THE EN BANC REQUIREMENTS OF 28 U.S.C. § 46(c): WHAT CONSTITUTES A MAJORITY IN THE EVENT OF A RECUSAL OR DISQUALIFICATION?

The recent litigation in *Arnold v. Eastern Air Lines, Inc.*[1] has again focused debate[2] on the procedural requirements for convening en banc hearings under 28 U.S.C. § 46(c).[3] Subsection 46(c) states that:

> [c]ases and controversies shall be heard and determined by a court or panel of not more than three judges . . . unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service . . . except that any senior circuit judge of the circuit shall be eligible to participate . . . as a member of an in banc court reviewing a decision of a panel of which such judge was a member.[4]

Difficulties have arisen in interpreting the en banc requirements of subsection 46(c) because the statute fails to specify whether the requisite majority shall be determined from the total number of circuit judges or from that number minus the number of recused or disqualified[5] judges. Neither Congress nor the Supreme Court has provided the circuit courts with any guidance. Moreover, the Supreme Court has apparently adopted the position that each circuit may decide for itself which rule it will follow.[6] Nevertheless, a uniform interpretation of 28 U.S.C. § 46(c) is clearly needed.

A majority of the circuits that have considered the issue have interpreted subsection 46(c) as requiring the vote of an absolute majority of circuit judges in order to convene an en banc hearing.[7] These circuits

1. Arnold v. Eastern Air Lines, Inc., 681 F.2d 186 (4th Cir. 1982), *cert. denied sub nom.* Aetna Casualty and Surety Co. v. U.S., — U.S. —, 103 S.Ct. 1801 (1983), *reh'g granted*, 712 F.2d 899 (4th Cir. 1983) (en banc), *cert. denied*, — U.S. —, 104 S.Ct. 703 (1984).
2. *See, e.g.*, Sylvester, *What Does a 'Majority' Mean in En Banc Cases?*, NAT'L L.J., Jan. 16, 1984, at 6, col. 1; Harper, *The Breakdown in Federal Appeals*, 70 A.B.A. J. 56 (1984).
3. 28 U.S.C. § 46(c) (1982). *See also* Federal Rule of Appellate Procedure 35(a) which implements subsection 46(c).
4. *Id.*
5. It has been suggested that a recusal differs from a disqualification in that a disqualification pursuant to 28 U.S.C. § 455 is mandatory while a recusal is voluntary. For purposes of this note, no distinction will be drawn between them.
6. The circuit courts of appeals have split over the issue of how the en banc majority requirement is satisfied. *See infra* notes 7 & 11 and accompanying text. The Supreme Court denied certiorari in *Arnold*, — U.S. —, 104 S.Ct. 703 (1984), and thus has apparently allowed the various circuits to choose for themselves which rule they will follow.
7. In each of the following cases, a petition for a rehearing en banc was denied: Copper & Brass Fabricators v. Dept. of Treasury, 679 F.2d 951 (D.C. Cir. 1982), *reh'g en banc denied by unpublished order* 81-2091 (5 votes to en banc, 3 against, 2 abstentions); Zahn v. International Paper Co., 469 F.2d 1033 (2d Cir. 1972) *aff'd on other grounds*, 414 U.S. 291 (1973) (4 votes to en banc, 3 against, 1 vacancy); Curtis-Wright Corp. v. General Electric Co., 599 F.2d

have held that requiring an absolute majority vote best effectuates the purposes of the en banc procedure by limiting en banc review to only very important cases.[8] They also argue that an absolute majority requirement best ensures that the law of the circuit will be decided by a majority of the circuit judges.[9] Finally, these circuits contend that the absolute majority requirement does not result in any particular injustice to individual litigants.[10]

Proponents of the minority position,[11] on the other hand, argue both that their interpretation of subsection 46(c) is textually accurate[12] and that it is supported by policy considerations.[13] They also suggest that the minority position does not defeat the purposes of the en banc procedure, which are to maintain uniformity and to have en banc courts decide cases in which exceptionally important issues are raised.[14] The very fact that a majority of judges qualified to hear a case have voted in favor of en bancing it, they argue, demonstrates the importance of many of these cases.[15] Finally, they suggest that the majority interpretation of subsection 46(c) allows a minority of judges to prevent a majority from convening an en banc hearing.[16]

This note examines these arguments more fully in the context of *Arnold v. Eastern Air Lines, Inc.*[17] It suggests that the Supreme Court has not specifically addressed this issue and that it is inaccurate to speak of a congressional intent regarding the subsection 46(c) majority requirement because Congress has failed to consider this question. In conclusion, this note will offer a compromise solution that would adopt the minority position with a quorum requirement. This compromise reconciles the important considerations raised by both the majority and minority positions.

ARNOLD V. EASTERN AIR LINES, INC.

The litigation in *Arnold* arose out of the crash of an Eastern Air

1259 (3d Cir. 1979), *cert. denied*, 449 U.S. 1022 (1980) (4 votes to en banc, 3 against, 2 vacancies); Clark v. American Broadcasting Companies, Inc., 684 F.2d 1208 (6th Cir. 1982), *cert. denied*, — U.S. —, 103 S.Ct. 1433 (1983) (5 votes to en banc, 4 against, 1 abstention); and Porter City Chapter of Izaak Walton League v. Atomic Energy Comm'n, 515 F.2d 513 (7th Cir. 1975) (4 votes to en banc, 3 against, 1 abstention).

8. *See infra* text accompanying notes 75-79.
9. *See infra* text accompanying notes 79-80.
10. *See infra* text accompanying note 74.
11. The Fourth, Eighth and Ninth Circuits have adopted the minority interpretation of 28 U.S.C. § 46(c). *See* Arnold v. Eastern Air Lines, Inc., 712 F.2d 899 (4th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 703 (1984); Ford Motor Co. v. F.T.C., 674 F.2d 1008, 1012 n.1 (9th Cir. 1982), *cert. denied*, — U.S. —, 103 S.Ct. 358; 8th Cir. R. 16(a).
12. *See* Arnold v. Eastern Air Lines, Inc., 712 F.2d 899 (4th Cir. 1983), *infra* notes 29-37 and accompanying text.
13. *See* Zahn v. International Paper Company, 469 F.2d 1033 (2d Cir. 1972), *infra* notes 94-96 and accompanying text.
14. *See Zahn*, 469 F.2d at 1042.
15. *See infra* text accompanying notes 94-96.
16. *See infra* note 96 and accompanying text.
17. 712 F.2d 899 (4th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 703 (1984).

