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"MINI" IN BANC PROCEEDINGS:
A SURVEY OF CIRCUIT PRACTICES

STEVEN BENNETT*
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In banc review was originally intended to resolve conflicts in circuit precedent. In this process, every active judge on a court can consider the merits of the disparate approaches taken by two individual three-judge panels, thus resolving the conflict. Full-scale in banc proceedings, however, which require full briefing, oral argument, and multiple opinions, are cumbersome, costly and time-consuming. In determining whether to proceed with in banc review, courts appear to weigh the costs of in banc review against its potential benefits. Employing this calculus, courts often forgo in banc review in conflict cases that would otherwise receive such treatment.

One solution to this problem is to reduce the cost and delay of in banc proceedings by streamlining the procedure. Recently, several federal circuit courts of appeals have adopted abbreviated forms of in banc review. These “mini” in banc proceedings share certain central characteristics. They are initiated by the three-judge panel assigned to hear the case in the first instance and are conducted without oral argument. They do not result in separate opinions from the majority and dissenters.

The purposes of this Article are to survey, describe and assess the usefulness of mini in banc procedures. Part I presents a brief history of in banc procedures, concluding that the original purpose of these procedures was to resolve conflicts in precedent. Part II explores how often in banc procedures are employed, concluding that there are many conflict cases that could easily be treated in banc that do not currently receive such treatment. Part III considers the disadvantages of traditional in banc procedures, and Part IV describes the mini in banc procedures adopted by some circuits. Part V surveys the potential objections to these new procedures and concludes that mini in banc review is a legitimate tool for resolving conflicts in precedent.

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1 This paper adopts the usage of the federal statute, 28 U.S.C. § 46(c)(1982), and the federal rule, FED. R. APP. P. 35, in referring to “in banc” rather than “en banc” proceedings.
2 See infra Part I.
3 See infra Part III.
4 See, e.g., Edwards Co. v. Monogram Indus., Inc., 730 F.2d 977, 987 (5th Cir. 1984)(Rubin, J., concurring)(“the resources of our fourteen-judge en banc court should be reserved for cases worthy of that effort”); Church of Scientology v. Foley, 640 F.2d 1335, 1341 (D.C. Cir. 1980)(in banc)(Robinson, J., dissenting) (“because it engages every active judge, consideration of a case en banc drains judicial resources . . . .”), cert. denied, 452 U.S. 961 (1981); Speigner v. Jago, 603 F.2d 1208, 1212 n.4 (6th Cir. 1979)(“it would be a waste of judicial time and resources to automatically require en banc hearing each and every time this court overrules or modifies one of its previous decisions.”), cert. denied, 444 U.S. 1076 (1980).
5 See infra Part II.
6 See infra Part IV (describing various circuit practices).
I. HISTORICAL BACKGROUND

Throughout the bulk of history of the federal courts, circuit courts consisted of three members; separate in banc procedures were unknown. Circuit courts were created by the Judiciary Act of 1789. This legislation—in which Congress for the first time exercised the power granted it under Article III of the Constitution to establish lower federal courts—provided for thirteen district and three circuit courts. The circuit courts had both original and appellate jurisdiction. There were, however, no circuit judges as such. Panels of the circuit courts consisted of two Supreme Court Justices “riding circuit” and the Judge of the district in which the session was convened. In 1793, Congress reduced the regular panel to one Supreme Court Justice and one district Judge. Nearly eighty years later, Congress finally established circuit judgeships, with one judge assigned to each circuit.

Congress provided for federal question jurisdiction for the first time in 1875. That development, coupled with the rapid population increase and industrialization of the post-war era, produced a flood of cases in the federal courts. The federal courts, fundamentally unchanged since the Judiciary Act of 1789, were ill-equipped to handle the burden. The Evarts Act of 1891 finally provided relief by interposing circuit courts of appeals between the Supreme Court and the trial courts. Consonant with previous legislation, the Evarts Act provided that the circuit courts of appeals “shall consist of three judges.” The Evarts Act did not abolish the old circuit courts, however; it merely terminated their appellate jurisdiction.

Finally, in the Judicial Code of 1911, Congress eliminated the old circuit courts and transferred their remaining original jurisdiction to the district courts. Thus, the structure of the modern federal courts was completed.

Although the 1911 Act carried over the three-judge provision of the Evarts Act, it also provided for more than three circuit judgeships in the

7 Judiciary Act, ch. 21, 1 Stat. 73 (1789). For a detailed account of the evolution of the federal courts, see C. Wright, A. Miller, & E. Cooper, Federal Practice §§ 3503-3504 (1975).
8 Act of March 2, 1793, ch. 20, § 4, 1 Stat. 73.
9 Act of April 10, 1869, ch. 22, § 2, 16 Stat. 44.
13 Id. § 2.
14 Id. § 4.
16 Id. § 117, 36 Stat. 1131.
Second, Seventh and Eighth Circuits. Thus, a controversy was born over whether the courts of appeals could sit with more than three judges. Many observers questioned the legality of multi-judge courts deciding cases in light of the historical three-judge panel model. Congress only intensified this controversy by adding circuit judgeships. By 1938, all but two of the eleven circuits had more than three judges.

By the late 1930s, the question of the legality of courts sitting with more than three judges finally received judicial review. In 1938, the Ninth Circuit held that no more than three judges may sit in the Circuit Court of Appeals. The Ninth Circuit reasoned that the provision in the Evarts Act, carried over into the 1911 Act, providing that a circuit court of appeals "shall consist of three judges," governed the size of the panel of the court irrespective of the number of judges appointed to the court. The Ninth Circuit found that any other rule could lead to the embarrassment of judges demanding to participate in the hearing of every appeal. Moreover, the court noted, such a rule could dramatically increase the workload of each judge.

Two years later, the Third Circuit ruled that in banc sittings were permitted in exceptional cases involving a difference in views among judges on a question of fundamental importance. The Third Circuit reasoned that the Act of Congress authorizing more than three judges for the Third Circuit amended the previous provision for three-judge circuit courts.

In Textile Mills Sec. Corp. v. Commissioner, the Supreme Court agreed with the Third Circuit view. The Court suggested that the central purpose of in banc reviews was to resolve conflicts in precedent:

Certainly, the result reached makes for more effective judicial administration. Conflicts within a circuit will be avoided. Finality of decisions in the circuit courts of appeal will be promoted.

---

17 Id. § 118.
18 This debate is most apparent in congressional pronouncements on the meaning of the provisions for more than three judges in some circuits. See, e.g., H.R. REP. No. 102, 68th Cong., 1st Sess. 5 (1924)(suggesting that no more than three judges can sit on a circuit court); 46 CONG. REC. 84 (1910)(statement of Rep. Moon)("We have made no change whatever in the operation of the courts.").
20 Lang's Estate v. Commissioner, 97 F.2d 867, 869 (9th Cir. 1938).
21 Id. at 870 n.2.
22 Id.
24 Id. at 70.
Those considerations are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases.\textsuperscript{26}

In 1948, Congress enacted 28 U.S.C. § 46(c), which codified the power of the courts of appeals to sit in banc.\textsuperscript{27} This provision allowed in banc proceedings, but did not compel them. In enacting Section 46(c), Congress accepted the view that the main value of in banc review was to resolve conflicts in precedent.\textsuperscript{28}

In 1953, The Supreme Court decided \textit{Western P. R.R. Corp. v. Western P. R.R.},\textsuperscript{29} which established that a litigant retained the right to suggest to an appellate court the appropriateness of in banc hearing or rehearing. In addition, the Court required that each circuit clearly explain, for the benefit of potential litigants, its in banc rules.\textsuperscript{30} In reaching its decision, the Court again referred to the conflict scenario as most appropriate for in banc review.\textsuperscript{31} Justice Frankfurter, concurring in the judgment, made the point even more clearly: "Rehearings \textit{en banc} by these courts, which sit in panels, are to some extent necessary in order to resolve conflicts between panels. This is the dominant concern."\textsuperscript{32}

In 1968, Congress adopted the Federal Rules of Appellate Procedure. Rule 35 expressed the congressional view that in banc proceedings should be used sparingly.\textsuperscript{33} Rule 35 also reiterated the point that resolution of conflicts is the central reason for in banc review. According to the new

\textsuperscript{26} Id. at 334-35.

\textsuperscript{27} Section 46(c) currently provides:
\begin{quote}
Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), 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 . . . , except that any senior circuit judge of the circuit shall be eligible to participate, at his election and upon designation and assignment . . . as a member of an in banc court reviewing a decision of a panel of which such judge was a member.
\end{quote}


\textsuperscript{28} The House Report on the new provision states this view: "If the court can sit in banc, the situation where two three-judge courts may reach conflicting conclusions is obviated. It also will obviate the situation where . . . a decision of two judges . . . sets the precedent for the remaining judges." H.R. REP. No. 1246, 77th Cong., 1st Sess. 1 (1941); see also Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 1053, 77th Cong., 1st Sess. 39-40 (1941). The one-page House Report makes no mention of important cases as a focus for the new provision.

