THE "NON-*BANC EN BANC*": SEVENTH CIRCUIT RULE 40(e) AND THE LAW OF THE CIRCUIT

The Honorable Michael S. Kanne*

I. INTRODUCTION

The virtues of *stare decisis* have always been revered in our nation's legal system. Alexander Hamilton wrote that, "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."[1] The law of the circuit–the specific application of *stare decisis* within a court of appeals–is what binds the U.S. Court of Appeals for the Seventh Circuit to its own pronouncements of law. The law of the circuit has been viewed by some as a vice that disconnects and alienates the separate courts of appeals from one another.[2] But in the Seventh Circuit, our commitment to the doctrine is embodied in Circuit Rule 40(e), which requires a majority of the entire court to approve opinions rendered by three-judge panels that conflict with existing Seventh Circuit precedent or create a split with the precedent of the other courts of appeals. This paper introduces Circuit Rule 40(e) and provides examples of the Rule in action. It then considers analogous rules embraced by the U.S. Courts of Appeals for the Second and D.C. Circuits, and addresses some criticisms to the prepublication-circulation procedure. Finally, it highlights the merits of Circuit Rule 40(e)–a Rule that provides an opportunity for each judge to weigh in on important issues, regardless of whether a case is heard *en banc*.

II. CIRCUIT RULE 40(e): A BRIEF OVERVIEW

Circuit Rule 40(e), titled "Rehearing Sua Sponte before Decision," requires the judges of the Seventh Circuit to circulate a draft opinion to the entire court prior to that opinion's publication in two situations. Circuit Rule

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1. THE FEDERALIST NO. 78 at 168 (Alexander Hamilton) (Frederick Quinn ed., 1997).
2. Walter V. Schaefer, *Comment: Reliance on the Law of the Circuit–A Requiem*, 1985 DUKE L.J. 690, 690 (1985).

40(e) is triggered by an opinion that either: (1) overrules Seventh Circuit precedent, or (2) creates a conflict between or among circuits.[3] When the Rule applies, a majority of the court must vote not to rehear *en banc* an issue arising in the circulated opinion, in order for the opinion to be published as proposed. The Rule also provides for a third scenario, which allows for circulation, at the discretion of the panel, where the proposed opinion will establish a new rule or procedure.[4]

If a majority of the court does not support an *en banc* rehearing after a Circuit Rule 40(e) circulation, the resulting panel opinion "shall" contain a footnote indicating that the opinion was circulated to active judges, and reporting the results of the poll: for example, the footnote might state that "No judge favored a rehearing *en banc*," "A majority did not favor a rehearing *en banc*," or other similar language.[5] From time to time, substance prevails over form and the necessary wording is contained in the text of the published opinion itself, instead of in the footnote as the Rule prescribes.[6]

In the event that a majority of judges on the court decide not to rehear a case *en banc* after a Circuit Rule 40(e) circulation, a judge in the minority favoring *en banc* review has the opportunity to comment on the denial of a rehearing. (Technically, any judge participating in the Circuit Rule 40(e) determination may publish comments along with the resulting opinion.) As such, this process allows for extended, published dialogue on salient issues relevant to the circuit as a whole that are only decided by a panel of three judges. For example, in *Doe v. University of Illinois*, one judge authored a separate statement "respecting the denial of rehearing *en banc*," and three judges dissented from the denial of a rehearing *en banc*, arguing that the issue in the case deserved the attention of the entire court.[7]

Typically, opinions decided by a three-judge panel are circulated only among the panel judges prior to publication. Insofar as Circuit Rule 40(e) mandates the circulation of some opinions to the entire active court, the Rule prevents a single panel of judges from creating new circuit law without the knowledge of the other judges on the court. The court has expressly

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3. 7TH CIR. R. 40(e).
4. *Id.*
5. *Id.*
6. *See, e.g.*, United States v. Tejeda, 476 F.3d 471, 475 (7th Cir. 2007); Thomas v. United States, 328 F.3d 305, 309 (7th Cir. 2007); Diaz v. Prudential Ins. Co. of Am., 424 F.3d 635, 640 (7th Cir. 2005).
7. Doe v. Univ. of Ill., 138 F.3d 653, 678–80 (7th Cir. 1998) (Easterbrook, J., respecting the denial of rehearing *en banc*) and (Posner, C.J., dissenting from denial of rehearing *en banc*); *see also* United States v. White, 406 F.3d 827, 837 (7th Cir. 2005) (Easterbrook, C.J., dissenting from decision not to hear certain *Booker* appeals *en banc*); United States v. Paladino, 401 F.3d 471, 485 (7th Cir. 2005) (Ripple, J., dissenting from the denial of rehearing *en banc*); United States v. Withers, 128 F.3d 1167 (7th Cir. 1997) (Wood & Rovner, JJ., concurring in result of Circuit Rule 40(e) poll).

