Court of Appeals Review of Agency Action: The Problem of En Banc Ties

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INTRODUCTION

When equally divided, a federal court of appeals sitting en banc generally reinstates the decision of the district court.¹ When an en banc court deadlocks in cases brought under statutes mandating direct court of appeals review of administrative agency action,² however, there is no district court decision to reinstate. Should the full court then reinstate the judgment of its three-judge panel or the judgment of the agency? En banc courts have chosen both paths,³

1. This practice has been followed in 58 of 59 en banc even divisions involving appeals from district courts. For an exhaustive list of all en banc ties in the courts of appeals through 1988, including both appeals from district courts and direct review of agency action, see *Petition for Limited Rehearing of Intervenor Automobile Importers of America, Inc., at A-1 to -4, Center for Auto Safety v. Thomas*, 856 F.2d 1557 (D.C. Cir. 1988) (No. 85-1515) [hereinafter *Petition*].

2. At least 38 provisions of the United States Code currently mandate direct court of appeals review of the actions of at least 20 administrative agencies and their officials. *See, e.g.*, 7 U.S.C. §§ 8(a), 9, 21(i)(4), 194(h), 1600, 2714(b)(2) (1988) (Department of Agriculture); 8 U.S.C. § 1105a(a) (1988) (Immigration and Naturalization Service); 12 U.S.C. § 2266(b) (1988) (Farm Credit Administration); 15 U.S.C. § 45(c) (1988) (Federal Trade Commission); 15 U.S.C. §§ 77i, 78y(a)(1), 79x, 80a-42, 80b-13 (1988) (Securities and Exchange Commission); 15 U.S.C. § 717r(b) (1988) (Department of Energy); 15 U.S.C. §§ 1394(a)(1), 2004(a) (1988) (Department of Transportation); 15 U.S.C. § 3416(a)(4) (1988) (Federal Energy Regulatory Commission); 19 U.S.C. § 81r(c) (1988) (Foreign Trade Zones Board); 20 U.S.C. §§ 1234g, 2464(b), 2834 (1988) (Department of Education); 21 U.S.C. § 371(f) (1988) (Food and Drug Administration); 28 U.S.C. § 2342(1) (1988) (Federal Communications Commission); 28 U.S.C. § 2342(2) (1988) (Department of Agriculture); 28 U.S.C. § 2342(3)(A) (1988) (Department of Transportation); 28 U.S.C. § 2342(3)(B) (1988) (Federal Maritime Commission); 28 U.S.C. 2342(4) (1988) (Atomic Energy Commission); 28 U.S.C. § 2342(5) (1988) (Interstate Commerce Commission); 28 U.S.C. 2342(6) (1988) (Department of Housing and Urban Development); 29 U.S.C. § 160(f) (1988) (National Labor Relations Board); 29 U.S.C. § 1578 (1988) (Department of Labor); 33 U.S.C. §§ 921(c), 1516 (1988) (Department of Labor); 42 U.S.C. § 300j-7(a) (1982) (Environmental Protection Agency); 42 U.S.C. § 2022(c)(2) (1982) (Environmental Protection Agency); 42 U.S.C. §§ 2239, 10139 (1982) (Department of Energy). A discussion of the policy considerations that may lead to the adoption of direct review statutes is found in Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 23-38 (1975). A fairly exhaustive list of direct review statutes as of 1957, including some which have since been repealed, appears in *Developments in the Law—Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 904 (1957).

3. *See, e.g.*, *Center for Auto Safety v. Thomas*, 806 F.2d 1071 (D.C. Cir. 1986) [hereinafter *Auto Safety I*] (overturning EPA regulations as contrary to statute), *aff'd on rehearing en banc*, 847 F.2d 843 (D.C. Cir. 1988) [hereinafter *Auto Safety II*] (panel decision left intact by court evenly divided on issue of standing), *rev'd on rehearing en banc*, 856 F.2d 1557 (D.C. Cir. 1988) (*per curiam*) [hereinafter *Auto Safety III*] (panel decision vacated and EPA regulations upheld without resolving standing issue).

but in six of seven cases, the en banc court has upheld the agency decision.⁴

This Note argues that this dominant practice is misguided. Because all decisions of a divided court carry *res judicata* but not *stare decisis* effect,⁵ petitioners' questions of law remain unresolved, but they are barred from relitigating the matter. This creates two problems. First, restoring the agency order in effect leaves the final determination of the dispute in the hands of the agency, an interested party, while denying the other party an opportunity for judicial review of the outcome. Second, it frustrates the intent of direct review statutes which are designed to ensure unusually easy, prompt, and final resolution of certain questions of law by federal courts of appeals. Petitioners are deprived of the final judicial ruling on the legality of agency action affecting their interests, to which they are statutorily entitled, and neither they, nor interested third parties, nor the agency itself receives a resolution of the legal issues on which to base their future conduct.

This Note analyzes the legal problems surrounding a divided en banc court's review of agency action and proposes a solution that would permit circuit courts to provide litigants with final judgments on the merits in all cases. Part I analyzes the existing Supreme Court practice and case law resolving equal divisions. It argues that lower courts have misconstrued the scope of Supreme Court precedent in this area and that lower courts are not in fact bound by doctrines they now mechanically apply. Part II examines the history and the policy underpinnings of en banc review in order to resolve the thorny question of the relationship between panel and en banc subject matter jurisdiction. It suggests that viewing en banc jurisdiction as an appeal *sua sponte* from the panel's decision, rather than as a replacement of that decision, offers the best path out of this conceptual morass. Part III addresses the congressional policies protected by statutes mandating direct, prompt, and final circuit court review of agency action. It argues that these interests deserve priority in any scheme to resolve the procedural uncertainties facing divided en banc courts. Part IV demonstrates that, given the limited subject matter jurisdiction of the federal courts, completely resolving jurisdictional uncertainties will require clarification by statute. It proposes a legislative solution mandating that where there is no

4. Seven out of 66 evenly divided en banc decisions prior to 1989 involved direct agency review statutes. Only in *Auto Safety II* did the en banc court reverse the agency by reinstating the panel opinion, but the court soon reversed this disposition in *Auto Safety III*. See *infra* notes 58-60 and accompanying text. In the other six decisions the en banc court did not reinstate the panel opinion, thus leaving the agency's decision as the final word. *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383 (1st Cir. 1986); *NLRB v. Vitronic Div. of Penn Corp.*, 630 F.2d 561 (8th Cir. 1979); *Packing House and Indus. Serv. v. NLRB*, 590 F.2d 688 (8th Cir. 1978); *I.T.O. Corp. of Baltimore v. Benefits Review Bd.*, 542 F.2d 903 (4th Cir. 1976), *cert. denied*, 433 U.S. 908 (1977); *Columbia Nat'l Bank of Washington v. District of Columbia*, 195 F.2d 942 (D.C. Cir. 1952); *Citizens Bank of Washington v. District of Columbia*, 195 F.2d 946 (D.C. Cir. 1952) (*per curiam*).

