Golden Gate University Law Review

Volume 41
Issue 3 *Ninth Circuit Survey*

Article 2

May 2011

Introduction

Marsha S. Berzon

Follow this and additional works at: http://digitalcommons.law.ggu.edu/ggulrev

 Part of the Courts Commons

Recommended Citation
Marsha S. Berzon, *Introduction*, 41 Golden Gate U. L. Rev. (2011).
http://digitalcommons.law.ggu.edu/ggulrev/vol41/iss3/2

This Introduction is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

INTRODUCTION

JUDGE MARSHA S. BERZON

As judges of the geographically largest and busiest federal circuit court of appeals, the 26 active and 22 senior Ninth Circuit judges[1] rarely have the luxury of looking back at the cases we have decided, rather than working on the opinions yet to be written and preparing for the new cases coming up for argument. That the Golden Gate University Law Review has for so many years (since Volume 6 in 1976) produced this annual volume documenting and analyzing our work product has been essential in filling the gap by providing an objective assessment of what – and how – we are doing as we strive both to do justice in individual cases and to provide guidance to lawyers and litigants for future litigation.

The popular media, in contrast, rarely says much of substance about the dispositions we work so hard to turn out, instead devoting itself to counting the Supreme Court reversal rate and reflexively labeling our court – inaccurately, as the opinions chosen for this survey indicate[2] – uniformly "liberal" and "out of the mainstream."[3] In fact, the judges of the Ninth Circuit are a wildly diverse lot, and we produce opinions that reflect that diversity. Which brings me to the topic I would like briefly to explore in this Introduction: The Ninth Circuit en banc process, which is our effort to create some uniformity when the diversity has gotten out of hand and resulted in conflicting opinions, intra- or, sometimes, inter-circuit. Through the en banc process, we hear unusually important cases

[1] There are 29 authorized judgeships for the Ninth Circuit, but 3 are currently vacant. Of the senior judges, 18 sit regularly on cases. Because this complement of judges is not nearly enough to hear and decide the approximately 6,324 cases on which we had full-merits briefing in 2010, we had 185 visiting judges – district judges from the Ninth Circuit and district and circuit judges from elsewhere – helping us out by sitting on panels. (Absent an emergency, no three-judge panel can have more than one visiting judge, *see* 28 U.S.C. § 46(b), and visiting judges do not participate in en banc votes or sit on en banc panels.)

[2] *See* Newdow v. Rio Linda Union School District, 597 F.3d 1007 (9th Cir. 2010); United States v. Pineda-Moreno, 591 F.3d 1212 (9th Cir. 2010).

[3] *See, e.g.*, John Schwartz, *'Liberal' Reputation Precedes Ninth Circuit*, N.Y. TIMES, Apr. 24, 2010, A33.

in panels more representative of the court as a whole than the usual three-judge panels.

The trigger for this modest project is that in two of the three Ninth Circuit cases covered in this volume, there was a call for en banc consideration, one directly and one in a predecessor case, each of which generated not one but two dissents from denial of en banc consideration.[4] So it is worth considering why and how cases are called en banc in our court, and why and how the practice of publishing dissents from (and, more recently, concurrences in) denial of en banc rehearing developed and burgeoned.

I begin with the why and how of en banc consideration:

First off, given its size, the Ninth Circuit long ago faced the fact that, unlike other federal circuits, we cannot as a practical matter have the court as a whole sit en banc. An argument with 29 judges on a panel would not allow lawyers to get a word in edgewise. (Many lawyers feel as though they rarely do anyway, even with our current partial en banc system.) And drafting, circulating, and voting on en banc opinions with a bench that large would stretch out the decision-making process indefinitely – which, again, some lawyers maintain is already the case.

