DWINDLING APPEALS AND NONEXISTENT EN BANC REVIEW IN THE TENTH CIRCUIT

WILEY KERSH,* MICHAEL A. KILBOURN,** & JUSTIN MARCEAU***

ABSTRACT

Recently, the *Denver Law Review* published an Article by two Tenth Circuit Judges and a former clerk. The Article offers lawyers advice for best practices when seeking en banc review in the Tenth Circuit. This Response to that Article is not a critique of the sensible suggestions the authors offer. We regard the suggestions as solid advice for litigants attempting to present the strongest petition possible to the court. And we certainly do not seek to diminish the expertise and good intentions of the authors. But we do question the practicality of giving guidance on seeking en banc review in a circuit that seems to have given up almost entirely on granting such petitions. The Tenth Circuit averages just over one en banc review every two years. This is one of the lowest rates among all circuits. In our Response, we argue that practice pointers for en banc review will be of minimal value in this circuit. Until the odds of being granted en banc review in the Tenth Circuit are more realistic, any stylistic pointers on the subject seem categorically quixotic.

TABLE OF CONTENTS

* Appellate Law Clerk, Colorado Court of Appeals. J.D. 2023, University of Denver Sturm College of Law.

** Associate Attorney at Johnson & Klein, PLLC; J.D., University of Denver Sturm College of Law. My deep appreciation to the members of the *Denver Law Review*, with special thanks to the editors whose diligence and meticulosity made publishing this Response possible. I am especially grateful for my sons Kai and Maks, who are an invariable fount of inspiration.

*** Professor, University of Denver Sturm College of Law. I am grateful to the *Denver Law Review* for working with us on this timely piece.

INTRODUCTION

Parties are filing fewer appeals in the Tenth Circuit.[1] From 2012 to 2022, every year but one saw a drop in the number of cases filed.[2] A decline in appeals submitted to a court that is simultaneously increasing in size[3] should allow for more time per case, or more sustained analysis of potential issues dividing the circuit court. Federal courts across the country have experienced a shrinking appellate docket as litigants are filing fewer federal appeals.[4] The Tenth Circuit, however, has seen an unusually steep decline in its appeals, with one of the largest drops in annual appeals of any federal circuit.[5]

But the Tenth Circuit is distinctive in another regard. It has one of the lowest rates of en banc review of any federal circuit.[6] By statute, federal appeals are decided by a three-judge panel or by the full court.[7] En banc rehearings are the procedure by which the full court or every active judge on a circuit adjudicates an appeal instead of the typical three-judge panel. Whereas a drop in the number of appeals filed is beyond the control of federal appellate courts, the rate of en banc rehearing depends solely on the discretion of an appellate court's active judges.

Commentators frequently observe that en banc appeals are among "the most significant cases decided by the courts of appeals" and provide an important vehicle for understanding a circuit's position on core questions.[8] Likewise, for researchers interested in understanding the ideology of a circuit as a whole, which could be of tremendous value in an era when political pundits tend to denigrate—often without empirical evidence—

1. Each federal circuit's appellate judges consider a myriad of factors (e.g., docket composition) in deciding whether to go en banc, and each circuit is responsible for resolving a variety of issues on appeal. However, this Response does not attempt to control for the many variables that the circuits navigate in their en banc decision-making. Instead, this Response focuses on the extreme infrequency with which the Tenth Circuit goes en banc: almost never. In the last decade, only one circuit—the Second—has averaged fewer en banc rehearings per 1,000 appeals than the Tenth Circuit. *See infra* Figure 7. Interestingly, and apparently unlike in the Tenth Circuit, this may be due to the Second Circuit's expressed disdain for en banc hearings, which traces back to the time of Judge Learned Hand. GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 441–42 (2d ed. 2010).

2. *See infra* Figure 1.

3. The Tenth Circuit had nineteen active and senior judges in 2012 and twenty-two in 2022. *U.S. Court of Appeals for the Tenth Circuit: Judges*, FED. JUD. CTR., https://www.fjc.gov/history/courts/u.s.-court-appeals-tenth-circuit-judges (last visited Nov. 8, 2024).

4. *Federal Judicial Caseload Statistics 2022*, U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2022 (last visited Sept. 24, 2024).

5. *See infra* Figure 2.

6. *See infra* Figure 7.

7. 28 U.S.C. § 46(c).

8. Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 217 (1999). In response to the idea that en banc decisions are desirable, commentators have implied that such a process is unseemly or uncivilized because it is tantamount to "airing disagreements" in a very public fashion. Steven M. Foster, Jr. & Anthony R. Guttman, *The Tenth Circuit's Blueprint for Minimizing En Banc Rehearings*, 102 DENV. L. REV. 317, 321 (2025). One might reasonably counter that a rationale for life tenure is to promote comfort with collegial disagreement and dissent, and public concerns about transparency and a fuller picture of the deliberation is more important than avoiding public disagreement.

judges as purely political actors,[9] en banc decisions on key legal questions will be of enormous value.

More importantly, as the Supreme Court has reduced its docket size over time,[10] the significance of en banc review by circuit courts has correspondingly increased. It cannot be gainsaid that circuit court review plays a much greater role than it did during earlier periods in U.S. history. Review by the U.S. Supreme Court used to be a matter of right.[11] Discussions of en banc practices during the early or mid-twentieth century offer little guidance on what circuit court practices should look like because it was not until the Judiciary Act of 1988[12] that essentially all mandatory appeals to the Supreme Court were eliminated.[13] For much of the Supreme Court's history, and thus also circuit court history, Supreme Court review was mandatory. So whatever the wisdom or value of en banc review in the mid-twentieth century, the discussion is necessarily a bit different in the modern era.

In modern times, the Supreme Court has expressed a preference for allowing important issues to percolate among the circuit courts.[14] After all, it is desirable to have more (rather than less) judicial attention to the most confounding and divisive legal questions of the day. Consistent with this preference, appellate rules expressly anticipate that en banc review will be granted in cases of exceptional importance.[15] En banc review results in circuit judges giving greater and more sustained attention to the most pressing legal questions of the day, which should be viewed as an unmitigated good. Moreover, and no less significant, a three-judge panel generally cannot overrule a prior three-judge panel,[16] which means that without en banc review, a circuit court is greatly constrained in its ability to revise and update its own precedent—no matter how outdated, idiosyncratic, or anomalous a three-judge panel's opinion may be.[17]

---

9. Andrew Breiner, *How Did the Courts Become So Politicized?*, LIBR. OF CONG. (Sept. 21, 2021), https://blogs.loc.gov/kluge/2021/09/how-did-the-courts-become-so-politicized/.

10. *See* Michael D. Berry, *The Numbers Reveal a United Supreme Court, and a Few Surprises*, THE FEDERALIST SOC'Y (Aug. 2, 2023), https://fedsoc.org/commentary/fedsoc-blog/the-numbers-reveal-a-united-supreme-court-and-a-few-surprises.

11. Thomas E. Baker, *Siskel and Ebert at the Supreme Court*, 87 MICH. L. REV. 1472, 1488 (1989).

12. Supreme Court Case Selections Act of 1988, Pub. L. No. 100-352, 102 Stat. 662 (1988).

13. 28 U.S.C. §§ 1254(2), 1257(1) (1982) (amended 1988).

14. *See, e.g.*, Michael Coenen & Seth Davis, *Percolation's Value*, 73 STAN. L. REV. 363, 365 (2021).

15. *Flipping Circuit Courts*, SENATE REPUBLICAN POL'Y COMM. (Dec. 10, 2019), https://www.rpc.senate.gov/policy-papers/flipping-circuit-courts (explaining the importance of appointing conservative appellate judges because circuit courts typically have "the final say in . . . federal cases").

16. Brewster v. Comm'r, 607 F.2d 1369, 1373 (D.C. Cir. 1979) (per curiam).

17. The Tenth Circuit has recognized a practice that allows a three-judge panel to overrule a prior panel if the panel obtains permission from all active, nonrecused judges. Lincoln v. BNSF Ry. Co., 900 F.3d 1166, 1177 (10th Cir. 2018) ("On appeal, Appellants, and the EEOC as amicus, ask this panel to overturn this court's precedent that filing an EEOC charge is a jurisdictional prerequisite to suit. After polling the full court, we overturn our precedent that filing an EEOC charge is a

We studied a ten-year period of en banc review in the circuit. Strikingly, the Tenth Circuit never took more than *one case* en banc in a single year from 2013 to 2022.[18] In four of those ten years, the Tenth Circuit *did not review a single case* en banc.[19] It has long been assumed wisdom that the Tenth Circuit was on the low end of en banc review rates,[20] but the fact that that the court has one of the lowest rates of en banc petitions granted per annum of any circuit in the country has not been previously documented in a comprehensive, empirical manner.[21]

In this Response to a recent Article published in the *Denver Law Review* regarding en banc review,[22] we provide a closer look at the declining number of appeals in the Tenth Circuit and closely scrutinize empirical data to show that the Tenth Circuit's en banc practices are decidedly aberrational.

I. DECLINING APPEALS

Over the decade from 2013 to 2022, the Tenth Circuit's volume of cases plunged from a high of 2,338 appeals in 2016 to 1,593 in 2022.[23] This reduction represents a more than 30% drop in the number of appeals in the circuit, leaving the total at only 68% of its highest caseload of the decade.[24] Looking back even further in Tenth Circuit history, the number

jurisdictional prerequisite to suit."); *id.* at 1185 ("While, as an individual panel, we cannot overrule our precedent, '[o]ne panel . . . may overrule a point of law established by a prior panel after obtaining authorization from all active judges on the court.'"). It is unlikely, however, that any appellate advocate would consider this procedure for the unanimous rejection of a prior precedent to be procedurally equivalent to the en banc process. En banc review, of course, provides the parties with notice, gives parties the opportunity to brief whether an issue should be overruled, provides every active judge with additional and full briefing on the issue before a decision is made, and does not require unanimity. It is also worth noting that the timing for such informal overruling procedures is not well understood by litigants because it rarely happens and is generally only discussed in the footnotes of opinions. Accordingly, to call this opportunity to overrule prior panels a "mini-en banc" procedure would seem to dramatically overstate the extent to which this procedure is understood by the public, standardized within the circuit, or available as reliable backstop to the absence of traditional en banc review. Foster & Guttman, *supra* note 8, at 323–24. Indeed, even those who celebrate this informal procedure recognize that the rules governing it are unwritten and largely unknown. *Id.* at 324 n.59 (explaining that it is not clear whether a simple majority or a unanimous vote of the circuit judges is "needed to overrule prior precedent in this manner.").

