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Hon. Robin S. Rosenbaum

FOREWORD

HON. ROBIN S. ROSENBAUM*

When the *University of Miami Law Review* asked me to write a foreword for the *Review*'s Eleventh Circuit Issue, I appreciated the opportunity to reflect on our Circuit—its procedure and its substance. Immediately, I thought of our en banc rehearings. After all, we have plenty of them. Because not everyone may be familiar with how we decide to hear a case en banc, I thought it might be interesting to write about that process and how it differs (or in some cases, is similar to) other circuits' processes.

For those readers who are not obsessed with federal appellate procedure,[1] en banc[2] review occurs when a majority of the non-recused Eleventh Circuit judges in active service vote to rehear a case as an entire court.[3] Although we reserve rehearing en banc for only "extraordinary" cases,[4] a case is eligible if either (1) the panel decision conflicts with a decision of the United States Supreme Court or of our Circuit, or (2) the question involved is one of "exceptional importance"—for instance, if the panel decision creates an inter-circuit split.[5]

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* Circuit Judge, United States Court of Appeals for the Eleventh Circuit. University of Miami Law School Class of 1991. I would like to thank my law clerks—Sameer Aggarwal, Harris Blum (Miami Law '22), Ngozi Giwa, Kristie Myers, and Daniel Rosenfeld—as well as *University of Miami Law Review* Editor-in-Chief Margaret Marquart, Eleventh Circuit Editor Joshua Schulster, and the editorial board for their invaluable assistance. All errors that remain are my clerks'. Just kidding; although I hope there are none, any remaining errors are, of course, mine.

1 But really, who isn't?

2 "En banc" is old French for "on the bench" or "in full court." 16AA CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE, JURISDICTION § 3981 n.1 (5th ed. 2020).

3 FED. R. APP. P. 35(b).

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

5 FED. R. APP. P. 35(b).

After a three-judge panel issues a decision, the en banc rehearing process can begin in one of two ways.[6] In the usual course, the losing party can petition[7] for the entire court to rehear the case.[8] Alternatively, regardless of whether a party seeks rehearing en banc, any active judge can proactively seek en banc review.[9]

But either way it comes to pass, for the process to continue, an active judge on the Court must "hold the mandate" by directing the Clerk of Court not to issue the mandate in that case.[10] A lengthy process then follows. First, the mandate-holding judge and the panel

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[6] On very rare occasions, we will hear a case en banc initially. We sometimes do that when a question is of such tremendous importance and the practical deadline for deciding the case comes too soon for en banc rehearing to be an option. For instance, we initially heard en banc the issue of "hanging chads" in the 2000 presidential election because of the case's nationwide import and the limited timeframe we had to hear the case. *See* Siegel v. LePore, 234 F.3d 1163, 1170 n.2 (11th Cir. 2000) (en banc). We did so as well in *Hunter v. United States* because the issue "involve[d] the proper handling of hundreds of cases a year"—and we "invited the other two states in our circuit, as well as a number of defender organizations, to file amici briefs." Hunter v. United States, 101 F.3d 1565, 1568 (11th Cir. 1996) (en banc) (discussing how Antiterrorism and Effective Death Penalty Act amendments applied to pending habeas petitions). Because we use this process so infrequently and the reasons for engaging in it are not precisely the same as those for our en banc-rehearing mechanism, I do not discuss it further here.

[7] The losing party can also petition for the panel to rehear the case in situations that are not exceptional but where the losing party still feels that the panel overlooked a fact or decided a legal issue incorrectly. We call this "panel rehearing." FED. R. APP. P. 35(b).

[8] While the use of old French might make the en banc procedure seem like it has existed since the Founding, it is a relatively new development. En banc review was first recognized in 1941 by the Supreme Court in *Commissioner v. Textile Mills Securities Corp.* 314 U.S. 326, 334 n.14 (1941). Congress judicially authorized en banc review seven years later. *See* 28 U.S.C. § 46(c). The Circuit Courts of Appeals, by the way, date only to the Evarts Act of 1891. *See* John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 386 (2006).

[9] *See* 11th Cir. R. 35 I.O.P. 5.

