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Hearings and Rehearings in Banc in the United States Courts of Appeals

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STUDENT NOTES

HEARINGS AND REHEARINGS IN BANC IN THE UNITED STATES COURTS OF APPEALS.1—Cases before nine of the eleven courts of appeals2 are ordinarily not considered by all the judges thereof. Rather, generally, hearings take place before and decisions are rendered by a three-judge panel or division of the full court.3 To a consideration of these alternatives, divisional or full court, this note is addressed: first, to examining the question of power—might

1 After research was substantially completed, a Note on the subject appeared in another legal periodical, 22 Geo. Wash. L. Rev. 482 (1954). The writer of this note gratefully acknowledges the help derived therefrom in supplementing his own research.

2 In the first and fourth circuits, the full court decides all cases. Each has but three judges. Letter to the West Virginia Law Review, dated February 16, 1954, from Mr. Roger A. Stinchfield, Clerk, United States Court of Appeals for the First Circuit; letter to the West Virginia Law Review, dated February 12, 1954, from Mr. Claude M. Dean, Clerk, United States Court of Appeals for the Fourth Circuit.

3 A full court consists of three judges in the first circuit, six in the second, seven in the third, three in the fourth, six in the fifth, six in the sixth, seven in the eighth, seven in the ninth, five in the tenth, and nine in the District of Columbia circuit. 28 U.S.C. § 44 (Supp. 1952). Pub. L. No. 294, 83d Cong., 1st Sess. (Feb. 10, 1954) authorized an increase in the number of judges in the fifth circuit to seven and in the ninth circuit to nine.
a court of appeals consisting of more than three judges legally sit as a full court—and its solution; second, to the procedures adopted by the circuits for shifting a hearing or rehearing of a case from a division to the full court; third, to the criteria used by the circuits in determining whether a particular case should be considered by a full court; fourth, to the frequency of an in banc sitting in the several circuits; and fifth, to an evaluation of the procedures in the circuits in the light of the indicia set forth in the Supreme Court opinions in *Western Pacific R.R. v. Western Pacific R.R.*

The federal courts of appeals were established in 1891. The act establishing these courts provided in Section 2 that each court shall consist of three judges. The three-judge provision of the act of 1891 was carried over into section 117 of the Judicial Code of 1911. Read in conjunction with section 118, this gave rise to a manifest inconsistency inasmuch as the latter section provided that four circuits should have four judges each.

With the passing of years, more judges were allotted to cope with the increasing work of various circuits. Some courts came to consist of two divisions and thus the possibility arose that one division might decide a case at odds with a previous decision by another division of the same circuit. Besides inter-circuit conflict, there thus existed a probability that intra-circuit conflicts would emerge. Should one division feel constrained to reach a diametrically opposite conclusion from that of a sister division, the question would arise, can the likelihood of opposite holdings in the same circuit be combatted by presenting the issue to a court comprised of all the judges assigned to the circuit? There was room for real doubt for as has been noted, section 117 of the Judicial Code said that each court of appeals shall consist of three judges. In the light of this section, could a court be composed of more than three judges? For example, could it consist of seven judges sitting together, which is the present number assigned to the eighth circuit?

*Power.*—In 1938, two judges on a division of the ninth circuit were unable to agree with an earlier decision of a division of that

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4 345 U.S. 247 (1953).
5 In the revision of title 28 of the United States Code, enacted by Congress in June 1948 the term "Court of Appeals" was substituted for the term "Circuit Court of Appeals."
7 36 Stat. 1131 (1911).
8 Bank of America v. Comm'r of Internal Revenue, 90 F.2d 981 (9th Cir. 1937).
court and the issue was first presented for formal decision whether diversity of view could be brought before all of the judges of the court, sitting in banc, for resolution. The ninth circuit opined that in view of the express language of section 117 there was no way for a circuit consisting of more than three judges to assemble itself in banc.9

