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En Banc Polarization in the Eighth Circuit

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EN BANC POLARIZATION IN THE EIGHTH CIRCUIT

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I. Setting the Stage

A. Purpose

This article examines the en banc1 proceedings of the Eighth Circuit Court of Appeals (Circuit) for the years 1989 and 1990.2 The examination was stimulated by recent claims, observations and suggestions that, as a consequence of “Reagan-era” appointments, a dramatic philosophical shift has occurred among the federal circuit courts of appeals judges’ use of such hearings.3 Some claim that “Reagan judges” consistently vote as a block on cases having significant social and political implications. Others claim that the judicial voting behavior reflects a conservative majority, which if unhappy with a decision made by the liberal minority, uses its en banc power to overturn the


2. Technically, an en banc rehearing does not affirm or reverse a three-judge panel decision made by the court. When an en banc hearing is ordered, the original three-judge opinion is vacated and the appeal decided anew. An en banc hearing is heard by the full court in the Eighth Circuit, which presently consists of ten sitting judges. See Note, Playing with Numbers: Determining the Majority of Judges Required to Grant En Banc Sittings in the United States Courts of Appeals, 70 VA. L. REV. 1505, 1506 (1984).

3. It is claimed that the Eighth Circuit Court of Appeals renders more decisions in which “Reagan-era” judges vote as a bloc against members of the court appointed by other Republican and Democratic presidents than any other circuit in the United States. See Smith, Polarization and Change in the Federal Courts: En Banc Decisions in the U.S. Courts of Appeals, 74 JUDICATURE 133, 136 (1990). See also Goldman, Reagan’s Second Term Judicial Appointments: The Battle at Midway, 70 JUDICATURE 324, 325 (1987) (detailing President Reagan’s attempt to reshape the federal bench); Wermiel, Full-Court Review of Panel Rulings Becomes Tool Often Used by Reagan Judges Aiming to Mold Law, Wall St. J., March 22, 1988, at 70, col. 3 (quoting Chief Judge Lay of the Eighth Circuit: “Newer judges are requesting en banc procedures in routine cases that are not of great importance”).
decision. 4

Commentators have detailed how conservative judges in the Seventh 5 and Ninth Circuits 6 actively urge their colleagues to increase en banc decisions. This increase in en banc proceedings was sharply criticized by Judge Edwards in Bartlett ex rel. Neuman v. Bowen. 7 In Bartlett, three prior grants of en banc rehearing were denied. 8 In a concurrence to the order, Judge Edwards criticized the conservative dissenters for “politicking” the en banc decision. 9 In a surprising concurrence, Reagan-appointee Judge Silberman stated that the use of en banc proceedings was “superfluous” to the certiorari process.10 There is also a growing belief that the voting behavior of the “Reagan judges” has polarized many circuit court judges.11

The claims regarding the political purity and the ideological goals of the Reagan appointees to the courts of appeals are based essentially upon three factors. First, the Reagan administration was by almost any standard the most conservative of the last fifty years. 12 With a broad-based mandate, the Reagan White House sought to vigorously advance its conservative agenda on many social issues including “abortion, busing, school prayer and affirmative action.”13 On its agenda of conservative change or elimination were many social welfare programs started not only under past Democratic presidents but

4. See H. Schwartz, Packing the Courts: The Conservative Campaign to Rewrite the Constitution 155 (1988) (“Many cases in the District of Columbia Circuit were en banced because the conservative majority on the circuit led by Judge Bork was unhappy with the decision, and there are indications that this is happening in other circuits as well.”); Note, The Politics of En Banc Review, 102 Harv. L. Rev. 864, 864 n.2 (1989) (citing various authorities critical of “Reagan-era” judges use of en banc proceedings).
5. Wermiel, supra note 3, at col. 1 (detailing how Judge Easterbrook sought an en banc rehearing to overrule a panel decision requiring search warrants to be used to search racetrack employees).
6. Rice, Earl Warren Would Blush, Am. Law. May/June 1988, at 48 (detailing how Judge Kozinski has made the en banc proceeding “the ultimate police power”).
7. 824 F.2d 1240 (D.C. Cir. 1987) (en banc) (per curiam).
8. Id. at 1240-42.
9. Id. at 1243 (Edwards, J., concurring).
10. Id. at 1246 (Silberman, J., concurring).
13. Id. at 767 n.9 (providing examples of conservative agenda are in note).
also under former Presidents Nixon and Ford. 14  

Second, Reagan administration officials centralized control over the judicial selection process in the White House. 15 While working with the Justice Department, which traditionally handles most of the appointment process, Reagan’s administration played a much larger role in recruiting and investigating potential judicial appointees than had any administration since the Franklin Roosevelt administration. 16 The Reagan administration sought nominees whose beliefs were clearly in line with the Republican party platform. 17  

The Reagan administration did not formally consult the American Bar Association Committee on the Federal Judiciary before making an initial selection of a judicial appointment. Also, that administration reserved the right to nominate candidates the American Bar Association had rejected as “not qualified.” 18 The careful attention given to the recruiting process by the Reagan administration caused one commentator to observe that the procedure was “the most consistent ideological or policy-orientation screening of judicial candidates since the first term of Franklin Roosevelt.” 19  

14. Id. at 767 nn.9-12 (illustrating the broad based conservative agenda advanced during the Reagan administration).  
16. See H. CHASE, FEDERAL JUDGES: THE APPOINTING PROCESS 50-51 (1972) (“President Kennedy did not involve himself deeply in the selection of nominees to the federal bench.”); see also id. at 89 ([T]he procedures developed by the Eisenhower administration and the performance under those procedures were markedly like those of the Kennedy administration . . .”). N. MC Feeley, Appointment of Judges: The Johnson Presidency 14 (1987); see also Note, supra note 12, at 768.  
17. See Note, supra note 12, at 768.  
18. Presidents Eisenhower, Kennedy, Johnson and Carter nominated candidates for the district court that the American Bar Association (ABA) had rated “not qualified.” See McFeeley, supra note 16, at 14, 73. Typically, before there is a nomination of a federal district and circuit court judge, the Attorney General sends the name of the prospective nominee to the fourteen-member ABA Committee. The committee examines the candidate’s legal writings, interviews the candidate, and interviews judges, lawyers, law professors, and others it believes are able to provide information regarding the candidate’s judicial competence. The Attorney General also sends the candidate an ABA questionnaire on background and qualifications. The full ABA Committee votes for a rating, and the outcome is reported to the Attorney General.  
Third, the United States Senate, which confirms or rejects all federal judicial nominees, was controlled by the Republicans during President Reagan's first six years in office. Consequently, during Reagan's first term, he won Senate approval of all 160 of his judicial nominees, including conservatives such as Judge Robert Bork, Judge Richard Posner and Associate Justice Antonin Scalia. With the loss of Republican control over the Senate during Reagan's second term, however, the Senate Judiciary Committee was less ready to approve White House nominees. For example, it rejected appointment of Jefferson Sessions to the District Court "due to his racially insensitive statements and conduct."

The combination of widespread popularity, centralized executive control over the appointments process, and command of the United States Senate provided President Reagan with an opportunity to appoint ideological extremists during the first six years of his presidency. Assuming he sought to make such appointments, did he achieve his goal in the Eighth Circuit?

While some believe that outside the Midwest President Reagan may have accomplished his agenda of appointing conservative extremists, the ideological commitment of the Midwest appointments appears less clear. It has been suggested that moderate midwestern Republican senatorial involvement in the process tempered Eighth Circuit appointments.

These are fascinating claims, suggestions, observations and charges. But how does one go about accurately determining their veracity? In this case, the author conducted a substantive examination of en banc decisions rendered by the Eighth Circuit during 1989 to 1990. These decisions which in one way or another, almost always, involved the entire bench, should provide an opportunity to observe the impact of the Reagan appointive process on the Eighth Circuit Court of Appeals.

20. The Democratic Party exercised majority control of the United States Senate from 1954 to 1980. During this period Republican judicial nominees presented to it for confirmation may have been less ideologically extreme because of concern they would be rejected.


B. Methodology

Obviously, an observer cannot know precisely what factors actually affect a judicial decision. The particular types of cases prevalent within a circuit, the circuit's size, traditions, local rules, institutional norms or other patterns of behavior all affect judicial decision making.

There is, however, a considerable amount of empirical data available that focuses on predicting judicial voting behavior, which the author used as background when conducting his analysis. For example, federal judges who are Republicans generally vote differently than those who are Democrats. Republican judges vote against criminal defendants more often than do Democratic judges. There is not, however, substantial empirical support demonstrating that the voting behavior of judges within the same political party depends upon the president who appointed them. One study found that Carter appointees voted similarly and "occasionally identically to appointees of previous Democratic administrations." A recent study of Reagan appointees concluded that they are not significantly more conservative than their Republican colleagues. One study conducted during the 1970s, however, concluded that Johnson appointees were more liberal than either Kennedy or Truman appointees. It is unclear, therefore, whether the voting behavior of judges from the same political party differs significantly depending upon which president appointed them.

Admittedly, the subjective analysis conducted by the author does not fully reflect the interaction between the Eighth Cir-


26. Id. at 173.


cuit judges that lead to a particular decision. However, by searching en banc opinions for typical partisan issues related to broader political conflicts dividing conservatives and liberals, a reasonably complete picture should emerge.

The article examines the nature of the particular en banc dispute, the precise language used in the opinion related to the dispute, and whether the judges were appointed by former President Reagan. To make the author's analysis easily understood, he chose to label all Reagan-appointed judges as "conservatives" while all non-Reagan-appointed judges are labeled "liberals." This is a potential weakness in the analysis because not all judges in the context of the large number of en banc decisions examined can be fairly characterized as either liberal or conservative on all issues.

The author hypothesized that conservative judges would support claims of business while opposing claims of individuals and public interest groups. Conservatives would be anti-union and more hostile to civil rights plaintiffs and plaintiffs attacking government officials using Section 1983 actions than would liberals. In the criminal area the author hypothesized that the conservative judges would be especially hostile to criminal defendants. Furthermore, he hypothesized that conservatives would sharply differ with liberals over disputes involving pornography and religion, with the conservatives supporting the religious perspective in a dispute while giving little support to first amendment questions involved in pornography matters.

Cases for this study are organized in traditional categories. For example, criminal cases are gathered in a single section and analyzed together. The author tried to identify language used by a judge to describe that judge's perspective on the dispute. The cases were examined to determine whether issues of exceptional importance posing either actual or potential intracircuit conflict existed. To the extent that this more objective standard was found to apply to a particular proceeding, the implication that the proceeding was primarily ideologically driven carries less weight.

Following each en banc discussion are the author's observa-

29. See Nagel, supra note 24, at 844-45; Note, supra note 12, at 777.
tions. His inferences are limited because they rely solely on the language used by the judges in the opinion under scrutiny.

C. En Banc Procedure

Normally, three-judge panels sit to decide cases on appeal to federal circuit courts. Panel decisions are considered decisions of the entire circuit court. An unhappy litigant has fourteen days after a panel decision is rendered to file an en banc petition for a rehearing.

En banc petitions, which have existed for nearly fifty years, are rarely granted. Nationwide, less than one percent of the courts of appeals' decisions "decided on the merits" are decided en banc.

Until 1983, a majority of the judges of the court who were actively participating in the affairs of the court and who were not disqualified in the particular case or controversy could order en banc hearings and rehearings. The court, however, adopted a rule in 1983 that requires an absolute majority of the circuit's judges to vote for an en banc hearing or rehearing.

One related and presently disputed issue in the Eighth Circuit involves the question of whether judges may request an en banc hearing when neither party asks for the review. Chief Judge Lay contends that Federal Rule of Appellate Procedure 35(b), 40(a), or the Eighth Circuit's local Rule 16(B) does not

30. Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member.