[10] 11th Cir. R. 41-1. An appellate court's mandate is the formal order that "direct[s] a lower court to take a specified action" and gives effect to the court's decision. *Mandate*, BLACK'S LAW DICTIONARY (11th ed. 2019). Unless the Court votes to expedite issuance of the mandate, 11th Cir. R. 41-2, the mandate issues seven days after either the time to file a petition for rehearing (twenty-one days after the decision) expires or the entry of an order denying such a petition. FED. R. APP. P. 41(b).

members generally share memoranda with the rest of the court, arguing that the case in whole or in part[11] should (or should not) be reheard en banc.[12] When the flurry of memoranda finishes flying, if any judge remains unsatisfied with the panel opinion, an active judge may request a poll of the active judges of the court.[13] If a majority of active, non-recused judges votes to rehear the case en banc, the petition is granted.[14] Generally, when the Eleventh Circuit votes to rehear a case en banc, that order "vacates" the panel opinion and corresponding judgment.[15] Then, the Court orders the parties to rebrief the en banc issue or issues. After we hear oral argument on the en banc issue or issues, the Eleventh Circuit files its en banc opinion—sometimes along with dissents and concurrences from some members of the Court.

The Circuit Courts of Appeals vary—sometimes widely—in both how and when they take cases en banc. For instance, traditionally, the Second Circuit famously almost never rehears a case en

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[11] In a case with multiple issues, the Court may vote to hear fewer than all of them en banc. If that occurs, after the en banc court decides the en banc issue, it remands the rest of the case to the panel for disposition. *See, e.g.*, Sosa v. Martin Cnty., 57 F.4th 1297, 1303 (11th Cir. 2023) (en banc) (deciding only whether the plaintiff stated an overdetention claim), *remanded to* No. 20-12781, 2023 WL 1776253 (11th Cir. Feb. 6, 2023) (addressing plaintiff's remaining claims).

[12] The panel retains control over the appeal. 11th Cir. R 46 I.O.P. 2. That is, upon receipt for a petition for rehearing en banc, a panel can grant *panel* rehearing without action by the full court. *Id. See, e.g.*, Adams v. Sch. Bd of St. Johns Cnty., 968 F.3d 1286 (11th Cir. 2020)*, reh'g granted,* F.4th 1299 (11th Cir. 2021), *vacated and remanded by* 57 F.4th 791 (11th Cir. 2022) (en banc).

[13] 11th Cir. R. 35 I.O.P. 3–5.

[14] 11th Cir. R. 35 I.O.P. 6–8. Senior judges who sat on the panel can vote with the en banc court on the disposition of the case, but not on whether to take the case en banc in the first instance. *Id.* And a tie in the poll leaves the panel's judgment in place. *See* 5 AM. JUR. 2D *Appellate Review* § 787 (2023).

[15] 11th Cir. R. 35-10. As a result, of course, that original panel decision has no legal effect.

banc.[16] Neither does the Third Circuit.[17] The Ninth Circuit also almost never rehears cases by the *full* court;[18] usually, just a subset of eleven judges rehears the case ("limited en banc").[19] Some other circuits have "informal" en banc review.[20] "Informal" en banc review occurs when the panel circulates an opinion to the rest of the court before publication, thus allowing the panel to "take[] an action that would ordinarily require the court to convene en banc."[21] In other words, by letting the rest of the court see and sign off[22] on the opin-

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[16] Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity "Crisis": Charting a Path for Federal Judiciary Reform*, 108 CALIF. L. REV. 789, 807 n.103 (2020).

[17] Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373, 1424 (2021).