Two years later the court of appeals for the third circuit came to a different conclusion. Reading section 117 and section 118 together, the court, in Comm'r of Internal Revenue v. Textile Mills Securities Corp.,10 held that it did have power to provide for sessions in banc, consisting of all the circuit judges in active service. To resolve the disagreement between circuits the Supreme Court granted certiorari11 in the Textile Mills case and on the in banc issue sustained the third circuit.12 Declaring that section 118 of the Judicial Code was not to be defeated by section 117, a result which would on all matters disenfranchise some circuit judges against the clear intendment of section 11813 although conceding that it might be subordinating literalness to common sense in construing the two sections, the Court reasoned that

"... The result reached makes for more effective judicial administration. Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted. Those considerations are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases. Such considerations are, of course, not for us to weigh in case Congress has devised a system where the judges of a court are prohibited from sitting en banc. But where, as here, the case on the statute is not foreclosed, they aid in tipping the scales in favor of the more practicable interpretation.14

And so it was settled that a court of appeals did have power to shift the hearing of a case from a division to the full court sitting in banc.

Congress in the 1948 revision of the Judicial Code of 1911 expressly adopted the approval of in banc settings, in title 28 of

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9 Lang's Estate v. Comm'r of Internal Revenue, 97 F.2d 867 (9th Cir. 1938). The diversity of views between the Bank of America and the Lang case was therefore certified to the Supreme Court and resolved in accordance with the opinion of that Court. The Court gave no opinion on the in banc issue. Lang's Estate v. Comm'r of Internal Revenue, 304 U.S. 264 (1938).
10 117 F.2d 62 (5th Cir. 1940).
11 312 U.S. 677 (1941).
12 314 U.S. 326 (1941).
13 Id. at 333.
14 Id. at 334-5.
the United States Code, while providing also for the continuance of divisional determination. The statute now reads:

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

Nothing is said regarding at whose instance who may initiate such action or by what procedure in banc considerations will be made available. Those were the next problems which demanded resolution.

Procedure.—In 1952, in Western Pacific R.R. v. Western Pacific R.R., the Court of Appeals was confronted with the question whether, by virtue of Section 46 (c), a losing party is entitled as of right to have its petition for rehearing in banc considered and ruled upon by the full court. The court, assembled in banc, held that the party had no such right, that

"A petition for rehearing in any such case, whatever its form or wording, must necessarily be treated as addressed to and is solely for disposition by the court or division to which the case was assigned for determination. If the court so constituted, or a majority of its members, denies the petition, that ends the matter so far as concerns the Court of Appeals."

The court's objection to having a petition for a rehearing in banc ruled upon by all active judges was that such "would render merely tentative or provisional the decisions of the court in 98 per cent or more of the cases that come before it."

The Supreme Court granted certiorari both on the merits and on the in banc issue. Remanding on the in banc question, the Court after extensive discussion concluded that litigants are given no statutory right to compel each member of the court to give formal consideration to an application for a rehearing in banc, that the statute does not compel the courts to adopt any particular procedure governing the exercise of the power, but that, whatever the procedure adopted, it should be clearly explained, so that the members of the court and litigants may become thoroughly familiar with it. The Supreme Court, in the exercise of its "general power

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16 197 F.2d 994 (9th Cir. 1952).
17 Id. at 1015.
18 Ibid.
19 344 U.S. 809 (1952).
20 345 U.S. 247 (1953).
to supervise the administration of justice in the federal courts,"21
set forth indicia to be observed by the courts of appeals in formu-
latitude procedures for exercising the in banc power. These will
be considered later.

What practices have the courts of appeal actually adopted or
announced in this connection?

