THE "LIMITED" EN BANC: HALF FULL, OR HALF EMPTY?

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I.

Alone among the circuit courts of appeals, the Ninth Circuit's judges do not sit together as a full bench when rehearing a case en banc. Rather, the court's en banc function is performed by eleven of its twenty-eight active judges in what is called a "limited en banc." A "limited" en banc is an oxymoron, because "en banc" means "full bench." It "refers to a session where the entire membership of the court will participate in the decision rather than the regular quorum."[1] The question is: How unfull can a bench be and still behave as if it were really full?

An unfull bench works because we say it works. It works in the sense that lawyers and judges are willing, as a practical matter, to accept the decisions of a limited en banc panel as authoritative. There is, after all, no realistic alternative in the Ninth Circuit because its court of appeals is (or is thought to be) too big to convene in a true en banc.[2] This is fine, so far as it goes; however, there is more to the en banc function than publishing en banc opinions. In my view, a full bench, comprising all active members of the court, serves important collegiality,[3] efficiency, and accountability functions that a limited en banc, consisting of judges

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1. BLACK'S LAW DICTIONARY 526 (6th ed. 1990).

2. The possibility of a full court rehearing exists. 9TH CIR. R. 35-3. However, few are requested, and none has ever been granted.

3. I use "collegiality" in the sense used by the White Commission, not to "connote friendship or agreement," but rather to reflect the "'intimate, continuing, open, and noncompetitive relationship' among judges that 'restrains one's pride of self and authorship [and] makes a virtue of patience in understanding and of compromise on non-essentials.'" COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, FINAL REPORT 40 (1998) [hereinafter STRUCTURAL ALTERNATIVES REPORT] (quoting FRANK COFFIN, ON APPEAL 215 (1994)).

randomly selected on a case-by-case basis, cannot possibly perform. For this reason, I see a "limited" en banc as half empty.

Federal appellate courts may rehear en banc a case determined by a three-judge panel when a majority of the active judges decides that en banc reconsideration is necessary to secure or maintain uniformity of the court's decisions, or the proceeding involves a question of exceptional importance.[4] By local rule in the Ninth Circuit, a case may also be en banc-worthy when the panel opinion creates an intercircuit conflict.[5] Traditionally, and elsewhere today, a court en banc consists of all circuit judges in regular active service.[6] A majority constitutes a quorum.[7]

The "limited en banc" was born in the wake of the recommendation by the Hruska Commission in 1973 that Congress split both the Fifth and Ninth Circuits.[8] Congress did not follow the recommendation, but did embrace the concept of an en banc proceeding with fewer than all the active judges as part of a compromise that created more judgeships for both circuits. The Omnibus Judgeship Act of 1978 increased the sizes of the Ninth Circuit to twenty-three judgeships and of the Fifth Circuit to twenty-six; at the same time, it authorized any appellate court with more than fifteen active judges to "perform its en banc function by such number of [judges] as may be prescribed by rule of the court of appeals."[9] By 1980 the (old) Fifth Circuit's court of appeals had held an en banc hearing with its entire complement of judges and decided in light of that experience that a split was necessary. The Ninth Circuit Court of Appeals, on the other hand, exercised the option for limited en banc proceedings.

The en banc process in the Ninth Circuit is fairly elaborate. A party may petition for rehearing en banc, or a judge or the panel before whom a case is calendared may make an en banc call sua sponte.[10] If a petition is filed, and any judge so requests, the panel circulates its recommendation to the full court.[11] Any judge may call for en banc consideration, and if a call is made, a vote is taken.[12] The vote tally is confidential.[13] If it fails, the panel resumes control and enters an order denying rehearing en banc.[14] If it succeeds, the Chief Judge enters an order

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4. 28 U.S.C. § 46(c) (2000); FED. R. APP. P. 35(a).

5. 9TH CIR. R. 35-1.

6. 28 U.S.C. § 46(c). A senior circuit judge is eligible to participate as a member of an en banc court if he or she was a member of the panel that decided the case being reheard. *Id.*

7. *Id.* § 46(d).

8. COMM'N ON REVISION OF THE FED. COURT APPELLATE SYS., THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE (1973). A more detailed history appears in the report of the White Commission. STRUCTURAL ALTERNATIVES REPORT, *supra* note 3, at 17–21, 29–34.

9. Pub. L. No. 95-486, § 6, 92 Stat. 1629.

10. FED. R. APP. P. 35(b); 9TH CIR. R. 35-2.

11. 9TH CIR. ADVISORY COMM. NOTE TO R. 35-1 TO 35-3, pt. (2).