5. *Res judicata* binds the parties to the judgment, who are thereby precluded from relitigating that issue in any intermediate or district court, although they may appeal to the Supreme Court. For all other parties the judgment lacks precedential authority even in the circuit in which it was issued. See Reynolds & Young, *Equal Divisions in the Supreme Court: History, Problems, and Proposals*, 62 N.C.L. REV. 29, 35 (1983).

district court decision below, the three-judge court of appeals panel decision must be left intact unless a majority of the en banc court agrees to overrule it.

I. SUPREME COURT PRACTICE WHEN EVENLY DIVIDED

Federal courts of appeals sitting en banc generally dispose of cases that evenly divide the judges by imitating Supreme Court practice. The imitators, however, have been guided by a false analogy. They have adopted a practice which is appropriate for Supreme Court appellate jurisdiction, but inappropriate to the exercise of circuit court original jurisdiction.

A. Supreme Court Appellate Jurisdiction

When the Supreme Court divides evenly while reviewing a judgment or order of a lower court, its decision: 1) affirms the decision or order of the court below; 2) binds the parties under principles of *res judicata*;⁶ and 3) is not regarded as precedent.⁷ The roots of these doctrines lie in principles of majority rule and respect for the actions of lower courts inherited from English common law.⁸

The Supreme Court has an extensive history of coping with equal divisions while exercising its appellate jurisdiction. *Hayburn's Case*,⁹ the Supreme Court's first constitutional decision, was also its first tie vote.¹⁰ In the exercise of its appellate jurisdiction, the Supreme Court has handed down tie votes more than one hundred times¹¹ and has developed clear doctrines on the subject. In 1825 the Court first expressly articulated the rule that an equal division requires affirmance of the court decision under review.¹² One year later, in *Etting v. Bank of the United States*, Chief Justice Marshall reiterated this holding: "[T]he principles of law which have been argued cannot be settled; but the judgment is affirmed, the Court being divided in opinion upon it."¹³

6. *But see* Neil v. Biggers, 409 U.S. 188, 192 (1972) (affirmance of state supreme court ruling by equally divided United States Supreme Court does not mean case "actually adjudicated" by Supreme Court for purposes of 28 U.S.C. § 2244(c) (1988) so as to bar habeas corpus proceedings on same issue in federal district court).

7. Potential litigants will of course be able to predict how the same court will dispose of the same issue in the future, which means that affirmance by an equally divided court can in fact both change the law and influence future decision making. Theoretical justification for a lack of precedential effect of such judgments remains "murky." Reynolds & Young, *supra* note 5, at 34.

8. A discussion of the effect of equally divided cases in English law appears in app., 74 U.S. (7 Wall.) 753, 755 (1868) (essay by Horace Wallace).

9. 2 U.S. (2 Dall.) 409 (1792).

10. *See* Reynolds & Young, *supra* note 5, at 30; *see also* Currie, *The Constitution in the Supreme Court: 1789-1801*, 48 U. CHI. L. REV. 819, 824 (1981) (discovering this hitherto unknown split through contemporary newspaper accounts).

11. *See* Reynolds & Young, *supra* note 5, at 30.

12. *The Antelope*, 23 U.S. (10 Wheat.) 66, 126-27 (1825).

13. 24 U.S. (11 Wheat.) 59, 78 (1826).

Two issues remained unresolved after these early cases: 1) whether the parties could relitigate their unsettled questions of law at a later date and 2) whether the Court's divided opinions carried formal weight as precedent. In 1868, in *Durant v. Essex Co.*, the Court addressed both questions.¹⁴ The appellant Durant had earlier appealed the dismissal of his claim in a United States circuit court to the Supreme Court, where the dismissal had been affirmed by an equally divided Court. Durant refiled in the circuit court and appealed a second time to the Supreme Court. Durant claimed that the earlier affirmance lacked res judicata effect and that the Supreme Court had violated his rights under its jurisdictional statute. He argued that since his case fell within the then mandatory jurisdiction over which the Supreme Court was "required to . . . determine such appeals,"¹⁵ the Court had no right in effect to abdicate its jurisdiction to the circuit court, but rather had to make its own determination in his case.

The Court unanimously affirmed its own earlier affirmance of the circuit court dismissal, holding that a judgment of affirmance rendered by an equally divided Supreme Court is a "final determination" of an appeal and consequently carries full res judicata effect.¹⁶ As Justice Field wrote, "the judgment of affirmance was the judgment of the entire [C]ourt."¹⁷ However, the judgment has no effect as precedent; the fact that the Court was evenly divided "prevents the decision from becoming an authority for other cases of like character."¹⁸

Durant also provided the first detailed analysis of the rationale for affirmance of a lower court decision by an equally divided appellate court:

It has long been the doctrine in this country and in England, where courts consist of several members, that no affirmative action can be had in a cause where the judges are equally divided in opinion as to the judgment to be rendered or order to be made. . . . If the affirmative action sought is to set aside or modify an existing judgment or order, the division operates as a denial of the application, and the judgment, or order, stands in full force.¹⁹

Absent a statutory mandate to hear the appeal, the logic of this analysis could just as easily have led the Court to relinquish its jurisdiction and dismiss the appeal. "The legal effect would be the same if the appeal, or writ of error, were dismissed."²⁰ But the Supreme Court, by the action of affirming, contributes finality to the lower court's decision, and discharges its statutory responsi-

14. 74 U.S. (7 Wall.) 107 (1868).

