

2-1-1994

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Jon O. Newman

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### Recommended Citation

Jon O. Newman, *Foreword: In Banc Practice in the Second Circuit, 1989-93*, 60 Brook. L. Rev. 491 (1994).

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# BROOKLYN LAW REVIEW

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Volume 60

1994

Number 2

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## FOREWORD

### IN BANC PRACTICE IN THE SECOND CIRCUIT, 1989-93

*Jon O. Newman\**

This is my third (and likely last) five-year report on in banc practice in the Second Circuit.<sup>1</sup> The salient characteristic of our in banc practice during 1989-93 is the continuation of an extremely low rate of rehearings in banc. In those five years the Second Circuit reheard in banc only 6 cases, an average of 1.2 cases per year. This figure is considerably lower than the average of 7.65 cases per year for all the federal courts of appeals.<sup>2</sup>

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\* Chief Judge, United States Court of Appeals for the Second Circuit.

<sup>1</sup> See Jon O. Newman, *In Banc Practice in the Second Circuit, 1984-1988*, 55 BROOK. L. REV. 355 (1989) [hereinafter 1989 Foreword]; Jon O. Newman, *In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 BROOK. L. REV. 365 (1984) [hereinafter 1984 Foreword].

Preparation of these five-year reports on our Court's in banc practice has been substantially facilitated by the filing system used by my efficient secretary of twenty-two years, Jeanne Ostapkevich. During my fifteen years on the Court of Appeals, she has maintained a separate file drawer of all cases that have involved all members of the Court—those in which rehearing in banc was ordered, those in which a poll for in banc rehearing was requested (whether or not successful), and those in which panel opinions were circulated to the full Court prior to filing. The availability of these files has made it possible to readily survey our in banc practice. Though in banc opinions and circulations to the full court (where noted in the opinion) could be identified through computer-assisted legal research, the requests for in banc polling could otherwise be identified only by laboriously examining all the unpublished orders denying rehearing in banc to see in which instances a poll had been requested.

<sup>2</sup> During the past five statistical years (ending June 30), the pattern of in

During the fifteen-year period between 1979 to 1993 the Second Circuit reheard 19 cases in banc, an average of 1.27 per year. Although a combination of fortuitous circumstances resulted in the Circuit hearing five cases in banc in 1988 alone,<sup>3</sup> the pattern for the latest five-year interval bears out both the assertion in my previous report that the 1988 figure was unusual and my prediction that "the number of in bancs per year will remain low."<sup>4</sup>

This five-year update will review the in banc cases from 1989 to 1993, consider some special issues that arise when voting is close on in banc cases, and hazard some views about the future of in banc practice. The "ground rules" of in banc practice are fully set forth in my *1984 Foreword*<sup>5</sup> and will not be repeated here.

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bancs among the circuits was as follows:

	1989	1990	1991	1992	1993	Total
D.C. Circuit	12	1	7	1	4	25
First Circuit	5	4	5	2	6	22
Second Circuit	0	0	0	1	2	3
Third Circuit	4	2	2	6	4	18
Fourth Circuit	11	13	9	11	9	53
Fifth Circuit	5	10	8	18	7	48
Sixth Circuit	7	4	6	1	12	30
Seventh Circuit	10	7	15	9	5	46
Eighth Circuit	14	7	15	6	14	56
Ninth Circuit	7	6	8	15	13	49
Tenth Circuit	17	19	10	11	5	62
Eleventh Circuit	<u>7</u>	<u>12</u>	<u>4</u>	<u>13</u>	<u>11</u>	<u>47</u>
All Circuits	99	85	89	94	92	459

Figures derived from data supplied by the Administrative Office of the United States Courts ("AO").

