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INTRODUCTION

All federal circuit courts allow for rehearing en banc. The en banc mechanism enables the full circuit to devote its attention to issues of considerable importance that may not otherwise make it to the Supreme Court's limited docket.[1] En banc review is typically the only means available for overruling precedent and resolving inconsistencies within a circuit.[2] En banc cases are "arguably the most significant cases decided by the courts of appeals[,]"[3] receive "more attention in the legal community, and are more likely to be reviewed by the U.S. Supreme Court than are rulings by three-judge panels."[4]

Standards used to determine the cases appropriate for en banc consideration are, however, complex and convoluted.[5] Appellate courts are divided as to what standards to apply in considering petitions for rehearing en banc and as to the correct method of application.[6] Although guided by statute,[7] each circuit likewise relies on federal and local rules in determining the standard for en banc review.[8] Despite similar standards, however, considerable variations exist among the circuits.[9]

From 2003 to 2007 the Tenth and D.C. Circuits have remained relatively consistent in the number of cases heard en banc.[10] Conversely,

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1. Pierre H. Bergeron, *En Banc Practice in the Sixth Circuit: An Empirical Study, 1990-2000*, 68 TENN. L. REV. 771, 771 (2001).

2. *Id.*

3. Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 217-18 (1999) (arguing that en banc cases are "of greater consequence" because en banc procedure (1) limits the number of cases heard by the entire court to those selected by a majority of the active judges, (2) "expends greater judicial and litigant resources," (3) exposes the parties and the circuit to inconsistent rulings, and (4) lessens some restraints of the appellate level of review).

4. Michael E. Solimine, *Due Process and En Banc Decisionmaking*, 48 ARIZ. L. REV. 325, 325 (2006).

5. *See* George, *supra* note 3, at 220; Judah I. Labovitz, Notes, *En Banc Procedure in the Federal Courts of Appeals*, 111 U. PA. L. REV. 220, 221 (1962).

6. *See* Labovitz, *supra* note 5, at 221-27.

7. *Id.* at 220-21(citing 28 U.S.C. § 46(c) (1958)); *see also* 28 U.S.C.A. § 46(c) (West 2009) ("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 Pub. L. 95-486, § 6, 92 Stat. 1633 (1978) . . . .").

8. *See id.* at 221-27.

9. *Id.* at 221.

10. *See* ADMIN. OFFICE OF THE U.S. COURTS, 2007 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 46 tbl.S-1 (2008), *available at* http://www.uscourts.gov/judbus2007/tables/S01Sep07.pdf [hereinafter 2007 ANNUAL REPORT]; ADMIN. OFFICE OF THE U.S. COURTS, 2006 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 50 tbl.S-1 (2007), *available at*

each circuit's pronounced and underlying reasoning in granting or denying these petitions has shifted during the five-year period. In addition to the inconsistent application of en banc standards within each circuit, discrepancies also exist between the two circuits in the interpretation of substantially similar standards.

Part I of this Comment sets up the legal background and history of en banc review. Part II surveys the Tenth Circuit's treatment of en banc review from the years 2003 to 2007. Part III discusses the D.C. Circuit's standards and decisions in respect to en banc review from 2003 to 2007. Part IV analyzes the Tenth Circuit's decision to rehear *United States v. Nacchio* en banc in the context of the Tenth Circuit's prior considerations. Part V explores whether *United States v. Nacchio* would have been treated differently if heard in the D.C. Circuit.

I. A HISTORY OF EN BANC REVIEW IN FEDERAL COURTS

A. The Past and Purpose of En Banc Review

The Judiciary Act of 1789 created the first circuit courts.[11] Appellate panels consisted of three judges including one circuit judge and two trial judges.[12] Not until the Evarts Act of 1891 ("The Evarts Act"),[13] however, did Congress create the now familiar three-tiered system of trial, appellate, and Supreme Courts.[14] Each appellate or circuit court received three judgeships.[15] The Evarts Act also created a certiorari procedure, ensuring that the Court could decide its own docket and rendering the court of appeals the "court of last resort" for the majority of federal appellate litigants.[16]

The adoption of the 1911 Judicial Code extended the judgeships of appellate courts to more than three, but made no explicit provisions for en banc review.[17] In the 1920s and 1930s, as caseloads grew, "Congress authorized more judgeships."[18] As more judgeships were added the po-

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http://www.uscourts.gov/judbus2006/tables/s1.pdf [hereinafter 2006 ANNUAL REPORT]; ADMIN. OFFICE OF THE U.S. COURTS, 2005 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 40 tbl.S-1 (2006), *available at* http://www.uscourts.gov/judbus2005/tables/s1.pdf [hereinafter 2005 ANNUAL REPORT]; ADMIN. OFFICE OF THE U.S. COURTS, 2004 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 37 tbl.S-1 (2005), *available at* http://www.uscourts.gov/judbus2004/tables/s1.pdf [hereinafter 2004 ANNUAL REPORT]; ADMIN. OFFICE OF THE U.S. COURTS, 2003 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 34 tbl.S-1 (2004), *available at* http://www.uscourts.gov/judbus2003/tables/s1.pdf [hereinafter 2003 ANNUAL REPORT].

11. Richard S. Arnold, *Why Judges Don't Like Petitions for Rehearing*, 3 J. APP. PRAC. & PROCESS 29, 30 (2001).

12. *Id.* The 1869 Judiciary Act created one circuit judgeship for each judicial circuit. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 30-31.

18. *Id.* at 31.

tential for inconsistent panel decisions increased, providing a growing need for an administrative solution.

The Ninth Circuit first took up the issue of en banc review in 1938.[19] In 1937, a divided Ninth Circuit panel ruled on an estate tax issue in *Bank of America National Trust & Savings Ass'n v. Commissioner*.[20] Just one year later in *Lang's Estate v. Commissioner*,[21] a panel of three different Ninth Circuit judges revisited the same issue but arrived at a different conclusion.[22] The two conflicting rulings presented a uniformity issue within the circuit, with no mechanism in place to resolve this conflict. The *Lang's Estate* panel, "faced with the situation where the decision of two judges of the circuit made a precedent for the remaining five,"[23] chose to certify the estate tax question to the Supreme Court rather than overturn the previous panel decision, effectively ruling out an en banc process.[24]

Two years after *Lang's Estate*, the Third Circuit disregarded the Ninth Circuit's dicta that a court could not sit en banc, and the full court of five judges heard *Commissioner v. Textile Mills Securities Corp.*[25] The Third Circuit concluded that the court had the "power to provide . . . for sessions of the court en banc, consisting of all the circuit judges of the circuit in active service."[26] The Supreme Court granted certiorari and unanimously affirmed, reasoning that, "en banc sittings would make for 'more effective judicial administration' because en banc review would promote finality of decision within the courts of appeals and would aid in resolving intra-circuit conflicts."[27]

