Mississippi College Law Review

Volume 14
Issue 2 *Vol. 14 Iss. 2*

Article 26

1994

The Most Abused Prerogative: En Banc Review in the United States Court of Appeals for the Fifth Judicial Circuit

Jody Brian Martin

Custom Citation
14 Miss. C. L. Rev. 395 (1993-1994)

THE MOST ABUSED PREROGATIVE: EN BANC REVIEW IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH JUDICIAL CIRCUIT

Jody Brian Martin

I. INTRODUCTION

The United States Courts of Appeals, as originally established, consisted of only three judges in each circuit.[1] As the workload increased additional judges were added, but the courts continued to sit in panels of three.[2] Each of these panels spoke with the authority of that circuit court.[3] The ever-increasing number of appeals filed and difficulty in communications, however, led to inconsistent holdings by panels within the same circuit.[4] The appellate courts soon began to address this problem by reviewing important cases en banc.[5] Justice Stewart articulated the purpose of an en banc hearing when he stated:

> The principal utility of determinations by the courts of appeals in banc is to enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions while enabling the court at the same time to follow the efficient and time-saving procedure of having panels of three judges hear and decide the vast majority of cases as to which no division exists within the court.[6]

Although en banc hearings consistently make up less than one percent of the caseload of the United States appellate courts,[7] they continue to serve the important functions recognized by Justice Stewart.

The en banc process is especially important to the Fifth Circuit which has had a historically larger number of en banc hearings than other circuits.[8] Several factors contribute to the importance of en banc review in the Fifth Circuit. The amount of

---

1. Evarts Act, ch. 517, § 2, 26 Stat. 826 (1891).

2. A. Lamar Alexander Jr., Note, *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities* (Part I), 40 N.Y.U. L. REV. 563, 570-71 (1965) [hereinafter Alexander].

3. 28 U.S.C. § 46(c) reviser's note (1970).

4. H.R. REP. No. 1390, 96th Cong., 2d Sess. 4 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4236, 4238.

5. *See, e.g.*, Commissioner v. Textile Mills Sec. Corp., 117 F.2d 62 (3d Cir. 1940) (en banc), *aff'd*, 314 U.S. 326 (1941). "En banc" means "in the bench" or "full bench" and allows a court which usually hears cases in small panels to convene all of the judges for a case in certain circumstances. *Black's Law Dictionary* 526-27 (6th ed. 1990). Both the relevant statute authorizing en banc hearings (28 U.S.C. § 46 (1988)) and the applicable federal rule (FED. R. APP. P. 35) use the spelling "in banc," but the terms "in banc" and "en banc" are apparently interchangeable. They are distinguished in neither *Black's Law Dictionary* nor in case law. For consistency, this Comment uses the spelling "en banc" due to its prevalent use in case law and literature.

6. United States v. American-Foreign S.S. Corp., 363 U.S. 685, 689-90 (1960) (quoting Albert B. Maris, *Hearing and Rehearing Cases in Banc*, 14 F.R.D. 91, 96 (1954)).

7. Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. REV. 29, 29-30 (1988) [hereinafter Solimine].

8. *Id.* at 42; *see also id.* at 45 tbl. 1.

new appeals has risen steadily,[9] and there has also been an increase in the number of judges.[10] Such circumstances may lead to a decrease in the control by a majority of active judges over panel decisions and a resulting lack of uniformity in some areas.[11] In addition, the large geographic size and the large number of judges of the Fifth Circuit make it difficult to maintain uniformity within its jurisdiction.[12] Part of the motivation behind the division of the old Fifth Circuit into the current Fifth and Eleventh Circuits was a recognition of the difficulty in maintaining uniformity in such a large jurisdiction and the cumbersome nature of the en banc process.[13] The current Fifth Circuit still uses the en banc process to resolve intra- circuit conflicts and to handle significant issues. This Comment looks at the development of the en banc procedure in general and then focuses on the Fifth Circuit's recent relationship with this extraordinary process.

II. HISTORICAL BACKGROUND OF EN BANC REVIEW IN THE FEDERAL COURTS OF APPEALS

The circuit courts of appeals were created in 1891 by the Evarts Act.[14] This Act provided that the courts of appeals would consist of three judges.[15] Twenty years later, section 117 of the Judicial Code of 1911 again provided that the circuit courts should consist of three judges, but section 118 increased the number of judgeships in three circuits.[16] Until 1940, however, no court of appeals other than the District of Columbia ever sat with more than three judges,[17] but in 1940 decisions of the Ninth and Third Circuits came into conflict over the power to sit en banc. A 1939 panel decision of the Ninth Circuit held that section 117 of the Judicial Code of 1911 authorized a court of three judges and no more.[18] Despite this holding, the Third Circuit began to hear cases en banc.[19] The Supreme Court granted certiorari in *Textile Mills Securities Corp. v. Commissioner*[20] to resolve the conflict. The Court stated that section 118 of the Judicial Code of 1911 impliedly

---

9. 1993 JUDICIAL BUSINESS OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT: CLERK'S REPORT FOR THE PERIOD JULY 1992-JUNE 1993 i [hereinafter CLERK'S REPORT]. The number of new appeals in the Fifth Circuit has risen from 4323 in 1988 to 6695 in 1993. *Id.*

10. *See* 28 U.S.C. § 44(a) (Supp. IV 1992) (amending 28 U.S.C. § 44(a) (1988)).

11. *See generally* Sheldon Goldman, *Conflict on the U.S. Courts of Appeals 1965-1971: A Quantitative Analysis*, 42 U. CIN. L. REV. 635 (1973); Peter M. Madden, Comment, *In Banc Procedures in the United States Courts of Appeals*, 43 FORDHAM L. REV. 401 (1974) [hereinafter Madden].

12. H.R. REP. NO. 1390, 96th Cong., 2d Sess. 4 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4236, 4238-39.

13. *Id.*

14. Evarts Act, ch. 517, 26 Stat. 826 (1891).

15. *Id.* § 2.

16. Judicial Code of 1911, ch. 231, §§ 117-18, 36 Stat. 1087, 1131 (1911).

17. *See* Madden, *supra* note 11, at 402.

18. Lang's Estate v. Commissioner, 97 F.2d 867, 869 (9th Cir.), *certified question answered*, 304 U.S. 264 (1938).

19. *See* Commissioner v. Textile Mills Sec. Corp., 117 F.2d 62 (3d Cir. 1940) (en banc), *aff'd*, 314 U.S. 326 (1941).

20. 314 U.S. 326 (1941).

amended section 117 and held that a court of appeals had the power to sit en banc.[21]

The decision of *Textile Mills* was essentially codified in section 46(c) of the Judicial Code of 1948.[22] Section 46 provides that the majority of cases would still be heard by three-judge panels unless a hearing or rehearing en banc was ordered by a majority of the circuit judges who were in regular active service.[23] Neither section 46 nor *Textile Mills* set out any guidelines or procedures governing the use of the en banc process.