\textsuperscript{29} Western P. R.R. Corp. v. Western P. R.R., 345 U.S. 247, 261 (1953).

\textsuperscript{30} Id.

\textsuperscript{31} Id. at 260 n.20.

\textsuperscript{32} Id. at 270 (Frankfurter, J., concurring).

\textsuperscript{33} Fed. R. App. P. 35(a)("Such a hearing or rehearing is not favored . . . ").
rule, however, in banc review may also be used to resolve exceptionally important cases. This latter concern has evolved into the dominant present-day use of in banc review.

II. THE UNUSED POTENTIAL OF IN BANC REVIEW

The legislative history of the in banc rules and the thrust of the relevant Supreme Court cases indicate that the in banc procedure was originally designed to minimize conflicts in precedent. That conflict resolution was once the dominant concern of in banc review is not surprising. The structure and function of federal appellate courts mandate an in banc review process. A three-judge panel cannot effectively resolve conflicts in precedent. Every three-judge panel of a circuit court of appeals is the court for the purposes of circuit precedent. Without a limiting rule, therefore, one three-judge panel could freely overturn the decision of another panel. Courts are concerned, however, with protecting stare decisis. Stare decisis promotes certainty in the law, to the benefit of litigants, interested parties, and the courts alike. To promote stare decisis, the majority of courts have held that one panel of a court cannot overrule a prior panel's rulings. Even if a court does not feel obliged to follow that rule, in banc treatment is still desirable. A statement from the entire body of judges on a court is obviously more authoritative than the

34 See id. (listing purposes).
35 See 28 U.S.C. § 46(c)(1982)(“Case and controversies shall be heard and determined by a court or panel of not more than three judges . . . .”).
36 The central role of stare decisis in our jurisprudence is amply documented. See, e.g., Vasquez v. Hillery, 106 S. Ct. 617, 624-25 (1986)(“The important doctrine of stare decisis [is] the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion.”); Helvering v. Hallock, 309 U.S. 106, 119 (1940)(“We recognize that stare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations.”); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932)(Brandeis, J., dissenting)(“Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.”). But see Wise, The Doctrine of Stare Decisis, 21 WAYNE L. REV. 1043, 1056 (1975)(suggesting that stare decisis does not actually enhance certainty in the law).
37 See, e.g., Association of Civilian Technicians, Mo. Air Chapter v. FLRA, 756 F.2d 172, 176 (D.C. Cir. 1985); White v. Estelle, 720 F.2d 415, 417 (5th Cir. 1983); Women's Services, P.C. v. Thone, 690 F.2d 667, 688 (8th Cir. 1982), vacated on other grounds sub nom. Kerrey v. Women's Services P.C., 462 U.S. 1126 (1983); In re Jaylaw Drug, Inc., 621 F.2d 524, 527 (2d Cir. 1980)(indicating that one panel may not depart from holding of previous panel); United States ex rel. Scoleri v. Banmiller, 310 F.2d 720 (3d Cir. 1962), cert. denied, 374 U.S. 828 (1963); Ellis v. Carter, 291 F.2d 270, 273 n.3 (9th Cir. 1961); But see Speigner v. Jago, 603 F.2d 1208, 1212 n.4 (6th Cir. 1979), cert. denied, 444 U.S. 1076 (1980); North Carolina Utilities Comm'n v. FCC, 552 F.2d 1036, 1044-45 (4th Cir.), cert. denied, 434 U.S. 874 (1977).
views of a single three-judge panel. The circuit courts, moreover, cannot rely on the Supreme Court to resolve these conflicts. The Court will rarely, if ever, grant certiorari in an intra-circuit conflict case.

Despite the agreement from courts, Congress and commentators that in banc review is a useful method for resolving conflicts in precedent, it is apparent that not all such conflicts are resolved by in banc proceedings. Rather, in banc review has come to be the dominant vehicle for deciding cases presenting novel and important issues. Conflict resolution is now a secondary concern of in banc review.

The most direct evidence on the underutilization of the in banc procedure comes from a study of the in banc decisions of one of the courts of appeals, the D.C. Circuit. The survey examined 76 in banc cases decided by the D.C. Circuit between 1971 and 1985. After a review of several indicators, the cases were categorized according to the court’s reason for granting in banc review. The survey revealed that very few (eight of seventy-six or 10.5%) in banc cases involved conflicts in prior precedent. Rather, the vast majority of cases were heard in banc because of the importance of the questions presented. Table I indicates the type of cases that were heard in banc by the D.C. Circuit.

Table I
D.C. CIRCUIT IN BANC CASES 1971-1985

<table>
<thead>
<tr>
<th>CASE TYPE</th>
<th>NUMBER</th>
</tr>
</thead>
<tbody>
<tr>
<td>Important/Trend-Setting</td>
<td>68</td>
</tr>
<tr>
<td>Constitutional</td>
<td>29</td>
</tr>
<tr>
<td>Administrative</td>
<td>15</td>
</tr>
<tr>
<td>Watergate</td>
<td>8</td>
</tr>
<tr>
<td>Other</td>
<td>16</td>
</tr>
<tr>
<td>Conflict Resolution</td>
<td>8</td>
</tr>
<tr>
<td>Total</td>
<td>76</td>
</tr>
</tbody>
</table>

38 See United States v. American-Foreign Steamship Corp., 363 U.S. 685, 689 (1960) (suggesting that in banc procedures are appropriate whenever the case required “authoritative consideration and decision by those charged with the administration and development of the law of the circuit”).


40 These indicators included the following: 1) An explicit statement by the court. Such statements occurred at the outset of the majority, concurring, or dissenting opinions and were often accompanied by reference to FED. R. App. P. 35; 2) Citations to prior D.C. Circuit caselaw. Where the in banc opinion cited no prior D.C. Circuit law, we presumed that the case involved a novel issue rather than a conflict; 3) The subject of the opinion. For example, opinions which concentrated on interpretations of recent Supreme Court precedent were considered not to involve conflicts.
Table II
SURVEY OF D.C. CIRCUIT CONFLICTS
CASES 1971-1980

<table>
<thead>
<tr>
<th>Year</th>
<th>Conflicts Within</th>
<th>Conflicts Outside</th>
</tr>
</thead>
<tbody>
<tr>
<td>1971</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1972</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>1973</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>1974</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>1975</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>1976</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>1977</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>1978</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>1979</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>1980</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>6</td>
<td>8</td>
</tr>
</tbody>
</table>

Further evidence on the underutilization of the in banc procedure for conflict resolution appears in another survey of D.C. Circuit cases. This study documents conflicts generated in the D.C. Circuit's precedent during the ten-year period spanning 1971–1980. For convenience, the survey examined results from Shepard's Citations. It surveyed 200 randomly-selected cases, 20 from each year, and counted potential conflicts both within and outside the circuit. The results of this survey are presented in Table II.

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The volumes of Shepard's Citations indicate when a case has been overruled, questioned, criticized, or limited by a subsequent case. Each of these indicators denotes a potential conflict in precedent. We randomly selected 20 cases from each of these years (a total of 200 cases), and Shepardized each of the citations, looking for subsequent cases overruling, questioning, criticizing, or limiting these cases. We found no subsequent cases overruling cases examined in the survey.

We included as a potential conflict case any case that had been overruled, questioned, criticized, or limited by any case within or outside the circuit. This method of counting could overstate the number of conflict cases. Since the focus of this Article is on the resolution of intra-circuit conflict cases, we could count only those cases that revealed subsequent conflicts within the circuit. Conflicts in precedent within a circuit are perhaps more intolerable than those between circuits. In certain circumstances, inter-circuit conflicts are useful as experiments. Armed with the results from two or more different approaches, a court considering a rule for the first time, or the Supreme Court, may choose its rule more carefully. Estreicher & Sexton, A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study, 59 N.Y.U. L. Rev. 681, 716-20 (1984)(describing this as a "percolation" process); Wallace, The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?, 71 CALIF. L. Rev. 913, 929 (1983)(describing advantages of conflicts); Stevens, Some Thoughts on Judicial Restraint, 66 JUDICATURE 177, 183 (1982)("[T]he existence of differing rules of law in different sections of our great country is not always an intolerable evil . . . "). The danger that parties will not be able to arrange their affairs is minimized by the fact that they can determine which jurisdiction's rule will
These figures provide a conservative estimate of the total number of conflicts generated from cases decided in these years. Assuming that these results accurately represent the years from which they were drawn, it is estimated that during the ten-year period between 1971 and 1980, the D.C. Circuit decided between 90 and 210 cases that would later lead to conflicts in precedent. Certainly not all of these cases represent insoluble conflicts worthy of in banc treatment. This survey of D.C. Circuit cases, however, suggests that there are a significant number of conflict cases that do not currently receive in banc review.

