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Is the U.S. Court of Appeals for the Fourth Circuit, long known as one of the most conservative federal appellate courts, liberalizing? If so, to what extent? In this first of two articles, the author looks at the frequency of the appeals court's recent en banc rehearings and suggests that the shift in the court from a majority of Republican appointees to a majority of Democratic appointees in the 2010-2011 term shows indications that the court is indeed leaning to the left.

A Liberal Shift in the Fourth Circuit?
Observations From the Court's Recent En Banc Rehearings
Part One

By Jason G. Idilbi

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The Fourth Circuit Court of Appeals has long held the distinction as one of the most - if not the most - conservative of the federal courts of appeals.[1] It has been described variously as ''the boldest conserva-

[1] *See, e.g.*, ''A Court Becomes a Model of Conservative Pursuits,'' Neil A. Lewis, May 24, 1999 (available at http://www.nytimes.com/1999/05/24/us/a-court-becomes-a-model-of-conservative-pursuits.html?pagewanted=all&src=pm).

The Federal appeals court based in Richmond, Va., has quietly but steadily become the boldest conservative court in the nation, in the view of scholars, lawyers and many of its own members who say the court has issued some remarkable rulings and taken a striking tone on several issues.

The court, the United States Court of Appeals for the Fourth Circuit, which covers five mid-Atlantic and Southern states, has in recent years evolved into the kind of bench that staunch conservatives had hoped to create at the Supreme Court but never quite achieved despite 12 years of Republican appointments under Presidents Ronald Reagan and George Bush.

The Fourth Circuit, which is one level below the Supreme Court, is by far the most restrictive appeals court in the nation in granting new hearings in death penalty cases, according to several statistical studies. It is highly receptive to efforts by states to restrict abortion, and it has blazed new trails in strik-

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tive court in the nation,'' the ''shrewdest, most aggressively conservative federal appeals court in the nation,'' and ''not only conservative but also bold and muscular in its conservatism.''[2] As for some of its high-profile decisions, they have been charged with ''not only bespeak[ing] a conservative philosophy of law but also serv[ing] a conservative political agenda.''[3] Judge Wilkinson, the longest-tenured judge on the court, recently acknowledged: ''[C]ommentators routinely call ours a conservative court, and it is often not meant as a compliment.''[4]

But President Obama, a Democrat, has now appointed six judges to the 15-member court since he took office in 2009, causing many to question whether his appointees are steering the court away from its historical conservatism to a moderate center. Some say yes,[5] while others go so far as to describe the court as ''one of the most liberal.''[6] In particular, pointing to recent rulings in the realm of criminal law and procedure, constitutional limits on the power of the federal government, and separation of church and state, some observers conclude that a sea change is impending, if not already upon us.[7]

Despite much opinion on the matter, there seems to be little substantive analysis to date as to whether an ideological shift can be detected in the court since Obama's nominees have taken their seats at the bench.[8] This article humbly attempts to fill that void by looking both to the occurrence and the outcomes of appeals that have been re-heard before the court sitting en banc (i.e., before the whole 15-judge court) since Obama's appointees have been confirmed to the court and shifted the balance of power (starting with the 2010-2011 court term).

What makes this approach so well suited to the task of analyzing a potential ideological shift in the court? A unique trifecta of features characterizes these en banc rehearings: (1) only appeals raising matters of ''exceptional importance'' may be considered en banc;[9] (2) perhaps unsurprisingly, then, they often concern partisan, hot-button issues on which the law may not be settled; and (3) they provide an opportunity to observe - in the snapshot of a single appeal – how each of the court's judges aligns on an important question of law.[10]

Part One of this two-part series concludes that the increasing occurrence of en banc rehearings is itself revealing as to the changed ideological composition of the court. Part Two takes the analysis a step further to discuss whether – and to what extent – the outcomes of

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ing down laws that a majority of its judges say improperly enhance Federal power at the expense of the states.