15. *Id.* at 108.

16. *Id.* at 109.

17. *Id.* at 110.

18. *Id.* at 113. For a discussion of what aspects of a case become precedent, see Goodhart, *On Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930).

19. 74 U.S. (7 Wall.) at 110.

20. *Id.* at 112.

bility to hear the appeal. "It is, indeed, the settled practice in such case [sic] to enter a judgment of affirmance; but this is only the *most convenient mode of expressing* the fact that the cause is *finally disposed of* in conformity with the action of the court below, and that that court can proceed to enforce its judgment."²¹ The affirmance of the lower court judgment combined with the Supreme Court's declaration of finality serves that Court's special role in bringing disputes to an ultimate conclusion.

B. *The Supreme Court's Original Jurisdiction*

The *Durant* Court noted that its holding would not apply when it sat under its original jurisdiction. When a lower court has already rendered judgment, the Supreme Court's policy interest in respecting lower court decisions not found to be in error combines with its role in providing finality to make the *Durant* approach workable. When the Court sits under its original jurisdiction and there is no decision below, inaction cannot resolve the dispute, and *Durant* indicated that courts must develop appropriate practices to resolve such deadlocks. "[I]n the case of the demurrer, the *effect of a division would depend, we think, upon the rules of practice established* in such cases."²²

As an example, *Durant* cites the practice used in original jurisdiction cases in England: "If affirmative action is necessary for the further progress of the cause, the division operates as a stay of proceedings."²³ The Supreme Court itself followed this course in *Virginia v. West Virginia*,²⁴ an original jurisdiction case argued the term before *Durant*. The Justices were evenly divided at conference, so the proceedings were stayed, and an opinion was not issued until two years later when the addition of a new Justice to the Court broke the deadlock.

However, the Supreme Court, in *In re Disbarment of Isserman*,²⁵ took affirmative action when evenly divided in an original jurisdiction case because the "rules of practice" were different. Before 1954, the Supreme Court's own rules provided that when a member of the Supreme Court bar was disbarred in a state proceeding, he would be suspended and required to show cause why he should not also be removed from the Supreme Court bar.²⁶ In other words, the Court's own local rule of practice placed the burden for preventing an action (disbarment) on the party before the Court. On the merits, the Court split four to four, and Isserman was disbarred on this tie vote.²⁷

21. *Id.* (emphasis added).

22. *Id.* (emphasis added).

23. *Id.* at 110.

24. 78 U.S. (11 Wall.) 39 (1870).

25. 345 U.S. 286 (1953), *vacated on reh'g*, 348 U.S. 1 (1954).

26. Sup. Ct. R. 2(5), 345 U.S. 286, 287 (1953).

27. *In Re Disbarment of Isserman*, 345 U.S. at 286. One year later the Court changed its rules to require a majority vote for disbarment. Isserman was granted a rehearing, which was decided in his favor. *In Re*

II. EN BANC COURT OF APPEALS PRACTICE WHEN EVENLY DIVIDED

Before 1940, the Supreme Court alone among federal courts faced the problem of equal division. With the invention of the en banc procedure at the federal court of appeals level, ties became possible for the first time in those intermediate courts. Since 1940, en banc circuit courts, when evenly divided, generally have mechanically applied the *Durant* rules to uphold judgments below,²⁸ although neither case law²⁹ nor the Federal Rules of Appellate Procedure require them to do so. This customary disposition leaves two important issues faced by en banc courts unanswered.

First, given the possibility that there may be both a judgment of a three-judge panel *and* a judgment of a district court or agency below, divided en banc courts of appeals have not resolved the question of *which* judgment below to uphold in order to apply correctly the *Durant* approach. Resolving this question requires a determination of whether en banc rehearings are appeals from the panel, which would suggest upholding the panel judgment, or substitutes for the panel, which would suggest upholding the district court or agency judgment. Examining the history and purposes of en banc review will help to clarify this issue.

Second, the courts of appeals have overlooked the fact that the Supreme Court expressly limited the holding of *Durant* to its own appellate jurisdiction.³⁰ Application of the *Durant* rules has become rote. Intermediate courts have not explored the issue of whether it even makes sense to apply these rules, either in routine appellate jurisdiction cases or, more importantly, in those cases in which the circuit court sits in original jurisdiction over petitioners seeking direct review of agency action.

A. *The Origins and Purposes of En Banc Jurisdiction*

The historical development of en banc review shows that it did not develop in order to substitute the true opinion of the circuit for that of the panel decision, but rather to provide for more effective judicial administration.

Disbarment of Isserman, 348 U.S. at 1.

28. Evenly divided en banc courts of appeals affirmed the judgment or order of the district court or executive branch agency below in 65 of 66 cases prior to 1989. See *Petition*, *supra* note 1, at A-1 to -4.

29. *Carmichael v. Eberle*, 177 U.S. 63 (1900), has been cited for the proposition that the Supreme Court holds lower courts to the requirement that they affirm the order below when evenly divided. See *Petition*, *supra* note 1, at A-5. However, *Carmichael* merely acknowledges this to be the practice of the Supreme Court of the Territory of New Mexico; it in no way requires the practice.

30. See *supra* notes 22-23 and accompanying text.

1. *Judicial Invention*

The en banc jurisdiction of the United States Courts of Appeals was not created deliberately as part of a coherent theory of Article III jurisprudence; its existence owes more to historical accident. When, in the Evarts Act of 1891, Congress first introduced permanent federal intermediate courts, no distinction between panels and a full circuit court existed.³¹ Section 2 of the Evarts Act stated: "[A] circuit court of appeals . . . shall consist of three judges."³² Ties were impossible because decisions could only be issued by full courts of three. When a vacancy arose, the statute authorized the justice of the Supreme Court assigned to that circuit, or a district judge within that circuit designated by the court itself, to sit on the appellate panel to bring it up to three judges.³³

The first distinction between three-judge panels and the total number of circuit judges in a circuit arose in 1911. Section 117 of the Judicial Code of 1911 incorporated the substance of section 2 of the Evarts Act, including its language about a three-judge court of appeals.³⁴ But a new section 118 provided for four circuit judges in the Second, Seventh, and Eighth Circuits, two in the Fourth Circuit, and three in each of the others.³⁵ As the Supreme Court has pointed out, "[a]n anomalous situation was presented if § 117 were to be taken at that juncture as meaning that the circuit court of appeals would continue to be composed of only three, in face of the fact that there were more than three circuit judges in some circuits."³⁶

The potential problems lay dormant from 1912 until 1940. During that time no circuit courts sat en banc; all appellate cases were heard by three-judge panels. In 1938 in *Lang's Estate v. Commissioner*, a Ninth Circuit panel explicitly interpreted section 117 to mean that a circuit containing more than three judges had no power to convene itself en banc.³⁷ A conflict in the circuits emerged over this issue in 1940. In *Commissioner v. Textile Mills Securities Corp.*,³⁸ all five judges in the Third Circuit heard arguments and voted on the case. All five agreed that they possessed the authority to sit en banc. The Supreme Court granted certiorari and affirmed.