Lines passenger jet in Charlotte, North Carolina on September 11, 1974. The crash resulted in the death of seventy-one passengers and crew members and the serious injury of eleven others.[18] Eastern settled the great majority of the ensuing lawsuits out of court for an average award of approximately $314,000.[19] Pursuant to the rules governing multi-district litigation,[20] the district court consolidated the two remaining personal injury actions, the one remaining wrongful death action, and the contribution and indemnification suits.[21] The subsequent trial resulted in jury awards for the personal injury and wrongful death plaintiffs which were substantially larger than the average out of court settlements. The jury denied the contribution and indemnification claims.[22] Eastern appealed to the Fourth Circuit. A three member panel affirmed the district court except that it remanded the wrongful death action for a redetermination of damages.[23] Eastern then petitioned the Fourth Circuit for a rehearing en banc.

The issue of the procedural mandates of subsection 46(c) arose in *Arnold* because the Fourth Circuit consisted of ten circuit judges at that time, with Judge Ervin disqualified from hearing the case.[24] Thus, whereas a majority of a ten-member circuit would have consisted of six judges, a majority of the nine-member circuit consisted of five judges. In a per curiam opinion, the Fourth Circuit in *Arnold* granted the request for an en banc rehearing by a vote of 5 to 4, reversed the judgment of the district court in the two personal injury actions, and remanded the case for a retrial limited to the issue of damages.[25]

While the en banc opinion of the Fourth Circuit in *Arnold* consisted of only a short per curiam statement, four judges delivered separate opinions in support of the opposing viewpoints. Judge Murnaghan argued that the majority required by subsection 46(c) is properly determined only after excluding those judges who have recused or disqualified themselves.[26] Judge Widener and Judge Phillips dissented, arguing that the votes of six judges were required to satisfy the majority requirement.[27] Finally, Judge Hall agreed with the majority's interpretation of subsection 46(c). He also argued, however, that because Judge Butzner had taken senior status before the court entered its order granting the en banc rehearing, yet after the poll of the court, he should not be counted as among the regular active service circuit judges.[28]

In his separate opinion, Judge Murnaghan focused on the specific

18. *Arnold*, 681 F.2d at 190.
19. *Arnold*, 712 F.2d at 907.
20. 28 U.S.C. § 1407 (1982).
21. *Arnold*, 712 F.2d at 901.
22. *Id.* at 907.
23. *Id.* at 902.
24. *Id.*
25. *Id.* at 901.
26. *Id.* at 901-06. *See infra* notes 29-37 and accompanying text.
27. *Id.* at 908-21. *See infra* notes 38-43 and accompanying text.
28. *Id.* at 912-13.

language of 28 U.S.C. § 46(c)[29] and on the Supreme Court's decision in *Shenker v. Baltimore & Ohio Railroad Co.*[30] He interpreted the Supreme Court's holding in *Shenker* as suggesting that, because of the administrative nature of the question, the circuit courts could adopt their own rules for determining when the majority requirement has been satisfied.[31] He then examined the language of subsection 46(c).

In his textual examination of subsection 46(c), Judge Murnaghan looked to the second sentence which states: "[a] court in banc shall consist of all circuit judges in regular active service. . . ."[32] He concluded that Judge Ervin had properly disqualified himself from the case, was not in regular active service and, therefore, was not a member of the en banc court:[33]

> Judge Ervin is regular and active, and as a general proposition is in service. However, should he, or any other regular, active member of the court, recuse or disqualify himself at any time, he is *out of service* insofar as that particular case is concerned. . . . Hence, Judge Ervin properly did not sit during the en banc rehearing, because, for the particular case, he was not one of the circuit judges in regular active service.[34]

After concluding that Judge Ervin was not a member of the en banc court within the meaning of the second sentence of subsection 46(c), Judge Murnaghan turned to the statute's first sentence which defines the en banc process. Again, he found that Judge Ervin was not in regular active service and, therefore, should not be included in the group from which the requisite majority is determined:[35] "It would obviously contradict the purpose of disqualification to treat the situation precisely as though the disqualified judge had voted 'no.' "[36] Thus, the minority construction most accurately interpreted 28 U.S.C. § 46(c), Judge Murnaghan concluded, because it gave substance to the phrase "judges in regular active service."[37]

In dissenting from the Court's determination that the requisite majority had voted in favor of an en banc rehearing,[38] Judge Widener concluded succinctly that all ten circuit judges should have been included in the court's poll. So defined, the poll would have yielded "five votes to grant [the] rehearing, four votes to deny [the] rehearing and one disqualification."[39] Five votes not constituting a majority of ten, he concluded that the rehearing was improperly granted.[40]

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29. 28 U.S.C. § 46(c) (1982).
30. 374 U.S. 1 (1963).
31. *Arnold*, 712 F.2d at 902.
32. *Id.* at 903 (quoting 28 U.S.C. § 46(c) (1982)).
33. *Id.* at 904.
34. *Id.* (footnote omitted) (emphasis in original).
35. *Id.*
36. *Id.*
37. *Id.* at 903-04.
38. *Id.* at 907.
39. *Id.* at 908.
40. *Id.*

In reaching his conclusion, Judge Widener looked to three sources of authority: Supreme Court decisions;[41] other circuit court opinions;[42] and the legislative history of subsection 46.[43] Each of these sources, however, presents questionable authority for asserting that subsection 46(c) requires an absolute majority vote to convene an en banc rehearing.

SUPREME COURT PRECEDENT

The Supreme Court has addressed the procedural requirements of 28 U.S.C. § 46(c) in three cases: *Textile Mills Securities Corp. v. Comm'r of Internal Revenue*,[44] the *Western Pacific Railroad Case*[45] and *Shenker v. Baltimore & Ohio Railroad Co.*[46] The Court's holding in each of these cases, however, was limited and at no point did the Court specifically resolve the question at issue in *Arnold*. In his dissenting opinion in *Arnold*, Judge Widener recognized the limited holdings in *Textile Mills* and the *Western Pacific Railroad Case*. Nevertheless, he rejected Judge Murnaghan's argument that *Shenker* allowed each circuit to adopt local rules for determining when the en banc majority requirement is satisfied.[47]