The Supreme Court faced the en banc issue once again in 1953 in the case of *Western Pacific Railroad Corp. v. Western Pacific Railroad.*[24] The Court held that an appellate court could not be compelled to hold an en banc rehearing.[25] A petitioner could only suggest that a court hear the case en banc.[26] Section 46 was a grant of power to the courts of appeals so that they could order en banc review and not the creation of a right in parties to compel such hearings.[27] The Court, however, did state that the circuit courts should explain whatever procedures they used to determine if en banc review was needed.[28] This decision approved the development of local rules by each circuit court to govern the en banc process. "The court [of appeals] is left free to devise its own administrative machinery to provide the means whereby a majority may order [an en banc] hearing."[29] The local rules which developed, however, were not uniform and often did not fully explain the processes used by the courts when considering en banc review.[30] Only the Fifth

---

21. *Id.* at 331-35.

22. Judicial Code and Judiciary Act, ch. 646, § 46(c), 62 Stat. 869, 871 (1948) (codified as amended at 28 U.S.C. § 46(c) (1982)).

23. 28 U.S.C. § 46 (1982) (as amended). The statute reads in part:

> (a) Circuit judges shall sit on the court and its panels in such order and at such times as the court directs.
> (b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges . . . .
> (c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible to participate, at his election and upon the designation and assignment pursuant to section 294 (c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member.

28 U.S.C. § 46(a)-(c) (1982).

Section 6 of Public Law 95-486 (92 Stat. 1633), which is referred to in subsection (c), is set out in a statutory note to 28 U.S.C. § 41 (1982). 28 U.S.C. § 41 note (1982). It authorizes courts of appeals having more than 15 active judges to perform their en banc functions by such number of members as might be prescribed by the local rule of the courts of appeals. *Id.* The Fifth Circuit which currently has 17 judgeships (28 U.S.C. § 44 (Supp. IV 1992)) has not utilized this law to reduce the number of judges who sit on its en banc panel but still defines an en banc court as composed of all active judges of the court. 5TH CIR. R. 35.

24. 345 U.S. 247 (1953).

25. *Id.* at 267.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 250.

30. Judah I. Labovitz, Note, *En Banc Procedure in the Federal Courts of Appeals*, 111 U. PA. L. REV. 220, 221-27 (1962).

Circuit listed any substantive criteria for determining if an en banc review was warranted, and these requirements were identical to those promulgated later in Federal Rule of Appellate Procedure 35(a).[31]

III. CURRENT RULES GOVERNING THE EN BANC PROCEDURE

A. Federal Rule 35

Federal Rule of Appellate Procedure 35 was adopted in 1968 under section 46(c) of the Judicial Code.[32] The current Rule 35 states:

> (a) When Hearing or Rehearing in Banc Will be Ordered. A majority[33] of the circuit judges who are in regular active service[34] may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.
>
> (b) Suggestion of a Party for Hearing or Rehearing in Banc. A party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.
>
> (c) Time for Suggestion of a Party for Hearing or Rehearing in Banc; Suggestion Does Not Stay Mandate. If a party desires to suggest that an appeal be heard initially in banc, the suggestion must be made by the date on which the appellee's brief is filed. A suggestion for a rehearing in banc must be made within the time prescribed

---

31. 5TH CIR. R. 25(a) (repealed 1968). *See* Note, *En Banc Review in Federal Circuit Courts: A Reassessment*, 72 MICH. L. REV. 1637, 1641 n.17 (1974).

32. The Federal Rules of Appellate Procedure were adopted by order of the Supreme Court on December 4, 1967, to be effective July 1, 1968. 389 U.S. 1065 (1967). See *supra* note 23 for partial text of § 46 of the Judicial Code.

33. What constitutes a "majority" has been a source of controversy. Several courts require an "absolute majority" of active judges to grant en banc review. *See* United States v. Nixon, 827 F.2d 1019 (5th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988); Zahn v. International Paper Co., 469 F.2d 1033 (2d Cir. 1972), *aff'd*, 414 U.S. 291 (1973). In these courts an active judge who is disqualified from voting on a suggestion for en banc consideration may still be counted as a member of the court, and a majority of the voting judges may not be enough to establish a majority of active judges. Thus, in *Zahn*, a minority of three active judges voting to deny en banc consideration overcame four active judges voting to grant en banc review. *Zahn*, 469 F.2d at 1040-42. This was achieved because there was a vacancy on the nine judge court, and one of the eight active judges had been disqualified. *Id.*

34. The courts have had difficulty defining the term "judges in regular active service." The problem arose when dealing with senior judges of a circuit and their relationship to the en banc process. In 1960, the Supreme Court held that a senior judge could neither vote nor sit en banc. United States v. American-Foreign S.S. Corp., 363 U.S. 685, 691 (1960). Congress, however, responded in 1963 by amending § 46(c) to provide that a retired or senior circuit judge could sit on an en banc court if he had sat on the panel which heard the case. Act of Nov. 13, 1963, Pub. L. No. 88-176, 77 Stat. 331 (1963) (amending 28 U.S.C. § 46 (1962)). The senior judge, though, may not vote on the suggestion for granting or denying en banc review. Moody v. Albermarle Paper Co., 417 U.S. 622, 626-27; 28 U.S.C. § 46(c) (1988). Rule 35 also allows any judge who sat on a panel to call for a vote on rehearing en banc, but if she is not an active member of the circuit court she may not vote to grant or deny, nor actually sit en banc. *Moody*, 417 U.S. at 626-27.

> by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.[35]

This rule was an attempt to establish uniformity of the criteria used to determine if a case was worthy of en banc review.[36] It was also aimed at establishing a procedure whereby a party could ask a court for en banc review, but it did not purport to affect the power of a court of appeals to, sua sponte, hold en banc hearings.[37] The Fifth Circuit, along with the other circuits, continued to publish local rules and internal operating procedures as authorized by *Western Pacific Railroad Corp. v. Western Pacific Railroad*.[38] The Local Rules of the Fifth Circuit set out the exact procedures to be used when contending with en banc suggestions within its jurisdiction.

B. Fifth Circuit Rules

Local Rule 35 of the Fifth Circuit and the court's Internal Operating Procedures supplement the processes set out in the federal rule.[39] Aside from these procedural rules, the Fifth Circuit also attempts to discourage filings of suggestions for en banc review. Federal Rule 35 states that this type of review is not favored, but the Local Rules of the Fifth Circuit make a much stronger assertion.