The Supreme Court in *Textile Mills* acknowledged that the current statutes were ambiguous, but since the matter was "not foreclosed," policy considerations could "aid in tipping the scales in favor of the more practicable interpre-

31. Ch. 517, §§ 2-3, 26 Stat. 826 (1891) (codified as amended at 28 U.S.C. §§ 41, 44 (1982)).

32. *Id.* at § 2.

33. *Id.* at § 3.

34. Act of March 3, 1911, ch. 6 § 117, 36 Stat. 1131 (codified as amended at 28 U.S.C. § 212, 297 (Supp. V 1987)).

35. *Id.* § 118.

36. *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326, 329 (1941) (footnote omitted).

37. 97 F.2d 867 (9th Cir. 1938).

38. 117 F.2d 62 (3d Cir. 1940), *aff'd*, 314 U.S. 326 (1941).

tation."³⁹ En banc review created a mechanism to protect doctrinal coherence within the circuits by allowing the full circuit courts to take up and resolve intracircuit disputes themselves. The Supreme Court, given the realities of its limited docket, could not hope to address all such disputes. It henceforth adopted a policy that an intra-circuit dispute would not be sufficient reason for granting certiorari.⁴⁰ This freed the Supreme Court to devote its limited resources elsewhere. The intended result was "more effective judicial administration."⁴¹

2. Congressional Ratification and the Development of En Banc Rules

In 1948 Congress codified the *Textile Mills* decision:

Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . unless a hearing or rehearing before the court in banc [sic] is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc [sic] shall consist of all circuit judges in regular active service.⁴²

But the language was permissive, and in *Western Pacific Railroad Corporation v. Western Pacific Railroad Company*, decided in 1953, the Supreme Court held that this statute did not grant litigants a right of appeal to the en banc court.⁴³ Each circuit could establish its own procedure for exercise of that power, but they were required to provide litigants a procedural opportunity to "suggest" rehearing en banc.⁴⁴

The *Western Pacific* decision, by granting each circuit discretion to formulate its own en banc procedures, resulted in nonuniform local rules. This nonuniformity was reduced by the adoption in 1967 of Rule 35 of the Federal Rules of Appellate Procedure, which set guidelines for when a case will be heard en banc: "Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance."⁴⁵ The meaning of "exceptional

39. *Textile Mills*, 314 U.S. at 335. The Supreme Court noted that the Judicial Conference of Senior Circuit Judges (the forerunner of the Judicial Conference of the United States) had recommended that appellate courts be permitted to sit en banc. Writing for the Court, Justice Douglas also took note of a bill attempting to enact that recommendation, which at the time he wrote the opinion had passed the House, although it subsequently failed to pass the Senate. Following normal rules of statutory construction, *Textile Mills* might have concluded that failed congressional attempts to authorize en banc jurisdiction by statute strongly implied that en banc courts were not authorized under existing statutes.

40. See R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* 275-76 (5th ed. 1978).

41. *Textile Mills*, 314 U.S. at 335.

42. 28 U.S.C. § 46(c) (1988); see *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 250-51 (1953) (28 U.S.C. § 46(c) "is but a legislative ratification" of *Textile Mills*).

43. *Western Pacific*, 345 U.S. at 250.

44. *Id.* at 267-68.

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

importance" remains controversial, but generally seems to be interpreted to include issues which recur in the circuit with unusual frequency and affect a large number of litigants there—for example, administrative law standing questions in the D.C. Circuit.⁴⁶ In summary, the history of en banc rules which culminated in Federal Rule of Appellate Procedure 35 also suggests that en banc review exists primarily to supplement the appellate jurisdiction of the Supreme Court by resolving legal issues or conflicts of opinion which are of great importance within a circuit but do not rise to the level of national importance which would justify granting certiorari.⁴⁷

3. *Mini En Bancs*

Congress approved "mini en bancs" by statute in 1978, authorizing a panel of as many as nine judges to exercise the en banc power for the full circuit court. The mini en banc procedure developed as a result of administrative difficulties with full courts sitting en banc in the larger circuits.⁴⁸ In 1978 Congress instead authorized "mini en banc" procedures by which any circuit with more than fifteen active judges may perform its en banc function with "such number of members of its en banc courts as may be prescribed by rule of the court of appeals."⁴⁹

A mini en banc will not always decide a case as the full en banc court would. Nor will two mini en bancs in the same circuit necessarily decide the same case the same way. These facts undermine the notion that an en banc will provide the "true" opinion of the circuit by stepping in and substituting its opinion for that of the panel. Congress' approval of mini en bancs thus shows that en banc review itself should be viewed as just another tier of appellate review.

B. *Equally Divided En Banc Courts in Appellate Jurisdiction*

When sitting in review of a federal district court, the en banc court exercises appellate jurisdiction. However, when its panel has reached a judgment, a mechanical application of the *Durant* rule alone cannot resolve a threshold

46. One-fourth of all federal agency review cases reach the D.C. Circuit, far more than any other circuit. This is due largely to statutory venue provisions. See Robinson, *The D.C. Circuit: An Era of Change*, 55 GEO. WASH. L. REV. 715, 716 (1987); see also P. Schuck & D. Elliot, To the Chevron Station: An Empirical Study of Federal Administrative Law 22-23 & nn. 34-35 (Sept. 18, 1989) (Report to the Administrative Conference of the United States) (continued high concentration of administrative cases in D.C. Circuit).