In *Textile Mills*, the Supreme Court held that circuit courts of appeals are not limited to sitting in three-judge panels where the court is sitting en banc.[48] Later, in the *Western Pacific Railroad Case*, the Court held that while a circuit court could not restrict a litigant's access to the en banc procedure, no applicant had the right to compel a circuit judge to consider such an en banc petition formally.[49] As Judge Widener recognized, neither of these holdings dealt directly with the en banc majority requirement of subsection 46(c). More importantly, the focus of the Court's opinions in *Textile Mills* and the *Western Pacific Railroad Case* was on the administrative powers which are vested in the circuit courts:

> In our view, § 46(c) is not addressed to litigants. It is addressed to the Court of Appeals. *It is a grant of power*. It vests in the court the power to order hearings *en banc*. It goes 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.[50]

Of the three Supreme Court cases which have addressed the proce-

41. *Id.* at 909.
42. *Id.* at 910-11.
43. *Id.* at 911-12.
44. 314 U.S. 326 (1941).
45. 345 U.S. 247 (1953).
46. 374 U.S. 1 (1963).
47. *Arnold*, 712 F.2d at 909.
48. 314 U.S. at 333.
49. 345 U.S. at 259, 261.
50. *Id.* at 250 (emphasis added).

dural requirements of subsection 46(c), *Shenker v. Baltimore & Ohio Railroad Co.*[51] came closest to deciding the issue presented in *Arnold*. Although *Shenker* is not precisely on point, it merits close examination since different interpretations of its holding partially account for the differences between the majority and minority opinions in *Arnold*.[52]

Shenker involved a suit under the Federal Employer's Liability Act for a work related injury.[53] Following a jury verdict for the plaintiff, the defendant railroad company appealed to the Third Circuit. A three judge circuit panel reversed the district court.[54] The full circuit court denied a petition for a rehearing en banc pursuant to a poll which yielded four votes to rehear the case en banc, two votes to deny, and two abstentions.[55] The plaintiff then successfully petitioned the Supreme Court for a writ of certiorari.[56]

The Supreme Court addressed the procedural questions raised by the petitioner in *Shenker* before proceeding to the merits of the case. In doing so, the Court held that under the circumstances of the petition vote, the Third Circuit was not compelled to grant an en banc rehearing.[57] The Supreme Court focused on its language in the *Western Pacific Railroad Case*[58] and on the administrative powers vested in the circuit courts.[59] Once again, it did not focus on the affirmative requirements of subsection 46(c).[60] While the Supreme Court could have decided the subsection 46(c) majority requirement issue in *Shenker*, it did not. The Court concluded that:

> the rights of the litigant go no further than the right to know the administrative machinery that will be followed and the right to suggest that the *en banc* procedure be set in motion in his case. . . . Such a procedure [as the Third Circuit used] is clearly *within the court's discretion* as we spoke of it in *Western Pacific*. For this Court to hold otherwise would involve it unnecessarily in the internal administration of the Courts of Appeals.[61]

As already suggested, the difference between the majority and minority opinions in *Arnold* is attributable, at least in part, to two different interpretations of the Supreme Court's holding in *Shenker*. Judge Widener argued that the Court's holding in *Shenker* requires an absolute majority to convene an en banc hearing under subsection 46(c).[62] Analyzing the facts of *Arnold* in light of the Supreme Court's decision in *Shenker*, he concluded:

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51. 374 U.S. 1 (1963).
52. *See infra* notes 62-64 and accompanying text.
53. 374 U.S. at 2.
54. 303 F.2d 596, 598 (3d Cir. 1962).
55. 374 U.S. at 4.
56. 371 U.S. 908 (1962).
57. 374 U.S. at 5.
58. *Id.* at 4-5 (discussing the Western Pacific Railroad Case, 345 U.S. 247, 250 (1953)).
59. 374 U.S. at 4-5.
60. *Cf. supra* note 50 and accompanying text.
61. 374 U.S. at 5 (emphasis added).
62. 712 F.2d at 909.

> [S]ince the Shenker case offered a perfect opportunity for the Supreme Court to adopt the view the majority now does, and it did not do so, I suggest that, because the adoption of the majority view here would have changed the result of the Shenker case, the Supreme Court has rejected the position the majority now embraces.[63]

Judge Murnaghan, on the other hand, interpreted *Shenker* as allowing the circuit courts discretion in deciding which rule to follow. He read *Shenker* as simply suggesting:

> that the area may well be one in which achieving fulfillment of our administrative responsibilities would allow us by rule to select as a quorum for purposes of ascertaining a majority, when votes on suggestions for hearings or rehearings en banc are taken, either (a) all judges in regular active service, including those disqualified for the purposes of the particular cases or (b) all judges otherwise in regular active service who are not, for the purposes of the particular case, disqualified from participating in any way.[64]

Two factors suggest that Judge Murnaghan's interpretation of the Supreme Court's holding in *Shenker* was the correct one. First, the Supreme Court denied certiorari in *Arnold*. In doing so, the Supreme Court has allowed each circuit to choose for itself which rule it will follow.[65] Second, an examination of the holdings in the *Western Pacific Railroad Case* and *Shenker* reveals that the focus of those opinions was the broad procedural limits within which the circuits can administer their courts. The Court did not concentrate on the affirmative requirements of 28 U.S.C. § 46(c). Nevertheless, neither Judge Widener nor Judge Murnaghan could have known that the Supreme Court would deny certiorari in *Arnold*. Moreover, the soundness of the Supreme Court's apparent decision[66] to allow each circuit to choose for itself which rule it will follow is questionable because this is an area where a clear rule is needed.

CIRCUIT COURT OPINIONS

The majority of circuits that have addressed the issue of the procedural requirements of subsection 46(c) have required the vote of an absolute majority of the circuit judges to convene an en banc hearing.[67] Of these relatively few cases, the Second Circuit, in *Zahn v. International Paper Company*,[68] undertook the most substantial discussion of the merits of each side of this issue. As Judge Murnaghan pointed out in *Arnold*, the Second Circuit's opinion in *Zahn* is notable because it focuses on the broader policy considerations underlying subsection

63. *Id.* at 909-10.
64. *Id.* at 902.
65. — U.S. —, 104 S.Ct. 703 (1984).
66. *See* discussion *supra* note 5.
67. *See* discussion *supra* note 7.
68. 469 F.2d 1033 (2d Cir. 1972), *aff'd on other grounds*, 414 U.S. 291 (1973).

46(c) rather than on the language of the statute.[69] Nevertheless, the opinion is instructive.