18. *See infra* Figure 3.

19. *See id.* (showing en banc rates for fiscal years 2013–2022).

20. *See, e.g.*, Bobby R. Baldock, Joel M. Carson III, & Bryston C. Gallegos, *Strategic Considerations for Going En Banc in the Tenth Circuit*, 100 DENV. L. REV. 325, 326–27 (2023).

21. *See infra* Figure 7 (demonstrating that only the Second Circuit and Eleventh Circuit had a lower rate than the Tenth Circuit of en banc petitions granted during the 2013–2022 period—with 0.069 per 1000 appeal in the Second Circuit and 0.318 per 1,000 appeals in the Eleventh Circuit).

22. Baldock, Carson, & Gallegos, *supra* note 20.

23. *See infra* Figure 1.

24. When the Tenth Circuit "goes en banc," generally, all 12 active judges preside over a matter. Judges with senior status—those who are no longer active but still hear Circuit cases—typically do not participate in en banc hearings. Between 2003 and 2012, 24,551 appeals were filed in the Tenth Circuit—an average of 2,455 appeals annually. *See infra* Figure 1. The number of Tenth Circuit judges changes sporadically due to retirements, deaths, and other circumstances, requiring some judges to end their service entirely while new judges are appointed. On average, twenty-one judges were on an active status each year between 2003 and 2012. *See* FED. JUD. CTR., *supra* note 3. By contrast, in 2022, the Tenth Circuit received 1,593 appeals, *see infra* Figure 1, and had 22 active judges. FED. JUD. CTR., *supra* note 3.

of appeals filed declined nearly 50% between 2005 (2,911 appeals) and 2022 (1,593 appeals).[25] In contrast, some circuits, such as the neighboring Eighth Circuit, have seen appeals remain roughly constant over the same period.[26]

Other circuits have seen dramatic reductions in appeals similar to the precipitous drop in the Tenth Circuit.[27] But the Tenth Circuit is among those circuits that have experienced the greatest reduction of appeals over the twenty-year period ending in 2022.

Tenth Circuit Appeals (2003–2022)	
Year	**Appeals**
2003	2,540
2004	2,646
2005	2,911
2006	2,742
2007	2,407
2008	2,226
2009	2,328
2010	2,270
2011	2,311
2012	2,170
2013	2,091
2014	1,986
2015	1,956
2016	2,338
2017	1,856
2018	1,830
2019	1,757
2020	1,737
2021	1,599
2022	1,593

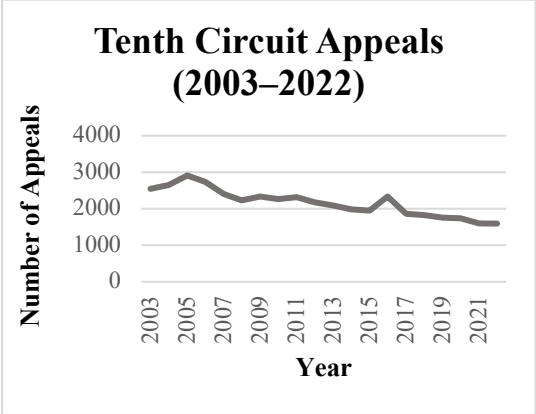

Figure 1[28]

25. *See infra* Figure 1. A former Chief Judge of the Circuit noted in 1993 that appeals in the circuit were rising "dramatically," and noted that the number of appellate "filings per judgeship" had recently tripled. Monroe G. McKay & John K. Kleinheksel, *The Decisional Process Within the Tenth Circuit—A Panoramic View of Its Internal Operations and Recent Innovations*, 33 WASHBURN L.J. 22, 23 (1993); *id.* at 27 (noting that there were 2,129 appeals in 1988).

26. *See infra* Figure 2 (The Ninth Circuit had a sharp drop in appeals in 2022, which puts it in the same company as the Tenth in terms of seeing a roughly 30% drop in its total appeals over the last decade. But the drop in the Ninth was more sudden and might suggest that those numbers will rebound, whereas the appeal numbers in the Tenth have steadily diminished year after year.).

27. The First Circuit experienced a 45.5% reduction between 2005 and 2022—dropping from 1,912 to 1,042 total appeals. *See id.* In the same period, the Second Circuit dropped 45.8%, from 7,035 to 3,816 total appeals; the Third Circuit dropped 45%, from 4,498 to 2,487 total appeals; and the Ninth Circuit dropped 46.6%, from 16,037 to 8,559 total appeals. *Id.*

28. These charts depict data for all circuits from October 1, 2002, to September 30, 2022. Each year begins on the first day of October and ends on the last day of the following September. For example, the year 2003 is comprised of data from October 1, 2002, through September 30, 2003. *Caseload Statistics Data Tables*, U.S. CTS., https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables (enter "B-1" in "Search by table number" field; then select "ending September 30th" as the reporting period; individually select each year between 2003–2022; click "Apply") (last visited Nov. 25, 2024).

With the exception of an anomalous spike in appeals across several circuits in 2016, most circuit courts across the country have seen a steady drop in the number of appeals filed annually since 2005:

Total Number of Appeals Filed Annually by Circuit (2003–2022)

Year	DC	First	Second	Third	Fourth	Fifth	Sixth	Sev-enth	Eighth	Ninth	Tenth	Elev-enth
2003	1,121	1,844	6,359	3,957	4,860	8,613	4,964	3,517	3,190	12,872	2,540	6,983
2004	1,390	1,723	7,008	3,871	4,957	8,509	4,841	3,377	3,101	14,274	2,646	7,065
2005	1,379	1,912	7,035	4,498	5,307	9,052	5,211	3,789	3,611	16,037	2,911	7,731
2006	1,281	1,852	7,029	4,503	5,460	9,479	5,151	3,634	3,312	14,636	2,742	7,539
2007	1,310	1,863	6,334	3,924	4,542	8,055	4,818	3,227	3,020	12,549	2,407	6,361
2008	1,307	1,631	6,904	4,054	5,185	7,667	4,853	3,307	3,022	13,577	2,226	7,371
2009	1,097	1,746	5,747	3,750	5,311	7,246	4,859	3,337	3,113	12,211	2,328	6,995
2010	1,178	1,530	5,371	3,951	4,854	7,462	4,954	3,124	2,878	11,982	2,270	6,438
2011	1,132	1,507	5,541	3,645	4,576	7,401	4,725	3,038	2,876	12,141	2,311	6,233
2012	1,193	1,587	5,531	3,766	5,002	7,641	4,855	2,994	3,080	12,684	2,170	6,998
2013	1,105	1,578	5,093	3,893	5,061	7,439	5,137	2,949	2,937	12,826	2,091	6,366
2014	1,003	1,421	5,044	4,029	4,765	7,886	4,698	3,016	2,927	12,061	1,986	6,152
2015	1,125	1,504	4,416	3,251	4,662	7,443	4,478	2,926	2,952	11,870	1,956	6,115
2016	1,197	1,704	4,640	3,618	6,411	8,664	5,242	3,382	3,665	11,473	2,338	8,023
2017	951	1,296	4,337	2,941	4,497	7,099	4,591	2,787	2,957	11,096	1,856	6,098
2018	1,034	1,245	4,062	2,941	4,261	7,566	4,221	2,814	2,844	10,566	1,830	5,892
2019	908	1,342	4,260	3,503	4,517	7,020	4,243	2,622	2,812	10,106	1,757	5,396
2020	1,118	1,284	4,698	2,877	4,680	6,401	4,306	2,609	2,766	10,400	1,737	5,314
2021	878	1,077	4,079	2,630	4,226	6,427	3,866	2,524	2,942	9,487	1,599	4,811
2022	995	1,042	3,816	2,487	3,930	5,905	3,602	2,426	2,822	8,559	1,593	4,662

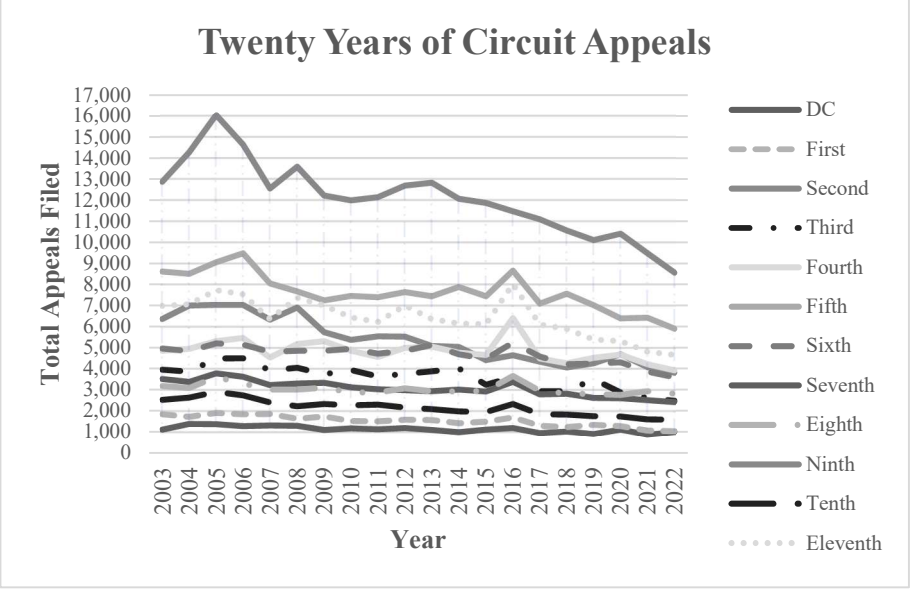

Figure 2[29]

29. *See Caseload Statistics Data Tables*, *supra* note 28 (representing twenty years of appellate case data expressed annually from 2002 to 2022 for all federal circuit courts).