articulated the reasoning behind this Rule: "One panel of this court cannot overrule another implicitly. Overruling [established precedent] requires recognition of the decision to be undone and circulation to the full court under Circuit Rule 40(e)."[8] Therefore, Circuit Rule 40(e) acts as a prophylactic rule that protects against the clandestine reversal of the court's precedent. By requiring a majority of the court to sign off on overruling opinions, the Rule ensures that panel decisions that seek to reshape circuit law are flagged to receive the careful attention of all active judges on the court.

Circuit Rule 40(e)'s existence also means that when an opinion has not been properly circulated, judges will hesitate to interpret it in a manner that conflicts with an earlier case. For example, in *Robledo-Gonzales v. Ashcroft*, the court noted that an earlier opinion relied on by one of the parties, "was not circulated pursuant to Circuit Rule 40(e) and, therefore, cannot overrule this court's prior decisions."[9] Likewise, in *United States v. De la Torre*, the court refuted the government's argument that *United States v. Krilich*, a Seventh Circuit case, had implicitly overruled two earlier cases, *United States v. Clay*[10] and *United States v. Turner*,[11] by relying on Circuit Rule 40(e).[12] As the court stated, "*Krilich* did not address our earlier decisions in *Clay* and *Turner* and was not circulated pursuant to Circuit Rule 40(e), which would have indicated an intent to overrule Circuit precedent."[13] Similarly, the court also relied on the import of the Rule in *United States v. Polichemi* when it noted: "*Osigbade* did not purport to overrule *Underwood*, nor could it have done so under this circuit's rules without undergoing circulation to the full court under the procedures established in Circuit Rule 40(e)."[14]

A cursory, and entirely unscientific, survey of published cases between the years of 2003 and 2007 uncovered 39 instances in which an opinion had been circulated to the entire Court before publication–an average of just under eight Circuit Rule 40(e) circulations per year. The two most common applications of the Rule have been in opinions that overrule circuit precedent, and those that create an intercircuit conflict; there were 12 of each over the five-year period.[15] Eleven opinions were circulated pursuant to the

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8. Brooks v. Walls, 279 F.3d 518, 522–23 (7th Cir. 2002).
9. 342 F.3d 667, 680 (7th Cir. 2003).
10. 37 F.3d 338, 340 (7th Cir. 1994).
11. 998 F.2d 534, 536 (7th Cir. 1993).
12. 327 F.3d 605, 609 n.3 (7th Cir. 2003).
13. *Id.*
14. 201 F.3d 858, 865 (7th Cir. 2000).
15. The court invoked Rule 40(e) to overrule circuit precedent in the following cases: Saban v. U.S. Dep't of Labor, 509 F.3d 376, 379 (7th Cir. 2007); United States v. Hamilton, 499 F.3d 734, 737 (7th Cir. 2007); United States v. Parker, 508 F.3d 434, 436 n.1 (7th Cir. 2007); United States v. Tejeda, 476 F.3d 471, 475 (7th Cir. 2007); Humphries v. CBOCS West, Inc., 474 F.3d 387, 403 n.12

discretionary provision in Circuit Rule 40(e) because they established new rules or procedures within the circuit.[16] The remaining opinions that were circulated did not fall neatly into any of the three categories listed in Circuit Rule 40(e).[17] One opinion, for example, did not expressly overrule an earlier case, but instead limited precedent in a way that might not have been anticipated.[18] Another case was circulated because the panel wanted to lay certain dictum "to rest."[19] Statistics regarding how often circulations result in rehearings *en banc* are not readily available, but the number is likely quite low,[20] possibly because of the low number of *en banc* hearings that the Seventh Circuit traditionally holds.

Seven of the opinions that fall under Circuit Rule 40(e)'s "new rule or procedure category" were circulated in the wake of the U.S. Supreme Court's decision in *United States v. Booker*.[21] After the Court announced *Booker*, the Seventh Circuit (along with the other courts of appeals) faced the daunting tasks of implementing the Court's holding in *Booker* that the U.S. Sentencing