The Supreme Court, however, noted that the "courts of appeals were empowered, but not required, to sit en banc."[28] A circuit could "devise its own administrative machinery to provide the means whereby a majority may order such a hearing."[29] Each circuit, therefore, had the discretion to determine whether to grant en banc review and to determine the criteria for granting en banc review.[30] The resulting uncertainty and inconsistency among the courts of appeals with regard to en banc review

19. *Id.*
20. 90 F.2d 981 (9th Cir. 1937).
21. 97 F.2d 867 (9th Cir. 1938).
22. *Id.* at 869.
23. *Id.*
24. *Id.* at 869-70; *see also* George, *supra* note 3, at 227-28.
25. 117 F.2d 62, 70-71 (3d Cir. 1940) (en banc), *aff'd*, 314 U.S. 326 (1941).
26. *Textile Mills*, 117 F.2d at 71.
27. Arnold, *supra* note 11, at 31 (quoting *Textile Mills*, 314 U.S. at 335). This decision was codified seven years later in section 46(c) of the Judicial Code of 1948. *Id.*
28. *Id.* (citing W. Pac. R.R. Corp. v. W. Pac. R.R. Co., 345 U.S. 247, 250 (1953)).
29. *W. Pac. R.R.*, 345 U.S. at 250.
30. Arnold, *supra* note 11, at 31-32.

caused Congress to standardize practices through the ratification of Federal Rule of Appellate Procedure 35.[31]

B. Purported Standards of En Banc Review

As a hearing by a full panel of all active judges consumes a considerable amount of both the time and resources of the court, the rules governing en banc review are fairly restrictive. The federal and local rules of several circuits address the potential burden of en banc review, and state that convening the full court for a hearing is not favored.[32]

Federal rules governing en banc review include Title 28, Section 46(c) of the United States Code[33] and Federal Rule of Appellate Procedure 35.[34] Under § 46(c), en banc review of a case "may be conducted if such review 'is ordered by a majority of the circuit judges of the circuit who are in regular active service.'"[35] In addition, the statute provides that an en banc court generally consists of "all of the active judges on the court."[36]

Federal Rule of Appellate Procedure 35 provides the mechanism by which "a party may suggest the appropriateness of convening the court in banc."[37] Generally "not favored,"[38] en banc review may only occur where "(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance."[39] The need for uniformity most often involves a conflict between two panel decisions.[40] "Resolving conflicts with Supreme Court precedent," clarifying cases of "general confusion within the circuit," and "overruling precedent that appears to be out of step with the current court" are also common reasons for granting en banc review.[41]

A decision to reconvene en banc based on uniformity is easier to analyze than review for matters of "exceptional importance."[42] The exceptional importance standard is far more subjective and is therefore more difficult to apply in a consistent fashion.[43] In many respects, the

31. George, *supra* note 3, at 230 & n.94.
32. FED. R. APP. P. 35(a); *see, e.g.*, 10TH CIR. R. 35.1(A).
33. 28 U.S.C.A. § 46(c) (West 2009).
34. FED. R. APP. P. 35.
35. Harry W. Wellford, Anna M. Vescovo & Lundy L. Boyd, *Sixth Circuit En Banc Procedures and Recent Sharp Splits*, 30 U. MEM. L. REV. 479, 481 (2000) (quoting 28 U.S.C. § 46(c) (1993 & Supp. 1999)).
36. *Id.*
37. FED. R. APP. P. 35 advisory committee note (1967 adoption).
38. *Id.* 35(a).
39. *Id.* 35(a)(1)-(2).
40. Bergeron, *supra* note 1, at 783.
41. *Id.*
42. *See id.* at 782.
43. *See id.*

exceptional importance standard is the default standard.[44] Cases not exhibiting issues of uniformity must necessarily fall into the category of "exceptional importance."[45]

Attempting to decode the meaning of "exceptional importance" is a "somewhat elusive endeavor"[46] that begs the question of whether courts should weigh the impact on the public, the judiciary, or the parties.[47] "The public is concerned about cases that can have a widespread impact on matters of interest to the community;" the court's interest may be in "the need to streamline 'the administration of justice' within the circuit;"[48] and the parties have at issue "large amounts of money or [matters of] extraordinary emotional impact . . . ."[49] Another reason that courts agree to rehear cases en banc is to "correct an apparently erroneous result" made by either the panel or the binding precedent of an earlier panel.[50] The court's failure to clearly state its reasons for granting en banc review makes it increasingly difficult to classify to whom the matter must be exceptionally important and to what extent.[51]

The Tenth and D.C. Circuit Courts of Appeals each have local rules that address en banc review.[52] Courts are entitled to considerable deference in interpreting and applying their own rules of practice and procedure.[53] Tenth Circuit Rule 35 provides that en banc review is limited to panel decisions of exceptional public importance or those that conflict with a decision of the United States Supreme Court or of the Tenth Circuit Court.[54] D.C. Circuit Rule 35 is identical to Tenth Circuit Rule 35 except that it does not specify that matters must be of exceptional importance to the public.[55]

II. THE TENTH CIRCUIT EN BANC: 2003-2007

The Tenth Circuit interprets Federal Rule 35 in its Tenth Circuit Rule 35, which is nearly identical to Federal Rule 35.[56] Like Federal

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44. *See id.* at 782-83.
45. *Id.* at 782.
46. *Id.* at 784.
47. Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981-1990*, 59 GEO. WASH. L. REV. 1008, 1025 (1991).
48. Bergeron, *supra* note 1, at 784 (quoting Ginsburg & Falk, *supra* note 47, at 1028).
49. Ginsburg & Falk, *supra* note 47, at 1032.
50. *Id.* at 1023.
51. *See* Bergeron, *supra* note 1, at 774-75.
52. *See* Labovitz, *supra* note 5, at 221-22, 226-27.
53. Smith v. Ford Motor Co., 626 F.2d 784, 796 (10th Cir. 1980); *see also* Lance, Inc. v. Dewco Servs., Inc., 422 F.2d 778, 784 (9th Cir. 1970) (noting that "[l]ocal [r]ules are promulgated by District Courts primarily to promote the efficiency of the Court, and that the Court has a large measure of discretion in interpreting and applying them").
54. 10TH CIR. R. 35.1(A).
55. *See* D.C. CIR. R. 35.
56. *See* 10TH CIR. R. 35.1(A) ("En banc review is an extraordinary procedure intended to focus the entire court on an issue of exceptional public importance or on a panel decision that conflicts with a decision of the United States Supreme Court or of this court.").