So, when the size of the Ninth Circuit was expanded in 1978 from 13 to 23 judges,[5] Congress also authorized any circuit of more than 15 active judges to use a partial en banc court, with the size of the partial en banc panels to be chosen by the circuit.[6] The Ninth Circuit was the first, and is still the only, court to take advantage of this permission.[7] We (I use the term "we" as members of the court usually do when speaking of court decisions, although I was not on the court at the time) had a mathematically savvy law clerk figure out the smallest number of judges that would fairly accurately reflect the diversity of views on the court the great majority of the time, and came up with eleven judges; that number was later confirmed as adequate by others with statistical expertise. We nonetheless – largely for appearance's sake, because lay people tend not to believe that less than half the active judges can be adequately

[4] United States v. Pineda-Moreno, 617 F.3d 1120, 1121 (9th Cir. 2010) (Kozinski, J., dissenting from denial of rehearing en banc); *Pineda-Moreno*, 617 F.3d at 1126 (Reinhardt, J., dissenting from denial of rehearing en banc); Newdow v. U.S. Congress, 328 F.3d 466, 471 (9th Cir. 2003) (O'Scannlain, J., dissenting from denial of rehearing en banc); *Newdow*, 328 F.3d at 482 (McKeown, J., dissenting from denial of rehearing en banc).

[5] *See* The Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, § 3(a), 92 Stat 1629, 1632; *see also* 28 U.S.C. § 46(c) (2006).

[6] *See* The Omnibus Judgeship Act of 1978, § 6 (codified at 28 U.S.C. §§ 41 note, 46(c)). The Fifth and Sixth Circuits are the only other circuits that currently qualify for limited en banc panels. *See* 28 U.S.C. § 44.

[7] *See* 9TH CIR. R. 35-3.

representative – did experiment for a short while with fifteen-judge en banc panels. But the larger panels were unwieldy during argument and prone to delay during the opinion-writing process.[8] We later went back to the eleven-judge system.

It is theoretically possible under our system to have a full-court en banc after a partial en banc panel decides a case.[9] But such full-court en bancs have been "called" by judges on the court only a handful of times,[10] and no such call has succeeded.[11]

I've often thought that the partial en banc system is integral to making our process for deciding *which* cases to take en banc – the part of the en banc process I'll focus on here – work. The reason is that the en banc panel is "pulled" at random, literally and in somewhat retro fashion, by pulling balls with judges' names on them from an old jury box. (The draw is among the non-recused active judges and any senior-judge members of the original three-judge panel who choose to be in the pool from which the en banc panel is drawn).[12] So, unlike in other circuits, when we vote on whether to "go" en banc, we do not know the composition of the panel that will ultimately hear the case. As a result, the *decision* on whether to hear a case en banc cannot be simply a trial vote on the likely outcome of the case once taken en banc, and is more likely to reflect the considerations that are supposed to govern whether a

[8] The 11-judge limited en banc procedure was first adopted by rule in 1979. *See* 9TH CIR. R. 35-3 (1979). Effective January 1, 2006, the limited en banc panels had 15 judges. *See* 9TH CIR. R. 35-3 (2006). On July 1, 2007, however, the rule was revised once more to return to the 11-judge system. *See* 9TH CIR. R. 35-3 (2007).

[9] *See* 9TH CIR. R. 35-3 ("In appropriate cases, the Court may order a rehearing by the full court following a hearing or rehearing en banc."); 9TH CIR. GEN. ORDER 5.8.

[10] *See* Abebe v. Holder, 577 F.3d 1113, 1113 (9th Cir. 2009) (Berzon, J., dissenting from the denial of rehearing en banc by the full court); United States v. Orso, 275 F.3d 1190, 1192 (9th Cir. 2001) (Trott, J., dissenting from an order rejecting a sua sponte call for rehearing by the full court); Compassion in Dying v. Washington, 85 F.3d 1440, 1441, 1446 (9th Cir. 1996) (individual dissents from an order rejecting a sua sponte call for rehearing by the full court by Judges O'Scannlain and Trott); Campbell v. Wood, 20 F.3d 1050, 1053 (9th Cir. 1994) (Reinhardt, J., dissenting from the denial of rehearing en banc by the full court); United States v. Penn, 647 F.2d 876, 889–91 (1980) (individual dissents from the denial of rehearing en banc by the full court by Judges B. Fletcher, Pregerson, and Ferguson).