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(7th Cir. 2007); Fairley v. Fermaint, 482 F.3d 897, 902 n.* (7th Cir. 2007); Diaz v. Prudential Ins. Co. of Am., 424 F.3d 635, 640 (7th Cir. 2005); Russ v. Watts, 414 F.3d 783, 784 n.1 (7th Cir. 2005); Owens v. United States, 387 F.3d 607, 611 (7th Cir. 2004); Spiegla v. Hull, 371 F.3d 928, 943 n.7 (7th Cir. 2004); United States v. Mitrione, 357 F.3d 712, 718 n.2 (7th Cir. 2004); United States v. Howze, 343 F.3d 919, 924 (7th Cir. 2003). In the following cases, the court invoked the rule when the panel decision created an intercircuit conflict: Bolante v. Keisler, 506 F.3d 618, 621 (7th Cir. 2007); Ibqal Ali v. Gonzales, 502 F.3d 659, 661 n.1 (7th Cir. 2007); Cent. States, SE & SW Areas Pension Fund v. Schilli Corp., 420 F.3d 663, 663 n.1 (7th Cir. 2005); Tex. Indep. Producers & Royalty Owners Ass'n v. EPA, 410 F.3d 964, 978 n.13 (7th Cir. 2005); Kircher v. Putnam Funds Trust, 373 F.3d 847, 851 (7th Cir. 2004); Int'l Fin. Servs. Corp. v. Chromas Techs. Canada, Inc., 356 F.3d 731, 739 n.4 (7th Cir. 2004); Bethea v. Robert J. Adams & Assocs., 352 F.3d 1125, 1129 (7th Cir. 2003); United States v. Russell, 340 F.3d 450, 457 n.3 (7th Cir. 2003); Lewis v. Peterson, 329 F.3d 934, 937 (7th Cir. 2003); United States v. Mitchell, 353 F.3d 552, 561 n.9 (7th Cir. 2003); Gill v. Ashcroft, 335 F.3d 574, 579 (7th Cir. 2003); Samirah v. O'Connell, 335 F.3d 545, 550 n.6 (7th Cir. 2003).

16. Corral v. United States, 498 F.3d 470, 475 (7th Cir. 2007); United States v. Bonner, 440 F.3d 414, 414 n.1 (7th Cir. 2006); Doe v. Smith, 470 F.3d 331, 346 n.24 (7th Cir. 2006); United States v. Lee, 399 F.3d 864, 867 n. † (7th Cir. 2005); McReynolds v. United States, 397 F.3d 479, 481 (7th Cir. 2005); United States v. Castillo, 406 F.3d 806, 822 n.7 (7th Cir. 2005); United States v. White, 406 F.3d 827, 837 (7th Cir. 2005); United States v. Schifler, 403 F.3d 849, 855 (7th Cir. 2005); United States v. Paladino, 401 F.3d 471, 485 (7th Cir. 2005); Thomas v. United States, 328 F.3d 305, 309 (7th Cir. 2003); Venturelli v. ARC Cmty. Servs., Inc., 350 F.3d 592, 592 n. * (7th Cir. 2003).
17. Forrester v. Rauland-Borg Corp., 453 F.3d 416, 417 (7th Cir. 2006); Meridian Sec. Ins., Co. v. Sadowski, 441 F.3d 536, 540 n. † (7th Cir. 2006); Toney v. L'Oreal USA, Inc., 406 F.3d 905, 911 n.4 (7th Cir. 2005); Frederiksen v. City of Lockport, 384 F.3d 437, 439 (7th Cir. 2004).
18. *Toney*, 406 F.3d at 910–11.
19. *Forrester*, 453 F.3d at 417.
20. *See, e.g.*, Thomas v. Law Firm of Simpson & Cybak, 392 F.3d 914 (7th Cir. 2004); Czerkies v. U.S. Dept. of Labor, 73 F.3d 1435 (7th Cir. 1996).
21. 543 U.S. 220 (2005).

Guidelines were advisory, [22] and addressing other Sixth Amendment concerns that arose after *Booker*. At the time, the judges on the Seventh Circuit agreed among themselves to circulate to the entire court opinions that dealt with applications of *Booker*. Although some of the opinions did not overrule circuit precedent or explicitly create any new rules of law for the circuit, the Seventh Circuit judges agreed that this dynamic area of law deserved the entire court's consideration.