Rule 35, the Tenth Circuit's rule provides that "[a] request for en banc consideration is disfavored."[57] The Tenth Circuit's adaptation of Federal Rule 35 specifically requires that matters of exceptional importance be of exceptional *public* importance.[58] This single addition fundamentally changes the analysis of the type of cases that merit en banc review.

The Tenth Circuit hears only a small number of cases by the full court each year.[59] From October 2003 through September 2007, the Tenth Circuit resolved twenty-seven en banc appeals on the merits out of 7,670 total appeals, representing only .35 percent of the total number of cases terminated on the merits.[60] From these statistics it appears that the Tenth Circuit heard roughly the average number of en banc cases as other circuit courts from the years 2003 to 2007.[61]

The twenty-seven en banc decisions in the Tenth Circuit from 2003 to 2007 present a variety of issues.[62] The following three cases, presenting issues of Fourth Amendment rights, evidentiary hearings, and caps on damages, exemplify the Tenth Circuit's approach in deciding which cases meet the standard of "exceptional public importance."

A. Cortez v. McCauley[63]

Cortez v. McCauley dealt with issues of constitutional rights and freedoms, but the main issue driving en banc review was whether a claim of excessive force must be subsumed into a claim of unlawful seizure.[64] It is likely that the full court agreed to rehear this case not because of its exceptional public importance, but because of its future implications for judicial administration within the circuit, and to provide finality for this issue and establish controlling precedent.

In 2001, the Bernalillo County Sheriff's department responded to a call from a nurse at a local hospital reporting complaints of sexual abuse by a babysitter's husband.[65] The defendants—police officers McCauley, Gonzales, Sanchez, and Covington—responded to the call immediately

57. *Id.*
58. *Id.*
59. *See* 2007 ANNUAL REPORT, *supra* note 10, at 46 tbl.S-1; 2006 ANNUAL REPORT, *supra* note 10, at 50 tbl.S-1; 2005 ANNUAL REPORT, *supra* note 10, at 40 tbl.S-1; 2004 ANNUAL REPORT, *supra* note 10, at 37 tbl.S-1; 2003 ANNUAL REPORT; *supra* note 10, at 34 tbl.S-1.
60. *See* 2007 ANNUAL REPORT, *supra* note 10, at 46 tbl.S-1; 2006 ANNUAL REPORT, *supra* note 10, at 50 tbl.S-1; 2005 ANNUAL REPORT, *supra* note 10, at 40 tbl.S-1; 2004 ANNUAL REPORT, *supra* note 10, at 37 tbl.S-1; 2003 ANNUAL REPORT; *supra* note 10, at 34 tbl.S-1.
61. For this same time period, the number of en banc appeals terminated on the merits for all United States Courts of Appeals was 304. Spread out over the twelve U.S. Courts of Appeals, the average would be 25.3 appeals terminated on the merits, en banc. *See* 2007 ANNUAL REPORT, *supra* note 10, at 46 tbl.S-1; 2006 ANNUAL REPORT, *supra* note 10, at 50 tbl.S-1; 2005 ANNUAL REPORT, *supra* note 10, at 40 tbl.S-1; 2004 ANNUAL REPORT, *supra* note 10, at 37 tbl.S-1; 2003 ANNUAL REPORT; *supra* note 10, at 34 tbl.S-1.
62. *See* cases listed *infra* Appendix.
63. 478 F.3d 1108 (10th Cir. 2007) (en banc).
64. *Id.* at 1112.
65. *Id.* at 1112-13 & n.1.

without waiting for medical examination results confirming the abuse, without taking the time to interview the child or the mother, and without seeking to obtain a search warrant.[66] When the defendants arrived at babysitter Tina Cortez's home, two of the officers awoke her husband Rick Cortez from his sleep, ordered him to exit his house, "seized him, handcuffed him, read him his *Miranda* rights, and placed him in the back of a patrol car . . . ."[67] Meanwhile, Defendant McCauley entered the Cortez's home, "seized [Tina Cortez] by the arm, and physically escorted her from her home" to a separate patrol car for questioning.[68] One of the officers then searched the home without a warrant.[69]

Plaintiffs Tina and Rick Cortez filed suit against employees of the Bernalillo County Sheriff's Department and the Board of County Commissioners of the County of Bernalillo, New Mexico, pursuant to 42 U.S.C. § 1983.[70] The Cortezes sought to recover for unlawful arrest, excessive force, and unreasonable search of their home arising out of an unsubstantiated claim of child molestation.[71]

Circuit Judges Ebel, White, and Henry presided over the case and, in an opinion by District Judge White of the District of Colorado, affirmed in part and reversed in part.[72] Judge Henry concurred in part and dissented in part with respect to Tina Cortez's excessive force claim, arguing that the defendants clearly violated her right to be free from excessive force and that the excessive force claim should not have been subsumed into the unlawful arrest claim.[73]

All active judges of the court reheard the case en banc to consider under what circumstances an excessive force claim could be subsumed into an unlawful arrest claim.[74] On rehearing en banc, the court affirmed the panel's opinion in part and reversed in part.[75] Judge Kelly wrote the majority opinion upholding the district court's denial of qualified immunity, minus one excessive force claim.[76]

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66. *Id.* at 1113.
67. *Id.*
68. *Id.*
69. *Id.*
70. 42 U.S.C.A. § 1983 (West 2009) ("Every person who, under color of any statute . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.").
71. *Cortez*, 478 F.3d at 1112.
72. Cortez v. McCauley, 438 F.3d 980, 986 (10th Cir. 2006).
73. *Id.* at 1002-03 (Henry, J., concurring in part and dissenting in part).
74. *Cortez*, 478 F.3d at 1112.
75. *Id.*
76. *Id.* at 1112, 1132-33.

The court broke down the unreasonable seizure claims into four separate discussions of the Fourth Amendment and individually analyzed each of the plaintiffs' excessive force claims.[77] After analyzing each of these claims, the court affirmed the district court's denial of the defendants' motion for partial summary judgment based on qualified immunity as to Plaintiff Rick Cortez's claim of an unreasonable seizure, but reversed as to Plaintiff Rick Cortez's claim of excessive force in connection with the arrest.[78] The en banc court affirmed the district court's denial of qualified immunity as to Plaintiff Tina Cortez.[79] Circuit Judge Kelly wrote the majority opinion, joined by Chief Judge Tacha and Circuit Judges Ebel, Henry, Briscoe, Lucero, and Murphy.[80] Circuit Judges Hartz, McConnell, and Gorsuch each wrote separate dissenting opinions.[81] The main premise of the dissents was that the court overcomplicated the plaintiffs' Fourth Amendment claims.[82]

The *Cortez* court did not discuss its reasons for granting en banc review.[83] The court did note that it agreed to rehear the case to decide the narrow issue of whether, "when a case contains claims for both an unlawful seizure and excessive force arising under the Fourth Amendment, the latter claim must always be subsumed within and resolved in like fashion as the former claim."[84] Rather than exceptional public importance or uniformity, this case appears to present an issue of judicial administration regarding the treatment of unlawful seizure and excessive force claims.