In the first circuit, where there are but three active judges, no
occasion has arisen for in banc procedure.22

The court of appeals of the second circuit has never assembled
in banc23 and has no established policy regarding such action, but
no rule of that court prohibits such hearings and the court recog-
nizes that it could sit in banc of its own motion.24

The third circuit, the pioneer in developing a procedure for in
banc hearings, has in the thirteen years since it first sat in banc25
achieved the formulation of a procedure which according to the
judges of the circuit has proved entirely satisfactory.26 For clarity,
the procedure for shifting a hearing or rehearing of a case from a
division to the full court has been classified into two headings:
hearing in banc and rehearing in banc. Under each, provisions for
litigant and sua sponte inception of suggestions for the shift are
set forth, followed by the procedure for disposing of the proposals.
The litigants may request that the original hearing of a case be
in banc but such requests are rarely made; a request does not have
the force of an order that the hearing be in banc. For sua sponte
inception before assignment to panel. no special provision is made
although occasionally an in banc hearing is ordered before assign-
ment. This is rare. Normally the judges have no knowledge of the
nature of the cases pending until after they have been listed for
argument before a panel of the court and briefs furnished to the
judges of the panel. After assignment to a panel, when the three
judges have read the briefs before argument, they occasionally

21 Id. at 260, citing United States v. National City Lines, 334 U.S. 573, 584
(1948).
22 Letter to the West Virginia Law Review, dated Feb. 16, 1954, from Mr.
Roger A. Stinchfield, Clerk, United States Court of Appeals for the First Circuit.
23 In In Re Sacher, 206 F.2d 358 (2d Cir. 1953), cert. denied, 74 Sup. Ct. 218
(1953), Judge Clark dissenting noted that he had requested the Chief Judge
to poll the court in an effort to bring the matter before the court in banc.
The judges declined to sit in banc by a vote of three to two. Note, 22 Geo. WASH. L. REV. 482 (1954).
24 Letter to the George Washington Law Review, dated November 23, 1953,
from Alexander M. Bell, Clerk United States Court of Appeals for the Second
25 Comm'r of Internal Revenue v. Textile Mills Securities Corp., 117 F.2d
62 (3d Cir. 1941).
26 Maris, Hearing and Rehearing Cases in Banc. The Procedure of the
United States Court of Appeals for the Third Circuit, 14 F.R.D. 91 (1953).
feel that the case ought probably to be originally heard in banc whereupon they consult with the other four. Hearing in banc is ordered only with the concurrence of at least four of the seven circuit judges of the circuit and always if four judges so request. As to rehearing in banc, there is no particular procedure for litigant inception before decision of the panel. After argument, the judge to whom the opinion is assigned prepares for the panel a draft opinion which is circulated by letter to other members of the panel and also to the judges not on the panel, the latter being requested merely to inform the opinion writer whether in their view the case should be reargued in banc. Normally an order for rehearing in banc after decision by a panel results from a petition for rehearing filed by the losing party. When a petition for rehearing after the panel decision is filed, the clerk transmits a copy to each of the circuit judges with a letter request to each to inform the judge who filed the opinion of the court whether he thinks the petition should be granted. It is the duty of each judge to answer either yes or no or any of the four judges not on the panel may answer that he is content to leave the disposition of the petition to the judges of the panel which heard and decided the case originally. An order for rehearing in banc after decision by a panel results only occasionally without a litigant petition at the instance of four or more judges of the court. No procedure is stated for sua sponte inception; apparently if any judge can obtain the concurrence of three of his brethren, the case will be reheard in banc. The question of rehearing in banc, as of a hearing in banc, is decided only by the votes of at least four circuit judges. While the panel which heard and decided the case originally or any one of concurring judges may direct a rehearing before the same panel, it is beyond the power of the panel, under the statute as the court construes it, to direct a rehearing in banc unless at least one other circuit judge, making a total of four in all, concurs in the order for such rehearing. There is an exception apparently when the four circuit judges leave the petition of the litigant for a rehearing in banc to the disposition of the panel. A rehearing in banc will be ordered if the four nonparticipating circuit judges so vote upon their individual consideration of the petition for rehearing submitted to them by the clerk even though all three judges of the panel which heard and decided the case vote against such rehearing.27

