absolute majority provision of Federal Rule of Appellate Procedure 35(a) needs to be changed by Congress or by the Supreme Court . . ." because even if six of the seven

---

13. *Id.*

14. Arnold v. Eastern Airlines, Inc., 712 F.2d 899 (4th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1040 (1984) (Fourth Circuit concluded that the majority requirement of section 46(c) did not oblige the court to count a recused judge when calculating whether a majority of the circuit's judges in regular active service had voted to grant en banc rehearing; with one of the circuit's ten active judges disqualified, the court ordered rehearing based on the affirmative votes of five of the court's nine remaining active judges).

15. *See* Waters, *supra* note 4, at 379; Wheaton, *supra* note 4, at 1520.

16. *See* Michael Ashley Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. Pitt. L. Rev. 805, 854 (1993) (Citing the Supreme Court's deference in the Western Pacific R.R. Case, 345 U.S. 247 (1953), to the administrative powers vested in the circuit courts, Stein concluded that "the individual circuits may promulgate rules and internal operating procedures that would allow modification in the way en banc votes are tallied."). *See also* Wheaton, *supra* note 4, at 1506, 1524 ("[I]nterpretation of the majority requirement remains within the authority of each circuit." "The rules and statutes do not require the circuits to adopt identical procedures . . . the several circuits have adopted significantly different rules.").

17. 226 F.3d 1220 (11th Cir. 2000) (opinion concerning per curiam denial of rehearing en banc).

18. 226 F.3d at 1222.

nonrecused judges in active service wanted to hear the case en banc, it would not be possible because six is not a majority of twelve.[19] "The result is that the law of this circuit is decided not on the basis of the votes of a majority of the seven non-disqualified judges of this court in active service," but instead by the vote of one judge.[20] Further, Judge Carnes argued that "there is no good reason why a uniform rule should not be followed in all the circuits."[21]

In April 2001, the Judicial Conference Advisory Committee on Appellate Rules decided to study Judge Carnes' request to amend Federal Rule of Appellate Procedure 35(a) and requested assistance from the Federal Judicial Center. Specifically, the Center was asked to provide information on the following:[22]

> (1) How do each of the thirteen federal courts of appeals interpret Rule 35(a) and 28 U.S.C. § 46(c)? How many apply the "absolute majority" rule adopted by the Eleventh Circuit? How many apply some other rule?
> (2) What arguments have been made to justify the "absolute majority "rule? What arguments have been made against the rule?
> (3) Are there any other intercircuit disagreements concerning either how courts decide whether to hear a case en banc or how courts decide cases that have been "en banced"? For example, do the circuits disagree about the participation of senior judges (i.e., judges who became senior after the panel decision) either in the decision whether to hear a case en banc or in the decision of the case on the merits?[23]

---

19. *Id.* at 1221, 1222–23.

20. *Id.* at 1223. In *Gulf Power Co.*, although six of the seven judges qualified to vote voted in favor of hearing the case en banc, the author of the panel majority opinion (the one vote against rehearing en banc) was able to prevent the case from being heard en banc because of the absolute majority rule (i.e., since the Eleventh Circuit court of appeals had twelve judges in regular active service at the time, all seven nondisqualified judges needed to vote in favor of rehearing in order to vote the case en banc). *Id.* at 1222.

21. *Id.* at 1225.

22. Letter from Judge Will Garwood, Fifth Circuit Court of Appeals, to Marie Leary, FJC research associate (May 14, 2001) (on file with author).

23. Section 46(c) of Title 28 of the U.S. Code makes it clear that senior judges cannot participate in the vote to hear a case en banc. We did not find any rule or any procedures in the courts of appeals to the contrary. Section 46(c) does define two circumstances in which a judge can elect to participate in an en banc hearing after taking senior status. In addition to rules and practices incorporating one or both of these exceptions, we did find several rules or practices that permit judges to continue to participate in the final resolution of an en banc case after taking senior status in circumstances not covered under the statute. *See infra* Section III.

### B. Methods for Collecting Information

In order to provide the Appellate Rules Committee with information on each appellate court's current interpretation of Federal Rule of Appellate Procedure 35(a), we sent a questionnaire to the chief judge and the clerk of each court of appeals. The questionnaires were tailored for each court and consisted of two parts. In the first part, we asked how a "majority" was calculated under Rule 35(a). If we were able to locate a relevant local rule or internal operating procedure, chief judges and clerks were asked to verify that this rule or operating procedure was still in effect. If the rule was no longer in effect, or if no formal rule was located, chief judges and clerks were asked to describe their courts' current practice. We asked about policies (if any) concerning temporary absences, why the courts of appeals adopted their current interpretation of Rule 35(a) and about any problems or expressions of dissatisfaction with their current approach.

Part two of the questionnaires sought to verify any rules or internal operating procedures we had located concerning the participation of senior judges in rehearings en banc.[24] In addition, we asked the chief judges and clerks to describe their courts' policies (if any) concerning the participation in the rehearing vote of judges who took senior status after the panel decision, and the participation in the en banc rehearing itself of judges who took senior status after the vote on whether to hear the case en banc.

We received responses to the questionnaires from all thirteen courts of appeals, either directly from the chief judge or from the clerk with the chief judge's approval. Follow up phone calls were made to several circuits to clarify ambiguous responses or to obtain additional information.

In order to describe arguments that have been made to justify the absolute majority approach and any arguments made in opposition to the rule, we conducted a search of case law and secondary sources. With the exception of Judge Carnes' opinion in *Gulf Power Co.*, most of these articles and cases are well over a decade old, suggesting that the debate over the interpretation of the majority requirement in 28 U.S.C. § 46(c) and Federal Rule of Appellate Procedure 35(a) has been dormant for a while. The articles that were most insightful and on point were written after the Fourth Circuit's opinion in *Arnold v. Eastern Airlines,*[25] which was a rare examination of the importance of the question of whether 28 U.S.C. § 46(c) and Rule 35(a) *require* a court to count a recused judge when calculating whether a majority of the circuit's judges in regular active service had voted to grant en banc rehearing. In

24. *Id.*

25. 712 F.2d 899 (4th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1040 (1984).