The district court in *Zahn* had refused to certify a diversity action as a class action because, while the named plaintiffs met the jurisdictional amount requirements, other unnamed members of the class did not.[70] A three-member panel of the Second Circuit affirmed the district court and the plaintiff petitioned the full court of appeals for a rehearing en banc.[71] The petition was denied with four judges voting in favor of the rehearing, three judges voting against it, and one judge abstaining.[72]

Three of the judges in *Zahn* delivered separate opinions in which they discussed the requirements of subsection 46(c). Judge Mansfield concluded that subsection 46(c), as written, required the vote of an absolute majority of judges in order to convene an en banc hearing.[73] He argued that requiring an absolute majority did not have an unfair impact on litigants in cases "where less than the court's full complement of judges. . ." was available.[74] Judge Mansfield suggested that the minority interpretation of subsection 46(c) incorrectly understood the objectives of the en banc procedure. "The goal of § 46(c) and of Rule 35(a) is to achieve intracircuit uniformity by assuring that where questions of exceptional importance are presented the law of the circuit will be established by the vote of a majority of the full court rather than by a three-judge panel."[75]

The issue before the court in *Zahn*, as Judge Mansfield characterized it, was "whether four judges of a court with a nine-judge complement may force an en banc reconsideration that could result in the law of the circuit being determined by less than a majority of the court."[76] The absolute majority requirement, he concluded, more effectively limited the en banc procedure to exceptionally important cases than did the minority position, and did so without presenting any injustice to litigants.[77] He also pointed out that any serious error could be corrected by the Supreme Court.[78]

To make his point, Judge Mansfield presented a worst case scenario where, in a nine-member court, four judges disqualified themselves and only three of the remaining five judges voted in favor of a rehearing en banc.[79] In such a situation, he argued, the law of the circuit could be decided by only three judges. Such a possibility, he suggested, demon-

69. 712 F.2d at 904.
70. 469 F.2d at 1034.
71. *Id.* at 1034-35.
72. *Id.* at 1040.
73. *Id.* at 1041.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*

strates the need for requiring an absolute majority in order to en banc a case.

While Judge Mansfield's arguments seem initially persuasive, a closer analysis shows several difficulties. Even the majority interpretation of subsection 46(c) cannot guarantee that the law of the circuit will be determined by a majority of judges. Assuming, for example, that four judges of a nine-member circuit recuse themselves from a case, each of the remaining five judges could vote in favor of en bancing the case and yet split on the merits.[80] Additionally, in those cases where an en banc court is not convened, the law of the circuit is decided by a three member panel.

More importantly, while it is clearly undesirable to have a distinct minority of judges deciding the law of a circuit, it is unlikely that Judge Mansfield's worst case scenario will arise frequently. An examination of the cases in which a recusal or disqualification has raised the en banc majority requirement issue reveals that, most frequently, only one[81] or two[82] judges have recused themselves. Much less frequently have three or more judges disqualified themselves.[83] Thus, it is unlikely that a distinct minority of judges will decide the law of a circuit on an important issue.

Even accepting the argument that the minority position more easily permits a small number of judges to decide the law of the circuit, one need not require an absolute majority in order to protect against such concerns. As will be suggested in the conclusion, a quorum requirement could be used to protect against egregious results.[84] In the great

80. *See, e.g.*, International Business Machines Corp. v. United States, 480 F.2d 293 (2d Cir. 1973), *cert. denied*, 416 U.S. 979 (1974). *See also* Judge Timbers' discussion in *Zahn*, 469 F.2d at 1042 n.1. In *IBM*, due to a vacancy on the Second Circuit and to the fact that three judges disqualified themselves from the case, the affirmative vote of each of the remaining five judges was necessary to en banc the case. Judge Timbers apparently cast the decisive vote in *IBM* in favor of granting the en banc hearing even though in doing so he allowed the full court to overturn the majority panel opinion in which he had joined. *See also* discussion *infra* note 91 and accompanying text.

81. Zahn v. International Paper Co., 469 F.2d 1033 (2d Cir. 1972) *aff'd on other grounds*, 414 U.S. 291 (1973) (4 votes to en banc, 3 against, 1 abstention, 1 vacancy); Boyd v. Lefrak Organization, 517 F.2d 918 (2d Cir. 1975), *cert. denied*, 423 U.S. 896 (1975) (4 votes to en banc, 3 against, 1 abstention); Porter City Chapter of Izaak Walton League v. Atomic Energy Comm'n, 515 F.2d 513 (7th Cir. 1975) (4 votes to en banc, 3 against, 1 abstention); Clark v. American Broadcasting Companies, Inc., 684 F.2d 1208 (6th Cir. 1982), *cert. denied*, — U.S. —, 103 S.Ct. 1433 (1983) (5 vote to en banc, 4 against, 1 abstention); Arnold v. Eastern Air Lines, Inc., 712 F. 2d 899 (4th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 703 (1984) (5 votes to en banc, 4 against, 1 abstention).

82. Copper & Brass Fabricators v. Dept. of Treasury, 679 F.2d 951 (D.C. Cir. 1982), *reh'g en banc denied by unpublished order* 81-2091 (5 votes to en banc, 3 against, 2 abstentions); Curtis-Wright Corp. v. General Electric Co., 599 F.2d 1259 (3d Cir. 1979), *cert. denied*, 449 U.S. 1022 (1980) (4 votes to en banc, 3 against, 2 abstentions).

83. International Business Machines Corp. v. United States, 480 F.2d 293 (2d Cir. 1973), *cert. denied*, 416 U.S. 979 (1974) (5 votes to en banc, 3 abstentions, 1 vacancy). Those instances where many circuit judges are routinely disqualified from a specific type of case, such as the oil and gas cases of the Fifth Circuit, have not been included because they are unique. Congress should address this problem on its own merit, apart from the issue now being considered.

84. *See infra* Recommendation and Conclusion of this note.

majority of cases, the law would then be decided by six or seven judges rather than three. Additionally, the availability of senior circuit judges to sit on en banc hearings[85] further abates Judge Mansfield's concern and affords protection against serious error. In *Zahn*, for example, two of the panel judges were senior judges who would have been entitled to vote on the merits had an en banc rehearing been granted.[86] But even discounting the uncertain availability of senior judges, the fact that less than an absolute majority of judges can convene an en banc rehearing does not, *ipso facto*, mean the merits of a case will be adversely affected.[87]

Finally, the majority opinions of the Second Circuit in *Zahn*,[88] and later in *Boraas v. Village of Belle Terre*,[89] implicitly assumed that the questions presented were not sufficiently important to justify convening an en banc rehearing. Judge Mansfield concluded that, even if the questions presented were substantial, and even if the circuit was in error, an appeal lay to the Supreme Court.[90] However, such arguments are not persuasive. The fact that four judges have voted in favor of en bancing a case is, of itself, an indication of the case's importance.[91] Also noteworthy is the fact that the Supreme Court granted certiorari in both *Zahn*[92] and *Boraas*.[93] Suggesting that the Supreme Court's authority to correct any error of the lower courts somehow diminishes the need for en banc hearings denies the Supreme Court the benefit of full en banc opinions. Moreover, access to the Supreme Court is never guaranteed, even in important cases.