III. CIRCUIT RULE 40(e) IN ACTION: TWO RECENT CASE STUDIES

Two recent opinions of the Seventh Circuit provide insightful examples of how the court operates under Circuit Rule 40(e). *IFC Credit Corporation v. United Business & Industrial Federal Credit Union*,[23] demonstrates how a panel may decide to circulate its opinion pursuant to the Rule when it fears that its decision might be perceived as conflicting with the precedents of other circuit courts of appeals. In *IFC Credit*, the panel determined that a contractual jury waiver provision was enforceable under Uniform Commercial Code principles of interpretation, as codified by the state of Illinois.[24] In reaching this conclusion, the panel rejected IFC Credit's argument that the Seventh Amendment right to a trial by jury in civil suits[25] required the court to employ a heightened waiver standard when determining whether IFC Credit had agreed to forego its right to a jury.[26] The Seventh Circuit had never adopted IFC Credit's suggested constitutional waiver approach to contractual provisions mandating a bench trial; however, the Second and Sixth Circuits had reasoned that federal-constitutional principles necessitated a "waiver" analysis to address this question.[27] In those cases, the courts of appeals upheld jury waiver provisions like the Seventh Circuit did in *IFC Credit*; however, they did so using a very different analytical framework. Thus, to avoid a potential conflict with the precedent of the Second and Sixth Circuits, the panel invoked Circuit Rule 40(e) and circulated the *IFC Credit* opinion to the

22. *Id.* at 264–65.
23. 512 F.3d 989 (7th Cir. 2008).
24. *Id.* at 992.
25. U.S. Const. amend. VII.
26. *IFC Credit*, 512 F.3d at 993.
27. *See id.*; *see also* K.M.C. Co. v. Irving Trust Co., 757 F.2d 752, 755–57 (6th Cir. 1985); Nat'l Equip. Rental, Ltd. v. Hendrix, 565 F.2d 255, 257–58 (2d Cir. 1977).

entire court before publication.[28] No active judge requested an *en banc* review of the issue, and the opinion was rendered.[29]

IFC Credit provides an excellent example of a relatively cautious use of the Circuit Rule 40(e) procedure. No Seventh Circuit case had ever ruled on the type of jury-waiver provision at issue, and all of the cases of other circuit courts of appeals had reached the same result, upholding similar waivers. Moreover, the two cases that provided the potentially conflicting authority were decades old, and other circuits had already analyzed jury waivers in the same manner as the Seventh Circuit would in *IFC Credit*.[30] Thus, the opinion did not "create" an intercircuit conflict that would trigger Circuit Rule 40(e). The panel in *IFC Credit* nevertheless displayed sensitivity to the potential conflict between its analysis and the decisions of other circuits, and consequently afforded all of the active Seventh Circuit judges an opportunity to weigh in by circulating the opinion under Circuit Rule 40(e). The resulting holding was an uncontroversial deviation from other circuits' precedent.

In contrast, another recent decision, *United States v. Gordon*,[31] illustrates how a panel's failure to circulate an opinion pursuant to Circuit Rule 40(e) might raise questions about the decision's precedential authority. In *Gordon*, the criminal defendant argued that his prosecution for illegal reentry[32] was time-barred because the government had "constructive knowledge" of his presence within the country.[33] The court rejected the argument by relying on *United States v. Are*,[34] a case in which the court had previously rejected another defendant's "constructive knowledge" argument.[35] The *Gordon* panel relied on *Are*'s reasoning that the statute of limitations for illegal reentry does not run until the government has actual notice of the alien's illegal presence in the United States, and upheld the defendant's conviction.[36]

Judge Kenneth F. Ripple concurred in the judgment, but questioned the majority's reliance on *Are*.[37] In his view, the *Are* decision's precedential value was limited because it potentially "set this circuit on a path different from all the other circuits that have addressed this issue," and yet had not been

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28. *IFC Credit*, 512 F.3d at 994.
29. *Id.*
30. *See, e.g.*, Leasing Serv. Corp. v. Crane, 804 F.2d 828, 832 (4th Cir.1986); Telum, Inc. v. E.F. Hutton Credit Corp., 859 F.2d 835, 837–38 (10th Cir. 1988).
31. 513 F.3d 659 (7th Cir. 2008).
32. *See Are*, 498 F.3d at 464–66.
33. *Id.* at 661.
34. 498 F.3d 460 (7th Cir. 2007).
35. *See* 8 U.S.C. § 1326(a)(2).
36. *Gordon*, 513 F.3d at 665.
37. *Id.* at 667–68 (Ripple, J., concurring).

circulated prior to publication pursuant to Circuit Rule 40(e).[38] And although Judge Ripple acknowledged that *Are* had partly based its holding on another Seventh Circuit decision, *United States v. Rodriguez-Rodriguez*,[39] he explained that *Rodriguez-Rodriguez* also probably warranted circulation under the Rule, both for "establishing a conflict among the circuits," and essentially overruling dicta in the court's earlier decision in *United States v. Herrera-Ordonez*,[40] which "had assumed that the view of the other circuits was correct."[41]