*Arnold*, the Fourth Circuit concluded that the majority requirement of section 46(c) did not require a court of appeals to count recused judges.[26]

### C. Overview of the Report

The following sections of the report present the findings from the research described above. Specifically, Section II describes the responses from part one of the questionnaires concerning each court of appeal's current interpretation of 28 U.S.C. § 46(c) and Federal Rule of Appellate Procedure 35(a). Section III presents responses to inquiries about the treatment of senior judges in en banc hearings from part two of the questionnaires. Section IV discusses the arguments found in case law and secondary sources for and against the absolute majority approach. Finally, Section V lays out several proposals that commentators have suggested for clarifying the definition of majority in 28 U.S.C. § 46(c) and Rule 35(a) to make the procedures uniform across the courts of appeals.

26. *Id.*

# II. Interpretation of the "Majority" Vote Requirement by the Courts of Appeals

## A. Three Approaches

The courts of appeals use one of three different approaches to define their en banc voting procedures.[27]

Eight[28] use the absolute majority approach in that they interpret "circuit judges who are in regular active service" to mean all of the active judges on the court of appeals in the circuit when the vote is taken, including all judges who have recused themselves or are disqualified from participating in the case or unable to vote for some other reason. For example, if a court of appeals has twelve judges in regular active service then a majority of all those judges (seven of the twelve judges, an "absolute majority") must vote to hear a case en banc, even though one or more of the twelve active judges may not be eligible to vote.

Four courts of appeals[29] have adopted the case majority approach.[30] They define a majority of the active circuit judges as a majority of the active judges eligible to participate in the case at issue. For example, on a court of appeals with twelve judges in regular active service and five judges disqualified from participating in a case, the case will be heard en banc if four of the remaining seven judges vote in favor of en banc review.

The U.S. Court of Appeals for the Third Circuit has adopted a modified case majority approach:[31] It requires a "majority" of circuit judges in regular active service who are not disqualified, but in addition requires that the voting judges constitute a majority of circuit judges who are in regular active service. The court has twelve judges in regular active service, and thus an en banc vote cannot occur if six or more judges are disqualified in the case because at least seven judges must vote to hear a case en banc.

---

27. We borrowed the terms used to describe the three approaches (i.e., absolute majority, case majority, modified case majority) from a report prepared by members of the Civil Practice and Procedure Committee of the American Bar Association Section of Antitrust Law recommending that the ABA propose an amendment to Fed. R. App. P. 35(a). Janet L. McDavid & Henry T. Reath, *Report to the House of Delegates on Procedures for Rehearing En Banc*, 55 Antitrust L. J. 665 (1987) [hereinafter ABA Report].

28. First Circuit, Fourth Circuit, Fifth Circuit, Sixth Circuit, Eighth Circuit, Eleventh Circuit, District of Columbia Circuit, and Federal Circuit. *See infra* Table 1.

29. Second Circuit, Seventh Circuit, Ninth Circuit, and Tenth Circuit. *See infra* Table 1.

30. *See supra* note 27.

31. *Id.*

Table 1 indicates which approach each court of appeals used at the time of our survey and whether the court has formally defined its voting procedures for en banc hearings in its local rules, internal operating procedures, or by some other means.

**Table 1. Current Interpretation of Federal Rule of Appellate Procedure 35(a) by the Courts of Appeals**

| Circuit | Description of approach | Source of procedures |
|---|---|---|
| First | Absolute majority | "For the purposes of determining a majority under 28 U.S.C. § 46(c) and Fed. R. App. P. 35(a), the term 'majority' means more than one-half of all the judges of the Court in regular active service, without regard to whether a judge is disqualified." Local Rule 35. |
| Second | Case majority | "Neither vacancies nor disqualified judges shall be counted in determining the base on which 'a majority of the circuit judges of the circuit who are in regular active service' shall be calculated, pursuant to 28 U.S.C. § 46(c), for purposes of ordering a hearing or rehearing in banc." Local Rule 35. |
| Third | Modified case majority | "[R]ehearing en banc shall be ordered only upon the affirmative votes of a majority of the judges of this court in regular active service who are not disqualified, provided that the judges who are not disqualified constitute a majority of the judges who are in regular active service." App. I, Internal Operating Procedure 9.5.3. |
| Fourth | Absolute majority | "A majority of the circuit judges who are in regular active service may grant a hearing or rehearing en banc. For purposes of determining a majority under this rule, the term majority means of all judges of the Court in regular active service who are presently serving, without regard to whether a judge is disqualified." Local Rule 35(b). |
| Fifth | Absolute majority | "For purposes of en banc voting under 28 U.S.C. § 46(c), the term 'majority' is defined as a majority of all judges of the court in regular active service presently appointed to office. Judges in regular active service who are disqualified for any reason or who cannot participate in the decision of an en banc case nevertheless shall be counted as judges in regular active service." Local Rule 35.6. |
| Sixth | Absolute majority | Although there is no current local rule or operating procedure defining a majority for the purpose of en banc voting, the practice in the U.S. Court of Appeals for the Sixth Circuit continues to reflect the explicit definition embodied in former Internal Operating Procedure 20.7, which was eliminated by the court in December 1997 ("Only judges of the court in regular active service at the time of the filing of the petition are eligible to vote on the request for a poll. . . . A majority is determined by calculating the majority vote of all active judges on the court, not the number qualified to hear the case."). |
| Seventh | Case majority | "A simple majority of the voting active judges is required to grant a rehearing en banc." Seventh Circuit Operating Procedure 5(d). |

**Table 1 (cont'd)**

| Circuit | Description of approach | Source of procedures |
|---|---|---|
| Eighth | Absolute majority | Although not embodied in its local rules or internal operating procedures, the U.S. Court of Appeals for the Eighth Circuit requires an affirmative vote by an absolute majority of all the judges in active service in order to grant a petition for rehearing en banc, regardless of disqualifications or other temporary reasons. *See* Ahlers v. Norwest Bank Worthington, 794 F.2d 388 (8th Cir. 1986) (petition for rehearing en banc denied even though five of the nine participating judges voted to grant it; since the court had ten judges in active service, six affirmative votes were required to grant the petition). |
| Ninth | Case majority | "Any active judge who is not recused or disqualified and who entered upon active service before the request for an en banc vote is eligible to vote." Local Rule 35-3, Advisory Committee Notes. |
| Tenth | Case majority | "A majority of the active judges who are not disqualified may order rehearing en banc." Local Rule 35.5. |
| Eleventh | Absolute majority | Although not embodied in its local rules or operating procedures, the U.S. Court of Appeals for the Eleventh circuit defines majority for purposes of a vote granting a rehearing en banc as a majority of all active judges, both qualified and disqualified.[32] |
| District of Columbia | Absolute majority | "[O]nly active judges of the Court may vote [on the question of whether there should be a rehearing *en banc*], and a majority of all active judges, regardless of recusals or temporary absences, must approve rehearing *en banc* in order for it to be granted." Handbook of Practice and Internal Procedures of the United States Court of Appeals for the District of Columbia Circuit, Part XIII.B.2. |
| Federal | Absolute majority | "A case will be reviewed en banc if a majority of the judges in regular active service agree to hear it en banc. Judges who are recused or disqualified from participating in the case are counted as judges in regular active service." Local Rule 35(a)(1). |

