THE TENTH CIRCUIT'S BLUEPRINT FOR MINIMIZING EN BANC REHEARINGS

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ABSTRACT***

The Tenth Circuit is known for two things: its collegiality and its downward trend of en banc rehearings. Recognizing this trend, two Tenth Circuit judges recently outlined in the *Denver Law Review* "best practices" for submitting en banc petitions. In response, some scholars propose that this practitioner's guide is not worth the read because of the larger problem at hand. Namely, they predict that even with better petitions, the Tenth Circuit will remain unwilling to rehear cases en banc, thereby decreasing intracircuit uniformity. But this prediction overlooks key factors driving the trend.

This Response accounts for one contributing factor—collegiality—causing the Tenth Circuit to rehear fewer cases and explains why this is desirable practice. To get there, this Response starts by tracing how en banc review emerged as a last-resort measure to resolve intracircuit conflict. It then discusses how collegiality plays a critical role in appellate review and the rehearing process. This Response concludes by explaining how the Tenth Circuit's informal procedures, fostered by its collegial spirit, likewise ensure precedential uniformity while minimizing the need to go en banc.

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INTRODUCTION

In the last decade, the Tenth Circuit has become infamous for its lack of en banc rehearings, a process that provides all active judges within a circuit the opportunity to collectively overrule a three-judge panel's ruling.[1] Compared to other circuits over the last decade, the Tenth Circuit's en banc rates have dwindled to about one rehearing per year—if that.[2] Today's scholarship attempts to diagnose the causes and effects, as well as the normative value, of this phenomenon.[3]

Contributing to the conversation, Tenth Circuit Judges Bobby R. Baldock and Joel M. Carson III, along with a former Tenth Circuit clerk, recently published a best-practices guide in the *Denver Law Review*.[4] From writing tips, to common pitfalls, to considerations on whether to request en banc review in the first place, the authors attempt to "create awareness about what types of cases might be suitable for en banc review in the Tenth Circuit and how to best present a petition to the court."[5] It is safe to say that this Article may soon become every appellate litigant's one-stop-shop resource for submitting en banc petitions in the Tenth Circuit.

But some disagree. For example, Professor Justin Marceau, Wiley Kersh, and Michael Kilbourn argue that this resource will not move the needle for petitioners because the Tenth Circuit will still refuse to rehear cases en banc. In their estimation, "The Tenth Circuit has uniquely, almost without explanation, and arguably to the detriment of litigants across a vast portion of the United States, virtually eliminated the prospect of a formal layer of judicial review that ensures doctrinal coherence and consistency."[6] This diagnosis, however, misconstrues the causes and effects of this downward trend.[7] Importantly, other considerations play a role in the Tenth Circuit's low en banc rate.

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1. Tenth Circuit litigants may request an en banc rehearing for two reasons: "(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." FED. R. APP. P. 35(a); *see also* 10TH CIR. R. 35.1(A).

2. Wiley Kersh, Michael Kilbourn, & Justin Marceau, *Dwindling Appeals and Nonexistent En Banc Review in the Tenth Circuit*, 102 DENV. L. REV. 297, 308 (2025). Some of the Tenth Circuit's sister courts of appeals have consistently reheard comparatively more en bancs every year over the past decade. *Id.* at 308. The Ninth Circuit, for instance, reheard twenty-one cases en banc in 2016, while the Tenth Circuit reheard zero. *Id.* at 311.

3. *See, e.g.*, Alexandra Sadinsky, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 FORDHAM L. REV. 2001, 2001 (2014); Sarah J. Berkus, *A Critique and Comparison of En Banc Review in the Tenth and D.C. Circuits and* United States v. Nacchio, 86 DENV. U. L. REV. 1069, 1069–70 (2009); Monroe G. McKay & John K. Kleinheksel, *The Decisional Process Within the Tenth Circuit—A Panoramic View of Its Internal Operations and Recent Innovations*, 33 WASHBURN L.J. 22, 35 (1993).

4. Bobby R. Baldock, Joel M. Carson III, & Bryston C. Gallegos, *Strategic Considerations for Going En Banc in the Tenth Circuit*, 100 DENV. L. REV. 325 (2023).