31. FED. R. APP. P. 35(c), 40(a). An en banc court can be convened in lieu of a three-judge panel, or it can be convened after a panel hears a case but before the panel issues its opinion. See Note, supra note 1, at 1638.


give circuit judges authority to request "a rehearing en banc after a panel opinion has been issued."³⁴ The chief judge observes that over the last twenty years, he is not aware of any decision of a panel of the Eighth Circuit "being reheard en banc where only a judge has requested a rehearing en banc and a party has not so requested it."³⁵ He argues that this "historical lesson weighs heavily against the advisability of such a rule."³⁶ However, Judge Fagg, whose conservative views and influence on the Circuit appear very significant, is not persuaded that the rules forbid sua sponte judicial reconsideration.³⁷

D. Traditional Purpose of En Banc Proceedings

En banc proceedings serve some practical needs. They help maintain uniformity within a circuit³⁸ by resolving conflicts between existing panels. Resolution of issues reduce future intracircuit conflict and leave future litigants with less confusion about the court’s view of a particular issue.³⁹ En banc proceedings may also anticipate future conflict with a particular panel decision with which the circuit’s majority disagrees. An en banc proceeding permits a rehearing of the case by the entire circuit before the conflict arises. This promotes uniformity

３４. United States v. Samuels, 808 F.2d 1298, 1299 (8th Cir. 1987) (Lay, C.J., concurring in denial of rehearing en banc).
３５. Id. at 1299 n.2.
３６. Id.
３７. Id. at 1302 (Fagg, J., dissenting from denial of rehearing en banc). Judge Fagg argued in Samuels:

The case is particularly appropriate for rehearing on the merits because the two active judges on the panel disagreed, leaving the ultimate panel decision to hinge on the vote of a district court judge sitting by designation. As the tally stands, five judges now vote to deny rehearing en banc: Chief Judge Lay, and Judges Heaney, McMillian, Arnold, and Magill.

I believe each judge on this court embraces the view that presidential safety is fundamental to the constitutional system we are bound to preserve and protect. I also believe a majority of the judges on the court deem this case—involving a direct threat to the President’s life—worthy of en banc review. Thus, I can conclude only that the court has based its denial of en banc review on a consideration wholly unrelated to the merits of this case: the Justice Department’s decision not to seek rehearing.

３８. See Western Pac. R.R. Corp. v. Western Pac. R.R. Co., 345 U.S. 247, 271 (1953) (Frankfurter, J., concurring) (The "dominant ends of [en banc review are] avoiding or resolving intra-circuit conflicts.").
within the circuit and gives control to a majority of the judges sitting.\textsuperscript{40} Theoretically, en banc review is reserved for rare cases where an intracircuit conflict of exceptional importance exists.\textsuperscript{41}

For a number of reasons, en banc proceedings have not been favored. Federal Rule of Appellate Procedure 35 reflects the traditional hesitation, declaring that suggestions for re-hearings en banc are "not favored" and "ordinarily will not be ordered" except to "secure or maintain uniformity" in decisions, or when the case "involves a question of exceptional importance."\textsuperscript{42}

By their very nature, en banc proceedings do not promote efficiency. The large modern caseload handled by the courts of appeals makes it difficult for each judge to take on the additional workload created by granting en banc requests.\textsuperscript{43} The en banc process requires that the judges read additional briefs, often travel to distant locations, and then hear arguments that were, for at least three judges, made at an earlier date.\textsuperscript{44} Furthermore, there are substantial delays in making a final decision in a case and a great deal of time and energy is directed away from the daily chores associated with operating the

\textsuperscript{40} See Western Pac. R.R., 345 U.S. at 270 (Frankfurter, J., concurring). "[T]he most constructive way of resolving conflicts is to avoid them. Hence, insofar as possible, determinations en banc are indicated whenever it seems likely that a majority of all the active judges would reach a different result than the panel assigned to hear a case or which has heard it." \textit{Id.}

\textsuperscript{41} See Textile Mills Sec. Corp. v. Commissioner, 314 U.S. 326 (1941) (upholding the authority of a federal court of appeals to hear a case en banc).

\textsuperscript{42} \textit{Fed. R. App. P. 35.} The rule, in pertinent part, states:

(a) When Hearing or Rehearing in Banc Will be Ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) Suggestion of a Party for Hearing or Rehearing in Banc. A party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.


\textsuperscript{44} See \textit{id.} (discussing the burdens placed on both the judiciary and the litigants).
circuit.\textsuperscript{45}

En banc proceedings may interfere with judicial personal and working relationships. En banc reviews may be viewed by some judges as undermining their panel decisions. They may also highlight and institutionalize fundamental conflicts among the judges. Overuse may promote divisiveness, undermine collegiality, and reduce public confidence in the judiciary.

The most severe damage to collegiality may occur when en banc proceedings are used to advance ideological ends. For example, judges seeking to foster a particular ideological perspective may resort to open politicking for votes among members of the court. Collegiality may also be injured when en banc reversals are viewed as a vote of no confidence in the three-judge panel that earlier decided the appeal or as "gratuitous intermeddling."\textsuperscript{46} Given the limited reasons for ordering en banc rehearings, and the potential adverse consequences associated with granting them, it is surprising to find that the Eighth Circuit apparently hears more en banc cases per year than any federal court of appeals in the nation.\textsuperscript{47}

\textbf{E. The Court's Composition}

The United States Eighth Circuit Court of Appeals covers seven states.\textsuperscript{48} It has ten male judges\textsuperscript{49} who serve life tenure.\textsuperscript{50} Six of the present judges were appointed by former President Reagan,\textsuperscript{51} one by President Bush,\textsuperscript{52} two by former President

\textsuperscript{45. See id.}
\textsuperscript{46. See Kaufman, Do the Costs of the En Banc Proceeding Outweigh its Advantages?, 69 JUDICATURE 7, 57 (1985) (suggesting that en banc review be substantially curtailed and limited to the "rarest circumstances").}
\textsuperscript{47. See Study Finds 8th Circuit Court of Appeals Most Polarized, St. Paul Pioneer Press, Feb. 15, 1991, at 2c, col. 1.}
\textsuperscript{48. Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota.}
\textsuperscript{49. A woman has never been appointed to the Eighth Circuit Court of Appeals.}
\textsuperscript{50. The introductory pages of the most recent bound volume of the second series of the Federal Reporter contains a current listing of the members of a particular circuit and their dates of appointment.}
\textsuperscript{51. John R. Gibson, Kansas City, Missouri (Mar. 30, 1982); George G. Fagg, Des Moines, Iowa (Oct. 1, 1982); Pasco M. Bowman, II, Kansas City, Missouri (July 19, 1983); Roger L. Wollman, Pierre, South Dakota (July 22, 1985); Frank J. Magill, Fargo, North Dakota (Mar. 4, 1986); Clarence A. Beam, Lincoln, Nebraska (Nov. 9, 1987).}

President Reagan appointed nearly half of the active federal circuit court judges. See H. SCHWARTZ, supra note 4, at 150. Reagan appointees currently hold majorities
Carter and one by former President Johnson. With six Reagan appointees and one Bush appointee, the conservatives enjoy a clear majority. During the two year period examined by the author, Judge Gerald W. Heaney, Judge Donald R. Ross, Judge Myron Bright and Judge Floyd R. Gibson played roles in some of the en banc proceedings. Judge Heaney was particularly active in several decisions considered by the Eighth Circuit during this period, despite his senior status.

F. Pre-1989 Studies

Pre-1989 studies of the Eighth Circuit indicate that the Reagan-appointed majority was exercising a conservative influence in the circuit. The conservative wing reached holdings inconsistent with those of the liberal panel in some cases involving politically controversial issues. For example, in 1985, the Eighth Circuit split evenly in three successive en banc hearings along roughly appointive lines.

The 1987 to 1988 en banc proceedings are consistent with
the 1985 observation. The judges split their votes along appointive lines in en banc matters and, by 1988, the conservatives were in control of the circuit.\textsuperscript{61} This article will examine en banc proceedings that occurred in 1989 and 1990.

II. CRIMINAL DECISIONS

The largest number of en banc proceedings in the Eighth Circuit during 1989 to 1990 involved criminal matters. The following is a summary of the en banc criminal disputes.

A. United States v. Jacobson\textsuperscript{62}

Keith Jacobson was convicted of one count of receiving child pornography though the mails. His defense at trial and upon appeal was entrapment. A three-judge panel consisting of two liberal Johnson-appointees, Chief Judge Lay and Judge Heaney, clashed head-on with conservative Reagan-appointee, Judge Fagg, over the conviction. The liberals concluded the government had entrapped Jacobson and reversed the conviction.\textsuperscript{63} Judge Fagg dissented.\textsuperscript{64}

Judge Heaney wrote the panel majority opinion and explained the reversal in the following manner:

Our view is threefold: (1) the Electric Moon purchase was not evidence of predisposition and did not give rise to a reasonable suspicion based on articulable facts that Jacobson

\begin{itemize}
\item \textsuperscript{61} See, e.g., Continental Ins. v. Northeastern Pharmaceutical & Chemical Co., 842 F.2d 977 (8th Cir.) (en banc) ("Damages" clause in an insurance policy held not to include cleanup costs for hazardous waste sites.), \textit{cert. denied}, 488 U.S. 821 (1988); \textit{In re IBP Confidential Business Documents Litig.}, 797 F.2d 632 (8th Cir. 1986) (en banc) (court upheld judgment for the plaintiff on libel and tortious interference with employment claims), \textit{cert. denied}, 479 U.S. 1088 (1987); Cody v. Hillard, 830 F.2d 912 (8th Cir. 1987) (en banc) (Court held that crowding prisoners not violative of the eighth amendment.), \textit{cert. denied}, 485 U.S. 906 (1988); Dace v. Mickelson, 816 F.2d 1277 (8th Cir. 1987) (en banc) (Panel dismissed section 1983 action; prisoner did not have a liberty interest in parole.); Hamilton v. Nix, 809 F.2d 463 (8th Cir.) (en banc), \textit{cert. denied}, 483 U.S. 1023 (1987) (Court denied habeas relief, errors committed during trial were harmless.); Arcoren v. Peters, 829 F.2d 671 (8th Cir. 1987) (en banc) (Court held that FmHA officials repossession of cattle did not clearly violate established law with a qualified immunity against a farmer's suit alleging procedural due process violations.), \textit{cert. denied}, 485 U.S. 987 (1988).
\item \textsuperscript{62} United States v. Jacobson, 893 F.2d 999 (8th Cir.), \textit{vacated and reheard en banc}, 916 F.2d 467 (8th Cir. 1990).
\item \textsuperscript{63} \textit{Id.} at 1002.
\item \textsuperscript{64} \textit{Id.}
had committed a crime in the past or was likely to commit a crime in the future; (2) the government must have reasonable suspicion based on articulable facts before instituting an undercover operation directed at a person; and (3) since the undercover operation was improper, Jacobson’s conviction must be set aside because there was no evidence of an intervening act which cured the government’s improper conduct.\footnote{Id. at 1000.}

Judge Fagg, in his dissent, charged that Judge Heaney and Chief Judge Lay had “declared war on the government’s power to initiate undercover investigations.”\footnote{Id. at 1002.} Furthermore, he accused the Johnson liberals of having “barred the government from obtaining a conviction because the undercover investigation was initiated without ‘reasonable suspicion based on articulable facts’ that Jacobson had committed or was likely to commit a similar crime . . . .”\footnote{Id. at 1003 (citations omitted).}

Judge Fagg also accused the liberals of creating a new criminal law entrapment standard by borrowing “from the rule of probable cause to arrest, and from the rule of particularized suspicion that governs brief investigatory detentions, for the singular purpose of narrowing the government’s power to initiate undercover investigations.”\footnote{Id. at 1003 (citations omitted).}

The government’s request for a rehearing en banc was granted. After hearing arguments and receiving additional briefs, the en banc court upheld the conviction, rejecting the liberal panel’s analysis.\footnote{United States v. Jacobson, 916 F.2d 467, 468 (8th Cir. 1990).} The Circuit’s conservatives were joined by the two Carter appointees\footnote{Judges Arnold and McMillian.} in their affirmance. The en banc majority suggested that the legal issue used by the liberals who voted to reverse the conviction had not been properly raised:

Jacobson contends the government cannot begin an undercover investigation of a suspected person unless the government has reasonable suspicion based on articulable facts that the suspected person is predisposed to criminal activity. Although Jacobson did not raise this legal issue in the district court, both the government and Jacobson were given an opportunity to brief and argue the issue before the

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court en banc.\textsuperscript{71}

Judge Heaney and Chief Judge Lay dissented from the en banc majority.\textsuperscript{72}

Observation: The case was not exceptionally important and en banc review initially seems unwarranted. However, if one accepts Judge Fagg's proposition that the Johnson liberals were attempting to create a new Circuit-wide standard unacceptable to the majority of the circuit judges and auguring future panel conflict, the proceeding is justified.