12. *Id.*

13. *Id.* pt. (3).

14. *Id.* pt. (2).

so indicating, and the en banc panel is drawn.[15] In this event, the panel opinion must not be cited as precedent in the courts of the circuit.[16]

Separate en banc procedures apply in death penalty cases when a date for execution has been set. A "stand-by" en banc court is drawn from the same pool as for all en bancs in accordance with Circuit Rule 35-3, the time frame for requesting en banc review and voting on requests is shortened, and the default rule for voting in favor of or against rehearing en banc is reversed (that is, a failure to vote is recorded as a "yes" vote in favor of en banc review).[17]

The Ninth Circuit's court of appeals presently has twenty-eight authorized judgeships. Senior judges (of whom there are now twenty-three) may participate in the en banc process by making en banc calls and circulating memoranda in support of, or in opposition to, an en banc call; they may not vote however. Circuit Rules provide for a limited en banc court of eleven, consisting of the Chief Judge, who sits on all en bancs, and ten drawn by lot from the active judges and eligible senior judges.[18] Once a case is taken en banc, only those judges participating in the en banc court are included in the distribution of memoranda, proposed opinions, and other communications regarding the en banc proceeding.

II.

The limited en banc has a number of virtues. It makes it possible for a court the size of the Ninth Circuit's to perform an en banc function without having to commit (or contend with) twenty-eight judges for every rehearing. As the court tends to take between fifteen and twenty cases en banc each year, this is a considerable "plus." Also, the task of resolving technical inconsistencies can be done as effectively by eleven (or fifteen) as by twenty-eight. To the extent that cases are taken en banc for this purpose, this, too, is a "plus."

Yet there is a systemic flaw in the limited en banc concept that is not without consequence. The limited en banc is premised at least in part on the notion that some number of judges smaller than the whole can represent the entire court. However, the premise is inapposite to the judiciary. Of course, three-judge panels regularly speak for the court as whole, and their decisions settle most of the law of

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15. 9TH CIR. R. 35-3.

16. 9TH CIR. ADVISORY COMM. NOTE TO R. 35-1 TO 35-3, pt. (3).

17. 9TH CIR. R. 22-2(d), 22-4(b), 22-5(e).

18. 9TH CIR. R. 35-3. The court of appeals will experiment with a limited en banc of fifteen for two years starting in 2006. Rule 35-3 also currently provides that a judge must be placed automatically on the next en banc if he or she is not drawn on any of three successive en banc courts, but this will be changed as of 2006 as well. Neither change affects my analysis, nor cures the defects that I see in the format. Although fifteen is a majority of twenty-eight, fifteen randomly selected judges still cannot represent the remaining thirteen. Even so, fifteen *is* a majority only when the chosen fifteen are unanimous. Setting aside the question whether unanimity would occur if input from others informed the process, the track record for limited en bancs resolved on the merits between 1999 and 2005 shows that of ninety-five cases, forty-three decisions were unanimous in outcome, if not always in reasoning. Put differently, more than fifty percent of limited en banc proceedings do not result in a unanimous decision. Accordingly, adding four judges lends no additional legitimacy to the process.

the circuit. But decisions by three-judge panels are generally accepted and regarded as authoritative because the full court is there as a backstop. The full bench can always change the outcome or the rationale of a panel opinion that a majority of the full court regards as out of line. While a majority of all the judges in a limited en banc circuit may cause a decision to be reheard—just as in a full-bench circuit—unlike a full-bench circuit, there is no assurance that those judges will have a voice or a vote in the actual en banc proceeding.[19] In this function, neither eleven judges, nor fifteen, nor any number less than the whole, can represent any other judge. Nor may six judges, a majority of eleven, or eight, a majority of fifteen, represent all twenty-eight judges or some hypothetical majority of all twenty-eight.[20]

This is so for a fundamental reason: courts are not legislative bodies, and Article III judges are not legislators whose views may be represented by others. A judge's commission is individual, based on that judge's "wisdom, uprightness and learning."[21] Judges cannot give proxies to their colleagues or pair their voting. At the same time, appellate courts make decisions collegially, that is, by a process of collaboration during which individual judgments are influenced and fine-tuned by the views of one's colleagues.[22] By definition, this cannot happen in a limited en banc when sixty percent of the court's judges are on the sidelines.[23]

It is impossible to quantify how much this matters in actual cases. Votes in favor of rehearing a panel decision en banc are not a good measure of majority

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19. For example, as of September 2005, I had been on 53 of the last 114 limited en bancs, which comes to somewhat less than fifty percent.