## B. Courts' Rationales for Adopting Current Approaches

We asked each chief judge to explain why his or her court adopted its particular interpretation of Federal Rule of Appellate Procedure 35(a). Only four responded to this inquiry. The other nine said they either did not recall or could not locate the rulemaking history that would explain the reasons their court adopted one approach over another.

**Absolute majority rule**. Chief Judge Wilkinson of the U.S. Court of Appeals for the Fourth Circuit, which follows an absolute majority approach, explained that this

32. A proposed amendment to the Eleventh Circuit's local rules to reflect the current practice has been approved for distribution for public comment and is presently being considered by the Eleventh Circuit's Lawyers Advisory Committee.

approach "spares us the resource drain of too many en banc hearings and, more importantly, safeguards the circuit against the imposition of an en banc ruling which does not actually reflect the views of a majority of judges on the circuit. . . [I]t would be altogether unwise to adopt a high-visibility rule in an en banc case with a large number of recusals which would only have to be changed at a later date, and to which a majority of a court decidedly does not subscribe." Chief Judge Wilkinson is not in favor of a uniform rule, and supports a continuation of the current variation in practice among the courts of appeals.

Similarly, Chief Judge Mayer of the U.S. Court of Appeals for the Federal Circuit explained that the Federal Circuit adopted the absolute majority approach "to ensure that the decision to grant rehearing en banc and the court's en banc decision would reflect the views of a majority of judges. Otherwise, the decision to grant and the ultimate resolution of the en banc issue could turn on the vagaries of recusal and unavailability. If an en banc case were decided by a majority of the participating judges, which is the only situation in which the choice of rule would make a difference, it would set the stage for a possible reversal of the en banc decision in a later case in which all of the active judges could participate, thus defeating the purpose of en banc to settle circuit law for the foreseeable future."

**Case majority**. In 1984, the Ninth Circuit Court of Appeals approved a change in the definition of majority for en banc purposes. The court departed from the absolute majority approach under which a recusal or abstention was counted as a no vote, and adopted a case majority approach because it believed that under the absolute majority rule, a recusal was in essence a negative vote.

**Modified case majority**. Chief Judge Becker of the U.S. Court of Appeals for the Third Circuit, which is unique in following a modified case majority approach (i.e., a majority of the circuit judges permitted to participate in a case have the power to grant en banc review, as long as the participating judges constitute a majority of the circuit judges in regular active service), explained that the change from an absolute majority approach was proposed and adopted because the absolute majority rule "made it too difficult to get rehearing in deserving cases" such as cases against a local university or large corporation where three or four active judges may be recused. Further, the additional requirement that the base constitute a majority of judges in active service provides a "'brake' so that an en banc decision could not be made by just a few judges on a large court."

### C. Vacancies and Temporary Absences

Although most courts of appeals did not address whether unfilled vacancies should affect the calculation of a "majority" required under section 46(c),[33] we assume based

33. *See contra* Second Circuit Local Rule 35 ("Neither vacancies nor disqualified judges shall be counted in determining the base on which 'a majority of the circuit judges of the circuit who are in

on additional language in some rules[34] and the plain meaning of 28 U.S.C. §§ 43–46[35] that all courts of appeals interpret "circuit judges of the circuit who are in regular active service" to refer to the number of judges actually appointed to the court, not the number of positions potentially available (i.e., the number of authorized judgeships). Thus, under all three approaches the majority is calculated with reference to the number of active judges presently on the appellate court excluding any vacancies not currently filled.

Chief judges were asked how temporary absences such as extended illness, travel, or other personal circumstances rendering a judge unavailable are treated when determining the base for calculating a section 46(c) majority. Four chief judges said that this issue had never arisen and thus they do not have a policy for temporary absences. The Third Circuit Court of Appeals (which follows a modified case majority approach) reported that temporary absences are not treated like disqualified judges when calculating a majority (i.e., judges who are temporarily unavailable are included in the base from which a majority of judges in regular active service is calculated; judges who are recused or disqualified are not included). The Second Circuit Court of Appeals (which follows a case majority approach) does count temporary absences in the base from which a majority is calculated. Likewise, the Ninth Circuit Court of Appeals (which follows the case majority approach) reported that temporary absences are not treated like disqualified or recused judges (i.e., temporary absences are counted for purposes of calculating a majority). The clerk of the Ninth Circuit Court of Appeals explained that every judge must respond to a request to hear a case en

---

regular active service' shall be calculated, pursuant to 28 U.S.C. Section 46(c), for purposes of ordering a hearing or rehearing in banc.")

34. *See, e.g.,* Fourth Circuit Local Rule 35(b) ("For purposes of determining a majority under this rule, the term majority means of all judges of the Court in regular active service who are presently serving . . . ."); Fifth Circuit Local Rule 35.6 ("For purposes of en banc voting under 28 U.S.C. § 46(c), the term 'majority' is defined as a majority of all judges of the court in regular active service presently appointed to office . . . .").