Given the subject of the dispute, a criminal conviction involving pornography, and the Circuit's composition, the conservatives' reaction was to be expected. Of additional interest is the gap between Johnson appointees to the Circuit and the conservatives—a gap not as apparent when Carter appointees disagree with the conservatives.

\textbf{B. Williams v. Armontrout\textsuperscript{73}}

Judge Bright,\textsuperscript{74} a Johnson appointee, and Judge McMillian,\textsuperscript{75} a Carter appointee, granted a writ of habeas corpus for defendant Doyle Williams following a hearing before a panel consisting of themselves and conservative Judge Fagg. The writ vacated Williams' death sentence, but left to Missouri the choice of resentencing him for first-degree murder or retrying the capital murder case with appropriate jury instructions.\textsuperscript{76} The liberals concluded that Missouri denied Williams equal protection under the law by selectively applying \textit{State v. Baker}.\textsuperscript{77} solely "to affirm convictions."\textsuperscript{78}

Judge Fagg vigorously dissented, arguing that the "holding that Williams's conviction for a thoroughly brutal and calculated murder must be overturned because he was constitution-
ally entitled to 'a kidnapping-based [felony] murder instruction,' . . . totally misses the mark.' 79 Furthermore, Judge Fagg attacked the liberal's decision as one that was "out of focus with a real world view." 80

The government's petition for en banc review was granted. After argument en banc, the conservatives, joined by liberals, Chief Judge Lay and Judge Arnold, rejected the panel majority's decision. 81 Judges McMillian and Bright, who made up the original three-judge panel majority, concurred and dissented in part.

Following the en banc decision, the NAACP Legal Defense and Educational Fund, the American Civil Liberty Union of Western Missouri, and the Missouri Capital Punishment Resource Center moved for permission to file briefs in support of Williams' petition for rehearing. 82 The question of whether to allow the filing of the briefs generated a heated exchange among the judges.

A majority of the Circuit refused to grant the amici permission to file their briefs. The denial was justified on the ground that

[for the most part, their briefs address Williams's claim that the Missouri Supreme Court has committed equal protection violations in murder cases. Because we held there was insufficient evidence in Williams's case to justify the submission of an instruction on the lesser included offense of felony murder, we did not reach the merits of Williams's equal protection claim. Thus, the equal protection arguments the moving parties assert in their briefs are irrelevant to our decision and add no support to Williams's petition. 83

Chief Judge Lay observed in dissent that he "would allow the filing of the amicus briefs. Having considered the same, I reaffirm my vote to deny the petition for rehearing." 84 Judge Bright found "no basis for rejecting their filings. Furthermore, the amici briefs support the dissent of this writer and Judge McMillian. Therefore, I believe these amici briefs have

79. Id. at 665.
80. Id. at 666.
81. Williams v. Armontrout, 912 F.2d 924 (8th Cir. 1990).
83. Id.
84. Id.
Judges Arnold and Gibson also dissented from the decision rejecting the request that the amici be allowed to file briefs. Judge Arnold wrote that while he had read the briefs, they had not persuaded him to change his mind. On the question of accepting the briefs, Judge Arnold observed:

This is a death case. Such cases command our attention and careful study in a unique way. Life—anyone's life—is a transcendent value, and there is no graver or more important judicial function than deciding matters of life and death. In this situation, we ought not close our ears to any responsible voices, whether or not we agree with what they are saying.

Here, the voices are unquestionably responsible. The NAACP Legal Defense and Educational Fund, the American Civil Liberty Union of Western Missouri, and the Missouri Capital Punishment Resource Center all have substantial experience and expert knowledge in the field of death-penalty law. We are not required to accept their arguments on the merits, but we should give them respectful consideration. Refusing them leave even to file briefs is inconsistent with this duty.

Observation: The conservatives on the Circuit acted in a predictable fashion when they rejected the panel’s decision granting the defendant relief. Of some surprise is the fact that Chief Judge Lay and Judge Arnold, both liberals, joined the conservative majority on the substantive issue involving the Writ of Habeas Corpus.

The dispute between the liberals and the conservatives over the filing of the amicus briefs, a kind of quasi-civil rights and criminal law issue, reflects the deeper and identifiable ideological conflict between Republican and Democratic appointees. The public airing of this aspect of the case is consistent with the political views of the judges involved in the decision.

85. Judge Bright, while disagreeing with the majority's decision on the merits, indicated, after considering the briefs, he would not vote for a rehearing because "a rehearing will not accomplish any changing of views by the majority." Id.
86. Id.
87. Liberal Chief Judge Lay and Judges Bright, McMillian and Arnold joined by conservative Gibson, were so upset with the majority's treatment of the briefs that they wrote a public dissent. The public airing of a request to submit briefs, especially where two liberal members of the court apparently agree with the conservative wing on the merits of the dispute, may signal a deeper conflict within the court on social-political issues.

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C. Hill v. Lockhart

A three-judge panel consisting of the two Carter appointees, Judges Arnold and McMillian, and a conservative, Judge Bowman, could not agree on whether Lloyd Hill, a convicted murderer, should be granted relief on the ground he was incompetently represented by counsel. The liberals affirmed the trial court’s determinations that Hill’s counsel was constitutionally ineffective and that his lawyer’s erroneous advice affected the outcome of the plea process. Thus, Hill was allowed to withdraw his guilty plea. Judge Bowman dissented.

The government’s en banc petition for review was granted and an en banc court affirmed the trial court’s decision. Judge Arnold, Chief Judge Lay and Judge McMillian, liberals, were joined by conservatives, Judges Fagg and Beam. The dissenters, Judges Bowman, Gibson, Wollman, and Magill, are all conservatives.

Observation: The case is unusual for two reasons. First, in 1985 the Eighth Circuit refused to grant Hill habeas relief. This proceeding seemed to cover much of the same ground as the 1985 action did, but the court reached a completely different result. Second, two conservatives joined the two Carter appointees and were responsible for upholding the reopening of the conviction when the en banc panel met.

88. 877 F.2d 698 (8th Cir. 1989), vacated and reheard en banc, 894 F.2d 1009 (8th Cir. 1990).
89. Id. at 702-03.
90. Id. at 704-05 (Bowman, J., dissenting). Judge Bowman asserted in dissent that the claim Hill presently asserts is identical to the claim he made and a panel rejected over five years ago in Hill v. Lockhart, 731 F.2d 568 (8th Cir.), aff’d per curiam, 764 F.2d 1279 (8th Cir. 1984) (en banc), aff’d, 474 U.S. 52 (1985). Bowman contended that the reasoning of that decision, which he argued assumed all the facts the district court has now found, was persuasive. He also argued that the circuit had expressly held that counsel’s advice concerning Hill’s parole eligibility, even though not entirely accurate, did not amount to constitutionally inadequate performance in Hill. Hill, 877 F.2d at 704.
91. Rehearing en banc was granted in Hill, and the panel decision thereby was vacated. On rehearing, however, the en banc court affirmed the trial court. Thus, in effect, the result reached by the panel decision was sustained. Hill v. Lockhart, 894 F.2d 1009 (8th Cir. 1990).
92. Id. at 1010.
93. See Hill v. Lockhart, 764 F.2d 1279 (8th Cir. 1984) (en banc) (per curiam) (An evenly divided court, though the alignment was not specified, affirmed the district court decision denying a habeas corpus claim that a plea bargain involved a promise of early parole.), aff’d, 474 U.S. 52 (1985).
94. Hill, 894 F.2d at 1009-10.
A possible inference is that the Carter liberals have better relationships with the conservatives than do the Johnson liberals. Therefore, they are able to occasionally obtain support from some of the conservatives on important issues. Another possible inference is that the conservatives are moderate Republicans, rather than extremists.

D. United States v. Kroh\textsuperscript{95}

John A. Kroh, Jr., was convicted of thirteen bank fraud charges\textsuperscript{96} by a jury and sentenced to concurrent maximum sentences on all counts, the longest of which was ten years.\textsuperscript{97} He appealed the convictions, asserting numerous grounds for reversal. A divided three-judge panel of Chief Judge Lay and Judges Magill and Bowman considered the verdict. Liberal Chief Judge Lay and conservative Judge Magill voted to reverse all of Kroh's convictions, basing their action on the ground that the government's use of Kroh's guilty plea during trial was prejudicial error.\textsuperscript{98} Judge Bowman wrote a lengthy dissent.\textsuperscript{99}

The Eighth Circuit granted the government's petition for rehearing en banc, vacating the original panel decision. The en banc court rejected the panel's decision and affirmed all thirteen convictions.\textsuperscript{100}

Chief Judge Lay was joined in dissent by Carter-appointee Judge McMillian and conservative Judge Magill. Chief Judge Lay charged the majority with conducting an unfair analysis and accepting the government's superficial motive for using the guilty plea. The Chief Judge stated:

The majority condones the principle that when a defend-

\textsuperscript{95} 896 F.2d 1524 (8th Cir.), vacated and reheard en banc, 915 F.2d 326 (8th Cir. 1990).


\textsuperscript{97} Kroh, 896 F.2d at 1526.

\textsuperscript{98} Id. at 1534.

\textsuperscript{99} Id. at 1534-42.

\textsuperscript{100} 915 F.2d 326, 328 (8th Cir. 1990).
ant is charged with conspiracy the government may in its case-in-chief offer a guilty plea of a co-conspirator, even though the plea necessarily implicates the defendant, as long as the trial judge gives a cautionary instruction. The cautionary instruction informs the jury that the plea is not to be considered as substantive evidence of a defendant’s guilt but only goes to the witness’s credibility. The unfairness of such a superficial analysis obliterates any reasonable sense of fairness. This is particularly true when the obvious purpose of the government is not to adduce factual evidence of the conspiracy nor to supply other needed evidence, but simply to bring to the jury’s attention the guilty plea of the alleged co-conspirator of the defendant. This court now allows the prejudicial use of the guilty plea without any exacting analysis of the government’s tactic in calling an alleged co-conspirator for the primary purpose of eliciting the guilty plea.101

Chief Judge Lay continued:

Far more troubling than the trial court’s decision to allow the government to question George Kroh about his guilty plea in the first instance is the majority’s ready acceptance of the government’s superficial explanation that it had a legitimate motive for using the guilty plea. The majority fails to show what the Fifth Circuit describes as their ‘deep sensitivity to the possibilities of prejudice caused by allowing a jury in a criminal case to consider evidence of a co-defendant’s guilty plea.’ . . . I believe the record, taken as a whole, clearly shows that the government offered George Kroh’s guilty plea as evidence of the defendant’s guilt.102

Chief Judge Lay’s dissent was written vigorously hoping that all trial judges will exercise great care when using guilty pleas against co-conspirators. The underlying theme of his dissent was that it is the trial judge who must insure the trial’s fairness.103

Observation: The case appears to be little more than a thirteen-count garden variety conspiracy conviction with the appellate judges examining the government’s conduct during the course of the trial to determine its ultimate fairness.104 Conse-

101. Id. at 335-36 (Lay, C.J., dissenting).
102. Id. at 338 (citations omitted).
103. Id. at 342.
104. One suspicion is that the conservative majority was affected by the number of counts in this criminal case—thirteen.
quently, justifying en banc review is, in light of the traditional use of such proceedings, difficult.\textsuperscript{105} Furthermore, the case did not seem to signal a future conflict between intracircuit panels on an important question of law.

The decision is consistent, however, with the statistically demonstrated enmity many Republican judges hold toward criminal defendants. It is also a decision where the gap between Chief Judge Lay and the conservative majority is apparent.