27 Maris, supra note 26.
There are but three judges assigned to the fourth circuit and in cases before this court all three sit.\textsuperscript{28}

The fifth circuit has no formal rules on in banc hearings and rehearings but the following informal procedure has obtained.\textsuperscript{29} If any judge of the court thinks a case should be considered in banc he discusses it with the Chief Judge who, if he agrees\textsuperscript{30} that such procedure is merited, speaks or writes informally to the other judges asking their views as to whether the full court should hear the case. When a total of four members feel such a hearing is desirable, an order is entered setting the case for in banc hearing before the full court, otherwise the matter is dropped without order of any kind.\textsuperscript{32}

In the sixth circuit there is no established procedure governing in banc hearings\textsuperscript{32} or rehearings. But one case has been heard in banc, the court there sitting in banc upon its own motion.\textsuperscript{33}

The seventh circuit has no rule regarding hearing or rehearing of cases in banc. There has been no in banc hearing or rehearing and no application for a full court sitting.\textsuperscript{34}

While the rules of the eighth circuit do not so provide, in practice the parties may by motion, either separate or joint, request that the court grant a hearing in banc. Rule 15(e) of the circuit states:

"The division of the Court by which a case has been heard and determined shall have the power to finally dispose of any petition for the rehearing of the case and of any request for consideration thereof by the Court in banc."

Rule 23 of the ninth circuit provides:

\textsuperscript{28} Letter to the West Virginia Law Review, dated February 12, 1954, from Mr. Claude M. Dean, Clerk, United States Court of Appeals for the Fourth Circuit.


\textsuperscript{30} "Without the support of the Chief Judge, it would be futile for a single dissenting judge to press his argument further, for the alliance of the Chief Judge with the other judges from the division makes a vote for \textit{en banc} action by the majority of circuit judges impossible in the six man court. See, however, Pub. L. No. 294, 83rd Cong. 1st Sess. (Feb. 10, 1954) which increases the number of judges in the Fifth Circuit from six to seven." Note, 22 Geo. Wash. L. Rev. 482, 486 (1954).

\textsuperscript{31} Id. at 482, based upon footnote 29 supra.

\textsuperscript{32} Stephan v. United States, 133 F.2d 87 (6th Cir. 1943) (involved the death penalty for treason).

\textsuperscript{33} Letter to West Virginia Law Review, dated February 12, 1954, from Mr. Carl W. Reuss, Clerk, United States Court of Appeals for the Sixth Circuit.

\textsuperscript{34} Letter to the West Virginia Law Review, dated February 17, 1954, from Mr. Kenneth J. Carrick, Clerk, United States Court of Appeals for the Seventh Circuit.
"All petitions for rehearing shall be addressed to and be determined by the court as constituted in the original hearing. 

"Should a majority of the court as so constituted grant a rehearing and either from a suggestion of a party or upon its own motion be of the opinion that the case should be reheard en banc, they shall so inform the Chief Judge. The Chief Judge shall thereupon convene the active judges of the court and the court shall thereupon determine whether the case shall be reheard en banc".

Apparently the court has no procedure relative to the original hearing of a case in banc.

Rule 20 of the tenth circuit provides:

"A hearing of a case or controversy shall be had only when ordered by a majority of the Judges of the Circuit who are in active service. Applications for hearing en banc will be considered by all of the Judges of the Circuit who are in active service. A majority of such Judges may order a hearing en banc sua sponte. This rule shall also apply to rehearing en banc".

The District of Columbia court of appeals provides for either litigant or sua sponte inception of an in banc hearing. The litigants may by written motion or petition request that the original hearing or a rehearing be in banc, the motion or petition being submitted to and ruled upon by all active circuit judges of the circuit. Any judge or any division of the court may request an in banc proceeding by memorandum addressed to all the active circuit judges which indicates why a case should be so heard or reheard and requests the judges to notify the chief judge of their vote on the request. If a majority are favorable, an order is entered and the case scheduled for in banc hearing or rehearing. The practice of the judges of this court is to furnish drafts of opinions in all cases to the non-sitting judges, for information, before filing. The latter, as well as the judges constituting the division which heard the case, may request and vote on a rehearing in banc, either before as well as after the decision is rendered.35

Criteria.—What, if any, criteria have evolved in the circuits for determining whether a particular case should be heard or reheard in banc?