47. For a discussion of the limited role certiorari plays in resolving administrative law questions, see generally Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987).

48. See Bennet & Pembroke, "Mini" In Banc Proceedings: A Survey of Circuit Practices, 34 CLEV. ST. L. REV. 531, 541-44 (1986).

49. Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1633 (incorporated by reference at 28 U.S.C. § 46(c) (1982)).

question: whether it is the judgment of the panel or the judgment of the district court that should be reinstated. Under the *Durant* rule any prior judgment "stands in full force," but under these circumstances, both judgments may continue to exist, although they may contradict one another.⁵⁰

In the early years of en banc procedure, courts did not explicitly vacate panel decisions when they voted for rehearing en banc. Whether granting rehearing en banc should *automatically* vacate a panel decision turns upon the theoretical question of whether the en banc court's jurisdiction should be understood as a substitute for or as an appeal from the panel's decision. This question has not yet been satisfactorily resolved.⁵¹

This issue first arose as a practical matter in 1969, in the Sixth Circuit case *United States v. Osborn*, in which the en banc court was divided equally both on the merits and on the effect of its equal division.⁵² Consequently, it ordered its decision held in abeyance. Rather than resolving the theoretical issue, the circuit adopted a local rule dictating that henceforth a grant of a rehearing en banc will vacate the panel opinion automatically.⁵³ Since that leaves only the district court judgment intact, mechanical application of the *Durant* rule leads to affirmance of that judgment.

Since 1969, all of the circuits have adopted comparable local rules declaring that a vote to rehear a case en banc automatically vacates the panel decision.⁵⁴ Of course, circuit courts are free to change or disregard their local rules at any time and occasionally have made exceptions in practice.⁵⁵ These local rules combined with the application of *Durant* have resolved the problem satisfactorily in cases involving an appeal from a district court opinion. Litigants receive a judicial judgment, the district court opinion. They are denied only an appeal, not judicial hearing in the first instance. But both the local rules vacating panel decisions and the application of *Durant* become completely inappropriate when there is no prior district court judgment to affirm.

50. *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 112 (1868).

51. For the argument that en banc jurisdiction should be understood to be appellate in nature, at least when circuit courts sit in original jurisdiction, see *supra* notes 31-49 and accompanying text.

52. 415 F.2d 1021 (6th Cir. 1969), *cert. denied*, 396 U.S. 1015 (1970).

53. 6TH CIR. R. 14(a).

54. Local rules concerning the en banc process are gathered in McFeeley, *En Banc Proceedings in the United States Courts of Appeals*, 24 IDAHO L. REV. 255, 263-72 (1987-88).

55. The D.C. Circuit has twice reinstated vacated three-judge panel decisions when evenly divided en banc. Since these particular panel decisions did not reverse the district court judgments below, in effect the divided en banc court affirmed both the district court and panel judgments. See *Bullock v. Washington*, 468 F.2d 1096 (D.C. Cir. 1972) (en banc); *Verkouteren v. District of Columbia*, 433 F.2d 461 (D.C. Cir. 1970) (en banc). The Eleventh Circuit disregarded its own local rules in *Rainey v. Beech Aircraft Corp.*, 827 F.2d 1498 (11th Cir. 1987) (en banc) (affirming panel decision that reversed district court judgment).

C. Problematic Cases: Equally Divided En Banc Courts in Original Jurisdiction

When petitioners bring their cases directly to the circuit court under a statute mandating direct review of agency action, there is no district court opinion to uphold.⁵⁶ Since in these cases circuit courts exercise original jurisdiction, they stand unequivocally outside the reach of *Durant*, and are free to develop practices that best promote the policies of the jurisdictional statutes under which they operate.

Original circuit court jurisdiction to review agency action has a number of idiosyncratic features. Courts of appeals sitting under direct review statutes are generally precluded from making any determinations of fact. They cannot take evidence. There is no means by which parties can obtain discovery. The courts engage in what has traditionally been viewed as an appellate function: application of the law to an extant record. Yet at the same time, the essential characteristic of appellate jurisdiction is lacking: no judicial orders or judgments are under review. For this reason, the Supreme Court will not take certiorari before judgment in direct appeals court agency-review cases, because it could be argued that, as the first judicial tribunal to decide the case, the Court would be exercising original jurisdiction beyond its constitutionally permitted scope.⁵⁷

Until *Auto Safety II*,⁵⁸ however, the circuit courts simply failed to distinguish agency review from run-of-the-mill appellate cases. *Auto Safety II* involved an en banc rehearing of a case that had come to the D.C. Circuit Court under a direct review statute. On the same day, the same en banc court reheard an unrelated case that had originated in a district court.⁵⁹ In both cases the en banc court divided evenly. In the conventional appellate case the en banc court reinstated the district court judgment, while in *Auto Safety II* it reinstated the decision of its own three-judge panel. Thus, the en banc court apparently recognized the distinct jurisdictional posture of the two cases and decided that its panel, rather than the agency, served as a better proxy for the "missing" district court. Unfortunately, the clarity that had been briefly gained was lost when, after a new judge joined the court, the en banc court reversed its procedural disposition in *Auto Safety II*. The two paragraph per curiam opinion failed to cite any authority and stated simply that its earlier procedural disposition had

56. See *supra* note 2 for examples of direct review statutes.

57. The Supreme Court has never held that it has no jurisdiction in such cases, but it has stated that it "does not normally review orders of administrative agencies in the first instance." *Civil Aeronautics Bd. v. American Air Transp.*, 344 U.S. 4, 5 (1952).

58. 847 F.2d 843 (D.C. Cir. 1988).

