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THE PRECEDENTIAL FORCE OF PANEL LAW

PHILLIP M. KANNAN*

I. INTRODUCTION

Federal courts of appeals are authorized by statute to hear and determine cases by panels as well as en banc.¹ In 1992, 6851 three-judge panels were possible from court of appeals judges alone.² The number of possible panels ranged from twenty in the First Circuit to 3276 in the Ninth Circuit.³ The number of possible panels would have increased substantially if district judges were included.⁴ Panels perform almost all of the appellate work in the federal judicial system;⁵ yet, as explained below, they lack a full range of judicial power and an adequate precedential system to fulfill this responsibility effectively.

No statute defines the precedential force of each panel's decision on subsequent panels of the same circuit. Intracourt comity, the model followed by district courts, could have been adopted by the courts of appeals.⁶ Instead, all thirteen circuits, with the possible exception of the Seventh Circuit, have developed the interpanel doctrine: No panel can overrule the precedent established by any panel in the same circuit; all panels are bound

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1. 28 U.S.C. § 46 (1988). "En banc" and "in banc" are both correct spellings for the same term. Although some sources, including the Federal Rules of Appellate Procedure, use "in banc," most courts prefer "en banc." In this Article, "en banc" will be used unless spelled otherwise by the source quoted.

Panels usually consist of three circuit judges, or two such judges and one district judge. An en banc court for a circuit generally consists of all the circuit judges in regular active service in that circuit. 28 U.S.C. § 46(c) (1988).

2. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 881 (D.C. Cir. 1992) (Randolph, J., concurring), *cert. denied*, 113 S. Ct. 1579 (1993).

3. *Id.*

4. 28 U.S.C. § 292 (1988).

5. FED. R. APP. P. 35(a) (An en banc "hearing or rehearing is not favored and ordinarily will not be ordered."); see also *Gonzales v. Southern Pac. Transp. Co.*, 772 F.2d 637, 641 (5th Cir. 1985) (stating that en banc consideration is an extraordinary procedure)

6. See, e.g., *United States v. Anaya*, 509 F. Supp. 289, 293 (S.D. Fla. 1980) (stating that under the doctrine of intracourt comity, judges of coordinate jurisdiction within a jurisdiction should follow rulings of other such judges except in unusual or exceptional circumstances), *aff'd sub nom. United States v. Zayas-Morales*, 685 F.2d 1272 (11th Cir. 1982). Such precedent is not binding. See, e.g., *Mueller v. Allen*, 514 F. Supp. 998, 1000-01 (D. Minn. 1981), *aff'd*, 676 F.2d 1195 (8th Cir. 1982), and *aff'd*, 463 U.S. 388 (1983).

by prior panel decisions in the same circuit.⁷ In the Seventh Circuit, the rule is implied from the practice of circulating, to all active judges of the court, panel decisions that reverse precedent.⁸

The decisions applying the interpanel rule have not clearly articulated their legal bases. The rule is apparently based on the assumption that panels have no judicial power or jurisdiction to overrule panel precedent.⁹ This assumption, in turn, seems based on an implication that, because the courts en banc have retained the authority to overrule panel precedent,¹⁰ panels have no such authority. That rationale, however, is questionable because en banc courts retain a full set of judicial power, but only this one facet is denied panels.

Another possible basis for the interpanel rule is Federal Rule of Appellate Procedure 35 ("Rule 35"), which explicitly authorizes *en banc* courts to resolve conflicts between decisions, although panels are *not* so authorized. This argument at best justifies only one part of the interpanel rule: the inability of a panel to overrule precedent. It does not support the other conclusion: namely, that panels are bound by such precedent. In any event, Rule 35's authorization of en banc courts to resolve conflicts does not support the interpanel rule. If the interpanel rule were valid, there would be no conflicts and no need for en banc courts to have authority to resolve them.