The second circuit has never convened in banc.36

36 See note 24 supra.
It is impossible to discover any definite criteria applied in the third circuit since the judges in voting on an application for an in banc sitting are not required to give reasons for their votes. Guiding considerations, however, appear to include the importance and difficulty of the problem presented, divergencies in the tentative views of the judges, and the raising of serious questions as to the correctness of an earlier decision of the court. Of the six cases heard in banc during the term beginning in October, 1951, one involved the construction of Federal Civil Procedure Rule 54 (b), one the availability of mandamus to review the refusal of a district judge to transfer a case under 28 U.S.C. § 1404 (a), two the construction of the federal Anti-Racketeering Act, and two an income tax point on which district courts in the circuit disagreed (both the hearing panel and the court in banc being similarly divided in opinion).

In the fifth circuit, the only criterion stated is "exceptional circumstances." The sixth circuit has heard but one case in banc. That involved the death penalty for treason. The in banc procedure has never been used in the seventh circuit.

The rules of the court in the eighth circuit do not specify the criteria used or to be used by the court in determining whether a particular case should be heard or reheard in banc.

In the ninth circuit, no definite criteria have been formulated by which to determine what cases are appropriate for in banc consideration. However, cases of extraordinary public importance or those involving constitutional questions seem to be so regarded.

No information from the tenth circuit is available as to the existence of any criteria.

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37 Bendix Aviation Corp. v. Glass, 195 F.2d 267 (3d Cir. 1952).
38 All State Freight v. Modarelli, 195 F.2d 1016 (3d Cir. 1952); section 1404a was a new statute in United States Code, a codification of *forum non conveniens* doctrine.
40 See note 26 supra.
42 Stephan v. United States, 133 F.2d 87 (6th Cir. 1943).
43 See note 33 supra.
44 See note 34 supra.
45 Letter to the West Virginia Law Review, dated February 12, 1954, from Mr. E. E. Koch, Clerk, United States Court of Appeals for the Eighth Circuit.
46 187 F.2d 994, 1014 n.4 (1952).
In the District of Columbia circuit, there has been hearing or rehearing in banc in three classes of cases—those involving a question whether a division of the court should be overruled, those involving a question as to the power of the court, and those involving a question of extraordinary public importance.

Frequency.—The second circuit has never sat in banc. In the third circuit sessions in banc take place only occasionally. The number of cases heard or reheard in banc during the term of court beginning in October, 1951 was only six, out of the total of 299 cases heard. In the fifth circuit the court seldom sits in banc more than once or twice a year. The court of appeals of the sixth circuit sat in banc once and that of the seventh circuit never. A full court hearing has been "seldom granted" in the eighth circuit. From 1941 until 1952 approximately thirty cases were heard in banc in the ninth circuit. Nineteen, or about two-thirds, were assigned to the court in banc at the time they were originally calendared. Rather more than half of the nineteen seem to have been cases of great public importance, for example, those during the war arising out of the suspension of the writ of habeas corpus, the institution of martial law in Hawaii, the removal of Japanese from Pacific coast states, and contempt proceedings involving claimed violations of the constitutional prohibition against self-incrimination. The court of appeals in the tenth circuit seldom sits as a full court. In the District of Columbia circuit the power to grant in banc hearings has been sparingly exercised. It is not