In contrast to Judge Mansfield, Judge Timbers characterized the issue presented in *Zahn* as being whether a minority of judges should be able to frustrate the will of a majority that wishes to en banc a case.[94] Judge Timbers also pointed out that while the Second Circuit was authorized to maintain a nine judge complement, one position on the court had been vacant for over a year and a half.[95]

> With only eight active judges, when one judge by reason of disqualification is *excluded* from voting whether to en banc but is *included* in determining what constitutes a majority, then the rule appears to require five out of seven to en banc the case. Such a result . . . . is espe-

85. 28 U.S.C. § 46(c) (1982) permits senior judges to sit on the en banc rehearing of any case of which they were a member of the circuit panel. *See infra* notes 119-122 and accompanying text.
86. 469 F.2d at 1042 n.1.
87. *See infra* text accompanying notes 147-149.
88. *See* 469 F.2d at 1041.
89. 476 F.2d 806, 828 (2d Cir. 1973), *rev'd on other grounds*, 416 U.S. 1 (1974).
90. *Zahn*, 469 F.2d at 1041.
91. The characterization of a case as being sufficiently important to justify en bancing it must be independant from any consideration as to whether the en banc court will reach a different decision than the panel court. The question which must be asked is, are the merits of the case important in themselves?
92. Zahn v. International Paper Co., 414 U.S. 291 (1973).
93. Boraas v. Village of Belle Terre, 416 U.S. 1 (1974).
94. 469 F.2d at 1042.
95. *Id.*

cially unfortunate here where the rule operates to permit a minority of the active judges of the Court to deny en banc reconsideration . . . .[96]

THE LEGISLATIVE HISTORY OF SUBSECTION 46(c)

The third source of authority which Judge Widener looked to in arguing that the circuit courts are foreclosed from allowing less than an absolute majority to convene an en banc hearing is the legislative history of 28 U.S.C. § 46. In analyzing that legislative history, however, it becomes clear that it is not accurate to speak of a congressional intent in regard to the majority requirement of subsection 46(c). Congress has not addressed the issue of how an en banc hearing is to be convened in the event of a recusal or disqualification. Thus, it is important to distinguish between saying that Congress considered this specific question and intended a certain result and saying that while Congress did not specifically consider the issue, certain factors indicate that Congress might have intended one result or the other, had it considered the issue. For ease of analysis, the legislative history of 28 U.S.C. § 46 will be examined in three sections: (1) the general recodification of Title 28 in 1948;[97] (2) the proposed amendment of 1973, which would have specifically addressed the en banc majority requirement issue;[98] and (3) amendments to subsection 46(c) in 1978[99] and 1982.[100]

The General Recodification of Title 28

In June 1948, Congress recodified and updated substantial portions of Title 28 of the United States Code that deal with the federal judiciary and judicial procedure.[101] As part of that general recodification, Congress revised section 46.[102] Nevertheless, Congress' intent in amending section 46 was limited. Congress intended only to give statutory effect to the Supreme Court's holding in *Textile Mills Securities Corp. v. Comm'r of Internal Revenue*.[103] The specific holding of the *Textile Mills* case was that notwithstanding the three-judge panel limitation, a court of appeals sitting en banc could properly consist of a greater number of judges.[104]

The House Report to the 1948 amendment clearly demonstrates that Congress did not intend to consider how a majority was to be de-

96. *Id.* (emphasis in original).
97. Act of June 25, 1948, ch. 646, 62 Stat. 869 (current version at scattered sections of 28 U.S.C.).
98. H.R. 10805, 93d Cong., 1st Sess., 129 CONG. REC. H33430 (daily ed. Oct. 9, 1973).
99. Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1629 (codified in scattered sections of 28 U.S.C.).
100. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified in scattered sections of 28 U.S.C.).
101. Act of June 25, 1948, ch. 646, 62 Stat. 869 (current version at scattered sections of 28 U.S.C.).
102. *Id.* § 1, 62 Stat. 869, 871.
103. 314 U.S. 326 (1941).
104. *Id.* at 333. *See also* H.R. REP. NO. 308, 80th Cong., 1st Sess., app. at A7, *reprinted in* LEGISLATIVE HISTORY OF TITLE 28 JUDICIARY AND JUDICIAL PROCEDURE (R. Mersky ed. 1971).

termined in the event of a recusal or disqualification. In discussing the 1948 amendments to section 46, the House Report concluded:

> [t]his section preserves the interpretation established by the Textile Mills case but provides in subsection (c) that cases shall be heard by a court of not more than three judges unless the court has provided for hearing en banc. This provision continues the tradition of a three-judge appellate court and makes the decision of a division [*i.e.*, a panel] the decision of the court, unless rehearing in banc is ordered.[105]

The Proposed Amendment of 1973

At its annual meeting in 1973, the Judicial Conference of the United States proposed legislation to clarify the majority requirement of 28 U.S.C. § 46(c).[106] The proposal would have adopted the minority interpretation of subsection 46(c) by "[making] clear that a majority of the judges in regular active service who are entitled to vote should be sufficient to en banc a case."[107] The legislation, House bill 10805, was introduced in the House by Representative Peter Rodino (D-N.J.) and was referred to the House Committee on the Judiciary.[108] The bill was then referred to the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, but died before any hearings were held on it or before any reports were issued.[109]

In analyzing the legislative history of House bill 10805, Judge Widener concluded that the Judicial Conference had recognized "that the law was to the contrary. . ." of the proposed legislation and that Congress had chosen not to change it.[110] Nevertheless, a careful reading of the Judicial Conference Report reveals no clear acknowledgement that subsection 46(c) requires an absolute majority to convene an en banc hearing. Rather, the focus of the report is on clarifying an ambiguous legislative enactment. The report noted that subsection 46(c) "has been construed" to require an absolute majority.[111] However, a minority of circuits now have also construed subsection 46(c) to require less than

105. H.R. REP. NO. 308, 80th Cong., 1st Sess, app. at A7-A8, *reprinted in* LEGISLATIVE HISTORY OF TITLE 28 JUDICIARY AND JUDICIAL PROCEDURE (R. Mersky ed. 1971).

106. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1973, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (1974) [hereinafter cited as 1973 JUDICIAL CONFERENCE REPORT].

107. *Id.* at 47.

108. H.R. 10805, 93d Cong., 1st Sess., 129 CONG. REC. H33430 (daily ed. Oct. 9, 1973). H.R. 10805 would have amended 28 U.S.C. § 46(c) to read:

> Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court en banc is ordered by a majority of the circuit judges of the circuit in regular active service *who are qualified to participate in the case*. A court en banc shall consist of all circuit judges in regular active service *who are qualified to participate in the case*. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court en banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof. (emphasis added).

109. Telephone interview with Mr. James Farr, House Judiciary Committee (March 15, 1984).

110. *Arnold*, 712 F.2d at 911.

111. *See* 1973 JUDICIAL CONFERENCE REPORT, *supra* note 106, at 47.

an absolute majority.[112] In conclusion, one cannot accurately infer any congressional intent from the introduction of H.R. 10805 when so little action was taken on it. It is unpersuasive to argue that because Congress failed to pass House bill 10805, it was satisfied with the status quo.

The 1978 And 1982 Acts

Judge Widener referred to two additional legislative acts in his dissenting opinion in *Arnold*[113] — an Act of October 20, 1978[114] and the Federal Courts Improvement Act of 1982.[115] In both acts, Congress amended section 46 of Title 28 without addressing the majority requirement issue. Thus, Judge Widener concluded, "[i]f any inference is to be drawn from the subsequent legislative history of § 46(c), it is that Congress, the only body competent to change the statute, was aware of the construction of the statute sought to be changed by the Judicial Conference and chose not to change it."[116] However, any consideration of the majority requirement of subsection 46(c) would have been outside the scope of the 1978 Act because that act focused primarily on the creation of additional federal judgeships. Moreover, the 1982 Act did not consider the issue even though it had been raised in 1973. Such a weak legislative history simply does not support the argument that Congress intended to require the vote of an absolute majority of judges in order to convene an en banc court.

In contrast to the Federal Courts Improvement Act of 1982, the Act of October 20, 1978 was limited in its scope and was specifically concerned with the burgeoning caseload of the Federal Courts. The purpose of the legislation was to provide for the creation of additional district and circuit judges to enable the courts to more efficiently and expeditiously handle the business brought before them.[117] As the discussion below will indicate, the few revisions that the bill effected which did not deal directly with the appointment of additional judges were simply ancillary to the bill's purpose.

The Act of October 20, 1978 amended subsection 46(c) in three ways. First, it changed the word "division" to "panel" wherever it occurred.[118] Second, it struck from subsection 46(c) the provision that empowered senior judges to sit on the en banc rehearing of any case in

112. *See* discussion, *supra* note 11.
113. 712 F.2d at 911.
114. Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1629 (codified in scattered sections of 28 U.S.C.).
115. Federal Courts Improvement Act of 1982, Pub L. No. 97-164, 96 Stat. 25 (codified in scattered sections of 28 U.S.C.).
116. *Arnold*, 712 F.2d at 911.
117. S. REP. No. 117, 95th Cong., 1st Sess. 7, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 3569-70.
118. Act of Oct. 20, 1978, Pub. L. No. 95-486, § 5(b), 92 Stat. 1629, 1633 (codified at 28 U.S.C. § 46(c)(1982)).

which they had been a member of the panel court.[119] Finally, the Act empowered any court of appeals having more than fifteen active judges to prescribe local rules governing en banc hearings and rehearings.[120] The Act did not address the majority requirements of subsection 46(c); and those portions of the 1978 Act that did deal with subsection 46(c) appear to have been very poorly thought out. Indeed, only four years after the passage of the 1978 Act, the Senate Report on the Federal Courts Improvement Act of 1982 criticized the logic of the 1978 Act in disenfranchising senior judges from sitting on en banc rehearings.[121] The 1982 Act then reinstated the deleted provision.[122] That Congress did not devote much consideration to the en banc procedure in the 1978 Act may also be seen in the Senate Report's statement that "[e]n banc matters, few in number, were not included" in analyzing the caseload of the federal judiciary.[123]

On April 2, 1982, Congress passed the Federal Courts Improvement Act of 1982[124] in an effort to resolve some of the many structural, administrative, and procedural difficulties facing the federal courts.[125] With respect to section 46, the Act had

> three basic objectives: (1) the elimination of confusion which has arisen in recent years in relation to the use of the terms "panel" and "division," especially following authorization of "administrative divisions" in section 6 of [the 1978 Act]; (2) clarification of the appropriate role for senior circuit judges in rehearings en banc, a matter which was apparently inadvertently thrown into confusion by provisions in section 5 of [the 1978 Act]; and (3) an express statutory requirement that, in all but the most unusual circumstances, each three-judge panel of a court of appeals contain two judges who are members of that court.[126]

Even a cursory examination of those objectives reveals that only the second deals directly with subsection 46(c). Moreover, that provision does not deal with the majority requirements of subsection 46(c), but

119. Act of Oct. 20, 1978, Pub. L. No. 95-486, § 5(a), 92 Stat. 1629, 1633, *repealed by* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 205, 96 Stat. 25, 53.

120. Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633 (codified at 28 U.S.C. § 41 (1980)). Senator DeConcini, D-Ariz., discussed the proper size of an en banc court in regard to this question of the 1978 Act. However, the exact question which was raised was the propriety of limiting en banc court of appeals in the Ninth Circuit to nine judges when that circuit consisted of twenty-three judges. He concluded that doing so would allow five or six judges to decide the law of the circuit while the remaining seventeen or eighteen judges could disagree strongly. Thus, this discussion is not on point with the issue at hand. 122 CONG. REC. 16086, 16091 (1977) (statement of Senator DeConcini).

121. S. REP. No. 275, 97th Cong., 2d Sess. 27, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 11, 37.

122. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 205, 96 Stat. 25, 53 (codified at 28 U.S.C. § 46 (1982)).

123. S. REP. No. 117, 95th Cong., 1st Sess. 24, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 3569, 3587.

124. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified in scattered sections of 28 U.S.C.).