35. In a memo to all circuit judges in the Ninth Circuit regarding the calculation of a majority for en banc purposes, a staff attorney pointed out that including vacant judgeships in the count of active judges presently on a court would "wreak havoc" with 28 U.S.C. §§ 43–46. He cites section 43(b), which states that "[e]ach court of appeals shall consist of the circuit judges of the circuit in regular active service. . . " and concludes that "[i]f 'judges. . . in regular active service' meant the same thing as authorized judgeships, the court would, by definition, cease to exist whenever a vacancy occurred." Memo from Bob Lohn, Office of Staff Attorneys for the Ninth Circuit Court of Appeals, to All Judges Re: Calculation of a Majority for En Banc Purposes 5 & n.2 (Sept. 24, 1984). *See also* United States v. Leichter, 167 F.3d 667 (1st Cir. 1999) (Although 28 U.S.C. § 46(c) and Fed. R. App. P. 35(a) require an absolute majority of the court's active judges to vote in favor of the petition, vacant judgeships are to be excluded from the count.); Arnold v. Eastern Air Lines, 712 F.2d 899, 910 n.2 (4th Cir. 1983) (en banc) (Widener, J., concurring and dissenting), *cert. denied,* 464 U.S. 1040 (1984).

banc by either voting in favor of an en banc hearing, or informing the court that he or she has recused himself or herself or is disqualified from participating in that particular case. If a judge fails to respond to an en banc poll, his or her nonresponse is treated as a negative vote for rehearing en banc.

Although the Sixth Circuit (which follows an absolute majority approach) does not have a formal policy regarding temporary absences, their informal practice allows the judge who will be temporarily unavailable to request an extension of the voting deadline to ensure that all judges who desire to cast a vote in an en banc poll may do so regardless of temporary absences. The clerk of the Fifth Circuit (which follows the absolute majority approach) stated that they had never addressed the issue, but assume that if a judge was unavailable, he or she would be treated as a recused judge (i.e., counted for purposes of calculating a majority). Likewise, the Sixth, Eighth, Eleventh, District of Columbia,[36] and Federal Circuits (which all follow the absolute majority approach) treat temporary absences identically to recused judges (i.e., they are counted in the base for purposes of calculating a majority).

### D. Satisfaction with Current Approach

We asked the chief judges and clerks about problems or expressions of dissatisfaction with the court's current interpretation of Federal Rule of Appellate Procedure 35(a). Almost all responded that they had not experienced any problems nor were they aware of dissatisfaction with their current approach. The chief judge of the Fourth Circuit Court of Appeals (which follows the absolute majority approach) explained that the rule in their court has met with satisfaction because it safeguards the coherence and stability of circuit law. The chief judge of the First Circuit Court of Appeals (which follows the absolute majority approach) reported that the only real problem that the circuit encountered with the rule was when a majority of the circuit judges were recused and en banc review was unavailable. Similarly, the clerk of the Fifth Circuit (which follows the absolute majority approach) reported that there have been instances where a majority of the judges were recused so that rehearing was not possible. Finally, the clerk of the Eleventh Circuit referred us to Judge Carnes' criticism of its absolute majority approach in his *Gulf Power Co.* opinion.[37]

---

36. U.S. Court of Appeals for the District of Columbia Circuit, *Handbook of Practice and Internal Procedures of the United States Court of Appeals for the District of Columbia Circuit*, Part XIII.B.2, explicitly states that "only active judges of the Court may vote [on the question of whether there should be a rehearing en banc], and a majority of all active judges, regardless of recusals *or temporary absences*, must approve rehearing en banc in order for it to be granted" (emphasis added).

37. 226 F.3d 1220 (11th Cir. 2000).

# III. Participation of Senior Judges in En Banc Hearings

Although normally an en banc court comprises only circuit judges in regular active service, 28 U.S.C. § 46(c) defines two circumstances in which senior judges are eligible to participate in an en banc hearing: (1) if the senior judge sat on the original panel that heard the case that is now under en banc review, the senior judge can elect to participate as a member of the en banc court; or (2) if the judge was in regular active service when a case was heard or reheard by the court en banc and then took senior status, the judge can continue to participate in the decision of the case after taking senior status.[38]

Inquiries were included in the questionnaire to identify whether one or both of the above statutory exceptions reflect the current practice in each court of appeals, and whether there were additional practices or rules in a particular court regarding the participation of senior judges in en banc hearings. Table 2 shows that in practice all courts of appeals permit senior judge participation in en banc hearings pursuant to the two circumstances defined in section 46(c). In addition, some appellate courts restated one or both of the exceptions defined in 28 U.S.C. § 46(c) in their local rules or internal operating procedures.

Besides the two circumstances defined in section 46(c), four courts of appeals have additional rules or practices permitting senior judges to participate in en banc hearings. The courts of appeals for the Third, Fifth, and Seventh Circuits permit a senior judge to participate in the final resolution of a case after taking senior status, if the senior judge only participated in the en banc poll for the case while in regular active service and then took senior status. Thus, the senior judge need not have sat on the en banc court that heard or reheard the case while in regular active service in order to participate in the resolution of the case as required by 28 U.S.C. § 46(c). Further, in the court of appeals for the Sixth Circuit a senior judge need only be in regular active service when a poll was requested on a petition for rehearing en banc in order to sit on an en banc court. It is not required for the judge to have participated in the vote before taking senior status.[39]

---

38. 28 U.S.C. § 46(c) (1982).

39. Concerned that its current rule is inconsistent with 28 U.S.C. § 46(c) because it allows senior judge participation on an en banc court in a circumstance not provided for under section 46(c), the court of appeals for the Sixth Circuit is currently undertaking an internal review of its en banc practice regarding the participation of senior judges.

**Table 2. Current Local Rules or Practices Re: the Participation of Senior Judges in En Banc Hearings in the Courts of Appeals**

| Circuit | Circuit allows senior judge to participate in an en banc hearing if the senior judge sat on the original panel as provided in 28 U.S.C. § 46(c)? | Circuit allows a judge to continue to participate in the decision of a case after taking senior status, if the judge was in regular active service when the case was heard or reheard by the court en banc as provided in 28 U.S.C. § 46(c)? | Circuit has additional practices or rules re: participation of senior judges in en banc hearings? |
|---|---|---|---|
| First | Yes. Provision referenced in U.S. Court of Appeals for the First Circuit, Local Rule 35(a). | Yes. Provision referenced in U.S. Court of Appeals for the First Circuit, Local Rule 35(a). | No. |
| Second | Yes. | Yes. | No. |
| Third | Yes. Provision restated in U.S. Court of Appeals for the Third Circuit, Internal Operating Procedure 9.6.4. | Yes. Provision restated in U.S. Court of Appeals for the Third Circuit, Internal Operating Procedure 9.6.4. | Yes. Third Circuit Internal Operating Procedure 9.6.4 also allows a judge to continue to participate in the final resolution of a case after taking senior status, if the judge participated in the en banc poll for the case while in regular active service. |
| Fourth | Yes. Provision restated in U.S. Court of Appeals for the Fourth Circuit, Local Rule 35(c).[40] | Yes. Provision restated in U.S. Court of Appeals for the Fourth Circuit, Local Rule 35(c). | Yes. In addition to Local Rule 35 setting forth the court's en banc procedures, there is a standing order signed by former Chief Judge Sam J. Ervin III, making participation of senior circuit judges en banc consideration of a case in which a senior judge sat on the original panel mandatory instead of voluntary upon the senior judge's election.[41] |