59. *Hotel & Restaurant Employees Union, Local 25 v. Smith*, 804 F.2d 1256 (D.C. Cir. 1986), *vacated en banc*, 808 F.2d 847 (D.C. Cir. 1987) (per curiam), *reh'g en banc*, 846 F.2d 1499 (D.C. Cir. 1988) (reinstating district court decision).

not been "appropriate" because it constituted "affirmative action on the merits."⁶⁰

The complete reversal of the outcome in *Auto Safety III* might be explained by saying that the court simply reverted to its local rule of vacating its panel decision upon granting rehearing en banc. But by exercising its discretion to uphold the order of the agency, when the agency is also one of the parties to the litigation, the court has violated the fundamental principle that no party should be made "a judge in its own cause."⁶¹

Furthermore, the underlying question of the nature of en banc jurisdiction cannot be evaded by mechanical application of existing local rules. If the en banc court is understood to be a substitute for the panel, then it too is sitting in original jurisdiction. In such cases the *Durant* rules should not be applied, and the courts should develop practices which take into account the special interests protected by their original agency review power. If on the other hand the en banc court is understood to be sitting in appellate jurisdiction over its own panel, *Durant* may be applied, but the full court should uphold the decision of the only court below by reinstating its panel decision.

III. THE SPECIAL PROBLEMS RAISED BY DENIAL OF JUDICIAL REVIEW IN COURT OF APPEALS ORIGINAL JURISDICTION CASES

Local rules and judicial practices should not become obstacles to carrying out Congress' clearly expressed intent to provide quick and final resolution of legal disputes brought under direct review statutes. Yet current practice in evenly divided en banc agency review cases thwarts congressional policy.

A. Congressional Policy Favors Judicial Review of Agency Action

The legislative history of the most important statutes granting jurisdiction to review agency action evinces both a clear intent to provide, and strong policy justifications for, review of agency action by Article III courts. This presumption in favor of review is especially strong when direct court of appeals review statutes apply.

60. *Auto Safety III*, 856 F.2d 1557, 1558 (D.C. Cir. 1988)

61. THE FEDERALIST NO. 80, at 478 (A. Hamilton) (C. Rossiter ed. 1961) See also Currie & Goodman, *supra* note 2, at 11. While some might argue that every administrative proceeding involves decisionmaking by the agency, which is also a party with interests in the dispute, the difference is that agency adjudications and rulemakings are subject to later judicial review.

1. *Political Origins of Direct Court of Appeals Review Statutes*

The Interstate Commerce Act of 1887 (ICC Act)⁶² contained the first legislatively enacted procedure for the judicial review of administrative determinations. Before that time judicial review of the executive branch could be had only by means of extraordinary writs, such as the writ of mandamus sought in *Marbury v. Madison*.⁶³ The ICC Act's review provisions required a special court consisting of three district judges to conduct a trial de novo whenever private parties wanted to prevent enforcement of an ICC order. This procedure was cumbersome and plagued with problems, the most important being that "trial de novo encourage[d] judicial invasion of the agency's policy-making functions."⁶⁴

When, in 1914, Congress debated the Act which created the Federal Trade Commission, Progressives sought to ensure that the FTC itself could define, investigate and sanction "unfair competition," while business interests sought to maximize opportunities for judicial control of antitrust law in general and the FTC in particular.⁶⁵

The conference committee introduced the innovation of direct court of appeals review of agency action as a compromise which efficiently balanced the aims of Progressives and business interests.⁶⁶ The new agency could conduct factual hearings into "unfair competition" and issue cease-and-desist orders. The FTC became the exclusive finder of fact in all judicial proceedings, but courts of appeals were given a new statutory grant of exclusive jurisdiction to review de novo related issues of law such as the meaning of "unfair competition" and its applicability to the factual record. Requiring both the FTC and potential targets of its orders to seek review in the circuit courts ensured business interests quick and final resolution of legal issues, including the constitutionality of the FTC Act itself. Since the courts of appeals were explicitly granted the exclusive right to "affirm, modify, or set aside" FTC orders, they could not be accused of overstepping their authority when reversing an FTC decision.⁶⁷ For businesses facing FTC orders, immediate recourse to the courts of appeals, even before FTC enforcement had begun if they wished, would greatly reduce the time that uncertainty about the legality of their behavior

62. Act of Feb. 4, 1887, ch. 104, 24 Stat. 379, *repealed by* Act of Oct. 17, 1978, Pub. L. No. 95-473, § 4(b), 92 Stat. 1337, 1467.

63. 5 U.S. (1 Cranch) 137 (1803).

64. Note, *supra* note 2, at 902.

65. See 5 E. KINTNER, *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES* 3701-08 (1982). At the time the FTC bill was debated, the courts were widely perceived as trying to erode aggressive executive branch enforcement of the populist Sherman Antitrust Act. This perception had been reinforced by the Supreme Court's narrow "rule of reason" interpretation of the Sherman Act in *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911).

66. See Federal Trade Commission Act, ch. 311, 38 Stat. 717, 720 (1914) (codified as amended at 15 U.S.C. § 45(c) (1988)). The bills prior to Conference Committee are reported at H.R. REP. NO. 1142, 63d Cong., 2d Sess. 11-18 (1914).

67. See Note, *supra* note 2, at 902.

would disrupt their activities. The circuit court could rule with finality (subject only to a Supreme Court grant of certiorari) without waiting for a final judgment from a district court. Other similarly situated businesses, aware that FTC adjudications expressed policy determinations that would also apply to them, would also have their questions answered quickly and with finality. The FTC itself would receive fairly definitive statements of the law to guide it in future adjudications. At the same time, the concerns of the Progressives were addressed, because the FTC was protected from the time-consuming and potentially disruptive reexamination of the factual basis for its orders which plagued the ICC.⁶⁸ It was explicitly articulated that the FTC would be the exclusive factfinder, along the lines of a magistrate appointed by the Supreme Court in exercise of its original jurisdiction.⁶⁹

2. *The Administrative Procedure Act of 1946*

During the New Deal, the proliferation of federal agencies possessing broad adjudicatory and rulemaking powers generated concerns that, in the words of President Franklin Roosevelt, a "fourth branch" of government was emerging which exercised power largely unchecked by statutory procedures or judicial oversight.⁷⁰ In response Congress passed the Administrative Procedure Act of 1946 (APA).⁷¹ The APA spells out the procedures agencies must follow in the exercise of their power, and, except for those specifically exempted, provides for judicial review of all administrative agencies. Section 706 of the APA specifically requires that: "the reviewing court *shall decide all relevant questions of law*, [and] interpret constitutional and statutory provisions"⁷²

Courts have construed the APA's review provisions as articulating a congressional policy favoring judicial review of agency action so that there should be a strong presumption in favor of judicial review. The Supreme Court has repeatedly held that such a presumption exists. As the Court wrote in *Abbot Laboratories v. Gardner*, "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review" of agency action.⁷³ The Court's formulation in *Abbot Laboratories* reflects the APA's two qualifications to the judicial review language of section 706. These qualifications limit judicial review when: "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion

68. *Id.*; see also Currie & Goodman, *supra* note 2, at 6-7.

