

From: Stephen E. Sachs
To: [Michael Chagares](#); [Edward A Hartnett](#)
Cc: [RulesCommittee Secretary](#)
Subject: Participation of Former Judges
Date: Monday, August 13, 2018 12:08:56 PM
Attachments: [Sachs FRAP36 Participation 20180813a.pdf](#)

Dear Judge Chagares and Prof. Hartnett,

Attached please find a letter on the participation of former judges in appellate decisions. It suggests that the Committee consider further rulemaking on this topic, potentially including amendments to Rule 36.

Thank you for your time and attention!

Best,
Steve

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BY ELECTRONIC MAIL

August 13, 2018

The Hon. Michael A. Chagares, Chair
Prof. Edward Hartnett, Reporter
Advisory Committee on Appellate Rules

RE: Participation of Former Judges

Dear Judge Chagares and Prof. Hartnett:

When judges leave the bench—by death, resignation, or otherwise—their votes sometimes live on. In *Altera Corp. v. Commissioner*, Nos. 16-70496, 16-70497 (9th Cir. July 24, 2018), for example, the deciding vote was cast by Judge Stephen Reinhardt, who had passed away nearly four months earlier. This decision and others like it have generated substantial public controversy, culminating in *Altera's* withdrawal by a reconstituted panel on August 7. Yet similar opinions have not been withdrawn, and the issue seems to be a recurring one. I suggest that the Committee consider further rulemaking on this topic. In particular, I propose that participation in issuing an order or judgment be limited to those judges who are authorized to participate when the order or opinion is delivered to the clerk for entry on the docket.

Under 28 U.S.C. § 46, appellate cases are normally heard and determined by three-judge panels or by the court en banc, with a quorum defined as “[a] majority of the number of judges authorized to constitute a court or panel thereof.” § 46(d). In many situations, then, a single judge’s departure will have no effect on the result. The remaining two judges on the panel, or the many other judges of the en banc court, will suffice for a quorum and may decide the case themselves. See, e.g., *Riederer v. United Healthcare Servs., Inc.*, No. 16-3041, 2018 WL 3569959, at 1 n.* (7th Cir. July 24, 2018); *Wabakken v. Cal. Dep’t of Corr. & Rehab.*, 725 F. App’x 564, 566 n.* (9th Cir. 2018); *Hayes v. N.Y.*

Att’y Grievance Comm., 672 F. 3d 158, 161 n.** (2d Cir. 2012); *United States v. Leshen*, 453 F. App’x 408, 409 n.1 (4th Cir. 2011); see also *United States v. Desimone*, 140 F. 3d 457 (2d Cir. 1998).

A problem arises, however, when a former judge has cast the deciding vote. While I have not conducted a full survey, courts appear to handle this problem in a number of different ways. For example:

- Sometimes a court adds a new judge to a diminished panel, whether preemptively, as in *Lanning v. Southeastern Pennsylvania Transportation Authority*, 308 F. 3d 286, 286 n.* (3d Cir. 2002), or after a petition for rehearing, as in *Greenberg v. FDA*, 803 F. 2d 1213, 1215 (D.C. Cir. 1986).
- Sometimes the local rules require adding an additional judge only if the remaining panel judges disagree, as under 2d Cir. IOP E(b), 8th Cir. R. 47E, or Fed. Cir. R. 47.11, or only in certain categories of cases, as under 9th Cir. General Order 3.2.h.
- Sometimes the equally divided court affirms the judgment under review, as in *Mayor & City Council of Baltimore v. Mathews*, 571 F. 2d 1273, 1276 (4th Cir. 1978) (en banc) (per curiam).
- And sometimes, as had occurred in *Altera*, a former judge’s vote is counted even after he or she has left office, as in *Rizo v. Yovino*, 887 F. 3d 453, 456 n.* (9th Cir. 2018) (en banc) (eleven days), *Hernandez v. Chappell*, 878 F. 3d 843, 845 n.** (9th Cir. 2017) (thirty-four days), *Hillsdale College v. HEW*, 696 F. 2d 418, 419 n.* (6th Cir. 1982) (twenty days), *vacated on other grounds*, 466 U.S. 901 (1984), and *Ass’n of National Advertisers v. FTC*, 627 F. 2d 1151, 1154 n.* (D.C. Cir. 1979) (thirty-seven days), *cert. denied*, 447 U.S. 921 (1980).