40. U.S. Court of Appeals for the Fourth Circuit, Local Rule 35(c), also provides that "A judge who joins the Court after argument of a case to an en banc Court will not be eligible to participate in the decision of the case. A judge who joins the Court after submission of a case to an en banc Court without oral argument will participate in the decision of the case."

41. Chief Circuit Judge (Fourth Circuit), Order Regarding Performance of Judicial Duties, *reprinted in* Federal Civil Judicial Procedure and Rules (West 2001) following 28 U.S.C. § 46.

**Table 2 (cont'd)**

| Circuit | Circuit allows senior judge to participate in an en banc hearing if the senior judge sat on the original panel as provided in 28 U.S.C. § 46(c)? | Circuit allows a judge to continue to participate in the decision of a case after taking senior status, if the judge was in regular active service when the case was heard or reheard by the court en banc as provided in 28 U.S.C. § 46(c)? | Circuit has additional practices or rules re: participation of senior judges in en banc hearings? |
|---|---|---|---|
| Fifth | Yes. Provision restated in U.S. Court of Appeals for the Fifth Circuit, Local Rule 35.6. | Yes. Provision restated in U.S. Court of Appeals for the Fifth Circuit, Local Rule 35.6. | Yes. Fifth Circuit Local Rule 35.6 also allows a judge to continue to participate in the final resolution of a case after taking senior status, if the judge participated in the en banc poll for the case while in regular active service. |
| Sixth | Yes. Provision restated in U.S. Court of Appeals for the Sixth Circuit, Internal Operating Procedure 35(a). | Yes. | Yes. Sixth Circuit Internal Operating Procedure 35(a) allows a senior judge to sit on an en banc court if the judge "was in regular active service at the time a poll was requested on the petition, for rehearing en banc."[42] |
| Seventh | Yes. Provision restated in U.S. Court of Appeals for the Seventh Circuit, Internal Operating Procedure 5(f). | Yes. | Yes. Although not specifically provided for by local rule or internal operating procedure, the Seventh Circuit indicated that it would permit a judge to continue to participate in the resolution of an en banc case after taking senior status, if the judge participated in the en banc poll for the case while in regular active service. |
| Eighth | Yes. | Yes. | No.[43] |

42. The Sixth Circuit is currently undertaking an internal review of its en banc practice vis-à-vis the participation of senior judges. This issue will be discussed at the fall meeting of the Sixth Circuit's Rules Committee.

43. Note that the Eighth Circuit specifically refuses to allow a judge to participate in a rehearing en banc if the judge was active at the time of the vote granting the petition for rehearing en banc, but became a senior judge before the case was heard and submitted for en banc decision.

**Table 2 (cont'd)**

| Circuit | Circuit allows senior judge to participate in an en banc hearing if the senior judge sat on the original panel as provided in 28 U.S.C. § 46(c)? | Circuit allows a judge to continue to participate in the decision of a case after taking senior status, if the judge was in regular active service when the case was heard or reheard by the court en banc as provided in 28 U.S.C. § 46(c)? | Circuit has additional practices or rules re: participation of senior judges in en banc hearings? |
|---|---|---|---|
| Ninth | Yes. Provision restated in U.S. Court of Appeals for the Ninth Circuit, Local Rule 35-3 Advisory Committee Notes (2). | Yes. Provision restated in U.S. Court of Appeals for the Ninth Circuit, Local Rule 35-3 Advisory Committee Notes (2). | No. |
| Tenth | Yes. Provision restated in U.S. Court of Appeals for the Tenth Circuit, Local Rule 35.5. | Yes. | No. |
| Eleventh | Yes. Provision restated in U.S. Court of Appeals for the Eleventh Circuit, Local Rule 35-9. | Yes. Provision restated in U.S. Court of Appeals for the Eleventh Circuit, Local Rule 35-9. | No. |
| District of Columbia | Yes. Provision restated in U.S. Court of Appeals for the District of Columbia Circuit, Handbook of Practice and Internal Procedures, Part XIII.B.2. | Yes. | No. |
| Federal Circuit | Yes. Provision restated in U.S. Court of Appeals for the Federal Circuit, Local Rule 35 Historical Notes. | Yes. | No. |

# IV. The Arguments For and Against the Absolute Majority Approach

A majority of appellate cases that have considered the issue have interpreted section 46(c) and Federal Rule of Appellate Procedure 35(a) as requiring the vote of an absolute majority of circuit judges in order to convene an en banc hearing or rehearing (i.e., requiring recused judges to be counted in the base from which a majority is calculated).[44] The various points of contention about the rule are summarized below.

## A. Minority Control of the Law of the Circuit

Defenders of the absolute majority rule argue that it prevents a minority of the court from determining the law of the circuit and thus effectuates what they see as the goal of section 46(c) and Rule 35(a): intracircuit uniformity by assuring that courts of appeals establish the law of the circuit on questions of exceptional importance by the vote of a majority of the full court rather than by a three-judge panel.[45] Judge Walter Mansfield, Second Circuit Court of Appeals, argued in 1972 that under the case majority approach, if four members of a nine-member court were disqualified, three of the five voting members could take a case en banc and determine the law of the circuit.[46]

Opponents of the absolute majority rule respond that votes to rehear a case do not necessarily predict votes to reverse.[47] In addition, in the great majority of cases,

---

44. *See, e.g.,* Lewis v. University of Pittsburgh, 725 F.2d 910, 928 (3d Cir. 1983) (en banc) (order denying en banc rehearing), *cert. denied,* 105 S. Ct. 266 (1984); Clark v. American Broad. Cos., 684 F.2d 1208, 1226 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040, *mandamus denied sub nom. In re* American Broad. Cos., 104 S. Ct. 538 (1983); Copper & Brass Fabricators Council v. Department of Treasury, 679 F.2d 951 (D.C. Cir. 1982), reh'g en banc denied by unpublished order No. 81-2091 (D.C. Cir. Aug. 3, 1982); Curtis-Wright Corp. v. General Elec. Co., 599 F.2d 1259 (3d Cir. 1979), *cert. denied,* 449 U.S. 1022 (1980); Porter City Chapter of Izaak Walton League v. Atomic Energy Comm'n, 515 F.2d 513 (7th Cir. 1975); Zahn v. International Paper Co., 469 F.2d 1033, 1040 (2d Cir. 1972) (order denying en banc rehearing), *aff'd on other grounds*, 424 U.S. 291 (1973).

