WHY JUDGES DON'T LIKE PETITIONS FOR REHEARING

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INTRODUCTION

Judges seldom look favorably on petitions for rehearing. Learned Hand, who was on the bench when Congress authorized en banc rehearings in 1948, swore he would never vote for one—and never did.[1] Few judges would go quite that far, and some are more open than others to the suggestion of revisiting a matter that has already been heard, discussed, considered, and brought to a conclusion by three of their colleagues. But Hand was hardly alone in his preference for the decided case. The numbers tell that much. The Federal Circuit, for example, from its inception in 1982 through 1998, granted an average of about 3.1% of petitions for panel rehearing, and only about 1.3% of en banc petitions.[2] The Tenth Circuit noted in a 1988 case that only 1.3% of all rehearing petitions in that circuit had been granted that year.[3] These figures are not atypical; in general, courts are much less ready to grant these petitions than lawyers and litigants are to file them.

The remarks that follow suggest an explanation from the judges' side. I want to explain what a rehearing petition is and what function it is supposed to perform in the procedural system

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1. *See* Gerald Gunther, *Learned Hand: The Man and the Judge* 515 (1st ed., Knopf 1994).

2. *The Sixteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit: Proceedings*, 193 F.R.D. 263, 301 (1999).

3. *Westcot Corp. v. Edo Corp.*, 857 F.2d 1387, 1388 n. 1 (10th Cir. 1988).

under the applicable rules and cases. I also want to spell out just what many judges think is wrong with the way many lawyers and litigants use rehearing petitions. But before I do those things, I should give the whole discussion a bit of historical background, for sometimes it is good to remember that things have not always been as they are now.

HISTORY OF THE REHEARING PROCESS[4]

The Judiciary Act of 1789, which created United States circuit courts along with a Supreme Court and a system of district courts, did not offer most litigants even one chance, let alone two chances, to be heard by an intermediate appellate tribunal. The circuit courts at that time were primarily traveling trial courts, each composed of three judges drawn from other federal courts. Their narrow appellate jurisdiction was rarely exercised. The 1869 Judiciary Act created one circuit judgeship for each judicial circuit but otherwise left the structure basically intact: Three-judge panels composed of a circuit judge and two other federal judges would hear mostly cases within the circuit court's original jurisdiction.

It was not until almost the turn of the century that the familiar three-tiered system developed. In the so-called Evarts Act of 1891, Congress created an intermediate level of purely appellate federal courts, the circuit courts of appeals. Like the lower circuit courts, the courts of appeals sat in three-judge panels, but in keeping with their distinct function they were allotted their own judgeships, three to a circuit. The newly instituted certiorari procedure for Supreme Court review ensured that, for most federal appellate litigants, a three-judge panel of a circuit court of appeals would be a court of last resort.

In the early part of the twentieth century, structural changes in the federal appellate courts raised new issues concerning the review process, especially en banc review. At the center of the controversy was a puzzle of statutory interpretation. The 1911 Judicial Code, while it perpetuated the three-judge panels that

4. For a more detailed and documented historical analysis, see Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 Wash. L. Rev. 213 (1999), and Christopher P. Banks, *The Politics of* En Banc *Review in the "Mini-Supreme Court,"* 13 J.L. & Pol. 377, 379-88 (1997). This section draws on these sources.

the Evarts Act had set up, also provided in the very next section that some circuits would have more than three judgeships. Did the statute empower these circuits to sit en banc, or not? At that time there was little need for an en banc procedure because most appellate courts still had only three or four seats. Any panel decision would, more likely than not, represent the judgment of a majority of the circuit's judges. An appellant who won en banc review could hope, at best, for a 2-2 tie or a reconsidered vote. But as caseloads grew in the 1920s and '30s, Congress authorized more judgeships. The issue was first decided by the Ninth Circuit, which held in *Lang's Estate v. Commissioner*[5] that no provision had been made for en banc review.

Sitting en banc in the case of *Textile Mills Securities Corp. v. Commissioner of Internal Revenue*,[6] the Third Circuit rejected the conclusion espoused in *Lang's Estate*. The Supreme Court unanimously affirmed. Among other considerations, the Court suggested that to resolve the statutory question in favor of en banc sittings would make for "more effective judicial administration" because en banc review would promote finality of decision within the courts of appeals and would aid in resolving intra-circuit conflicts.[7] These ends were thought especially important given the increasing number of cases in which courts of appeals provided the final hearing. Seven years later, Congress codified the result of *Textile Mills* in section 46(c) of the Judicial Code of 1948. The traditional three-judge panel remained the norm, however, because en banc review had to be approved by the majority of a circuit's active judges.