There is a discrepancy between the three in bancs reported by the AO figures and the six in bancs discussed in this Article. *United States v. DiNapoli*, 8 F.3d 909 (2d Cir. 1993) (in banc), was reheard in calendar year 1993, but decided after the statistical year ended; *Asherman v. Meachum*, 957 F.2d 978 (2d Cir. 1992) (in banc), was probably not counted by the AO since the in banc court left the case for ultimate resolution by the panel; there appears to be no reason why *United States v. MacDonald*, 916 F.2d 766 (2d Cir. 1990) (in banc), *cert. denied*, 112 S. Ct. 1759 (1992) was not counted by the AO in either 1990 or 1991.

<sup>3</sup> See 1989 Foreword, *supra* note 1, at 368.

<sup>4</sup> See 1989 Foreword, *supra* note 1, at 357.

<sup>5</sup> See 1984 Foreword, *supra* note 1, at 366-71.

## I. IN BANC PRACTICE

The six cases reheard in banc by the Second Circuit in the past five years, listed in the order of their in banc rehearing dates, are *United States v. MacDonald* (1990),<sup>6</sup> *United States v. Chestman* (1991),<sup>7</sup> *Asherman v. Meachum* (1992),<sup>8</sup> *Bellamy v. Cogdell* (1992),<sup>9</sup> *In re Extradition of McMullen* (1993),<sup>10</sup> and *United States v. DiNapoli* (1993).<sup>11</sup> As this list shows, no cases were reheard in banc in 1989, and either one or two were reheard in each of the subsequent years. Since February 2, 1993, when *DiNapoli* was reheard, the Second Circuit has not held an in banc reargument.

During the same five-year period, the Circuit conducted an in banc poll in ten additional cases, all of which failed to gain majority support for in banc rehearing. In eleven cases, panel opinions were circulated to all active judges prior to filing.

### A. Appeals Reheard in Banc

The issue in the first in banc case heard during the 1989-93 period, *United States v. MacDonald*, was whether a warrantless entry into private premises was justified by the exigent circumstances exception to the Fourth Amendment's warrant requirement. At the trial level, the district court found that exigent circumstances had existed; a divided panel reversed the conviction;<sup>12</sup> and, by a 9-to-3 vote, the in banc court rejected the panel's ruling and reinstated the judgment of conviction.<sup>13</sup>

Writing for the majority, Judge Altimari reviewed the circumstances of the undercover narcotics operation. An undercover agent had been admitted to an apartment and had pur-

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<sup>6</sup> 916 F.2d 766 (2d Cir. 1990) (in banc), *cert. denied*, 498 U.S. 1119 (1991).

<sup>7</sup> 947 F.2d 551 (2d Cir. 1991) (in banc), *cert. denied*, 112 S. Ct. 1759 (1992).

<sup>8</sup> 957 F.2d 978 (2d Cir. 1992) (in banc).

<sup>9</sup> 974 F.2d 302 (2d Cir. 1992) (in banc), *cert. denied*, 113 S. Ct. 1383 (1993).

<sup>10</sup> 989 F.2d 603 (2d Cir.) (in banc), *cert. denied*, 114 S. Ct. 301 (1993).

<sup>11</sup> 8 F.3d 909 (2d Cir. 1993) (in banc).

<sup>12</sup> *United States v. Thomas*, 893 F.2d 482 (2d Cir. 1990), *vacated sub nom United States v. MacDonald*, 916 F.2d 766 (2d Cir. 1990) (in banc), *cert. denied*, 498 U.S. 1119 (1991).

<sup>13</sup> At the time that *MacDonald* was argued, the Second Circuit had 12 active judges of its authorized complement of 13.

chased marijuana there. While inside the apartment, the agent had observed large quantities of cocaine and marijuana, along with two weapons. The agent left and within ten minutes returned with other agents. After the agents knocked on the door and announced their presence, they heard the sound of "shuffling feet,"<sup>14</sup> and received a radio communication from other agents who observed occupants of the apartment trying to escape from a window. At that point the agents made a forced entry. The in banc majority upheld the district court's finding of exigent circumstances, rejecting the claim that the officers' lawful conduct in knocking and announcing their presence had improperly created the exigent circumstances relied on for the warrantless entry. Judge Kearse dissented in an opinion joined by then-Chief Judge Oakes and Judge Feinberg.<sup>15</sup>

*MacDonald* was a fact-specific case, a circumstance that normally weighs against in banc consideration. Because the fact pattern was one likely to recur in numerous cases, however, it was considered appropriate for the entire in banc court to establish the approach that would be followed in assessing the existence of exigent circumstances for warrantless entry in undercover narcotics operations.