45. *See* Waters, *supra* note 4, at 374, 380; Wheaton, *supra* note 4, at 1529, 1529–35 (quoting United States v. American-Foreign S.S. Corp., 363 U.S. 685, 689–90 (1960) ("The principal claimed purpose of the en banc procedure is to make it possible for a 'majority of [a circuit's] judges always to control and thereby to secure uniformity and consistency in its decisions.'")). *See also* Zahn v. International Paper Co., 469 F.2d 1033, 1041 (2d Cir. 1972) (Mansfield, J., concurring in denial of en banc rehearing), *aff'd on other grounds*, 414 U.S. 291 (1973); Lewis v. University of Pittsburgh, 725 F.2d 910, 928–29 (3d Cir. 1983) (opinion of Adams, J., on the petition for rehearing).

46. *Zahn,* 469 F.2d at 1041.

47. Waters, *supra* note 4, at 381 (The absolute majority approach does not guarantee that the majority will control the law of the circuit because even if "four judges of a nine-member circuit recuse themselves from a case, each of the remaining five judges could vote in favor of en bancing the

three-judge panels establish the law of the circuit without en banc rehearings. In fact, said one opponent, "[b]y insulating panel decisions from en banc review, the absolute majority rule makes it less likely that the law of the circuit will represent the views of a majority of judges in active service."[48] Finally, opponents argue, the examples cited of large numbers of disqualifications in fact occur rarely.[49]

### B. Overuse of the En Banc Procedure

Supporters of the absolute majority approach contend that it limits en banc review to the most important cases, thereby avoiding overuse of the en banc procedure and resulting judicial inefficiency.[50]

Opponents respond that under the absolute majority approach, en banc review is limited to those cases in which the absolute majority would grant review and not necessarily to the most important cases.[51] These opponents also make the distinction that the purpose of the en banc vote is to decide whether or not to convene an en banc hearing or rehearing based on an evaluation of the relative importance of a given case, and is not a vote on the merits of that case nor is it a vote to decide whether to limit en banc hearings to questions of exceptional importance.[52] Responding to the claim that not adopting the absolute majority approach will encourage en banc hearings in every case where a minority of the court may desire a decision by the full court, Judge Carnes pointed out that "[e]n banc rehearings take a lot of judicial resources and no court of appeals is going to drift into the habit of having

---

case and yet split on the merits."); ABA Report, *supra* note 27, at 668; Wheaton, *supra* note 4, at 1531–32 ("If a vote for or against rehearing is truly a vote distinct from the merits of the case, a 3-2 split on the en banc panel is as likely under an absolute majority rule, where all five available judges might vote for rehearing but divide on the merits, as it is under a standard that makes a majority of eligible judges sufficient to order rehearing.")

48. Gulf Power Co. v. Federal Communications Comm'n, 226 F.3d 1220, 1224 (11th Cir. 2000) (Carnes, J., opinion concerning the denial of rehearing en banc).

49. Waters, *supra* note 4, at 381.

50. *Zahn,* 469 F.2d at 1041 (Judge Mansfield, in his concurring opinion denying en banc rehearing, suggested that the absolute majority requirement "serves the further salutary purpose of limiting en banc hearings to questions of exceptional importance rather than allow the court to drift into the unfortunate habit of requiring such hearings in every case where a minority of the court may desire a decision by the full court."). *See also* Lewis v. University of Pittsburgh, 725 F.2d 910, 928–29 (3d Cir. 1983) (opinion of Adams, J., on the petition for rehearing); ABA Report, *supra* note 27, at 667 (citing Waters, *supra* note 4, at 379–80 and Note, *En Banc hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities*, 40 N.Y.U. L. Rev. 563, 574–77 (1965)).

51. ABA Report, *supra* note 27, at 668.

52. Waters, *supra* note 4, at 389; Gulf Power Co. v. Federal Communications Comm'n, 226 F.3d 1220, 1224 (11th Cir. 2000) (Carnes, J., opinion concerning the denial of rehearing en banc).

too many of them" regardless of how a circuit interprets the majority requirement of Rule 35(a).[53]

### C. Frustrates the Will of the Majority of Voting Judges

Opponents contend that requiring an absolute majority to en banc a case in which there are recusals or disqualifications often frustrates the will of the majority that wants to en banc an important case.[54] For example, on a court with nine active judges, if three judges are recused and thus excluded from voting, the absolute majority rule requires five of the six nondisqualified judges to en banc the case, thus permitting only two judges to block a rehearing.[55] In such cases where the absolute majority approach requires the concurrence of a supermajority of judges eligible to vote, opponents further allege that recusals may disable a court from rehearing an issue en banc.[56]

### D. Contradicts the Language of 28 U.S.C. § 46(c) and Federal Rule of Appellate Procedure 35(a) and the Purpose of Judicial Disqualification

Opponents of the absolute majority approach contend that the language of 28 U.S.C. § 46(c) and Rule 35(a) permits en banc hearings based on the affirmative votes of less than an absolute majority of the circuit's active judges.[57] Judge Murnaghan of the U.S. Court of Appeals for the Fourth Circuit argued in his concurring opinion that the court had properly granted the request for an en banc rehearing by a vote of five to four even though the court consisted of ten judges at the time with

---

53. *Gulf Power Co.,* 226 F.3d at 1224.

54. *See* ABA Report, *supra* note 27, at 668; Waters, *supra* note 4, at 374; Gulf Power Co. v. Federal Communications Comm'n, 226 F.3d 1220 (11th Cir. 2000) (opinion concerning per curiam denial of rehearing en banc).