* * *

Perhaps most significantly, some of the Republican-appointed judges who hold the majority on the 13-member court proudly assert that they are part of an effort to reshape large areas of Federal law and constitutional interpretation.

* * *

[The Fourth Circuit] is confident enough to strike down acts of Congress when it finds them stretching the limits of the federal government's power and hardheaded enough to rule against nearly every death-row defendant who comes before it.

* * *

[The Court] pushes the envelope, testing the boundaries of conservative doctrine in the area of, say, reasserting states rights over big government. Sometimes, the Supreme Court reins in the Fourth Circuit, reversing its more experimental decisions, but it also upholds them or leaves them alone to become the law of the land.

[2] *Id.*

[3] ''The Power of the Fourth,'' Deborah Sontag, March 9, 2003 (available at http://www.nytimes.com/2003/03/09/magazine/the-power-of-the-fourth.html?pagewanted=all&src=pm).

''Among its many decisions, the Fourth Circuit has upheld the minute of silence in Virginia schools; ended court-ordered busing in Charlotte; upheld state laws that stringently regulate abortion clinics or require parental notification or ban so-called partial-birth abortions; ruled that the Virginia Military Institute could remain all male as long as there was a separate but comparable education for women; upheld a Charleston, S.C., program that tested maternity patients for illegal drug use without their consent and turned the results over to the police; overturned a Virginia prohibition against license plates bearing the Confederate flag; ruled that the F.D.A. didn't have the authority to regulate nicotine as a drug; and, most recently, overruled a West Virginia federal judge's efforts to strictly limit mountaintop mining that buries Appalachian streams beneath piles of fill and waste.'' *Id.*

[4] The Honorable J. Harvie Wilkinson III, ''The Fourth Circuit and its Future,'' 61 S.C. Law Rev. 415, 418 (2010).

[5] *See, e.g.*, NC Policy Watch, ''Is the 4th Circuit veering back to the center?'' (available at http://www.ncpolicywatch.com/2013/02/13/is-the-4th-circuit-veeringback-to-the-center). ''What [Obama's six appointees have] brought, in the eyes of court observers, is a slow but not yet steady shift leftward—to the center.'' *Id.* ''I don't know that I would call it a seismic shift.'' *Id.* (quoting Cornell Law Professor John Blume). ''I do think it's a less conservative court—there's no dispute about that. But whether it's liberal is much less clear.'' *Id.* (quoting University of Richmond School of Law Professor Carl Tobias).

See also ''4th Circuit shedding conservative reputation,'' (available at http://www.timesdispatch.com/news/state-regional/government-politics/th-circuit-shedding-conservative-reputation/article_bc5d4a00-3208-11e2-a877-0019bb30f31a.html). ''There's no doubt that the 4th Circuit has fundamentally changed; the court has shifted dramatically as a result of appointments.'' *Id.* (quoting Professor Kevin C. Walsh). ''I wouldn't call it a liberal federal court of appeals but I would call it much more of a moderate court of appeals now. . . . [I]t's definitely much more moderate than it was four years ago.'' *Id.* (quoting Professor Blume).

[6] *See, e.g.*, ''Conservative federal appeals court shifts left,'' available at http://articles.baltimoresun.com/2011-11-19/news/bs-md-fourth-circuit-20111119_1_federal-appeals-ilya-shapiro-4th-circuit (''There's been a marked change [in the Fourth Circuit],'' said Ilya Shapiro, a senior fellow at the Cato Institute, a libertarian think tank in Washington. ''Historically, this has been one of the most, if not the most, conservative circuits. Now it's almost one of the most liberal.'')

[7] *See supra* n.5-6.

[8] *But see* ''Gauging the Impact of Obama's Fourth Circuit Appointees,'' Jonathan Biran, Sept. 5, 2013 (available at http://mdappellate.wordpress.com/2013/09/05/gauging-the-impact-of-obamas-fourth-circuit-appointees) (analyzing the court's published opinions and concluding ''that rumors of the Fourth Circuit's fractiousness have been exaggerated'' given that the percentage of unanimous opinions that the court has published has held steady over time, including the period after Obama made his appointments to the bench).