\section*{E. United States v. Watson\textsuperscript{106}}

Jackson Rip Holmes, a thirty-seven year old federal prisoner, was being housed in the general population of the Mental Health Unit at the Medical Center for Federal Prisoners in Springfield, Missouri. He was convicted of threatening Secret Service protectee Jeb Bush, the son of President George Bush, and received a three-year prison sentence.\textsuperscript{107} Holmes, along with another inmate, asked a three-judge panel consisting of Judges Heaney, Gibson and Bowman to decide whether the two inmates had a constitutional right to refuse the administration of psychotropic medications.

Johnson-appointee Judge Heaney and conservative Judge Bowman held that federal prisoners suffering from a mental disease or defect have a qualified right to refuse such treatment and reversed the district court’s order allowing the government to forcibly medicate Holmes.\textsuperscript{108} The panel then remanded the matter for a determination of whether Holmes could function adequately in the prison without medication.\textsuperscript{109} Judge Gibson dissented. He argued:

\begin{quote}
The court today, under the guise of recognizing a qualified right for these mentally ill prisoners to refuse treatment, condemns them to nothing more than warehousing. The continuation of their serious mental disorders, which is a necessary consequence of the court’s decision, is nothing less than cruel and unusual punishment. In reaching this
\end{quote}

\begin{footnotes}
\footnotetxt{105}{The defendant received the maximum term on each count, the longest of these being 10 years. All of the sentences ran concurrently. Kroh, 896 F.2d at 327.}
\footnotetxt{106}{893 F.2d 970 (8th Cir.), vacated and reheard en banc, 900 F.2d 1322 (8th Cir. 1990).}
\footnotetxt{107}{Id. at 972.}
\footnotetxt{108}{Id. at 982.}
\footnotetxt{109}{Id.}
\end{footnotes}
decision, the court selectively reads not only the Supreme Court precedent, neatly excising and discarding the most significant portion of it, but also the medical evidence before the magistrate and district court. 110

The government’s en banc petition was granted, 111 the original opinion vacated, and the case set for oral argument. 112 When the matter came on for hearing, the en banc court noted that the panel’s opinion had been vacated and then dismissed Holmes’ appeal. 113 The panel accepted the government’s statement at oral argument that it had filed a certificate seeking a district court hearing for a determination of whether Holmes still suffers from a mental disease or defect that would create a substantial risk of harm to another if he was released. 114 The government claimed that the requested hearing had been delayed several times at Holmes’ request. The government stated that it had acceded to Holmes’ wishes to delay the hearing because Holmes was voluntarily taking an antipsychotic medication. Additionally, the government chose to defer the hearing because of the pendency of the en banc rehearing and the government’s anticipation of the decision of the United States Supreme Court in Washington v. Harper. 115 The government asserted that the matter had become moot because Holmes had completed his sentence. The en banc court agreed and dismissed Holmes’ appeal. 116

Observation: This dispute is of no immediate apparent significance. The original panel opinion neither created a major change in the law, nor generated future intra circuit conflict. Consequently, it is difficult to justify the instant en banc review in light of the traditional use of such proceedings. However, the United States Supreme Court’s consideration of a similar matter gives some credence to the decision to rehear the matter en banc.

110. Id. at 983 (Gibson, J., dissenting).
111. United States v. Holmes, 900 F.2d 1322, 1322 (8th Cir. 1990).
112. Id.
113. Id.
114. Id.
116. Holmes, 900 F.2d at 1322.
F. United States v. Unit No. 7\(^{117}\)

This dispute came to the court for en banc reconsideration of a three-judge panel decision authored by Carter-appointee Judge Arnold, joined by Carter-appointee Judge McMillian and Johnson-appointee Chief Judge Lay. Stanley Carter Kiser was indicted for conducting a continuing criminal enterprise.\(^{118}\) The indictment alleged that some of Kiser's property, including two parcels of real estate in Miami, Florida, and one in Aspen, Colorado, should be forfeited to the government.\(^{119}\)

After the indictment was filed, the government brought civil forfeiture actions against the real estate. Warrants were issued by a magistrate, who made an ex parte finding of probable cause. Kiser then sought relief in federal district court to release two of the properties from forfeiture so he could transfer them to his attorney in payment of fees and costs for legal representation. He then petitioned the Eighth Circuit for a writ of mandamus asking that it order the district court to stay the criminal prosecution pending determination of his motion to set aside the forfeiture and pay his attorney.\(^{120}\) A panel of the Eighth Circuit directed that the district court promptly hold an adversary hearing on his motion.\(^{121}\)

At the hearing on the motion, the trial judge found that the proposed attorney fee contract between Kiser and his retained attorney was reasonable and that Kiser had no other assets not subject to forfeiture.\(^{122}\) The court ruled the sixth amendment

\(^{117}\) 853 F.2d 1445 (8th Cir. 1988), vacated and reheard en banc, 890 F.2d 82 (8th Cir. 1989).

\(^{118}\) Id. at 1446.

\(^{119}\) Id. at 1448.

\(^{120}\) Id. at 1447.

\(^{121}\) Id. at 1446. The panel ordered the district judge to

"promptly . . . hold an adversary hearing on Petitioner's Motion. . . . Judge Vietor shall consider Petitioner's financial condition in order to determine whether Petitioner has assets not subject to forfeiture that could supply a reasonable fee to the counsel he has retained to assist in his defense in the pending criminal prosecution. For the protection of Petitioner's Fifth Amendment privilege of self-incrimination, any examination of Petitioner to determine his financial condition shall be conducted ex parte and in camera by Judge Vietor. If it is determined that Petitioner is without assets not subject to forfeiture from which he could pay the fee of his retained counsel, Judge Vietor shall determine the amount of a reasonable fee for Petitioner's retained counsel in the pending criminal prosecution and shall decide whether Petitioner's motion should be granted to that extent."

\(^{122}\) Id.
right of counsel required that the motion be granted to the extent the properties were needed to pay his counsel. Judge Arnold wrote:

Due process requires more than allegation and a determination of probable cause that property is the fruit of illegal drug trafficking before the government can place it out of reach of a criminal defendant who needs it to pay the lawyer conducting his defense. . . . But the present case involves more than a deprivation of property simpliciter; it involves a criminal defendant’s loss of the only property he has with which to hire a lawyer of his own choice to defend him. So the case involves both the Due Process Clause of the Fifth Amendment and the Assistance of Counsel Clause of the Sixth Amendment. . . . [Kiser] has demonstrated that these particular assets are the only ones with which he can pay his lawyer for assisting in his defense to the government’s serious criminal charges. He has a fundamental Sixth Amendment right to defend himself against these charges, and he unquestionably has a Sixth Amendment right (however qualified) to hire private counsel to aid in his defense.\(^\text{123}\)

The government asked for en banc review of the panel decision. Its request was delayed until the United States Supreme Court decided two closely related disputes,\(^\text{124}\) Caplin & Drysdale, Chartered v. United States\(^\text{125}\) and United States v. Monsanto.\(^\text{126}\) The Supreme Court held that a defendant’s sixth amendment right to counsel is not violated by the pretrial seizure of his assets.\(^\text{127}\)

After the United States Supreme Court’s decisions, the dispute was heard en banc.\(^\text{128}\) Chief Judge Lay, rejecting the panel’s earlier views, observed:

We are satisfied under Caplin and Monsanto that the district court’s limited order must be vacated. The dissent relates that Kiser is entitled to an adversarial hearing to vindicate his sixth amendment right to use of assets for payment of attorney fees. Caplin clearly decides to the contrary.\(^\text{129}\)

\(^{123}\) Id. at 1449-50 (emphasis in original).

\(^{124}\) United States v. Unit No. 7, 864 F.2d 1421 (8th Cir. 1988), reheard en banc, 890 F.2d 82 (8th Cir. 1989).

\(^{125}\) 109 S. Ct. 2646 (1989).


\(^{127}\) See Caplin, 109 S. Ct. at 2651-56; Monsanto, 109 S. Ct. at 2665-67.

\(^{128}\) Unit No. 7, 890 F.2d at 82.

\(^{129}\) Id. at 84 (citations omitted).
Carter-appointee Judge Arnold and conservative Judge Bowman urged that the en banc judges rule on what type of hearing be conducted. Chief Judge Lay rejected the argument.  

In dissent, Judge Arnold declared:  

The important question presented in this case is what process is due to a criminal defendant who is in danger of losing the only money he has to hire a lawyer because of an ex parte finding of forfeitability. Is a grand-jury indictment or a magistrate's issuance of a civil forfeiture warrant sufficient? Or should there be at least a limited adversary hearing, at which the government would have to show, by analogy to the requirements for obtaining a preliminary injunction, some likelihood of succeeding in its claim of forfeiture? This is the question reserved by the Supreme Court in *United States v. Monsanto*. It is the question that was vigorously debated by Court and counsel at the argument before the Court en banc. But it is not the question decided by the Court today. The Court decides only that the due-process issue is not properly before it, though the issue was at the heart of the panel opinion. Thus this case ends with a whimper instead of a bang. We will have to face the due-process issue another day.  

Observation: The grant of an en banc hearing was appropriate in view of the related pending decisions by the United States Supreme Court. The disagreement between Johnson-appointee Chief Judge Lay and Carter-appointee Judge Arnold and conservative Judge Bowman was a little unusual. One  

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130. *Id.* at 85.  
This case serves as a vivid illustration as to why appellate courts should not pass on an issue not raised or tried in the district court. Kiser's oral argument on appeal is ambiguous as to what theory of due process he relies upon: (1) whether an adversarial hearing is necessary to establish probable cause before seizure; or (2) whether subsequent to the seizure the government must assume, in an adversarial proceeding, the burden to show the likelihood of success on the merits of the criminal proceeding; or (3) that the forfeiture of the property is not otherwise improper. If the due process issue is properly raised in the district court, as it still may be, it would then be clear to this court what the contentions were and what evidentiary proofs support those contentions. Suffice it to say no one disputes the fact that the district court heard none of these claims. The dissent seems to raise another theory of due process: a need for an adversarial hearing to determine whether the government can show a likelihood of success on the merits so as to deprive Kiser of his property to retain his own counsel. As indicated, we feel *Caplin* and *Monsanto* dispose of this issue and the issue, at least as stated by the dissent, is no longer involved in this case.  

131. *Id.* at 85 n.4.  
132. *Id.* at 85 (citation omitted).
would have thought that Chief Judge Lay would support Judge Arnold's view of the dispute.

G. Chambers v. Armontrout

James Chambers appealed his conviction and death sentence. A divided three-judge panel consisting of Johnson-appointees Judge Floyd Gibson, and Judge Heaney and conservative Judge John R. Gibson could not agree on how effectively Chambers' counsel performed at trial. Liberals Judge Floyd Gibson and Judge Heaney concluded that Chambers' counsel for his second trial provided ineffective assistance by failing to interview or to call a witness who would have testified that Chambers acted in self-defense. Judge John R. Gibson sharply disagreed:

The court today concludes that trial counsel Hager's failure to interview Jones or to call him as a witness at trial constituted ineffective assistance of counsel under Strickland's tests for reviewing claims of ineffective performance and prejudice. Because I conclude that neither element of the Strickland test is satisfied, I would affirm the judgment of the district court denying the writ.

The government's petition for an en banc review was granted. However, the en banc decision came down on the same side as the original panel decision by a 6-5 vote. Conservative Judge Wollman joined three Johnson-appointees, Chief Judge Lay, Judges Heaney and Floyd Gibson, and two Carter-appointees, Judges McMillian and Arnold in the decision.

Observation: What one sees in these disputes is the occasional defection from the conservative ranks by one judge. In this case, that defection gave the liberal wing of the Circuit sufficient clout to block a change the original panel decision. The defections support the view that the Circuit conservatives do not hold "extremist" views.