Judge Ripple's concurrence in *Gordon* reflects the type of concern that might have motivated the panel in *IFC Credit* to circulate the opinion pursuant to Circuit Rule 40(e). Although *Are* relied in part on circuit precedent such as *Rodriguez-Rodriguez* to reject a "constructive notice" statute-of-limitations defense to the crime of illegal reentry,[42] it did so despite apparently contradicting decisions from other circuits, and decisions of the Seventh Circuit.[43] Judge Ripple's concerns reveal how the failure to circulate an opinion pursuant to Circuit Rule 40(e) could lead future panels to question its authority and precedential value.[44]

IV. ANALOGOUS RULES FROM THE SECOND AND D.C. CIRCUITS AND RESULTING CRITICISMS

The procedure outlined in Circuit Rule 40(e) is not unique to the Seventh Circuit. The Second and D.C. Circuits both have similar procedures to circulate opinions before publication if the opinions depart from circuit precedent or create a circuit split. However, what is unique to the procedure outlined in Circuit Rule 40(e) is that it seems to be the only procedure governed by a promulgated circuit rule. In contrast, the procedures providing

38. *Id.* (Ripple, J., concurring).
39. 453 F.3d 458, 461 (7th Cir. 2005).
40. 190 F.3d 504, 510–11 (7th Cir. 1999).
41. *Gordon*, 513 F.3d at 668 n.1.
42. *See Are*, 498 F.3d at 466.
43. *See Gordon*, 513 F.3d 664.
44. *See id.*; *see also* Roquet v. Arthur Andersen LLP, 398 F.3d 585, 592 (7th Cir. 2005) (Wood, J., dissenting) ("If the all-or-nothing rule is truly being adopted by the majority, it is creating a conflict with the Eighth Circuit . . . and the opinion should be circulated under Circuit Rule 40(e)" (internal citation omitted)).

for circulation in the Second[45] and D.C. Circuits,[46] are governed by informal practices that were eventually woven into circuit precedent.

Take, for example, the 1981 case of *Irons v. Diamond*, in which the D.C. Circuit, for apparently the first time, announced in a footnote (very similar to the footnote Circuit Rule 40(e) requires) the court's practice of circulating opinions before publication if those opinions resolved "an apparent conflict between two prior decisions."[47] Subsequent opinions that were likewise circulated would include a similar footnote stating as such[48]–a footnote that would later be deemed the "*Irons* Footnote."[49] In fact, over time the court expanded the range of justifications for using the *Irons* footnote procedure, including to extend or limit earlier decisions,[50] to reject "dicta,"[51] or simply to overrule a decision deemed incorrect or outdated.[52] In an apparent attempt to standardize the use of the *Irons* footnote procedure, in 1996 the D.C. Circuit promulgated a "policy statement" identifying specific circumstances for which the *Irons* footnote's use was approved, including "overruling a more recent precedent which, due to an intervening Supreme Court decision . . . a panel is convinced is clearly an incorrect statement of current law."[53]

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45. *See, e.g.*, United States v. Brutus, 505 F.3d 80, 87 n.5 (2d Cir. 2007); United States v. Parkes, 497 F.3d 220, 230 (2d Cir. 2005); United States v. Crosby, 397 F.3d 103, 105 n.1 (2d Cir. 2005); United States v. Gonzalez, 420 F.3d 111, 132 n.18 (2d Cir. 2005); United States v. Mincey, 380 F.3d 102, 103 n.1 (2d Cir. 2004) (per curiam); Jacobson v. Fireman's Fund Ins. Co., 111 F.3d 261, 268 n.9 (2d Cir. 1997). Indeed, to show that the title of this paper is not a blithe–yet, catchy–characterization of the Rule 40(e) procedure and its analogs, at least one judge with the Second Circuit has likewise referred to practice of circulation opinions prior to publication as "a mini-*en banc*." Michael v. Immigration & Naturalizations Servs., 206 F.3d 253, 268 n.2 (2d Cir. 2000) (Cabranes, J., concurring).

46. *See, e.g.*, United States v. Southerland, 466 F.3d 1083, 1084 n.1 (D.C. Cir. 2006); United States v. Dorcely, 454 F.3d 366, 373 n.4 (D.C. Cir. 2006); Outlaw v. Airtech Air Conditioning & Heating, Inc., 412 F.3d 156, 160 n.1 (D.C. Cir. 2005); Consumer Elecs. Ass'n v. Fed. Commc'n Comm'n, 347 F.3d 291, 297 n.2 (D.C. Cir. 2003); Chung v. Dep't of Justice, 333 F.3d 273, 278 n. * (D.C. Cir. 2003); Entravision Holdings, LLC v. Fed. Commc'n Comm'n, 202 F.3d 311, 313 n. ** (D.C. Cir. 2000); Brown v. Brody, 199 F.3d 446, 456 n.9 (D.C. Cir. 1999); Irons v. Diamond, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981).