The initial statement in the Local Rules, citing the "serious call on limited judicial resources" effected by a suggestion for en banc review, cautions parties against filing a suggestion and asserts that the court is fully justified in imposing sanctions of its own initiative.[40] The Internal Operating Procedures of the court refer to the extraordinary nature of a suggestion for rehearing en banc and characterize such suggestions as "the most abused prerogative."[41]

This disfavor of en banc hearings can be seen in the fact that over the last five years en banc reviews have made up less than one percent of the cases handled by the circuit.[42] In fact, as the number of new appeals filed has risen, the number of en banc cases heard in the last three years has decreased.[43] In the fiscal year of

---

35. FED. R. APP. P. 35.

36. FED. R. APP. P. 35 advisory committee's notes.

37. *Id.*

38. 345 U.S. 247 (1953); *see supra* notes 24-29 and accompanying text.

39. *See* 5TH CIR. R. 35; 5TH CIR. INTERNAL OPERATING PROCEDURES [hereinafter 5TH CIR. IOP] 35.

40. 5TH CIR. R. 35.1.

41. 5TH CIR. IOP. 35. The Internal Operating Procedure for Fifth Circuit Rule 35 states:

> A suggestion for rehearing en banc is an extraordinary procedure which is intended to bring to the attention of the entire Court a precedent-setting error of exceptional public importance or an opinion which directly conflicts with prior Supreme Court or Fifth Circuit precedent. Alleged errors in the determination of state law, or in the facts of the case (including sufficiency of evidence), or error asserted in the misapplication of correct precedent to the facts of the case, are matters for panel rehearing but not for rehearing en banc.

Id.

42. CLERK'S REPORT, *supra* note 9, at i.

43. CLERK'S REPORT, *supra* note 9, at i. The Fifth Circuit heard 18 en banc cases in 1991, 9 in 1992, and 8 in 1993. *Id.*

1993, 220 Suggestions for Rehearing En Banc were filed and only four were granted.[44] The court also heard four en banc cases on its own motion in 1993.[45] These are very small numbers when compared with the Fifth Circuit's regular caseload,[46] but en banc review allows the full court to speak on important issues. Determining what questions the court considers to be "important," however, is a difficult inquiry which may only be resolved by considering both the relevant rules and statutes along with previous cases heard en banc.

IV. EN BANC IN THE FIFTH CIRCUIT

Federal Rule of Appellate Procedure 35(a) states that an en banc hearing will not be granted except "(1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance."[47] These two considerations give circuit courts substantive standards on which to rely in reviewing suggestions for en banc hearings, but there are no hard and fast definitions of these standards. Indeed, en banc cases rarely fit neatly into one category or the other. Many times the court will not state the reason for hearing the case en banc, and when reasons are given, they are rarely confined to one category. A survey of recent cases, however, can be used to identify generalities and characteristics of cases which are likely to be heard en banc.

A. Maintaining Uniformity of Decision

The Fifth Circuit has held that a prior decision of the court – panel or en banc – cannot be overruled except by an en banc hearing absent an "overriding Supreme Court decision or a change in statutory law."[48] Despite this rule, conflicting decisions do occasionally surface within the circuit. These conflicts are rare, but they must be dealt with en banc.

In *United States v. Lambert*,[49] the Fifth Circuit affirmed the strict interpretation of procedures for departing upward from sentencing guidelines, thus requiring the sentencing judge to evaluate each sentence range above the defendant's assigned category and explain why she chose a particular sentencing range rather than some lesser range.[50] This approach was set forth in *United States v. Lopez*[51] and conflicted with a line of cases advocating a more lenient standard.[52] In *Lambert* the

---

44. CLERK'S REPORT, *supra* note 9, at 20. Of the 220 Suggestions, members of the court requested a poll to be taken on seven of the cases; three of the polls were negative and four were successful. *Id.*

45. CLERK'S REPORT, *supra* note 9, at 20.

46. In 1993 there were 6695 new appeals filed with the Fifth Circuit. CLERK'S REPORT, *supra* note 9, at i.

47. FED. R. APP. P. 35(a).

48. United States v. Don B. Hart Equity Pure Trust, 818 F.2d 1246, 1250 (5th Cir. 1987) (citing Girald v. Drexel Burnham Lambert, Inc., 805 F.2d 607, 610 (5th Cir. 1986)); United States v. Lewis, 475 F.2d 571, 574 (5th Cir. 1973); *see also* 1 GEORGE K. RAHDERT & LARRY M. ROTH, APPEALS TO THE FIFTH CIRCUIT MANUAL ch. 15, at 22 & n.86 (1991) [hereinafter RAHDERT].

49. 984 F.2d 658 (5th Cir. 1993) (en banc).

50. *Id.* at 661-64.

51. 871 F.2d 513 (5th Cir. 1989).

52. *See, e.g.*, United States v. Harvey, 897 F.2d 1300 (5th Cir.), *cert. denied*, 498 U.S. 1003 (1990).

Fifth Circuit compared its law to that of other circuits and to recent Supreme Court decisions.[53] The court noted that several other circuits had adopted the *Lopez* rationale and then embraced this rule for themselves.[54]

The Fifth Circuit faced another conflict when it considered the terms of section 933 of the Longshore and Harbor Workers' Compensation Act[55] [hereinafter LHWCA] in *Nicklos Drilling Co. v. Cowart*.[56] Section 933 contained an approval requirement which conditioned eligibility for continuing LHWCA benefits on the employer's and the employer's insurance carrier's prior written approval of any settlement between an injured employee and a third party for less than his LHWCA compensation entitlement.[57] In 1984 Judge Politz authored an unpublished opinion accepting the interpretation given to section 933 by the Director of the Office of Workers' Compensation Program.[58] The Director's interpretation limited the approval requirement to those instances where the employer or its carrier was paying LHWCA benefits at the time of the settlement.[59] Three opinions, however, were later published which rejected the Director's interpretation, relying instead on the plain meaning of the statute.[60]

The court heard *Nicklos Drilling Co. v. Cowart*[61] en banc to resolve the conflict. The en banc court held the approval requirement was not limited to the time when the injured employee was receiving compensation benefits, rejecting Judge Politz's and the Director's view.[62] Judge Politz filed a dissenting opinion in which Judges King and Johnson joined.[63]

When an en banc hearing spawns a dissenting opinion, the effectiveness of the en banc decision becomes questionable. If a hearing of this type fails to establish unanimity among the judges, the conflict becomes highlighted rather than resolved. The precedential value of such a decision, especially in front of the dissenters' panel, then becomes a dubious proposition.[64] If such a case is not accepted as precedent, the time and cost associated with the en banc process become super-

---

53. *Lambert*, 984 F.2d at 661-63.

54. *Id.*

55. 33 U.S.C. § 933 (1988).

56. 927 F.2d 828, 833 (5th Cir. 1991) (en banc) (per curiam), *aff'd*, 112 S. Ct. 2589, *and cert. denied sub nom.* Barger v. Petroleum Helicopters, Inc., 112 S. Ct. 3026 (1992). *Nicklos* was consolidated with Petroleum Helicopters, Inc. v. Barger, 910 F.2d 276 (5th Cir. 1990), *cert. denied*, 112 S. Ct. 3026 (1992), for rehearing en banc. *Nicklos*, 927 F.2d at 829-30.