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132. 885 F.2d 1318 (8th Cir. 1989), vacated and reheard en banc, 907 F.2d 825 (8th Cir. 1990).
133. Senior Circuit Judge.
134. Senior Circuit Judge.
136. Id. at 1324.
H. United States v. Wilson

Jimmie L. Wilson appealed his criminal conviction claiming that the district court erred when it decided that the government did not violate \textit{Batson v. Kentucky}. The district court held that the government had rebutted Wilson's prima facie case of race discrimination in the selection of the jury panel in his criminal prosecution. An Eighth Circuit panel consisting of Johnson-appointee and Senior District Court Judge Fred J. Nichol, and conservatives Judges Magill and Bright all agreed that the government failed to rebut Wilson's prima facie showing of the government's racial bias in using all of its peremptory strikes against blacks on the jury panel. The government's petition for an en banc hearing was granted.

The en banc court, by a vote of 6-5, agreed with the original panel's ruling. The court held that the government failed to rebut Wilson's prima facie case of purposeful race discrimination because it did not offer a racially neutral explanation for striking a black venireman. The matter was reversed and remanded for a new trial. Johnson-appointees Chief Judge Lay and Judge Heaney were joined by Carter-appointees Judges Arnold and McMillian and one conservative defector, Judge Bright.

\textit{Observation:} While the Reagan appointees continue to vote mostly as a bloc, the defection of Judge Bright was the decisive vote. The result of the en banc proceeding was the same as that of the original panel.

I. United States v. Neumann

Steven Earl Neumann appealed his convictions for bank robbery by the use of a dangerous weapon and the use of a firearm during the robbery. Neumann alleged that the trial judge

\begin{itemize}
\item 138. 853 F.2d 606 (8th Cir. 1988), \textit{vacated and reheard en banc}, 884 F.2d 1121 (8th Cir. 1989).
\item 139. 476 U.S. 79 (1986).
\item 140. Judge Nichol was sitting on the panel by designation.
\item 141. \textit{Wilson}, 853 F.2d at 606-12.
\item 142. United States v. Wilson, 861 F.2d 514 (8th Cir. 1988), \textit{reheard en banc}, 884 F.2d 1121 (8th Cir. 1989).
\item 143. United States v. Wilson, 884 F.2d 1121, 1124-25 (8th Cir. 1989) (en banc).
\item 144. \textit{Id}.
\item 145. 867 F.2d 1102 (8th Cir.), \textit{vacated and reheard en banc}, 887 F.2d 880 (8th Cir. 1989).
\item 146. \textit{Id.} at 1103.
\end{itemize}
erred in giving jury instructions and that the judge improperly commented on the evidence. Neumann also challenged the scope of the search warrant and claimed he was denied a fair trial because of the prosecutor’s closing argument. A three-judge panel consisting of conservative Judge Magill and two liberals considered and then affirmed the jury conviction. Judge Magill wrote the opinion, with Judges Arnold and Larson reluctantly concurring. Judge Arnold expressed concern that “the District Court virtually directed a verdict with respect to at least one element of the crime.”

Neumann’s petition for en banc review was granted and the en banc court agreed with the original panel’s decision and affirmed the conviction. One liberal, Judge McMillian, was the lone en banc dissenter arguing that the trial judge’s comments to the jury regarding the evidence “simply went too far.”

Observation: This en banc proceeding was unusual. The original panel consisting of one conservative and two liberals all voted to uphold the conviction. Yet, en banc review was granted. Consequently, there is little likelihood of ideology finding its way into the case. This case reflects the moderate conservative nature of the Circuit on some issues. It also may reflect the consideration the conservative majority provides Carter appointees.

J. Stokes v. Armontrout

A three-judge panel consisting of Carter-appointees Judges McMillian and Arnold and conservative Judges Bowman rejected Winfred Stokes petition for a writ of habeas corpus. Stokes was under a death sentence in the Missouri State Penitentiary for a 1978 murder.

This petition was Stokes’ second. Stokes alleged constitu-

147. Id. at 1103-08.
148. Id. at 1103.
149. The Honorable Earl R. Larson was sitting on the panel by designation.
150. United States v. Neumann, 867 F.2d 1102, 1106 (8th Cir.) vacated and reheard en banc, 887 F.2d 880 (8th Cir. 1989).
152. Id.
153. Id. at 900.
154. 893 F.2d 152 (8th Cir. 1989), reh’g denied, 901 F.2d 1460 (8th Cir. 1990).
155. Id. at 153.
156. Id. at 152.
tional errors in the jury instructions during the sentencing phase of his trial. The district court denied relief and refused to grant Stokes a certificate of probable cause so that he could appeal the court’s decision.\textsuperscript{157} The trial judge found that any appeal would be frivolous because the law governing Stokes’ claims was “not susceptible to debate.”\textsuperscript{158} Upon Stokes’ motion, however, the Eighth Circuit issued a certificate limited to one issue: “Stokes’s challenge to the jury instructions under \textit{Mills v. Maryland}.”\textsuperscript{159} The panel rejected Stokes’ appeal because Stokes failed to raise his \textit{Mills} claim in state court. Because the record showed no justification for that failure, the court held that Stokes was precluded from raising the issue now. The panel affirmed the district court’s dismissal of the habeas petition. “Stokes’s procedural default bars him from raising his \textit{Mills} claim in a federal habeas corpus proceeding.”\textsuperscript{160}

Following the panel decision, Stokes filed a petition for en banc review. The en banc review was rejected. Johnson-appointed Chief Judge Lay was the lone dissenter to the en banc denial.\textsuperscript{161} The Chief Judge argued against the panel’s procedural denial of the habeas petition. Also, he declared that the panel improperly placed itself in the position of the jury in rejecting the mitigating evidence. Chief Judge Lay stated:

This court has no right to place itself in the role of the jury and reject the mitigating evidence as not credible or not relevant. . . . The panel speculates that the jury would have found the death penalty even if it had been properly instructed. Such speculation does not belong in the law and obviates an unconstitutional procedural error which constitutes the height of arbitrariness.\textsuperscript{162}

Finally, Chief Judge Lay argued that the panel’s decision placed “Stokes in procedural catch-22.”\textsuperscript{163} Stokes was not able to raise the issue in the Eighth Circuit because of the proce-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{157} Stokes v. Armontrout, No. 88-1809C(6), slip op. (E.D. Mo. Jan. 13, 1989), aff’d, 893 F.2d 152 (8th Cir. 1989), reh’g denied, 901 F.2d 1460 (8th Cir. 1990).
\item \textsuperscript{158} Id. at 5.
\item \textsuperscript{159} 108 S. Ct. 1860 (1988). \textit{Mills} governs mitigating factors considered by the jury during the sentencing phase of a death penalty case. \textit{Stokes}, 893 F.2d at 152-53.
\item \textsuperscript{160} \textit{Stokes}, 893 F.2d at 153.
\item \textsuperscript{161} Stokes v. Armontrout, 901 F.2d 1460, 1460-62 (8th Cir. 1990) (Lay, C.J., dissenting).
\item \textsuperscript{162} Id. at 1462.
\item \textsuperscript{163} Id. at 1463.
\end{itemize}
\end{footnotesize}
duetal bar and yet the panel decided that a jury would have rejected the mitigating evidence. The Chief Judge concluded: "I know of no rule of law that allows such speculation. Certainly, this type of reasoning is not warranted in a death penalty case." 164

Observation: The case illustrates the philosophical difference between the Carter and Johnson appointees, suggesting that Johnson appointees are most likely to adamantly oppose the use of the death penalty because of political conviction, while Carter appointees possess a more flexible view of the death sentence. Generally, the conservative judges do not hold a view that the death penalty is inappropriate.

K. In re Search of 4801 Fyler Avenue 165

The United States appealed a district court order that required the return of property seized during execution of a search warrant against the Kiesel Company. The warrant was held by the district court to be constitutionally over broad because it described virtually all property on the Kiesel premises, both business and personal. 166

A three-judge panel consisting of Carter-appointee Judge McMillian and conservative Judges Gibson and Magill split over the question of whether the district court order should be reversed. The conservative majority reversed the district court order. 167 Judge McMillian dissented. 168 A request for rehearing en banc was filed and denied by the Eighth Circuit. 169

Observation: The denial of en banc review is consistent with the views on criminal matters held by the conservative majority that controls the circuit. No lack of collegiality is evident from the published case.

164. Id.
166. Id. at 386-87. The district court did not suppress the seized evidence, but required that the government return the evidence to Kiesel and not use it at trial unless a proper warrant was obtained to again seize the property. Id. at 386.
167. Id. at 390.
168. Id. at 390-91.
169. Judge McMillian would have granted the petition for en banc review.
III. FARM FAMILY RIGHTS

Zajac v. Federal Land Bank of St. Paul

In 1988, a three-judge panel consisting of Johnson-appointees Judge Heaney and Senior District Court Judge Hanson and conservative Judge Fagg were confronted with a dispute containing clear social-political overtones in the farming area. The Zajacs, a North Dakota farm couple, appealed a decision of the district court holding that the Agricultural Credit Act of 1987 (Act) did not provide them with a private right of action to enjoin the Federal Land Bank of St. Paul (Bank) from foreclosing on their property. The two Johnson appointees formed a majority, holding that the Zajacs possessed a private right of action under the Act requiring the appointment of an independent appraiser.

Judge Fagg dissented. "For the reasons stated by the Ninth Circuit in Harper v. Federal Land Bank of Spokane, I do not believe farm-borrowers have an implied cause of action to enforce the borrowers' rights provisions of the Agricultural Credit Act of 1987."

The Bank petitioned for en banc review and the request was granted. The en banc court did not agree with the three-judge panel and reinstated the district court decision dismissing the couple's lawsuit. Carter-appointees Judges Arnold and McMillian concurred in the opinion while Johnson-appointees Chief Judge Lay and Judge Heaney dissented.

Judge Arnold observed:

The Anti-Injunction Act embodies a fundamental policy of federalism. It is a limitation on the jurisdiction of the federal courts, and one that should be scrupulously observed. Exceptions to the Act should be narrowly construed, and doubts should be resolved in favor of applying it. On this basis, I would affirm the District Court's

170. 887 F.2d 844 (8th Cir. 1989), vacated and reheard en banc, 909 F.2d 1181 (8th Cir. 1990).
171. The Honorable William C. Hanson was sitting on this panel by designation.
172. Zajac, 887 F.2d at 845-46. James B. Loken, who later became the first appointment to the Eighth Circuit by President Bush, represented the Federal Land Bank. Id. at 845.
173. Id. at 857 (citation omitted).
175. Id.
176. Id. at 1184.
dismissal.\textsuperscript{177}

Judge Fagg, writing for the en banc majority, observed:

Having carefully considered all of the Zajacs’ arguments, we agree ‘the Ninth Circuit’s analysis in \textit{Harper v. Federal Land Bank of Spokane} is correct.’ We thus join the Ninth and Tenth Circuits in holding there is no implied private right of action available to enforce the Act, and affirm the district court.\textsuperscript{178}

Judge Heaney, writing in dissent for himself and Chief Judge Lay, declared:

We are always hesitant to create a conflict between circuits on important issues of the law. This is one instance, however, in which we should not hesitate to set forth our own view on the question of whether farm borrowers have a private right of action to enforce the borrowers’ rights provisions of the Agricultural Credit Act of 1987. In my view, \textit{Harper} was wrongly decided.\textsuperscript{179}

\textit{Observation}: This dispute reflects the distinct ideological gap between the Reagan and Johnson appointees and offers proof of the middle-of-the-road view often taken by the Carter-appointed judges. The case involved broad social-political ideology and reflects the polarization between the Johnson and Reagan appointees.