47. 670 F.2d at 268 n.11.

48. *See, e.g.*, *Southerland*, 466 F.3d at 1084 n.1*; Dorcely*, 454 F.3d at 373 n.4; *Outlaw*, 412 F.3d at 160 n.1; *Consumer Elecs. Ass'n*, 347 F.3d at 297 n. 2; *Chung*, 333 F.3d at 278 n. *; *Entravision Holdings, LLC*, 202 F.3d at 313 n. **; *Brown*, 199 F.3d at 456 n.9.

49. *In re Sealed Case II*, 181 F.3d 128, 145 (D.C. Cir. 1999) (Henderson, J., concurring).

50. *See* Londrigan v. Fed. Bureau of Investigation, 722 F.2d 840, 844–56 (D.C. Cir. 1983); United States v. Brawner, 32 F.3d 602, 603 (D.C. Cir. 1994).

51. *See* U.S. Dep't of Navy v. Fed. Labor Relations Auth., 952 F.2d 1434, 1439 (D.C. Cir. 1992); Chem. Waste Mgmt., Inc. v. U.S. Envtl. Protection Agency, 873 F.2d 1477, 1482 (D.C. Cir. 1989); Melcher v. Fed. Open Mkt. Comm., 836 F.2d 561, 563–64 (D.C. Cir. 1987); Ctr. for Science in Pub. Interest v. Regan, 802 F.2d 518, 524 (D.C. Cir. 1986).

52. *In re Sealed Case II*, 181 F.3d at 145–46 (Henderson, J., concurring).

53. *See id.*; *see also Chem. Waste Mgmt., Inc.*, 873 F.2d at 1482.

The *Irons* footnote procedure is particularly interesting because it was the catalyst of a debate between members of the D.C. Circuit regarding the propriety of the pre-publication circulation procedure it represents. The debate took place within the court's *en banc* opinion in the 1999 case, *In re Sealed Case No. 97–3112*, and a brief summary of the facts of that case will help set the context for the debate. With *In re Sealed Case*, the court addressed the question of whether a district court could sentence a criminal defendant below the (then-mandatory) guidelines imprisonment range under U.S.S.G. § 5K1.1 for his substantial assistance to the government's investigation of other criminals, absent a motion from the government to do so.[54] The defendant argued at his sentencing hearing that the assistance he rendered to the government qualified him for the substantial-assistance departure, even though the government had not filed a motion in support of the departure.[55] The district court rejected the defendant's argument by relying on *United States v. Ortez*[56] to conclude that such a motion was a "prerequisite to downward departure from a guidelines sentence for substantial assistance," and denied his request for a downward departure.[57] The defendant appealed, and a panel of the D.C. Circuit reversed.[58] The panel acknowledged that *Ortez* barred a substantial-assistance departure absent a government motion.[59] However, the panel determined that the U.S. Supreme Court had "effectively overruled" *Ortez* in *Koon v. United States*,[60] and thus the Court had left the district court free to apply a departure for a defendant's substantial assistance in all instances "where circumstances take the case out of the relevant guideline heartland."[61] The panel reversed the district court and remanded for resentencing.[62] The government, however, moved for a rehearing *en banc*, which the court granted on its way to unanimously reversing the panel's decision.[63]

The D.C. Circuit's *en banc* opinion was very thorough and well written, but for present purposes, this paper will focus solely on Judge Karen LeCraft Henderson's concurrence. Judge Henderson wrote separately "to register [her] concern about the process leading up to the *en banc* affirmance of the

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54. 181 F.3d at 130–31.
55. *Id.* at 131.
56. 902 F.2d 61, 64 (D.C. Cir. 1990).
57. *In re Sealed Case II*, 181 F.3d at 131.
58. *In re* Sealed Case *(Sentencing Guidelines' "Substantial Assistance")* (*In re Sealed Case I*), 149 F.3d 1198, 1204 (D.C. Cir. 1998).
59. *Id.*
60. 518 U.S. 81, 98–99 (1996).
61. *In re Sealed Case I*, 149 F.3d 1198, 1204.
62. *Id.*
63. *In re Sealed Case II*, 181 F.3d 128, 131, 142 (D.C. Cir. 1999).