57. 33 U.S.C. § 933 (1988).

58. *Nicklos*, 927 F.2d at 833 (Politz, J., dissenting) (citing Arrow Contractors v. OWCP, 729 F.2d 777 (5th Cir. 1984) (mem.)).

59. *Id.* at 830.

60. Nicklos Drilling Co. v. Cowart, 907 F.2d 1552 (5th Cir. 1990), *aff'd on reh'g*, 927 F.2d 828 (5th Cir. 1991) (en banc) (per curiam), *aff'd*, 112 S. Ct. 2589 (1992); Petroleum Helicopters, Inc. v. Barger, 910 F.2d 276 (5th Cir. 1990), *aff'd on reh'g sub nom.* Nicklos Drilling Co. v. Cowart, 927 F.2d 828 (5th Cir. 1991) (en banc) (per curiam), *aff'd*, 112 S. Ct. 2589, *cert. denied sub nom.* Barger v. Petroleum Helicopters, Inc., 112 S. Ct. 3026 (1992); Petroleum Helicopters, Inc. v. Collier, 784 F.2d 644 (5th Cir. 1986).

61. *Nicklos*, 927 F.2d at 829.

62. *Id.* at 832.

63. *Id.* at 833-34 (Politz, J., dissenting).

64. Alexander, *supra* note 2, at 582-85.

fluous expenditures of judicial resources. The infrequent use of the en banc process, though, lends impact to the precedential value of even a divided en banc court. An outvoted minority may still try later to overlook the majority view,[65] but this is less likely if the court has established an authoritative en banc precedent.[66]

The authorization of Federal Rule of Appellate Procedure 35 to "maintain uniformity of decision" allows the circuit court to use the en banc process to resolve intra-circuit conflict. However, apart from this type of conflict, the goal of maintaining uniformity is unlikely to justify en banc review on its own. Most of the Fifth Circuit cases examined seem to also meet the "exceptional importance" criteria.[67] In fact, one could easily consider the need to "maintain uniformity" as a matter of "exceptional importance" under Federal Rule 35. Viewed in this manner, any distinction between the two goals is rendered arbitrary and artificial. This is further supported by the fact that no Fifth Circuit case examined refers to either aim of the federal rule specifically. If an opinion states the reason for accepting the case en banc, it does so in terms of the specific issues of that case. Most en banc cases fall under the "exceptional importance" umbrella and should be analyzed as such.

B. Questions of Exceptional Importance

1. Overruling Precedent and Creating New Law[68]

The Fifth Circuit considers a great many issues, most of which may be disposed of by relying on prior precedents. Occasionally, however, the court will recognize the need to create new law in an effort to adjust its jurisprudence and take into account rights and substantive issues which may not have been previously considered. Even if the issue is one of first impression and no precedents need be overruled, the court may wish to speak authoritatively through an en banc hearing. In *Rohner Gehrig Co. v. Tri-State Motor Transit*,[69] the court adopted the substantial compliance standard and the *Hughes* test from the Seventh Circuit[70] when considering whether or not a bill of lading complies with the tariffs filed with the Interstate Commerce Commission by a carrier.[71] This case established a new rule, but did not overrule any previous cases. The en banc court accepted the view of Judge Wiener's dissent to the panel decision, using the en banc rehearing to articu-

---

65. *See, e.g.*, United States v. Lambert, 984 F.2d 658, 661-62 (5th Cir. 1993) (en banc).

66. Madden, *supra* note 11, at 409.

67. FED. R. APP. P. 35(a).

68. Although the cases in the previous section also overruled prior precedents, they are not included here. Section IV. A. concentrated on cases seeking to resolve intra-circuit conflicts of precedents. This section focuses on cases where the court overrules precedents in favor of a new rule and cases where the court adopts a rule to address an issue of first impression within the circuit.

69. 950 F.2d 1079 (5th Cir. 1992) (en banc).

70. The *Hughes* test requires a carrier to (1) maintain a tariff within the prescribed guidelines of the Interstate Commerce Commission; (2) obtain the shipper's agreement as to his choice of liability; (3) give the shipper a reasonable opportunity to choose between two or more levels of liability; and (4) issue a receipt or bill of lading prior to moving the shipment. Hughes v. United Van Lines, Inc., 829 F.2d 1407 (7th Cir. 1987), *cert. denied*, 485 U.S. 913 (1988).

71. *Rohner Gehrig Co.*, 950 F.2d at 1081.

late what the majority of circuit judges considered to be the correct standard.[72] Cases of first impression such as *Rohner Gehrig* are rare. Most cases creating law involve overruling precedents.

Precedents in the Fifth Circuit may only be overruled by an en banc court; thus, cases rejecting precedents will always be handed down by the full court.[73] *United States v. Bachynsky*[74] eliminated the rule of per se reversal if a court failed to make reference to or explain the effect of a supervised release term to a criminal defendant,[75] and, by doing this, the en banc court overruled the line of cases beginning with *United States v. Molina-Uribe*.[76] The Fifth Circuit interpreted Federal Rule of Criminal Procedure 11[77] as addressing three core concerns: whether a guilty plea was coerced, whether the defendant understood the nature of the charges, and whether the defendant understood the consequences of his plea.[78] Failure to address one of these core concerns resulted in the vacation of a defendant's conviction and remand to the district court so that the defendant could plead anew.[79] If there was only a partial failure to address a core concern, however, the colloquy was reviewed under the harmless error standard of Rule 11(h).[80]

The question involved in *Bachynsky* was whether failure to explain the effect of a supervised release term is a "total" or "partial" failure to address a core concern of Rule 11.[81] Considering the rule of per se reversal when the court fails to address supervised release in the plea colloquy, the court found the rule inconsistent with both the plain language of the Federal Rule of Criminal Procedure 11(c)(1) and the advisory committee's notes to Rule 11(h).[82] The en banc court then surveyed the law of other circuits and rejected the per se reversal rule.[83] This case is an example of the court's willingness to overrule precedent which seems to have no solid foun-

---

72. *Id. See also* Rohner Gehrig Co. v. Tri-State Motor Transit, 923 F.2d 1118, 1123-27 (5th Cir. 1991) (Wiener, J., concurring in part and dissenting in part), *rev'd*, 950 F.2d 1079 (5th Cir. 1992) (en banc).

73. *See supra* note 49 and accompanying text.

74. 934 F.2d 1349 (5th Cir.) (en banc) (per curiam), *cert. denied*, 112 S. Ct. 402 (1991).