20. It is sometimes argued in defense of the Ninth Circuit's limited en banc that eleven judges are a sufficient number to render an authoritative decision, as it is in those circuits whose appellate courts have eleven active judges. I have no quarrel with this proposition when eleven is the total number of judges. What I question is whether any number less than the entire number (regardless of what that number is) can truly backstop panel opinions, declare the law of the circuit authoritatively, and effectively fulfill the other en banc functions of accountability, efficiency, and collegiality.

21. The phrase "Wisdom, Uprightness and Learning" has been included in federal judicial commissions as far back as George Washington's time. *See, e.g.*, George Washington, Appointment Notice (Aug. 28, 1790) (commissioning Robert Morris as a federal judge for New Jersey's district court), *in* Gilder Lehrman Collection Documents, No. 4421, *available at* http://www.gilderlehrman.org/search/display_results.php?id=GLC04421.

22. Although the position of two judges may be the same on any given issue, each will bring different experience and learning to bear and will inevitably express his or her views differently. One judge may think experientially, another pragmatically. One may have been a scholar, another a district judge. One may reason from policy, another from precedent. What persuades one colleague may not persuade another, but it is this sort of exchange among all judges that informs the decisionmaking process and uniquely characterizes the collegial nature of an appellate court.

23. This figure assumes that all twenty-eight active judgeships are filled and that the limited en banc consists of eleven judges. If there are vacancies, or when there are fifteen judges on the limited en banc panel, the nonparticipation percentage will go down. However, even with fifteen on the panel and four vacancies, nearly forty percent of the active judges will be left out.

sentiment because judges vote "yes" or "no" for any number of reasons having little to do with how that judge would actually come out on the merits. Further, off-panel judges seldom have access to the record and cast their vote about going en banc primarily on the basis of the petitions for rehearing and exchange of memoranda; preliminary views that drive the en banc vote may well change after full review of the record, argument of the parties, and consideration of what others have to say in conference.

However, experience does show that anomalies occur in the limited en banc procedure that could not occur in a true en banc. For example, of ninety-five en bancs resolved on the merits between 1999 and 2005, there were nine cases where at least as many Ninth Circuit judges (in en banc dissents and the panel majority) signed opinions that reach the opposite result on at least one issue as signed the limited en banc majority decision.[24] In other words, a majority of a limited en banc panel can produce a result that is contrary to the known views of the same number, or a greater number, of judges.[25] Even allowing for the difficulty of assessing outcomes, and acknowledging that these incidents are few in comparison to both the total number of cases taken en banc and the total number of cases decided by the court of appeals, the fact remains that this kind of disconnect could not occur with a full-bench rehearing.

III.

The limited en banc has other shortcomings that are less obvious, but arguably are more important, than the possibility that the majority of a limited en banc can differ from the majority of a true en banc of twenty-eight in any given case. Appellate decisionmaking is a collegial endeavor by which a reasonably consistent, stable, coherent, and predictable body of law is developed. The en banc function furthers this end. Ultimately, it is the means by which all members of the court participate in developing the law of the jurisdiction and, in so doing, assure

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24. Silvers v. Sony Pictures Entm't, Inc., 402 F.3d 881 (9th Cir. 2005) (en banc), *rev'g* 330 F.3d 1204 (9th Cir. 2003); United States v. Kincade, 379 F.3d 813 (9th Cir. 2004) (en banc), *rev'g* 345 F.3d 1095 (9th Cir. 2003); Chein v. Shumsky, 373 F.3d 978 (9th Cir. 2004) (en banc), *rev'g* 323 F.3d 748 (9th Cir. 2003); Payton v. Woodford, 346 F.3d 1204 (9th Cir. 2003) (en banc), *aff'g* 299 F.3d 815 (9th Cir. 2002) (en banc), *aff'g* 258 F.3d 905 (9th Cir. 2001), *rev'd sub nom.* Brown v. Payton, 544 U.S. 133 (2005); United States v. Cabaccang, 332 F.3d 622 (9th Cir. 2003) (en banc), *aff'g in part and rev'g in part* 16 F. App'x. 566 (9th Cir. 2001); Ramirez-Alejandre v. Ashcroft, 320 F.3d 858 (9th Cir. 2003) (en banc), *rev'g* 276 F.3d 517 (9th Cir. 2002); Gerber v. Hickman, 291 F.3d 617 (9th Cir. 2002) (en banc), *rev'g* 264 F.3d 882 (9th Cir. 2001); Idaho v. Horiuchi, 253 F.3d 359 (9th Cir. 2001) (en banc), *rev'g* 215 F.3d 986 (9th Cir. 2000), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001); Catholic Soc. Servs., Inc. v. INS, 232 F.3d 1139 (9th Cir. 2000) (en banc), *aff'g and rev'g in part* 182 F.3d 1053 (9th Cir. 1999).