B. United States v. Nacchio[85]

Although *United States v. Nacchio* involved a high-profile company and has been a hot topic in the Colorado news, the case did not represent issues of exceptional importance to the public as required by the Tenth Circuit's local rules, but rather presented an issue of importance to judicial administration in the circuit. Of the multiple issues involved, the en banc court chose to ignore the substantive legal issues and instead to rehear the "sleepier" issue concerning the exclusion of testimony and the need for an evidentiary hearing when neither party requested it. This again represents an issue of judicial administration.

The United States District Court for the District of Colorado convicted Defendant Joseph Nacchio, former CEO of Qwest Communica-

77. *See id.* at 1115-32.
78. *Id.* at 1132-33.
79. *Id.* at 1133.
80. *Id.* at 1112. Circuit Judges Hartz, O'Brien, McConnell, Tymkovich, Gorsuch, and Holmes joined in part. *Id.*
81. *Id.* at 1133-49.
82. *See id.* at 1133 (Hartz, J., concurring in part and dissenting in part).
83. *See id.* at 1112-15.
84. *Id.* at 1137-38 (Gorsuch, J., concurring in part and dissenting in part).
85. 519 F.3d 1140 (10th Cir. 2008).

tions International, Inc., of nineteen counts of insider trading.[86] Nacchio appealed, arguing that there was insufficient evidence to convict, that the jury was improperly instructed, and that the trial judge improperly excluded expert testimony and classified information that Nacchio's key expert witness sought to introduce.[87] The trial court judge excluded the expert's testimony on the ground that Nacchio's Rule 16 disclosure failed to discuss the witness's methodology.[88] The defense's strategy rested on the key expert witness testimony of Professor Daniel Fischel and classified information regarding Qwest's business prospects.[89] The district court kept both out of court.[90]

"The Federal Rules of Criminal Procedure require a defendant under certain circumstances to provide to the government, upon request, 'a written summary of any testimony that the defendant intends to use [at trial] under Rules 702,[91] 703,[92] or 705[93] of the Federal Rules of Evidence.'"[94] "The summary must describe the witness's opinions, the bases and reasons for these opinions, and the witness's qualifications."[95] The defense disclosed its intent to call expert witness Professor Daniel Fischel to testify about Nacchio's trading patterns in an economic context, and the "economic importance of the allegedly material inside information."[96] The district court agreed with the government's argument that this disclosure was insufficient under Federal Rules of Criminal Procedure Rule 16[97] "because the defense had 'offer[ed] no bases or reasons whatsoever for Professor Fischel's opinions contained in the summary.'"[98]

The defense then filed a revised disclosure describing Fischel's background and qualifications as an expert witness and stating his belief that "Mr. Nacchio's sales were inconsistent with what one would expect

86. *Id.* at 1144.
87. *Id.*
88. *Id.* at 1148, 1150.
89. *Id.* at 1148.
90. *Id.*
91. FED. R. EVID. 702 (requiring the expert witness' testimony to be based upon sufficient facts or data, to be a product of reliable principles and methods, and requiring that the witness has applied the principles and methods reliably to the facts of the case).
92. FED. R. EVID. 703 (stating that facts of a type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject need not be admissible in evidence in order for the opinion or inference to be admitted).
93. FED. R. EVID. 705 (stating that the expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise).
94. *Nacchio*, 519 F.3d at 1149 (quoting FED. R. CRIM. P. 16(b)(1)(C)).
95. FED. R. CRIM. P. 16(b)(1)(C).
96. *Nacchio*, 519 F.3d at 1149.
97. *See* FED. R. CRIM. P. 16(b)(1)(C)(ii) (2008) (requiring a defendant to notify the Government of its intent to call an expert witness and provide a summary of the expert's testimony, the reasons and basis for his opinion and his qualifications).
98. *Nacchio*, 519 F.3d at 1149 (quoting App. at 352).

them to be if the government's claims were true."[99] When it came time to call Fischel to the stand, the district court judge dismissed the jury and declared the testimony inadmissible.[100] The judge reasoned that the defendant had failed to meet Rule 16 and that the "expert economic analysis would 'invit[e] the jurors to abandon their own common sense and common experience and succumb to this expert's credentials.'"[101]

On appeal, the case went before a panel of three judges comprised of Circuit Judges Kelly, McConnell, and Holmes.[102] The appellate court held that it was an abuse of discretion to exclude Fischel's testimony, and that an expert witness could not be excluded solely on the basis of a deficiency in a Rule 16 disclosure without the opportunity for briefing or hearing.[103] Because the improper exclusion of Fischel's testimony prejudiced Nacchio's defense, the court reversed his conviction and left the government the ability to try him a second time.[104] The case was remanded for a new trial before a different district court judge.[105] Circuit Judge Holmes dissented in part and concurred in part.[106]

The full circuit convened on September 25, 2008 for the en banc hearing, but for reasons unstated, Judges O'Brien, Tymkovich, and Gorsuch did not participate,[107] leaving only nine of the twelve judges to resolve the case. With the views of Holmes, Kelly and McConnell clear, the outcome depended on six "wild card" judges, including Judges Henry, Tacha, Briscoe, Lucero, Murphy and Hartz.

The court did not include its reasoning for agreeing to rehear the case en banc in its order granting the petition, nor did any judges file a dissent from the order.[108] The issues to be reconsidered en banc primarily concerned the evidentiary hearing.[109] The en banc court ignored the materiality issue.[110] Although the court did not include its reasoning for granting the petition for rehearing en banc, the parties' briefs in support

99. *Id.*
100. *Id.*
101. *Id.* at 1150 (quoting App. at 3920).
102. *Id.* at 1144.
103. *See id.* at 1154.
104. *Id.* at 1169.
105. *Id.* at 1169-70. Judge Nottingham has since stepped down.
106. *Id.* at 1170 (Holmes, J., dissenting in part and concurring in part).
107. *See* United States v. Nacchio, 535 F.3d 1165, 1165 (10th Cir. 2008) (en banc).
108. *See id.* at 1165-66.
109. *See id.* at 1166. The full list of issues to be reconsidered en banc were:

> (1) Was the defendant sufficiently on notice that he was required either to present evidence in support of the expert's methodology or request an evidentiary hearing in advance of presenting the expert's testimony? (2) Did the defendant have an adequate opportunity to present such evidence or request an evidentiary hearing in advance of presenting the expert's testimony? (3) Did the defendant bear the burden of requesting an evidentiary hearing? (4) Did the district court abuse its discretion in disallowing the evidence, and if so, is the appropriate remedy necessarily a new trial, or is a remand for purposes of conducting an evidentiary hearing adequate?