Somewhat less direct evidence supports the conclusion that the use of in banc review to resolve conflicts has diminished. The thrust of that
evidence is that the use of the in banc procedure has not grown in proportion to the number of cases decided by the courts of appeals. During the fiscal year ending June 30, 1965, for example, the courts of appeals decided 51 cases in banc out of a total of 5,771 cases decided. 46 By the fiscal year ending June 30, 1985, the number of cases terminated by the courts of appeals had grown to 16,369, but the courts decided only 85 cases in banc. 46 Thus, the number of in banc cases grew by 66.6 percent while the number of cases terminated grew by 183 percent. If in banc procedures were used primarily to resolve conflicts, presumably, the number of in banc cases would grow in proportion to the total number of cases decided.

This statistical evidence on the underutilization of the in banc procedure for conflict resolution is supported by the views of many legal observers. Both judges and commentators have noted that the in banc procedure is used only infrequently to resolve conflicts. For example, former Chief Judge Robinson, of the District of Columbia Circuit, dissenting in Church of Scientology v. Foley, 47 proposed the general rule that "the truly extraordinary 'cases meriting en banc treatment are those involving issue[s] likely to affect many other cases'—in other words, those of real significance to the legal process as well as to the litigants." 48 Chief Judge Robinson's statement suggests that the existence of a conflict is, alone, insufficient to justify in banc treatment. More recently, Judge Wald, recently appointed Chief Judge of the D.C. Circuit court, reemphasized this general approach, suggesting that the court will review a case in banc only when the force of prior precedent becomes intolerable. 49 These statements are echoed by the observations of several commentators. 50

Although in banc review was originally designed to resolve conflicts in precedent, the evidence indicates that courts currently underutilize this method of procedure. The overriding reason that courts avoid in banc review is that hearings in banc are expensive, time-consuming and

45 NYU Note, supra note 39, at 564.
46 See Administrative Office of the United States Courts, Annual Report 121 (1985) (hereinafter Annual Report) (Table seven) (appeals terminated on the merits) (table includes both decisions after oral hearing and decisions after submission on briefs).
48 Id. at 1341 (Robinson, J., dissenting) (brackets in original) (footnotes omitted).
49 P. Wald, Lecture at Cleveland-Marshall College of Law 8 (April, 1986) (See article by Chief Judge Wald at page 476 of this issue).
50 See, e.g., Fordham Note, supra note 19, at 409-10 (suggesting that, in Second Circuit, in banc treatment is granted only when both uniformity and importance criteria are met); Note, En Banc Review in Federal Circuit Courts; A Reassessment, 72 Mich. L. Rev. 1637, 1647 (1974) (hereinafter Michigan Note) (reporting on survey of circuit court judges which found that many listed resolution of intra-circuit conflicts as a secondary concern of in banc review).
inefficient. Part III, surveys these drawbacks to conventional in banc procedure.

III. DISADVANTAGES OF CONVENTIONAL IN BANC REVIEW

Courts and commentators agree that conventional in banc review must be used sparingly, largely because of its potential problems. These problems are several. In banc review does not always accomplish its purposes; it can be inefficient. Such review also taxes the resources of the courts. For these reasons, courts hesitate to make use of the conventional procedure.

The structure of conventional in banc review virtually guarantees that the procedure will, for the most part, fail to resolve conflicts in precedent. The primary reason for this failure is that in banc cases rarely produce consensus. In the period from 1971 to 1985, for example, the D.C. Circuit issued 87 in banc opinions, 66.09 percent of which contained a dissent. That dissent rate compares to an overall dissent rate in the D.C. Circuit in a recent year of 5.8 percent. These figures are confirmed by an earlier survey of all the circuits.

The multiple opinions often produced by in banc proceedings undermine the purpose of in banc review. Multiple opinions are less likely to produce a clear statement of the law. Subsequent litigants and judges may, as a consequence, suffer the same uncertainties about the state of the law as they suffered before the in banc decision. Multiple opinions also detract from the sense of finality which in banc review is intended to achieve. Losing parties and other interested persons may be tempted to re-test an issue, especially once the composition of the court changes.

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51 See, e.g., Church of Scientology v. Foley, 640 F.2d 1335, 1339 (D.C. Cir. 1980)(en banc)(Robinson, J., dissenting) (suggesting that in banc review is appropriate only in rare circumstances), cert. denied, 452 U.S. 961 (1981); Zahn v. International Paper Co., 469 F.2d 1033, 1041 (2d Cir. 1972), affd, 414 U.S. 291 (1973)(same); Michigan Note, supra note 50, at 1645 (suggesting presumption against in banc review); NYU Note, supra note 39, at 577 ("en banc proceedings must be strongly disfavored, and justification for them must approach the level of necessity"); Virginia Note, supra note 44, at 1509.

52 If we count only the in banc cases that produced any opinion, the figure is even higher. Of the 62 cases, 26 were decided without opinion. For the remaining 36 cases with 29 dissents, the dissent rate is 80.5%.


54 In a review of all in banc cases from 1940 through June 1964, 262, or 61.9% of the cases resulted in at least one dissent. See NYU Note, supra note 39, at 608 (Table IV).


56 See NYU Note, supra note 39, at 583 (noting that "[i] failure to agree en banc may
In banc review fails to resolve conflicts because it sometimes produces no decision at all. When an in banc court is evenly divided, the lower court or agency decision remains in effect with no clear statement from the appellate court. When the issue has been left undecided by an evenly divided court, the temptation to renew the battle in the next case or with the next change in the court is all the greater.

Finally, conventional in banc review often does not resolve conflicts because of the vote-counting rules that apply in such cases. Ordinarily, if a judge who is assigned to a three-judge panel discovers that he must recuse himself, he will be replaced and the appeal proceeds to decision as usual. The statutory provision for in banc review, however, provides that "[a] court in banc shall consist of all circuit judges in regular active service ...." A majority of the circuits that have considered the issue have interpreted this provision to require an absolute majority vote of the circuit judges in order to convene an in banc hearing. For these purposes, recusals are counted as "no" votes. As a result, with the conventional in banc procedure, it may be impossible to convene the court in banc even though a majority of the unrecused judges favor doing so.

leave judges unwilling to respect the en banc precedent strictly in subsequent panel decisions).

See id., at 584 (14 of 84 cases in sample were deadlocked).


See Carrington, supra note 44, at 583.


The problem of recusals can severely hamper a court's ability to operate in banc, especially in circuits with many judges who hold stock or who have held public office. See
Even when conventional in banc review achieves its purposes, the costs to the court and litigants may not justify the effort. Delay is one major cost of conventional in banc review. Delay is almost inevitable because the in banc court is an unwieldy decisionmaker; it lacks the benefits of small, flexible decisionmaking conferences and rapid exchanges of draft opinions. According to some surveys, in banc review can more than double the time from argument to decision. The chief vice of delay, of course, is uncertainty. The longer the court takes to decide an issue, the longer the litigants are left without direction on how to conduct their affairs.

Conventional in banc review also creates a drag on court efficiency. The decline in efficiency occurs in direct proportion to the number of judges on the in banc panel. For example, an in banc panel of twelve judges could be doing the work of four three-judge panels. This concern for efficiency is especially heightened by the recent "explosion" in the business of the federal courts of appeals.

Conventional in banc review can also produce intangible harm to the internal workings of appellate courts. A call for a rehearing in banc may be perceived by the members of the original three-judge panel as gratuitus intermeddling by the other members of the court. Moreover, in banc review of "hard" cases about which judges hold strong feelings sometimes exacerbates rather than accommodates personal differences.


See NYU Note, supra note 39 at 576.

In a survey conducted in the Second and D.C. Circuits, one commentator found that cases reheard in banc took approximately five and one half times longer to reach final decision than cases heard and disposed of by three-judge panels, and cases initially heard in banc took approximately two and one half to three and one half times longer than cases heard and disposed of by three-judge panels. Michigan Notes, supra note 50, at 1644. Another survey, conducted in the Second and Third circuits, found that the average time from argument to judgment doubled if the in banc court originally heard the case and quadrupled if the in banc court reheard the case. NYU Note, supra note 39, at 577.

See, e.g., Michigan Note, supra note 50, at 1644 (explaining source of inefficiency); NYU Note, supra note 39, at 577 (same).


Although unquantifiable, this potential disruption of the personal relationships between judges is a very real concern.

IV. "Mini" in Banc Procedures

Mini in banc proceedings respond to many of the concerns noted in Part III. Despite the fact that no two federal circuit courts of appeals have adopted the same mini in banc procedures, there are some significant similarities. This Part describes the procedures in each of the circuits. The rules are presented in declining order, from most formalized to least formalized.

A. Seventh Circuit

The Seventh Circuit has adopted the most formalized procedure for mini in banc review. The Seventh Circuit judges adopted their Rule 16(e) in 1977.\(^{68}\) The conflict-resolution provisions of the Seventh Circuit's rule include four important steps:

(1) An opinion is prepared by the initial three-judge panel;
(2) The proposed opinion creates a conflict by either:
   (a) Overruling a prior decision of the court, or
   (b) Creating a conflict between or among circuits;
(3) The opinion is circulated to the active members of the court; and
(4) A majority of the active judges do not vote to rehear the case.