II. PRACTICE POINTERS FROM TENTH CIRCUIT JUDGES REGARDING EN BANC

It has been said that there is a unique "aura of mystique around en banc practice and procedure."[30] This reputation is well-deserved.[31] Given the secrecy around circuit court votes on whether to take a case en banc and the distinctive procedures involved, it is difficult to determine what characteristics signal that a case is a strong candidate for en banc review. It would be rare to find a losing party in a federal case who does not think that their appeal raises issues of unique significance that deserve full-court attention. And it is important to disabuse litigants of this perception. The en banc best practices Article does a good job of making this point.[32] As a practical matter, simply losing an appeal does not make en banc review likely. Moreover, solid guidance about how to attract en banc attention from the circuit is hard to come by. Accordingly, the *Denver Law Review*'s decision to publish an Article on the topic,[33] authored by two current Tenth Circuit judges and a former clerk for one of those judges, will likely attract the interest of many practitioners.

Unfortunately, we think that many readers will finish the en banc best practices Article wanting more. This is not because the authors fail to clearly canvas the rules, nor is it because the authors lack the experience to make salient observations about en banc practice. And it is not even because their practical advice contains any suggestions that we disagree with. Rather, we think that the most appropriate focus for a discussion of en banc review in a circuit that frequently refuses to grant such review even a single time per year is the *absence* of en banc review, or perhaps the procedures that are thought to substitute for such review. When the number of en banc cases is zero, as it was in 2020, or one, as it was in 2021 and 2022, we think the niceties of stylistic considerations are a tad bit beside the point. Suggestions about tone, length, or style ignore the enormous

30. Pierre H. Bergeron, *En Banc Practice in the Sixth Circuit: An Empirical Study, 1990–2000*, 68 TENN. L. REV. 771, 772 (2001).

31. If en banc procedures are obscure and mysterious, then the process that some refer to as the "mini en banc" procedure—where the judges of a circuit agree to overrule a principle by a unanimous secret vote over the course of an unspecified period of time on a perhaps unbriefed question of law—is even more so. In a thoughtful Essay responding to this Response, Foster & Guttman, *supra* note 8, at 323, the authors suggest that en banc is less necessary in the Tenth Circuit because of the existence of informal processes such as mini en banc review. *Id.* (contending that the informal processes around circulating draft opinions "accomplish[] the objective of en banc rehearings"). If it is the case that these informal processes (unknown to many litigants) are of such import, however, then a practice guide on these informal processes might be needed. For Tenth Circuit practitioners, it would arguably be more useful to explain to litigants the best way to frame their case for mini or informal en banc review, which, unlike en banc review, is a process that is not explicitly recognized by the circuit rules, and for which there is essentially no guidance on how to achieve or avoid such review. Put differently, the existence of informal processes that are framed as an adequate substitute for en banc review by Foster and Guttman tend to reinforce the idea that the niceties of formal en banc practice are largely beside the point, and that litigants need to focus more attention and training on these informal mechanisms instead. One might imagine the circuit hosting a training or set of educational opportunities on these informal processes that Foster and Guttman describe as adequate substitutes for en banc review.

32. Baldock, Carson, & Gallegos, *supra* note 20.

33. *Id.*

elephant in the en banc room. It seems implausible that stylistic concerns are driving the reality that not a single litigant (or only one) per year—even among law firms and lawyers who frequently appear before the en banc courts of other circuits or the Supreme Court—are going en banc in the Tenth Circuit.

The authors frame their contribution as a set of "[s]trategic considerations for going en banc in the Tenth Circuit."[34] But they situate their strategic advice as a natural outgrowth of the extreme rarity of en banc review in the circuit. Writing as though it is almost a syllogism, the Article declares that the low rate of en banc review in the Tenth Circuit "makes clear" that en banc petitions should "be filed sparingly and not as a matter of course."[35] In the spirit of collegial exchange, we think it is worth reconsidering whether the statistics about nonexistent en banc review in the Tenth Circuit, which serve as the gravamen for the Article's conclusion that litigants should avoid petitioning for en banc review, might instead serve as a clarion call for the Tenth Circuit's judges to revisit their en banc practices and norms. To analogize to a different context, law students eagerly seek exam tips from their professors, but a professor's tips might seem irrelevant if none of the professor's students ever pass the exam. The advice might be solid and well-intentioned, but if everyone is failing, then the calls for reform should probably be directed at the professor and not the students. And this is probably no less true even if there happen to be informal, largely secret procedures by which students can appeal and seek adjustments of their grades after the exam. Similarly, a careful reader might conclude that the main features of Tenth Circuit's en banc review practices are how rare such review is and how the absence of such review might be damaging to the clarity and certainty of the law within the circuit.[36]

---

34. *Id.* at 325. In this Response, we are critical of the idea that inadequate en banc petitions are a driving force behind the limited number of cases taken en banc in the Tenth Circuit. But in the Foster–Guttman Essay, commentators are critical of our Response because they think we have missed the bigger point. In the view of the Foster–Guttman Essay, the absence of en banc cases is not a matter for concern because the informal process of privately circulating opinions among the judges of the entire court prior to publication is a process that "accomplishes the objective of en banc rehearings" without all the public fanfare and hassle. Foster & Guttman, *supra* note 8, at 323. It is difficult to fully respond to a piece describing an informal process that is not fully understood, or even known to the public. But, of course, this is precisely the problem. Informal procedures that are not codified in the public rules of the circuit cannot fully or fairly supplant a robust en banc process. Indeed, ours is a Response that brings to light the empirical data about the circuit's en banc practice. No such data is available regarding these informal en banc procedures.

35. *Id.* at 336.

36. In his *Aposhian v. Wilkinson* dissent, Chief Judge Tymkovich expressed his disapproval of the Tenth Circuit en banc majority's decision to vacate its en banc order in that case. 989 F.3d 890, 891 (10th Cir. 2021) (Tymkovich, C.J., dissenting). His chief concern was apparently that the court would leave future litigants without clarity on important issues. *Id.* at 903. He posited that the issues in the case were difficult and that the court's refusal to hear the case en banc "perpetuate[d] confusion . . . in the circuit." *Id.* While Judges Hartz, Eid, Carson, and Holmes joined in dissenting, Judge Hartz and Judge Carson authored opinions explicitly agreeing with Judge Tymkovich's confusion as to why the majority vacated the en banc order, considering the issues left unresolved. *Id.* at 903, 906.

After reflecting on a smattering of data indicating that en banc review is vanishingly rare in the Tenth Circuit, the authors of the previous Article devote a fair amount of text to parsing the language of the federal and Tenth Circuit rules regarding en banc procedures, emphasizing phrases that describe en banc review as "extraordinary" and generally disfavored.[37] The authors point out that, according to Federal Rule of Appellate Procedure 35, en banc review is "not favored and ordinarily will not be ordered" unless it is necessary to maintain judicial uniformity or "involves a question of exceptional importance."[38] The Tenth Circuit rule, created by the Tenth Circuit's own judges, differs from the federal rule in three ways.

First, it replaces the "ordinarily will not be granted" language with "[e]n banc review is an extraordinary procedure."[39] The authors of the Article concede that the term "exceptional importance" is "subjective and somewhat nebulous,"[40] but when it comes to the "extraordinary" nature of en banc review, they reveal no such hermeneutical hesitations. Instead, the authors conclude that "extraordinary" must mean that en banc is rare and almost never used. But the discerning lawyer will recognize that parsing this textual language—which is relatively standard across circuits—offers very little meaningful guidance.[41]

Second, the Tenth Circuit's version of the rule includes language discouraging litigants from submitting en banc rehearing petitions based on the circuit's informal processes: "Before seeking rehearing en banc litigants should be aware and take account of the fact that, before any published panel opinion issues, it is generally circulated to the full court and every judge on the court is given an opportunity to comment."[42] This seems to imply that the informal practice of *generally* circulating panel decisions for comment before they are announced forecloses the need for en banc review in most, if not all, cases. Setting aside the discretionary nature of this prepublication circulation rule, it is laudable that the court has a preference for vetting its opinions among colleagues before publication. But it would seem that such a process would be better suited for editing suggestions, making sure that there are not conflicting decisions coming out on the same issue at the same time, and perhaps for flagging any glaring inconsistencies with prior precedent.

In other words, this informal process, it appears to us, is probably more of a safeguard for the panel than it is for the litigants. Such a process (limited to a period for just more than a week and bereft of any briefing on whether to overrule a point of law) is no doubt valuable, but would seem

37. Baldock, Carson, & Gallegos, *supra* note 20, at 326.
38. *Id.* at 328 (citing FED. R. APP. P. 35(a)).
39. 10TH CIR. R. 35.1(A).
40. Baldock, Carson, & Gallegos, *supra* note 20, at 334.
41. "Overall, parsing the language of these rules offers little guidance to litigants attempting to ascertain whether a particular case is worthy of en banc consideration." Bergeron, *supra* note 30, at 774.
42. 10TH CIR. R. 35.1(A).

to be a rather poor proxy for a full en banc process. Consider the fact that the rule is not so much a rule, but instead as a statement of what will generally happen. Or consider the fact that even if it is treated as a rule, the circulation of panel opinions only applies to opinions that will be published. It is beyond the scope of this Response to consider whether unpublished opinions are on the rise in the Tenth Circuit and the role of unpublished decisions in developing or impeding legal norms in the circuit, but it is beyond dispute that the large majority of federal appellate decisions across the country are not published.[43] This means, as a practical matter, that the potential en banc substitute is not available in most cases in the circuit each year.

Of course, we are not privy to the internal dynamics on the current Tenth Circuit. It is possible that Foster and Guttman are correct and the informal processes of the circuit are an adequate, even preferable substitute for en banc review. Perhaps our assumptions about the need for en banc review are wrong. Perhaps the informal process is a reliable means of ensuring that matters worthy of en banc attention are fully addressed through robust procedures. But if this is the case, we would welcome an article (or even a continuing legal education course) on these processes from the judges on the circuit who could explain in more detail this rather rare and secretive process. After all, if the value of the en banc best practices Article contains practical insights for litigants, and if informal processes are more important than formal en banc review, then it would seem that litigants ought to be more fully apprised of the nature and details of these internal practices. Indeed, for litigants unfamiliar with this practice, just imagining that the legal rule they are treating as settled precedent might be overruled without briefing on that point is a rather discomforting thought. Is there an agreed upon timeframe for making these "informal" en banc decisions? Or what happens if a notable plurality of the active judges express a concern with a panel opinion, but that concern is not unanimous, or the concern does not interest the panel judges? Especially for matters of exceptional importance or intercircuit splits (as opposed to the most obvious intracircuit conflict), this brief, discretionary, and informal process seems an inadequate substitute for robust, full-court review, at least in the absence of further explanation and clarity from the circuit to litigants.