[11] According to Professor Arthur Hellman, former Chief Judge James R. Browning strongly opposed the first call for the full court to rehear a case decided by a limited en banc panel. *See A Celebration Honoring James R. Browning*, 63 MONT. L. REV. 251, 262–66 (2002) (remarks of Arthur Hellman). Although he likely disagreed with the en banc decision, and while emphasizing that he "d[id] not question for one minute . . . [the requesting judge's] absolute right to call for the vote," Chief Judge Browning urged his colleagues to vote against the call for the good of the Court, explaining that otherwise the experiment with the limited en banc process would fail. *Id.* at 265 (quoting a previously-confidential memorandum of Chief Judge Browning). Chief Judge Browning's position won out.

[12] 9TH CIR. R. 35-1 & 35-3 circuit advisory committee's note 2.

case is worthy of en banc consideration – namely, the importance of the case, and whether it conflicts with Supreme Court cases, other cases from our court, or cases from other circuits.[13]

Here, in brief outline, is how we decide whether to "go" en banc: Any judge of the court, senior judges included, can "call" a case en banc, following a prescribed time schedule I'll not go into here.[14] The en banc call can follow the submission of a petition for rehearing en banc, or it can be "sua sponte" by a judge or judges. All parties will always have a chance to comment before we have a vote whether to go en banc.[15] As a matter of tradition but not rule, a dissenting judge on a panel will usually not be the person to make the en banc call, the theory being that unless someone other than the one dissenting judge thinks the case worthy of en banc rehearing, the "call" is unlikely to succeed**.** Occasionally, three-judge panels as a whole decide to call a case en banc, either before or after publishing an opinion, because they discover an intracircuit conflict or a conflict of our precedent with that of the Supreme Court or of other circuits. Because of our size, we tend to be quite scrupulous about not allowing three-judge panels to change the law of the circuit unless there is a squarely on-point Supreme Court case,[16] so there are a certain number of "housekeeping" en bancs, designed only to harmonize Ninth Circuit case law that, usually inadvertently, is in conflict, even if on fairly minor points.

Once there's an en banc "call," we have a vigorous internal exchange of memorandum about whether the case should be heard en banc. These memoranda are, in many ways, the most interesting and best work we do on cases – impassioned, detailed, sometimes deeply analytical – even though the products are for internal consumption only (except as they sometimes morph into dissent from denial of en banc, a subject I'll explore shortly). Apparently – and I say this only from discussions with judges on other circuits – this writing of extensive, thoughtful memoranda before deciding whether to go en banc is not always undertaken in other circuits, and is, in my view, a great strength of our system. By the time a case is actually taken en banc, which

[13] *See* FED. R. APP. P. 35. The former Fifth Circuit went en banc if a substantial minority of the court voted to do so, but the current Federal Rules of Appellate Procedure do not allow this procedure. *See* FED. R. APP. P. 35(a) ("A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc.").

[14] 9TH CIR. R. 35-1 & 35-3 circuit advisory committee's note 2.

[15] 9TH CIR. R. 35-2.

[16] *See* Hulteen v. AT&T Corp, 498 F.3d 1001, 1003 (9th Cir. 2007) (en banc), *rev'd on other grounds*, 129 S. Ct. 1962 (2009); Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

requires the vote of a majority of non-recused active judges,[17] the issues possibly meriting en banc consideration have been thoroughly aired, to the great advantage of the en banc panel eventually drawn.