district court."[64] According to Judge Henderson, the process "disregarded our established procedure and, far worse, failed to honor the bedrock principle of *stare decisis*."[65] Specifically, Judge Henderson criticized the original panel for rejecting *Ortez*–established circuit precedent–"with no *Irons* footnote seeking *en banc* endorsement (based presumably on 'an intervening Supreme Court decision' making *Ortez* 'clearly an incorrect statement of the current law)."[66] Indeed, she asserted, "[h]ad the panel opinion been circulated to the full court with an *Irons* footnote, the opinion would not have been endorsed unanimously as required (as manifested by today's lopsided vote to the contrary) and it could not have issued in the form that it did."[67] Thus, Judge Henderson stated, "[w]ith one *sub silentio* sweep," the panel improperly reversed "this substantial body of circuit authority."[68]

Judge Henderson's criticism did not end with the procedure the panel employed; in a footnote of her own, she expressed her belief that "our Irons footnote procedure has serious flaws."[69] In her view, the procedure

> has evolved from an expedient device to reconcile inconsistent circuit holdings into a summary method of overruling unambiguous circuit precedent, without any of the safeguards or formalities attending the *en banc* process. A three-judge panel determines that full-court consideration is warranted and non-panel members concur without benefit of briefing or argument. The resulting decision is then announced by footnote. Reasoned decisionmaking and *stare decisis* call for a more deliberate process. If we wish to change our precedent, we should invoke the *en banc* mechanism expressly authorized for that purpose by the Federal Rules of Appellate Procedure.[70]

Judge Henderson accordingly concluded with the exhortation to the rest of the members of her court, "As long as the *Irons* footnote procedure exists, however, the least we should do is follow it."[71]

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64. *Id.* at 145 (Henderson, J. concurring).
65. *Id.* at 146 (Henderson, J. concurring).
66. *Id.* (Henderson, J. concurring).
67. *Id.* at 147 (Henderson, J. concurring).
68. *Id.* (Henderson, J. concurring).
69. *Id.* at 146 n.5 (Henderson, J. concurring).
70. *Id.* (Henderson, J. concurring).
71. *Id.* (Henderson, J. concurring).

V. THE CRITICISMS' (IN)APPLICABILITY TO CIRCUIT RULE 40(E)

The question of whether Judge Henderson was correct to conclude that the *In re Sealed Case* panel improperly followed the D.C. Circuit's *Irons* footnote procedure by not circulating its opinion to the entire membership of the court before publication is left for another day; this is, after all, a symposium on only the Seventh Circuit. Nevertheless, one could argue that Judge Henderson's criticisms of her court's *Irons* footnote procedure could also be levied against the Seventh Circuit's Rule 40(e) procedure. As Judge Henderson pointed out, a court runs the risk of giving circuit precedent–and, accordingly, the doctrine of *stare decisis*–short shrift by allowing one panel of three judges to depart from precedent, so long as the opinion is circulated and approved by the membership of the court prior to publication. After all, non-panel member judges are not directly involved in the briefing or argument underlying the circulated opinion. Thus, it could be said that those judges do not have the necessary involvement or experience with the case to make truly informed decisions regarding a potential change in circuit law.

Another potential problem with the Circuit Rule 40(e) procedure, inherent in Judge Henderson's comments, is that it may be unclear when the procedure must be invoked. The Rule itself commands that an opinion must be circulated among the entire court if it "overrule[s] a prior decision of [the] court," or "create[s] a conflict between or among circuits." But it is generally unclear to what extent a decision must "overrule" circuit precedent to invoke the Rule. Specifically, it is uncertain whether the Rule is implicated only when a panel specifically states that it is overruling prior precedent *in toto*, or if the Rule also applies when a panel merely limits or constrains precedent that "effectively" overrules a case. Indeed, it would not be unusual for a line of decisions to erode circuit precedent over time; in such a scenario it is difficult to ascertain which panel–if any–of those rendering the decisions would be required to follow the Rule. The lack of clarity surrounding when Circuit Rule 40(e) applies can have significant consequences. As discussed earlier, and as Judge Ripple stated in his concurrence in *Gordon*, a failure to circulate an opinion before publication could adversely affect the precedential value of the decision.[72]

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72. *See* United States v. Gordon, 513 F.3d 659, 667–68 & 668 n.1 (7th Cir. 2008) (Ripple, J., concurring); *see also* Roquet v. Arthur Andersen LLP, 398 F.3d 585, 592 (7th Cir. 2005) (Wood, J., dissenting); Brooks v. Walls, 279 F.3d 518, 522–23 (7th Cir. 2002); U.S. De la Torre, 327 F.3d 605, 609 (7th Cir. 2003); United States v. Polichemi, 219 F.3d 698, 712 (7th Cir. 2000).