Counting a former judge’s vote may appear to promote judicial economy or to show respect to a former colleague. But however well-motivated it may be, counting the vote of someone who is no longer an

Article III judge is an improper practice for a court of law. Judges cannot exercise their legal authority after they leave office. Under current law, this authority is needed whenever the judges act, including when they file an opinion or order on behalf of the court. Treating a former judge's vote as decisive, even for efficiency's sake, would exceed this authority and might unduly limit the court's consideration of the issues. And leaving the matter up to discretion and circumstance might undermine public confidence in the judicial process, especially in a contentious case. The issue ought to be addressed by a uniform rule, and the only proper rule is one that limits participation to those judges still authorized to act.

A judge's authority is conferred by law, and the law defines when this authority ends. A judge's tenure in office might end for any number of reasons, including death, resignation, conviction after impeachment, or the expiration of the commission granted by an Article II recess appointment. Or a judge who remains in office might be rendered unable to participate in a particular case, whether by temporary disability or by a newly created conflict. (Say, if a relative acquires an interest that 28 U.S.C. § 455 treats as disqualifying.)

These departures, disqualifications, or recusals do not invalidate past orders of the court. But neither do they allow individuals who are no longer "judges authorized to constitute a court or panel," § 46(d), or who legally "cannot sit because recused or disqualified," § 46(b), to issue *new* orders or to participate further in the case. The not-yet-final vote of a judge who has passed away has no more legal authority than that of a judge who has been impeached and convicted, who has resigned from office, or whose temporary commission has expired. Such a person is no longer an Article III judge; and "[e]ven if the parties had *expressly* stipulated to the participation of a non-Article III judge in the consideration of their appeals, no matter how distinguished and well qualified the judge might be, such a stipulation would not have cured the plain defect in the composition of the panel." *Nguyen v. United States*, 539 U.S. 69, 80–81 (2003).

This is how the law treats judicial status in other contexts. For example, the Judicial Council of the Second Circuit recently concluded that it could not investigate misconduct allegations against Judge Alex Kozinski, because his immediate retirement under 28 U.S.C. § 371(a) meant that he was no longer “a circuit judge” under 28 U.S.C. § 351(d)(1). According to the Judicial Council, he had “resigned the office of circuit judge, and [he] can no longer perform any judicial duties.” *In re Complaint of Judicial Misconduct*, No. 17-90118, slip op. at 2–3 (2d Cir. Judicial Council Feb. 5, 2018). A private citizen who can no longer be the subject of a judicial misconduct investigation can hardly bear responsibility for the future disposition of a still-pending case. Determining the outcome of a pending case is a judicial duty—indeed, one of the more important ones. And if a judge who has left office voluntarily “can no longer perform any judicial duties,” the same is true of a judge who has passed away.

Altera’s initial approach therefore seems inconsistent with the current law governing the composition of the appellate courts. As the Supreme Court has held in a closely related context, a judge’s authority to participate in a case must be assessed as of the time the case is decided. In *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685 (1960), the Court concluded that the prior version of § 46 did not allow a retired judge to cast the deciding vote in an en banc proceeding—even though the case had been fully submitted to the en banc court weeks before his retirement took effect. The Court noted that § 46 then referred to cases “heard and *determined*” en banc only by judges in active service, and it concluded that “[t]he literal meaning of the words seems plain enough[:] * * * A case or controversy is ‘determined’ when it is decided.” *Id.* at 688. Today’s version of § 46 likewise refers to cases being “heard and determined” by panels of judges—not panels of former judges or of private citizens. See § 46(c); accord § 46(b) (“hearing and determination”). If a case is determined when it is decided, then a person who is no longer a member of the court when its decision is made may not take part in the court’s determination.

The legal argument for counting a former judge's deciding vote has to be that the vote had already "vested" at some earlier time, when the judge did have legal authority to act. But a judge does not exercise his or her legal authority by agreeing to a disposition at a postargument conference—or even by approving a draft opinion, giving its author some kind of permanent proxy to file the opinion with the clerk. While certain orders may be entered by a single judge or even the clerk of court, see Rule 27(b)–(c), any other judicial acts must be those of the full court or panel, which can act only by a majority of a quorum. See generally *Arnold v. E. Air Lines, Inc.*, 712 F. 2d 899, 905–06 (4th Cir. 1983) (citing H. Robert, Robert's Rules of Order § 43, at 339 (S. Robert ed., 1970)).