125. S. REP. No. 275, 97th Cong., 2d Sess. 1, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 11.

126. S. REP. No. 275, 97th Cong., 2d Sess. 26, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 11, 36.

rather, reempowers senior judges to sit on en banc rehearings. Thus, Congress did not consider the problem presented in *Arnold* in any section of either the 1978 or 1982 Acts.

A review of the cases which have addressed the subsection 46(c) majority requirement issue reveals both cases that have focused on the text of 28 U.S.C. §46(c)[127] and cases which have focused on the broader policy concerns which underlie the en banc procedure.[128] While strong arguments have been offered in support of each position, neither position has been accepted by all courts. Moreover, the legislative history of subsection 46(c) shows that Congress has not specifically addressed the issue.[129] Nevertheless, what little congressional intent that can be gleaned from the 1982 Act suggests that if Congress had addressed the question, it would not have required an absolute majority to convene an en banc hearing under subsection 46(c).

In its report on the Federal Courts Improvement Act of 1982,[130] the Senate Judiciary Committee discussed some of the broad considerations of Title II of the Act that dealt with the governance and administration of the federal courts.[131] In discussing the proposed amendments to sections 45 and 46, the Committee wrote:

> *this section would permit the courts of appeals to sit en banc with less than a full en banc court for cases in which authoritativeness of opinion is particularly useful or in which the issues are especially difficult or important.* The circuit courts could continue to adopt local rules permitting the disposition of an appeal in situations in which one of the three judges dies or becomes disabled and the remaining two agree on the disposition; but, in the first instance, all cases would be assigned to [a] panel of at least three judges.[132]

The language of the Judiciary Committee's report demonstrates a clear preference for having en banc courts decide important or difficult issues, even if less than a full court is available. Considering that preference with the present majority interpretation of subsection 46(c), the minority position appears to better represent the wishes of Congress in this area. In the event of a recusal or disqualification, the present majority rule requires that a relatively large number of votes be obtained from a diminished pool of judges. In so doing, the majority requirement makes it significantly more difficult to en banc a case. However, a recusal or disqualification would apparently present the very situation which the Judiciary Committee contemplated when it wrote that "this section would permit the courts of appeals to sit en banc with less than

127. *See supra* notes 29-37 and accompanying text.
128. *See supra* notes 68-96 and accompanying text.
129. *See supra* notes 101-133 and accompanying text.
130. S. REP. No. 275, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 11.
131. S. REP. No. 275, 97th Cong., 2d Sess. 8, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 11, 18.
132. S. REP. No. 275, 97th Cong., 2d Sess. 9, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 11, 19 (emphasis added).

a full en banc court. . . ."[133]

THE PURPOSES OF THE EN BANC PROCEDURE

The purposes of the en banc procedure authorized by 28 U.S.C. § 46(c) are to promote uniformity of decisions in a circuit and to encourage full en banc courts to decide cases of exceptional importance. These purposes are set forth in Federal Rule of Appellate Procedure 35(a),[134] which implements the statutory authority of subsection 46(c), and have been recognized in Supreme Court cases,[135] lower federal court cases and by commentators.[136] Rule 35(a) states:

> [a] majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.[137]

The Supreme Court has addressed the purposes of the en banc procedure in an *ad hoc* manner in a small number of cases.[138] Of those cases, the Court's opinion in *U.S. v. American-Foreign Steamship Corp.*[139] most clearly focused on this issue. In delivering the majority opinion in *American-Foreign Steamship Corp.*, Justice Stewart wrote that "*[e]n banc* courts are the exception, not the rule. They are convened only when extraordinary circumstances exist that call for authoritative consideration and development of the law of the circuit."[140] He continued by pointing out that the en banc procedure helps to avoid conflict, promote finality of decisions in a circuit[141] and should be used

133. *Id.*

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

135. *See infra* notes 138-142 and accompanying text.

136. A complete discussion of the purposes of the en banc procedure is outside the scope of this note. For such a discussion *see generally in order of relevance*, Comment, *In Banc Procedures in the United States Courts of Appeals*, 43 FORDHAM L. REV. 401 (1974); Note, *En Banc Review in Federal Circuit Courts: A Reassessment*, 72 MICH. L. REV. 1637 (1974); Note, *Federal Jurisdiction and Practice*, 47 ST. JOHN'S L. REV. 339 (1972); Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969); Note, *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities (Part I)*, 40 N.Y.U. L. REV. 563 (1965); Note, *En Banc Hearings in the Federal Courts of Appeals: Accomodating Institutional Responsibilites (Part II)*, 40 N.Y.U. L. REV. 726 (1965); Note, *En Banc Procedure in the Federal Courts of Appeals*, 111 U. PA. L. REV. 220 (1962); Comment, *The En Banc Procedures of the United States Courts of Appeals*, 21 U. CHI. L. REV. 447 (1954).

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

138. Textile Mills Securities Corp. v. Comm'r of Internal Revenue, 314 U.S. 326, 334-35 (1941); Western Pacific Railroad Case, 345 U.S. 247, 260 (1953); U.S. v. American-Foreign Steamship Corp., 363 U.S. 685, 688-89 (1960); Moody v. Albemarle Paper Co., 417 U.S. 622, 626 (1974).

139. 363 U.S. 685 (1960).

140. *Id.* at 689.

141. *Id.*

to "determine the major doctrinal trends of the future. . . ."[142]

Judge Albert Maris of the Third Circuit wrote of the en banc procedure that:

> The principal utility of determinations by the courts of appeals in banc is to enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions, while enabling the court at the same time to follow the efficient and time-saving procedure of having panels of three judges hear and decide the vast majority of cases as to which no division exists within the court.[143]

Other commentators have defined the purposes of the en banc procedure negatively. En banc courts are not to be convened as an additional level of appellate review.[144] Circuit judges should not vote to convene an en banc hearing or rehearing simply because they disagree with the result reached by the panel court.[145] Finally, en banc review is inappropriate when all that is at issue is the application of a particular set of facts to clearly recognized principles of law.[146]

Proponents of the majority position argue that requiring the vote of an absolute majority of circuit judges to convene an en banc hearing best effectuates the purposes of that procedure.[147] While such an argument seems initially persuasive, it ignores one of the two objectives of the en banc procedure. The en banc procedure has two, albeit related, purposes: 1) maintaining uniformity within circuits, and 2) encouraging full circuit courts to decide cases of exceptional importance.[148] Proponents of the majority position have focused exclusively on the uniformity goal and have ignored the related goal of having more than a three-judge panel decide exceptionally important cases.