That being said, it appears that many–if not all–of Judge Henderson's concerns do not apply to the Seventh Circuit's current Circuit Rule 40(e) practice. First, Judge Henderson's concerns that a judge must address a potential change or conflict in the law without the benefit of briefing or argument has been alleviated with the advances of time and technology. The briefs for every case appealed since 2000 are available in electronic format to both the judges and the public on the Seventh Circuit's website, as are audio recordings of every oral argument. Thus, it cannot be said that judges are unqualified to offer their views on a particular issue by virtue of not having access to case materials that were once available only to members of the panel hearing the case. Likewise, it cannot be suggested that the judges do a disservice to either precedent or the doctrine of *stare decisis* by addressing an issue without an *en banc* hearing, as they have access to the fully briefed and argued issues before them via Circuit Rule 40(e). Rather, by requiring a majority of the court to sign off on circulated opinions, the Rule ensures that panel decisions that seek to reshape circuit law are flagged to receive the careful attention of all active judges.

One overarching result of Circuit Rule 40(e) that does not come up in Judge Henderson's concurrence is that the Rule allows important court deliberations regarding conflicting or changing rules of law into the open. As previously explained, Circuit Rule 40(e) provides to all active judges the power to state, both privately and publicly, their views on whether a case should be reheard *en banc*. Once a judge forms a view on whether a case should be reheard, Circuit Rule 40(e) allows that judge to publicly share the view in a concurrence or dissent to the panel decision, and thus preserve it for posterity. This practice highlights potentially conflicting or changing rules of law for litigants; it also ensures that the court will remain aware of those possibly controversial rules and procedures, and helps preserve such issues for the court's future deliberations.

Ultimately, Judge Henderson's criticism overlooks one substantial benefit to the court that Circuit Rule 40(e) provides: the ability to address a substantial, yet obvious, change or conflict in the law in a manner that saves the court's time and resources. Such flexibility is valuable–if not necessary–to the court when addressing dynamic and fluid areas of the law. As such, the value of the Circuit Rule 40(e) procedure was perhaps best demonstrated in the months following *United States v. Booker*,[73] during which the court was forced to address several issues regarding how the Supreme Court's holding would affect then-current and pending sentencing challenges.

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73. 543 U.S. 220 (2005).

Not every post-*Booker* sentencing issue required an *en banc* hearing for resolution. Indeed, the dynamic nature of sentencing law at that time made it impractical to address so many issues *en banc*. It takes time for an issue to be addressed by the court *en banc*, particularly when briefing must be scheduled, a hearing must be set, the hearing must be held, and then the decision must be rendered. It was completely possible, if not probable, that during that time frame the Supreme Court or another circuit would have addressed the same issue and rendered the *en banc* process unnecessary. Thus, the court (quite effectively) relied on the Rule to collectively address obvious changes in sentencing law, and to provide an expedient decision during that tumultuous time.

VI. CONCLUSION

In sum, Circuit Rule 40(e) allows the court to provide an "*en banc* ruling" without the formalities of "*en banc* procedure." Such flexibility is greatly valued in certain circumstances and for certain issues–such was the case in the months following *Booker*. Nevertheless, and as Judge Henderson asserted in her concurrence to *In re Sealed Case*,[74] there will always be legal issues that, by their nature and impact on circuit precedent, which will require the court's attention at an *en banc* hearing. Certainly, the hearing is preferred to prepublication circulation; after all, Circuit Rule 40(e) was not intended to replace *en banc* hearings in their entirety. But, when addressing those issues that may be sufficiently disposed without the formalities of full *en banc* review, the Rule provides the court an efficient means of rendering decisions in dynamic and controversial areas of the law, as well as in areas of the law that are not as exciting, but about which this circuit and others have seldom spoken.

Judge Henderson is correct in one sense: a procedure allowing for prepublication circulation, whether it is governed by the *Iron* footnote rule or Circuit Rule 40(e), is only as good as the judges to whom the procedure applies. Circuit Rule 40(e) procedure worked well in the months after *Booker* because the judges utilized the procedure openly and effectively. But an instance could arise where judges could either overlook a potential change or conflict in the law before circulating an opinion, or merely believe that no such change or conflict resulted in a particular opinion. Certainly, such pitfalls are not unique to Circuit Rule 40(e); they are, in fact, inherent in any procedural rule. But it falls to the judges on our court to ensure that we

74. *In re Sealed Case II*, 181 F.3d at 145 (Henderson, J. concurring).

properly adhere to the procedures outlined in Circuit Rule 40(e). And so long as we properly abide by the Rule, the prepublication-circulation procedure not only helps preserve the Seventh Circuit's time and resources, but also the circuit's precedent.