Although the Seventh Circuit's procedure is the most comprehensive of the mini in banc rules, an examination of the rule in operation more fully illustrates its scope. Since 1977, the Seventh Circuit has published twenty-four opinions in which Rule 16(e) has been employed. A study of those opinions yields several important observations.

\(^{68}\) The Seventh Circuit rule reads:

_rehearing sua sponte before decision._ A proposed opinion approved by a panel for this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear in banc the issue of whether the position should be adopted. In the discretion of the panel, a proposed opinion which would establish a new rule or procedure may be similarly circulated before it is issued. When the position is adopted by the panel after compliance with this procedure, the opinion, when published, shall contain a footnote worded, depending on the circumstances, in substance as follows: This opinion has been circulated among all judges of this court in regular active service. (No judge favored, or a majority did not favor) a rehearing in banc on the question of (e.g., overruling Doe v. Roe.)

7th Cir. R. 16(e).
First, although the rule also permits the in banc court to adopt new procedures, the court has used the rule primarily to resolve conflicts. Table III presents a categorization of the cases which illustrates this

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69 In one case, the court acted under Rule 16(e) both because of a conflict with prior Seventh Circuit law and a conflict with a case outside the circuit. Chicago & N. W. Transp. Co. v. Atchison, T & S. F. Ry., 609 F.2d 1221, 1232 n.11 (7th Cir. 1979).

We divide the cases in these categories as follows:


**Cases clarifying prior decisions:** Analytica, Inc. v. NPD, 708 F.2d 1263, 1265 n.* (7th Cir. 1983) (indicating that opinion was circulated because of dissenting opinion suggesting that it is in conflict with prior decisions); Norris v. United States, 687 F.2d 899, 899 n.* (7th Cir. 1982) (arguable conflict with Guzzardo v. Bengston, 643 F.2d 1300 (7th Cir.), cert. denied, 452 U.S. 941 (1981)); Shango v. Jurich, 681 F.2d 1091, 1091 n.* (7th Cir. 1982) (noting potential conflict with statements in prior opinions).

**Cases interpreting prior decisions in light of Supreme Court decision:** Pridegon v. Gates Credit Union, 683 F.2d 182, 194 (7th Cir. 1982) (overruling Smith v. No. 2 Galesburg Crown Fin. Corp., 615 F.2d 407 (7th Cir. 1980) in light of intervening Supreme court precedent); Zeigler Coal Co. v. Local 1870, 566 F.2d 582, 585 (7th Cir. 1977) (overruling Inland Steel Co. v. UMW, 505 F.2d 293 (7th Cir. 1974) in light of intervening Supreme court precedent), cert. denied, 436 U.S. 912 (1978).

**Conflict outside circuit:** Watkins v. Blinzinger, 789 F.2d 474, 476 n.4 (7th Cir. 1986); Gracyzky v. USW, 763 F.2d 256, 256 n.* (7th Cir.) (noting conflict with Anness v. USW, 707 F.2d 917 (7th Cir. 1983), cert. denied, 106 S. Ct. 335 (1985); Louisville & Nashville R.R. v. Mead Johnson & Co., 737 F.2d 683, 683-84 n.* (7th Cir.) (noting disagreement with Johnson Machine Works, Inc. v. Chicago, B & Q R.R., 297 F.2d 793 (8th Cir. 1962), cert. denied, 469 U.S. 982 (1984); Allison v. Liberty Sav., 695 F.2d 1086, 1086 n.* (7th Cir. 1982) (noting conflict with Vega v. First Fed. Sav. & Loan Assoc., 622 F.2d 918 (6th Cir. 1980)); King v. IRS, 688 F.2d 488, 488 n.* (7th Cir. 1982) (noting conflict with Long v. IRS, 596 F.2d 362 (9th Cir. 1979)).
point. Indeed, according to the Circuit Executive for the Seventh Circuit, "[t]he purpose of adopting this rule was to allow the court to overrule prior decisions without having to have an en banc hearing and to forestall the issuance of opinions in conflict with other circuits which would be later vacated by the en banc court." The additional rule-change function appears to have been a secondary concern.

Although Rule 16(e) does not explicitly so state, any mini in banc decision is rendered without prejudice to a further request for rehearing and suggestion for rehearing in banc. Thus, for example, in Analytica, Inc. v. NPD Research, Inc., Judge Wood stated that he would not vote on the Rule 16(e) question,

preferring to have the benefit of the parties' arguments made on petition for rehearing with suggestion for rehearing en banc, should such a petition be filed after they have had an opportunity to study the majority and dissenting opinions, before he votes on whether the case should be heard en banc.

Although mini in banc proceedings do not tax court resources as much as conventional in banc reviews do, the Seventh Circuit still uses the process sparingly. For example, Rule 16(e) is interpreted literally to require that the case to be given mini in banc treatment creates a new conflict with other circuits. If a conflict between circuits already exists,

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70 Letter from Collins T. Fitzpatrick, Circuit Executive for the Seventh Circuit, to Authors (Feb. 25, 1986).
71 Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263 (7th Cir. 1983).
72 Id. at 1265 n.4.
Rule 16(e) does not apply. Thus, in *Milwaukee County v. Donovan*, an opinion of a three-judge panel was initially circulated to the full court because it created a conflict with opinions from the Third and Ninth Circuits. While the opinion was circulating, however, the Second circuit adopted a position contrary to the other two circuits. Because no new conflict was created by the proposed opinion, the Rule 16(e) submission to the full court was withdrawn.

Rule 16(e) also does not require unanimity on an issue. In this sense, it truly operates as a mini in banc hearing. In at least five of the Seventh Circuit mini in banc cases, one or more of the judges preferred to rehear the case in banc rather than issue the opinion without full consideration. Where judges dissented, moreover, dissenting votes were simply noted; no separate dissenting opinions issued. In at least three cases, however, the Rule 16(e) suggestion was rejected, and the court proceeded to rehear the case in banc.

**B. Second Circuit**

Unlike the Seventh Circuit’s Rule 16(e), the Second Circuit’s mini in banc rule is “entirely informal and is not set forth in any local rule or elsewhere.” In general, however, the procedure is similar to that employed by the Seventh Circuit. If a three-judge panel determines that its opinion should be circulated to the full court prior to publication, the judges then exchange memos, and the opinion may be revised. When the opinion is published, it will sometimes note that it has been circulated to the full court. The purpose of this approach is “to give the entire court the opportunity to have input into opinions in controversial, unusual and/or important cases, and to insure uniformity of decisions.”

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74 *Id.* at 983 n.*. See *KINBB*, supra note 58, at 284 (“This process does not foreclose a party’s suggestion that a case should be reheard or reheard in banc, but it obviously places a heavier burden on such a petition.”).

75 *See Gaertner v. United States*, 763 F.2d 787, 788 (7th Cir.)(four judges dissenting), *cert. denied*, 106 S. Ct. 535 (1985); *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1265 (7th Cir. 1983)(two judges dissenting, one abstaining); *Norris v. United States*, 687 F.2d 899, 899 (7th Cir. 1982)(three judges dissenting); *Allison v. Liberty Sav.,* 695 F.2d 1086, 1086 (7th Cir. 1982)(two judges dissenting); *Davis v. Califano*, 603 F.2d 618, 626 (7th Cir. 1979)(one judge dissenting).

76 *United States ex rel. Teague v. Lane*, 779 F.2d 1332 (7th Cir. 1985); *United States v. Gometz*, 730 F.2d 475, 477 (7th Cir.), *cert. denied*, 469 U.S. 845 (1984); *Mosey Mfg. Co., Inc. v. NLRB*, 701 F.2d 610, 611 (7th Cir. 1983).

77 Letter from Geoffrey A. Mort, Program Analyst, Office of the Circuit Executive for the Second Circuit, to Authors (Feb. 24, 1986). The Second Circuit procedure is commonly referred to as “junior en banc.” *Id.*

78 *Id.*
Table IV
SECOND CIRCUIT MINI IN BANC CASES

| Cases overruling prior decisions | 10 |
| Cases clarifying prior decisions | 3 |
| Cases interpreting prior decisions in light of Supreme Court decision | 2 |
| Rules cases | 1 |
| Allegations of judicial misconduct | 1 |
| Total | 17 |

Because the Second Circuit approach is so informal, the scope of its operation becomes apparent only after an examination of the cases in which it has been employed. These cases demonstrate several important dimensions of the procedure. First, the Second Circuit most often uses the procedure to overrule or clarify its own precedent. As illustrated in Table IV, a survey of the seventeen unreported cases employing the mini in banc approach reveals that conflicts with other circuits have never been cited as justification for the mini in banc procedure.

Parallel to the Seventh Circuit's Rule 16(e), the Second Circuit may issue a mini in banc opinion with less than a unanimous vote. In five of the seventeen cases surveyed, the vote to issue the mini in banc opinion

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79 We divide the cases into the following categories:


was less than unanimous. In only one case, however, was a full dissenting opinion entered. In one other case, the three-judge panel's suggestion of mini in banc treatment was apparently rejected, and the case received full in banc treatment.