[18] I'm not aware of any cases in which the Ninth Circuit has actually sat as a full court. *See, e.g.*, Abebe v. Holder, 577 F.3d 1113, 1114 (9th Cir. 2009) (Berzon, J., dissenting from denial of full court rehearing en banc) ("Although this court has never held a full court en banc . . . ."). If they did, I'd imagine they'd sit in Pasadena—maybe the Rose Bowl? *See, e.g.*, Compassion in Dying v. State of Wash., 85 F.3d 1440, 1442 (9th Cir. 1996) (O'Scannlain, J., dissenting from denial of full court rehearing en banc) ("Although our Pasadena Courthouse has a courtroom designed for full court en banc rehearings, there may be those who genuinely tremble at the prospect of up to twenty-eight judges looming from three tiers of benches, intimidating the hapless appellate advocates."). To my knowledge, the closest they've come is *Vega-Anguiano v. Barr*, in which *twelve* judges dissented from the denial of rehearing en banc by the full court. 982 F.3d 542, 558 (9th Cir. 2019) (Bennett, J., dissenting from full court rehearing en banc).

[19] The Ninth Circuit uses a "limited en banc" process where only eleven of the twenty-nine active judges sit—the Chief Judge and ten randomly selected active judges. Alexandra Sadinsky, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 FORDHAM L. REV. 2001, 2023 n.201 (2014) (citing 9th Cir. R. 35-3). Federal statute allows any circuit court larger than fifteen judges—the Ninth, Fifth, and Sixth—to use the limited en banc procedure. *See id.* (citing 28 U.S.C. § 46(c)).

[20] *Id.* at 2024–25 (explaining that the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits use this procedure).

[21] *Id.*; Devins & Larsen, *supra* note 17, at 1423.

[22] Opinions note that the full court approved of the opinion through informal en banc review. Sadinsky, *supra* note 19, at 2024. *See, e.g.*, Saban v. U.S. Dep't of Lab., 509 F.3d 376, 379 (7th Cir. 2007) ("[W]e [overrule precedent] today, having circulated our opinion to the full court in advance of publication, as required, for an overruling, by 7th Cir. R. 40(e)."); United States v. Southerland,

ion before release, the panel can issue an "informal en banc" opinion, addressing qualms non-panel members might have and even overruling Circuit precedent.[23]

The Eleventh Circuit, though, does not engage in "informal" en banc review. And we don't have the judge count that authorizes use of the "limited" en banc process.[24] Nor do we share the Second Circuit's reticence; to the contrary, we are a talkative bunch when it comes to seeking en banc proceedings. By my count, between 2016 and 2022, judges have asked for a poll of the en banc court at least seventy-two times, or on average, more than ten times per year.[25] In those polls, we have granted en banc rehearing more than half the time—thirty-nine instances.[26]

So why rehear a case en banc? The primary reason is that our Circuit has an extremely strict prior-precedent rule. Once we issue a published decision, that is the law in our Circuit.[27] In other words, our Circuit "emphatic[ally]" insists that *only* the Supreme Court or the en banc Court may overrule a prior panel's decision.[28] We recognize no exceptions to the rule: no "overlooked reason" loophole, no "egregiously wrong" escape hatch, and certainly no "well, they must have meant" outlet.[29] Even if the prior panel failed to apply a Supreme Court decision, we must follow prior panel precedent.[30]

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466 F.3d 1083, 1084 n.1 (D.C. Cir. 2006) ("Because our conclusion—that a suppression remedy is no longer available under § 3109—conflicts with this precedent, this opinion has been circulated to and approved by the full court.").

[23] Sadinksy, *supra* note 19.

[24] *Id.* at 2024–25; *see also* 28 U.S.C. § 46(c).

[25] Eleventh Circuit En Banc Poll Orders, https://www.ca11.uscourts.gov/enbanc-poll-orders (last accessed Feb. 27, 2023).

[26] *Id.*

[27] Litigants sometimes argue that we are "bound" by unpublished decisions. We are not. An "unpublished decision"—often found in the Federal Appendix, or "F. App'x"—is not binding on this Court or any district court. 11th Cir. R. 36-2. We might find the decision's reasoning persuasive, but we aren't bound by the decision itself. We are bound by only published decisions—generally those found in the Federal Reporter: F., F.2d, F.3d., F.4th, etc. At the end of 2021, West stopped publishing the Federal Appendix, so now unpublished opinions may be found in our files and in electronic records bases, with a reporting citation assigned by the particular online opinion service. *See* Letter from Thomson Reuters to Customer, Nov. 3, 2021 (on file with *University of Miami Law Review*).