Despite its dicta in *Textile Mills* concerning the benefits of en banc review, the Supreme Court was not prepared to hold that the Judicial Code created a statutory right to a hearing by an en banc court. In fact, the 1953 case of *Western Pacific R.R. Corp. v. Western Pacific R.R. Co.*[8] established the contrary. *Western Pacific* made clear that courts of appeals were empowered, but not required, to sit en banc. They were also vested with wide discretion, not only to grant or deny such review in a given case, but also to formulate the criteria according to which review

5. 97 F.2d 867 (9th Cir. 1938).
6. 117 F.2d 62 (3d Cir. 1940), *aff'd*, 314 U.S. 326 (1941).
7. *Textile Mills*, 314 U.S. at 334-35.
8. 345 U.S. 247, 250 (1953).

would, in general, be granted or denied. Courts of appeals were also able to "devise [the] administrative machinery" through which the decision would be made. Litigants who tried to circumvent the procedure by requesting that the question presented be certified to the Supreme Court were generally unsuccessful.[9] The Supreme Court's 1957 decision in *Wisniewski v. United States*, for example, noted the problems of intra-circuit consistency raised by the growing number of circuit judgeships, but discouraged courts of appeals from using the certification process to solve them.[10] And the high court itself set an example of liberality in the case of *Cahill v. New York, New Haven, & Hartford Railroad Co.*[11] where five justices voted to grant a second petition for rehearing despite objections that it was prohibited by the Court's own rules.

The development of the rehearing process reveals that Congress and the Supreme Court, while persuaded that rehearing is not only authorized but also has salutary functions to perform, have left most questions concerning rehearing to be answered by the officials most directly concerned—the appellate judges themselves. Nevertheless, there is substantial agreement as to the role of rehearing petitions in the appeals process. Let me turn to that subject.

WHAT IS A PETITION FOR REHEARING, WHAT DOES IT DO, AND WHY?

Before there was a question of en banc sittings, courts had the equitable power to rehear cases within the term in which they were decided. W.S. Simkins, glossing Equity Rule 69, stated the traditional factors in the decision whether to appeal or to seek equitable rehearing.

> Unless you have some new and forcible ground, such as where a mistake is palpable, or some material fact has been overlooked by the court, it is better to appeal at once. It is

9. *See e.g. Taylor v. Atlantic Maritime Co.*, 181 F.2d 84 (2d Cir. 1950); *Kronberg v. Hale*, 181 F.2d 767 (9th Cir. 1950) (per curiam). The 1948 statute granting courts of appeals power to certify questions of law to the Supreme Court is presently codified at 28 U.S.C. § 1254(2).

10. 353 U.S. 901, 902 (1957) (per curiam).

11. 351 U.S. 183, 184 (1956).

> not profitable to catch at straws, or rehash old arguments, as the result of a vast majority of these applications attest . . . .[12]

This was good advice, because it was then the rule in all but one circuit that no petition for rehearing would be granted or even argued unless it was supported by a judge who had concurred in the original judgment.[13] The Supreme Court retains this rule.

Now that en banc hearing is explicitly allowed, a matter already decided may be reheard either by the original panel or by the full court. These alternatives have some substantial differences. First, panel rehearings are more frequently granted. Second, as the Supreme Court noted in *Missouri v. Jenkins*, a timely petition for panel rehearing under Federal Rule of Appellate Procedure 40 tolls the 90-day period within which a petition for certiorari to the Supreme Court must be filed, while a bare suggestion for rehearing en banc does not.[14] These two motions are often filed as one, leaving the choice up to the court. Although *Jenkins* illustrates the hazards of such a habit, the certiorari petitioner there, the State, was initially denied access to the writ because it had filed hybrid "petitions for rehearing en banc" rather than making explicit that it intended both to request panel rehearing and to suggest en banc determination.[15]

The first procedural consequence of a grant of rehearing is that the original panel's judgment is vacated. This is a serious matter, as reflected, for example, in the prerequisites for en banc determination. While it is always within the court's discretion to grant or to deny rehearing of any kind, Federal Rule of Appellate Procedure 35 advises litigants that "[a]n en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the

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12. W.S. Simkins, *Federal Practice* 877 (Lawyer's Coop. Publg. Co. 1923).

13. *Id.* at 1268-70.

14. 495 U.S. 33, 45-47 (1990). Note the terminology: There was technically no such thing as a "petition for rehearing en banc." At that time, Federal Rule of Appellate Procedure 35 used the term "suggestion" to emphasize the court's discretion. The rules have now been clarified, and the terminology changed. The term "petition" is now used for both panel-rehearing requests and en-banc-rehearing requests. Fed. R. App. P. 35(d) (2000).