\textbf{IV. Supremacy of Federal Government in Military Matters}

\textit{Perpich v. United States Department of Defense} \textsuperscript{180}

A divided three-judge panel of the court consisting of Johnson-appointee Judge Heaney, Carter-appointee Judge McMillian and Johnson-appointee Judge Thomas S. Fairchild\textsuperscript{181} upheld a challenge to the constitutionality of the Montgomery Amendment brought by Minnesota’s liberal governor, Rudy Perpich. The Amendment restricts the power of state governors to withhold consent to federal deployment of the National Guard of the United States.\textsuperscript{182} The district court held that the

\begin{itemize}
  \item \textsuperscript{177} \textit{Id.} (citation omitted).
  \item \textsuperscript{178} \textit{Id.} at 1183 (quoting \textit{Griffin v. Federal Land Bank}, 902 F.2d 22, 24 (10th Cir. 1990)).
  \item \textsuperscript{179} \textit{Id.} at 1189.
  \item \textsuperscript{180} 880 F.2d 11 (8th Cir. 1989), aff’d, 110 S. Ct. 2418 (1990).
  \item \textsuperscript{181} Judge Fairchild was sitting on this panel by designation.
  \item \textsuperscript{182} Perpich sought a declaration of a governor’s constitutional authority to with-
\end{itemize}
Constitution does not require gubernatorial consent to active duty for training of the National Guard of the United States. A divided panel of the Eighth Circuit reversed.

The court granted an en banc rehearing, thus vacating the opinion of the panel. The en banc court disagreed with the panel decision and affirmed the judgment of the district court, upholding the constitutionality of the Montgomery Amendment.

Judge Heaney, writing for himself and Judge McMillian, dissented and made the following observations:

With a few strokes of the word processor, the majority has written the Militia Clause out of the United States Constitution. In so doing, it contradicts the clear intent of the founding fathers, who believed that state control over elements of the military was essential to a free and peaceful republic. To this end, they gave the states a degree of power over the militia, which they intended to be a significant element of our national defense. The majority ignores the unambiguous language of the Constitution, and disregards the historical construction given to the Militia Clause and the Army Clause by the three branches of the federal government and the states. The plain and unassailable fact is that, until Congress tacked the Montgomery Amendment on to a defense appropriations bill, it was not responsibly asserted that Congress had the power under the Constitution to require the National Guard to participate in peacetime training missions without the consent of the governor.
of the affected state.\textsuperscript{186}

\textit{Observation}: This case involved conflicting assertions of sovereignty by state and national governments and the question of which sovereign would control the military. The conservative majority rejected the liberal panel's decision and ruled en banc in favor of the national government.\textsuperscript{187} The opinion reflects a broad philosophical difference between Judges Heaney and McMillian and the conservative majority on the question of federalism and the use of the military.

The question before the Eighth Circuit was legally significant and en banc review was warranted. Given the Circuit's conservative majority, the outcome of the en banc proceeding was predictable. Nevertheless, given the importance of the issue, the en banc rehearing was justified.

V. PORNOGRAPHY

\textbf{Walker v. City of Kansas City, Missouri}\textsuperscript{188}

A three-judge panel consisting of Judges Bowman, Dumbauld\textsuperscript{189} and Chief Judge Lay found themselves in sharp disagreement over the implications of the refusal by Kansas City, Missouri, to issue a zoning permit.\textsuperscript{190}

Walker had submitted a rezoning application to the Kansas City Planning Commission requesting that his property be granted a District C-X zoning classification, which would permit him to display go-go girls in his drinking establishment. The Commission recommended approval of the zoning change, which permitted forwarding Walker's application to the City Council for consideration. A series of hearings were held on the application, but over a year passed without a decision.\textsuperscript{191}

Shortly before the City Council denied his application, Walker brought suit under 42 U.S.C. § 1983 against Kansas City and its Mayor and Council members alleging that the defendants had violated his constitutional rights to free

\textsuperscript{186} Id. at 18.
\textsuperscript{187} Liberal Judge Arnold did not join in the dissent. Chief Judge Lay did not participate in the case.
\textsuperscript{188} 911 F.2d 80 (8th Cir.), \textit{reh'g denied}, 919 F.2d 1339 (8th Cir. 1990).
\textsuperscript{189} Judge Dumbauld was sitting on this panel by designation.
\textsuperscript{190} \textit{Walker}, 911 F.2d at 96-99.
\textsuperscript{191} Id. at 82-83.
speech and due process and the defendants had conspired to deprive him of his civil rights. He sought both an injunction and damages.192

Following a hearing on Walker's motion for a preliminary injunction, which was converted into a trial on the merits of the case, the district court found no due process violation. However, it held that the zoning ordinance violated Walker's first amendment rights.193

After hearings on the scope of relief, the trial court enjoined the city from enforcing the ordinance against Walker. It rejected his claim for compensatory damages and awarded only nominal damages.194 On appeal, Walker contested the trial court's dismissal of the individual city council members from the lawsuit, rejection of his due process claim, limitation of damages and denial of his motion for a new trial on the compensatory damages issue. The city cross-appealed the trial court's first amendment holding and the award of nominal damages and attorney fees.195 The majority on the original three-judge panel, with Chief Judge Lay dissenting, reversed the judgment for Walker on his first amendment claim and vacated the injunction and the award of damages and attorney fees.196

Chief Judge Lay, dissenting in the three-judge panel matter, was irate:

In my view, the majority improperly reaches issues not raised by the parties, and then erroneously resolves those issues.... The opinion in Section II discusses in ten pages why the Kansas City ordinance as applied to go-go dancing should not deserve first amendment protection. It concludes, however, that it is not necessary to decide the case on this basis because the City was within its authority to deny Walker's application under the twenty-first amendment. Not only is the discussion on the first amendment advisory and pure dicta, it is also clearly wrong.197

192. Id.
195. Walker v. City of Kansas City, 911 F.2d 80, 83 (8th Cir.), reh'g denied, 919 F.2d 1339 (8th Cir. 1990).
196. Judge Dumbauld concurred with Judge Bowman. Id. at 96-97.
197. Id. at 98.
In a footnote to his opinion, Chief Judge Lay observed that "[t]he majority, in its dicta discussion of the first amendment, portrays a personal distaste for Walker's proposed go-go dancing."198 The Chief Judge ended his dissent with a brief lecture on the duties of the judiciary, stating, "I respectfully submit that the majority opinion offends [the] basic canons governing judicial review."199

Walker's petition for a rehearing en banc was denied because a majority of active judges failed to vote for rehearing. Two liberals, Chief Judge Lay and Judge McMillian and one conservative, Judge Gibson, dissented from the denial of the petition for rehearing.200 Judge Gibson and Chief Judge Lay wrote separate dissents with Judge McMillian joining both of them.

Chief Judge Lay, still furious over the panel decision, observed:

I deem it unfortunate that the court refuses to grant a rehearing en banc in this case. I believe that en banc procedures should be used sparingly on any Court of Appeals. Federal Rule of Appellate Procedure 35 stresses that en banc cases should be heard only when necessary to seek uniform decisions or when a question is exceptionally important. Here the issue is one of exceptional importance. The important question is not, perhaps, as some might think, whether go-go dancing is a form of expressive speech protected under the First Amendment. The district court held that it is protected speech and only Judge Bowman in his opinion argues that it is not. Neither Judge Dumbauld nor I agree with his rhetorical disdain of go-go dancing and the protection it has enjoyed as expressive conduct.

We should grant a rehearing en banc in the present case because it is the first case in the history of the Eighth Circuit wherein we reverse a district court on grounds that were (1) not factually engaged in by the parties before the City Council, (2) not passed upon by the City Council, (3) not asserted in the district court, and (4) not briefed or argued before this court. . . . Our court injects into the factual background of this case, on pure hypothesis, a constitutional ruling under the Twenty-first Amendment, never considered or relied upon by the parties before the City Council.

198. Id. at 99 n.6.
199. Id. at 99.
Council. . . . We deserve jurisprudential doctrine when the court creates a supposed justiciable issue out of thin air.\textsuperscript{201}

\textit{Observation:} This case reflects a particularly acerbic disagreement between Chief Judge Lay and the conservative members on the court. Chief Judge Lay, a constitutional scholar of some note with a reputation as a first amendment expert, was no doubt exasperated at the pragmatic view taken by the Circuit in its panel decision and frustrated at his inability to move some of the conservatives to his view. The dispute illustrates the strength of the conservative majority on the court and forecasts for civil libertarians an almost impossible task of obtaining favorable decisions in the first amendment-pornography area. The dispute makes clear however, that Chief Judge Lay’s liberal philosophy has little support among the active members of the Circuit.

\textbf{VI. RELIGION}

\textbf{Clayton v. Place\textsuperscript{202}}

A group of students, parents, and taxpayers brought an action against Purdy R-2 School District, its Superintendent, and members of the district's Board of Education seeking to set aside the school district’s rule prohibiting dancing on school premises. The plaintiffs challenged the rule on several grounds, including a charge that the rule violates the establishment clause of the first amendment because it advances the views of residents in the district who oppose dancing on religious grounds. Following a hearing, the district court agreed with the plaintiffs and invalidated the rule on that basis.\textsuperscript{203} The school district appealed and a panel consisting of Judges Fagg, Floyd R. Gibson, and William H. Timbers\textsuperscript{204} unanimously reversed the district court decision.\textsuperscript{205}

Religion is an important force in Purdy, a small, rural community in southwestern Missouri. Several churches within the

\textsuperscript{201} Id. at 1341-42 (citations omitted).

\textsuperscript{202} 884 F.2d 376 (8th Cir.), \textit{reh'g denied}, 889 F.2d 192 (8th Cir. 1989), \textit{cert. denied}, 110 S. Ct. 1811 (1990).


\textsuperscript{204} The Honorable William H. Timbers was sitting on this panel by designation.

\textsuperscript{205} Clayton v. Place, 884 F.2d 376 (8th Cir.), \textit{reh'g denied}, 889 F.2d 192 (8th Cir. 1989), \textit{cert. denied}, 110 S. Ct. 1811 (1990).
community are staunchly opposed to social dancing. "A tenet of one denomination in Purdy requires 'a separation from worldliness, including dancing,' and another teaches that 'social dancing is sinful.'" Various groups have unsuccessfully sought permission for school dances and have proposed changing the school district's no-dancing rule. Purdy students are not prohibited from holding, and had regularly held, dances away from school property.

The question before the three-judge panel was whether the district court had correctly applied the test found in *Lemon v. Kurtzman*. The court found it had not been correctly applied. Judge Fagg observed:

> The mere fact a governmental body takes action that coincides with the principles or desires of a particular religious group, however, does not transform the action into an impermissible establishment of religion. . . .

> We simply do not believe elected government officials are required to check at the door whatever religious background (or lack of it) they carry with them before they act on rules that are otherwise unobjectionable under the controlling *Lemon* standards. In addition to its unrealistic nature, this approach to constitutional analysis would have the effect of disenfranchising religious groups when they succeed in influencing secular decisions. In this case, the district court recognized '[r]eligious groups . . . have an absolute right to make their views known and to participate in public discussion of issues.' Nevertheless, the court held 'those views may not prevail,' even though these groups have long been legitimate participants in secular community debate.

> At bottom, the proper remedy for plaintiffs’ disenchantment with a Board that refused to change a rule that is compatible with *Lemon* is found at the ballot box and not in the Constitution.

206. *Id.* at 378 (quoting *Clayton*, 690 F. Supp. at 856).

207. *Id.*

208. 403 U.S. 602, 612-13 (1971). The *Lemon* test has been consistently followed by the Supreme Court for determining whether a challenged governmental rule offends the establishment clause.

> Under the *Lemon* framework, a rule is permissible if it has a secular purpose; if it neither advances nor inhibits religion in its principal or primary effect; and if it does not foster an excessive entanglement with religion. The challenged rule in this dispute is valid only if it meets all three tests.

*Clayton*, 884 F.2d at 379.

209. *Id.* at 380-81.
The requested en banc review was not granted. Three liberals, Johnson-appointee Chief Judge Lay, and Carter-appointees Judges McMillian and Arnold, were joined by Judge John R. Gibson in a dissent from the denial of a rehearing. Judge John R. Gibson observed:

The district court’s findings of fact demonstrate overwhelmingly that the religious views of five churches in Purdy, Missouri, caused the school board to refuse to change its rule prohibiting social dancing. These findings compel the conclusion that the test of *Lemon v. Kurtzman* has not been satisfied. . . .