7. *United States v. Walling*, 936 F.2d 469, 472 (10th Cir. 1991); *Capital Produce Co. v. United States*, 930 F.2d 1077, 1078 (4th Cir. 1991); *Siegel v. Alpha Wire Corp.*, 894 F.2d 50, 53 n.2 (3d Cir.), *cert. denied*, 496 U.S. 406 (1990); *Greenhow v. Secretary of Health & Human Servs.*, 863 F.2d 633, 636 (9th Cir. 1988); *Drake v. Scott*, 812 F.2d 395, 400 (8th Cir.), *reh'g denied*, 823 F.2d 239 (8th Cir. 1987); *United States v. Ianniello*, 808 F.2d 184, 190 (2d Cir. 1986), *cert. denied sub nom. Cohen v. United States*, 483 U.S. 1006 (1987); *Alexander v. Chevron, U.S.A.*, 806 F.2d 526, 529 (5th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987); *Lacy v. Gardino*, 791 F.2d 980, 985 (1st Cir.), *cert. denied*, 479 U.S. 888 (1986); *Humane Society of United States v. United States Env'tl. Protection Agency*, 790 F.2d 106, 110 & n.32 (D.C. Cir. 1986); *General Dynamics Corp. v. United States*, 773 F.2d 1224, 1225 n.2 (Fed. Cir. 1985), *rev'd on other grounds*, 481 U.S. 239 (1987); *Julius v. Johnson*, 755 F.2d 1403, 1404 (11th Cir. 1985), *aff'd on habeas corpus proceeding*, 875 F.2d 1520 (11th Cir.), *cert. denied*, 493 U.S. 971 (1989); *Meeks v. Illinois Cent. Gulf R.R.*, 738 F.2d 748, 751 (6th Cir. 1984).

8. *See United States v. Rosciano*, 499 F.2d 173, 176 nn.2 & 4 (7th Cir. 1974) (per curiam) (pointing out this practice of the Seventh Circuit in *Moody v. United States*, 497 F.2d 359, 365 n.7 (7th Cir. 1974)); *United States v. Miller*, 495 F.2d 362, 366 n.3 (7th Cir. 1974).

9. *See, e.g., United States v. Kiser*, 948 F.2d 418, 422 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1666 (1992); *Deleski v. Raymark Indus., Inc.*, 819 F.2d 377, 381 (3d Cir. 1987); *United States v. Adamson*, 665 F.2d 649, 656 & n.19 (11th Cir.), *reh'g denied*, 700 F.2d 953 (11th Cir. 1982), *cert. denied*, 464 U.S. 833 (1983); *In re Jaylaw Drug, Inc.*, 621 F.2d 524, 527 (2d Cir. 1980).

10. *Fast v. School Dist.*, 728 F.2d 1030, 1034 (8th Cir. 1984); *Ford v. General Motors Corp.*, 656 F.2d 117, 119-20 (5th Cir. 1981) ("[W]e note that the task of reexamining and overruling panel decisions is left to the full Court, sitting en banc.").

In addition to lacking a firm basis, the interpanel rule is at least implicitly inconsistent with Rule 35,¹¹ with the statute authorizing panels,¹² and with statutes creating appeals as of right.¹³ These three inconsistencies are examined in Part II. If the interpanel rule is flawed by being contrary to these statutes, one would expect to find evidence that the rule does not work in practice in the cases that apply or attempt to apply it. Part III considers that evidence. Part IV suggests three alternatives to replace the interpanel rule.

II. STATUTORY BASES FOR QUESTIONING THE INTERPANEL RULE

In this Part, the interpanel rule is tested for consistency with Rule 35, with the statute authorizing panels, and with statutes creating appeals as of right. The interpanel rule is inconsistent with all three statutes. Adjustments must be made in either the interpanel rule or in the three statutes. Modifying the interpanel rule would primarily affect judicial administration by increasing the number of en banc decisions. Courts of appeals themselves could make the change by repudiating the interpanel rule. In contrast, if the statutes were amended, fundamental legal theory would have to be altered, which would require action by courts and Congress. Consequently, the interpanel rule, not the statutes, should be modified.