50 Sawyer v. United States Steel Co., 192 F.2d 582 (D.C. Cir. 1952), involving the power of the President to seize an industrial enterprise, sub nom., District of Columbia v. Catholic Education Press, 199 F.2d 176 (D.C. Cir. 1952), involving a question as to tax exemption.
51 See note 24 supra.
52 See note 26 supra.
53 See note 29 supra.
54 See note 33 supra.
55 See note 34 supra.
56 See note 45 supra.
57 See note 46 supra.
58 Letter to the West Virginia Law Review, dated February 16, 1954, from Mr. Robert B. Cartwright, Clerk, United States Court of Appeals for the Tenth Circuit.
used to make the court in banc a general reviewing court for divisional decisions. From September 1, 1948, when title 28 became effective until March, 1953, petitions by litigants for hearing in banc were three in number and all were denied. Of thirty-four petitions by litigants for rehearings in banc, four were granted and thirty denied. Three hearings in banc were ordered by the court *sua sponte*, as were five rehearings in banc.

**Circuits' conformance to Western Pacific requirements and indica.**—Analysis along the same lines of procedure for invoking, locus of determination, criteria, and frequency is pertinent in examining the impact of the Western Pacific opinions (as distinct from the decision) as to what may or should be provided by the circuits in formulating procedure and criteria for shifting the hearing or rehearing of a case from a panel to the full court.

As to procedure, the opinion is explicit in admonishing the circuits that litigants be enabled to suggest to whoever has the function of according a rehearing in banc that a case is an appropriate one for exercise of the power, while recognizing that the court may properly initiate in banc hearings *sua sponte*. Section 46 (c) does not require each active judge assigned to a circuit to give formal consideration to an application for a rehearing in banc. Whatever the procedure adopted, it should be clearly defined so that the members of the court and litigants may become thoroughly familiar with it.

The opinion states that the court, consistently with the statute, may formulate either a practice whereby a majority of the full

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59 See note 47 supra.
60 345 U.S. 247, 267 (1953). The opinion continued: "... counsel's suggestions need not require any formal action by the court; it need not be treated as a motion; it is enough if the court simply gives each litigant an opportunity to call attention to circumstances in a particular case which might warrant a rehearing en banc." Justice Frankfurter, however, in his concurring opinion at page 271 says that "[t]he ends of § 46 (c) may be served in other ways than by permitting petitions for rehearing en banc. A court may decide that it will act under § 46 (c) only *sua sponte* and will do so whenever the need is made evident. . . ."
61 *Id.* at 262. Justice Frankfurter at page 271 suggests that in *sua sponte* initiation each panel circulate its opinions, before they are emitted, to all the active members of the court. He points out that there may be other ways of acting *sua sponte* but he can conceive of no procedure that will accomplish the purpose of the in banc power which does not apprise all active judges either of all decisions of panels of the court, or of those decisions which counsel bring to the court's attention, by motion or suggestion as raising the problems at which the grant of power in section 46c is directed.
62 *Id.* at 267. The concurring opinion at page 272 states that unless the court determines to act only *sua sponte*, the *en banc* power cannot achieve its full purpose unless all judges are apprised of the decisions which counsel bring to the court's attention as proper for an *en banc* consideration.
63 *Id.* at 267.
bench determines whether there should be hearings or rehearings in banc or one delegating to the division the responsibility for passing on the appropriateness for exercise of the in banc power.\textsuperscript{64}

Without proposing particular criteria, the opinion, in reiterating the view of the Textile Mills case that in banc power is a necessary and useful one\textsuperscript{65} and in calling attention to cases\textsuperscript{66} whose disposition illustrated the usefulness which it deemed the power to have in the administration of justice in the courts of appeals, seems to imply that they should not be unduly restrictive.