[9] Federal Rule of Appellate Procedure 35(a). The Rule also provides an additional category of appeals that merits en banc rehearing: those ''necessary to secure or maintain uniformity of the court's decisions.'' *Id.*

[10] Ancillary to this last feature is the fact that an en banc rehearing vacates a ''panel opinion,'' as discussed in more detail below. Thus, to the extent that the panel opinion was ''conservative'' or ''liberal,'' an en banc rehearing can reveal whether the court accepted the initial ruling or changed course.

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these en banc rehearings indicate a shift away from the court's historical conservatism.

President Obama's Influence

We've briefly discussed what features make en banc rehearings potentially revealing as to the Fourth Circuit's ideological status, but what exactly is an en banc rehearing? Before I describe these rare phenomena, allow me first to set the stage for our discussion. When President Obama was first elected, only 10 of the statutorily authorized 15 seats on the Fourth Circuit bench were occupied. It was composed of six judges appointed by Republican presidents and four by Democratic presidents.[11] These vacancies earned the court the unenviable status of ''judicial emergency.''[12]

Since President Obama took office in 2009, however, he has filled each of these five vacancies along with an additional one that arose at the passing of Judge M. Blane Michael in March 2011. With Judge Davis announcing that he will take senior status in February 2014, President Obama will have yet another opening to fill on the court.[13] Thus, while the number of Republican-appointed judges on the court remains locked at six, the number of Democratic-appointed judges has more than doubled, giving Democratic appointees a comfortable nine to six advantage over Republican appointees.

What makes this all the more remarkable is that President Obama's six appointments to the Fourth Circuit constitute the most appellate judges he has confirmed to a single circuit court (not to mention, the most appointments that any one president has made to the Fourth Circuit in its entire history).[14] Obama has had more of an impact on the overall composition of the Fourth Circuit than on any other circuit court, as measured by the percentage of seats he has filled on each court.[15] Thus, that the Fourth Circuit traditionally has been a staunchly conservative court and has so quickly undergone such a dramatic swing in composition makes it uniquely suited to studying how much influence President Obama's appointees have had on the court.

En Banc Rehearings and Their Infrequency

Returning to the question at hand: what are en banc rehearings? The most visible work of any circuit court is, of course, the hearing of oral arguments. The Fourth Circuit - composed as it is of judges scattered throughout the circuit (which covers Maryland, Virginia, West Virginia, North Carolina, and South Carolina) - convenes six times a year in Richmond for a week of oral argument. Each day during these six court weeks, five panels of three judges hear argument on the cases that have been calendared for oral argument. Some months after oral argument,[16] the three-judge panel that heard an oral argument will issue its majority opinion (possibly accompanied by a concurring and/or a dissenting opinion), effectively concluding the Fourth Circuit's work on that matter.

In the exceedingly rare instance, however, a ''panel opinion'' will be vacated and will be reheard before the entire 15-judge court. This may come about either be-

[11] In the Republican-appointed column were Judges Wilkinson, Niemeyer, Shedd, Duncan, Agee, and Gregory. In the Democrat-appointed column were Judges Traxler, Motz, King, and Michael.

Chief Judge Traxler and Judge Gregory deserve special mention here. Judge Traxler was first confirmed to the U.S. District Court for the District of South Carolina by George H.W. Bush, on the recommendation of long-time South Carolina Senator Strom Thurmond. See Judge Traxler's biographical listing on the Fourth Circuit website, at http://www.ca4.uscourts.gov/judges/judges-of-the-court/chief-judge-william-b-traxler-jr- and *see also* ''The Power of the Fourth,'' *supra* n.3. President Clinton subsequently successfully nominated Judge Traxler to a seat on the Fourth Circuit. *Id.*

Meanwhile, Judge Gregory received a recess appointment from President Clinton in December 2000. He was nominated to the same position by George W. Bush and subsequently confirmed. See Judge Gregory's biographical listing on the Fourth Circuit website, at http://www.ca4.uscourts.gov/judges/judges-of-the-court/judge-roger-l-gregory.