5. *Id.* at 327.

6. Kersh, Kilbourn, & Marceau, *supra* note 2, at 307.

7. Further, Judge Baldock and Judge Carson wrote their Article to increase the quality of en banc petitions they review on a routine basis. Their Article presupposes issues with current pleading practices, and incorporating their suggestions in theory would lead the Tenth Circuit to rehear more cases en banc. We do not further unpack this presumption in this Article.

This Response identifies collegiality as one reason why the Tenth Circuit rehears so few cases en banc and explains why this is desirable practice.[8] Collegiality—i.e., the willingness to work together effectively—helps reduce the need for en banc rehearings.[9] Part I begins by tracing the origins of en banc review as a last-resort measure to resolve intracircuit conflict. Part II then explains the importance and relevance of collegiality, a critical aspect of appellate judging. That background in mind, Part III details how the Tenth Circuit's informal procedures channel the court's collegiality to minimize en banc rehearings while achieving the same objective: resolving intracircuit conflict.[10]

I. THE ORIGINS OF EN BANC REVIEW

Congress first exercised its Article I power to "constitute Tribunals inferior to the supreme Court"[11] with the Judiciary Act of 1789.[12] This law created thirteen district courts situated within three "circuit courts" (Eastern, Middle, and Southern)—none of which originally had permanent judgeships.[13] Sitting twice a year, circuit courts exercised mostly original (not appellate) jurisdiction and issued rulings from three-judge panels usually consisting of two Supreme Court justices and the respective district judge.[14] While the Judiciary Act of 1869 eventually created one permanent judgeship for each circuit court, these "old circuit court panels never had a distinct identity because the judges sitting on the panels changed from session to session."[15]

That began to change with the Circuit Court of Appeals Act of 1891.[16] The Act created "circuit courts of appeals" that would hear only appeals from both district and circuit courts.[17] With the practice of "circuit riding"—once a major source of frustration for Supreme Court justices—becoming optional,[18] panels would now generally consist of two circuit

8. Importantly, this Response does not take a position on whether the Tenth Circuit should rehear cases en banc more than it currently does.

9. *See* MORGAN L.W. HAZELTON, RACHAEL K. HINKLE, & MICHAEL J. NELSON, THE ELEVATOR EFFECT 17 (2023); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1644–45, 1680 (2003).

10. This Response discusses two informal mechanisms, that when combined with the Tenth Circuit's collegial nature, contribute to a lower en banc rate. The authors recognize that there likely are other reasons why the Tenth Circuit has taken fewer en banc rehearings over the years.

11. U.S. CONST. art. I, § 8, cl. 9; David Engdahl, *Inferior Courts*, *in* THE HERITAGE GUIDE TO THE CONSTITUTION 157 (David F. Forte & Matthew Spalding eds., 2d ed. 2014).

12. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

13. RUSSELL R. WHEELER & CYNTHIA HARRISON, FED. JUD. CTR, CREATING THE FEDERAL JUDICIAL SYSTEM 6 (1989).

14. *Id.* at 6, 9; Engdahl, *supra* note 11, at 157 ("Three-judge circuit courts were the principal federal tribunals; they tried diversity cases and most federal crimes, heard cases removed from state courts, and could review most of the single-judge district courts' decisions.").

15. Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 222 (1999).

16. Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. 826 (1891).

17. George, *supra* note 15, at 224.

18. 28 U.S.C. § 42. To this day, this law allows Supreme Court justices to "circuit ride," which originally referred to the process by which Supreme Court justices rode horses across the country to

judges and a district judge.[19] It wasn't until 1911 that Congress fully abolished the old circuit courts and transferred circuit judges to the courts of appeals.[20] In contrast to the first half of our nation's history, these new appellate courts with permanent judgeships allowed the formation of more concrete circuit identities. With judges sticking around for longer than one case at a time, their relationships with their life-tenured colleagues solidified.[21] That consistency in turn allowed circuit judges to resolve issues more effectively while keeping a better account of the law in their respective circuit.[22]

This context teed up the Supreme Court's landmark 1941 opinion, *Textile Mills Securities Corp. v. Commissioner*.[23] There, the Court held that courts of appeals have inherent power to sit en banc.[24] Critical to the Court's holding was that the option to rehear cases results in "more effective judicial administration" by helping resolve intracircuit conflicts and promoting the finality of decisions.[25] Such a tool was especially important because the circuit courts of appeals were, and still are, the courts of last resort in the vast majority of cases.[26]

A few years later in 1948, Congress enacted 28 U.S.C. § 46(c), which granted appellate courts the authority to hear cases en banc and, in effect, amounted to a "legislative ratification of *Textile Mills*."[27] In 1953, the Supreme Court in *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*[28] held that § 46(c) affirmed a circuit's authority to "devise its own administrative machinery to provide the means whereby a majority may order such a[n en banc] hearing."[29] The Court cited its "general power to supervise the administration of justice in the federal courts" as its authority to "define [the] requirements [of en banc review] and insure their observance."[30]

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join lower court panels. See WHEELER & HARRISON, *supra* note 13, at 9–10, for an interesting background of why "circuit riding" was frustrating.

19. WHEELER & HARRISON, *supra* note 13, at 24.

20. George, *supra* note 15, at 224.

21. *See id.*

22. *See id.* at 224–25.

23. 314 U.S. 326 (1941).

24. *Id.* at 333–35. The authors are unaware of any judge or scholar explicitly connecting this "inherent power" to rehear cases to Article III's vesting of the "judicial power of the United States . . . in one supreme Court, and *in such inferior Courts* as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1 (emphasis added).

25. *Textile Mills*, 314 U.S. at 334–35.

26. *Id.* at 335.

27. W. Pac. R.R. Corp. v. W. Pac. R.R. Co., 345 U.S. 247, 250–51 (1953). The Supreme Court has long interpreted the Supremacy Clause in Article VI to mean that "where Congress is silent, federal courts can establish procedures of their own, but that legislation regarding procedure" otherwise prevails. Engdahl, *supra* note 11, at 156. However, "if judges find a procedure enacted by Congress incompatible with the independent performance of their own constitutional duties, it would seem that they are bound by their oaths to disregard it." *Id.*

28. 345 U.S. 247 (1953).

29. *Id.* at 250.

30. *Id.* at 260.

Concurring in the judgment, however, Justice Frankfurter cautioned that rehearings "are not a healthy step in the judicial process" and "ought not to be deemed a normal procedure."[31] He posited that a rehearing is "an abuse of judicial energy," "results in needless delay," "arouses false hopes in defeated litigants and wastes their money," and "bespeak[s] serious defects in the work of the courts of appeals, an assumption which must be rejected."[32] Others have noted that, in addition to being costly and time consuming,[33] the rehearing process can be divisive and unpleasant.[34] For these reasons, many courts of appeals embrace Justice Frankfurter's wisdom by exercising their § 46(c) en banc discretion as a last resort.[35]

Implicit in Justice Frankfurter's parade of horribles is the fact that airing disagreements in such a public fashion comes at the expense of collegiality among judges.[36] In lieu of a formal en banc process, he recommended that courts use informal procedures that both require collegiality among judges and achieve the "ends" of en banc review.[37] Part II examines the importance of this judicial collegiality and how it relates to the en banc rehearing process.

II. COLLEGIALITY: A CRITICAL ASPECT OF APPELLATE JUDGING

Collegiality is essential to the functioning of any human institution.[38] This is particularly true for appellate courts.[39] Compared to larger groups, which encourage free riding, appellate judges decide cases in small groups.[40] Life-tenured appellate judges—especially following the Circuit Court of Appeals Act of 1891—generally work with each other for much

31. *Id.* at 270 (Frankfurter, J., concurring).
32. *Id.*
33. Deanell Reece Tacha, *The "C" Word: On Collegiality*, 56 OHIO ST. L.J. 585, 590 (1995).
34. Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373, 1376 (2021).
35. *See W. Pac. R.R. Corp.*, 345 U.S. at 270 (Frankfurter, J., concurring).
36. *See* Devins & Larsen, *supra* note 34, at 1376 & n.8 ("[S]ome circuits even tout their low en banc rate as illustrative of a collegial and apolitical culture."); *W. Pac. R.R. Corp.*, 345 U.S. at 271 (Frankfurter, J., concurring). Chief Judge Jon Newman explains that the Second Circuit generally refrains from hearing cases en banc because it is an inherently inefficient layer of appellate review imposing significant travel and preparation burdens on active judges; he expresses that it also poses a threat to a court's collegiality. Martin Flumenbaum & Brad S. Karp, *The Rarity of En Banc Review in the Second Circuit*, 256 N.Y. L.J. (2016).
37. *W. Pac. R.R. Corp.*, 345 U.S. at 271 (Frankfurter, J., concurring).
38. HAZELTON, HINKLE, & NELSON, *supra* note 9, at 18 ("We define collegiality as behavior by individuals that is intended to maintain relationships with colleagues. Collegiality, as we define it, does not require that co-workers to be friends or even like each other (though such bonds can't hurt). Rather, we are focused on actions intended to make interpersonal interactions better.").
39. *Id.* at 15–16.
40. *Id.* at 20; Robert Albanese & David D. van Fleet, *Rational Behavior in Groups: The Free-Riding Tendency*, 10 ACAD. MGMT. REV. 244, 246 (1985) ("Free-rider theory holds that rational individuals who are members of a large, potential group will not necessarily organize or act in their common interest. That is the free-rider paradox. The greater the number of potential group members, the less likely an individual or set of individuals will feel that the costs of organizing a group are justified by the benefits to be received. The larger the potential group, the greater the costs of organizing the group are likely to be. It would not be rational for an individual to bear these costs because the individual will receive the same relative share of the public good as will those who bear no costs of organization, assuming equal distribution of benefits. Thus it will be in each potential member's best interest to let someone else bear the costs of organization.").

longer than most other types of coworkers.[41] Circuit opinions often take center stage in the public's imagination, and breakdowns in collegiality can impact the public's perception of a court's legitimacy.[42] These factors thus raise the importance of judicial collegiality and decrease a circuit court's willingness to rehear cases en banc.[43]

Put this way, the absence of en banc rehearings is a feature—not a bug—of the Tenth Circuit.[44] Some bemoan the absence of en banc rehearings as an elimination of "the prospect of a formal layer of judicial review that ensures doctrinal coherence and consistency."[45] Missing from this line of argument, however, is any consideration of the above-mentioned reasons why a circuit court may seek to avoid rehearing cases in the first place. Collegiality is a key reason.[46]

While various technical definitions of collegiality exist, Judge Harry Edwards provides an excellent overview of this term in the legal context:

> When I speak of a collegial court, I do not mean that all judges are friends. And I do not mean that the members of the court never disagree on substantive issues. That would not be collegiality, but homogeneity or conformity, which would make for a decidedly unhealthy judiciary. Instead, what I mean is that judges have a common interest, as members of the judiciary, *in getting the law right*, and that, as a result, we are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect. Collegiality is a process that helps to create the conditions for principled agreement, by allowing all points of view to be aired and considered.[47]

Thus, collegiality as used here means the willingness to work together effectively in writing opinions and interpreting law. With that in mind, instead of parading disagreements to the public, the Tenth Circuit channels

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41. HAZELTON, HINKLE, & NELSON, *supra* note 9, at 20.

42. *Id.* at 21; *see also* Devins & Larsen, *supra* note 34, at 1376.

43. Senator Amy Klobuchar posed a written question to then-nominee (now-Judge) Gregory Phillips to become a Tenth Circuit Judge: "Do you think that collegiality is an important element of the work of a Circuit Court? If so, how would you approach your work on the court, if confirmed?" He answered: "Yes. I would always strive to maintain cordial relations with fellow judges and staff. Throughout my career, I have seen for myself that the quality of work increases when decision-makers work together in a friendly, cooperative atmosphere." *Confirmation Hearings on Federal Appointments: Before the Comm. on the Judiciary*, 113th Cong. 945 (2013), https://www.congress.gov/113/chrg/CHRG-113shrg91101/CHRG-113shrg91101.pdf.

44. To be clear, collegiality is one among several factors that disincentivizes en banc rehearings, and those other factors will sometimes compel the need to rehear cases. Even the most collegial courts *must* rehear cases en banc from time to time. Furthermore, there are other distinct reasons *to go en banc*, as more fully explained in Judge Baldock, Judge Carson, and Mr. Gallegos's Article, but we do not explore those other reasons in detail here. *See generally* Baldock, Carson, & Gallegos, *supra* note 4.

45. Kersh, Kilbourn, & Marceau, *supra* note 2, at 307.

46. Former Tenth Circuit Judge Deanell Reece Tacha stated that "judicial collegiality enhances the quality of appellate decisionmaking." Tacha, *supra* note 33, at 586. Tenth Circuit Judge Michael Murphy has also explained that "a collegial court better manifests the bedrock principle upon which appellate courts rest: multiple minds are better than one." Michael R. Murphy, *Collegiality and Technology*, 2 J. APP. PRAC. & PROCESS 455, 456 (2000).

47. HAZELTON, HINKLE, & NELSON, *supra* note 9, at 17 (emphasis added).

its existing collegiality[48] to resolve those disagreements through more informal—and less public—measures.[49]

III. THE TENTH CIRCUIT'S INFORMAL ALTERNATIVES TO EN BANC REVIEW

Among the informal measures courts of appeals have at their disposal are internal procedures that "accomplish all that needs to be accomplished in the exercise of the discretionary power to sit en banc."[50] Before precedential opinions are published, for example, circuit courts now circulate drafts to their active members.[51] This process accomplishes the objective of en banc rehearings.[52] It acquaints all active judges on the court "with the proposed opinion that is coming down, so if they do have an opportunity to point out any conflict, or something of the kind, it may be done."[53]

Along those lines, the Tenth Circuit employs two informal procedures.[54] The first is what scholars and courts call a "mini" or "informal" en banc process.[55] Before filing a published opinion, "[d]raft opinions are circulated, and if a nonsitting judge comments on the substance of a proposed opinion, consideration is given to whether the case should be heard en banc."[56] In other words, judges can object to the outcome of a proposed

48. The collegiality of any circuit is difficult to prove with mathematical precision, but it does have a "know it when you feel it" sort of effect. Michael Karlik, *10th Circuit Conference Features Gorsuch, Discussions About 'Judicial Endeavor,'* COLO. POLS. (Sept. 11, 2003), https://www.coloradopolitics.com/courts/10th-circuit-conference-features-gorsuch-discussions-about-judicial-endeavor/article_7261be16-5026-11ee-bdc0-bf65f2c3426d.html (Judge Veronica S. Rossman noting Tenth Circuit's collegiality); Judge Richard E. N. Federico, Address at the Federal Bar Association Oklahoma City Chapter: Tenth Circuit Year in Review (Dec. 30, 2024) (stating that "[a]ll of us have an obligation to maintain collegiality and that culture of collegiality in the Circuit").

49. W. Pac. R.R. Corp. v. W. Pac. R.R. Co., 345 U.S. 247, 271 (1953) (Frankfurter, J., concurring).

50. *Id.* at 272.

51. *Id.* at 271.

52. *Id.*

53. *Id.* (quoting testimony from then-Chief Justice of the United States Court of Appeals for the District of Columbia, Duncan L. Groner); Judah I. Labovitz, *En Banc Procedure in the Federal Courts of Appeals*, 111 U. PA. L. REV. 220, 231 (1962) ("The purpose of en banc rehearings is not panel supervision but resolution of panel conflict.").

54. The Tenth Circuit's habit of resorting to informal procedures can be traced as far back as over sixty years ago. Labovitz, *supra* note 53, at 226–27 ("The rule of record [for hearing cases en banc] is apparently less important than the informal approach adopted by the Tenth Circuit judges. . . . There seems to be a certain attitude in the circuit that cases which deserve en banc consideration may be 'intuitively' discovered without resort to formal procedure.").