69. See 51 CONG. REC. H8847 (daily ed. May 19, 1914) (statement of Rep. Covington) (statutory grants of factfinding power to the FTC "were actually taken, in substance, from the recent rules of the Supreme Court providing for references to masters in chancery").

70. H.R. REP. NO. 1980, 79th Cong., 2d Sess. 8 (1946).

71. Act of June 11, 1946, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706 (1988)).

72. 5 U.S.C. § 701 (1988) (emphasis added).

73. 387 U.S. 136, 141 (1967). This holding has been reiterated in subsequent Supreme Court decisions. See, e.g., *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971).

by law.”⁷⁴ While the range of “agency discretion” remains problematic, in *Citizens to Preserve Overton Park v. Volpe* the Supreme Court interpreted exception (2) to limit review when the statutes under which the agency acts were written so broadly that there is “no law to apply.”⁷⁵

3. *The Intent Behind Post-APA Direct Review Statutes*

When Congress wants to grant more certain, prompt, and final review of specific agency actions than that provided by the APA, it turns to the scheme pioneered in the FTC Act.⁷⁶

Statutes mandating direct circuit court review of agency action indicate a congressional preference for more certain judicial review than that expressed by the APA. By writing a special jurisdictional statute, Congress ensures that the qualifications contained in APA section 701 cannot be invoked to deny review based on claims that the courts lack statutory subject matter jurisdiction or have “no law to apply.”⁷⁷

The inclusion of original circuit court review provisions in an agency’s enabling statute also indicates that Congress sought to provide parties affected by that agency’s actions with the same kinds of additional safeguards offered by the original political compromise of the FTC Act: prompt and final resolution of legal questions that, until settled, may chill the activities of litigants and similarly situated third parties.⁷⁸

The statutory review scheme set up in the FTC Act has served congressional aims so well that it has since been copied, in nearly identical form, in at least thirty-eight different statutes.⁷⁹ Circuit courts have direct review of actions of the National Labor Relations Board, the Food and Drug Administration, the Securities and Exchange Commission, the Maritime Commission, the Department of Labor, and other administrative agencies.⁸⁰

The survival of direct review statutes should not be viewed as a mere unthinking holdover from pre-APA days. After passage of the APA, Congress specifically took up the issue of whether to reorganize existing special review statutes. In 1946 a number of statutes creating executive branch agencies contained ICC Act-style judicial review provisions, while others were modeled on the FTC. In 1950 Congress converted all of the existing special review

74. 5 U.S.C. § 701 (1988).

75. 401 U.S. 402, 410 (1971) (quoting S. REP. NO. 752, 79th Cong., 1st Sess. 26 (1946)).

76. See Currie & Goodman, *supra* note 2, at 5-6.

77. *Overton Park*, 401 U.S. at 410.

78. See H.R. REP. NO. 1142, 63d Cong., 2d Sess. 19 (1914) (original court of appeals review provides “the speediest settlement of disputed questions”). See e.g., H.R. REP. NO. 1086, 87th Cong., 1st Sess. 22-23 (1961) (speed of resolution was express reason for extending direct review procedure to deportation orders of Immigration and Naturalization Service).

79. See *supra* note 2.

80. See *supra* note 2 for examples of direct review statutes.

statutes (except for some which governed the ICC itself) to the FTC model.⁸¹ Since that time, Congress has included direct circuit court review statutes when it has created new agencies, such as the EPA.

With the emergence of regulations issued after informal notice and comment as the dominant form of agency action, the special policy aims of sure, prompt, and final judicial resolution protected by FTC-style statutes have become even more important. Through rulemaking, an agency directly affects many more parties than through adjudication. Adjudications bind only the parties, although the outcome may shift the law; regulations can create binding, explicit, and potentially costly prospective limits on the behavior of numerous individuals or corporations. Not only the specific litigants challenging a rule, but others who are subject to it may have a stake in seeing legal questions regarding the rule's validity and scope resolved. For many third parties seeking to plan their actions in an atmosphere of settled expectations, uncertainty may be as harmful as an adverse ruling.

B. *Inconsistency Between En Banc Practices and the Intent of Direct Review Statutes*

Under current en banc practices, litigants may obtain *less* satisfactory review under direct review statutes, even though these were expressly written to ensure *better* judicial review. A judge-made procedural disposition which denies litigants a prompt and final judicial decision under a direct review statute clearly violates the central policy aim of those statutes: the quick and conclusive judicial resolution of questions of law. Yet the current divided en banc practice of affirming the agency's decision when a district court judgment does not exist produces just this undesired result. Given Congress' clear desire to provide the parties with quick resolution of legal issues, the burden of justification should be on the court when it fails to provide review.⁸²

In the special case of en banc review, it is possible and desirable to replace the normal presumption that ties are resolved in favor of appellees with the practice of reinstating the already litigated panel decision, because that disposition does not place any new burden on the appellee. This can be achieved simply by staying the panel decision when granting rehearing en banc and dissolving that stay if the en banc court divides equally.

In addition, third parties and the agency will suffer potentially severe costs due to uncertainty. They have an interest in getting at least as certain an outcome as they would get at the district court. Under current practices, a petitioner may win on the merits before a panel, as in *Auto Safety I*, yet be

81. Administrative Orders Review Act of 1950, 28 U.S.C. §§ 2341-2353 (1988). See H.R. REP. NO. 2122, 81st Cong., 2d Sess. 3-4 (1950).