Once the deciding judge departs or is disqualified, that majority of a quorum is absent. If *two* judges on a panel die or resign, the panel plainly lacks a quorum under § 46(d) to file any new order or opinion: a quorum is needed for the court to "legally transact judicial business," *Tobin v. Ramey*, 206 F. 2d 505, 507 (5th Cir. 1953), and filing an order or opinion is judicial business. And if a single judge's departure leaves the court equally divided, then there is no majority on whose behalf the remaining judges might act. As the Supreme Court has long held, "no affirmative action can be had in a cause where the judges are equally divided in opinion," other than to leave "in full force" any judgment under review. *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 110 (1868). That is why the Court, after the death of Justice Scalia, affirmed a number of decisions by equal division and without precedential effect—see, e.g., *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016)—rather than treating Justice Scalia's vote as having been permanently cast on the date of some prior conference vote or "join" memo.

Even if it were permitted by law, *Altera's* approach would still be bad policy. The decision of a circuit court determines the law of the circuit: every word and phrase may have a significant impact, not only on the parties, but on other cases and on the public at large. If other judges continue to work on a case after their former colleague has cast the deciding vote, the eventual opinion can no longer carry the authority

of the full court or panel. Any subsequent changes to the “majority” opinion or order will reflect the choices of less than a majority of a quorum—indeed, perhaps only the choices of a single judge.

The same is true if a former judge’s vote is counted while dissents and concurrences are still in the works. In *Hernandez*, Judge Harry Pregeron’s deciding vote was counted thirty-four days after his death, on the theory that he had “fully participated in this case and formally concurred in this opinion”—presumably referring to the majority opinion—“after deliberations were complete.” 878 F. 3d at 845 n.**. During that thirty-four day period, however, any changes that might have been made to a dissent or a concurrence would have had no opportunity to persuade the judge whose vote was decisive. If local rules permit, a majority of a court or panel can always choose to file its opinion immediately, with separate concurring or dissenting opinions to be published later. But the majority judges’ choice *not* to do so is a choice to keep their options open and their votes nonfinal, which gives their colleagues a chance to convince them otherwise before any final determination is made. To count the vote of a former judge is to preserve that judge’s once-expressed views in amber, a practice fundamentally inconsistent with the full and deliberate consideration that appellate courts owe to the parties and the public.

The most plausible scenario for counting a former judge’s vote is when “[t]he majority opinion and all [separate opinions] were final, and voting was completed,” prior to the judge’s departure. *Rizo*, 887 F. 3d at 456 n.*. Releasing already-written opinions might seem sensible *ex post*—not only to avoid rehearing a case that had been considered at length, but also to avoid any apparent disrespect to the memory of a beloved colleague. Still, the remaining five judges who had joined Judge Reinhardt’s opinion in *Rizo* could not lawfully treat their own judgment as that of the en banc court, when five other members of that court disagreed with them. And a rule that such judgments may be issued in the future, so long as no changes are made to the drafts after the decisive judge leaves office, would also impose an improper burden *ex ante*: it would prevent other members of the court from making what

they might see as necessary changes to their own opinions, on pain of forcing a reconstituted panel, reargument, or affirmance by an equally divided court. (Indeed, such a rule could even be triggered strategically by a judge who hopes for such a result.)

Determining circuit precedent by counting the votes of former judges has the potential to undermine public confidence in the judiciary and in the quality of its decisions. It has already been the subject of much public commentary, most of it starkly negative.¹ And public confidence requires that the practice be stopped *by rule*, rather than by leaving the winning vote in an important case up to circumstance or local variation. Judges' departures from office can come all too suddenly, and the public should be able to depend upon a regular, open, and evenhanded procedure for addressing them. Especially in a contentious case, there should be no suspicion that the outcome has rested on ad hoc decisionmaking or unpredictable discretion. As Congress has created a largely uniform system of appellate courts, there are no local circumstances relevant to this issue that might require the use of different rules in different circuits.

If a general rule is to be made, it should make clear that a judge's vote "vests" only when the order or opinion at issue is actually delivered to