A. The Interpanel Rule Is Inconsistent with Federal Rule of Appellate Procedure 35.

Under Rule 35(a), only two conditions permit a hearing or rehearing en banc. One condition is "when consideration by the full court is necessary to secure or maintain uniformity of its decisions."¹⁴ This language anticipates a lack of uniformity within the circuits. In adopting this rule, the Supreme

11. The Federal Rules of Appellate Procedure are not statutes. However, 28 U.S.C. § 2072 (1988) expressly authorizes the Supreme Court to "enact" these rules. They are codified at 28 U.S.C. For convenience, they will be included in the discussion of statutes in Part II of this Article.

12. 28 U.S.C. § 46 (1988).

13. These include 28 U.S.C. § 1291 (1988) regarding final decisions of district courts and many other statutes that grant parties the right to appeal final actions of federal agencies. Examples of these latter statutes are § 7006(a) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6976(a) (1988), and § 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b) (1988). For convenience, all such statutes will be grouped and considered as a single unit in this Article.

14. FED. R. APP. P. 35(a)(2).

Court expected panels to develop inconsistent law and even specified the procedure for resolving such inconsistencies.¹⁵

By establishing the interpanel rule as law, the courts of appeals have subverted the intent of the Supreme Court in two ways, one substantive and the other procedural. The substantive conflict is that the interpanel rule forecloses the possibility of inconsistent decisions within a circuit. This is contrary to Rule 35, which indicates that panels have the power to reject panel precedent in the circuit. Although the Supreme Court recognized that panels have the judicial power to reject panel precedent, the courts of appeals, through the interpanel rule, deny the existence of such power.

The procedural deviation from the Supreme Court's intent is that the courts of appeals have developed their own rule for resolving conflicting intracircuit panel precedent. The court-made rule states that if a panel's decision is inconsistent with the previous decision of a panel in the same circuit, the later decision is not the law; it is invalid.¹⁶ This rule mandates that there be no inconsistent interpanel decisions in a circuit. Inconsistencies are aborted at conception. The Supreme Court, in Rule 35(a), foresaw that such inconsistencies would arise and provided a mechanism for resolving them, but did not require that they be resolved. If the Court, acting with the express authority of Congress, had intended no inconsistent interpanel decisions in a circuit, it would have required en banc resolutions or provided some other procedure to assure consistency.

B. The Interpanel Rule Is Inconsistent with the Statute Authorizing Panels

The interpanel rule not only prohibits each panel in a given circuit from overruling *other* panels' decisions, it also forbids a panel from overruling its own decisions.¹⁷ Thus, for circuit panels, the doctrine of stare decisis takes

15. See, e.g., 9 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 235.02 n.3 (2d ed. 1992) ("The function of the in banc hearing is important in resolving conflicting decisions within the circuit . . .").

16. *Smith v. Penrod Drilling Corp.*, 960 F.2d 456, 459 n.2 (5th Cir.), *modified on denial of reh'g*, (5th Cir. 1992); *Newell Cos. v. Kenney Mfg. Co.*, 864 F.2d 757, 765 (Fed. Cir. 1988), *cert. denied*, 493 U.S. 814 (1989).

17. Although no case was found that addresses this point directly, this conclusion is inherent in the interpanel rule itself when stated in the form that only an en banc court can overrule panel precedent. See, e.g., *Ford v. General Motors Corp.*, 656 F.2d 117, 119-20 (5th Cir. 1981) ("[W]e note that the task of reexamining and overruling panel decisions is left to the full Court, sitting en banc."); *Ingram v. Kumar*, 585 F.2d 566 (2d Cir. 1978) ("This panel, of course, is bound by *Sylvestri* and cannot properly overrule it except by rehearing en banc."), *cert. denied*, 440 U.S. 940 (1979); see also Gerald B. Tjoflat, *More Judges, Less Justice*, A.B.A. J., July 1993, at 70, 72 ("In theory, prior-panel rules permit panels to create binding precedent, which can be overruled only by the entire court sitting en banc.").

on an absoluteness that is contrary to the intent of that doctrine. Stare decisis, as described by the Supreme Court, is “not an inexorable command”¹⁸ and “not a mechanical formula of adherence to the latest decision.”¹⁹ In the Supreme Court’s formulation of the doctrine, courts not only have the power to reject their previous holdings, they have an obligation to do so in some circumstances.²⁰ Yet, under the interpanel rule, panels have neither the power nor the obligation to deviate from their past decisions.²¹

The statute²² creating the authority of panels to decide cases does not hint that Congress intended to burden society with a set of handicapped courts. The statute mandates that “cases” and “controversies” “shall be heard and determined”²³ by panels. The statute places no restrictions on “heard and determined.” No language in the statute implies that a fundamental property of stare decisis, the authority of a court to overrule its own precedent, is to be changed. Such radical departure from stare decisis, an integral part of the common law, would require a clear expression of Congress’s intent to change the judicial course. Not only is there no clear expression in the statute authorizing panels, there is no evidence of it at all. The interpanel rule is simply court-made law that sharply contrasts with the statute the courts are purporting to apply. The interpanel rule should be rejected, and panels should be able to apply stare decisis in full measure like all other courts.

C. *The Interpanel Rule Is Inconsistent with Statutes That Create an Appeal as of Right.*

Courts of appeals are given “jurisdiction of appeals from all final decisions of the district courts.”²⁴ That grant of jurisdiction,²⁵ which is obligatory for the courts of appeals, creates a right to have the courts of appeals

18. *Payne v. Tennessee*, 111 S. Ct. 2597, 2609 (1991).

19. *Id.* at 2609-10 (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

20. *See, e.g., Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2813 (1992) (joint opinion of O’Connor, Kennedy, & Souter, JJ.) (“[T]he decision to reexamine *Plessy* was . . . not only justified but required.”); *Payne*, 111 S. Ct. at 2618 (Souter, J., concurring) (discussing two important examples of the Court applying this process).

21. The strongest evidence of this proposition is that no court stating the interpanel rule has noted an exception for its own precedent. *See cases cited supra* note 7; *see also supra* note 17.

22. 28 U.S.C. § 46 (1988).

23. 28 U.S.C. § 46(c) (1988).

24. 28 U.S.C. § 1291 (1988).

25. This applies to all parties in a civil case, defendants in criminal cases, and the government regarding certain issues in criminal cases.

exercise the jurisdiction.²⁶ The interpanel rule, however, depreciates this right.

A right to have a court exercise its jurisdiction means a right to have the court exercise its judicial power. That is the meaning of jurisdiction. The judicial power of a court includes the authority to reject its own precedent.²⁷ Thus, when a party with a right to an appeal goes before a panel encumbered with the interpanel rule, that party's right is curtailed.

III. EMPIRICAL EVIDENCE THAT THE INTERPANEL RULE IS INVALID

Just because a legal doctrine has exceptions does not render the doctrine invalid. However, as the number of exceptions increases, confidence in the doctrine declines. Moreover, if the exceptions are necessary to avoid conflicts between the doctrine and very fundamental legal principles, the doctrine is questioned even further. As the discussion of the exceptions to the interpanel doctrine will show, the interpanel doctrine contains both of these symptoms, which makes its legal validity questionable.

Some exceptions to the interpanel rule, although very narrow and precise, implicate fundamental questions of judicial power. In this category are the cases in which a panel is confronted with a ruling by a prior panel that would vest jurisdiction in the panel when none exists. The dilemma facing the court is whether to follow the interpanel rule and allow a court to create jurisdiction or to engage in "soft rejection" of the rule: that is, find an exception and respect the jurisdictional boundaries created by Congress.

An example of this dilemma and how it can be resolved is found in *Hayes v. United States Government Printing Office*.²⁸ The issue in *Hayes* was the jurisdiction of the court of appeals in a mixed-motive²⁹ appeal from the Merit System Protection Board. An earlier motions panel found jurisdiction; the later merits panel refused to be bound by that holding.³⁰ The inability to revisit that question would have been at odds with the court's basic power to decide whether it had jurisdiction, and questions of jurisdic-

26. "Ordinarily the conferral of jurisdiction without mention of discretion to decline to exercise it has been construed to make the exercise of jurisdiction obligatory. Read this way, § 1291 confers on persons aggrieved by a final decision of the district court a right to review by the court of appeals." 9 MOORE ET AL., *supra* note 15, ¶ 110.05.

27. See *United States v. Aguon*, 851 F.2d 1158, 1173 (9th Cir. 1988) (en banc) (Reinhardt & Nelson, JJ., concurring) (discussing differences between courts of appeals and the Supreme Court in applying *stare decisis*).

28. 684 F.2d 137 (D.C. Cir. 1982).

29. A mixed-motive case is one in which a federal employee "raises allegations both of discrimination and of insufficient evidence to support the agency decision of [poor performance or misconduct]."

30. *Hayes*, 684 F.2d at 138 n.1.

tion can be considered at any stage of a proceeding. The same reasoning has been applied when, after a panel grants interlocutory appeal,³¹ a later panel concludes that the decision was incorrect and amounted to the panel creating jurisdiction.³²

A second narrow exception arises when en banc review of a panel's decision is not possible. In these cases, a later panel is not bound by the earlier panel's decision. An example of this exception is *North Carolina Utilities Commission v. Federal Communications Commission*.³³ In this Fourth Circuit case, all but one of the active judges of the court were disqualified, and thus en banc review was not possible. The court, which included two judges from the Fifth Circuit sitting by designation, held that when the interpanel rule would deny the parties the right to even the possibility of a review of panel precedent, a right guaranteed by statute, the interpanel rule must yield.³⁴

Courts chafing under the strain of the interpanel rule also use a broader and more malleable exception, the "intervening change" exception. This exception provides that if an intervening, controlling change in the law occurs after a panel decides an issue, a later panel is not bound by the earlier panel's decision. The intervening change can be caused by the en banc court,³⁵ the Supreme Court,³⁶ Congress,³⁷ or an authoritative state court or legislature when that state's law is controlling.³⁸

Intervening changes in the law often are within the discretion of the hearing court. A panel faced with precedent it believes is wrong almost certainly can weave a complex argument that points to some shift in the intervening law.³⁹ *Gresham Park Community Organization v.*

31. 28 U.S.C. § 1292(b) (1988).

32. *Ray v. Edwards*, 725 F.2d 655, 658 n.3 (11th Cir. 1984).

33. 552 F.2d 1036 (4th Cir.), *cert. denied sub nom. AT&T v. Federal Communications Comm'n*, 434 U.S. 874 (1977).

34. *Id.* at 1044-45.

35. *Centel Cable Television Co. v. Thos. J. White Dev. Corp.*, 902 F.2d 905, 908-09 (11th Cir. 1990).

36. *See, e.g., Footman v. Singletary*, 978 F.2d 1207, 1211 (11th Cir. 1992) ("We may decline to follow a decision of a prior panel if necessary to give full effect to a United States Supreme Court decision."); *Lufkin v. McCallum*, 956 F.2d 1104, 1107 (11th Cir.), *cert. denied*, 113 S. Ct. 326 (1991); *Adamson v. Lewis*, 955 F.2d 614, 620 (9th Cir.) (en banc) (referring to a collection of cases so holding), *cert. denied*, 112 S. Ct. 3015 (1992).

37. *United States v. Woodard*, 938 F.2d 1255, 1258 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1210 (1992).

38. *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir.), *reh'g denied*, 936 F.2d 571 (5th Cir. 1991).

39. Unfortunately, using complexity to obscure questionable reasoning was not beyond even Justice Marshall. *Jerry J. Phillips, Marbury v. Madison and Section 13 of the 1789 Judiciary Act*, 60 TENN. L. REV. 51, 52 (1992) ("The reasoning on this issue, which is central to the outcome of

*Howell*⁴⁰ illustrates how far panels will stretch to escape panel precedent that they consider in error. The plaintiffs in *Gresham Park* sought an injunction under federal civil rights law⁴¹ to prohibit the enforcement of an injunction issued by a Georgia state court. The panel in *Gresham Park* was faced with clear panel precedent from *Brown v. Chastain*.⁴² In that case, the panel held that the district court had no jurisdiction to enjoin the state court's order.⁴³ The *Gresham Park* panel acknowledged that *Brown* was consistent with a "line of the Fifth Circuit cases"⁴⁴ and that *Brown* had been followed by other panels.⁴⁵ Using questionable legal analysis, the panel avoided precedent. The panel developed two arguments for not following *Brown*, but neither argument is persuasive.

The panel's first effort to avoid *Brown* involved the claim that *Brown* was implicitly inconsistent with two later Supreme Court cases, *Huffman v. Pursue, Ltd.*,⁴⁶ and *Juidice v. Vail*,⁴⁷ which applied the abstention doctrine. The panel premised that if the Supreme Court abstains from hearing a case, it must have had jurisdiction to hear the case.⁴⁸ That premise is highly questionable. Perhaps neither the parties nor the Court raised the issue of jurisdiction. In *Califano v. Sanders*,⁴⁹ the Court considered the issue of a court deciding the merits without considering jurisdiction. In *Califano*, the court held that the Administrative Procedure Act (APA) was not an independent basis for jurisdiction.⁵⁰ The Court referred to previous cases it had decided in which jurisdiction had been assumed to exist under the APA, although the issue had not been considered.⁵¹ It is simply not universally true that a court must have had jurisdiction if it decides a case or if it

the case, is as confusing and convoluted as any to be found in constitutional law. One suspects Marshall of intentionally confusing the issue, to obscure the weakness of his reasoning.") (footnote omitted).

40. 652 F.2d 1227 (5th Cir. 1981).

41. 42 U.S.C. § 1983 (1988).

42. 416 F.2d 1012 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970).

43. *Gresham Park*, 652 F.2d at 1234 ("Under *Brown*, the district court here would have no jurisdiction over GPCO's suit to enjoin the enforcement of the state court order.").

44. *Id.*

45. *Id.* at 1234 n.14.

46. 420 U.S. 592 (1975).

47. 430 U.S. 327 (1977).

48. *Gresham Park*, 652 F.2d at 1234.

49. 5 U.S.C. §§ 501-706 (1988).

50. 430 U.S. 99, 105 (1977).

51. *Id.* "Three decisions of this Court arguably have assumed, with little discussion, that the APA is an independent grant of subject-matter jurisdiction. However, an Act of Congress enacted since our grant of certiorari in this case now persuades us that the better view is that the APA is not to be interpreted as an implicit grant of subject-matter jurisdiction to review agency actions." *Id.* (citations omitted).

decides to abstain. The argument in *Gresham Park* based on that assumption is grounded on a false premise and therefore leads to an invalid conclusion.

Gresham Park's second argument to circumvent *Brown* asserted that later cases in the Fifth Circuit departed from *Brown*. The panel cited *Henry v. First National Bank (Henry I)*⁵² and *Henry v. First National Bank (Henry II)*⁵³ as departing from *Brown*. The weakness in this argument is that these cases should have been invalid under the interpanel rule because they were decided after *Brown* and were required to follow *Brown*.⁵⁴ To avoid the error it perceived in *Brown*, the panel in *Gresham Park* should have faced squarely the interpanel rule, which appeared to make *Brown* binding. Instead, the panel constructed complex arguments based on dubious premises. Ironically, it also relied on decisions that ignored the interpanel rule, as it strove to show that it did not have to ignore the rule.

Another exception to the interpanel rule based on serious or egregious errors allows panels even more opportunity to avoid the interpanel rule. Of course, the later panel will decide whether the earlier panel precedent was erroneous and, if so, whether the error was serious enough to warrant rejection. This is a prescription for rule-swallowing if ever there was one.

Panels have been willing to follow the prescription. An example of this willingness is *Tucker v. Phyfer*.⁵⁵ While panel precedent controlled the outcome in *Tucker*, the earlier decision failed to mention a controlling Supreme Court decision that would have determined the outcome.⁵⁶ Consequently, the later panel felt free to reject the earlier panel's holding.⁵⁷

Courts have also developed the manifest injustice rule, a more generic rule based on the "egregious error" exception. Under this exception, the later panel is free to re-examine the issue if following panel precedent would cause manifest injustice.⁵⁸ The later panel, of course, determines whether following precedent would result in manifest injustice.

If unable to find an intervening change in the law or rationalize a finding of egregious error or manifest injustice, a panel has a final escape valve from

52. 444 F.2d 1300 (5th Cir. 1971), *cert. denied sub. nom.* *Henry v. Claiborne Hardware Co.*, 405 U.S. 1019 (1972).

53. 595 F.2d 291 (5th Cir. 1979), *cert. denied sub. nom.* *Claiborne Hardware Co. v. Henry*, 444 U.S. 1074 (1980).

54. *See supra* text accompanying note 16.

55. 819 F.2d 1030 (11th Cir. 1987).

56. *Id.* at 1035 n.7.

57. *Id.*

58. *See, e.g.,* *United States v. Fooladi*, 746 F.2d 1027, 1033 (5th Cir. 1984) ("[W]e see no reason to conclude that the panel's ruling was 'manifest injustice.'"), *cert. denied*, 470 U.S. 1006 (1985).

the interpanel rule. A panel can rely on the principle that all courts should decide cases according to their reasoned view of the way the Supreme Court would decide the case today, rather than limiting their function to mere blind adherence to precedent.⁵⁹ Panels quite rationally have concluded that they, like all courts, have this power.⁶⁰

With the many exceptions, including some based on judicial discretion and judgment, it is difficult to imagine a case that a panel could not exempt from the interpanel rule.⁶¹ The interpanel rule is not a principle of law for courts to follow, but an obstacle for them to avoid. It has been openly ignored;⁶² its existence has been vigorously denied by a Senior Circuit Judge of the Sixth Circuit;⁶³ and it has been avoided by a 1982 finding that an 1891 case had been overruled *sub silentio* by an 1894 Supreme Court decision.⁶⁴ The interpanel rule is no longer conducive to coherent, reasoned judgments, and it forces strained logic based on questionable premises and nebulous implications in Supreme Court precedent. Such a state of affairs is an obvious example of exceptions swallowing a rule. The interpanel rule has lost its compulsion, its ability to bind panels, and is at best an alternative to its expanding exceptions.

59. *Cf. Vukasovich, Inc. v. Commissioner*, 790 F.2d 1409, 1416 (9th Cir. 1987) ("We conclude that the courts of appeal should decide cases according to their reasoned view of the way [the] Supreme Court would decide the pending case today.").

60. *Gallagher v. Wilton Enters., Inc.*, 962 F.2d 120, 124 & n.4 (1st Cir. 1992) (per curiam) (overruling precedent after circulating opinion to all active judges; advised that this should be done only sparingly and with extreme caution); *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth.*, 945 F.2d 10, 12 (1st Cir. 1991) (stating that a panel can overrule panel precedent in "those few instances in which newly emergent authority, although not directly controlling, nevertheless offers a convincing reason for believing that the earlier panel, in light of the neoteric developments, would change its course"), *rev'd on other grounds*, 113 S. Ct. 684 (1993).

61. In the opinion of one chief judge, the more judges in a circuit, the less likely the interpanel rule is to be applied. Tjoflat, *supra* note 17, at 72 ("As the monitoring burden grows with the size of the court, jumbo court judges simply abandon their prior-panel rule implicitly, if not by design.").

62. *See, e.g., United States v. Bess*, 593 F.2d 749 (6th Cir. 1979); *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974); *see also* Tjoflat, *supra* note 17, at 70 ("[T]here are too many situations in which three-judge panels, in their published opinions, have glossed over precedent or have disregarded it *sub silentio*, or in unpublished opinions, have decided cases plainly contrary to an established rule of law.").

63. *Speigner v. Jago*, 603 F.2d 1208, 1212 n.4 (6th Cir. 1979) ("However, there is no rule in this Circuit which requires an en banc hearing to overrule a decision of a three-judge panel."), *cert. denied*, 440 U.S. 1076 (1980).

64. *United States v. Thevis*, 665 F.2d 616, 626 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982).