To put the matter plainly, the text of the Tenth Circuit's rule regarding en banc review does not necessitate its exceedingly low rate of en banc review. We should be candid that the rarity of en banc rehearing is a

43. An astute commentator has observed that "[n]early 90% of merits decisions from the federal courts of appeals look nothing like what law students read in casebooks. Over the last fifty years, federal courts have increasingly relied on the so-called 'unpublished decision' to combat a caseload volume 'crisis.'" Merritt E. McAlister, *"Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533, 535 (2020).

distinct preference by the judges to avoid formal en banc review; it is not a rule that dictates this outcome.[44]

We applaud the prior Article's practical pointers, especially from the perspective of judges on the court. The en banc best practices Article offers a set of commonsense tips that we agree represent best practices for pursuing en banc review.[45] But more important than these buttoned-up suggestions that will surely find their way into Continuing Legal Education materials is the reality that en banc review is vanishingly rare in the Tenth Circuit.[46] The Tenth Circuit has uniquely, almost without explanation, and arguably to the detriment of litigants across a vast portion of the United States, virtually eliminated the prospect of a formal layer of judicial review that ensures doctrinal coherence and consistency. As the next Part demonstrates, an en banc petition that would be granted in nearly any other circuit would likely be denied in the Tenth Circuit, and it is not because the quality of legal practice is lower in this circuit.

III. PUTTING THE RARITY OF TENTH CIRCUIT EN BANC REVIEW IN CONTEXT

Thurgood Marshall once remarked that "[d]eciding not to decide" is among the most important powers wielded by the modern Supreme Court.[47] Similar to the Supreme Court's discretion over its docket, the federal circuit courts enjoy broad discretion when deciding whether to hear cases en banc. At the same time, just as some commentators have bemoaned the Supreme Court's shrinking docket,[48] it is reasonable to point out that the broad discretion that is afforded to circuit courts on the en banc question does not inevitably suggest an overly parsimonious approach to en banc review.

In fact, the Tenth Circuit is decidedly out of step with rates of en banc review across the federal circuits and even with Supreme Court review rates. Scholars have pointed out that en banc review is so rare that

44. Foster and Guttman suggest a plausible explanation for this circuit's aversion to en banc review. They posit that the judges prioritize collegiality over en banc procedures. Foster & Guttman, *supra* note 8, at 325. This strikes us as plausible, and enjoying collegial relations with colleagues who all enjoy a lifetime appointment certainly has its benefits. But prioritizing collegiality might, at least in some instances, come at the expense of robust intracircuit engagement. One might wonder if the risk of appearing noncollegial can stifle full debate and meaningful exposition on some occasions. And is a strong aversion to public disagreement truly a necessary ingredient in a healthy judiciary? We think that litigants in the trenches might view calls for collegiality rather than en banc review a little less charitably than Foster and Guttman.

45. Baldock, Carson, & Gallegos, *supra* note 20, at 327–30; *see also* SUP. CT. R. 10.

46. Dart Cherokee Basin Operating Co. v. Owens, 574 U.S. 81, 92, 96 (2014) (criticizing the Tenth Circuit's denial of en banc review and overturning the Tenth Circuit decision to deny en banc review as an abuse of discretion). The Court agreed with Judge Hartz's dissent from that en banc denial, reasoning that a precedential legal error that was unlikely to re-present itself for correction was sufficient grounds for granting en banc. *Id.* at 86.

47. THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 177 (Mark V. Tushnet ed., 2001) (delivering remarks at the Second Circuit Judicial Conference on Civil Rights Enforcement and the Supreme Court's Docket on September 8, 1978).

48. *See* Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1251–63 (2012).

nationally, "en banc dispositions account[] for only one-third of one percent of the cases decided by the federal appellate courts."[49] Likewise, the Supreme Court's average rate of review is estimated at about 1%, which leading commentators describe as the "tiniest percentage of petitions" filed.[50] But over the last decade, the Tenth Circuit has granted en banc review at rates ranging from 0% per year (in 2014, 2016, 2018, and 2020) to approximately .06% per year (one out of 1,593 petitions in 2022).[51]

Total Number of Tenth Circuit Appeals and En Banc Grants (2013–2022)

Year	Appeals	En Banc Grants
2013	2,091	1
2014	1,986	0
2015	1,956	1
2016	2,338	0
2017	1,856	1
2018	1,830	0
2019	1,757	1
2020	1,737	0
2021	1,599	1
2022	1,593	1

Figure 3[52]

To put these numbers in context, the odds of the U.S. Supreme Court granting certiorari are as much as 16.7 times greater than the odds of the Tenth Circuit granting a petition for en banc rehearing. More broadly, the rate at which circuits across the country approve en banc petitions—0.3%[53]—is almost triple the Tenth Circuit's rate.

49. Bergeron, *supra* note 30, at 771. In 2022, the circuit courts granted a total among them of forty-three en banc petitions out of 28,504 total appeals, resulting in an en banc grant rate of .15%. During the same period, the Supreme Court granted certiorari on 128 out of 3,516 petitions, resulting in a certiorari grant rate of 3.6%—orders of magnitude greater than the national and Tenth Circuit en banc grant averages of .15% and .09%, respectively. *Caseload Statistics Data Tables*, *supra* note 28 (enter "B-2" in "Search by table number" field; then select "ending September 30th" as the reporting period; enter 2022 as the reporting period end year; click "Apply"; repeat for table numbers "B-10" and "B-1").

50. Ralph Mayrell & John Elwood, *The Statistics of Relists Over the Past Five Terms: The More Things Change, the More They Stay the Same*, SCOTUSBLOG (Jan. 4, 2022, 4:14 PM), https://www.scotusblog.com/2022/01/the-statistics-of-relists-over-the-past-five-terms-the-more-things-change-the-more-they-stay-the-same/.

51. *See infra* Figure 3.

52. *See Caseload Statistics Data Tables*, *supra* note 28 (showing ten years of appellate case data expressed annually from 2012 to 2022 for the Tenth Circuit).

53. This calculation yielding this rate excludes the Tenth Circuit as a data point.

Tenth Circuit Certiorari and En Banc Grants (2013–2022)	
Action	**Total**
Tenth Circuit Petitions Granted by SCOTUS	52
Tenth Circuit Cases Heard En Banc	6

Figure 4[54]

Another way of parsing the data is to note that from 2013 to 2022, the Supreme Court reviewed panel decisions from the Tenth Circuit about 8.5 times more often than the Tenth Circuit did itself.[55] This is a staggering figure, and it undercuts the claim that the Tenth Circuit's en banc rules—which of course are not more stringent than the Supreme Court rules—dictate the rarity of en banc review in the circuit. It also betrays the claim that appeals in the Tenth Circuit are somehow less likely to raise issues of exceptional importance or concern so as to warrant additional review.[56] The Supreme Court likely reviewed between 80,000 and 100,000 certiorari petitions during this ten-year period, and out of this pool of nationally significant issues, it found more than fifty cases out of the Tenth Circuit that warranted additional review.[57] During the same period, and while dealing with between 15,000 and 17,000 appeals (not all of which sought en banc review), the Tenth Circuit only identified *six* cases of such extraordinary importance to be worthy of en banc review.[58] If en banc review is truly designed to afford cases of exceptional importance or cases that present intracircuit or intercircuit splits additional review, then the Tenth Circuit's practice seems to be inconsistent with this norm, at least as measured by the frequency of Supreme Court review of the circuit's decisions.[59]

The vast gulf between the rate of en banc review in the Tenth Circuit and the rate of Supreme Court certiorari review of Tenth Circuit cases provides an important insight. But the authors of the en banc best practices Article suggest that this data provides an insight for practitioners, rather than serving as a catalyst for reflection by the circuit itself about why en

54. *See Caseload Statistics Data Tables*, *supra* note 28 (enter "B-2" in "Search by table number" field; then select "ending September 30th" as the reporting period; individually select each year between 2013–2022; click "Apply"); *see also id.* (enter "B-10" in "Search by table number" field; then select "ending September 30th" as the reporting period; individually select each year between 2013–2022; click "Apply").

55. *See supra* Figure 4.

56. It is also undercuts the claim that an informal en banc process in the form of prepublication circulation adequately addresses the key legal issues presented in Tenth Circuit appeals.

57. *See* Benjamin D. Battles, *Multistate Amicus Briefs and Supreme Court Review*, AM. BAR ASS'N (Oct. 17, 2022), https://www.americanbar.org/groups/judicial/publications/appellate_issues/2022/fall/multistate-amicus-briefs-supreme-court-review/; *see also supra* Figure 4.

58. *See Caseload Statistics Data Tables*, *supra* note 28; *see also supra* Figure 4.

59. The point is not that the Tenth Circuit decisions are more likely than other circuits to be overturned by the Supreme Court. It is a question of transparency about issues of unique importance and a matter of providing the full circuit an opportunity to review and deliberate about the most divisive and critical questions of law. Some contend that airing public disagreements between judges through en banc review is undesirable or even unseemly. But it would seem that being overturned by the Supreme Court, sometimes summarily and without oral argument, is even more undesirable. Andrew v. White, 145 S. Ct. 75, 83 (2025) (summarily reversing a Tenth Circuit decision affirming a death sentence).

banc review is so rare.[60] In one of the Article's most candid moments, the authors surmise that "litigants have a greater shot . . . at having the Supreme Court grant certiorari in their case than the Tenth Circuit granting their petition for en banc consideration."[61] In the very next sentence, the Article concludes that, therefore, "attorneys and their clients should carefully consider whether it is worth the time and money" to seek en banc review.[62] The figures presented here, however, might support a different conclusion.[63] But this seems like a bit of an *ipse dixit*, or an effort to disguise the issue (low en banc review rates) as necessitating the conclusion that fewer en banc petitions should be filed. Again, one might draw a different set of conclusions from this information.