This is a case about religious tyranny. The members of five churches who have strong views on the religious significance of dancing successfully exerted pressure on the board to prohibit school dances. In the overall scheme of things, a dance at Purdy high school, with an enrollment of 519, may not be of earth-shattering significance. Yet, our Constitution protects all citizens, including the students at Purdy high school, from religious, as well as political, oppression by a majority. The first amendment rights of those students sound a call that this court should not ignore. Our denial of the petition for rehearing en banc turns a deaf ear to the pleas of those students.

*Observation:* It is difficult to dismiss Judge Gibson’s compelling arguments and concerns over the potential for majoritarian “religious tyranny” playing a role in the school board’s decision. Such appeals, however, as this denial of en banc review demonstrates, find little solace with a staunchly conservative court.

## VII. Labor

**Powell v. National Football League**

The National Football League (NFL) appealed a district court order denying the NFL’s motion for partial summary judgment in an antitrust action. The action was brought by Marvin Powell, eight other professional football players, and the National Football League Players Association (NFLPA).

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211. *Id.* at 193-95 (citations omitted).

The district court ruled “that the nonstatutory labor exemption to the antitrust laws expires when, as here, the parties reached an ‘impasse’ in negotiations following the conclusion of a collective bargaining agreement.”

On appeal, the NFL contended that the challenged practices were products of bona fide, arm’s-length collective bargaining and thus governed by federal labor law. The NFLPA argued to uphold the district court’s ruling and that the current compensation system may be challenged as an unlawful restraint of trade.

The three-judge panel in a 2-1 split concluded that the antitrust laws were inapplicable and reversed the district court’s order. Judge John R. Gibson and Judge Wollman voted to reverse the district court, in effect ruling for the NFL owners. Judge Heaney disagreed. He charged in his dissent that “[t]oday, the majority permits the owners to violate the antitrust laws indefinitely.” Also, he thought that the practical result of the majority’s decision “eliminated the owners’ fear of the antitrust lever; therefore, little incentive exists for the owners to ameliorate anticompetitive behavior damaging to the players.”

The NFLPA petitioned for an en banc review of the panel decision. The effort was unsuccessful. Chief Judge Lay, joined by Judge McMillian, dissented from the denial of the petition. The Chief Judge contended that the case was of significant importance and that a panel decision would now be important precedent in the area of collective bargaining. He also contended that the two-judge majority in the panel decision impliedly overruled longstanding precedent.

Further, Chief Judge Lay observed:

En banc procedures should seldom be invoked. In recent years I have been critical of this court using en banc procedures to hear routine and insignificant issues. En banc procedures expend valuable judicial energies which should be used not to correct questionable panel decisions but only to

213. Id. at 561.
214. Id.
215. Id. at 568.
216. Id.
217. Id. at 571.
218. Id. at 572-74.
219. Id. at 572 (citation omitted).
decide decisions of the utmost importance or to resolve intracircuit conflicts. Here, not only is the issue significant, but the panel has impliedly overruled a long-standing decision of this court. Thus, in my judgment, this case is among the rare exceptions which should be reheard en banc.\textsuperscript{220}

\textit{Observation:} This case is another example of the polarization on the Eighth Circuit between the Johnson appointees and the Reagan bloc. Johnson-appointee Judge Heaney dissented in the original panel decision and Johnson-appointee Chief Judge Lay was upset with both the panel decision impliedly reversing a decision he authored and the 7-2 decision against rehearing en banc. Additionally, the polarization is evident by the fact that Reagan-appointee Judge John R. Gibson felt compelled to write a response to Chief Judge Lay’s dissent in the denial of the en banc rehearing.

VIII. \textbf{SECTION 1983 ACTIONS}

\textbf{Warren v. City of Lincoln}\textsuperscript{221}

This section 1983 action arose out of a confrontation between Jackson Warren, a college student, and members of the Lincoln police department investigating a burglary. The police responded to a call from a man who claimed someone had just attempted to break into his apartment through a second story window. After the attempted break-in, the intruder fled. The caller described the intruder “as a slender white male in his early twenties wearing a white short-sleeved shirt.”\textsuperscript{222}

One of the responding officers, teamed with a police dog, tracked the intruder’s scent east from the crime scene to where Warren’s car was parked, a distance of four and one-half blocks. Warren, a slender, white nineteen year old male, was wearing a light-colored short-sleeved shirt. As the police approached his car, he started his engine but was stopped by the police. A license check revealed an outstanding traffic violation warrant. He was arrested on the outstanding warrant, searched and taken to the Lincoln jail where a detective questioned him regarding a number of burglaries and prowling in-

\textsuperscript{220} \textit{Id.} (citations omitted).
\textsuperscript{221} 816 F.2d 1254 (8th Cir. 1987), \textit{vacated and reheard en banc}, 864 F.2d 1436 (8th Cir. 1989).
\textsuperscript{222} Warren v. City of Lincoln, 864 F.2d 1436 (8th Cir. 1989).
Warren's requests to see an attorney were denied, and none of the police read him his rights pursuant to *Miranda v. Arizona*.

After Warren was booked, he posted bail and left the jail. He was in custody for about two hours and forty minutes.

Warren brought an action alleging that the police officers "violated his constitutional rights in contravention of the fourth, fifth, sixth, and fourteenth amendments by falsely imprisoning him, denying him access to counsel, subjecting him to harassing interrogation, fingerprinting him, and photographing him." At the close of Warren's case-in-chief, the district court dismissed the action against one officer and the city. At the conclusion of the trial, the jury returned a verdict in favor of the remaining two police officers. Warren appealed the district court judgment.

A panel consisting of Johnson-appointee Judge Heaney, Kennedy-appointee Senior District Court Judge Earl R. Larson and conservative Judge Wollman unanimously reversed and remanded the matter to the trial judge for a new trial. The panel held that the district court erred by failing to instruct the jury on pretextual arrest, that the jury instructions on post-arrest detention and qualified immunity were erroneous, and that the district court improperly granted the city's and one police officer's motion to dismiss. The city petitioned for en banc review and its request was granted.

The en banc majority disagreed with the original panel's reasoning. The en banc court concluded that Warren's detention was lawful because probable cause existed to arrest him for attempted burglary and that his other grounds for recovery were without merit. Judge Wollman, who apparently agreed with

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223. *Id.* at 1437-38.
225. *See Warren,* 864 F.2d at 1438.
226. *Id.*
227. *Id.*
228. Judge Earl R. Larson is also a Johnson appointee.
230. *Id.* at 1259.
231. *Id.* at 1261.
232. *Id.* at 1263.
233. *Id.* at 1259.
235. *Id.* at 1441.
the original panel’s view of the dispute, wrote the en banc opinion.236

The four liberals on the Circuit at the time237 joined in a dissent authored by Judge Heaney. Judge Heaney observed:

The majority holds that Police Officer Myers had probable cause as a matter of law to arrest Warren for attempted burglary. It reaches this conclusion—even though Officer Myers conceded in district court that she did not have probable cause to make such an arrest, even though the case was tried in district court on the theory that no probable cause existed, and even though the issue of probable cause was not presented to this Court on the initial appeal. In light of these facts, and the fact that a reasonable jury could find that probable cause did not exist, this Court is without the authority to hold that there was probable cause to arrest Warren for attempted burglary.238

Observation: This case involves a traditional political split between Democrats and Republicans—liberals and conservatives. Conservatives are generally more hostile to civil rights plaintiffs and plaintiffs attacking government officials through section 1983 actions than are liberals. Therefore, the opinion is consistent with the political philosophy of each group.

IX. FREEDOM TO CONTRACT

Modern Computer Systems v. Modern Banking Systems239

Modern Computer Systems, Inc. (MCS) appealed a district court’s denial of its motion for a preliminary injunction against Modern Banking Systems, Inc. (MBS). MCS claimed that MBS could not terminate MCS as its computer software distributor or market software in MCS’s exclusive sales territory. MCS alleged that violations of Minnesota’s Franchise Act (Act)240 committed by MBS necessitated injunctive relief.241

Johnson-appointees Judges Heaney and Earl R. Larson242 and conservative Judge Magill did not agree on the question of

236. Id. at 1437.
237. The liberals are Chief Judge Lay and Judges Heaney, Arnold and McMillian.
238. Id. at 1442 (Heaney, J., dissenting).
239. 858 F.2d 1339 (8th Cir. 1988), vacated and reheard en banc, 871 F.2d 734 (8th Cir. 1989).
240. See MINN. STAT. §§ 80C.01-.30 (1990).
241. Modern Computer Sys., 858 F.2d at 1340.
242. Senior District Judge, sitting by designation.
whether the Act overrode a choice of law provision contained in the contract between the parties to the dispute.\textsuperscript{243} The Johnson appointees concluded that the Act should be applied, holding that MCS showed a likelihood of success on the merits of its claims under the Act. The panel reasoned that because injunctive relief was the only remedy available for violations of Minnesota law, the plaintiff’s remedy would be meaningless if preliminary relief was denied.\textsuperscript{244} Judge Magill dissented. He observed:

Today the court concludes that the public policy of Minnesota overrides the choice of law provision agreed upon by the parties. Because I believe that the majority has underesti\textsuperscript{MCS}mated both the bargaining power [MCS] had when it agreed to the terms of its franchising agreement with [MBS] and the applicability of \textit{Tele-Save Merchandising Co. v. Consumers Distributing Co.} to this case, I respectfully dissent.\textsuperscript{245}

MBS petitioned for and was granted an en banc rehearing. On rehearing, the en banc court voted 8-2\textsuperscript{246} rejecting the reasoning of the original panel and affirming the judgment of the district court.\textsuperscript{247} Judge Magill, writing for the en banc court, stated: “Our review of the record convinces us that [MCS] failed to establish the irreparable injury required to necessitate injunctive relief. Moreover, we agree that no fundamental public policy of Minnesota overrides the choice of law provision agreed upon by the parties in the distributorship agreement.”\textsuperscript{248}

Judge Magill relied upon \textit{Tele-Save Merchandising Co. v. Consumers Distributing Co.},\textsuperscript{249} a Sixth Circuit decision.

In \textit{Tele-Save}, the Sixth Circuit upheld a choice of law pro-

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\item \textsuperscript{243} The district court based its denial of [MCS’s] motion on two findings. First, it concluded that because of a choice of law clause in the [MCS-MBS] contract, Nebraska law (not the [the Act]) must govern all disputes between the parties arising from the contract. Second, the court found that [MCS] failed to carry its burden to prove that [MBS’s] actions caused the irreparable injury integral to any request for injunctive relief.
\item \textsuperscript{244} \textit{Modern Computer Sys. v. Modern Banking Sys.}, 871 F.2d 734, 735 (8th Cir. 1989) (en banc).
\item \textsuperscript{245} \textit{Id.} at 735.
\item \textsuperscript{246} Judge McMillian concurred in the majority opinion but did not participate in the opinion’s final vote due to illness.
\item \textsuperscript{247} \textit{Id.} at 737.
\item \textsuperscript{248} \textit{Id.} at 1346 (Magill, J., dissenting) (citation omitted).
\item \textsuperscript{249} Modern Computer Sys. v. Modern Banking Sys., 871 F.2d 734, 735 (8th Cir. 1989).
\end{itemize}
\end{footnotesize}
vision in a supply agreement despite the existence of an Ohio statute that (like the [Act]) includes a non-waiver provision. The court chose to enforce the choice of law provision for the following reasons: (1) the parties had agreed in advance to the law to be applied in future disputes; (2) contacts between the parties were fairly evenly divided between the state selected in the contract and the plaintiff's home state; (3) the parties were not of unequal bargaining strength; and (4) the application of the law chosen in the contract was not repugnant to the public policy of the plaintiff's state. 250

Johnson-appointees Judge Heaney and Chief Judge Lay dissented.

*Observation:* The dispute appears to rest upon conflicting views regarding the right to freely contract and the extent to which government may intrude into that process. On that hypothesis, the outcome is predictable. The decision reflects the philosophical gap between the Johnson and the Reagan appointees.

X. CIVIL RIGHTS

Manifold v. Blunt 251

Missouri's Libertarian Party and several of its members "challenged the constitutionality of Missouri's statutory requirement that new political parties certify their presidential electors earlier than established parties." 252 The district court denied their request for an injunction requiring the Missouri Secretary of State to place their presidential and vice-presidential candidates on Missouri's 1988 ballot. A panel consisting of conservatives, Judges Bowman and Magill, and Johnson-appointee Judge Heaney predictably disagreed. The conservatives, who formed the panel majority, rejected the constitutional challenge. 253 Judge Heaney's dissent contended that neither of the rationales advanced by Missouri met the strict scrutiny requirements of *Anderson v. Celebrezze.* 254

250. Modern Computer Sys., 871 F.2d at 738.
251. 863 F.2d 1368 (8th Cir. 1988), reh'g denied, 873 F.2d 178 (8th Cir.), cert. denied, 110 S. Ct. 242 (1989).
252. Id. at 1369.
253. Id. at 1375.
254. Id. at 1376 (Heaney, J., dissenting). The rationales set out by Missouri for having this earlier filing date were (1) assuring that capable and qualified people
Following the panel decision, the Libertarian Party petitioned for en banc rehearing. The en banc request was denied, a majority of active judges failing to vote to rehear the case. All of the liberals and conservative Judge Fagg voted to grant an en banc rehearing. The four liberals joined in a dissent to the Circuit's refusal to rehear the matter. Judge Heaney, writing for the dissent, argued that, because Missouri failed to meet its burden of justifying the earlier filing requirement, the statute violated the equal protection clause of the United States Constitution.

Observation: Wide-spread participation in the political process, recognition of splinter political group participation in the political process, and a willingness, sometimes an eagerness, to achieve these goals by expanding the Constitution are a part of a liberal's portfolio. Strict interpretation of statutes and constitutional provisions to uphold the intention of a democratically elected legislature is a part of a conservative's political baggage. As this case illustrates, because conservative's control the Circuit, the Libertarian Party's failure to get an en banc rehearing was predictable. Were Democrats, especially Johnson appointees, in control of the Circuit, the result would likely have been different.

XI. Bankruptcy

Bush v. Taylor

The issue before the panel in Bush v. Taylor was whether a Chapter 7 debtor was entitled to a discharge of his ongoing obligation under a state-court divorce decree, which required that he remit to his former wife one-half of the payments he received under a pension plan. The bankruptcy court denied the discharge on two grounds. First, it reasoned that the prospective obligation to turn over a percentage of the pension payments was not a "debt" subject to discharge. Second, it believed that Taylor held his ex-wife's portion of the pension

serve as candidates in the "new" political party; and (2) serving the interest of efficiency. Id. See Anderson v. Celebrezze, 460 U.S. 780, 793-94 (1983).

255. The court apparently voted 5-5 on the en banc request. See Manifold v. Blunt, 873 F.2d 178, 178 (8th Cir. 1989).

256. Id.

257. Id. at 179.

258. 893 F.2d 962 (8th Cir.), vacated and reheard en banc, 912 F.2d 989 (8th Cir. 1990).
only as a constructive trustee.\textsuperscript{259} The district court affirmed the bankruptcy judge’s ruling.\textsuperscript{260} The Eighth Circuit, however, in a 2-1 decision, reversed, holding that the obligation to remit a portion of pension payments falls within the “broad and flexible definition of debt under the Code.”\textsuperscript{261}

The majority panel opinion, written by Judge Arnold, reasoned that the obligation arose from a property settlement, a type of debt that Congress chose not to exempt from discharge.\textsuperscript{262} Judge Arnold rejected a Ninth Circuit opinion which held that pension payments not yet become due and payable at the time of the bankruptcy petition did not represent dischargeable debts.\textsuperscript{263} He also rejected the district court’s alternative view that the debtor had been placed in a fiduciary position by the divorce court so that he merely held the pension payments for Bush’s benefit, as a constructive trustee for future payment.\textsuperscript{264} Judge Arnold concluded that Taylor’s ongoing obligation to provide his ex-wife with one-half of his pension was nothing more than a debt for property settlement, the payment of which was not yet due.\textsuperscript{265}

Judge Bowman vigorously dissented. He argued:

The Court’s decision is indefensible. It permits a deadbeat husband to use the Bankruptcy Code’s grace for honest debtors as a slick scheme for euchring his former wife out of her ‘sole and separate property’ in one-half of the benefits he receives under a pension plan. Under the Court’s decision, the former wife’s entitlement to one-half of the pension benefits—a property right established by judicial decree when the marriage was dissolved—becomes merely another debt dischargeable in bankruptcy. The result is that, post-bankruptcy, the husband will enjoy 100 percent of the monthly pension benefits for as long as he lives, and his ex-wife will be deprived forever of her half of these benefits. Short of outright thievery, it is hard to imagine a more compelling case of unjust enrichment.

If I truly thought that Congress had commanded such a bizarre and unjust result, I would join the Court’s

\textsuperscript{259} \textit{Id.} at 964.
\textsuperscript{260} \textit{Id.} (citation omitted).
\textsuperscript{261} \textit{Id.} at 963.
\textsuperscript{262} \textit{Id.}
\textsuperscript{263} \textit{Id.} at 964-66. \textit{See In re Teichman}, 774 F.2d 1395, 1397-98 (9th Cir. 1985).
\textsuperscript{264} \textit{Bush}, 893 F.2d at 966.
\textsuperscript{265} \textit{Id.} at 966-67.
opinion.\textsuperscript{266}

Bush petitioned and received an en banc rehearing. A majority in the en banc decision disagreed with the original panel decision. Judge Bowman, writing for the majority, affirmed both the bankruptcy and district courts' analyses of the problem. He stated:

\begin{quote}
We do not believe that Congress intended the Bankruptcy Code's grace for honest debtors to be used as Taylor suggests, and Congress's actions with regard to federally regulated pension plans suggest as much. . . . We doubt that Congress ever intended that a former wife's judicially decreed sole and separate property interest in a pension payable to her former husband should be subservient to the Bankruptcy Code's goal of giving the debtor a fresh start.\textsuperscript{267}
\end{quote}

Judge Arnold wrote the dissenting opinion and was joined by Chief Judge Lay and Judges John R. Gibson and Magill. He re-emphasized that the issue before the court was one of statutory interpretation, not of equity.\textsuperscript{268} Additionally, he reasoned that despite the inequitable result, the court should not have ignored the law as it was written.\textsuperscript{269}

\textit{Observation}: Of all the en banc decisions during the period 1989 to 1990, this decision is particularly surprising. If the en banc court had agreed with the panel's original decision the impact on traditional homemakers divorced within the Eighth Circuit would have been dramatic. Therefore, the political/social implications were immense. From an abstract "justice" perspective, allowing the debtor husband to discharge a marital property settlement obligation is unconscionable. Consequently, finding the liberal wing of any court arguing against a broad public policy interpretation of a statute that protects a large group of people from injustice—here, women in traditional marriages, is unusual.

Also, this case is interesting because it does not carry an immediate ideological label. The result finds a rare blend of Johnson, Carter and Reagan appointees dissenting as a group. The dissenters sound like traditional conservatives while the conservative majority sounds like the Johnson liberals. Looking prospectively at this case, followers of the Eighth Circuit

\begin{footnotes}
\item[266] \textit{Id.} at 967.
\item[267] \textit{Id.} at 993-94.
\item[268] \textit{Id.} at 994.
\item[269] \textit{Id.} at 996.
\end{footnotes}
might have predicted a discharge by the conservative majority because of the plain language of the Bankruptcy Code, along the lines of the Seventh Circuit’s reasoning in a somewhat similar dispute.270

CONCLUSION

Most observers of the Eighth Circuit will agree that the result of this examination of two years en banc proceedings is not surprising. Each judge’s political party’s perspectives are reflected in his en banc decisions. Not surprising is the fact that, in areas of major disagreement, the Circuit’s decisions almost always fall on the Republican side of the ledger.271

Sometimes, however, the conservative perspective did not prevail. This reinforces the suggestion made earlier that moderate midwestern Republican senators played a role in assuring that more moderate judicial appointments are made to the Circuit.

What is unclear at this point is to what extent the conservative members on the Circuit are committed to leaving their “ideological fingerprints” on key decisions.272 Clearly, however, they are having a pervasive “conservative” impact on federal law within the Circuit.

To those who do not follow the Circuit, some disputes granted en banc review may not appear grist for such treatment. Ideologically, however, many of the three-judge panel decisions that triggered en banc rehearings, those made by a majority of Johnson or Johnson-Carter appointees, were inconsistent with the prevailing conservative majority's view of the law. Consequently, there is some support for the claim that most en banc proceedings are warranted because of the existence or potential existence of intra circuit conflict. On the other hand, the analysis also provides support for claims that the conservative majority is sometimes using en banc rehear-

270. See In re Sanderfoot, 899 F.2d 598 (7th Cir.), cert. granted, 111 S. Ct. 507 (1990). The conservative majority on the Seventh Circuit used this precise reasoning to allow a debtor husband to discharge a lien in bankruptcy. Judge Posner in dissent charged that Sanderfoot had carried out a plan “designed to nullify (or perhaps to complete the nullification of) the divorce decree and give the husband all rather than half the marital property.” “Today,” wrote Judge Posner, “we place the crown of success on this vicious scheme.” Id. at 606 (Posner, J., dissenting).

271. See Wermiel, supra note 3, at 70.

272. See Note, supra note 4, at 864 n.2 (citation omitted).
ings to overturn liberal panel decisions with which it simply disagrees. The bottom line, however, is that a majority of en banc proceedings seem to be serving their traditional purpose.\textsuperscript{273}

Also apparent in the analysis is that the Circuit's conservative judges consistently vote as a bloc with only a rare defector. Occasionally a liberal, usually a Carter appointee, joins the conservative vote.

The Circuit's liberal voices do not vote as a bloc in similar fashion. The Carter liberals, Judges Arnold and McMillian, quite often either join the conservative ranks or split between Johnson and Reagan appointees. Like the conservatives, the Johnson liberals, Chief Judge Lay and Judge Heaney almost always vote as a bloc. Their voting behavior is in stark contrast to the Carter liberals.

Some of the sharp language used in various opinions suggests that a rift exists between some members of the Circuit.\textsuperscript{274} In particular, the Johnson and Reagan appointees often find themselves locked in fierce verbal combat. Their disputes provide the most conspicuous philosophical contrast and the best evidence supporting the suggestion of an ideological polarization.

A follower of the Circuit may question whether the Circuit has become more of a "political institution" than a "legal institution."\textsuperscript{275} The current analysis does not prove this. However, the ease with which an outcome is predictable in terms of the Circuit's ideological alignment, the deadlocked ideological gap between the Johnson and Reagan appointees, and the unwillingness to compromise among the members of the two camps, raise troubling questions about the Circuit as an independent legal institution.

Followers of the Circuit's opinions may ponder, for example, whether the judicial appointment process has become so heavily ideologically affiliated with a particular political partisan view, that the judges can no longer be trusted to carry out the

\textsuperscript{273} See McFeeley, \textit{supra} note 33, at 273-74; Solimine, \textit{supra} note 23, at 33-38.

\textsuperscript{274} In reading some of the opinions, it seems that the language selected by the judges is far sharper than necessary, even for good advocacy.

\textsuperscript{275} See Smith, \textit{supra} note 3, at 134 (quoting Justice Blackmun's speech given at the 1988 Eighth Circuit Judicial Conference).
essential functions of an independent judiciary in a free society, even with lifetime appointments.

A concern is that America's judiciary may have begun a slow drift, with little notice, into becoming the ideological enforcement arm of the prevailing political party. In totalitarian societies, this has already happened. Such regimes direct the judiciary to decide legal disputes in accordance with political principles laid down by the government and the controlling party. Clearly, in American society, that has not happened. As this analysis suggests, however, choosing "pure" ideologues to sit as judges over disputes involving citizens raises troublesome questions. The polarization in the Eighth Circuit suggests that alternative methods of appointing judges need to be explored if the judiciary is to carry out its appropriate role in a free society.276

276. The suggested dangers to democracy are as great when a governor or a president undertake control of the appointive process, particularly if there is no check on the process.