If visiting judges are counted, there have been eleven cases where the total number of judges signing an opinion that reached the opposite conclusion was greater than or equal to the number of judges in the limited en banc majority.

25. This, of course, does not allow for the possibility that judges who previously held one view might change their view as a result of the en banc proceeding, or that those judges who held a different view but were not part of the limited en banc proceeding might have been able to change the view of some of those who were.

that the law is developed in a measured and sensible way. In this way, full-bench review holds three-judge panels accountable. Three-judge panels make decisions understanding that if a majority of their colleagues disagree on an important issue, their decision will be reconsidered en banc.

However, accountability is undermined when the en banc court consists of less than the full bench and is constituted on a case-by-case basis. Neither its composition nor its outlook is known or knowable. There is no way of quantifying the effect of this uncertainty on collegial behavior, but common sense suggests that the moderating effect of full-bench review is lessened if the three-judge panel has no idea who will be on the limited en banc when the panel renders its decision. By the same token, no one knows who will be on the limited en banc panel when active judges vote on whether to take a case en banc. This unknown may also affect the calculus in ways that it never would with a full-court rehearing. In addition, members of the original three-judge panel are not necessarily members of the limited en banc panel. Frequently they are not. Of the ninety-five cases surveyed between 1999 and 2005, there were twenty-two in which no members of the original panel were on the limited en banc panel.[26] Of these, there were nine where not one of the judges from a unanimous three-judge panel was drawn for the limited en banc, yet a majority of the limited en banc panel came out the other way.[27] Even where there was some overlap, there were twelve cases in which

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26. Diaz v. Parks, 420 F.3d 897 (9th Cir. 2005) (en banc), *rev'g* 380 F.3d 480 (9th Cir. 2004); Skokomish Indian Tribe v. United States, 410 F.3d 506 (9th Cir. 2005) (en banc), *aff'g in part and transferring in part* 332 F.3d 551 (9th Cir. 2003); Thomas v. Gonzales, 409 F.3d 1177 (9th Cir. 2005) (en banc), *aff'g* 359 F.3d 1169 (9th Cir. 2004), *vacated*, No. 05-552, 2006 U.S. LEXIS 3268 (Apr. 17, 2006); United States v. Navarro-Vargas, 408 F.3d 1184 (9th Cir. 2005) (en banc), *aff'g* 367 F.3d 896 (9th Cir. 2004); *Silvers*, 402 F.3d 881; Barapind v. Enomoto, 400 F.3d 744 (9th Cir. 2005) (en banc), *aff'g in part and rev'g in part* 360 F.3d 1061 (9th Cir. 2004); Cooper v. Woodford, 358 F.3d 1117 (9th Cir. 2004) (en banc), *rev'g* 357 F.3d 1019 (9th Cir. 2004); Wilderness Soc'y v. U.S. Fish & Wildlife Serv., 353 F.3d 1051 (9th Cir. 2003) (en banc), *rev'g* 316 F.3d 913 (9th Cir. 2003); Welch v. Carey, 350 F.3d 1079 (9th Cir. 2003) (en banc), *rev'g sub nom.* Welch v. Newland, 267 F.3d 1013 (9th Cir. 2001); *Payton*, 346 F.3d 1204; Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 914 (9th Cir. 2003) (en banc), *rev'g* 344 F.3d 882 (9th Cir. 2003); *Ramirez-Alejandre*, 320 F.3d 858; Paulson v. City of San Diego, 294 F.3d 1124 (9th Cir. 2002) (en banc), *rev'g* 262 F.3d 885 (9th Cir. 2001); Sistrunk v. Armenakis, 292 F.3d 669 (9th Cir. 2002) (en banc), *aff'g* 271 F.3d 1174 (9th Cir. 2001); Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201 (9th Cir. 2001) (en banc), *rev'g* 229 F.3d 1210 (9th Cir. 2000); United States v. Sesma-Hernandez, 253 F.3d 403 (9th Cir. 2001) (en banc), *aff'g* 219 F.3d 859 (9th Cir. 2000); John v. United States, 247 F.3d 1032 (9th Cir. 2001) (en banc), *aff'g* 72 F.3d 698 (9th Cir. 1995); Gentala v. City of Tucson, 244 F.3d 1065 (9th Cir. 2001) (en banc), *aff'g in part and rev'g in part* 213 F.3d 1055 (9th Cir. 2000), *overruled in part by* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Whalem/Hunt v. Early, 233 F.3d 1146 (9th Cir. 2000) (en banc), *rev'g* 204 F.3d 907 (9th Cir. 2000); *Catholic Soc. Servs.*, 232 F.3d 1139; United States v. Gracidas-Ulibarry, 231 F.3d 1188 (9th Cir. 2000) (en banc), *aff'g in part and rev'g in part* 192 F.3d 926 (9th Cir. 1999); McDowell v. Calderon, 197 F.3d 1253 (9th Cir. 1999) (en banc), *aff'g in part and rev'g in part* 173 F.3d 1186 (9th Cir. 1999).

