

SECOND CIRCUIT REVIEW

Expert Analysis

## The Rarity of En Banc Review In the Second Circuit

In two weeks, football fans across the country will celebrate their home teams' return to the gridiron. But New England Patriots fans will have to wait an additional month for their starting quarterback to take the field, thanks in part to the Second Circuit's denial of Tom Brady's petition for rehearing en banc of a panel decision reinstating his four-game suspension.<sup>1</sup> Despite the extravagant media coverage of Brady's petition for a rehearing en banc, the Second Circuit's decision denying the petition should have come as no surprise to experienced court observers. Since 1979, the U.S. Court of Appeals for the Second Circuit has consistently granted fewer petitions for rehearing en banc than any other circuit court, both in absolute terms and relative to the court's caseload,

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as indicated in the accompanying table.<sup>2</sup>

This trend, which we first discussed in this column more than 30 years ago and originated with

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Judge Learned Hand in the 1940s, has become more pronounced in recent years (see Table, Number of Rehearings En Banc Granted by Circuit, 2011 to July 2016, on p. 7).<sup>3</sup> Since the beginning of 2011, the Second Circuit has reconsidered

only two appeals en banc,<sup>4</sup> compared to an average of 12 across all circuits during the same period. By way of example, the Sixth Circuit, facing a similar number of total appellate filings from 2011 through July 2016, granted en banc review 17 times.<sup>5</sup>

### Circuit's En Banc Practice

Federal Rule of Appellate Procedure 35(a) provides for en banc rehearing of a panel decision on the vote of a majority of active circuit judges, while emphasizing that en banc review "is not favored and ordinarily will not be ordered unless" either "necessary to secure or maintain uniformity of the court's decisions," or the case presents "a question of exceptional importance." But as former Chief Judge Jon O. Newman explained in a series of articles published from 1984 to 1994, the Second Circuit generally regards the presence of such circumstances as necessary

but not sufficient to trigger en banc review.

On more than 70 occasions, however, the Second Circuit has used an informal version of en banc review (known as “mini en banc”). Unlike the traditional en banc protocol which generally features a new round of briefing and argument before the full court, the mini en banc reflects a more streamlined review process. A Second Circuit panel may invoke the mini en banc sua sponte by circulating a draft opinion internally to all active judges for comment. The opinion will then be published—generally accompanied by a footnote indicating that the opinion was circulated prior to publication—if no other judge requests a vote for rehearing en banc or if a requested vote fails to garner majority support.<sup>6</sup>

The Second Circuit has generally adopted the mini en banc procedure where consideration by the full court is statutorily available but deemed unnecessary, such as when a panel concludes that intervening Supreme Court authority has impliedly overruled Second Circuit precedent.<sup>7</sup> Aside from the Seventh Circuit (which has issued more than 270 mini en banc rulings), the Second Circuit has issued more than twice as many mini en banc decisions as any of its sister circuits.<sup>8</sup> Similarly, the Second

Circuit has applied the “exceptional importance” label sparingly, recognizing that “‘exceptional importance’ is frequently in the eye of the beholder.”<sup>9</sup>

### Reasons for Limited Review

Writing in 1989, Chief Judge Jon Newman cited three main reasons for the Second Circuit’s institutional reluctance to rehear cases en banc.<sup>10</sup> First, Judge Newman explained that the Second Circuit views en banc rehearing as an inherently inefficient extra layer of appellate review that imposes significant travel and preparation burdens on the court’s active judges. Second, Newman observed that “frequent use of the in banc practice surely poses a threat” to a court’s collegiality. Judge Newman attributed the absence of vitriolic language in Second Circuit opinions, compared to that present in opinions issued in other circuits, to “the infrequency of the occasions when we confront each other as members of an in banc court.”

Newman also cautioned against judges’ use of the en banc hearing “so that the world will be enlightened as to their view of the dispute at hand.” Speaking of the Second Circuit, Newman said there is a modesty to judges’ willingness to allow assigned panels to decide the cases before them, regardless

of their feelings about a particular panel’s disposition of a specific case.

### Dissension

In the 30 years since Judge Newman described the Second Circuit’s motivations for maintaining a limited en banc caseload, the court has become even more parsimonious in granting en banc rehearings. Somewhat ironically, the past two decades have seen a significant increase in dissents from denials of rehearing en banc, and a concomitant increase in use of the mini en banc procedure.

Since 1999, denials of en banc rehearing have elicited one or more dissenting opinions on 33 separate occasions, three times as many as occurred during the previous 17-year span.<sup>11</sup> Such dissents have generally been authored by four highly respected judges (Judges Dennis Jacobs, Jose Cabranes, Reena Raggi, and Debra Livingston) who have taken issue with the court’s reluctance to rehear cases that they view to be important and/or erroneously decided by the assigned panel.