The en banc determination vote is just that — a vote to convene an en banc hearing or rehearing. It is a vote which evaluates the relative importance of a given case. It is not a vote on the merits of that case. The bulk of the cases in which the subsection 46(c) majority requirement issue has arisen clearly meet that exceptional importance criterion. This is evidenced by the fact that a majority of the judges available to convene an en banc hearing have voted in favor of doing so.[149] To argue that the absolute majority requirement best effectuates the purposes of the en banc procedure improperly limits the inquiry to the uniformity goal alone.

Finally, the majority errs in assuming that because one case ought

142. *Id.* at 690 (quoting American-Foreign Steamship Corp. v. United States, 265 F.2d 136, 155 (1958) (separate statement of Judge Clark)).
143. 14 F.R.D. 91, 96 (1954).
144. Western Pacific Railroad Case, 345 U.S. 247, 273 (1953) (Jackson, J., dissenting).
145. Walters v. Moore-McCormack Lines, Inc., 312 F.2d 893, 894 (1963).
146. Rodriguez v. McGinnis, 456 F.2d 79, 80 (1972).
147. *See supra* text accompanying notes 73-79.
148. *See supra* text accompanying notes 134-137.
149. *See supra* notes 81-83.

not be afforded en banc consideration, other cases also should not be considered by the full circuit. This argument generalizes the purported impropriety for en banc consideration of one case over many cases. But the propriety or impropriety of any given case must not affect the general rule for determining what constitutes an en banc majority.

RECOMMENDATION AND CONCLUSION

Strong arguments have been offered in support of both positions in the debate over the majority requirement of 28 U.S.C. § 46(c). However, no uniform interpretation of subsection 46(c) has been reached and no alternatives have been considered. What Congress would have intended had it addressed the issue is now of little import since the Supreme Court has allowed each circuit to choose for itself which rule it will follow. Nevertheless, Judge Murnaghan offered a well-reasoned and persuasive opinion in *Arnold* to suggest that the majority interpretation gives rise to insoluble conflict within the statute. The majority argument that the minority interpretation necessarily defeats the purposes of the en banc procedure is unpersuasive.

The one point of agreement is that the time has long since come for Congress to clarify 28 U.S.C. § 46(c). In acting, Congress must realize that it need not adopt either the majority position or the minority position. Compromise is possible. Any proposed solution must recognize two facts: 1) no proposal can completely neutralize the effect of a disqualification or recusal; and 2) both the current majority and minority positions have raised important issues that must be considered. In defense of the majority position, a distinct minority of judges should not be allowed to decide the law of a circuit. To do so would be to undermine the stability which the subsection 46(c) en banc procedure seeks to encourage. Nevertheless, the minority has argued forcefully that requiring an absolute majority to en banc a case in the event of a recusal or disqualification often frustrates the will of a majority that wishes to en banc an important case. The minority proponents also point out that including a recused or disqualified judge in the en banc determination vote has the effect of counting that vote as a 'no' vote and makes it commensurately more difficult to obtain the requisite number of votes.

An appropriate alternative would be to adopt the minority position with a quorum requirement. This compromise would require that a definite number of judges be available to sit before any en banc court could be convened. Thereafter, the majority would be determined from the number of circuit judges qualified to participate in a case. Thus, only a majority of the judges qualified to vote would be required to convene an en banc hearing. But at the same time, the quorum requirement would protect against the undesirable possibility that a minority of judges could decide the law of the circuit in an important case. Additionally, the quorum requirement could be determined by comparing it to that point at which it is no longer possible to convene

an en banc hearing under the majority position.[150]

Assume, for example, that two judges of a ten-member court of appeals are disqualified to hear a case. Under the present majority position, the votes of six of the eight remaining judges are needed to en banc the case. Thus, three judges can effectively prevent the en banc consideration of any case despite the fact that five other judges wish to rehear it. Moreover, as the number of disqualified judges increases, the relative difficulty of obtaining the necessary votes increases disproportionately.[151]

Under the alternative plan, the votes of five judges would be sufficient to en banc a case where only eight judges of a ten judge circuit were qualified to vote. But where should the quorum requirement be set? Clearly, eight judges should constitute a quorum of a ten judge circuit. But, should the quorum be as low as six or seven judges? The concern which arises in setting the quorum at six or seven is that four judges can decide the law of the circuit in such a situation. If the quorum is set at eight, however, the vote of five judges will be necesasary to sustain a majority.

Whatever quorum is selected, it must strike a balance between maintaining uniformity in the circuit and encouraging circuit courts to en banc difficult or important cases. It would not be unreasonable to set the quorum requirement at a somewhat high level in light of the fact that, most frequently, only one or two judges are disqualifed from any given case. Additionally, an exception from the quorum requirement could be made for cases in which an absolute majority of judges have voted in favor of en bancing a case. In any event, the number of judges which would be required to hear a case must be determined according to the number of judges in each of the circuit courts of appeals. Alternatively, Congress could allow each circuit to set its own quorum requirement while strongly encouraging them to hear cases in which relatively few judges are disquaified. Should Congress choose

150. *See* Table I.

151. As the denominator decreases, with a constant numerator, the relative difficulty of obtaining the requisite number of votes increases:

Judges available	Votes needed to en banc under present majority position	Votes needed to en banc under present minority position
10	6/10 = 60.0%	6/10 = 60.0%
9	6/ 9 = 66.6%	5/ 9 = 55.5%
8	6/ 8 = 72.5%	5/ 8 = 62.5%
7	6/ 7 = 85.7%	4/ 7 = 57.1%
6	6/ 6 = 100.0%	4/ 6 = 66.6%

not to adopt either alternative, it should simply adopt the minority rule. But, Congress must act.

Thomas J. Waters*

TABLE I

Judges available	Votes needed to en banc under present majority position	Votes needed to prevail on merits	Votes needed to en banc under present minority position	Votes needed to revail on merits
10	6/10	6/10	6/10	6/10
9	6/ 9	5/ 9	5/ 9	5/ 9
8	6/ 8	5/ 8	5/ 8	5/ 8
7	6/ 7	4/ 7	4/ 7	4/ 7
6	6/ 6	4/ 6	4/ 6	4/ 6
5	—	—	3/ 5	3/ 5
4	—	—	3/ 4	3/ 4
3	—	—	2/ 3	2/ 3
2	—	—	2/ 2	2/ 2
1	—	—	—	—

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