[28] Cargil v. Turpin, 120 F.3d 1366, 1386 (11th Cir. 1997).

[29] Smith v. GTE Corp., 236 F.3d 1292, 1303 (11th Cir. 2001).

[30] *Id.* at 1302.

Given the limited scope of the Supreme Court's docket[31] and our requirement that a later Supreme Court decision must directly "eviscerate" our earlier precedent to free a later panel from the binds of the prior-precedent rule,[32] en banc review is a crucial mechanism for error correction.

That said, en banc review imposes significant costs.[33] For starters, the entire court needs to review the panel briefing, the panel decision, and the petition for rehearing, plus any memoranda circulated internally.[34] And that is just to decide whether to rehear the case! If we grant the petition, another round of briefing and another round of oral argument generally ensue.[35] We usually follow that with a lengthy conference on the case and rounds of draft opinions that travel around the court until all judges are satisfied. One federal appellate judge has estimated that rehearing a case en banc consumes five times as many resources as a regular case.[36]

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[31] Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1366–67 (2006).

[32] Our prior panel precedent is abrogated only when the Supreme Court "demolish[es]" and "eviscerate[s]" each of the precedent's "fundamental props." Del Castillo v. Sec'y, Fla. Dep't of Health, 26 F.4th 1214, 1223 (11th Cir. 2022) (citing United States v. Petite, 703 F.3d 1290, 1297–98 (11th Cir. 2013)). In other words, a Supreme Court decision must be directly on point to overrule prior panel precedent.

[33] United States v. Hogan, 986 F.2d 1364, 1369 (11th Cir. 1993) ("[T]he heavy artillery of en banc decision making should be resorted to only where smaller gauge weapons are unavailing.").

[34] Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 UNIV. PA. L. REV. 1319, 1369 (2009).

[35] 11th Cir. R. 35-8; 11th Cir. R. 35 I.O.P. 9(d) ("Appeals to be reheard en banc will ordinarily be orally argued unless fewer than three of the judges of the en banc court determine that argument should be heard."). Sometimes we don't need oral argument when the answer is clear, and we just need a quick fix. For instance, we revisited *United States v. Watkins* en banc without oral argument. There, the Supreme Court had made it clear that our panel precedent was wrong, and we "lack[ed] the temerity to tell the Supreme Court that it was wrong in *Bourjaily* about what its holding in *Nix* was." United States v. Watkins, 10 F.4th 1179, 1182 (11th Cir. 2021) (en banc) (citing Nix v. Williams, 467 U.S. 431 (1984)) (citing Bourjaily v. United States, 483 U.S. 171 (1987)). For that reason, we simply needed to "realign our circuit law," *id.*, and oral argument was not necessary.

[36] Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981–90*, 59 GEO. WASH. L. REV. 1008, 1018–19 (1991).

For this reason, we tend to reserve en banc review for cases that involve important issues with broad application. For instance, in the last few years, we have considered, among other questions: (1) at what point, if at all, the detention of a misidentified person detained on a valid arrest warrant issued for someone else violates the Constitution;[37] (2) how the United States Sentencing Guidelines and application notes interact;[38] (3) how to analyze standing in the context of statutory violations;[39] and more.[40] In other words, these are not issues that just apply to the litigants in an individual case. Rather, they are issues that arise in many cases.

Before I close, I would like to mention one final element of the en banc process: dissentals. Sometimes, one or more judges feel strongly that a case should be heard en banc.[41] If the rest of the court disagrees—in other words, when the poll fails—the judge can dissent from the denial of rehearing en banc. This opinion is known as a "dissental."[42] A dissental can alert the Supreme Court to perceived

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[37] Sosa v. Martin Cnty., 57 F.4th 1297 (11th Cir. 2023) (en banc).

[38] United States v. Dupree, 57 F.4th 1269 (11th Cir. 2023) (en banc).

[39] Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917 (11th Cir. 2020) (en banc); Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 48 F.4th 1236 (11th Cir. 2022) (en banc).