Id.
110. *See id.* at 1165-66.

and in opposition of en banc review suggest possible facts and issues that the court may have taken into consideration.

In its petition for rehearing en banc, the government argued that the panel's decision both (1) departed from precedent, and (2) threatened to restrict the judges' "traditional and important discretion to exclude unsupported expert opinions and unnecessary economic commentary."[111] This argument goes to the uniformity standard of Rule 35.[112] The government also argued that "the universe of potentially affected cases is broad" and that "the panel's decision presents questions of exceptional importance warranting en banc review."[113]

In opposition to the government's petition for rehearing en banc, the defense argued that en banc review was unwarranted because (1) the government's decision announced no new law, (2) the court's decision was correct and the government did not even claim that it directly conflicted with other Tenth Circuit precedent, and (3) the court's opinion did not impose costly and unnecessary burdens on district courts to always hold hearings before excluding testimony as the government argued.[114]

The discussion in the courtroom centered on whether it was an abuse of the court's discretion to fail to hold a hearing before excluding Fischel's expert testimony and whether this required a new trial.[115] Maureen Mahoney, counsel for Nacchio, began her argument by noting that "the case had come down to the sole question of whether the defense forfeited the right to present Fischel's testimony by the failure to ask for a hearing."[116] Mahoney argued that the defense was given insufficient time to request a hearing, and that the exclusion of Fischel's testimony was a complete surprise.[117] Edwin Kneedler, counsel for the government, argued that the court did not abuse its discretion in excluding Fischel's testimony, and that the defense "had opportunity after the fact to revisit the exclusion issue but did not take all the steps they could [have taken]."[118]

The court issued its opinion on rehearing en banc on February 29, 2009, five months after the en banc hearing.[119] In a 5-4 decision, the majority opinion—written by Judge Holmes who also wrote the dissenting panel opinion—held that Fischel's expert testimony was properly

111. Petition for Rehearing En Banc at 2, *Nacchio*, 519 F.3d 1140 (No. 07-1311), 2008 WL 2072295.

112. *See* FED. R. APP. P. 35(a)(1).

113. Petition for Rehearing En Banc, *supra* note 111, at 2.

114. *See* Appellant's Opposition to the Petition for Rehearing En Banc at 2, 10, *Nacchio*, 519 F.3d 1140 (No. 07-1311), 2008 WL 2113264.

115. *See* Posting of J. Robert Brown to The Race to the Bottom, http://www.theracetothebottom.org/nacchio-trial/ (Sept. 25, 2008, 14:36 MST).

116. *Id.*

117. *Id.*

118. *Id.*

119. United States v. Nacchio, No. 07-1311, 2009 WL 455666 (10th Cir. Feb. 25, 2009).

excluded and thus affirmed the district court's judgment.[120] Judges Tacha, Briscoe, Lucero and Hartz joined in the majority opinion.[121] The en banc decision vacated the panel's opinion and reinstated Nacchio's conviction.[122] Judge Holmes and the en banc majority held that: (1) defendant "was sufficiently on notice that he was required to present evidence in support of his expert's testimony;"[123] (2) the burden of requesting a hearing fell to the defendant;[124] and (3) "the district court properly performed its *Daubert* gatekeeping role in excluding Professor Fischel's testimony as inadmissible for lack of reliability."[125] Judge McConnell, who wrote the panel majority opinion, dissented and was joined by Chief Judge Henry, Judge Kelly, who also joined in the panel majority opinion, and Judge Murphy.[126]

C. Robbins v. Chronister[127]

Robbins v. Chronister examined whether to place a cap on the attorneys' fees for those representing prisoners as proposed by the Prisoners' Litigation Reform Act ("PLRA").[128] At stake in this case was whether the prevailing party's attorneys' fees should be capped at $1.50 or if the fees should stand at roughly $9,000.[129] Given that the decision of the case would impact future applications of the cap on attorneys' fees under the PLRA, and that the court would likely encounter this issue again, it is possible that the court agreed to rehear the case en banc as a matter of judicial administration.

Plaintiff-Appellee Ralph Robbins, who happened to have several traffic warrants out for his arrest at the time, waited was waiting in his car for a pump to become available when a police officer, Chronister, pulled into the gas station.[130] Officer Chronister recognized Robbins from an altercation a few weeks earlier and approached, baton in hand.[131] Chronister identified himself but Robbins refused to get out of his car.[132] Chronister shattered the car window with his baton and attempted to pull Robbins through.[133] While attempting to get away, Robbins' car fish-

120. *Id.* at *1.
121. *Id.*
122. *Id.*
123. *Id.* at *7.
124. *Id.* at *12.
125. *Id.* at *17.
126. *Id.* at *16.
127. 402 F.3d 1047 (10th Cir. 2005), *rev'd en banc*, 435 F.3d 1238 (10th Cir. 2006).
128. *Robbins*, 402 F.3d at 1048.
129. *See id.* at 1049.
130. *Id.* at 1048.
131. *Id.*
132. *Id.*
133. *Id.*

tailed on the icy pavement, toward Chronister.[134] Chronister shot twice, striking Robbins' chest and side.[135]

Robbins pled guilty to aggravated assault of a police officer and filed a complaint alleging excessive force in violation of his Fourth Amendment rights.[136] The court held that Chronister's use of deadly force in shooting at the car was reasonable under the Fourth Amendment, but that shattering the driver side window with his baton was not.[137] Not physically injured from Chronister's breaking of the window, Robbins received nominal damages equal to one dollar.[138] Robbins filed a motion to recover attorneys' fees and Chronister responded by arguing that attorneys' fees should be capped at 150% of the damages awarded, or $1.50.[139] Chronister based his argument on § 1997e(d)(2) of the PLRA,[140] because Robbins was imprisoned when he filed suit.[141]

Judges Seymour, McWilliams, and Hartz declined to cap the attorneys' fees, upholding the ruling of the trial court that reasoned "applying the PLRA in these circumstances would produce an absurd result because Congress could not have intended the statute to apply to meritorious civil rights claims that arose prior to a prisoner's confinement."[142] The court awarded Robbins $9,680 in attorneys' fees and $915.16 in expenses. Chronister sought en banc review, arguing that the fee cap should have been enforced.[143] Judge Hartz dissented, disagreeing with the majority's view that "it would be absurd to think Congress wished to apply [the PLRA] to suits alleging preconfinement [sic] misconduct."[144]