75. *Id.* at 1362. The Fifth Circuit later took the case of United States v. Johnson, 1 F.3d 296 (5th Cir. 1993) (en banc), for the " 'housekeeping' purpose of deciding whether to complete the process [they] began two years ago with [the] en banc opinion in *United States v. Bachynsky*." *Johnson*, 1 F.3d at 297. In *Johnson* the court repudiated the requirement of determining if error in the plea colloquy was a failure of the court to comply with a core concern. *Id.* at 297-98. Judge Wiener characterized this decision as going "the remaining 'half the distance to the goal' of fully embracing section (h)" of Federal Rule of Criminal Procedure 11. *Id.* at 298.

76. 853 F.2d 1193 (5th Cir. 1988), *cert. denied*, 489 U.S. 1022 (1989).

77. Rule 11 deals with pleas made by a defendant. FED. R. CRIM. P. 11.

78. *See* United States v. Bachynsky, 924 F.2d 561, 564 (5th Cir.), *rev'd per curiam*, 934 F.2d 1349 (5th Cir.) (en banc), *cert. denied*, 112 S. Ct. 402 (1991).

79. *Id.*

80. *Id.*

81. United States v. Bachynsky, 934 F.2d 1349, 1351 (5th Cir.) (en banc) (per curiam), *cert. denied*, 112 S. Ct. 402 (1991).

82. *Id.* at 1356-58.

83. *Id.* at 1358-61.

dation. The court itself characterized the overruled line of cases as inapposite to "logical and obvious" observations which dictate against those cases' holdings.[84]

Other instances of the en banc court overruling precedents include *Phillips v. Marine Concrete Structures, Inc.*[85] In a case prior to *Phillips*, a panel of the Fifth Circuit held that section 910(f) of the LHWCA allowed annual cost of living adjustments for the period of an injured worker's "temporary total disability."[86] Section 910(f), however, refers only to adjustments for "permanent total disability."[87] In *Phillips* the court began by examining the words of the LHWCA,[88] and, finding the words of the statute unambiguous, the court overruled the prior case which conflicted with the majority of the judges' reading of the statute.[89]

Also, in *United States v. Zuniga-Salinas*,[90] the appellate court overturned *Herman v. United States*,[91] a decision which had been widely criticized.[92] The *Herman* court, without citing any authority, held that a verdict against one co-conspirator will not stand where all others are acquitted.[93] An intervening Supreme Court decision addressed the issue indirectly, stating that inconsistent decisions could be attributed to compromise, mistake, or leniency and should not be a bar to a guilty verdict.[94] Noting this decision, *Herman's* lack of authority, and other circuit decisions, the Fifth Circuit held that "[a]n inconsistent verdict should no longer be a bar to conviction. . . ."[95]

The common thread running through the previous three cases is the court's use of the en banc process to overrule precedent. The court looked for guidance in these cases from other circuits,[96] Supreme Court opinions,[97] and the statutes and rules involved in the cases.[98] All of these factors as well as scholarly and professional criticism of a ruling will enter into the judges' decisions to grant an en banc hearing. Overruling previous panel or en banc decisions is an action which judges are reluctant to take. The court overruled precedent in the previous cases only when it was convinced that the governing standard was contradicted by a statute

---

84. *Id.* at 1356. United States v. Anderson, 885 F.2d 1248 (5th Cir. 1989) (en banc), is another example of a case that the court took en banc to overrule a line of cases which the majority considered to be "aberrational." *Anderson*, 885 F.2d at 1249.

85. 895 F.2d 1033 (5th Cir. 1990) (en banc).

86. Holliday v. Todd Shipyards Corp., 654 F.2d 415 (5th Cir. 1981).

87. 33 U.S.C. § 910(f) (1988).

88. *Philips*, 895 F.2d at 1035; *see also* 33 U.S.C. §§ 901-950 (1988).

89. *Philips*, 895 F.2d at 1035-36. *See also* Holliday v. Todd Shipyards Corp., 654 F.2d 415 (5th Cir. 1981).

90. 952 F.2d 876 (5th Cir. 1992) (en banc).

91. 289 F.2d 362 (5th Cir.), *cert. denied*, 368 U.S. 897 (1961).

92. *See Zuniga-Salinas*, 952 F.2d at 877.

93. *Herman*, 289 F.2d at 368.

94. United States v. Powell, 469 U.S. 57, 65 (1984).

95. *Zuniga-Salinas*, 952 F.2d at 878.

96. *Id.*; United States v. Bachynsky, 934 F.2d 1349 (5th Cir.) (en banc) (per curiam), *cert. denied*, 112 S. Ct. 402 (1991).

97. *Zuniga-Salinas*, 952 F.2d at 877-78.

98. *Bachynsky*, 934 F.2d at 1356-58; Phillips v. Marine Concrete Structures Inc., 895 F.2d 1033, 1034-36 (5th Cir. 1990) (en banc); United States v. Anderson, 885 F.2d 1248, 1250-51 (5th Cir. 1989) (en banc).

and the current legal thinking on the issue. Even if these factors are present in a case, however, they provide no guarantee that the court will overrule precedent.[99]

2. Procedural Cases[100]

One of the goals of the en banc hearing is to allow a majority of judges to maintain control over panel decisions and the action of the circuit court in general.[101] In this era of crowded dockets, the courts are reluctant to take cases where jurisdiction may be questionable. Interpreting procedural standards is one way the court controls what types of substantive rights may be enforced in the federal courts, thus allowing the judges to control, to some extent, the court's docket.[102] *Young v. Herring*[103] demonstrates this principle.

In *Young*, Jerry Lynn Young sought habeas corpus relief after the Mississippi Supreme Court affirmed his conviction for armed robbery.[104] The state court rejected the due process claim, holding that a procedural failure barred the claim.[105] If the state court relied on an adequate and independent state ground to support its judgment, this would prevent a federal court from taking the case.[106] If the claim ruled on by the state court was interwoven with federal law, however, there should be a plain statement that the state court relied on state law to support the decision.[107] A panel of the Fifth Circuit held that the state court's decision in *Young* was ambiguous and lacked a plain statement, and the federal court could take jurisdiction.[108] The en banc court reversed the panel, holding that the state procedural bar precluded federal habeas corpus review even though the state decision contained no plain statement.[109] This decision rejected jurisdiction where state law may be

---

99. *See, e.g.*, Christophersen v. Allied-Signal Corp., 939 F.2d 1106 (5th Cir. 1991) (en banc) (continuing to use the *Frye* standard for admission of expert testimony despite increasing criticism).

100. The term "procedural law" is used as distinct from substantive law and focuses on questions of how cases may properly be brought before a particular court. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 1.1 (2d ed. 1993).