Judge Jacobs’ dissent from a denial of rehearing in *Zhong v. U.S. Department of Justice*<sup>12</sup> is illustrative. Joined by Judges Cabranes and Raggi, Judge Jacobs criticized the Second Circuit’s decision not to rehear a panel ruling

that effectively overruled court precedent on a question of “exceptional importance.” In reviewing an alien’s petition for review of a Board of Immigration Appeals decision despite his failure to exhaust all available administrative remedies, the panel set aside *Foster v. INS*,<sup>13</sup> which had held that the court lacked jurisdiction to review an alien’s unexhausted claim.

Judge Jacobs characterized the court’s present practice as “so rusty and cumbersome that its desuetude will allow a single panel to skate past full court review,” and warned that it lays the groundwork for future panels to overrule such precedent anew, “with equal authority and equal occasion and equal legitimacy.” He concluded that such an ad hoc decision-making process is “institutionally dangerous.”

**Conclusion**

Although Tom Brady’s appeal was an imperfect vehicle for en banc review, it seems likely that the Second Circuit’s historical reluctance to engage in en banc review will be tested in the years to come both by litigants and an increasingly spirited contingent of respected Second Circuit judges who appear somewhat less wed to the circuit’s idiosyncratic en banc precedent. How this will play out is uncertain, but maintaining the

court’s collegiality is a priority of Chief Judge Robert Katzmann. It is telling in this regard that Chief Judge Katzmann dissented from the panel majority in the Brady appeal, but did not dissent from the court’s

Number of Rehearings En Banc Granted by Circuit, 2011 to July 2016	
Circuit	Total Number Of Cases
D.C.	4
First	4
Second	2
Third	9
Fourth	7
Fifth	17
Sixth	17
Seventh	13
Eighth	19
Ninth	40
Tenth	6
Eleventh	7

SOURCE: The authors, based on case law research.

denial of the petition for rehearing en banc. Whether this subtle shift in en banc approach will continue (more dissents from en banc denials and greater use of the mini en banc)—and, if so, whether the court’s renowned collegiality will suffer as a consequence—remains to be seen.



1. *Nat’l Football League Mgmt. Council v. Nat’l Football League Players Ass’n*, 820 F.3d 527, 534, 539 (2d Cir. 2016) (finding that the commissioner’s decision to discipline Brady for engaging in “conduct detrimental to the integrity of and public confidence in the game of professional football” was “plausibly grounded” in the collective bargaining

agreement between the NFL and the NFL Players Association), reh’g denied, No. 15-2801, Doc. 323 (July 13, 2016). The authors’ firm conducted the independent investigation in the Brady football “deflation” matter that concluded it was “more probable than not” that conduct violative of the collective bargaining agreement had in fact occurred.

2. See Table: Number of En Banc Cases by Circuit, 2011 to July 2016 (reflecting original case law research); Second Circuit Courts Comm., En Banc Practices in the Second Circuit: Time for a Change? FEDERAL BAR COUNCIL, July 2011, at 6; Jon O. Newman, “In Banc Practice in the Second Circuit, 1989-93,” 60 BROOK. L. REV. 491, 491 (1994) [Newman III]; Jon O. Newman, “In Banc Practice in the Second Circuit, 1984-88,” 55 BROOK. L. REV. 355, 355-56 (1989) [Newman II]; Jon O. Newman, “In Banc Practice in the Second Circuit: The Virtues of Restraint,” 50 BROOK. L. REV. 365, 365 (1984) [Newman I].

3. See Martin Flumenbaum and Brad S. Karp, “Second Circuit Review: Recent Developments,” 195 NYLJ 37 (Feb. 1986).

4. See *United States v. Ganias*, — F.3d —, 2016 WL 3031285 (2d Cir. May 27, 2016) (en banc); *Poventud v. City of N.Y.*, 750 F.3d 121 (2d Cir. 2014) (en banc).

5. See United States Courts, U.S. Court of Appeals—Judicial Caseload Profile, FEDERAL COURT MANAGEMENT STATISTICS, March 31, 2016, at 7, 15.

6. See Amy E. Sloan, “The Dog That Didn’t Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals,” 78 FORDHAM L. REV. 713, 725-28 (2009).

7. See, e.g., *Greathouse v. JHS Sec. Inc.*, 784 F.3d 105, 107 & n.2 (2d Cir. 2015) (noting that “[t]he panel’s opinions have been circulated to all active members of this Court prior to filing”).

8. See Sloan at 728.

9. See Newman I at 371.

10. See Newman II at 369.

11. See Mario Lucero, “The Second Circuit’s En Banc Crisis,” 2013 CARDOZO L. REV. DE NOVO 32, 68-73 (2013) (supplemented with original case law research covering post-2012 time frame).

12. 489 F.3d 126, 134-39 (2d Cir. 2007) (mem.).

13. 376 F.3d 75, 77-78 (2d Cir. 2004).