The full court convened to rehear the case.[145] Judge Hartz wrote the en banc opinion, reflecting the court's decision to reverse the district court's award of attorneys' fees and limit the award to $1.50.[146] The court did not give explicit reasons for agreeing to rehear the case, but Hartz's dissent and the decision of the en banc court indicate that the

134. *Id.*
135. *Id.*
136. *Id.* at 1049; *see also* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").
137. *Robbins*, 402 F.3d at 1049.
138. *Id.*
139. *Id.*
140. 42 U.S.C.A. § 1997e(d)(2) (West 2009) ("Whenever a monetary judgment is awarded in an action . . . a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.").
141. *Robbins*, 402 F.3d at 1049.
142. *Id.* at 1048-49.
143. *Id.* at 1049.
144. *Id.* at 1055 (Hartz, J., dissenting).
145. Robbins v. Chronister, 435 F.3d 1238, 1239 (10th Cir. 2006) (en banc).
146. *Id.* at 1244.

court may have been motivated by the absurdity of applying the PLRA cap where the inmate's suit alleged pre-confinement misconduct.[147]

There is no mention of a uniformity issue motivating en banc review, nor is there an explicit discussion of "exceptional importance." A matter concerning caps on damages does not appear to be of exceptional importance to the public, especially when contrasted with the type of cases that the D.C. Circuit commonly rehears en banc. Nor do the facts suggest that the case represented an issue of exceptional importance to the parties. However, it is possible that the court agreed to rehear *Robbins* en banc as a matter of judicial administration. The court might have believed that the original panel had reached an erroneous result, or simply wanted to clear up the question of whether attorneys' fees should be capped under the PLRA.

III. THE D.C. CIRCUIT EN BANC: 2003-2007

The D.C. Circuit's local Rule 35 is virtually indistinguishable from Federal Rule 35.[148] The wording of the sections discussing uniformity and exceptional importance are an identical match.[149] Unlike the Tenth Circuit's Rule 35, the D.C. Circuit's Rule 35 standard for en banc review retains the Federal standard of "exceptional importance" without the additional qualifier of "to the public."[150] In theory, this leaves the D.C. Circuit with broader discretion in applying the exceptional importance standard.

The D.C. Circuit rarely takes cases en banc. From the years 2003 to 2007, the D.C. Circuit consistently ranked among the lowest number of appeals heard en banc in the U.S. Courts of Appeals.[151] From 2003-2007, the D.C. Circuit decided a total of ten appeals on the merits en banc, compared to an all-circuit average of 23 during that time.[152] This represented only .38 percent of the total appeals terminated on the merits after oral hearings or submission on briefs in the D.C. Circuit.[153] Of the ten cases that the D.C. Circuit terminated on the merits en banc from 2003 to 2007, the following two cases dealt with access to prescription drugs for the terminally ill and a federal wire-tapping scandal.

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147. *See id.* at 1239; *Robbins*, 402 F.3d at 1055 (Hartz, J., dissenting).

148. *Compare* Fed. R. App. P. 35, *with* D.C. Cir. R. 35.

149. Fed. R. App. P. 35(a)(1)-(2); D.C. Cir. R. 35(a)(1)-(2).

150. *Compare* Fed. R. App. P. 35(a)(2), *and* D.C. Cir. R. 35(a)(2), *with* 10th Cir. R. 35.1(A).

151. *See* 2007 Annual Report, *supra* note 10, at 46 tbl.S-1; 2006 Annual Report, *supra* note 10, at 50 tbl.S-1; 2005 Annual Report, *supra* note 10, at 40 tbl.S-1; 2004 Annual Report, *supra* note 10, at 37 tbl.S-1; 2003 Annual Report; *supra* note 10, at 34 tbl.S-1.

152. *See* 2007 Annual Report, *supra* note 10, at 46 tbl.S-1; 2006 Annual Report, *supra* note 10, at 50 tbl.S-1; 2005 Annual Report, *supra* note 10, at 40 tbl.S-1; 2004 Annual Report, *supra* note 10, at 37 tbl.S-1; 2003 Annual Report; *supra* note 10, at 34 tbl.S-1; *see also infra* Appendix.

153. *See* 2007 Annual Report, *supra* note 10, at 46 tbl.S-1; 2006 Annual Report, *supra* note 10, at 50 tbl.S-1; 2005 Annual Report, *supra* note 10, at 40 tbl.S-1; 2004 Annual Report, *supra* note 10, at 37 tbl.S-1; 2003 Annual Report, *supra* note 10, at 34 tbl.S-1.

A. Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach[154]

Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach represents the type of case that the D.C. Circuit typically rehears en banc because of its exceptional importance on a national level. The case concerned the availability of experimental drugs to terminally ill patients across the United States. It also involved issues of fundamental human rights and constitutional issues that gained national attention.

Plaintiff Abigail Alliance for Better Access to Developmental Drugs ("Abigail Alliance"), a public interest group, sued to enjoin the Food and Drug Administration ("FDA") from barring the sale of experimental drugs not yet approved for public use to terminally ill patients.[155] The Food, Drug, and Cosmetic Act ("FDCA") prohibits access to new drugs "unless and until they have been approved by the [FDA]."[156] The approval process for a new drug is often lengthy and requires multiple steps.[157] Abigail Alliance's complaint alleged that the FDA's new drug testing process was excessively drawn out.[158]

Abigail Alliance petitioned the FDA, proposing that early access to investigational drugs be allowed "based upon 'the risk of illness, injury, or death from the disease in the absence of the drug.'"[159] The FDA responded by arguing that Abigail Alliance's proposal would place too much emphasis on the early availability of drugs to terminally ill patients and not enough on the investigation of the drug's benefits and risks.[160] After rejection by the FDA, Abigail Alliance "turned to the courts."[161] The U.S. District Court for the District of Columbia dismissed Abigail Alliance's complaint challenging the FDA's refusal to allow access to experimental drugs to terminally ill patients under the FDCA.[162]

The full court of the D.C. Circuit convened to consider the issue of "whether the Constitution provides terminally ill patients a right of access to experimental drugs that have passed limited safety trials but have not been proven safe and effective."[163] Judge Griffith wrote the majority opinion, with Judges Rogers and Ginsburg dissenting.[164] On

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154. 495 F.3d 695(D.C. Cir. 2007) (en banc).

155. Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach, 445 F.3d 470, 471-72 (D.C. Cir. 2006), *vacated en banc*, 495 F.3d. 695 (D.C. Cir. 2007). The Abigail Alliance "is an organization of terminally ill patients and supporters that seeks to expand access to experimental drugs for the terminally ill." *Abigail Alliance*, 495 F.3d at 697.