15. 495 U.S. at 47.

proceeding involves a question of exceptional importance."[16] With respect to rehearing of any kind, the rules reveal a greater concern for expeditiousness than for thoroughness, the presumption being that a decided case has already received thorough consideration. Thus, petitions are limited to fifteen pages, responses are not permitted unless solicited by the court, and courts need not vote on the merits of petitions unless a judge calls for a vote.[17] In my circuit, petitions are automatically denied ten days after circulation unless a judge has requested a poll, and litigants or counsel who file frivolous petitions are subject to a monetary sanction,[18] although this sanction is infrequently imposed. The overriding concern is to provide an avenue for the exercise of the court's power to rehear cases, without unduly multiplying proceedings. Nevertheless, there are extraordinary circumstances in which justice requires the rehearing of a decided case. Let me give a few examples from the Eighth Circuit.

Walker v. Lockhart[19] was a murder case in which the defendant, Walker, maintained his innocence. Walker, along with several other men, participated in a shootout in which a police officer was killed. Although Walker had undisputedly squared off against that officer and had himself been shot numerous times, ballistics tests revealed that none of the guns recovered from his person had been fired. In fact, only one of the guns recovered from any of the suspects had been fired: It was found on the street near where Walker fell. Walker was convicted. After exhausting state remedies, he petitioned for federal habeas relief, which was denied by both the district court[20] and the court of appeals.[21] The denial of Walker's second habeas petition[22] was also affirmed by a divided Eighth Circuit sitting en banc,[23] although a majority of that court thought that

16. Fed. R. App. P. 35(a)(1), (2) (2000).
17. Fed. R. App. P. 35(f) (2000).
18. 8th Cir. I.O.P. § IV(D) (2000).
19. 763 F.2d 942 (8th Cir. 1985).
20. *Walker v. Bishop*, 295 F. Supp. 767 (E.D. Ark. 1967).
21. 408 F.2d 1378 (8th Cir. 1969).
22. 514 F. Supp. 1347 (E.D. Ark. 1981).
23. 726 F.2d 1238 (8th Cir. 1984).

the earlier habeas petition should probably have been granted.[24] Walker then filed a motion to recall the mandate,[25] on the basis that new exculpatory evidence had surfaced: Among other things, new testimony was available which strongly suggested that the only shot that could have killed the officer had been fired by another man. This was enough to change my mind about the case, and my vote gave Walker a majority and a new trial.[26] Even under these circumstances, however, four judges dissented. A motion to recall the mandate is the functional equivalent of an untimely petition for rehearing, and it almost never succeeds.

The case of *Clemmons v. Delo*[27] arose from a stabbing in a prison. Eyewitness testimony conflicted as to whether Clemmons was the assailant. A guard testified that he was, but several inmates testified that another inmate, Fred Bagby, had committed the murder. The prosecution cast doubt on the inmates' testimony because Bagby had died and was thus an easy scapegoat. Evidence existed, however, that less than an hour after the stabbing, a captain of the prison guard had interviewed an inmate who had accused Bagby of the crime. That evidence was not given to Clemmons's attorney. Moreover, the government introduced testimony against Clemmons in the form of a deposition, raising serious Confrontation Clause issues. After exhausting his state remedies, Clemmons filed a habeas corpus petition. The district court denied it, holding that the issues had not been properly raised in the state courts, and our panel affirmed. In Clemmons's petition for rehearing, he pointed out that he had presented evidence relevant to his Confrontation Clause argument in the state habeas court. He also corrected the panel's misunderstanding of Missouri evidence law in a way that affected his *Brady* issue.[28] For these reasons we granted him a panel rehearing and reversed the district court's denial of post-conviction relief. Clemmons's death sentence and conviction were set aside and a new trial ordered.

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24. *Id.* (Gibson, Ross, Fagg & Bowman, JJ., with Arnold, J., concurring; Bright, Lay, Heaney & McMillian, JJ., dissenting).

25. *Id.* at 1265.

26. 763 F.2d at 961-62.

27. 100 F.3d 1394 (8th Cir. 1996), *rev'd on rehearing*, 124 F.3d 944 (8th Cir. 1997).

28. 124 F.3d at 946 n. 1.

At the new trial, Clemmons was acquitted! (He's still in jail on another murder conviction.)

The government also may benefit from rehearing. In *United States v. Ramos*,[29] I was a member of a panel that reversed a drug conviction because two of us thought that the arresting officer had performed an illegal search. On rehearing, all three judges were persuaded that the defendants had consented to the search, and we reversed the original panel judgment.[30]

All these exceptions prove the rule, however: Petitions for rehearing are generally denied unless something of unusual importance—such as a life—is at stake, or a real and significant error was made by the original panel, or there is conflict within the circuit on a point of law. In the usual course of things, cases receive all the consideration they need the first time through. Perhaps losing parties do not share that opinion, or perhaps they do not understand how firmly most judges believe it. Whatever the reason, the difference between the number of rehearing petitions granted and the number filed is, as I have noted, measurable in orders of magnitude.