55. *See, e.g.*, Amy E. Sloan, *The Dog that Didn't Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals*, 78 FORDHAM L. REV. 713, 715 n.3 (2009); Steven Bennett & Christine Pembroke, *Mini in Banc Proceedings: A Survey of Circuit Practices*, 34 CLEV. ST. L. REV. 531, 552 (1986); United States v. Parkes, 497 F.3d 220, 230 n.7 (2d Cir. 2007); Labovitz, *supra* note 53, at 222 ("The practice of circulating draft opinions enables the other judges to make an informed decision on the en banc question without extensive effort to become acquainted with the issues in the case. This practice has been criticized, however, primarily because it permits judges to whom the litigants were unable to argue their views to exert considerable influence on the disposition of a case.").

56. Labovitz, *supra* note 53, at 226.

draft sua sponte and use the given case as a vehicle to change circuit precedent upon a majority vote—without a full rehearing.[57]

Many times, the Tenth Circuit has used the mini en banc process to avoid the fanfare of full en banc rehearings. On at least thirty-one separate occasions since 1984,[58] the court has explained in footnotes that a unanimous vote via the mini en banc process resulted in clarifying or overruling conflicting precedent.[59] Thus, *before* a conflict arises "between panels"—which is the "dominant concern" that rehearings alleviate—the mini en banc process gives the court the ability to proactively avoid such problems. And that solution thereby obviates the future need to correct any conflicting circuit opinions.[60]

The second internal process the Tenth Circuit uses to avoid rehearings also comes from the collegial review process of circulating draft opinions to the full circuit. Circuit court judges circulate drafts to active judges who were not on the panel to exchange edits, recommendations, and comments before filing finished versions. Yet the Tenth Circuit does things uniquely.[61] Not only do panels circulate proposed opinions to the full court, but they do so in a way that is likely to garner the attention and assistance of the full court.[62] After a three-judge panel hears oral argument, one of the judges circulates a preliminary draft directly to the members of the panel.[63] Rather than apprising the full circuit of the back-and-forth of minor nits, substantive changes, and separate writings, the three-judge panel keeps all of this between themselves until an entire draft opinion is

57. *See, e.g.*, *Parkes*, 497 F.3d at 230 n.7; Labovitz, *supra* note 53, at 227 (noting that "cases which deserve en banc consideration may be 'intuitively' discovered without resort to formal procedure").

58. Importantly, the mini en banc mechanism is not used that often, but the Tenth Circuit does use it more often than some other circuits. *See* Sloan, *supra* note 55, at 727–28 (stating that the Tenth Circuit used the informal mechanism "twenty-nine times from 1984 to 2007"); TW Telecom Holdings Inc. v. Carolina Internet Ltd., 661 F.3d 495, 497 n.2 (10th Cir. 2011); United States v. Payne, 644 F.3d 1111, 1113 n.2 (10th Cir. 2011).

59. Bennett & Pembroke, *supra* note 55, at 552. And it is not clear whether merely a majority vote is needed to overrule prior precedent in this manner. It seems that all Tenth Circuit cases using the mini en banc process have had a unanimous agreement to overrule or clarify a case as a full court. *See, e.g.*, *TW Telecom Holdings Inc.*, 661 F.3d at 497 n.2 ("We have circulated this order to the en banc court, which unanimously agrees to overrule our prior [precedent.]"); *Payne*, 644 F.3d at 1113 n.2 (same); United States v. Goff, 314 F.3d 1248, 1249 n.1 (10th Cir. 2003) (same); United States v. Duncan, 242 F.3d 940, 947 n.10 (10th Cir. 2001) (same); Hale v. U.S. Dep't of Just., 2 F.3d 1055, 1058 n.2 (10th Cir. 1993) (same); Ambus v. Granite Bd. of Educ., 975 F.2d 1555, 1562 n.4 (10th Cir. 1992) (same), *modified on reh'g*, 995 F.2d 992 (10th Cir. 1993); Davis v. TXO Prod. Corp., 929 F.2d 1515, 1518 n.3 (10th Cir. 1991) (same); Amoco Prod. Co. v. Heimann, 904 F.2d 1405, 1414 n.8 (10th Cir. 1990) (same); United States v. Allen, 895 F.2d 1577, 1580 n.1 (10th Cir. 1990) (same); Reppy v. Dep't of Interior, 874 F.2d 728, 730 n.5 (10th Cir. 1989) (same); EEOC v. Gaddis, 733 F.2d 1373, 1377 n.3 (10th Cir. 1984) (same).