82. Obviously, Congress cannot instruct courts to exceed the constitutional limits of their jurisdiction—e.g., to decide cases that are not cases or controversies within the meaning of Article III.

deprived of that decision if the full court is divided on a threshold issue, as in *Auto Safety III*. As a guide for future conduct, judicial resolution is essential. Direct judicial review statutes are intended to serve all of these interests, yet in tie cases courts have left the litigants, third parties, and the agency in a worse position than they would be in if the case could have been brought in district court under the APA. Current practice also offers less prompt resolution of the issues than would be found in district court. All interested parties will simply have to wait for another case—yet the whole point of the FTC Act-style statute was to bypass time-consuming district court adjudication and get a quick decision binding on the whole circuit.

Finally, circuit courts themselves have an interest in seeing that litigants are granted a final determination on the merits. As one commentator has pointed out in analyzing the dangers of inconclusive en banc rehearings, prolonged litigation that demonstrates the courts' inability to decide legal issues erodes public respect for the courts.⁸³

IV. PROPOSED SOLUTION: AMENDMENT OF THE EN BANC JURISDICTIONAL STATUTE

The policy aims of the direct court of appeals review statutes, which are currently thwarted by the practice of denying judicial review in en banc ties, can best be protected by an additional statute clarifying the en banc review process itself. An amendment to the en banc jurisdictional statute should mandate that when rehearing direct review cases, en banc courts must leave intact the decisions of their own panels unless a majority of the full court can agree on the merits of a case. The existing panel judgment is not only the most logical judicial substitute for the usual district court judgment; it is also precisely the kind of judgment Congress intended litigants to receive. Preserving the panel decision best meets the traditional congressional policy of granting litigants, the agency involved, and interested third parties prompt and final judicial decisions in such cases.

As has been explained above, nothing in current case law, statutes, or the Federal Rules of Appellate Procedure prevents en banc courts from simply reinstating a panel decision when the full court agrees it has subject matter jurisdiction, yet divides evenly on the merits. A few circuits have local laws which specify that a divided en banc court should always reinstate the order or judgment below, but the courts can easily change these rules themselves.

However, a statutory solution to the problem remains necessary because when the full court is divided on the issue of its own subject matter jurisdiction, it may hesitate for jurisdictional reasons to reinstate its panel decisions, or even

83. See Note, *United States v. Mandel: The Problem of Evenly Divided Votes in En Banc Hearings in the United States Courts of Appeals*, 66 VA. L. REV. 919, 929 (1980).

to let its panel decisions stand if not previously vacated. This caution reflects longstanding doctrines that since federal courts are courts of limited subject matter jurisdiction, they should interpret statutory grants of jurisdiction narrowly and not exercise Article III judicial power unless certain as to their statutory subject matter jurisdiction.⁸⁴ In this context, hesitancy to act stems from the widely held perception that the circuit panel and the full en banc court are, in some sense, the same court, exercising the same jurisdiction. Consequently, under this theory, when a court of appeals convenes en banc it substitutes its jurisdiction for that of the panel, and any power exercised by the surviving panel becomes in some sense affirmative judicial power exercised by the full, yet divided court. This issue seems to have troubled the *Auto Safety III* court.⁸⁵ Obviously, these concerns, whether or not they reflect an accurate understanding of the present relationship between panel and full court jurisdiction, cannot be allayed merely by changing local en banc rules or amending the Federal Rules of Appellate Procedure, because no rule can require an Article III court to exceed its statutory subject matter jurisdiction.

The amended en banc statute can easily clarify this area of law by specifically distinguishing between the jurisdiction of the panel and that of the en banc court in the special agency review context, and by indicating that rehearing by the en banc court should be understood as an appeal (although sua sponte and not of right) from the panel decision. Given statutory language to that effect, preservation and enforcement of the panel decision would become no more controversial than the now routine reinstatement of district court decisions when an en banc court evenly divides.⁸⁶

While, as explained in Parts I and II, no case law requires federal circuit courts sitting in their appellate jurisdiction to follow the Supreme Court's *Durant* approach and reinstate the decision of the court below when evenly divided, this disposition generally works well. Defining en banc rehearing of panel decisions brought under direct review statutes as appeals from the panels brings with it an added benefit: leaving those panel decisions undisturbed in ties is consistent with the *Durant* approach, while simultaneously protecting the congressional intent of the direct review statutes.

In summary, the en banc jurisdictional statute, 28 U.S.C. 46(c), should be amended by the addition of the following language:

Whenever a court of appeals is granted direct jurisdiction to review agency action: 1) the jurisdiction of said circuit court shall vest in the

84. See, e.g., *Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8, 11 (1799) ("[T]he fair presumption is . . . that a cause is without [the Court's] jurisdiction till the contrary appears.").

85. See *Auto Safety III*, 856 F.2d 1557, 1558 (1988).

86. Note that when a court of appeals divides evenly on the question of subject matter jurisdiction, a policy of vacating the district court decision as well would actually be more consistent with *Bank of North America*. However, the countervailing policy of respect for the settled opinions of the lower courts has invariably prevailed.

first instance in a three-judge panel of that court; 2) the court shall not grant a hearing or rehearing en banc until that panel has reached a judgment, and rehearing en banc shall constitute an appeal sua sponte from the panel decision; 3) granting a rehearing en banc shall stay the panel judgment or order; and 4) if the en banc court is evenly divided it shall lift the stay and leave undisturbed the judgment of the panel below.

Such an amendment would guarantee litigants a judicial determination and clarify the existing statutory scheme without overruling any case law.⁸⁷

CONCLUSION

In reviewing agency action, divided en banc courts have failed litigants in three respects. First, they have failed to consider that judge-made rules designed to resolve the Supreme Court's ties when it exercises appellate jurisdiction may be inappropriate and inapplicable when an intermediate court ties, particularly when that lower court exercises original jurisdiction. Second, en banc courts have been unable, due to a lack of statutory guidance, to determine whether their jurisdiction should be understood as a substitute for, or an appeal from, the judgment of the circuit panel. Most importantly, however, as a consequence of doctrinal confusion in these two areas, circuit courts have failed to protect the interests for which Congress provided direct agency circuit court review. The proposed statutory amendment will render the first problem moot and resolve the second and third problems with a minimum of disruption to current Article III jurisprudence.

87. Litigants would still have no appeal of right to the en banc court. *See* *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 250 (1953). Courts of appeals could continue to apply the *Durant* rules as a matter of discretion if they wished. *See supra* notes 10-19 and accompanying text.