101. Madden, *supra* note 11, at 402.

102. *See, e.g.*, Apache Bend Apartments, Ltd. v. United States, 987 F.2d 1174 (5th Cir. 1993) (en banc) (holding taxpayers lacked standing to challenge the constitutionality of the Tax Reform Act's transition rules); Derden v. McNeel, 978 F.2d 1453 (5th Cir. 1992) (en banc) (rejecting formulation of cumulative error theory that allows easier access to federal habeas corpus relief), *cert. denied*, 113 S. Ct. 2928 (1993); Society of Separationists, Inc. v. Herman, 959 F.2d 1283 (5th Cir.) (en banc) (holding that a prospective juror lacked standing to seek prospective relief), *cert. denied*, 113 S. Ct. 191 (1992); United States v. Vontsteen, 950 F.2d 1086 (5th Cir.) (en banc) (holding that constitutional right is lost due to failure to comply with contemporaneous objection rule), *cert. denied*, 112 S. Ct. 3039 (1992); United States v. Shaid, 937 F.2d 228, (5th Cir. 1991) (en banc) (applying cause and prejudice test strictly), *cert. denied*, 112 S. Ct. 978 (1992).

103. 938 F.2d 543 (5th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 978 (1992).

104. Young v. State, 420 So. 2d 1055 (Miss. 1982), *habeas corpus granted sub nom.* Young v. Herring, 917 F.2d 858 (5th Cir. 1990), *rev'd en banc*, 938 F.2d 543 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1485 (1992).

105. *Id.* at 1057-58.

106. *See, e.g.*, Young v. Herring, 938 F.2d 543, 548-50 (5th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 1485 (1992); Harris v. Reed, 489 U.S. 255 (1989).

107. Coleman v. Thompson, 111 S. Ct. 2546 (1991); Harris v. Reed, 489 U.S. 255 (1989).

108. Young v. Herring, 917 F.2d 858, 864 (5th Cir. 1990), *rev'd en banc*, 938 F.2d 543 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1485 (1992).

109. *Young*, 938 F.2d at 546.

sufficient to support the conclusion, thus reducing duplicative litigation in the federal courts.

Many times the circuit court will decide procedural cases en banc to articulate standards and procedures that are to be used by the federal courts within the circuit.[110] Decisions on procedural matters are vitally important to district courts because these points may be involved in a great number of cases at the trial level. The circuit judges are very aware of this importance.[111] In *Christophersen v. Allied-Signal Corp.*,[112] for example, the court attempted to settle the issue as to what standard should be used to determine if expert testimony should be admitted in a trial.[113] This matter had generated a great amount of controversy in the legal community nationwide.[114]

The conflict arose from two competing standards governing admission of scientific evidence into a trial. The first originated with *Frye v. United States*.[115] This standard imposed the burden that evidence was admissable only if it was generally accepted by the relevant scientific community.[116] The second approach was to treat scientific evidence as any other type of evidence and weigh its probative value against countervailing dangers.[117] This latter approach corresponds to the Federal Rules of Evidence.[118] At the time *Christophersen* was heard, the *Frye* method had come under fire from an increasing number of courts and scholars.[119] Despite this criticism, however, the Fifth Circuit recognized the continuing vitality of the *Frye* test in *Christophersen*[120] and used the test in conjunction with the Federal Rules of Evidence to determine if expert scientific testimony was admissible.[121]

In *Kelly v. Lees Old Fashioned Hamburgers, Inc.*,[122] the Fifth Circuit, en banc, addressed another procedural topic. Rule 54(b) of the Federal Rules of Civil Procedure allows a court to enter final judgment on less than all of the claims in a case.[123] In order to use this procedure the court must make an "express determina-

---

110. Micheaux v. Collins, 944 F.2d 231 (5th Cir. 1991) (en banc) (holding that federal court need not accept state court's "proposed findings" and affirming the federal trial court's de novo review), *cert. denied*, 112 S. Ct. 1226 (1992); Resolution Trust Corp. v. Montross, 944 F.2d 227 (5th Cir. 1991) (en banc) (holding that a party cannot raise an issue for the first time before an en banc court).

111. Interview with Judge Charles C. Clark, Retired Chief Judge of the United States Court of Appeals for the Fifth Judicial Circuit, in Jackson, Miss. (Sept. 20, 1993).

112. 939 F.2d 1106 (5th Cir. 1991) (en banc) (abrogated by Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993)), *cert. denied*, 112 S. Ct. 1280 (1992).

113. *Id.* at 1108.

114. *See, e.g.*, PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE §§ 1-5 [hereinafter GIANNELLI] (discussing the controversy thoroughly and listing authorities).

115. 293 F. 1013 (D.C. Cir. 1923).

116. *Id.* at 1014; GIANNELLI, *supra* note 114, at 9.

117. GIANNELLI, *supra* note 114, at 26-27.

118. GIANNELLI, *supra* note 114, at 26-27.

119. GIANNELLI, *supra* note 114, at 12-13 & nn. 70-75.

120. Christophersen v. Allied-Signal Corp., 939 F.2d 1106, 1110 (5th Cir. 1991) (en banc) (abrogated by Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993)), *cert. denied*, 112 S. Ct. 1280 (1992).

121. *Id.*

122. 908 F.2d 1218 (5th Cir. 1990) (en banc) (per curiam).

123. FED. R. CIV. P. 54(b).

tion that there is no just reason for delay" in issuing a final judgment on that particular part of the case.[124] Without such a finding, the order is not considered a final judgment and may not be appealed.[125] Many circuit courts will accord partial judgment finality under Rule 54(b) only if the district judge included the talismanic words "no just reason for delay" in the order.[126] The Fifth Circuit considered the conflicting cases on this issue and held that an order lacking the recitation of "no just reason for delay" may be directly appealed if the "language in the order either independently or together with related parts of the record reflects the trial judge's clear intent to enter a partial final judgment under Rule 54(b)."[127]

The circuit court decided both *Kelly* and *Christophersen* en banc to settle conflicting interpretations of procedural issues. Other procedural cases which seem likely to attract en banc review are those involving standards which govern access to the federal courts.[128] There are, in addition, other discreet categories of cases which form significant portions of the court's en banc docket.

3. Federal Statutory Law

En banc review is reserved for issues of "exceptional importance,"[129] and issues of federal statutory law seem to fit within the court's definitions of this requirement. It is not enough, though, that a claim is simply founded on federal law, nor that there is a dispute as to the facts constituting the claim; en banc review is most likely achieved by those cases involving issues not clearly addressed in a statute itself and not yet defined by common law in the area.[130] In *Bright v. Houston Northwest Medical Center Survivor, Inc.*,[131] the court considered a case based on section 7(a)(1) of the Fair Labor Standards Act.[132] The issue was the definition of "working time" under the statute.[133] The plaintiff worked as an equipment repairman and wished to have the time spent "on call" included in his working time.[134] A divided panel of the court reversed the trial court's summary judgment against the plain-

---

124. *Id.*

125. *See Kelly*, 908 F.2d at 1219-20.