55. *See also* Boraas v. Village of Belle Terre, 476 F.2d 806, 828 (2d Cir. 1973) (Timbers, J., dissenting from denial of rehearing en banc), *rev'd on other grounds*, 416 U.S. 1 (1974).

56. For a period of time the District of Columbia Circuit was prevented from hearing some telecommunications issues en banc because of the negative votes of only three judges. Douglas H. Ginsberg & Donald Falk, *The Court En Banc: 1981–1990*, 59 Geo. Wash. L. Rev. 1008, 1048 n.37 (1991) (citing New England Tel. & Tel. Co. v. FCC, No. 85-1087 (D.C. Cir. Nov. 2, 1988) (denying rehearing en banc of decision at 826 F.2d 1101 (D.C. Cir. 1987) where two of the eleven active judges then serving recused themselves, requiring six of the remaining nine votes for the court to grant en banc rehearing)). *See also* Wheaton, *supra* note 4, at 667 ("This problem could also arise in a circuit that is the home of a major university, where so many judges on that circuit are likely to have to disqualify themselves because they teach at or are otherwise affiliated with the university that no case involving the university could be heard en banc.").

57. Waters, *supra* note 4, at 376 (discussing Arnold v. Eastern Air Lines, Inc., 712 F.2d 899 (4th Cir. 1983), *cert. denied,* 464 U.S. 1040 (1984); Wheaton, *supra* note 4, at 1514.

one disqualified judge.[58] Judge Murnaghan concluded that in order to give substance to the phrase "judges in regular active service" in 28 U.S.C. § 46(c) a disqualified judge is not in regular active service and, therefore, should not be included in the group from which the requisite majority is determined.[59]

Further, opponents argue that interpreting section 46(c) to include disqualified judges in the calculation of the necessary majority would contradict the purpose of the statutes and ethics rules that control judicial disqualifications because it would treat a disqualified judge as if he or she were not disqualified at all:[60] "Considering the presence of the recused judge for the purpose of determining the appropriate majority, but not allowing him to cast a vote, is in effect counting the judge as a no vote. Although this may not directly violate [28 U.S.C.] section 455—which only requires the judge to withdraw from the case—the policy of the disqualification statute is not given effect when the recused judge has this negative impact on the vote for rehearing."[61] Further, since the absolute majority rule counts a recused judge as a no vote, it causes potential interference with the ethical goal of ensuring the neutrality of a disqualified judge because an order to deny rehearing assumes some secondary character as a decision to leave intact the conclusions of the three-judge panel.[62]

### E. Potential for U.S. Supreme Court Review Negates Any Unfairness

Advocates of the absolute majority approach contend that it does not result in any particular injustice of unfairness to individual litigants in cases where a judge's abstention or disqualification has the effect of a vote against rehearing en banc because "[i]n cases of exceptional importance, or where there is a conflict between circuits, it may be expected that the Supreme Court will grant certiorari and settle the questions in issue."[63]

Opponents criticize this claim because access to the Supreme Court is never guaranteed, even in important cases.[64] Further, "[s]uggesting that the Supreme Court's authority to correct any error in the lower courts somehow diminishes the

58. Arnold v. Eastern Air Lines, Inc., 712 F.2d 899, 902 (4th Cir. 1983) (en banc) (Murnaghan, J., concurring), *cert. denied*, 464 U.S. 1040 (1984).

59. 712 F.2d at 903–04.

60. Wheaton, *supra* note 4, at 1539. *See also Arnold*, 712 F.2d at 904.

61. Wheaton, *supra* note 4, at 1540–41.

62. *Id.*

63. Zahn v. International Paper Co., 469 F.2d 1033, 1041 (2d Cir. 1972) (Mansfield, J., concurring in the denial of rehearing en banc), *aff'd on other grounds*, 414 U.S. 291 (1973).

64. Waters, *supra* note 4, at 382.

need for en banc hearings denies the Supreme Court the benefit of full en banc opinions."[65]

65. *Id.*

# V. Suggested Remedies to the Intercircuit Conflict over the Interpretation of 28 U.S.C. § 46(c) and Federal Rule of Appellate Procedure 35(a)

Despite the apparent willingness of Congress, the U.S. Supreme Court, and the Judicial Conference to leave it up to the individual circuits to formulate a standard for calculating a "majority of judges in regular active service" in order to en banc a case,[66] some argue in favor of a single, nationally applicable interpretation of 28 U.S.C. § 46(c) and Federal Rule of Appellate Procedure 35(a).

In his opinion concerning the denial of rehearing en banc in *Gulf Power Co. v. Federal Communications Commission*, Judge Carnes clearly expressed his view that the current circuit split over the interpretation of 28 U.S.C. § 46(c) and Rule 35(a) should be addressed by code and rule amendments because "there is no good reason why a uniform rule should not be followed in all circuits . . . a litigant who loses before a panel in this circuit should not be treated differently in terms of the basic en banc procedures than one who loses before a panel in the same circumstances in another circuit."[67]

In 1986, the American Bar Association Section of Antitrust considered the arguments for and against the absolute majority rule and the case majority rule, and consistent with the policy that a uniform rule should govern procedures used by the circuits for granting or denying motions for rehearing en banc, recommended that the ABA propose an amendment to Federal Rule of Appellate Procedure 35(a) that adopts a modified case majority approach.[68] In 1987, the ABA House of Delegates approved a resolution to amend Rule 35(a) to provide that a majority of court of appeals judges in a circuit permitted to participate in a case have the power to grant en banc review, provided that the participating judges constitute a majority of the judges

---

66. *See supra* section I.A.

67. *Gulf Power Co.,* 226 F.3d at 1225. *But see* Wheaton, *supra* note 4, at 1522 (The Supreme Court should not resolve the confusion caused by competing definitions of majority because "[n]onuniformity is the precise result contemplated by the permissive grant of authority to make any rules 'not inconsistent' with the binding standards of federal law and the federal appellate rules. The possibility that one court will impose a more stringent definition of majority than another is not more offensive than the likelihood that judges of one circuit will be more willing to grant an en banc rehearing than those of a second court. . . [T]he en banc power is simply a tool of judicial administration—it is not intended to serve litigants. Litigants can demand little more than a prospectively announced rule.") (citing 28 U.S.C. § 2071 (1982) (federal courts can make rules consistent with acts of Congress and the rules prescribed by the Supreme Court) and Fed. R. App. P. 47 (courts of appeals may adopt practice rules "not inconsistent" with the Federal Rules of Appellate Procedure)).