There is one final feature of Tenth Circuit en banc review that warrants mentioning. Most Tenth Circuit decisions reviewed by the Supreme Court *did not* get en banc review.[64] That is to say, en banc review by the Tenth Circuit is not helping to identify key cases for Supreme Court review. If not for the Supreme Court granting review, the final word on issues of national importance would have been that of a three-judge panel. In fact, over the two-decade period from 2003 to 2022, only a single case that received an en banc rehearing in the Tenth Circuit was later reviewed by the Supreme Court.[65]

SCOTUS Certiorari Grants After Tenth Circuit En Banc (2013–2022)	
Action	**Total**
Petitions Granted by SCOTUS	51
Tenth Circuit Cases Heard En Banc Prior to Certiorari Grant	1

Figure 5[66]

IV. EN BANC IN NEIGHBORING CIRCUITS

At this point, interested readers might be asking how the Tenth Circuit compares with other circuits in terms of willingness to hear a case en banc. As an initial matter, we were curious how the Tenth Circuit compares to the geographically-neighboring circuits. It is conceivable that there would be similar en banc rates among the courts closest to the Tenth Circuit. So we compared the number of en banc grants in the Tenth Circuit

60. Baldock, Carson, & Gallegos, *supra* note 20.
61. *Id.* at 332.
62. *Id.*
63. The authors of the en banc best practices Article candidly acknowledge this purpose of en banc review as a mechanism for reviewing cases "of exceptional importance that may not otherwise reach the Supreme Court." *Id.* at 326.
64. *See infra* Figure 5.
65. The sole case heard before an en banc Tenth Circuit prior to the Supreme Court granting certiorari was Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013).
66. *See id.*; *Caseload Statistics Data Tables*, *supra* note 28 (enter "B-2" in "Search by table number" field; then select "ending September 30th" as the reporting period; individually select each year between 2013–2022; click "Apply").

with each circuit that shares a geographic boundary with the Tenth (the Ninth, Eighth, and Fifth Circuits). By examining the number of en banc grants in each contiguous circuit, we illuminate how anomalous the Tenth Circuit's practice is, even among geographically similar circuits or courts with a similarly small volume of appeals.

Neighboring Circuits Total Appeals and En Banc Granted (2013–2022)								
	Tenth		Ninth		Eighth		Fifth	
Year	Appeals	En Banc Granted	Appeals	En Banc Granted	Appeals	En Banc Granted	Appeals	En Banc Granted
2013	2,091	1	12,826	14	2,937	2	7,439	11
2014	1,986	0	12,061	17	2,927	7	7,886	5
2015	1,956	1	11,870	20	2,952	2	7,443	5
2016	2,338	0	11,473	21	3,665	1	8,664	4
2017	1,856	1	11,096	17	2,957	8	7,099	1
2018	1,830	0	10,566	10	2,844	3	7,566	8
2019	1,757	1	10,106	9	2,812	4	7,020	4
2020	1,737	0	10,400	13	2,766	2	6,401	6
2021	1,599	1	9,487	8	2,942	1	6,427	7
2022	1,593	1	8,559	11	2,822	3	5,905	10

Figure 6[67]

Next, we compared the rates of en banc review across all of the federal circuit courts. En banc review is rare in every circuit. Figure 7 below shows just how infrequently en banc appeals are granted, and to account for the variation in caseload, we calculated an en banc rate per one-thousand appeals for each court. The Second Circuit has long been famous for having the lowest en banc review rate in the country, and our ten-year examination of the practice across all circuits confirms this reality.[68] But no circuit has more years with zero en banc cases than the Tenth Circuit. Only two circuits had lower average rates of en banc review per one-thousand cases than the Tenth Circuit (the Eleventh and the Second). And the Tenth Circuit's average en banc rate over the decade is less than half of the overall average en banc rate across all circuits. By any metric, the Tenth Circuit has a comparatively low rate of en banc review.

67. *See Caseload Statistics Data Tables*, *supra* note 28 (showing ten years of appellate case data expressed annually from 2012 to 2022 for the Fifth, Eighth, Ninth, and Tenth Circuits); *see also id.* (enter "B-10" in "Search by table number" field; then select "ending September 30th" as the reporting period; individually select each year between 2013–2022; click "Apply").

68. The rarity of review has been labeled a "crisis." Mario Lucero, *The Second Circuit's En Banc Crisis*, 2013 CARDOZO L. REV. DE NOVO 32, 63 (2013) ("The en banc process is a statutorily mandated procedure for resolving issues of exceptional importance, and has fallen into disuse by the Second Circuit.").

Federal Circuits Rate of En Banc Per 1,000 Appeals (2013–2022)												
Year	**DC**	**First**	**Second**	**Third**	**Fourth**	**Fifth**	**Sixth**	**Seventh**	**Eighth**	**Ninth**	**Tenth**	**Eleventh**
2013	0.000	0.634	0.000	0.514	0.395	1.479	0.973	1.356	0.681	1.092	0.478	0.000
2014	1.994	0.000	0.198	0.248	0.210	0.634	0.213	1.326	2.392	1.410	0.000	0.325
2015	1.778	0.665	0.000	0.615	0.644	0.672	0.447	1.025	0.678	1.685	0.511	0.327
2016	0.000	1.174	0.000	1.106	0.156	0.462	0.763	1.183	0.273	1.830	0.000	0.000
2017	2.103	0.000	0.000	0.000	0.889	0.141	0.436	1.435	2.705	1.532	0.539	0.328
2018	4.836	0.000	0.246	1.360	0.235	1.057	0.474	1.066	1.055	0.946	0.000	0.849
2019	3.304	0.745	0.000	0.571	0.886	0.570	0.236	0.763	1.422	0.891	0.569	0.556
2020	1.789	0.000	0.000	0.348	1.496	0.937	0.000	1.150	0.723	1.250	0.000	0.376
2021	1.139	1.857	0.245	0.760	1.183	1.089	1.293	0.792	0.340	0.843	0.625	0.208
2022	1.005	3.839	0.000	0.000	1.527	1.693	0.833	0.824	1.063	1.285	0.628	0.215
Average	**1.795**	**0.891**	**0.069**	**0.552**	**0.762**	**0.873**	**0.567**	**1.092**	**1.133**	**1.276**	**0.335**	**0.318**

Figure 7[69]

V. EN BANC PRACTICES IN THE TENTH CIRCUIT

We are confident that if one conducted a detailed, multiyear study of the cases for which en banc review is denied in the Tenth Circuit, some exceptionally important cases with strong petitions for en banc review would be uncovered. It would not be a leap of faith to imagine that some of the cases where en banc review was sought included particularly strong and well-drafted en banc petitions. Indeed, some of the same lawyers that obtained certiorari review from the Supreme Court in recent years have had far less luck (or no luck) in getting an en banc petition granted for the same cases in the Tenth Circuit.[70] We do not doubt for a moment the good faith and diligence of the judges on the Tenth Circuit, but we do doubt that any overriding commitment to norms like efficiency, civility, or collegiality justify the reality that matters of first impression and literal matters of life and death will essentially never be granted en banc review in the Tenth Circuit.

A careful survey of the types of cases that have been denied the procedures, additional briefing, and depth of review that en banc review entails is beyond the scope of this short Response. But we will flag two recent cases that help illustrate how the en banc best practices Article's tactical advice about navigating the Tenth Circuit's en banc protocol misses the bigger picture of en banc review in the circuit. The criteria set out by the Tenth Circuit's Rule 35—which states that, to merit an en banc rehearing, an issue must be (i) of exceptional public importance, or (ii) the result of

69. *See Caseload Statistics Data Tables*, *supra* note 28 (showing ten years of appellate case data expressed annually from 2012 to 2022 for all federal circuit courts); *see also id.* (enter "B-10" in "Search by table number" field; then select "ending September 30th" as the reporting period; individually select each year between 2013–2022; click "Apply").

70. *See supra* Figure 5.

a panel decision that conflicts with a decision of the Supreme Court or the Tenth Circuit—seem to play, at best, an attenuated role in predicting whether the Tenth Circuit will grant en banc review.[71] In this context, sufficiency for review under the rule is not even close to being a proxy for predicting whether such review will in fact occur.

In May 2022, for example, the Tenth Circuit denied a petition for en banc review in *United States v. Jones*.[72] That case concerned whether a federal definition of "controlled substance" could vary based on the venue state's definition.[73] In her dissent to that denial, Judge Veronica Rossman suggested the panel's decision conflicted with Supreme Court precedent, at least five Tenth Circuit decisions, and three other circuit court decisions.[74] One need not agree with Judge Rossman's reading of the cases to recognize that these kinds of issues might best be addressed through en banc review. At the very least, reasonable minds could disagree about the best interpretation of the law and whether the panel decision created a conflict. Solicitation of feedback on draft, prepublication versions of an opinion does little to ameliorate the sense that more deliberation could have aided the decision-making process in this case. There is value in the process of circulating opinions before publication, but this courtesy is not an adequate substitute for a robust en banc process over several months with additional briefing and oral argument. Moreover, if completely internal, private discussions among the active judges are to be viewed as a collegial substitute for the rancor of a full-court hearing (and the briefing that would invite such rancor), then one might still doubt the utility of the en banc best practices Article that prompted us to draft this Response.

Even more recently, the idea that the quality of an en banc petition's drafting is predictive or perhaps even relevant to the granting of en banc review in the Tenth Circuit was further amplified. In March 2024, the circuit heard *United States v. Hohn*[75] en banc. It was the only case the circuit took en banc that year. But the case arrived before the en banc court without a high-quality petition, or any petition at all. The circuit sua sponte ordered en banc review in *Hohn*—before the panel had issued an opinion or heard oral arguments in the case.[76] Extremely rare en banc rates might lead one to speculate that a perfectly crafted petition for rehearing is a necessary element of obtaining en banc review. By this logic, even if filing a high-quality petition will often not be sufficient to get a case en banc, then it is certainly a necessary prerequisite. But as *Hohn* illustrates, the substance or quality of an en banc petition is not only not sufficient but it is also not necessary for en banc review.[77] If in any given year en banc

71. 10TH CIR. R. 35.1(A).
72. Order at 1–2, United States v. Jones, No. 20-6112 (10th Cir. May 9, 2022).
73. *See id.* at 3 (Rossman, J., dissenting).
74. *Id.* at 9–12.
75. Order at 1–2, United States v. Hohn, No. 22-3009 (10th Cir. Jan. 31, 2024) (conveying the issues that the parties must address at the *en banc* hearing).
76. *Id.*
77. *See* United States v. Hohn, 123 F.4th 1084, 1091–92 (10th Cir. 2024).

review might be *more* likely when one has not even requested it, then it seems that the Tenth Circuit might be operating less from the vantage point of evaluating the quality of en banc petitions with precision, and more with a sense of confidence that they know it when they see it.