In contrast to conventional in banc practice, the Second Circuit does not always note the fact that a case has been given mini in banc treatment. In United States v. Jacobs, the court explained, for the first time, that a prior opinion had received mini in banc treatment. The court noted that "[w]e did not mention this originally because we deemed it an internal matter." Even when the court mentions that a case has been decided under the mini in banc approach, the court does not always note the exact votes of the judges.

On occasion, the Second Circuit has referred mini in banc opinions both to active judges and to senior judges. In Maiorino v. Branford Sav. Bank, the court circulated the opinion to senior judges who were members of the panel that decided an earlier case clarified by the Maiorino opinion. In United States v. Jacobs, the court simply stated that a previous opinion had been circulated before filing to all active and senior judges of the circuit. Ordinarily, senior circuit judges are only


Cases interpreting circuit law in light of Supreme Court decision: Boothe v. Hammock, 605 F.2d 661, 663 (2d Cir. 1979); Grimes v. United States, 607 F.2d 6, 16 (2d Cir. 1979).

Rules cases: United States v. Jacobs, 547 F.2d 772, 773 n.2 (2d Cir. 1976) (requiring that United States attorney inform potential defendant that he is target of investigation prior to appearance before grand jury), cert. dismissed, 436 U.S. 31 (1978).

Allegations of judicial misconduct: In re Phillips, 510 F.2d 126, 127 (2d Cir. 1975) (allegation that district judge should have recused himself because of ex parte contacts).

See United States v. Taylor, 464 F.2d 240, 244 n.2 (2d Cir. 1972) (one judge suggesting formal in banc); United States v. Ramos, 572 F.2d 360, 363 (2d Cir. 1978) (one judge dissenting); United States v. Jacobs, 547 F.2d 772, 773 (2d Cir. 1976) (one judge not responding; one judge dissenting), cert. dismissed, 436 U.S. 31 (1978); In re Phillips, 510 F.2d 126, 127 (2d Cir. 1975) (two judges disqualified); United States v. Freeman, 357 F.2d 606, 607 n.4 (2d Cir. 1966) (one judge taking no position on opinion).


Id. at 773 n.2.


Id. at 773 n.2.
permitted to sit on the in banc rehearing of cases on which they sat as a member of the original panel. The Second Circuit practice may be justified on the ground that such circulation to senior judges is done to gather their views and not to solicit their votes.

Finally, apart from its primary mini in banc procedures, the Second Circuit has, on at least one occasion, adopted a procedure for resolving cases where separate panels have considered the same issue and intend to reach different conclusions. In a recent speech, Judge Kaufman described a situation in which three different panels had to determine the elements of a civil RICO action. Because the three panels intended to reach different conclusions, some judges suggested that the court review all three cases in banc. The court later agreed, however, to let one panel take the lead on the issue, thus establishing a precedent that the other two would follow. This procedure avoided the need for in banc treatment altogether.

C. D.C. Circuit

In 1981, the D.C. Circuit issued *Irons v. Diamond*, which suggested for the first time the possibility of using a mini in banc procedure in that circuit. The *Irons* case had already been to the D.C. Circuit three times, and the court found two of these prior opinions in "irreconcilable"

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91 Id. (noting that voting memos indicated that an in banc hearing would likely have created an even more uncertainty).


The fact that this procedure was used is nowhere noted in any of the cases in the *Sedima* trilogy.


The court declined to resolve the inconsistency on a law of the case rationale, noting however, that "this path would lead us out of the present thicket, [but] would do little if anything to cut away the tangled legal underbrush and clarify the controlling law in this circuit." Instead, the court circulated the opinion to the full court for consideration. In recognition of this procedure, the court provided a footnote: "[t]he foregoing part of the division's decision, because it resolves an apparent conflict between two prior decisions, has been separately considered and approved by the full court, and thus constitutes the law of the circuit." The D.C. Circuit has not implemented the "Irons footnote" procedure by rule. Instead, the court has detailed the scope of the procedure by example in each new case. Since Irons, the court has used the procedure only four times. In one case, the court used the Irons footnote to overrule language in a prior opinion in the same case, a result similar to the situation in Irons itself. In two other cases, the court used the procedure to overrule dicta from prior cases. In the fourth instance, the court used the Irons footnote procedure expressly to resolve inconsistencies in prior decisions. The resolution of conflicts in prior opinions, according to Judge Edwards of the D.C. Circuit, is one of the express purposes of the Irons footnote.

Unfortunately, the D.C. Circuit's mini in banc procedure remains undeveloped in several areas. It is unclear, for example, whether an Irons footnote could be adopted with a less than unanimous vote from the full court. In addition, the court has not yet used the Irons procedure to overrule a precedent, as opposed to resolving conflicts in prior opinions or clarifying prior dicta.

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95 Irons v. Diamond, 670 F.2d 267.
96 Id. at 268.
97 Id. at 268 n.10.
99 Id. at 844 (suggesting that language in first opinion may be inappropriate).
102 Id. at 75 n.24.
103 Edwards, supra note 42, at 638.
104 See P. Wald, supra note 49, at n.27 (suggesting that less than a unanimous vote might be permitted).
D. Tenth Circuit

The Tenth Circuit has not adopted a formal rule governing mini in banc proceedings. Circuit practice, however, requires that all panel opinions be circulated to the entire court, including both active and senior judges.\(^6\) Any active judge may request a poll of the court on whether to review a case in banc. If no poll is requested, the opinion is issued without the imprimatur of the full court. If an opinion is filed which is contrary to an earlier decision of the court, a footnote may be appended stating that the earlier decision is no longer valid and that the statement is made with the approval of the entire court.\(^7\)

The Tenth Circuit has used this informal procedure exclusively to overrule precedent. In *Wiley v. Rayl*,\(^8\) the court used the procedure to overrule a case that had been superseded by Supreme Court precedent.\(^9\) In *EEOC v. Gaddis,*\(^10\) the court simply overruled two prior cases.\(^11\)

Perhaps due to its informality, the Tenth Circuit approach remains ill-defined. For example, the court has not indicated whether a mini in banc opinion can issue with a less than unanimous vote of the active judges.\(^12\)

E. Fourth Circuit

In the Fourth Circuit, every proposed opinion in an argued case\(^13\) is circulated to every circuit judge, including senior judges, and their comments are solicited.\(^14\) The aim of this solicitation of comments is to promote a collegial attitude among the members of the court and to maintain uniformity of decisions within the circuit.\(^15\) Ordinarily, the

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\(^6\) Letter from Robert L. Hoecker, Chief Deputy Clerk, Tenth Circuit, to Author (Feb. 27, 1986).
\(^7\) Id.
\(^8\) *Wiley v. Rayl*, 767 F.2d 679 (10th Cir. 1985).
\(^9\) *See id.* at 681 n.2 (overruling Hux v. Murphy, 733 F.2d 737 (10th Cir. 1984), cert. denied, 472 U.S. 1022 (1985)).
\(^10\) *EEOC v. Gaddis*, 733 F.2d 1373 (10th Cir. 1984).
\(^11\) *Id.* at 1377 n.3 (overruling Shah v. Halliburton, 627 F.2d 1055 (10th Cir. 1980) and Zuniga v. AMPAC Foods, Inc., 580 F.2d 380 (10th Cir. 1978)).
\(^12\) In *Wiley*, the court noted that the poll of the active judges was unanimous. *Wiley*, 767 F.2d at 681 n.2. In *Gaddis*, the court noted only that one judge did not participate. *Gaddis*, 733 F.2d at 1377 n.3.
\(^13\) The Circuit Executive for the Fourth Circuit emphasized that these procedures apply only to argued cases. Proposed opinions for submitted cases are not always circulated to every member of the court. Letter from Samuel W. Phillips, Circuit Executive for the Fourth Circuit, to Authors (May 27, 1986).
\(^14\) Fourth Circuit Internal Operating Procedure 36.2 ("When a proposed opinion in an argued case is prepared and submitted to other panel members, copies are provided to the non-sitting judges including the senior judges and their comments are solicited.")
\(^15\) Letter from Samuel W. Phillips, Fourth Circuit Executive, to Author (Feb. 24, 1986).
issued opinion does not identify the panel members' votes and does not indicate whether the full court has adopted the opinion.\textsuperscript{116}

In at least one published opinion, however, the court specifically indicated that the opinion had been circulated to all members of the court and that a majority had agreed with the opinion.\textsuperscript{117} The opinion proposed to confine a prior opinion to its particular facts.\textsuperscript{118}

The Fourth Circuit procedure leaves several open questions. For example, the procedure does not elucidate how often opinions overruling prior decisions receive full court approval without explicit notation of that fact in the opinion.