So how often are cases called en banc, and how often do the en banc calls succeed? In the last ten years, since I've been on the court (I was confirmed in March, 2000), we have heard between 13 and 25 cases en banc annually, out of between 32 and 47 en banc calls each year. The percentage of en banc calls that have been successful has varied between about one-third to just over one-half. These statistics can be gleaned from public information, as orders denying en banc rehearing report whether there was a vote of the whole court concerning en banc rehearing[18] – and, of course, a grant of rehearing en banc speaks for itself. We do not, however, as some circuits do,[19] announce either the numerical vote whether to go en banc or the judges voting either way; indeed, judges are not given the choice to record their votes in the order denying en banc rehearing, although the burgeoning practice of publishing dissents from denial of en banc provides the same opportunity to some degree.

Whether we should change the practice of not publicly recording en banc votes in the order granting or denying en banc rehearing is a matter members of the court have debated.[20] Favoring our current practice is the consideration that a recorded vote for or against en banc review could be misunderstood as a vote on the merits rather than a vote on the question of further review. There is also the related concern that as judges we ordinarily explain why we do what we do if our names are attached to a decision, triggering the concern that some judges would feel compelled to explain their vote if it were recorded. Moreover, judges may decide to vote for or against en banc consideration for reasons not in any respect substantive, such as the quality of the lawyering or whether the facts of the case present the underlying issue well; recording such reasons, legitimate though they are with regard to the exercise of discretionary jurisdiction, could be untoward, while concealing them in favor of less candid explanations would not advance transparency in the

[17] If an eligible judge does not vote on an en banc call, the vote is recorded as a "no" vote, *see* 9TH CIR. GEN. ORDER 5.5(b), except in death penalty cases in which execution is imminent, in which a failure to vote is recorded as a "yes" vote, *see* 9TH CIR. R. 22-4(d)–(e).

[18] 9TH CIR. R. 35-1 & 35-3 circuit advisory committee's note 2.

[19] *See, e.g.*, 4TH CIR. R. 35(b) (order denying rehearing en banc reflects the vote of each participating judge); *see also* D.C. CIR. R. 35; 7th Cir. Internal Operating Procedure 5(d) (order denying rehearing en banc reflects which judges voted to grant rehearing, if they wish).

[20] *See, e.g.*, United States v. Koon, 45 F.3d 1303, 1308-10 (9th Cir. 1995) (Reinhardt, J., dissenting from the denial of rehearing en banc).

en banc process. Finally, there is the consideration that exposing the vote count, either numerically or by name, would put pressure on the option to abstain and have the vote counted – in most instances, as a no vote – according to our automatic attribution rules. In other words, judges might feel obliged to vote either yes or no, when they would rather not vote at all – for example, so as to avoid the appearance of pre-commitment on the issues should the case go en banc. Abstention could be understood as not participating, when that is not exactly what it is, given the rule that a non-vote usually counts as a no vote. One option to deal with this latter concern would be recording, numerically or by name, only "yes" votes in the ordinary, non-death penalty case covered by the "no" default rule, and only "no" votes in death penalty cases covered by the "yes" vote default rule.

Weighing against these considerations are others some members of our court have found compelling:[21] Preeminent is the concern that secrecy in the form of lack of attribution in judicial decision-making on important decisional matters is generally unacceptable, as judges should be accountable for their decisions on cases. Further, for purposes of petitions for writ of certiorari, the actual vote whether to go en banc may be influential for the Supreme Court in deciding how important or debatable a case is. For instance, a lopsided no vote may be viewed differently from an evenly split vote, although both result in denial of en banc and would be recorded identically under our present system in the order denying rehearing en banc. Exposing the vote would demonstrate to the public the impact of court vacancies; provide information about the performance of individual judges that could be useful should that judge be considered for a Supreme Court appointment; and may give some sense of voting patterns useful to students of the judicial process.[22]

To those considerations I would add that if en banc review is granted – I would assume that vote recording would have to be symmetrical and so apply to grants as well as denials of en banc review – recording the vote would provide some information to the litigants preparing for en banc argument. True, reading the tealeaves would require sophistication. Given the various reasons for granting en banc review, the actual reason could well be, for example, an irreconcilable intracircuit conflict, not the merits of the issue. But the litigants familiar with the case will have some idea concerning the reason for grant of en banc rehearing, and so may infer that an overwhelming vote to hear a case en banc signals a likelihood that either the three-judge panel opinion

[21] *See id.*

[22] *Id.*

or prior precedent is likely to be overturned, absent some clarifying advocacy. A less lopsided vote could suggest that the outcome is in no way presaged, especially given our partial en banc system.

We come, finally, to the most recent innovations in our en banc procedure: the practice of recording dissents from denial of en banc, and the countervailing emergence of concurrences in denial of en banc. To provide, once again, some numbers: When I started on the court, in 2000, there were 5 dissents from denial of en banc, from among 24 denials of en banc rehearing after a vote, and no concurrences in denial of en banc. In 2010, there were 16 dissents from denial of en banc, among 27 denials following a vote, and 5 concurrences. In the first five years I was on the court, never did more than half the denials of en banc result in published dissents from denial of en banc; and overall, slightly less than 40% of denials of rehearing en banc resulted in a dissent. In the next six years, 2005 through 2010, at least 55% of denials each year resulted in a dissent, and over that period as a whole, 62.5% of denials were accompanied by dissents.[23] And, to keep up with the dissent trend, the practice of publishing concurrences in denial of en banc, largely countering arguments made in the dissents from denial that did not appear in the three-judge panel opinion or any dissent therefrom, has grown as well, albeit more modestly. From 2000 through 2004, about 9% of cases with dissents from denials of en banc also had concurrences; over the following six years, that number was 22.5%.[24]

Why have these practices grown, and what is to be made of that growth? For one thing, there has been some indication from members of the Supreme Court that they find the dissents useful in deciding whether to take cases on certiorari. The dissents, it has been said, inform the Supreme Court of the importance of an issue and of arguments favoring one side or the other that have not theretofore appeared in print. Further, as noted, the dissents are often relatively easy to produce, given the lengthy memoranda that have already been exchanged among the judges debating the propriety of en banc consideration. A final consideration favoring the new tradition of dissents from denial of en banc is the same one favoring recording votes on en banc calls – transparency for the public.[25]

Countering this consideration is the accusation – one of them mine[26]

[23] Internal Court Compilation by Maria Daquipa (Feb. 24, 2011) (on file with author).

[24] *Id.*

[25] *See generally* Indraneel Sur, *How Far Do Voices Carry: Dissents from Denial of Rehearing En Banc*, 2006 WIS. L. REV 1315.

[26] *See* Defenders of Wildlife Ctr. for Biological Diversity v. EPA, 450 F.3d 394, 402 (9th Cir. 2000) (Berzon, J., concurring in the denial of rehearing en banc).

– that the dissents sometimes read, inappropriately, like petitions for writs of certiorari. The suggestion underlying such observations is that advocacy for further review is inappropriate for judges of our court, who should be upholding our decision-making processes once they are completed rather than seeking intervention from the Supreme Court. Moreover, the time spent on dissents from denials of en banc, and concurrences as well, might, some argue, be better spent working on the new cases gathering on our desks. And the transparency consideration favoring the dissents is countered by the observation that the appearance of transparency is a mirage: Many judges who vote to grant en banc do not join dissents from denial of en banc, either generally as a matter of principle or in the individual case – because, for example, their reasons for voting to grant en banc were not the same as those of the judge writing the dissent, or because they do not consider the case of sufficient importance to merit a dissent from denial of en banc. Finally, those judges uncomfortable with the recent notion that dissents from denial of en banc are almost de rigeur point to the overblown appearance of internal dissension and disarray created by such dissents. In fact, such dissents appear in a tiny percentage of the cases we work on as a court, and convey a degree of criticism of our colleagues' work we tend to avoid outside of this medium.