60. W. Pac. R.R. Corp. v. W. Pac. R.R. Co., 345 U.S. 247, 270 (1953) (Frankfurter, J., concurring).

61. A comparison between the courts of appeals' internal procedures reveals differences in how panel members and nonpanel members review drafts and file published opinions in each circuit. *See generally* JON O. NEWMAN & MARIN K. LEVY, WRITTEN AND UNWRITTEN: THE RULES, INTERNAL PROCEDURES, AND CUSTOMS OF THE UNITED STATES COURTS OF APPEALS 96–114 (2024).

62. *See, e.g.*, McKay & Kleinheksel, *supra* note 3, at 35.

63. *See id.*

finalized. If the panel, or the authoring judge, seeks to publish the opinion and make it precedential,[64] then the panel circulates the final proposed draft to all active judges in the circuit.[65]

The court's status as one of the most collegial courts in America only enhances its review process.[66] Members of the court "know each other well personally" and have "intense respect" for each other's "substantive differences of opinion."[67] With that collegiality in mind, Tenth Circuit judges "place a high premium on consistency within the circuit."[68] When a panel circulates a proposed opinion to the full circuit, "not surprisingly, judges consistently reserve their nonpanel comments for issues that are important to maintain consistency in circuit law or to guide district courts throughout the circuit."[69] This procedure, coupled with the Tenth Circuit's collegial relationships, "allows the court to reach full court consensus before the panel issues the opinion, sometimes saving the court from a formal en banc hearing after the opinion has been issued."[70] Put simply, collegiality helps prevent future inconsistencies in published opinions.

In sum, some scholars correlate the Tenth Circuit's low en banc rate with a low "willingness" to revisit three-judge panel cases as a full court.[71] But understanding what happens behind the bench reveals that there is more than meets the public eye. The Tenth Circuit works together to reduce the need for en banc rehearings by employing informal mechanisms for all Tenth Circuit judges to review drafts of precedential opinions before publication. Together, those mechanisms and the court's collegial nature accomplish "the most constructive way of resolving conflicts" by "avoid[ing] them" proactively, obviating the need for a full en banc rehearing.[72]

CONCLUSION

When the Supreme Court expounded the en banc power in *Western Pacific Railroad Corp.*, Justice Frankfurter warned that this new layer of review was "not a healthy step in the judicial process."[73] He emphasized that circuit courts can obviate the need for en banc rehearings by simply working together before filing an opinion to avoid a conflict after the fact. Keeping Justice Frankfurter's recommendation in mind, the Tenth Circuit achieves the same objectives of en banc rehearings by implementing informal procedures to avoid such rehearings altogether. This at the same

64. *Cf.* FED. R. APP. P. 32.1; 10TH CIR. R. 32.1.
65. McKay & Kleinheksel, *supra* note 3, at 35.
66. *See, e.g.*, Tacha, *supra* note 33, at 588 (stating that the Tenth Circuit is "a model of collegial decisionmaking").
67. *Id.* at 588–89.
68. *Id.* at 589–90.
69. *Id.* at 590.
70. *Id.*
71. Kersh, Kilbourn, & Marceau, *supra* note 2, at 308–10.
72. W. Pac. R.R. Corp. v. W. Pac. R.R. Co., 345 U.S. 247, 270 (1953) (Frankfurter, J., concurring).
73. *Id.*

time fosters the Circuit's collegial spirit. And in so doing, the Circuit serves as a model of collegial decision-making for all courts.