\textbf{F. Eighth Circuit}

Like the D.C., Second and Tenth Circuits, the Eighth Circuit also lacks a formal procedure for pre-issuance opinion review by the full court.\textsuperscript{119} Indeed, the court's Internal Operating Procedures do not even suggest that panel opinions are ever circulated to the full court prior to publication.\textsuperscript{120}

Although the Internal Operating Procedures provide for no such mini in banc procedure, the Eighth Circuit has employed a truncated in banc review on occasion. In \textit{United States v. Kasto},\textsuperscript{121} the court indicated that the opinion had been circulated to the active judges on the court and that a majority of the active judges approved the overruling of a prior decision.\textsuperscript{122} In another opinion, \textit{In re Multi-Piece Rim Prods. Liab. Litig.},\textsuperscript{123} the court seemed to indicate that the same procedure had been used, noting that "[t]his opinion has been circulated to the court en banc, and all active judges concur."\textsuperscript{124} The heading on the \textit{Rim Prods.} opinion, however, states that the court was sitting in banc.\textsuperscript{125} The court did not state whether it actually sat in banc or whether it merely approved a...

\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Bell v. United States}, 521 F.2d 713, 715 n.3 (4th Cir. 1975), \textit{cert. denied}, 424 U.S. 918 (1976).
\textsuperscript{118} \textit{Id.} (referring to \textit{Paige v. United States}, 443 F.2d 781 (4th Cir. 1971)).
\textsuperscript{119} Letter from Sheila Greenbaum, Eighth Circuit Senior Staff Attorney, to Authors (Feb. 28, 1986).
\textsuperscript{120} Eighth Circuit Internal Operating Procedures VI(A)(noting only that proposed opinions are circulated to other panel members).
\textsuperscript{122} \textit{Id.} at 272 n.4 (overruling \textit{Packineau v. United States}, 202 F.2d 681 (8th Cir. 1953)).
\textsuperscript{124} \textit{Id.} at 378 n.2.
\textsuperscript{125} \textit{Id.} at 377. In addition, the docket sheet for the case apparently states that the case was submitted without oral argument and "en banc." Letter from Sheila Greenbaum, Senior Staff Attorney, Eighth Circuit, to Authors (May 29, 1986).
panel opinion. The *Rim Prods.* opinion, like the *Kasto* opinion, overruled a prior decision.

G. Federal Circuit

The Court of Appeals for the Federal Circuit, newest of the federal courts of appeals, does not have a formal mini in banc procedure. There is, however, a procedure whereby any judge at any time may request an in banc poll of the circuit judges in regular active service to determine if the case should be considered in banc. If a majority of the active judges agree, the case will be considered in banc, but review may not involve further briefing and oral argument. In at least one published opinion, the court used a form of mini in banc review. In *Zenith Radio Corp. v. United States*, the appellant attacked one of the court’s prior opinions and suggested that in banc reviews might be the appropriate technique for dealing with that precedent. The three-judge panel refused to overrule the prior opinion and denied the in banc suggestion, noting that “[t]his opinion has been circulated to the entire court prior to issuance, and no judge endorsed the suggestion [to hear the case in banc].”

This single opinion leaves many unanswered questions. The Federal Circuit has not affirmatively stated that the procedure could be used to overrule a prior opinion without a formal in banc hearing. Moreover, the voting requirements of this shortened in banc review remain undefined.

H. Fifth Circuit

The Fifth Circuit does not ordinarily circulate panel opinions to the full court. Court policy does require, however, that “[p]anel opinions which

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126 Ordinarily, when the Eighth Circuit sits in banc, the court indicates the procedural posture of the case. See, e.g., Bibbs v. Block, 778 F.2d 1318, 1319 (8th Cir. 1985)(in banc) (indicating that initial three-judge panel had reversed district court order); Flittie v. Solem, 775 F.2d 933, 935 (8th Cir. 1985)(in banc) (indicating that initial three-judge panel had affirmed district court order), cert. denied, 106 S. Ct. 1223 (1986).
127 *Rim Prods.*, 612 F.2d at 378 (overruling Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602 (8th Cir. 1977), cert. denied, 436 U.S. 905 (1978) and Arkansas v. Dean Food Prods. Co., 605 F.2d 380 (8th Cir. 1979)).
128 Letter from Francis X. Gindhart, Federal Circuit Clerk of Court, to Authors (August 12, 1986). Because the court’s internal operating procedures prohibit a panel from overruling or conflicting with precedent, the only option available to accomplish this is in banc consideration. *Id.*
130 *Id.* at 186 n.3. Though pre-issuance circulation to all the judges is required as a way to eliminate conflicts with precedent, it is not an in banc procedure. Letter, supra note 128.
131 Letter from Lydia G. Comberrel, Circuit Executive for the Fifth Circuit, to Authors (Feb. 25, 1986).
create conflict between circuits are to be pre-circulated to all active judges.”¹³² The Fifth Circuit has used this procedure to review inter-circuit conflict cases in at least two published opinions.¹³³ These opinions make clear that a mere majority vote of the active judges is sufficient to approve a panel opinion that creates a conflict with another circuit.¹³⁴ If a majority of the court favors en banc rehearing, the initial three-judge panel decision may be published, even though it will be subsequently vacated by the vote to hear the case in banc.¹³⁵ The court has never used this procedure to overrule its own precedent.¹³⁶

I. Third Circuit

In the Third Circuit, draft opinions are circulated to all active judges. This circulation acts as a request for notification if in banc consideration is deemed appropriate.¹³⁷ The court does not appear to have adopted or implemented any other mini in banc procedure.

J. Sixth Circuit

Sixth Circuit rules explicitly prevent one panel from overruling the published opinion of a prior panel. Thus, in banc consideration is required to overrule a prior published opinion.¹³⁸ The rules permit any active judge or member of the original hearing panel to call for in banc consideration of the case, even without a request for rehearing by one of the parties.¹³⁹ The court does not appear, however, to have considered any mini in banc procedure.¹⁴⁰

¹³² Id. This statement of policy is not contained in the court’s local rules.
¹³⁴ See, e.g., Fuel Oil, 762 F.2d at 1284 n.* (noting that a majority of active judges did not call for in banc rehearing).
¹³⁶ The Fifth Circuit has used the full in banc procedure to overrule some cases. See, e.g., Crown Zellerbach Corp. v. Ingram Indus., Inc. 783 F.2d 1296, 1297 (5th Cir.)(in banc)overruling Olympic Towing Corp. v. Nebel Towing Co., 419 F.2d 230 (5th Cir. 1969), cert. denied, 397 U.S 989 (1970), cert. denied, 107 S. Ct. 87 (1986); United States v. Henry, 749 F.2d 203, 206 n.2 (5th Cir. 1984)(in banc)overruling several cases.
¹³⁷ Third Circuit Internal Operating Procedure 5(c)(5).
¹³⁸ Sixth Circuit Internal Operating Procedures § 11.3.
¹³⁹ Id. at § 12.2.
¹⁴⁰ Letter from James A. Higgins, Circuit Executive for the Sixth Circuit, to Authors (Feb. 24, 1986) (“The Sixth Circuit has not adopted a procedure whereby the en banc court may review all or part of an opinion before it is issued by a panel. Insofar as I am aware, the Sixth Circuit has never considered the adoption of such a procedure.”).
K. First Circuit

The First Circuit, with only five active judges, is least likely to conduct in banc proceedings. Nevertheless, under appropriate circumstances, the court may consider conducting such proceedings. The court does not have any formal procedure for circulating drafts of opinions to non-panel members and has not adopted any mini in banc procedure.

L. Ninth Circuit

The Ninth Circuit is the only circuit to have established the in banc court as a group containing fewer than all the active judges of the circuit. Ninth Circuit procedure establishes in banc courts consisting of the chief judge plus ten additional active judges drawn by lot. Because the composition of any particular in banc court cannot be determined in advance, circulation of draft opinions to the in banc court is impossible. Although the Ninth Circuit has not adopted a mini in banc procedure, the office of staff attorneys is charged with the responsibility of reviewing all dispositions and does bring potential conflicts to the attention of concerned panels.

M. Eleventh Circuit

The Eleventh Circuit policy is for each panel to send its opinions directly to the Clerk of Court for issuance. Opinions are not circulated to non-panel members for their comments. Panels may occasionally discover, however, that they have related cases or cases raising similar issues. In that event, communication between the judges' chambers can occur. There is, however, no institutionalized rule for review of draft

\[\text{\textsuperscript{141}}\] In the one-year period ended June 30, 1985, the First Circuit was the only circuit in which there were no cases terminated as a result in banc proceedings. \textit{Ann. Rep.}, supra note 46, at 121 (Table 7).

\[\text{\textsuperscript{142}}\] See \textit{United States v. Martorano}, 620 F.2d 912, 920 (1st Cir. 1980)(suggesting that policies behind in banc rule apply as much to First Circuit as to other courts), \textit{cert. denied}, 449 U.S. 952 (1980).

\[\text{\textsuperscript{143}}\] In \textit{28 U.S.C. \textsection 46(c)(1982)}, Congress provided that the in banc court may consist of fewer than all the circuit judges in regular active service.

\[\text{\textsuperscript{144}}\] Ninth Circuit Local Rule 25.

\[\text{\textsuperscript{145}}\] Letter from Cathy A. Catterson, Ninth Circuit Clerk of Court, to Authors (Mar. 18, 1986).

\[\text{\textsuperscript{146}}\] \textit{Id}. ("the Ninth Circuit has not adopted a procedure whereby the en banc court may review all or part of an opinion before it is issued by a panel").

\[\text{\textsuperscript{147}}\] Letter from Cathy A. Catterson, Ninth Circuit Clerk of Court, to Authors (May 28, 1986).

\[\text{\textsuperscript{148}}\] Letter from Miguel J. Cortez, Jr., Eleventh Circuit Chief Deputy Clerk, to Authors (Feb. 26, 1986).
opinions. Nor has the court ever published an opinion making reference to such a procedure.