27. *Silvers*, 402 F.3d 881; *Barapind*, 400 F.3d 744; *Carey*, 350 F.3d 1079; *Sw. Voter Registration Educ. Project*, 344 F.3d 914; *Paulson*, 294 F.3d 1124; *Bugenig*, 266 F.3d

neither of the two judges forming the panel majority was on an en banc panel that went the other way.[28] When this occurs, the limited en banc decisionmaking process lacks the benefit of input from colleagues who are well-versed in the record and law applicable to the case and whose prior work would bring a different perspective to en banc deliberations. In this respect collegial participation that is always present in full-bench review is missing from the limited en banc process. This implicates collegiality, efficiency, and authoritativeness because it is apparent in such cases that not all judges with a full understanding of the issues have a voice and a vote in the en banc decision.

The absence of overlap between the three-judge panel and the limited en banc panel has a more pronounced effect when it occurs in a case where the number of judges concurring in the limited en banc opinion is less than or equal to the number of judges who have signed an opinion reaching the opposite result. This problematic outcome has happened in four cases.[29]

Finally, the limited composition of the limited en banc panel means that off-panel judges are not necessarily aware of imminent en banc opinions that may affect pending decisions.[30] This, of course, could not happen with full court en bancs. Also, a limited en banc means that the views of off-panel judges are not necessarily known or taken into account in the collaborative effort to craft an opinion. Judges who are not invested and have not had their different point of view taken into account may feel less constrained about chipping away at the en banc ruling in subsequent opinions.[31]

CONCLUSION

In sum, while the limited en banc concept has the merit of affording another level of review short of calling upon the resources of the full court, it nevertheless has built-in shortcomings that curtail the unifying and stabilizing functions of true, full-bench review. Thus, as I see it, being half full, the limited en banc is half empty.

1201; *Whalem/Hunt*, 233 F.3d 1146; *Gracidas-Ulibarry*, 231 F.3d 1188; *McDowell*, 197 F.3d 1253.

28. *Diaz*, 420 F.3d 897; Hayes v. Brown, 399 F.3d 972 (9th Cir. 2005) (en banc), *rev'g sub nom.* Hayes v. Woodford, 301 F.3d 1054 (9th Cir. 2002); Pincay v. Andrews, 389 F.3d 853 (9th Cir. 2004) (en banc), *rev'g* 351 F.3d 947 (9th Cir. 2003); *Cooper*, 358 F.3d 1117; *Wilderness Soc'y*, 353 F.3d 1051; *Payton*, 346 F.3d 1204; *Gerber*, 291 F.3d 617; United States v. Barrios-Gutierrez, 255 F.3d 1024 (9th Cir. 2001) (en banc), *rev'g* 218 F.3d 1118 (9th Cir. 2000); Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000) (en banc), *rev'g* 196 F.3d 979 (9th Cir. 1998), *vacated*, 535 U.S. 391 (2002); Gorbach v. Reno, 219 F.3d 1087 (9th Cir. 2000) (en banc), *rev'g* 179 F.3d 1111 (9th Cir. 1999); Gruntz v. County of Los Angeles (*In re* Gruntz), 202 F.3d 1074 (9th Cir. 2000) (en banc), *rev'g* 177 F.3d 728 (9th Cir. 1999); Sanders v. Union Pac. R.R., 193 F.3d 1080 (9th Cir. 1999) (en banc), *rev'g* 154 F.3d 1037 (9th Cir. 1998).

29. *Silvers*, 402 F.3d 881; *Payton*, 346 F.3d 1204; *Ramirez-Alejandre*, 320 F.3d 858; *Catholic Soc. Servs.*, 232 F.3d 1139.

30. *See, e.g.*, Abreu-Reyes v. INS, 350 F.3d 966 (9th Cir. 2003).

31. *Compare* Fisher v. INS, 79 F.3d 955 (9th Cir. 1996) (en banc), *with* Lising v. INS, 124 F.3d 996 (9th Cir. 1997), *and id.* at 999 (Boochever, J., concurring).

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