IV. PROPOSED ALTERNATIVES TO REPLACE THE INTERPANEL RULE

Discarding the interpanel rule is only half of the job; a replacement is needed. Three alternatives are proposed in this Article for completing this task. The first alternative would allow conflicting panel precedent in a circuit. The second and third alternatives would eliminate that possibility and the legal uncertainty created by it.

The first alternative to replace the interpanel rule would permit a panel to depart from, but not to overrule, prior panels' decisions. The amount of weight or deference to be given to panel precedent would be for the courts to decide by an evolutionary process. One possibility would be the standard applied by federal district courts regarding intradistrict precedent: to follow such precedent as a matter of comity except in unusual or exceptional circumstances.⁶⁵

If the alternative of freeing panels to accept or reject panel precedent were adopted, circuits would have conflicting precedent. There would be an increased need for en banc courts to exercise their authority to resolve the conflicts and to maintain or achieve uniformity.⁶⁶ In circumstances likely to result in rehearings, circuit rules to guide the en banc courts would inject more predictability into the system. This, in turn, would greatly benefit the bar.

If the existence of conflicts and the increased docket of the court en banc seem too steep a price for rejecting the interpanel rule, courts could utilize a variation of this alternative and establish a senior panel to rehear and resolve conflicts.⁶⁷

The second alternative that could replace the interpanel rule would grant panels the authority to disregard intracircuit panel precedent, and also the power to overrule it. As in the first proposal, the courts would determine the weight panel precedent is to have. However, a decision inconsistent with such precedent would overrule it. This approach is analogous to the long-standing rule of the Supreme Court that when two of its decisions are in conflict, the more recent one has the effect of overruling the older one.⁶⁸ This second alternative has the advantage of giving a high level of certainty to the law in the circuits. It also would not increase the pres-

65. *See supra* note 6.

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

67. Even under the interpanel rule, a panel can be authorized to overrule circuit precedent by the full court and all active members. *See United States v. Taylor*, 828 F.2d 630, 633 (10th Cir. 1987).

68. *Vukasovich, Inc. v. Commissioner*, 790 F.2d 1409, 1416 (9th Cir. 1986) (basing rule on *Hudgens v. NLRB*, 424 U.S. 507, 517-20 (1976) and *Asher v. Texas*, 128 U.S. 129, 132 (1888)).

sure on en banc courts to rehear cases merely to achieve uniformity in the circuit.

The courts of appeals could adopt either alternative without legislation. The third, however, would require intervention of the Supreme Court to change Rule 35. Under this approach, when a panel determines that controlling panel precedent is wrong, it would certify the issue to the court en banc. The court en banc would be required to hear and decide that issue.⁶⁹ A variation of this model would authorize the court en banc to empower a panel to resolve this issue. Either form of this third proposal would prevent conflicting panel precedent in a circuit. The price for this certainty would be an increased burden on the en banc court to hear more cases, a burden that could be eliminated by the suggested variation.

V. CONCLUSION

The interpanel rule deprives panels of part of their judicial power, denies parties a portion of their right of appeal, and dilutes the strength of the Supreme Court's enactments. The courts have ambiguously and obliquely eliminated the interpanel rule by creating a spiraling array of exceptions. This has made reliance on the rule uncertain. The courts have rejected the substance of the rule, but have left the facade standing. It is time to bring that down, too. The judicial system would benefit if the courts of appeals eliminated the rule decisively and directly.

The most reasonable replacement for the interpanel rule is the first alternative presented in Part IV. Under that model, panels would be freed from the control of panel, but not en banc, precedent. This enhances the authority of the panel hearing a case and thereby restores a major portion of the parties' rights of appeal. It would also re-establish the duty of resolving conflicts for en banc courts as envisioned by the Supreme Court. Neither of the other two alternatives meets these boundary conditions as well as the first, but either would be better than the current interpanel rule.

69. *Asherman v. Meachum*, 957 F.2d 978, 983-84 (2d Cir. 1992) (en banc) (The court en banc had the power to determine what issues it would consider, and it could grant rehearing limited to specific issues only.).