From 2000 through 2010, there were 125 dissents from denial of rehearing en banc in our court.[27] Petitions for writs of certiorari have been filed with the Supreme Court in 83 of those 125. As of this writing, 9 of those petitions remain pending, and in another case there is still time to file a petition. Of the 74 cases with adjudicated certiorari petitions, the Supreme Court granted certiorari in 33 – a 44.6% rate.

There is, of course, a selection bias in these numbers: the cases important enough to elicit dissents from denial of en banc consideration are also likely to be good candidates for grant of petition for writ of certiorari on their merits. But I doubt that's the whole story. Some of the dissents from denial of en banc create the appearance of seriously wayward decision-making by the panel majority even when that is not the case, or at least not any more so than in many other cases in which, for one reason or another, no member of the court has chosen to call for en banc rehearing.

With those considerations in mind, I'll look quickly at the dissents from denial of en banc related to the *Pineda-Moreno* and *Newdow* cases covered in this year's Ninth Circuit survey. I don't want to trench on the substantive commentaries that appear later in this volume, so I'll

[27] Internal Court Compilation by Maria Daquipa (Feb. 24, 2011) (on file with author).

concentrate instead on the *kinds* of arguments made in the dissents, in an effort to see what the writers, and those who joined them, were trying to accomplish.

First up is Chief Judge Kozinski's dissent from denial of en banc rehearing in *Pineda-Moreno* (which I and four other judges joined).[28] Few of us can match Chief Judge Kozinski in writing with passion, precision, and humor, using language and allusions accessible to a wide audience. The *Pineda-Moreno* dissent from denial of en banc, concerning a panel opinion with two major Fourth Amendment issues, is a masterpiece of Chief Judge Kozinski's oeuvre.

The dissent begins with the warning that "1984 may have come a bit later than predicted, but it's here at last,"[29] goes on to maintain that "poor people are entitled to privacy, even if they can't afford all the gadgets of the wealthy for ensuring it,"[30] accuses the panel opinion of "unselfconscious cultural elitism,"[31] and of approving "something creepy and un-American,"[32] and ends with the assessment that unless the panel opinion is reconsidered, "the consequences for ourselves and our children may be dire and irreversible."[33] At the same time, Chief Judge Kozinski provided more traditional legal analysis concerning why the case met our en banc criteria, maintaining that the panel opinion conflicts with Supreme Court case law and a recent D.C. Circuit case. So Chief Judge Kozinski's dissent was directed both at provoking public discussion about where we are going as a society with regard to privacy protection generally and at providing a basis for granting Supreme Court review on certiorari. (Judge Reinhardt also wrote a dissent from denial of rehearing en banc in the same case for himself alone, also bemoaning, albeit much more briefly, a perceived demise in the protections accorded by the Fourth Amendment.[34])

It's worth noting that there was no panel dissent in *Pineda-Moreno*, so, without the dissents from denial of en banc, neither the dire assessments about the general direction of Fourth Amendment law nor the more technical arguments about why the case merited en banc review would have been given voice. Beyond that, though, I suppose one's assessment of Chief Judge Kozinski's dissent is very much in the eyes of

[28] United States v. Pineda-Moreno, 617 F.3d 1120, 1121 (9th Cir. 2010) (Kozinski, J., dissenting from denial of rehearing en banc).

[29] *Id*. at 1121.

[30] *Id*. at 1123.

[31] *Id*.

[32] *Id*. at 1126.

[33] *Id*.

[34] *Id*. at 1126-27 (Reinhardt, J., dissenting from the denial of rehearing en banc).

the beholder: Will such an engaging and passionate opinion actually capture popular concern about the installation of GPS systems on cars in driveways? What is likely to come of such concern? Would the Supreme Court likely have missed the asserted conflict with a D.C. Circuit case were it not flagged in a dissent from denial of en banc rehearing? For myself, having not succeeded in discouraging the publication of such dissents as a routine matter, I have taken to deciding on a case-by-case basis whether to join particular dissents from denial of rehearing en banc, as my joining Chief Judge Kozinski in *Pineda-Moreno* indicates.