156. *Abigail Alliance*, 495 F.3d at 697.

157. *Id.*

158. *Id.* at 698.

159. *Id.* at 699 (quoting Abigail Alliance's petition to the FDA).

160. *Id.* at 700.

161. *Id.*

162. *See id.*

163. *Id.* at 697.

164. *Id.* at 695.

rehearing en banc, the court opted to hear the due process question and voted to vacate the panel's decision, holding that "there is no fundamental right 'deeply rooted in this Nation's history and tradition' of access to experimental drugs for the terminally ill."[165] Accordingly, the en banc court affirmed the judgment of the district court, upholding the FDA's policy of limiting access to investigational drugs to the terminally ill.[166] This case demonstrates the D.C. Circuit's practice of taking cases en banc that are exceptionally important to the public on a national level.

B. Boehner v. McDermott[167]

Boehner v. McDermott also represents the D.C. Circuit's standards for rehearing a case en banc. The case involved constitutional issues, public political figures, and scandal. *Boehner* received attention on a national level in the media and in the legal and political communities, and was eventually reviewed by the Supreme Court. The decision to grant en banc review in *Boehner* is consistent with the D.C. Circuit's practice of agreeing to convene the full court for matters of exceptional national public importance.

Defendant James McDermott, a Democratic member of the House of Representatives, disclosed to the *New York Times* and the *Atlanta Journal-Constitution* the contents of an illegally intercepted conference call between Plaintiff John Boehner, a Republican member of the House of Representatives, and several other House Republican leaders.[168] The intercepted conversation also included Newt Gingrich, who was undergoing investigation by the House Committee on Standards of Official Conduct, the "House Ethics Committee."[169] The purpose of the conference call was to discuss "how they might deal with an expected Ethics Committee announcement of Gingrich's agreement to accept a reprimand and to pay a fine in exchange for the Committee's promise not to hold a hearing."[170]

John and Alice Martin, residents of Florida, used a police radio scanner to pick up the conversation through the in-range cellular telephone of Plaintiff Boehner, who was in Florida at the time.[171] The Martins recorded the conference call and turned it in to a Florida Representative who refused delivery of the tape.[172] The Martins then delivered the tape—along with a letter stating that the Martins "understand that [they] will be granted immunity"—to Defendant McDermott, who was the

165. *See id.* at 697 (quoting Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997)).
166. *Id.* at 713.
167. 484 F.3d 573 (D.C. Cir. 2007) (en banc).
168. *See id.* at 575-76.
169. *Id.* at 575.
170. *Id.*
171. *Id.*
172. *Id.* at 575-76.

ranking Democrat on the Ethics Committee at the time.[173] McDermott accepted the tape.[174]

Upon listening to the tape, McDermott called reporters at both the *New York Times* and the *Atlanta Journal-Constitution*, both of which subsequently published articles relating to the wiretapped conference.[175] Neither of the articles named McDermott as the leak, but the Martins named McDermott in a press conference and he resigned from the Ethics Committee.[176]

Boehner's complaint alleged that McDermott's disclosure violated 18 U.S.C. § 2511(1)(c), a wire-tapping statute which "makes intentional disclosure of any illegally intercepted conversation a criminal offense if the person disclosing the communication knew or had 'reason to know' that it was so acquired."[177] The district court found a violation and, on appeal, a panel of the D.C. Circuit comprised of Chief Judge Ginsburg and Circuit Judges Sentelle and Randolph affirmed.[178] Judge Sentelle dissented.[179] The D.C. Circuit court granted en banc review.[180]

All active judges of the D.C. Circuit met to review the case en banc.[181] The issue to be decided was whether Defendant McDermott had a First Amendment right to disclose the tape to the press given the manner in which he received the tape, his ongoing proceedings before the Ethics Committee, and McDermott's position as a member of the Committee.[182] On rehearing en banc, the court affirmed the panel's grant of summary judgment to Plaintiff Boehner, ruling that McDermott did not have a First Amendment right to disclose the tape.[183]

The en banc court reasoned that when McDermott became a member of the House of Representatives Ethics Committee, he accepted a duty of confidentiality that superseded his First Amendment right to disclose the wiretap recording to the press.[184] Because McDermott's speech was limited by the Committee's rules, he was not able to invoke First Amendment protection against charges under the wiretap statutes of the United States and Florida.[185] Judge Randolph filed the majority opinion, with Circuit Judge Griffith concurring.[186] Judge Sentelle filed a dissent

173. *Id.* at 576.
174. *Id.*
175. *Id.* at 576-77.
176. *See id.* at 577.
177. *Id.* (quoting 18 U.S.C. § 2511(1)(c) (2006)).
178. Boehner v. McDermott, 441 F.3d 1010, 1010-11 (D.C. Cir. 2006), *vacated en banc*, 484 F.3d 573 (D.C. Cir. 2007).
179. *Boehner*, 441 F.3d at 1017.
180. *See Boehner*, 484 F.3d at 574.
181. *See id.*
182. *Id.* at 577.
183. *Id.* at 581.
184. *Id.*
185. *Id.* at 579-81.
186. *Id.* at 575, 581.

joined by Judges Rogers, Tatel, Garland, and Griffith.[187] The issue in this case, First Amendment freedom of speech, exemplifies the type of case that the D.C. Circuit typically agrees to rehear en banc because of the exceptional national importance.

IV. TENTH CIRCUIT EN BANC REVIEW OF *UNITED STATES V. NACCHIO*

Federal Rule 35 states that decisions to grant en banc review are "not favored."[188] Similarly, Tenth Circuit Rule 35 allows en banc review only for "an issue of exceptional public importance or a panel decision that conflicts with a decision of the United States Supreme Court" or with some precedent in the Tenth Circuit.[189] Despite the circuit's strict rules, the court interprets "exceptional public importance" loosely and often takes cases based on importance to judicial administration, as demonstrated by *Cortez*, *Robbins*, and *Nacchio*.