PRACTICAL OBSERVATIONS

First. There doesn't have to be a petition for rehearing in every case. I understand that lawyers and litigants who feel aggrieved want to say so. Still, I think lawyers should advise their clients that very few petitions for rehearing, either by the panel or en banc, are granted, and filing such a petition may be a waste of the client's money. Moreover, lawyers have a duty not to file frivolous rehearing petitions. There is a rule that provides for the imposition of a sanction upon the filing of a frivolous or scurrilous petition for rehearing.[31] The rule is rarely invoked, but it is there.

Second. If an attorney does file a petition for rehearing, either by the panel or en banc, it needs to be pointed and vigorous. It needs somehow to attract the attention of the Court. Have in mind that most petitions for rehearing are automatically

29. 20 F.3d 348 (8th Cir. 1994) (Beam, J., dissenting), *rev'd on rehearing*, 42 F.3d 1160 (8th Cir. 1994).

30. *Id.* at 1163 n. 3 (Judge Beam concurred in the result, *id.* at 1164-65).

31. 8th Cir. R. 35(a)(2) (2000).

denied with the passage of time. In most cases, no one requests a poll on a petition for rehearing en banc, and so no actual vote is conducted. The silence of the judges is taken to be a "no," and a routine order is entered denying the petition in due course. In writing a petition, the attorney must somehow strike a balance between vigor and disrespect. Remember that three of the judges to whom the petition is addressed (I assume here that all three members of the panel were circuit judges in regular active service) have already heard and rejected the attorney's position. Occasionally, though, they can be persuaded of the error of their ways, and it would be unwise to phrase the petition in such a way as to be offensive. The petition should take the bark off the tree, but gently. This of course is difficult to do, but changing anybody's mind about conclusions already reached after deliberation is necessarily going to be difficult.

Third. The title of this essay asks a question: Why don't judges like petitions for rehearing? The answer should be obvious: People don't like to be told that they are wrong. Once in a great while, however, people, including judges, can be brought to admit that they were wrong. Occasionally this happens even in matters of life and death, as in the *Clemmons* case, discussed above. This case alone, I suppose, justifies the existence of the rehearing procedure, though on many days, I confess, I find myself wishing that there were no such thing.

Fourth. Count your votes. In the Eighth Circuit, only circuit judges who are in regular active service (that is, who have not taken senior status) are eligible to vote on the question whether to grant rehearing en banc. A majority of these judges must vote in favor of the petition, or it is denied. This holds true even if there are disqualifications or failures to participate on account of illness or disability. For this reason, there have been cases where a majority of those judges who voted also favored rehearing en banc, but the petition was still denied.[32] Speaking again of Eighth Circuit procedure, if the panel of three judges that ruled against the petitioner included a senior circuit judge, whether of the Eighth Circuit or another circuit, or a district judge, sitting by designation, a petitioner's chances of getting rehearing en

32. *See e.g. In re Ahlers*, 794 F.2d 388, 414-15 (8th Cir. 1986), *rev'd on other grounds, sub nom. Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988) (five members of the Eighth Circuit dissent from denial of rehearing).

banc granted may be increased, just as a statistical matter. If, for example, the panel consists of one circuit judge in regular active service, one senior circuit judge, and a district judge, only one member of the panel is eligible to vote on the question of granting rehearing en banc. So, if the active circuit judge on the panel dissented and voted in the petitioner's favor, the chances of getting rehearing en banc may be enhanced. Two further quirks: If a senior judge of the Eighth Circuit sat on the original panel, that judge, at his or her option, will be eligible to vote on the court en banc if rehearing en banc is granted. Such a judge cannot vote on the petition itself, but he or she may participate in the decision of the case if rehearing en banc is granted. In addition, en banc decisions sometimes produce tie votes. The Eighth Circuit presently has one vacancy, so there are only ten active circuit judges. If the court en banc splits five to five, the effect is to affirm the judgment of the district court, which decides the particular case but makes no precedent. An attorney might think that an evenly divided vote on the court en banc would reinstate the panel opinion, but it doesn't. It affirms the judgment of the district court.

Fifth. In some ways, petitions for rehearing by the panel may have more chance than petitions for rehearing en banc. The latter tend to suggest that the sky is falling, that some cosmic error has occurred. Judges are skeptical of such claims. A petition for rehearing by the panel, by contrast, can be very effective if it points out the court's misunderstanding of the record on some crucial point.

Sixth. If after considering all these points, an attorney still wants to file a petition for rehearing, good luck. We do read them all, though few are granted.