CONCLUSION

The *Denver Law Review* published what on its face appears to be a valuable piece containing practice pointers for obtaining en banc review in the Tenth Circuit.[78] And we appreciate that the authors are avoiding what they call the normative questions about whether there should be "increased or decreased use of the en banc tool."[79] The Article claims that it is limiting itself to the stylistic question of "how to" do an en banc petition well.[80] But we think that this advice misses the appellate forest for the trees.

The agnosticism of the authors—two of whom are Tenth Circuit judges—regarding the rarity of en banc review within their own court is confusing. The Article reads as though the authors are telling readers that in the "eyes of the law," this kind of review is so extraordinary as to necessarily be rare. But of course, the law does not have eyes and the authors themselves (with their judicial colleagues) decide the rules and procedures for the Tenth Circuit. En banc review need not be uniquely rare or nonexistent in the Tenth Circuit, and the authors cannot fairly claim that the rarity of en banc review is due to the lacking quality of en banc petitions filed with the court. Instead, the Article concludes that litigators should only rarely seek en banc review *because* the court infrequently grants it.[81] This conflates the cause of the rarity with advice to avoid such review.

The rates of en banc review across federal circuits leads us to a different conclusion. We think the Tenth Circuit should reflect on the numbers in this Response, take note of the fact that it is a national outlier, and consider whether a less frugal approach to en banc review may better serve the circuit's litigants. In 1972, Justice Potter-Stewart famously quipped that death sentences were a bit like being struck by lightning because they were so rare and unpredictable. The rate of en banc review in the Tenth Circuit is considerably lower than the rate of death sentencing in 1972. If en banc review in the Tenth Circuit becomes more of a practical possibility and less of a lightning strike, then the practice pointers for en banc petitions published in the *Denver Law Review* will be of greater value to lawyers engaged in appellate practice before the Tenth Circuit—and it is likely that the quality of en banc petitions would even improve. On the other hand, if the circuit wants to prioritize informal processes, then perhaps the court could consider publishing guidance on these practices and or

78. Baldock, Carson, & Gallegos, *supra* note 20, at 327–30.
79. *Id.* at 327.
80. *Id.*
81. *Id.* at 330 (The authors quip that with "all the reasons stacked against granting en banc review," based on the "numbers," an en banc petition "will not fare well.").

amending their rules to provide transparency on exactly how the practices work and how litigants might best avail themselves of these informal processes.

THE TENTH CIRCUIT'S BLUEPRINT FOR MINIMIZING EN BANC REHEARINGS

STEVEN M. FOSTER, JR.* & ANTHONY R. GUTTMAN**

ABSTRACT***

The Tenth Circuit is known for two things: its collegiality and its downward trend of en banc rehearings. Recognizing this trend, two Tenth Circuit judges recently outlined in the *Denver Law Review* "best practices" for submitting en banc petitions. In response, some scholars propose that this practitioner's guide is not worth the read because of the larger problem at hand. Namely, they predict that even with better petitions, the Tenth Circuit will remain unwilling to rehear cases en banc, thereby decreasing intracircuit uniformity. But this prediction overlooks key factors driving the trend.

This Response accounts for one contributing factor—collegiality—causing the Tenth Circuit to rehear fewer cases and explains why this is desirable practice. To get there, this Response starts by tracing how en banc review emerged as a last-resort measure to resolve intracircuit conflict. It then discusses how collegiality plays a critical role in appellate review and the rehearing process. This Response concludes by explaining how the Tenth Circuit's informal procedures, fostered by its collegial spirit, likewise ensure precedential uniformity while minimizing the need to go en banc.

TABLE OF CONTENTS

* Steven Foster is an Honors JAG attorney at the Office of the Chief Counsel for the U.S. Army Corps of Engineers in Washington, D.C. He served as a judicial law clerk for the U.S. District Court for the District of New Mexico and will later serve as a judicial law clerk for the U.S. Court of Appeals for the Tenth Circuit. B.A., Virginia Military Institute; J.D., University of Chicago.

** Anthony Guttman is an associate at Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C. in Washington, D.C. He served as a judicial law clerk for the U.S. Court of Appeals for the Tenth Circuit and the U.S. Court of Appeals for the Sixth Circuit. B.S.B.A., University of Nevada, Las Vegas; J.D., University of Chicago.

*** This Response reflects the personal views of the authors and does not necessarily represent the views of the United States government, the Department of Defense, or its components. The authors would like to extend a special thanks to Clerk of Court Chris Wolpert for his valuable insights on Tenth Circuit practice. The authors also thank Grant Strobl, Douglas Maggs, William Harren, and the *Denver Law Review* for helpful comments and suggestions.

INTRODUCTION

In the last decade, the Tenth Circuit has become infamous for its lack of en banc rehearings, a process that provides all active judges within a circuit the opportunity to collectively overrule a three-judge panel's ruling.[1] Compared to other circuits over the last decade, the Tenth Circuit's en banc rates have dwindled to about one rehearing per year—if that.[2] Today's scholarship attempts to diagnose the causes and effects, as well as the normative value, of this phenomenon.[3]

Contributing to the conversation, Tenth Circuit Judges Bobby R. Baldock and Joel M. Carson III, along with a former Tenth Circuit clerk, recently published a best-practices guide in the *Denver Law Review*.[4] From writing tips, to common pitfalls, to considerations on whether to request en banc review in the first place, the authors attempt to "create awareness about what types of cases might be suitable for en banc review in the Tenth Circuit and how to best present a petition to the court."[5] It is safe to say that this Article may soon become every appellate litigant's one-stop-shop resource for submitting en banc petitions in the Tenth Circuit.

But some disagree. For example, Professor Justin Marceau, Wiley Kersh, and Michael Kilbourn argue that this resource will not move the needle for petitioners because the Tenth Circuit will still refuse to rehear cases en banc. In their estimation, "The Tenth Circuit has uniquely, almost without explanation, and arguably to the detriment of litigants across a vast portion of the United States, virtually eliminated the prospect of a formal layer of judicial review that ensures doctrinal coherence and consistency."[6] This diagnosis, however, misconstrues the causes and effects of this downward trend.[7] Importantly, other considerations play a role in the Tenth Circuit's low en banc rate.

---

1. Tenth Circuit litigants may request an en banc rehearing for two reasons: "(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." FED. R. APP. P. 35(a); *see also* 10TH CIR. R. 35.1(A).

2. Wiley Kersh, Michael Kilbourn, & Justin Marceau, *Dwindling Appeals and Nonexistent En Banc Review in the Tenth Circuit*, 102 DENV. L. REV. 297, 308 (2025). Some of the Tenth Circuit's sister courts of appeals have consistently reheard comparatively more en bancs every year over the past decade. *Id.* at 308. The Ninth Circuit, for instance, reheard twenty-one cases en banc in 2016, while the Tenth Circuit reheard zero. *Id.* at 311.

3. *See, e.g.*, Alexandra Sadinsky, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 FORDHAM L. REV. 2001, 2001 (2014); Sarah J. Berkus, *A Critique and Comparison of En Banc Review in the Tenth and D.C. Circuits and* United States v. Nacchio, 86 DENV. U. L. REV. 1069, 1069–70 (2009); Monroe G. McKay & John K. Kleinheksel, *The Decisional Process Within the Tenth Circuit—A Panoramic View of Its Internal Operations and Recent Innovations*, 33 WASHBURN L.J. 22, 35 (1993).

4. Bobby R. Baldock, Joel M. Carson III, & Bryston C. Gallegos, *Strategic Considerations for Going En Banc in the Tenth Circuit*, 100 DENV. L. REV. 325 (2023).

5. *Id.* at 327.

6. Kersh, Kilbourn, & Marceau, *supra* note 2, at 307.

7. Further, Judge Baldock and Judge Carson wrote their Article to increase the quality of en banc petitions they review on a routine basis. Their Article presupposes issues with current pleading practices, and incorporating their suggestions in theory would lead the Tenth Circuit to rehear more cases en banc. We do not further unpack this presumption in this Article.

This Response identifies collegiality as one reason why the Tenth Circuit rehears so few cases en banc and explains why this is desirable practice.[8] Collegiality—i.e., the willingness to work together effectively—helps reduce the need for en banc rehearings.[9] Part I begins by tracing the origins of en banc review as a last-resort measure to resolve intracircuit conflict. Part II then explains the importance and relevance of collegiality, a critical aspect of appellate judging. That background in mind, Part III details how the Tenth Circuit's informal procedures channel the court's collegiality to minimize en banc rehearings while achieving the same objective: resolving intracircuit conflict.[10]

I. THE ORIGINS OF EN BANC REVIEW

Congress first exercised its Article I power to "constitute Tribunals inferior to the supreme Court"[11] with the Judiciary Act of 1789.[12] This law created thirteen district courts situated within three "circuit courts" (Eastern, Middle, and Southern)—none of which originally had permanent judgeships.[13] Sitting twice a year, circuit courts exercised mostly original (not appellate) jurisdiction and issued rulings from three-judge panels usually consisting of two Supreme Court justices and the respective district judge.[14] While the Judiciary Act of 1869 eventually created one permanent judgeship for each circuit court, these "old circuit court panels never had a distinct identity because the judges sitting on the panels changed from session to session."[15]

That began to change with the Circuit Court of Appeals Act of 1891.[16] The Act created "circuit courts of appeals" that would hear only appeals from both district and circuit courts.[17] With the practice of "circuit riding"—once a major source of frustration for Supreme Court justices—becoming optional,[18] panels would now generally consist of two circuit

8. Importantly, this Response does not take a position on whether the Tenth Circuit should rehear cases en banc more than it currently does.

9. *See* MORGAN L.W. HAZELTON, RACHAEL K. HINKLE, & MICHAEL J. NELSON, THE ELEVATOR EFFECT 17 (2023); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1644–45, 1680 (2003).

10. This Response discusses two informal mechanisms, that when combined with the Tenth Circuit's collegial nature, contribute to a lower en banc rate. The authors recognize that there likely are other reasons why the Tenth Circuit has taken fewer en banc rehearings over the years.

11. U.S. CONST. art. I, § 8, cl. 9; David Engdahl, *Inferior Courts*, *in* THE HERITAGE GUIDE TO THE CONSTITUTION 157 (David F. Forte & Matthew Spalding eds., 2d ed. 2014).

12. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

13. RUSSELL R. WHEELER & CYNTHIA HARRISON, FED. JUD. CTR, CREATING THE FEDERAL JUDICIAL SYSTEM 6 (1989).

14. *Id.* at 6, 9; Engdahl, *supra* note 11, at 157 ("Three-judge circuit courts were the principal federal tribunals; they tried diversity cases and most federal crimes, heard cases removed from state courts, and could review most of the single-judge district courts' decisions.").

15. Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 222 (1999).

16. Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. 826 (1891).

17. George, *supra* note 15, at 224.

18. 28 U.S.C. § 42. To this day, this law allows Supreme Court justices to "circuit ride," which originally referred to the process by which Supreme Court justices rode horses across the country to

judges and a district judge.[19] It wasn't until 1911 that Congress fully abolished the old circuit courts and transferred circuit judges to the courts of appeals.[20] In contrast to the first half of our nation's history, these new appellate courts with permanent judgeships allowed the formation of more concrete circuit identities. With judges sticking around for longer than one case at a time, their relationships with their life-tenured colleagues solidified.[21] That consistency in turn allowed circuit judges to resolve issues more effectively while keeping a better account of the law in their respective circuit.[22]

This context teed up the Supreme Court's landmark 1941 opinion, *Textile Mills Securities Corp. v. Commissioner*.[23] There, the Court held that courts of appeals have inherent power to sit en banc.[24] Critical to the Court's holding was that the option to rehear cases results in "more effective judicial administration" by helping resolve intracircuit conflicts and promoting the finality of decisions.[25] Such a tool was especially important because the circuit courts of appeals were, and still are, the courts of last resort in the vast majority of cases.[26]

A few years later in 1948, Congress enacted 28 U.S.C. § 46(c), which granted appellate courts the authority to hear cases en banc and, in effect, amounted to a "legislative ratification of *Textile Mills*."[27] In 1953, the Supreme Court in *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*[28] held that § 46(c) affirmed a circuit's authority to "devise its own administrative machinery to provide the means whereby a majority may order such a[n en banc] hearing."[29] The Court cited its "general power to supervise the administration of justice in the federal courts" as its authority to "define [the] requirements [of en banc review] and insure their observance."[30]

---

join lower court panels. See WHEELER & HARRISON, *supra* note 13, at 9–10, for an interesting background of why "circuit riding" was frustrating.

19. WHEELER & HARRISON, *supra* note 13, at 24.

20. George, *supra* note 15, at 224.

21. *See id.*

22. *See id.* at 224–25.

23. 314 U.S. 326 (1941).

24. *Id.* at 333–35. The authors are unaware of any judge or scholar explicitly connecting this "inherent power" to rehear cases to Article III's vesting of the "judicial power of the United States . . . in one supreme Court, and *in such inferior Courts* as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1 (emphasis added).

25. *Textile Mills*, 314 U.S. at 334–35.

26. *Id.* at 335.

27. W. Pac. R.R. Corp. v. W. Pac. R.R. Co., 345 U.S. 247, 250–51 (1953). The Supreme Court has long interpreted the Supremacy Clause in Article VI to mean that "where Congress is silent, federal courts can establish procedures of their own, but that legislation regarding procedure" otherwise prevails. Engdahl, *supra* note 11, at 156. However, "if judges find a procedure enacted by Congress incompatible with the independent performance of their own constitutional duties, it would seem that they are bound by their oaths to disregard it." *Id.*

28. 345 U.S. 247 (1953).

29. *Id.* at 250.

30. *Id.* at 260.

Concurring in the judgment, however, Justice Frankfurter cautioned that rehearings "are not a healthy step in the judicial process" and "ought not to be deemed a normal procedure."[31] He posited that a rehearing is "an abuse of judicial energy," "results in needless delay," "arouses false hopes in defeated litigants and wastes their money," and "bespeak[s] serious defects in the work of the courts of appeals, an assumption which must be rejected."[32] Others have noted that, in addition to being costly and time consuming,[33] the rehearing process can be divisive and unpleasant.[34] For these reasons, many courts of appeals embrace Justice Frankfurter's wisdom by exercising their § 46(c) en banc discretion as a last resort.[35]

Implicit in Justice Frankfurter's parade of horribles is the fact that airing disagreements in such a public fashion comes at the expense of collegiality among judges.[36] In lieu of a formal en banc process, he recommended that courts use informal procedures that both require collegiality among judges and achieve the "ends" of en banc review.[37] Part II examines the importance of this judicial collegiality and how it relates to the en banc rehearing process.

II. COLLEGIALITY: A CRITICAL ASPECT OF APPELLATE JUDGING

Collegiality is essential to the functioning of any human institution.[38] This is particularly true for appellate courts.[39] Compared to larger groups, which encourage free riding, appellate judges decide cases in small groups.[40] Life-tenured appellate judges—especially following the Circuit Court of Appeals Act of 1891—generally work with each other for much

31. *Id.* at 270 (Frankfurter, J., concurring).
32. *Id.*
33. Deanell Reece Tacha, *The "C" Word: On Collegiality*, 56 OHIO ST. L.J. 585, 590 (1995).
34. Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373, 1376 (2021).
35. *See W. Pac. R.R. Corp.*, 345 U.S. at 270 (Frankfurter, J., concurring).
36. *See* Devins & Larsen, *supra* note 34, at 1376 & n.8 ("[S]ome circuits even tout their low en banc rate as illustrative of a collegial and apolitical culture."); *W. Pac. R.R. Corp.*, 345 U.S. at 271 (Frankfurter, J., concurring). Chief Judge Jon Newman explains that the Second Circuit generally refrains from hearing cases en banc because it is an inherently inefficient layer of appellate review imposing significant travel and preparation burdens on active judges; he expresses that it also poses a threat to a court's collegiality. Martin Flumenbaum & Brad S. Karp, *The Rarity of En Banc Review in the Second Circuit*, 256 N.Y. L.J. (2016).
37. *W. Pac. R.R. Corp.*, 345 U.S. at 271 (Frankfurter, J., concurring).
38. HAZELTON, HINKLE, & NELSON, *supra* note 9, at 18 ("We define collegiality as behavior by individuals that is intended to maintain relationships with colleagues. Collegiality, as we define it, does not require that co-workers to be friends or even like each other (though such bonds can't hurt). Rather, we are focused on actions intended to make interpersonal interactions better.").
39. *Id.* at 15–16.
40. *Id.* at 20; Robert Albanese & David D. van Fleet, *Rational Behavior in Groups: The Free-Riding Tendency*, 10 ACAD. MGMT. REV. 244, 246 (1985) ("Free-rider theory holds that rational individuals who are members of a large, potential group will not necessarily organize or act in their common interest. That is the free-rider paradox. The greater the number of potential group members, the less likely an individual or set of individuals will feel that the costs of organizing a group are justified by the benefits to be received. The larger the potential group, the greater the costs of organizing the group are likely to be. It would not be rational for an individual to bear these costs because the individual will receive the same relative share of the public good as will those who bear no costs of organization, assuming equal distribution of benefits. Thus it will be in each potential member's best interest to let someone else bear the costs of organization.").

longer than most other types of coworkers.[41] Circuit opinions often take center stage in the public's imagination, and breakdowns in collegiality can impact the public's perception of a court's legitimacy.[42] These factors thus raise the importance of judicial collegiality and decrease a circuit court's willingness to rehear cases en banc.[43]

Put this way, the absence of en banc rehearings is a feature—not a bug—of the Tenth Circuit.[44] Some bemoan the absence of en banc rehearings as an elimination of "the prospect of a formal layer of judicial review that ensures doctrinal coherence and consistency."[45] Missing from this line of argument, however, is any consideration of the above-mentioned reasons why a circuit court may seek to avoid rehearing cases in the first place. Collegiality is a key reason.[46]

While various technical definitions of collegiality exist, Judge Harry Edwards provides an excellent overview of this term in the legal context:

> When I speak of a collegial court, I do not mean that all judges are friends. And I do not mean that the members of the court never disagree on substantive issues. That would not be collegiality, but homogeneity or conformity, which would make for a decidedly unhealthy judiciary. Instead, what I mean is that judges have a common interest, as members of the judiciary, *in getting the law right*, and that, as a result, we are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect. Collegiality is a process that helps to create the conditions for principled agreement, by allowing all points of view to be aired and considered.[47]

Thus, collegiality as used here means the willingness to work together effectively in writing opinions and interpreting law. With that in mind, instead of parading disagreements to the public, the Tenth Circuit channels

---

41. HAZELTON, HINKLE, & NELSON, *supra* note 9, at 20.

42. *Id.* at 21; *see also* Devins & Larsen, *supra* note 34, at 1376.

43. Senator Amy Klobuchar posed a written question to then-nominee (now-Judge) Gregory Phillips to become a Tenth Circuit Judge: "Do you think that collegiality is an important element of the work of a Circuit Court? If so, how would you approach your work on the court, if confirmed?" He answered: "Yes. I would always strive to maintain cordial relations with fellow judges and staff. Throughout my career, I have seen for myself that the quality of work increases when decision-makers work together in a friendly, cooperative atmosphere." *Confirmation Hearings on Federal Appointments: Before the Comm. on the Judiciary*, 113th Cong. 945 (2013), https://www.congress.gov/113/chrg/CHRG-113shrg91101/CHRG-113shrg91101.pdf.

44. To be clear, collegiality is one among several factors that disincentivizes en banc rehearings, and those other factors will sometimes compel the need to rehear cases. Even the most collegial courts *must* rehear cases en banc from time to time. Furthermore, there are other distinct reasons *to go en banc*, as more fully explained in Judge Baldock, Judge Carson, and Mr. Gallegos's Article, but we do not explore those other reasons in detail here. *See generally* Baldock, Carson, & Gallegos, *supra* note 4.

45. Kersh, Kilbourn, & Marceau, *supra* note 2, at 307.

46. Former Tenth Circuit Judge Deanell Reece Tacha stated that "judicial collegiality enhances the quality of appellate decisionmaking." Tacha, *supra* note 33, at 586. Tenth Circuit Judge Michael Murphy has also explained that "a collegial court better manifests the bedrock principle upon which appellate courts rest: multiple minds are better than one." Michael R. Murphy, *Collegiality and Technology*, 2 J. APP. PRAC. & PROCESS 455, 456 (2000).