Nacchio affects the proper functioning of the trial courts in the Tenth Circuit.[190] As stated in a post on the blog *theracetothebottom.org*, "[t]he panel decision (finding that the failure to hold an unrequested hearing was reversible error) affects every trial judge in the circuit."[191] The blog post noted that if the panel opinion remains in place, the circuit's trial courts "will likely be forced to hold hearings sua sponte even when not requested in order to insulate their decision from reversal."[192] This, of course, would prove unfavorable to the courts, as it would be "an inefficient, time consuming addition to the work load [sic] of already busy courts."[193] The blog post presents a compelling argument that it was the impact on the trial courts that created the "exceptional importance" motivating en banc review.[194]

V. *UNITED STATES V. NACCHIO* IN THE D.C. CIRCUIT?

Some have concluded that D.C. Circuit judges are more politicized than other circuits.[195] As a result, they may have a different approach to en banc review. Because D.C. Circuit judges often have Supreme Court aspirations, this might lead the court to hold petitions for en banc review to a higher standard of exceptional *national* importance.[196] Compared to Tenth Circuit judges, who are not known to "seriously aspire" to sit on the Supreme Court bench, and who are "generally not motivated by publicity or the need to demonstrate their intellectual acumen by writing

187. *Id.* at 581.
188. FED. R. APP. P. 35(a).
189. 10TH. CIR. R. 35.1(A).
190. *See* posting of J. Robert Brown to The Race to the Bottom, http://www.theracetothebottom.org/nacchio-trial/ (Aug. 5, 2008, 6:15 MST).
191. *Id.*
192. *Id.*
193. *Id.*
194. *See id.*
195. *Id.*
196. *See id.*

ground breaking opinions," D.C. Circuit judges may be more particular in selecting the cases that merit the attention of the full court.[197]

The D.C. Circuit consistently hears a very low number of cases en banc each year.[198] The Circuit also tends to grant en banc review to issues of *national* public importance, fitting with the idea that the judges of the D.C. Circuit are primarily concerned with matters that would merit the attention of the Supreme Court, the public, and the media on a national level. Although the D.C. Circuit's *rules* do not reflect its focus on matters of public importance, its *practice* of en banc procedure indicates that possibly the most important factor in granting en banc review in the D.C. Circuit is whether a case presents an issue that will gain national attention and readership.

Two cases recently heard en banc by the D.C. Circuit include *Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach* and *Boehner v. McDermott*. Each of these cases presented an issue of exceptional national public importance. In examining the following two cases, and keeping in mind the D.C. Circuit's rules governing en banc review, it appears doubtful that *Nacchio* would have merited en banc review if the case were in the jurisdiction of the D.C. Circuit.

Abigail Alliance presented the issue of whether terminally ill patients should have earlier access to investigational drugs.[199] The decision of whether to allow terminally ill patients access to investigative drugs has widespread national impact, and the issue of preserving fundamental Constitutional rights is certainly a matter of exceptional importance. The Supreme Court also deemed *Abigail Alliance* worthy of its time and attention, another factor that is consistent with the D.C. Circuit's reasoning in its decision to grant en banc review.

Boehner dealt with a matter concerning speakers of the United States House of Representatives and a "scandal" that was widely reported in the national media at the time. The case's "flashy" nature, the national media coverage, and the fact that it involved highly public figures all may have played a role in the D.C. Circuit's decision to take on the case en banc.

CONCLUSION

In reviewing the cases that the Tenth Circuit and the D.C. Circuit agreed to rehear en banc from 2003 to 2007, it appears that the Tenth Circuit tends to rehear a higher number of cases en banc, including even

197. *Id.*

198. *See* 2007 ANNUAL REPORT, *supra* note 10, at 46 tbl.S-1; 2006 ANNUAL REPORT, *supra* note 10, at 50 tbl.S-1; 2005 ANNUAL REPORT, *supra* note 10, at 40 tbl.S-1; 2004 ANNUAL REPORT, *supra* note 10, at 37 tbl.S-1; 2003 ANNUAL REPORT; *supra* note 10, at 34 tbl.S-1.

199. Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach, 495 F.3d 695, 697 (D.C. Cir. 2007) (en banc).

the "sleepiest" of issues. The D.C. Circuit, which hears far fewer cases en banc each year, is more selective in the cases it chooses to rehear en banc, and seems to focus its en banc attention to "flashy" cases that are likely to gain attention on a national level.

The Tenth Circuit Court of Appeals' decision to grant en banc review in *United States v. Nacchio*, despite its failure to meet the requirements of federal (Federal Rule of Appellate Procedure 35) and local (Tenth Circuit Rule 35) rules governing en banc review, exemplifies the court's use of broad discretion in applying its local rules. The court's decision also represents the complex and convoluted process of en banc review.

It was the decision's impact on the functioning efficiency and the workload of the trial courts, and not the public impact, that motivated the court to grant the government's petition for en banc review in *Nacchio*. In comparing the Tenth Circuit's en banc rules and standards to those of the D.C. Circuit, and considering that the D.C. Circuit has historically only reheard cases en banc that clearly satisfy the exceptional importance standard on a national level, it is unlikely that *Nacchio* would have merited en banc review in the D.C. Circuit. Since the result of the Tenth Circuit's decision to rehear *Nacchio* en banc was to vacate the panel opinion and reinstate the conviction, it appears that Nacchio was unlucky to be subjected to suit in the Tenth Circuit.

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APPENDIX: TABLE OF EN BANC CASES (2003-2007)

	2003	2004	2005	2006	2007
Tenth Circuit	Bryan v. Mullin, 335 F.3d 1207 N.L.R.B. v. Oklahoma Fixture Co., 332 F.3d 1284 U.S. ex rel Holmes v. Consumer Ins. Grp., 318 F.3d 1199 U.S. v. Haney, 318 F.3d 1161 Beem v. McKune, 317 F.3d 1175 U.S. v. Hurst, 322 F.3d 1256	FTC v. Kuykendall, 371 F.3d 745 Gonzales v. City of Castle Rock, 366 F.3d 1039 The Tool Box v. Ogden City Corp., 355 F.3d 1236 U.S. v. Aguirre-Tello, 353 F.3d 1199	U.S. v. Gonzales-Huerta, 403 F.3d 727 U.S. v. Yazzie, 407 F.3d 1139	Zuni v. Pub. School Dist. No. 89 v. U.S. Dept. of Educ., 437 F.3d 1289 Robbins v. Chronister, 435 F.3d 1238 Initiative and Referendum Inst. v. Walker, 450 F.3d 1082 Hain v. Mullin, 436 F.3d 1168 Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643	Cortez v. McCauley, 478 F.3d 1108 San Juan County, Utah v. U.S., 503 F.3d 1163 Zamora v. Elite Logistics, Inc., 478 F.3d 1160 In re Mersmann, 505 F.3d 1033
D.C. Circuit	Rugierro v. F.C.C., 317 F.3d 339		In re Cheney, 406 F.3d 723 D.C. v. Beretta, U.S.A., Corp., 872 A.2d 633	Boehner v. McDermott, 376 U.S. App. D.C. 75 Wilson-Bey v. U.S., 903 A.2d 818	U.S. v. Valdes, 475 F.3d 1319 Abigail Alliance for Better Access to Prescription Drugs v. Eschenbach, 495 F.3d 65 U.S. v. Powell, 483 F.3d 836