[40] *See* Adams v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791 (11th Cir. 2022) (en banc) (addressing whether a school's bathroom policy designed to prohibit transgender students from using the bathroom of the gender with which they identify violates the Equal Protection Clause or Title IX); United States v. Campbell, 26 F.4th 860 (11th Cir. 2022) (en banc) (addressing the difference between forfeiture and waiver); United States v. Brown, 996 F.3d 1171 (11th Cir. 2021) (en banc) (addressing when a district court may excuse jurors during a criminal trial); Gogel v. Kia Motors Mfg., Inc., 967 F.3d 1121 (11th Cir. 2020) (en banc) (addressing whether Title VII-protected conduct can render an employee ineffective in the performance of her duties).

[41] Justice William O. Douglas once said that dissenting opinions are the only thing that makes an appellate judgeship "tolerable." William O. Douglas, AMERICA CHALLENGED 4 (1960). I don't share that view but note it as an interesting aside on the issue.

[42] Indraneel Sur, *How Far Do Voices Carry: Dissents from Denial of Rehearing En Banc*, 2006 WIS. L. REV. 1315, 1347–48 (2006); Alex Kozinski & James Burnham, *I Say Dissental, You Say Concurral*, 121 YALE L.J. ONLINE 601, 601 (2012).

flaws in a panel opinion if the Supreme Court decides to grant certiorari[43] in that case or in another case raising the issue, or it can warn other circuits about perceived errors in a panel's reasoning.[44] And at the very least, the dissental provides one more bit of (albeit non-binding) analysis on the legal question for consideration.

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With that, I end my brief review of the en banc process (for now!). And without further delay, I am delighted to be able to introduce this Issue. In the pages following, the *University of Miami Law Review* has curated a fascinating series of articles. First, Susan L. Shin, Pravin R. Patel, Nicole Comparato, and Katheryn Maldonado discuss the Supreme Court decision in *Morgan v. Sundance* regarding arbitration clauses and waiver of the right to arbitrate. They connect it to Eleventh Circuit and other federal circuit-court decisions. After that, Amanda Harmon Cooley examines the Eleventh Circuit decision *Rojas v. City of Ocala* and its influence as the potential end of the *Lemon* test across other federal courts. Then, Jose M. Espinosa proposes changes to Federal Rule of Criminal Procedure 6(e) regarding disclosure of grand-jury materials following the Eleventh Circuit's decision in *United States v. Pitch*. And finally, Jae Lynn Huckaba considers Florida's latest insurance-reform bill and its effect on property insurers and policyholders. I hope you'll enjoy these pieces as much as I have.

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[43] *See, e.g.*, Bies v. Bagley, 519 F.3d 324 (6th Cir. 2008), 535 F.3d 520 (6th Cir. 2008) (Sutton, J., dissenting from denial of rehearing en banc), *rev'd by* 556 U.S. 825 (2009); Crawford v. Marion Cnty. Election Bd., 472 F.3d 949 (7th Cir. 2007), 484 F.3d 436 (7th Cir. 2007) (Wood, J., dissenting from denial of rehearing en banc), *rev'd by* 553 U.S. 181 (2008); Bostock v. Clayton Cnty. Bd. of Comm'rs, 723 F. App'x 964 (11th Cir. 2018), 894 F.3d 1335, 1336 (11th Cir. 2018) (Rosenbaum, J. dissenting from rehearing en banc), *rev'd by* 140 S. Ct. 1731 (2020).

[44] *See, e.g.*, Khan v. Filip, 554 F.3d 681, 687 n.2 (7th Cir. 2009) (following Ramadan v. Keisler, 504 F.3d 973 (9th Cir. 2007) (O'Scannlain, J., dissenting from rehearing en banc)); Johnson v. Governor of Fla., 405 F.3d 1214, 1227–34 (11th Cir. 2005) (en banc) (following Farrakhan v. Washington, 359 F.3d 1116, 1116 (9th Cir. 2004) (Kozinski, J., dissenting from rehearing en banc)); Tingley v. Ferguson, 47 F.4th 1055, 1082–83 (9th Cir. 2022) (relying in part on Otto v. City of Boca Raton, 41 F.4th 1271, 1285 (11th Cir. 2022) (Rosenbaum, J., dissenting from rehearing en banc)).