*United States v. Chestman* confronted the Second Circuit with a dispute concerning the scope of insider trading liability.<sup>16</sup> The case concerned a stockbroker, Robert Chestman, who had bought shares of Waldbaum, Inc., a publicly traded corporation that owned a large supermarket chain, just prior to the public announcement of a tender offer. The claim of insider trading was based on the following circumstances. Two days before the tender offer, the president of Waldbaum told his sister of the transaction; the sister told her daughter; the daughter told her husband (the president's nephew-in-law); the husband called his broker, Chestman. He told Chestman that he had "'some definite, some accurate information' that Waldbaum was about to be sold at a 'substantially higher' price than its market value."<sup>17</sup> Chestman then proceeded to buy Waldbaum shares for himself and his clients.

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<sup>14</sup> *MacDonald*, 916 F.2d at 768.

<sup>15</sup> *Id.* at 773 (Kearse, J., dissenting).

<sup>16</sup> 947 F.2d 551 (2d Cir. 1991) (in banc), *cert. denied*, 112 S. Ct. 1759 (1992).

<sup>17</sup> *Id.* at 555.

Chestman was convicted of violating Rule 14e-3(a)<sup>18</sup> and Rule 10b-5 issued pursuant to the Securities Exchange Act of 1934,<sup>19</sup> the mail fraud statute,<sup>20</sup> and the perjury statute.<sup>21</sup> The panel reversed the convictions on all counts.<sup>22</sup> The in banc court reheard the case as it pertained to the Rule 14e-3(a), Rule 10b-5 and mail fraud convictions. The Rule 14e-3(a) convictions were affirmed by a vote of ten-to-one.<sup>23</sup> The Rule 10b-5 and mail fraud convictions were reversed by a vote of six-to-five. Judge Meskill's majority opinion held that Chestman's conduct, although violative of the tender offer rule, did not render him liable for a Rule 10b-5 or mail fraud conviction because he was neither an aider or abettor of a person who had misappropriated information nor a tippee of a person who had breached a fiduciary duty.<sup>24</sup>

Judge Winter dissented from the Rule 10b-5 and mail fraud reversals, in an opinion joined by then-Chief Judge Oakes and Judges Kearse, McLaughlin and myself.<sup>25</sup> Judge Mahoney joined Judge Meskill in reversing the Rule 10b-5 and mail fraud convictions, but dissented from the affirmance of the Rule 14e-3(a) conviction.<sup>26</sup>

*Chestman* resolved an important issue of insider trading in the context of information relayed among family members. It

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<sup>18</sup> 17 C.F.R. § 240.14e-3(a) (1994) (dealing with transactions in securities based on nonpublic information).

<sup>19</sup> 17 C.F.R. § 240.10b-5 (1994) (dealing with the use of deceptive devices in connection with security transactions).

<sup>20</sup> 18 U.S.C. § 1341 (1988 & Supp. IV 1992) (makes mail fraud punishable by \$1000 fine, imprisonment of not more than five years, or both).

<sup>21</sup> 18 U.S.C. § 1621 (1988) (makes perjury punishable by \$2000 fine, imprisonment of not more than five years, or both).

<sup>22</sup> *United States v. Chestman*, 903 F.2d 75 (2d Cir. 1990).

<sup>23</sup> The in banc court that heard oral argument consisted of 12 judges, since Judge Walker, who had presided at Chestman's trial as a district judge, recused himself. After oral argument, Judge Feinberg took senior status, a circumstance that rendered him no longer eligible to participate in further consideration of an in banc rehearing of a case on which he was not a member of the original panel. *United States v. Chestman*, 947 F.2d at 554 n.\*. See also 28 U.S.C. § 46(c) (1988) ("A court in banc shall consist of all circuit judges in regular active service."); *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685 (1960) (a circuit judge who has retired is ineligible to participate in decision of case on rehearing in banc, even where he took part in original three-judge hearing or where he was not yet retired when in banc hearing was originally ordered).

<sup>24</sup> *Chestman*, 947 F.2d at 571.

<sup>25</sup> *Id.* (Winter, J., concurring in part and dissenting in part).

<sup>26</sup> *Id.* at 583 (Mahoney, J., concurring in part and dissenting in part).

was clearly an appropriate case for in banc rehearing in a court that handles a considerable amount of both criminal and civil securities litigation.

*Asherman v. Meachum* concerned a self-incrimination challenge to administrative action taken by state prison officials.<sup>27</sup> They had terminated the supervised home release of a sentenced prisoner because he had refused to answer questions about his crime at a scheduled post-conviction psychiatric evaluation. The district court sustained his challenge to the adverse state action, and a panel affirmed by summary order.<sup>28</sup>

The in banc court rejected Asherman's self-incrimination challenge by a vote of ten-to-three.<sup>29</sup> Writing for the majority, I held that the psychiatric inquiry concerning Asherman's crime was relevant to prison officials' responsibilities in administering the supervised home release program and that the officials were entitled "to take adverse action against those whose refusal to answer impedes the discharges of those responsibilities."<sup>30</sup> Judges Lumbard and Cardamone wrote separate dissenting opinions, with then-Chief Judge Oakes concurring in Judge Cardamone's opinion.<sup>31</sup>

The case merited in banc review since it concerned a recurring and important issue as to public officials' ability to take administrative action when confronted by a refusal to answer a question relevant to the officials' responsibilities.

*Asherman* also divided the in banc court on a procedural issue relevant to in banc practice. After rejecting the self-incrimination challenge, the court left the remaining issues in the case for consideration by the original panel.<sup>32</sup> The majority opinion noted that occasionally the court had granted in banc rehearing limited to one or more specified issues and reasoned that the same authority justified returning unresolved issues to the original panel.<sup>33</sup> Ten members of the

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<sup>27</sup> 957 F.2d 978 (2d Cir. 1992) (in banc).

<sup>28</sup> *Asherman v. Meachum*, 923 F.2d 845 (2d Cir. 1990), *aff'd*, 957 F.2d 978 (2d Cir. 1992) (in banc).

<sup>29</sup> The in banc court consisted of the twelve active judges of the Court plus Judge Lumbard, a senior judge who had been a member of the original panel.

<sup>30</sup> 957 F.2d at 982.

<sup>31</sup> *Id.* at 985 (Cardamone J., dissenting).

<sup>32</sup> *Id.* at 984.

<sup>33</sup> *Id.* at 983-84.

court supported this view, including the three judges who had dissented on the merits of the case.<sup>34</sup> Judge Miner, writing for himself and for Judges Pratt and Altimari, expressed the view that once the in banc court voted to rehear the case without restriction as to issues, it should be obliged to decide the entire case.<sup>35</sup>

*Bellamy v. Cogdell* concerned the circumstances under which a claim of ineffective assistance of counsel will be decided by application of a *per se* rule that the defendant suffered prejudice from counsel's failures.<sup>36</sup> In *Bellamy*, the defendant had been convicted in state court. At trial, defendant's counsel failed to fulfill his assurance to the court that he would not try the case but would only assist another lawyer whose services he would obtain.<sup>37</sup> At the same time, trial counsel was facing disciplinary proceedings before the New York State Appellate Division and the trial counsel's lawyer in that matter had told the court that his client was incompetent by reason of ill health to participate in the disciplinary proceedings.

A divided panel reversed the district court's denial of a writ of habeas corpus, holding instead that the *per se* rule was applicable and that Bellamy had been denied the effective assistance of counsel.<sup>38</sup> The in banc court upheld the district court's denial of habeas corpus relief by a vote of seven-to-six.<sup>39</sup> Writing for the majority, Judge Altimari ruled that the *per se* approach was inapplicable to the facts of Bellamy's case. He noted that the *per se* approach had previously been applied only when counsel was unlicensed or was implicated in the defendant's crimes.<sup>40</sup> Judge Feinberg dissented in an opinion joined by Judges Oakes, Kearse, Cardamone, Winter and me.

The case turned significantly on its precise facts, prompting Judge Feinberg to begin his dissent by expressing the view

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<sup>34</sup> *Id.* at 985 (Lumbard, J., dissenting in part); *id.* at 991 n.3 (Cardamone, J., dissenting).

<sup>35</sup> *Asherman*, 957 F.2d at 984-85 (Miner, J., concurring).

<sup>36</sup> 974 F.2d 302 (2d Cir. 1992) (in banc), *cert. denied*, 113 S. Ct. 1383 (1993).

<sup>37</sup> *See id.* at 304.

<sup>38</sup> *Bellamy v. Cogdell*, 952 F.2d 626 (2d Cir. 1991), *aff'd*, 974 F.2d 302 (2d Cir. 1992) (in banc), *cert. denied*, 113 S. Ct. 1383 (1993).

<sup>39</sup> The in banc court consisted of twelve active judges (there was one vacancy) plus Senior Judge Feinberg, who had participated in the panel decision.

<sup>40</sup> 974 F.2d at 306 (citing *United States v. Novak*, 903 F.2d 883 (2d Cir. 1990) and *United States v. Cancilla*, 725 F.2d 867 (2d Cir. 1984)).



that the case was inappropriate for in banc consideration.<sup>41</sup> The majority evidently believed it was important to narrow the circumstances under which the *per se* approach was applicable to claims of ineffective assistance of counsel.

*In re Extradition of McMullen* presented the issue of whether a supplementary treaty that retroactively expanded the coverage of a prior extradition treaty was an unconstitutional bill of attainder.<sup>42</sup> A district court had granted a writ of habeas corpus,<sup>43</sup> and a divided panel had affirmed.<sup>44</sup> The in banc court reversed by a vote of ten-to-two.<sup>45</sup>

Writing for the majority, Judge Miner ruled that extradition was not punishment that implicated the Bill of Attainder Clause,<sup>46</sup> and rejected McMullen's separation of powers contention.<sup>47</sup> Judge Altamari dissented in an opinion joined by Judge Timbers.<sup>48</sup>

Though the case presented a rarely litigated issue, it involved a matter of major importance, bearing on the United States's international obligations. The importance of the case made it appropriate for in banc consideration.

*United States v. DiNapoli* concerned a narrow point of evidence arising under Rule 804(b)(1) of the *Federal Rules of Evidence*.<sup>49</sup> Rule 804(b)(1) provides that testimony given by a currently unavailable witness at a prior hearing is not excluded by the hearsay rule if "the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."<sup>50</sup> The issue presented was whether, at the grand jury examination of two witnesses, the prosecution had had the requisite "similar motive" to develop their testimony, compared

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<sup>41</sup> 974 F.2d at 309-10 (Feinberg, J., dissenting).

<sup>42</sup> 989 F.2d 603 (2d Cir.) (in banc), *cert. denied*, 114 S. Ct. 301 (1993).

<sup>43</sup> *In re Extradition of McMullen*, 769 F. Supp. 1278 (S.D.N.Y. 1991), *rev'd*, 989 F.2d 603 (2d Cir.) (in banc), *cert. denied*, 114 S. Ct. 301 (1993).

<sup>44</sup> *McMullen v. United States*, 953 F.2d 761 (2d Cir. 1992), *rev'd*, 989 F.2d 603 (2d Cir.) (in banc), *cert. denied*, 114 S. Ct. 301 (1993).

<sup>45</sup> The in banc court consisted of eleven active judges (there were two vacancies) plus Senior Judge Timbers, who had been a member of the panel.

<sup>46</sup> 989 F.2d at 611-13.

<sup>47</sup> *Id.* at 613-14.

<sup>48</sup> *Id.* at 614 (Altamari, J., dissenting).

<sup>49</sup> 8 F.3d 909 (2d Cir. 1993) (in banc).

<sup>50</sup> FED. R. EVID. 804(b)(1).

to its motive at a subsequent trial at which the same witnesses were unavailable. The trial court had rejected the defendants' attempt to introduce the witnesses' grand jury testimony at trial, and the defendants, including Anthony Salerno, the lead defendant, were convicted.

The case then followed a protracted course.<sup>51</sup> A Second Circuit panel initially reversed the convictions on the ground that the "similar motive" requirement of Rule 804(b)(1) was inapplicable to a case in which the government had the power to confer immunity on the witnesses.<sup>52</sup> The Supreme Court reversed, ruling that the "similar motive" requirement was applicable in every case and remanding for consideration whether the facts of *DiNapoli* satisfied that requirement.<sup>53</sup> On remand, the panel ruled that the "similar motive" requirement had been satisfied and again reversed the convictions.<sup>54</sup>

By a vote of eight-to-three, the in banc court ruled that the "similar motive" requirement had not been satisfied.<sup>55</sup> Writing for the majority, I rejected both the defendants' contention that the prosecution's motives at a grand jury proceeding and at trial are always similar and the government's contention that the prosecution's motives at the two proceedings are always different. Instead, the majority asked whether in this case the party opposing the offered testimony "had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue."<sup>56</sup> The majority concluded that similarity of motive was not shown in this case. Judge Pratt dissented in an opinion joined by Judges Miner and Altimari.<sup>57</sup>

The case involved a fairly narrow point of law, but was deemed appropriate for in banc consideration because the issue had "potentially broad implications for the administration of criminal justice."<sup>58</sup>

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<sup>51</sup> The litigation outlived the lead defendant, Anthony Salerno. See *DiNapoli*, 8 F.3d at 911 n.2.

<sup>52</sup> *United States v. Salerno*, 937 F.2d 797 (2d Cir. 1991).

<sup>53</sup> *United States v. Salerno*, 112 S. Ct. 2503 (1992).

<sup>54</sup> *United States v. Salerno*, 974 F.2d 231 (2d Cir. 1992).

<sup>55</sup> The in banc court consisted of the eleven active members of the Court (there were two vacancies).

<sup>56</sup> *DiNapoli*, 8 F.3d at 914-15.

<sup>57</sup> *Id.* at 915 (Pratt, J., dissenting).

<sup>58</sup> *Id.* at 910.

## B. Procedural Issues in In Banc Rehearings

The close division in some of the in banc cases reheard in the past five years has prompted consideration of issues that arise when the in banc court consists of an even number of judges who are evenly divided. Though that circumstance did not occur in any of the six cases reheard in the past five years, it was a possibility of sufficient likelihood to have engaged the attention of some members of the court.

The equal division of an in banc court poses three issues: First, does the equal division affirm the judgment of the district court or the judgment of the panel whose decision is being reheard? Second, should opinions be written as to the issue on which the in banc court is equally divided? Third, does an affirmance by an equally divided vote have precedential effect?

In three prior in banc cases, *Alleghany Corp. v. Kirby*,<sup>59</sup> *Farrand Optical Co. v. United States*,<sup>60</sup> and *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers International*,<sup>61</sup> the Second Circuit ruled that the equal division of an in banc court results in affirmance of the judgment of the district court.<sup>62</sup> This appears to be the practice in some other circuits as well.<sup>63</sup> The in banc equal-division practice of these courts of appeals follows Supreme Court practice.<sup>64</sup>

On the issue of whether opinions should be written in cases of equal division, the practice of the Supreme Court is to withhold opinions when the justices are equally divided, issuing only a brief *per curiam* opinion announcing the judgment of the Court.<sup>65</sup> The Supreme Court's rationale for not issuing opinions appears to be that an affirmance by an equal division is not accorded precedential weight.<sup>66</sup> Even if equal-division in

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<sup>59</sup> 340 F.2d 311, 312 (2d Cir. 1965) (in banc), *cert. dismissed*, *Holt v. Alleghany Corp.*, 384 U.S. 28 (1966).

<sup>60</sup> 317 F.2d 875, 883 (2d Cir. 1963) (in banc).

<sup>61</sup> 294 F.2d 399, 400 (2d Cir. 1961) (in banc), *aff'd*, 370 U.S. 254 (1962).

<sup>62</sup> In *Drake Bakeries*, however, the court noted that Judges Lumbard and Friendly believed that the equal division of the in banc court left the opinion of the panel in force. *Id.* at 400.

<sup>63</sup> See, e.g., *Penthouse Int'l v. McAuliffe*, 717 F.2d 517, 517 (11th Cir. 1983) (in banc), *cert. denied*, 465 U.S. 1108 (1984); *Roesch, Inc. v. Star Cooler Corp.*, 712 F.2d 1235, 1236 (8th Cir. 1983) (in banc), *cert. denied*, 466 U.S. 926 (1984).

<sup>64</sup> See *Neil v. Biggers*, 409 U.S. 188, 191-92 (1972).

<sup>65</sup> See, e.g., *Radich v. New York*, 401 U.S. 531 (1971).

<sup>66</sup> See *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 264 (1960) (opinion of

banc judgments in courts of appeals lack precedential effect, it does not necessarily follow that these courts should withhold opinions in such cases. The opinions of an equally divided court of appeals might well be useful to the Supreme Court in deciding whether to grant certiorari, a concern obviously absent when the Supreme Court itself is equally divided.

In the Second Circuit, opinions were not issued in the three prior equal-division in banc cases, *Alleghany*, *Farrand Optical*, and *Drake Bakeries*. That practice has been followed in some circuits,<sup>67</sup> but rejected by others.<sup>68</sup> As to whether an in banc affirmance by an equally divided vote has precedential effect, the Second Circuit has not expressed a view. Other circuits have taken the seemingly sensible approach that such a disposition lacks precedential effect.<sup>69</sup>

### C. *In Banc Polling*

In the past five years, of the hundreds of suggestions for rehearing in banc that routinely accompany petitions for panel rehearing, there were only twenty requests from an active judge or panel member to poll the active judges on whether a case should be reheard in banc. The request for an in banc poll was withdrawn in four cases after the panel opinion was amended, leaving sixteen cases in which a vote was taken. Of those sixteen requests, only six received the majority vote of the active judges needed to rehear the case in banc. Four of the ten cases that failed to garner a majority vote yielded opinions dissenting from the denial of the rehearing in banc.<sup>70</sup>

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Brennan, J.). Justice Brennan also notes the following "salutary" effect of the practice: it "prevent[s] the identification of the Justices holding the differing views as to the issue, and this may well enable the next case presenting it to be approached with less commitment." *Id.*

<sup>67</sup> See *Hill v. Lockhart*, 764 F.2d 1279 (8th Cir. 1984) (in banc), *aff'd*, 474 U.S. 52 (1985); *Penthouse Int'l*, 717 F.2d at 517.

<sup>68</sup> See *Hotel & Restaurant Employees Union v. Smith*, 846 F.2d 1499 (D.C. Cir. 1988) (in banc); *United States v. Klubock*, 832 F.2d 664 (1st Cir. 1987) (in banc); *Roesch*, 712 F.2d at 1236; *Herweg v. Ray*, 619 F.2d 1265 (8th Cir. 1980) (in banc), *rev'd on other grounds*, 455 U.S. 265 (1982); *McSurely v. McClellan*, 553 F.2d 1277 (D.C. Cir. 1976) (in banc) (equal division on one issue).

<sup>69</sup> See, e.g., *Penthouse Int'l*, 717 F.2d at 517; *Roesch*, 712 F.2d at 1236; *Henderson v. Fort Worth Indep. Sch. Dist.*, 584 F.2d 115, 116 (5th Cir. 1978) (in banc), *cert. denied*, 441 U.S. 906 (1979).

<sup>70</sup> See *United States v. Concepcion*, 983 F.2d 369, 395 (2d Cir. 1992) (Newman,

The low number of in banc polls continues a pattern reflected in prior years. The number of in banc polls that were voted upon fell from twenty-five during the 1979 to 1983 period to nineteen during the 1984 to 1988 period to the sixteen during the 1989 to 1993 period. The number of polls in the most recent period corresponds to an average of approximately three polls per year.

During the latter part of the recent five-year period, the Second Circuit had three vacancies. Because a vacancy is not counted in the base for calculating a majority of active judges in an in banc poll,<sup>71</sup> it took only six judges (out of ten) to obtain a rehearing in banc in the most recent years, rather than the seven required when the Court is at its full complement of thirteen. Nevertheless, the rate of in banc polling declined.

#### D. *In Banc Circulation of Panel Opinions*

For various reasons, a panel of the Second Circuit on occasion circulates a proposed opinion to the full court prior to filing. This occurred eleven times during 1989-93. In all but one instance, the fact of circulation was noted.<sup>72</sup>

### II. PERSONAL REFLECTION

I continue to believe that the Second Circuit's pattern of rarely rehearing cases in banc has been a sound policy, well serving the institutional needs of the court and thereby enabling the court to serve the public interest efficiently. I say this even though I have written three of the four opinions in the past five years dissenting from denial of rehearing in banc

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J., dissenting from denial of rehearing in banc), *cert. denied*, 114 S. Ct. 163 (1993); *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 925 F.2d 576, 587 (2d Cir. 1991) (Oakes, C.J., dissenting from denial of rehearing in banc), *aff'd in part*, 112 S. Ct. 2701 (1992) and *aff'd*, 112 S. Ct. 2709 (1992); *New Era Publications Int'l v. Henry Holt Co.*, 884 F.2d 659, 662 (2d Cir. 1989) (Newman, J., dissenting from denial of rehearing in banc), *cert. denied*, 493 U.S. 1094 (1990); *In re Drexel Burnham Lambert Inc.*, 869 F.2d 116, 119 (2d Cir. 1989) (Newman, J., dissenting from denial of rehearing in banc), *cert. denied*, 490 U.S. 1102 (1989).

<sup>71</sup> 2D CIR. R. 35.

<sup>72</sup> See, e.g., *United States v. Cutler*, 6 F.3d 67, 73 n.5 (2d Cir. 1993) ("This opinion has been circulated to the active members of this court prior to filing").

and have joined the fourth opinion.<sup>73</sup> The fact that my preference for in banc consideration of particular cases was not shared by a majority of the active judges has not altered my general agreement with the restrained approach our court has adopted for in banc practice.

Our approach enables us to use judicial resources efficiently, concentrating our efforts on the prompt hearing and disposition of cases by panel opinion. It has also contributed significantly to the high level of collegiality that this court enjoys.<sup>74</sup>

As the membership of the court changes, there is always the possibility that the pattern of rare in bancs might change. My guess, however, is that the pattern that I have observed during the past fifteen years—years in which we have reheard only nineteen cases in banc—will likely continue. It may fluctuate a bit, but those coming onto the court, including the three new judges confirmed this year, will find a rather firmly established tradition. I hope that they—and all who observe the work of this Court—will appreciate the benefits that our practice of infrequent in bancs has conferred upon our institution.

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<sup>73</sup> See *supra* note 70.

<sup>74</sup> I have previously discussed these considerations, and will not repeat them here. See 1989 Foreword, *supra* note 1, at 369-70.