126. *See, e.g.*, MOONEY V. FRIERDICH, 784 F.2D 875 (8TH CIR. 1986) (PER CURIAM); FRANK BRISCOE CO. V. MORRISON-KNUDSEN CO., 776 F.2D 1414 (9TH CIR. 1985). *See also Kelly*, 908 F.2d at 1222 (Smith, J., dissenting).

127. *Kelly*, 908 F.2d at 1220.

128. *See supra* notes 102-10 and accompanying text.

129. FED. R. APP. P. 35(a).

130. *See, e.g.*, Boureslan v. ARAMCO, 892 F.2d 1271 (5th Cir. 1990) (en banc) (applying Title VII outside the United States), *aff'd sub nom.* EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991); Mills v. Director Office of Workers' Comp. Program, 877 F.2d 356 (5th Cir. 1989) (en banc) (considering scope of LHWCA as incorporated in the Outer Continental Shelf Lands Act); International Bhd. of Teamsters v. Southwest Airlines Co., 875 F.2d 1129 (5th Cir. 1989) (en banc) (classifying drug testing program under Railway Labor Act); EEOC v. Mississippi State Tax Comm'n, 873 F.2d 97 (5th Cir. 1989) (en banc) (considering if physical fitness could be a bona fide occupation qualification under the Age Discrimination in Employment Act).

131. 934 F.2d 671 (5th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 882 (1992).

132. *Id.*; *see also* 29 U.S.C. § 207(a)(1) (1988).

133. *Bright*, 934 F.2d at 674.

134. *Id.* at 673-74. The plaintiff worked a normal 40 hour week, but during his time off he was required to wear a beeper so that he could be summoned for emergency repairs. *Id.*

tiff.[135] The panel ruled that whether on call time is working time is a question for the jury and precludes summary judgment.[136] The en banc court rejected this, stating firmly that on call time was not within the statute's provisions.[137]

Another case where the en banc court rejected a panel's interpretation of a federal statute was *Plaisance v. Texaco, Inc.*[138] The plaintiff was involved in a fire on a tugboat in Louisiana coastal waters.[139] The plaintiff alleged he was suffering from post-traumatic stress disorder and sued for damages under the Jones Act.[140] A panel of the Fifth Circuit affirmed the dismissal of the plaintiff's suit, but, despite this conclusion, the panel proceeded to hold that a plaintiff could recover for emotional injuries under the Jones Act.[141] The court, en banc, agreed with the dismissal of the case, but it rejected the panel's additional conclusion.[142] The en banc court stated that the facts of this case do not allow "us to decide whether . . . we might permit recovery of damages for purely emotional injuries."[143]

The federal government has a special interest in interpreting its own laws uniformly through the federal courts.[144] Interpretation of these federal statutes is an area likely to attract en banc review. As demonstrated above, this is especially likely to occur when a divided panel's interpretation of a statute breaks new ground and will have potentially far- reaching results. Another area in which the federal government may wish to promote uniformity of interpretation is that of constitutional law.

4. Constitutional Rights

One area within constitutional law which is a frequent recipient of en banc review is that of the Fourth Amendment. The vagueness of the Fourth Amendment probable cause issue and the constantly evolving interpretations in this area account for its frequent appearance in en banc hearings.[145] Within the last five years the Fifth Circuit has heard five Fourth Amendment cases en banc.[146] In *United States v. Rideau*,[147] the divided en banc court ruled that touching the pants pocket of the defendant was not an illegal search under the Fourth Amendment.[148] This

135. Bright v. Houston N.W. Med. Center Survivor, Inc., 888 F.2d 1059, 1064 (5th Cir. 1989), *rev'd en banc*, 934 F.2d 671 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 882 (1992).

136. *Id.*

137. *Bright*, 934 F.2d at 678.

138. 966 F.2d 166 (5th Cir.) (en banc), *cert. denied*, 113 S. Ct. 604 (1992).

139. *Id.* at 167.

140. *Id.* at 168.

141. *Id.*

142. *Id.* at 168-69.

143. *Id.* at 169.

144. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 221 (1989).

145. Solimine, *supra* note 7, at 54.

146. United States v. Rideau, 969 F.2d 1572 (5th Cir. 1992) (en banc); United States v. Ibarra, 965 F.2d 1354 (5th Cir. 1992) (en banc); United States v. Pierre, 958 F.2d 1304 (5th Cir.) (en banc), *cert. denied*, 113 S. Ct. 280 (1992); United States v. De Leon-Reyna, 930 F.2d 396 (5th Cir. 1991) (en banc); United States v. Hurtado, 905 F.2d 74 (5th Cir. 1990) (en banc).

147. 969 F.2d 1572 (5th Cir. 1992) (en banc).

148. *Id.* at 1574-76.

expanded the scope of a reasonable search under the Fourth Amendment.[149] Also, *United States v. De Leon-Reyna*[150] applied the "good-faith exception" to a "stop" situation where the officer had received incorrect information over the radio.[151] In all of its Fourth Amendment cases, the en banc court followed the lead of the United States Supreme Court in expanding the scope of lawful search and seizure.[152]

The Fifth Circuit has reviewed, en banc, constitutional questions other than Fourth Amendment issues only in very limited instances. Only two such cases have been decided en banc in the past five years. *Fleming v. Collins*[153] expanded the public safety exception to the *Miranda* rules which protect Fifth Amendment rights.[154] *Kinsey v. Salado Independent School District*[155] was reviewed en banc to consider the protection afforded by the First Amendment to a public school superintendent.[156] Both of these cases, as well as the previously discussed Fourth Amendment cases, were taken from divided panels and involved nebulous and controversial issues.

Five of the seven en banc constitutional decisions discussed drew dissents. In fact, one case resulted in an equally divided court, which by law affirms the lower court decision.[157] The divisiveness of the court attests to the controversial character of these issues, and it is this uncertain nature which prompts the court's en banc review of constitutional cases. In constitutional law, the court works to mold concepts involving both legal and societal issues. An important and substantial body of constitutional law where this intertwining of issues is prominent is the field of civil rights.

---

149. *Id.*

150. 930 F.2d 396 (5th Cir. 1991) (en banc).

151. *Id.* at 401-02.

152. *See, e.g.*, Minnesota v. Dickerson, 113 S. Ct. 2130 (1993) (allowing police to seize non-threatening contraband detected through the sense of touch during a frisk); Skinner v. Railway Labor Executives' Assoc., 489 U.S. 602 (1989) (allowing blood and urine tests for drugs without requiring a warrant or reasonable suspicion); United States v. Leon, 468 U.S. 897 (1984) (allowing evidence obtained by an invalid warrant to be admitted to trial because an officer had relied on it in good faith); Illinois v. Gates, 462 U.S. 213 (1983) (embracing the more lenient "totality of the circumstances" test for determining if third party information established probable cause).

153. 954 F.2d 1109 (5th Cir. 1992) (en banc).

154. *Id.* at 1114.

155. 950 F.2d 988 (5th Cir. 1992) (en banc).