V. POTENTIAL CRITICISMS OF MINI IN BANC PROCEDURES

As the above survey indicates, most federal courts of appeals have not adopted formal procedures for truncated in banc review. Not surprisingly, the informal procedures that courts do follow have received very little critical commentary. This Part will discuss potential objections to mini in banc review. In general, for these purposes, we concern ourselves with a rule, like that of the Seventh Circuit, which permits a three-judge panel to overrule a prior opinion of the court by circulating an opinion to the active judges of the court for their approval.

A. Ineffectiveness

Mini in banc procedures will not withstand critical scrutiny unless they are effective in accomplishing their primary purpose. As the survey presented in Part II reveals, it appears that the general purpose of mini in banc procedures is to provide a more efficient method of resolving conflict cases. We can thus divide the effectiveness issue into two component questions. First, do these mini in banc procedures actually resolve conflicts? Second, are these procedures more efficient than ordinary in banc proceedings?

1. Conflict resolution

At least two different measures indicate the effectiveness of mini in banc procedure in resolving conflicts. First, if such procedures produce unanimous results in most cases, we may deem the conflict reviewed in these proceedings more effectively resolved. As discussed earlier, conventional in banc proceedings tend to encourage continued uncertainty because in banc opinions are rarely unanimous. By contrast, mini in banc proceedings are much more likely to be unanimous. Of a sample of thirty-five conflict cases decided in the Second and Seventh Circuits, dissenting votes were cast in only six cases (17.1 percent). In only one of those cases (2.8 percent of the total) was a full dissenting opinion entered. These figures compare to the nearly 50 percent dissent rate with conventional in banc proceedings.

Second, the degree to which mini in banc cases resolve the question presented once and for all may be a good proxy for the effectiveness of

149 Id.
150 See supra text accompanying notes 68-70 (describing Seventh Circuit procedure).
151 See supra text accompanying notes 52-56.
152 See supra notes 69, 79 (listing cases).
153 See supra text accompanying notes 52-54.
such procedures. Of the thirty-five mini in banc conflict cases from the Second and Seventh Circuits, none were later overruled, questioned, limited, or criticized by the court that decided the case.

2. Efficiency

Conventional in banc proceedings are often extremely time consuming. Mini in banc proceedings have proven to be much more efficient. For example, the Second Circuit requires an average of 14.5 months to finally decide a case that involves an in banc rehearing. By comparison, in the fifteen mini in banc conflict cases heard in that circuit, the court required an average of only 3.36 months to reach a decision. Similar results obtain in the Seventh Circuit. That court requires an average of 12.6 months to finally decide an in banc case that includes an in banc rehearing. In the present authors' survey of twenty mini in banc conflict cases, however, the court required an average of only 8.3 months to reach a decision.

The mini in banc procedure is efficient by design. The procedure generally produces only one opinion. This factor alone plays an important role in improving efficiency, as judges generally find the production of written opinions the most time consuming of all judicial tasks. With the mini in banc procedure, the initial panel opinion is drafted and circulated to the full court; the panel need not await additional concurring and dissenting statements.

The mini in banc procedure is also extremely efficient because it narrows the focus of the full court's attention. Traditional in banc cases bring a complete range of issues before the full court. The parties produce new briefs and may address all the issues that were presented to the original panel. The mini in banc procedure, by contrast, focuses the court's attention on a single question: should the panel opinion stand, despite the conflict with other precedent? Essentially, the full court need only read the panel opinion and the cases with which it conflicts to determine the answer to this question. Of course, if the issue presented in the mini in banc review is too complicated for this summary disposition, members of the full court can call for a full hearing in banc.

154 See supra text accompanying notes 63-64.
155 We surveyed ten recently published Second Circuit in banc cases to develop this average. We measured the period from date of original argument to date of final in banc decision.
156 See supra note 155 (describing method for developing average figure).
157 See supra text accompanying notes 80-82 (relating Seventh Circuit experience with procedure).
B. Threats to Stare Decisis

Most federal circuit courts of appeals have adopted a rule that one three-judge panel cannot overrule the decision of another three-judge panel. These rules, of course, protect the principle of stare decisis. Mini in banc procedures, to the extent that they make overruling circuit precedent easier, post a potential threat to stare decisis. A rapid turnover in judges on a court, for example, could result in sudden shifts in controlling law.

The empirical answer to this problem is that it does not appear that courts that use the mini in banc procedure have suffered wide swings in precedent. The experience of the Second Circuit, which has used the procedure to overrule prior decisions more often than any other court, demonstrates the point. In its ten mini in banc cases overruling prior decisions, the average elapsed time between the overruled decision and the mini in banc decision was 27.7 years. The shortest time was seven years. These figures suggest that the mini in banc procedure is most often used to overrule precedent that has so obviously eroded that a full in banc hearing is not required to overrule it.

Moreover, the existence of mini in banc procedures does not mean that judges are no longer aware of the role of stare decisis in our jurisprudence. This awareness of the concern for stare decisis should restrain judges from too quickly changing precedent. This is precisely the kind of concern, moreover, that judges who find themselves in the minority could press on their colleagues as a justification for sending a case to the full court for conventional in banc rehearing. Indeed, a judge could effectively stake out such a demand by threatening to publish an opinion dissenting from the use of the mini in banc procedure. Given that kind of pressure, the matter would probably not be treated with the mini in banc procedure.

A final theoretical point is that stare decisis is not a goal in itself. Rather, the rule of stare decisis serves to promote certainty and predictability in the law. It is important to note that the mini in banc procedure serves the same purpose. The mini in banc procedure can resolve conflicts

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159 See supra note 37.
160 See P. Wald, supra note 49, at 4 (suggesting that changes in composition of the D.C. circuit have resulted in rapid changes in circuit precedent).
161 One Second Circuit opinion explicitly makes this point: “Although we would normally invoke in banc consideration before taking such a step [overruling United States v. Feinberg, 140 F.2d 592 (2d Cir.), cert. denied, 322 U.S. 726 (1944)], Feinberg has already been so eroded that we have deemed it sufficient to circulate this opinion to the judges in regular active service, all of whom have expressed approval of the ruling here made.” United States v. Taylor, 464 F.2d 240, 244 (2d Cir. 1972).
162 See supra note 36.
163 Chief Judge Wald has described at least two cases in the D.C. Circuit where this scenario was played out. P. Wald, supra note 49, at n.27.

in precedent, thus promoting certainty. That beneficial effect balances against the changes in precedent necessarily required to resolve conflicts.

C. Mistakes

The mini in banc procedure could be seen as permitting too casual a decision-making process, thus leading to inadequately considered decisions.164 A case from the Second Circuit illustrates this potential problem. In *United States v. Freeman*,165 the Second Circuit overruled its prior decisions which had adopted the M'Naghten rule for criminal responsibility. The court adopted the new American Law Institute insanity test. The opinion was drafted by a three-judge panel and circulated to the full court for approval. On the same day that *Freeman* was issued, the same panel of the court issued *United States v. Malafronte*.166 In *Malafronte*, the court applied the new, more liberal *Freeman* rule and reversed the appellant's conviction. Because *Malafronte* applied the new *Freeman* rule, it appeared that *Freeman* would have retroactive applicability. *Freeman* would not simply apply to cases tried after that decision was handed down, but would include cases previously tried that were still on appeal when *Freeman* was decided. Some ten months later, another Second Circuit panel clarified the retroactivity issue. In *United States v. Sheller*,167 the court held that *Freeman* would receive "limited" retroactive effect: it would apply to those cases still on direct appeal when it was decided.168 Two years after *Sheller*, the court again addressed the question of retroactivity. In *United States v. Tarrago*,169 the court convened in banc to consider whether *Sheller* was wrongly decided.170 The in banc court reaffirmed *Sheller*. Chief Judge Lumbard, in an opinion in which Judge Moore concurred, however, pointed out the possibility that a mistake was made when *Freeman* was originally given retroactive effect by *Malafronte*:

Since both *Freeman* and *Malafronte* were circulated to all of the active judges of the court and neither my brethren nor I objected or desired to give these cases en banc consideration, I feel

164 See id. at n.27 ("There is a danger . . . that a court will not fully recognize the import of what it is doing without going the advocacy route, and will change meaningful precedents too casually.").
165 United States v. Freeman, 357 F.2d 606 (2d Cir. 1966).
166 United States v. Malafronte, 357 F.2d 629 (2d Cir. 1966).
167 United States v. Sheller, 369 F.2d 293 (2d Cir. 1966).
168 Id. at 295.
169 United States v. Tarrago, 398 F.2d 621 (2d Cir. 1968)(in banc).
170 Id. at 622 (noting that two members of initial three judge panel thought that *Sheller* was wrongly decided).
compelled to accept the logical consequences of the remand in
Malafronte . . . .