68. ABA Report, *supra* note 27, at 668.

in regular active service.[69] The Antitrust Section explained that "[t]his amendment will permit the court to hear all cases that at least a substantial minority believe are important, while also insuring that en banc decisions are not rendered by a panel that includes only a minority of the judges in the circuit."[70] This policy remained in effect until August 1999 at which time it was archived and thus is no longer active ABA policy. At this time we are unaware of any current section activity in this area.

After examining the arguments in support of both positions, one commentator suggested that "the time has long since come for Congress to clarify 28 U.S.C. § 46(c). In acting, Congress must realize that it need not adopt either the majority position or the minority position. Compromise is possible. Any proposed solution must recognize two facts: 1) no proposal can completely neutralize the effect of a disqualification or recusal; and 2) both the current majority and minority positions have raised important issues that must be considered."[71] As an alternative to the majority and minority approaches, he suggested the adoption of the minority position with a quorum requirement:

> This compromise would require that a definite number of judges be available to sit before any en banc court could be convened. Thereafter, the majority would be determined from the number of circuit judges qualified to participate in a case. Thus, only a majority of the judges qualified to vote would be required to convene an en banc hearing. But at the same time, the quorum requirement would protect against the undesirable possibility that a minority of judges could decide the law of the circuit in an important case. . . .
>
> Whatever quorum is selected, it must strike a balance between maintaining uniformity in the circuit and encouraging circuit courts to en banc difficult or important cases. It would not be unreasonable to set the quorum requirement at a somewhat high level in light of the fact that, most frequently, only one or two judges are disqualified from any given case. Additionally, an exception from the quorum requirement could be made for cases in which an absolute majority of judges have voted in favor of en bancing a case. In any event, the number of judges which would be required to hear a case must be determined according to the number of judges in each of the circuit courts of appeals. Alternatively, Congress could allow

---

69. *Id.* at 669. *See also* U.S. Court of Appeals for the Third Circuit, App. I, Internal Operating Procedure 9.5.3, which describes a very similar approach.

70. ABA Report, *supra* note 27, at 669. The ABA Report pointed out that the approach taken in its proposed amendment to Fed. R. App. P. 35(a) was generally consistent with the 1973 recommendation of the Judicial Conference that section 46(c) be amended to "make clear that a majority of the judges in regular active service who are entitled to vote should be sufficient to en banc a case." 1973 Rep. of the Proc. of the Jud. Conf. of the U.S. 47. *See supra* section I.A.

71. Waters, *supra* note 4, at 390.

> each circuit to set its own quorum requirement while strongly encouraging them to hear cases in which relatively few judges are disqualified. Should Congress choose not to adopt either alternative, it should simply adopt the minority rule. But, Congress must act.[72]

One commentator explained that although two possible definitions of majority fit within the meaning of the current language of 28 U.S.C. § 46(c) (i.e., an absolute majority of the judges of the circuit or a majority of the judges of the circuit eligible to vote in the rehearing decision), the definition of majority should depend in each case on the number of judges eligible to participate because the absolute majority definition uniquely weakens the effectiveness of disqualification guidelines.[73] Further, the concerns for circuit workload and for majority control of circuit precedents that are implicated by a rule that focuses on a majority of the judges eligible to vote are insufficient to outweigh the danger to judicial integrity that would accompany a definition that considers a disqualified judge, as explained by the following commentary:[74]

> Counting a recused judge as a no vote affects the final outcome of a case in a way that counting the recusal as a yes vote does not. If by treating a disqualification as a yes vote the outcome of the voting decision is altered, the merits of the case remain unaffected by the changed outcome; granting a rehearing does not, a priori, represent a choice between competing position[s] on the merits of a controversy. If the disqualification is equivalent to a no vote, on the other hand, the disqualified judge's presence may indeed determine the final outcome of a case. Although a denial of rehearing is primarily tied only to interests in judicial administration, the order to deny rehearing also assumes some secondary character as a decision to leave intact the conclusions of the three-judge panel. Because the no vote has then affected the disposition of the case by allowing a particular resolution of the underlying merits, an absolute majority rule cannot avoid potential interference with the ethical goal of ensuring the neutrality of a disqualified judge.[75]

This commentator concludes that the responsibility for adopting the appropriate definition of majority rests with each individual circuit for now[76] in light of: (1) Congress's failure to select or impose a particular meaning of majority in 28 U.S.C. § 46(c); (2) the Supreme Court's consistent choice not to examine current circuit constructions of the en banc statute despite the intracircuit conflict over the

---

72. *Id.* at 390–92.

73. Wheaton, *supra* note 4, at 1540.

74. *Id.* at 1542.

75. Id. at 1540–41.

76. Wheaton, *supra* note 4, at 1542.

definitional question;[77] and (3) the Judicial Conference's decision not to resurrect its 1973 proposal that Congress rewrite the en banc statute and its suggestion that circuits adopt en banc voting rules that will provide notice to litigants of the definition of majority applied by each circuit. This commentator further believes that each court of appeals should reexamine its en banc voting procedures and reconcile its chosen definition with the traditional importance of intracircuit uniformity of law and the importance of effective judicial disqualification statutes.[78]

77. *See, e.g.,* Lewis v. University of Pittsburgh, 105 S. Ct. 266 (1984), *denying cert. to* 725 F.2d 910 (3d Cir. 1983); Adams v. Proctor & Gamble Mfg. Co., 104 S. Ct. 1318 (1984), *denying cert. to* 697 F.2d 582 (4th Cir. 1983); Arnold v. Eastern Air Lines, 464 U.S. 1040 (1984), *denying cert. to* 712 F.2d 899 (4th Cir. 1983); *In re* American Broadcasting Cos., 104 S. Ct. 538 (1983), *denying mandamus to* Clark v. American Broadcasting Cos., 684 F.2d 1208 (6th Cir. 1982), *cert. denied,* 460 U.S. 1040 (1983); American Broadcasting Cos. v. Clark, 460 U.S. 1040 (1983), *denying cert. to* 684 F.2d 1288 (6th Cir. 1982).

78. *Id.* at 1529.