¹ See, e.g., Jonathan H. Adler, *The Dead Can Vote (At Least on the Ninth Circuit) (Updated)*, Volokh Conspiracy (July 25, 2018, 3:49 p.m.), <https://goo.gl/c49RHc>; Howard J. Bashman, *Dead Judges Voting: When Does Life Tenure End?*, Law.com (Feb. 21, 2006), <https://goo.gl/Nqh2s5>; Howard J. Bashman, *Reader Mail on the Subject of Dead Judges Voting*, How Appealing (May 24, 2006, 11:15 p.m.), <https://goo.gl/NMB6us>; Patrick Gregory, *Multiple Circuits Let Dead Judges Vote in Cases*, Bloomberg Law: Big Law Business (Apr. 16, 2018), <https://goo.gl/Vp5D2G>; Tony Mauro, *Posthumous Judging: Appeals Courts Allow It, but Not the Supreme Court*, The Recorder (Apr. 9, 2018, 5:38 p.m.), <https://goo.gl/j7EkjC>; Chris Walker, *Nearly Four Months After His Death, Judge Reinhardt Casts the Deciding Vote in an Important Tax Exceptionalism Case: Altera v. Commissioner of Internal Revenue*, Yale J. Reg. Notice & Comment (July 24, 2018), <https://goo.gl/Z1AaCh>; Ed Whelan, *Reinhardt Votes from the Grave*, National Review: Bench Memos (July 27, 2018, 11:07 a.m.), <https://goo.gl/iKxVcn>; see also Frank H. Easterbrook, *The Most Insignificant Justice: Further Evidence*, 50 U. Chi. L. Rev. 481, 490 n.37 (1983) (noting cases without detailed discussion).

the circuit clerk for entry on the docket. As Rule 36(a)(1) describes, the clerk normally prepares and enters a judgment upon receiving an opinion from the judges assigned to the case. This duty is purely ministerial: with qualifications not relevant here, the rule states that “[t]he clerk *must* prepare, sign, and enter the judgment.” *Id.* (emphasis added). Once the court has delivered materials to the clerk for entry on the docket, the case has been “determined” within the meaning of § 46(c): the judges’ work is done, no further action on their part is necessary, and the clerk’s subsequent conduct no longer depends on the presence or qualifications of a particular judge. Cf. *Monteiro v. City of Elizabeth*, 436 F. 3d 397, 399 n.* (3d Cir. 2006) (releasing an opinion that had been “submitted * * * to the Clerk’s office for processing” while the panel was fully still constituted). If, however, the materials have not yet been handed off to the clerk, then the law still requires some further action by the judges assigned to the case—and an action supported by fewer than a majority of qualified judges cannot be treated as that of the court.

I suggest that the Committee consider the need for rulemaking on this issue at its next meeting. The date on which a judge’s vote “vests” is a topic that falls within the Supreme Court’s authority “to prescribe general rules of practice and procedure * * * for cases in the * * * courts of appeals.” 28 U.S.C. § 2072(a). That said, the topic has not yet been addressed through rulemaking, and there is no natural home for such a provision in any of the Appellate Rules. The most appropriate location for an amendment may well be Rule 36, which currently addresses the procedure for entering judgments, and which could be expanded to include this issue as well.

While drafting any precise language may be premature, I propose amending that rule substantially as follows, with additions indicated in red:

Rule 36. Entry of Judgment; Notice; Participation

(a) Entry. A judgment is entered when it is noted on the docket. The clerk must prepare, sign, and enter the judgment:

(1) after receiving the court’s opinion—but if settlement of the judgment’s form is required, after final settlement; or

(2) if a judgment is rendered without an opinion, as the court instructs.

(b) Notice. On the date when judgment is entered, the clerk must serve on all parties a copy of the opinion—or the judgment, if no opinion was written—and a notice of the date when the judgment was entered.

(c) Participation. Unless these rules provide otherwise, only those judges authorized to be counted toward a quorum when an order or opinion is delivered to the clerk may participate in issuing the order or judgment.

This amendment would limit participation to the judges “authorized to be counted toward a quorum.” That, in turn, is limited by § 46(d) to those judges who are authorized by statute “to constitute a court or panel thereof,” and it is further limited by disqualification provisions (such as 28 U.S.C. §§ 47 and 455) and by the recusal decisions of individual judges. Judges who have chosen to recuse themselves, who may not lawfully participate in a particular matter, or who are no longer in office are not counted toward the quorum, see, *e.g.*, *Comer v. Murphy Oil USA*, 607 F.3d 1049, 1053–54 (5th Cir. 2010), and their votes should not be counted either.

(The proviso “unless these rules provide otherwise” is inserted to account for Rule 27(b), which allows a court “to authorize its clerk to act on specified types of procedural motions.” In such a case, a person other than a qualified judge would lawfully participate in issuing the order of the court.)

The Hon. Michael A. Chagares & Prof. Edward Hartnett
RE: Participation of Former Judges
August 13, 2018
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I hope this is helpful to you. Please do not hesitate to contact me if there is more information that I can provide, and thank you for your time and attention.

Respectfully,

A handwritten signature in blue ink that reads "Stephen E. Sachs". The signature is written in a cursive style.

STEPHEN E. SACHS

SES/ses

cc: Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure