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February 13, 2004

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington D.C. 20544

Re: Proposed Amendment re En Banc Majority

Dear Mr. McCabe:

I write in strong support of the proposed amendment to FRAP 35(a), which would adopt the "case majority" approach for determining what constitutes a majority for hearing or rehearing a case en banc.

The arguments in support of the "case majority" rule are set forth in detail in a lucid opinion by Judge Edward Carnes of the Eleventh Circuit in Gulf Power Co. v. FCC, 226 F.3d 1220 (11th Cir. 2000) (opinion on denial of rehearing en banc). I am sure the members of the Committee are familiar with that opinion, and I will not restate Judge Carnes's cogent analysis here. Rather, I will respond to the arguments made by Chief Judge Haldane Robert Mayer in his letter of January 6. Judge Mayer endorses the "absolute majority" rule now followed by the Federal Circuit, and he urges the Committee not to move forward with the proposed amendment.

Judge Mayer first argues, in essence, that the case majority rule would frustrate majority control of the law of the circuit. The flaw in this argument is that the absolute majority rule can easily lead to the same result, but on a larger scale. Consider the example given by Judge Mayer: on a court of twelve active judges, five are disqualified. Judge Mayer notes that in that situation, "only four judges would be needed to grant en banc review and decide the case en banc." True – but the panel decision that prompted the en banc vote might have been a two-to-one decision, with one active judge and one senior judge in the majority, and one active judge dissenting. In that situation, the position of one active judge

establishes the law of the circuit even though four active judges – a majority of those eligible to participate in full-court consideration – believe the decision is wrong.

Even more troubling anomalies can result from the operation of the absolute majority rule in circuits that make extensive use of visiting judges. In the Eleventh Circuit, for example, the panel majority might include only a single judge of the circuit (active or senior). Yet under the absolute majority approach, as Judge Carnes has demonstrated, as many as six active judges might be powerless to overturn the decision.

Other considerations cast further doubt on the soundness of the absolute majority approach. First, it is a mistake to assume that the only reason for taking a case en banc is to establish a precedent that will thereafter stand as the law of the circuit. Often judges vote for rehearing en banc because they think the case is important in its own right and that the panel has decided it wrongly. (Death penalty habeas cases typically fall into this category.) In that situation, the pending case provides the only opportunity that the eligible judges will ever have to correct what a majority of them believe to be error. To put it another way, the absolute majority rule disables the only *relevant* majority from working its will at the only time when it matters.

Second, when recusals result from judges' stock holdings, the effect may be felt in all cases involving a particular industry. For example, there was a period some years ago when a large number of judges in the Fifth Circuit were disqualified from hearing oil and gas cases. In that situation, the absolute majority rule may prevent a majority of the nonrecused judges from ever correcting an errant panel ruling on an important and recurring issue in that industry.

The best that can be said about the absolute majority approach is that it may contribute marginally to maintaining stability in the law of the circuit. But that is also a signal of its weakness. Declaring and clarifying the law is an important function of the courts of appeals, but it is a secondary function. The reason we establish appellate courts is to do justice in the individual cases and controversies that come before them. The great virtue of the case majority approach is that by allowing maximum possible participation in the task of review for error, it gives priority to this central function.

Judge Mayer also argues that there is no need for national uniformity on a matter that involves "the internal procedures of each court." If the only issue were how best to preserve majority control of the law of the circuit, I might agree that the individual courts should be allowed to make the determination for themselves. But more is at stake.

By definition, a judge who is recused from participation in a case should have no influence over that case's outcome. Yet under the absolute majority rule, nonparticipation is equivalent to a "no" vote. Each judge who is recused cancels out the affirmative vote of a judge who is not recused. Recused judges thus have a direct influence over the outcome of the case: their de facto "no" votes can result in the upholding of a panel decision that a majority of the nonrecused judges would overturn. I do not see how that result can be reconciled with the purpose of recusal.

Because of this concern, the original version of the Judicial Improvements Act of 2002, introduced in the House with bipartisan support in March 2002, included a provision amending 28 USC section 46(c) to make clear that recused judges would not be counted for purposes of determining whether to hear or rehear a case en banc. The provision was dropped from the bill when Congress learned that the Advisory Committee had decided to consider the issue. It was not included in the final version of the Act that became law as part of the Justice Department authorization bill.

It would certainly be appropriate for Congress to enact legislation to clarify an existing statute. It is also appropriate (and indeed laudable) for Congress to defer to the rule-making process. If FRAP 35(a) is amended as the Advisory Committee has proposed, there will be no need for Congress to revisit the issue.

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The case majority approach is the rule that best serves the primary function of the federal courts of appeals; it is also the rule that conforms to the purpose of the judicial disqualification statutes. I urge the Committee to move forward with the proposed amendment to FRAP 35(a) to implement the case majority rule nationwide.

Sincerely,

Arthur Hellman

Arthur D. Hellman
Professor of Law
Distinguished Faculty Scholar