47. HAZELTON, HINKLE, & NELSON, *supra* note 9, at 17 (emphasis added).

its existing collegiality[48] to resolve those disagreements through more informal—and less public—measures.[49]

III. THE TENTH CIRCUIT'S INFORMAL ALTERNATIVES TO EN BANC REVIEW

Among the informal measures courts of appeals have at their disposal are internal procedures that "accomplish all that needs to be accomplished in the exercise of the discretionary power to sit en banc."[50] Before precedential opinions are published, for example, circuit courts now circulate drafts to their active members.[51] This process accomplishes the objective of en banc rehearings.[52] It acquaints all active judges on the court "with the proposed opinion that is coming down, so if they do have an opportunity to point out any conflict, or something of the kind, it may be done."[53]

Along those lines, the Tenth Circuit employs two informal procedures.[54] The first is what scholars and courts call a "mini" or "informal" en banc process.[55] Before filing a published opinion, "[d]raft opinions are circulated, and if a nonsitting judge comments on the substance of a proposed opinion, consideration is given to whether the case should be heard en banc."[56] In other words, judges can object to the outcome of a proposed

48. The collegiality of any circuit is difficult to prove with mathematical precision, but it does have a "know it when you feel it" sort of effect. Michael Karlik, *10th Circuit Conference Features Gorsuch, Discussions About 'Judicial Endeavor,'* COLO. POLS. (Sept. 11, 2003), https://www.coloradopolitics.com/courts/10th-circuit-conference-features-gorsuch-discussions-about-judicial-endeavor/article_7261be16-5026-11ee-bdc0-bf65f2c3426d.html (Judge Veronica S. Rossman noting Tenth Circuit's collegiality); Judge Richard E. N. Federico, Address at the Federal Bar Association Oklahoma City Chapter: Tenth Circuit Year in Review (Dec. 30, 2024) (stating that "[a]ll of us have an obligation to maintain collegiality and that culture of collegiality in the Circuit").

49. W. Pac. R.R. Corp. v. W. Pac. R.R. Co., 345 U.S. 247, 271 (1953) (Frankfurter, J., concurring).

50. *Id.* at 272.

51. *Id.* at 271.

52. *Id.*

53. *Id.* (quoting testimony from then-Chief Justice of the United States Court of Appeals for the District of Columbia, Duncan L. Groner); Judah I. Labovitz, *En Banc Procedure in the Federal Courts of Appeals*, 111 U. PA. L. REV. 220, 231 (1962) ("The purpose of en banc rehearings is not panel supervision but resolution of panel conflict.").

54. The Tenth Circuit's habit of resorting to informal procedures can be traced as far back as over sixty years ago. Labovitz, *supra* note 53, at 226–27 ("The rule of record [for hearing cases en banc] is apparently less important than the informal approach adopted by the Tenth Circuit judges. . . . There seems to be a certain attitude in the circuit that cases which deserve en banc consideration may be 'intuitively' discovered without resort to formal procedure.").

55. *See, e.g.*, 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, 715 n.3 (2009); Steven Bennett & Christine Pembroke, *Mini in Banc Proceedings: A Survey of Circuit Practices*, 34 CLEV. ST. L. REV. 531, 552 (1986); United States v. Parkes, 497 F.3d 220, 230 n.7 (2d Cir. 2007); Labovitz, *supra* note 53, at 222 ("The practice of circulating draft opinions enables the other judges to make an informed decision on the en banc question without extensive effort to become acquainted with the issues in the case. This practice has been criticized, however, primarily because it permits judges to whom the litigants were unable to argue their views to exert considerable influence on the disposition of a case.").

56. Labovitz, *supra* note 53, at 226.

draft sua sponte and use the given case as a vehicle to change circuit precedent upon a majority vote—without a full rehearing.[57]

Many times, the Tenth Circuit has used the mini en banc process to avoid the fanfare of full en banc rehearings. On at least thirty-one separate occasions since 1984,[58] the court has explained in footnotes that a unanimous vote via the mini en banc process resulted in clarifying or overruling conflicting precedent.[59] Thus, *before* a conflict arises "between panels"—which is the "dominant concern" that rehearings alleviate—the mini en banc process gives the court the ability to proactively avoid such problems. And that solution thereby obviates the future need to correct any conflicting circuit opinions.[60]

The second internal process the Tenth Circuit uses to avoid rehearings also comes from the collegial review process of circulating draft opinions to the full circuit. Circuit court judges circulate drafts to active judges who were not on the panel to exchange edits, recommendations, and comments before filing finished versions. Yet the Tenth Circuit does things uniquely.[61] Not only do panels circulate proposed opinions to the full court, but they do so in a way that is likely to garner the attention and assistance of the full court.[62] After a three-judge panel hears oral argument, one of the judges circulates a preliminary draft directly to the members of the panel.[63] Rather than apprising the full circuit of the back-and-forth of minor nits, substantive changes, and separate writings, the three-judge panel keeps all of this between themselves until an entire draft opinion is

57. *See, e.g.*, *Parkes*, 497 F.3d at 230 n.7; Labovitz, *supra* note 53, at 227 (noting that "cases which deserve en banc consideration may be 'intuitively' discovered without resort to formal procedure").

58. Importantly, the mini en banc mechanism is not used that often, but the Tenth Circuit does use it more often than some other circuits. *See* Sloan, *supra* note 55, at 727–28 (stating that the Tenth Circuit used the informal mechanism "twenty-nine times from 1984 to 2007"); TW Telecom Holdings Inc. v. Carolina Internet Ltd., 661 F.3d 495, 497 n.2 (10th Cir. 2011); United States v. Payne, 644 F.3d 1111, 1113 n.2 (10th Cir. 2011).

59. Bennett & Pembroke, *supra* note 55, at 552. And it is not clear whether merely a majority vote is needed to overrule prior precedent in this manner. It seems that all Tenth Circuit cases using the mini en banc process have had a unanimous agreement to overrule or clarify a case as a full court. *See, e.g.*, *TW Telecom Holdings Inc.*, 661 F.3d at 497 n.2 ("We have circulated this order to the en banc court, which unanimously agrees to overrule our prior [precedent.]"); *Payne*, 644 F.3d at 1113 n.2 (same); United States v. Goff, 314 F.3d 1248, 1249 n.1 (10th Cir. 2003) (same); United States v. Duncan, 242 F.3d 940, 947 n.10 (10th Cir. 2001) (same); Hale v. U.S. Dep't of Just., 2 F.3d 1055, 1058 n.2 (10th Cir. 1993) (same); Ambus v. Granite Bd. of Educ., 975 F.2d 1555, 1562 n.4 (10th Cir. 1992) (same), *modified on reh'g*, 995 F.2d 992 (10th Cir. 1993); Davis v. TXO Prod. Corp., 929 F.2d 1515, 1518 n.3 (10th Cir. 1991) (same); Amoco Prod. Co. v. Heimann, 904 F.2d 1405, 1414 n.8 (10th Cir. 1990) (same); United States v. Allen, 895 F.2d 1577, 1580 n.1 (10th Cir. 1990) (same); Reppy v. Dep't of Interior, 874 F.2d 728, 730 n.5 (10th Cir. 1989) (same); EEOC v. Gaddis, 733 F.2d 1373, 1377 n.3 (10th Cir. 1984) (same).

60. W. Pac. R.R. Corp. v. W. Pac. R.R. Co., 345 U.S. 247, 270 (1953) (Frankfurter, J., concurring).

61. A comparison between the courts of appeals' internal procedures reveals differences in how panel members and nonpanel members review drafts and file published opinions in each circuit. *See generally* JON O. NEWMAN & MARIN K. LEVY, WRITTEN AND UNWRITTEN: THE RULES, INTERNAL PROCEDURES, AND CUSTOMS OF THE UNITED STATES COURTS OF APPEALS 96–114 (2024).

62. *See, e.g.*, McKay & Kleinheksel, *supra* note 3, at 35.

63. *See id.*

finalized. If the panel, or the authoring judge, seeks to publish the opinion and make it precedential,[64] then the panel circulates the final proposed draft to all active judges in the circuit.[65]

The court's status as one of the most collegial courts in America only enhances its review process.[66] Members of the court "know each other well personally" and have "intense respect" for each other's "substantive differences of opinion."[67] With that collegiality in mind, Tenth Circuit judges "place a high premium on consistency within the circuit."[68] When a panel circulates a proposed opinion to the full circuit, "not surprisingly, judges consistently reserve their nonpanel comments for issues that are important to maintain consistency in circuit law or to guide district courts throughout the circuit."[69] This procedure, coupled with the Tenth Circuit's collegial relationships, "allows the court to reach full court consensus before the panel issues the opinion, sometimes saving the court from a formal en banc hearing after the opinion has been issued."[70] Put simply, collegiality helps prevent future inconsistencies in published opinions.

In sum, some scholars correlate the Tenth Circuit's low en banc rate with a low "willingness" to revisit three-judge panel cases as a full court.[71] But understanding what happens behind the bench reveals that there is more than meets the public eye. The Tenth Circuit works together to reduce the need for en banc rehearings by employing informal mechanisms for all Tenth Circuit judges to review drafts of precedential opinions before publication. Together, those mechanisms and the court's collegial nature accomplish "the most constructive way of resolving conflicts" by "avoid[ing] them" proactively, obviating the need for a full en banc rehearing.[72]

CONCLUSION

When the Supreme Court expounded the en banc power in *Western Pacific Railroad Corp.*, Justice Frankfurter warned that this new layer of review was "not a healthy step in the judicial process."[73] He emphasized that circuit courts can obviate the need for en banc rehearings by simply working together before filing an opinion to avoid a conflict after the fact. Keeping Justice Frankfurter's recommendation in mind, the Tenth Circuit achieves the same objectives of en banc rehearings by implementing informal procedures to avoid such rehearings altogether. This at the same

64. *Cf.* FED. R. APP. P. 32.1; 10TH CIR. R. 32.1.
65. McKay & Kleinheksel, *supra* note 3, at 35.
66. *See, e.g.*, Tacha, *supra* note 33, at 588 (stating that the Tenth Circuit is "a model of collegial decisionmaking").
67. *Id.* at 588–89.
68. *Id.* at 589–90.
69. *Id.* at 590.
70. *Id.*
71. Kersh, Kilbourn, & Marceau, *supra* note 2, at 308–10.
72. W. Pac. R.R. Corp. v. W. Pac. R.R. Co., 345 U.S. 247, 270 (1953) (Frankfurter, J., concurring).
73. *Id.*

time fosters the Circuit's collegial spirit. And in so doing, the Circuit serves as a model of collegial decision-making for all courts.