156. *Id.* at 990.

157. United States v. Ibarra, 965 F.2d 1354 (5th Cir. 1992) (en banc).

5. Civil Rights

The subject of civil rights has been historically important to the Fifth Circuit and should be discussed when examining the court's en banc process.[158] It is an area where the courts have dealt with important issues, and the Fifth Circuit, consisting exclusively of southern states, has been a leading forum for these issues.[159] An excellent example is *League of United Latin American Citizens v. Clements*.[160] This case wound its way through the federal court system for several years,[161] presenting a complex problem addressing the relationship between section 2 of the Voting Rights Act[162] and the election of state trial judges in Texas.[163] The plaintiffs alleged that electing trial judges county-wide violated section 2 of the Voting Rights Act by diluting the voting strength of minorities in the Texas system.[164] This case confronted the broad issue of subtle discrimination by a state. The circuit court heard a similar issue en banc in a case that alleged discrimination in the state university system of Mississippi.[165] These cases dealt with remnants of a segregated system which the Fifth Circuit played a large role in disassembling.[166] Resolving these issues continues to be of great importance in the Fifth Circuit.

Another feature of the civil rights cases addressed by the court en banc involves jury selection. The court reviewed the use of peremptory challenges by civil litigants which were allegedly based on racial grounds in *Edmonson v. Leesville Con-*

---

158. *See generally* JOHN M. SPIVACK, RACE, CIVIL RIGHTS, AND THE UNITED STATES COURT OF APPEALS FOR THE FIFTH JUDICIAL CIRCUIT (1990) [hereinafter SPIVAK]; HARVEY C. COUCH, A HISTORY OF THE FIFTH CIRCUIT 1891-1981 chs. V-VI (1984) [hereinafter COUCH].

One en banc case not discussed in this Comment is Graham v. Collins, 950 F.2d 1009 (5th Cir. 1992) (en banc). This case does not fall within any of the subject areas used in this Comment. Graham sought habeas relief after he was sentenced to death. *Graham*, 950 F.2d at 1013. A panel of the Fifth Circuit denied relief, and the Supreme Court later remanded the case to be considered in light of a recent decision. *Id.* at 1011. A divided panel then granted relief, but the en banc court disagreed with the panel and once again denied relief. *Id.* at 1034. *Graham* does not fit in with other en banc cases because the inquiry here was specific to the case at hand. The court did not set out a new rule or address a controversial issue important to the court's functioning. This anomaly may be accounted for because the case involved capital punishment and had been remanded by the Supreme Court with specific directions that it be considered in light of a recent ruling. These facts could explain this case's characterization by en banc review as a case of exceptional importance.

159. *See generally* SPIVACK, *supra* note 158; COUCH, *supra* note 158.

160. 999 F.2d 831 (5th Cir. 1993) (en banc).

161. A panel of the Fifth Circuit heard this case originally in 1990. League of United Latin Am. Citizens v. Clements, 902 F.2d 293 (5th Cir. 1990). A majority of the court, sua sponte, ordered en banc rehearing. League of United Latin Am. Citizens v. Clements, 914 F.2d 620 (5th Cir. 1990) (en banc). The Supreme Court of the United States granted certiorari, consolidated the case with another, and reversed. Houston Lawyer's Ass'n v. Attorney General, 111 S. Ct. 2376 (1991). On remand, a panel of the Fifth Circuit again heard the case. League of United Latin Am. Citizens v. Clements, 986 F.2d 728 (5th Cir. 1993). Once again the court, sua sponte, ordered en banc rehearing. League of United Latin Am. Citizens v. Clements, 999 F.2d 831 (5th Cir. 1993) (en banc).

162. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988)).

163. *League of United Latin Am. Citizens*, 902 F.2d at 294-95.

164. *League of United Latin Am. Citizens*, 999 F.2d at 838. The charge of dilution was finally rejected by the court. *Id.* at 893.

165. *See* Ayers v. Allain, 914 F.2d 676 (5th Cir. 1990) (en banc), *vacated by* United States v. Fordice, 112 S. Ct. 2727 (1992).

166. *See generally* SPIVACK, *supra* note 158.

crete Co., Inc.[167] Also, in *United States v. Greer*,[168] the court en banc approved a trial court's refusal to strike members of certain races and religions in a hate crime case.[169] Cases involving jury selection have been a persistent source of controversy regarding civil rights.[170] Controversial issues involving subtle discrimination and civil rights violations appear quite often in the Fifth Circuit's caseload[171] and are likely candidates for en banc review.

V. CONCLUSION

Determining if a case is "enbancworthy"[172] is an uncertain process which is often frustrating for litigants. The authorizations of Federal Rule of Appellate Procedure 35 for hearing questions of exceptional importance and maintaining uniformity within the circuit provide starting points for determining the result of an en banc suggestion, but these aims must be filtered through at least a majority of judges on the circuit.[173] While the examination and categorization of en banc cases is helpful in determining which issues may precipitate en banc review, such a listing does not indicate a limit on the court's discretion in this area. Each judge in the circuit must decide what constitutes exceptional importance when deliberating on a suggestion for en banc review. Many factors enter these considerations: the procedural posture, the subject matter, procedural elements, potential recurrence in the courts, and current attitudes toward the issues involved. All of these different factors make granting en banc review a very subjective endeavor for the court.

An attorney contemplating en banc review should keep in mind the unlikeliness of actually achieving an en banc hearing. An en banc hearing should only be requested when a case involves overruling bad precedents, resolving intra-circuit conflict, addressing controversial standards or procedures, or "precedent-setting error of exceptional public importance or an opinion which directly conflicts with prior Supreme Court or Fifth Circuit precedent."[174] These suggestions will never have a high rate of success due to the court's unwillingness to waste judicial resources,[175] but, as demonstrated in this Comment, the court will hear en banc those issues which affect the efficient functioning of the federal courts or which address important areas of the circuit court's jurisprudence.

---

167. 895 F.2d 218 (5th Cir. 1990) (en banc), *rev'd*, 500 U.S. 614 (1991).

168. 968 F.2d 433 (5th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1390 (1993).

169. *Id.* at 434.

170. *See, e.g.*, Powers v. Ohio, 499 U.S. 400 (1991); Batson v. Kentucky, 476 U.S. 79 (1986).

171. Civil rights cases consistently make up approximately 10% of the appeals filed in the Fifth Circuit. CLERK'S REPORT, *supra* note 9, at 2.

172. This term apparently originated with Chief Judge John R. Brown of the Fifth Circuit. Alan R. Gilbert, Annotation, *In Banc Proceedings in Federal Courts of Appeals*, 37 A.L.R. FED. 274, 280 n.8 (1978).

173. *See* FED. R. APP. P. 35(a).

174. 5TH CIR. IOP 35.

175. RAHDERT, *supra* note 48, at 32.