I am sure that had our attention been directed to the retroactiv-
ity issue in Freeman and Malafronte, or had the United States
Attorney sought en banc consideration of it, we might well have
decided the matter differently from its decision by a panel of the
court in Sheller. 171

The response to this criticism requires both a closer look at the Freeman
series of cases and a more general response to the question whether
mistakes will often be made with the mini in banc procedure.

Despite the protests from Judges Lumbard and Moore, the procedural
history of the Freeman case does not clearly reveal an error. The error,
according to Judges Lumbard and Moore, was that the Malafronte court
was unaware that it was setting a precedent for retroactivity by applying
Freeman to the case, yet that was precisely the issue in Malafronte. The
court's retroactive application of Freeman should have been apparent to
the full court. More importantly, the Sheller court did not indicate that
Malafronte required that Freeman be given retroactive applicability in
all future cases. Instead, the Sheller court independently assessed the
claim that Freeman should be made retroactive. 172 Thus even if the court
made a "mistake" in Freeman and Malafronte, it made the same "mis-
take" when directly confronted with the issue in Sheller and two years
later in Tarrago. 173 In this posture, retroactive application of the Free-
man rule does not appear to be the result of hasty decision-making.

Even assuming that Malafronte was wrongly decided, there is little
reason to believe that such mistakes would commonly occur. The Malafronte case is the only mini in banc case where such an allegation
has been made. 174 The Malafronte retroactivity problem, moreover, is
unique to criminal law decisions that announce a new rule. Indeed, errors

171 Id. at 625-26.
172 Sheller, 369 F.2d at 295.
173 Tarrago, 398 F.2d at 623-25.

Indeed, the Tarrago court makes a very persuasive case for the limited retroactivity of the Freeman rule. The court pointed out, for example, that the question would really only affect one or two cases that were on direct appeal when Freeman was decided. Id. at 623. The court also cited several Supreme Court decisions in which new criminal law rules were given limited retroactive effect. Id. (citing Linkletter v. Washington, 381 U.S. 618, 622 & nn. 4 & 5 (1965); Tehan v. United States ex rel. Shott, 382 U.S. 406, 409 n.3 (1966)).

174 The Malafronte case demonstrates, moreover, that even if a mistake appears, it can be corrected. After Malafronte was decided, the government could have requested rehearing and rehearing in banc. The government apparently chose not to correct the "mistake." Indeed, the government seems to have been unconcerned even when another criminal defendant proposed to apply Freeman retroactively. See Sheller, 369 F.2d at 295 (referring to government's pro forma claim that the expanded standard of Freeman should not apply to Sheller.).
are likely to occur more often in mini in banc cases only if the expedited procedure encourages judges to overlook issues. Yet the very heart of a mini in banc procedure is circulation to the full court to gain approval over a particular aspect of a case. This procedure necessarily raises a red flag over the controversial issue and renders very unlikely the possibility of inadvertent decision-making.

D. Case or Controversy

The mini in banc procedure presents to the court the limited question of whether a particular case should be overruled. That practice presents the practical problem of deciding a case divorced from full briefs and oral argument. Chief Judge Wald, dissenting in a recent D.C. Circuit case, raised precisely this problem. Chief Judge Wald suggested that this problem is related to the "case or controversy" requirement of Article III, which dictates that judges not issue advisory opinions on abstract legal issues. In her view, the central vice in such a practice is that an issue may be decided without reference to its factual setting. When a court is presented with only a limited issue, for example, it may fail to grasp the opportunity to decide the case on the narrowest grounds. Although Chief Judge Wald raised this concern in a conventional in banc proceeding, her criticism clearly applies to the mini in banc setting as well.

Chief Judge Wald's criticism, however, misapprehends what is at stake when the full court reviews a three-judge panel opinion via the mini in banc procedure. The most useful analogy is to a request for rehearing in banc. In such a case, the three-judge panel opinion has been written. The losing party requests a rehearing and suggests rehearing in banc. The full court reviews the request, including the allegations as to errors made by the three-judge panel. If no judge calls for a vote on the suggestion for rehearing in banc, the suggestion fails. If one judge calls

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176 Id.
177 Id.
178 Judge Scalia writing for the majority in the Scientology case, specifically made this connection:

[Judge Wald's] concern must logically extend, of course—and should indeed have heightened application—to the court's common practice of rendering en banc decisions on isolated legal issues without en banc rehearing, by means of a so-called, "Irons footnote" added to the panel opinion, reflecting the fact that departure from prior law of the circuit has been approved by the full court. Scientology, 792 F.2d 153 at n.1. Judge Scalia went on to explain that it is appropriate to decide some legal issues without reference to their legal setting when the court is functioning more as a law-giving body than as an error-correcting body. Id.
for a vote, the vote is taken. A majority of the judges in regular active service may then order that the case be reheard in banc. With the suggestion for rehearing in banc, the whole case is before the full court. Before the court reaches the merits of the case, however, it must address a preliminary question, i.e., whether the full court should take the case for in banc rehearing. In deciding that preliminary question, the court may concentrate on a single issue to determine whether it justifies rehearing in banc. This situation is essentially the same as the Supreme Court's practice of taking a single issue for review on writ of certiorari.

Chief Judge Wald's criticism is not, therefore, that the practice of deciding some isolated legal issues is unprecedented. Rather, the Chief Judge's Wald's complaint is that the judges of a court may not have access to the entire factual record. This very narrow statement of the problem suggests its own simple solution. When a three-judge panel suggests mini in banc treatment to the full court, the full court should be made aware of the factual setting of the case. This information could be conveyed in a number of ways. The draft opinion should provide the essential factual setting, and the briefs presented to the original three-judge panel will also contain this information. The full court should be aware that these briefs are available for review. Finally, the full court should be notified that the record from the district court or agency is also available for review.

E. Unfairness

At least one commentator, Professor Carrington, has suggested that there is some unfairness in a court convening an in banc proceeding without the prompting of counsel. According to Professor Carrington, it may be unfair to subject a litigant to "unexpected and extraordinary toils." Professor Carrington especially decried the informal convening of the court via the mini in banc procedure.

The unfairness objection to the mini in banc procedure loses most of its potency once one recalls the purpose of in banc review. In banc review is a tool provided to the courts for the resolution of conflicts in precedent and important cases. Litigants may suggest the need for in banc review but may not demand it. It is for the court to determine how it wishes to exercise this power. To the extent that the unfairness objection is based

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180 Carrington, supra note 44, at 583.
181 Id. at 583 n. 183.
182 The Supreme Court, in the Western Pacific case, clearly suggested that in banc review was a power granted to the court, not a right granted to litigants:

In our view, § 46(c) is not addressed to litigants. It is addressed to the Court of
on the possibility that a court may operate in banc without the knowledge of the parties, moreover, this objection is obviated by the existence of a set of rules for mini in banc proceedings. When litigants realize that a court can resolve conflicts via the mini in banc procedure, litigants are free to suggest, where appropriate, that the procedure be used to resolve troubling precedent.

VI. CONCLUSION

The use of mini in banc procedures appears to be growing. Eight of the twelve federal circuit courts of appeals have published opinions in which some form of the procedure has been employed. The two circuits with the longest history of use of the procedure, moreover, appear to have stepped up their use of the procedure in recent years.

The increased use of mini in banc procedures is a natural response to two trends creating pressures on the circuit courts of appeals. The first trend is toward ever greater number of conflicts in precedent within and between circuits. These conflicts ordinarily would require full in banc treatment for resolution. The second trend is toward ever increasing

Appeals, It is a grant of power. It vests in the court the power to order hearings en banc. It does no further. It neither forbids nor requires each active member of a Court of Appeals to entertain each petition for a hearing or rehearing en banc. The court is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing.


183 These circuits include: D.C., Second, Fourth, Fifth, Seventh, Eighth, Tenth, and Federal.

184 The Second Circuit, for example, has published 17 mini in banc decisions since 1966, the bulk of which were published in the past ten years:

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The Seventh Circuit, which adopted its mini in banc rule in 1977, has also shown a steady increase in the use of the procedure. The court has published 25 mini in banc cases since 1977:

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caseloads in the circuit courts of appeals. The increasing caseload requires the circuit courts to carefully conserve their decision-making resources. Mini in banc procedures, which can both resolve conflicts and conserve judicial resources, have proven themselves an effective method for dealing with these pressures.

No two circuits use precisely the same mini in banc procedures. By studying the practices of other circuits, however, a court can effectively refine its procedures, utilizing the better parts of the procedures adopted by other courts. It is our hope that the description presented in this Article will aid that process.