Mr. Justice Frankfurter, concurring, is more specific, saying:

"Rehearings \textit{en banc} by these courts, which sit in panels, are to some extent necessary in order to resolve conflicts between panels. This is the dominant concern. Moreover, the most constructive way of resolving conflicts is to avoid them. Hence, insofar as possible, determinations \textit{en banc} are indicated whenever it seems likely that a majority of all the active judges would reach a different result than the panel assigned to hear a case or which has heard it. Hearings \textit{en banc} may be a resort also in cases extraordinary in scale—either because the amount involved is stupendous or because the issues are intricate enough to invoke the pooled wisdom of the circuit."\textsuperscript{67}

As to frequency, the Court said that while the in banc power may be used sparingly, the courts of appeals ought not curtail its use indiscriminately.\textsuperscript{68}

Comparing the majority with the concurring opinion, the former stressed the necessity of permitting litigants to suggest proper cases for rehearing in banc; the latter was willing to sanction pro-

\textsuperscript{64} Id. at 261. But the concurring opinion at page 272 reasons that "a delegation of authority to the panel which heard the case to dispose finally, in behalf of the entire court, of petitions for rehearing \textit{en banc}—if there are to be such petitions and if through them alone § 46(c) is to be implemented—would \textit{not} constitute adoption of a permissible procedure for the exercise of the powers conferred by § 46(c). It may be proper to require petitions for rehearing \textit{en banc} to be made to the panel in the first instance, but to allow the discretionary function under § 46(c) to be discharged definitively by the panel whose judgment may call for \textit{en banc} action is to treat the statute as an empty, purposeless form of words."

\textsuperscript{65} Id. at 260.

\textsuperscript{66} United States \textit{ex rel.} Robinson v. Johnston, 316 U.S. 649 (1942), and Civil Aeronautics Board v. American Air Transport, 344 U.S. 4 (1952). In the first case, a "conflict of views" had arisen "among the judges of the Ninth Circuit" and the Supreme Court remanded the case "for further proceedings, including leave to petitioner to apply for a hearing before the court \textit{en banc}.

In the second case, a division of the court of appeals "were unable to agree on a disposition of the case," and the Supreme Court dismissed the certificate with the suggestion: "Perhaps the Court of Appeals may now wish to hear this case \textit{en banc} to resolve the deadlock indicated in the certificate and give full review to the entire case."

\textsuperscript{67} 345 U.S. 247, 270 (1953).

\textsuperscript{68} Id. at 261.
cedures contemplating only *sua sponte* inception of an in banc sitting. The former left it to each court to elect whether the judges should all vote on in banc petitions or whether this should be delegated to the division; the latter felt that only the first course would serve the purposes of section 46 (c).

There is the utmost variety in the extent to which the circuits, since the *Western Pacific* decision, exhibit conformity with the views there expressed. The range extends from the third circuit's elaborate procedure to the seventh circuit's utter absence of procedure for a complete nonuse of the in banc power. The second, sixth, and seventh circuits, since they have no established procedures, of course, have none than can be "clearly explained" to litigants. While these circuits do not prohibit such hearings, it may be that they are curtailing the in banc power "indiscriminately." The eighth and ninth circuits, in providing for having petitions of litigants for rehearing in banc ruled on by the division, have chosen an option permissible under the majority but condemned by the concurring opinion. The third, tenth, and District of Columbia circuits' established procedures seem fully to conform to the *Western Pacific* opinion and afford to other circuits useful though not identical patterns of how conformity may be achieved.

The feasibility of formulating criteria for application to all cases coming before the court to determine whether there should be an in banc sitting is doubtful. The classes of cases in which the District of Columbia circuit has used its in banc power is, however, suggestive of those appropriate for consideration by full court.

G. R. M.

**LAW OF SAFETY DEPOSIT BOXES.**—The growth of safety deposit business to its present commercial importance had its origin as an incident of banking from its very beginning when the goldsmiths of London received money, bullion and plate from depositors merely for safe-keeping. Though a body of law, separate from the general law of banking, has developed concerning safe-deposit boxes, the business of leasing depositories for the safe-keeping of valuables is nearly always conducted by a bank or trust company.

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69 See Laskin, *The Supreme Court of Canada*, 29 CAN. B. REV. 1036, 1048 (1951). The Supreme Court of Canada though it sits in division and in banc has no established criteria to be applied to all cases to determine if a particular one is proper for a full court hearing.