The first Ninth Circuit *Newdow* opinion, which struck down as an Establishment Clause violation the recitation of the Pledge of Allegiance, with its "under God" phrase, in public school classrooms, was eventually heard by the Supreme Court and reversed on standing grounds.[35] Before that reversal, however, Judge O'Scannlain of our court, joined by five colleagues, published a dissent from denial of rehearing en banc restricted to the merits of the Establishment Clause issue.[36] (Judge McKeown, joined by three other judges – for a total of ten – also published a dissent from denial of en banc consideration, albeit one just a paragraph long and noting only the "exceptional importance" of the issue.[37])

Judge O'Scannlain's dissent from denial, although less colorful in its allusions and language, was almost, if not quite, as impassioned as Chief Judge Kozinski's later *Pineda-Moreno* version: It noted that the *Newdow* panel opinion had "produced a public outcry across the nation," "would make hypocrites out of the Founders," might invalidate the Thanksgiving holiday, and "confers a favored status on atheism in our public life."[38] Again like Chief Judge Kozinski, Judge O'Scannlain also provided a more traditional legal analysis, pointing out an asserted conflict with a Seventh Circuit opinion and Supreme Court opinions, while at the same time acknowledging "a lack of clarity in the Supreme Court's Establishment Clause cases generally."[39] Judge O'Scannlain concluded by directly inviting Supreme Court review ("Perhaps the Supreme Court will have the opportunity to correct the error for us."[40]). Matters did not play out quite that way, but the ultimate result, after the

[35] *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 17-18 (2004).

[36] *See* Newdow v. U.S. Congress, 328 F.3d 466, 471 (9th Cir. 2003) (O'Scannlain, J., dissenting from denial of rehearing en banc).

[37] *Id*. at 482 (McKeown, J., dissenting from denial of rehearing en banc).

[38] *Id*. at 472-73, 479, 481 (O'Scannlain, J., dissenting from denial of rehearing en banc).

[39] *Id*. at 482.

[40] *Id*.

second *Newdow* case in the Ninth Circuit, was the one for which Judge O'Scannlain and his colleagues fervently argued.

Unlike the *Pineda-Moreno* panel opinion, the first *Newdow* three-judge panel opinion included a dissent by Judge Fernandez, so at least some of the arguments contained in the dissent from denial of rehearing en banc were already in the public record.[41] And the importance of the case was certainly not likely to escape the Supreme Court's attention, given the very public outcry Judge O'Scannlain's dissent recorded. Still, the dissent did serve as a comprehensive survey of the arguments against the original panel opinion, and the ultimate outcome was, perhaps not entirely coincidentally, consistent with the dissent. Overall, although one could argue – and I do – that the entire practice of dissents from denial of en banc consideration should be eliminated or severely curtailed, since that has not happened, the dissent from denial of en banc rehearing in the first *Newdow* case is as effective an example of the medium as we have seen.

The upshot? I'm not sure. It seems that asking federal appellate judges to refrain from publishing their deeply felt views in favor of institutional coherence and finality just does not work. Still, even with the seemingly unstoppable development of the dissent from (and now concurrence in) denial of en banc rehearing tradition, our en banc process remains vital and essential for a court of our size. We spend a great deal of time on it, perhaps to the detriment of our regular case load, but that's not going to change any time soon. May we just find enough hours in our days – and those of our hardworking law clerks – to continue down this path, if that is the one that we are going to be traveling.

[41] *See* Newdow v. U.S. Congress, 292 F.3d 597, 612 (9th Cir. 2002) (Fernandez, J., concurring in part and dissenting in part).