In this article, I consider the political party only of the President that succeeded in getting Senate confirmation for his nominees to the Fourth Circuit. Thus, I consider Judge Traxler a Clinton appointee while I consider Judge Gregory a George W. Bush appointee. It should be noted, though, that Judge Traxler ''votes so often with the conservative majority that court watchers forget he's a Democratic appointee.'' ''The Power of the Fourth,'' *supra* n.3. Meanwhile, Judge Gregory is ''considered one of the more liberal judges on the Court.'' ''Gauging the Impact of Obama's Fourth Circuit Appointees,'' *supra* n.8. Because both judges are considered to buck the party line of the President that appointed them, this article's analysis is unaffected.

[12] *See, e.g.,* Opinion, ''Integrating an All-White Court,'' available at http://www.nytimes.com/2001/01/02/opinion/integrating-an-all-white-court.html (discussing that the vacancy for which Judge Gregory had been nominated was designated a judicial emergency).

[13] ''US appeals court judge taking senior status,'' Oct. 4, 2013 (available at http://www.wtop.com/41/3472468/US-appeals-court-judge-taking-senior-status).

[14] Obama has also filled six seats on the Federal Circuit Court of Appeals, but as discussed *infra* n.15, the Federal Circuit is unique among the federal circuit courts. But with Judge Davis taking senior status in February 2014, *see supra* n.13 and accompanying text, President Obama has the chance to break his own records. Although Judge Davis was himself an Obama appointee, and Obama's subsequent nomination wouldn't change the number of *active* Democrat-appointed judges on the Fourth Circuit bench, Judge Davis would nevertheless remain a member of the court and participate in panels (albeit at a reduced caseload).

[15] In descending order, Obama has filled the following percentages of seats on each circuit court: 40 percent of the Fourth Circuit (six of 15 seats); 38 percent of the Second Circuit (five of 13 seats); 36 percent of the D.C. Circuit (four of 11 seats); 33 percent of the First Circuit (two of six seats); 25 percent of the Tenth Circuit (three of 12 seats); 21 percent of the Third Circuit (three of 14 seats); 17 percent of the Ninth Circuit (five of 29 seats); 16 percent of the Eleventh Circuit (two of 12 seats); 12.5 percent of the Sixth Circuit (two of 16 seats); 12 percent of the Fifth Circuit (two of 17 seats); and 10 percent of each of the Seventh and Eighth circuits (one of 11 seats in each instance). Obama has filled six seats on the 12-member Federal Circuit Court of Appeals, but that court is unique in several respects among the circuit courts of appeals – *see, e.g.,* http://www.cafc.uscourts.gov/the-court/court-jurisdiction.html - and does not provide a fitting comparison for our purposes.

[16] The Fourth Circuit takes on average just over two months to issue a ''Last Opinion or Final Order'' from the date of oral argument. *See* Table B-4, Statistical Tables - U.S. Courts of Appeals (available at http://www.uscourts.gov/Statistics/JudicialBusiness/2012/statistical-tables-us-courts-appeals.aspx).

cause a party has petitioned for it or a judge on the court calls for a vote on his or her own initiative; in either event, a majority of the court's active judges must vote in favor of rehearing en banc. If the votes in favor prevail, the panel opinion is vacated and the appeal is re-calendared for oral argument before the entire court. This is an en banc rehearing.

How rare is ''exceedingly rare''? During the 12-month period ending Sept. 30, 2012, the Fourth Circuit resolved 4,020 total cases. Only 423 - or about 10 percent - of those were calendared for oral argument.[17] And of the 423 cases calendared for oral argument during this period, the court held an en banc rehearing for exactly *two* appeals (or less than 0.05 percent of the entire oral argument docket).

It is largely by design that en banc rehearings occur so infrequently. As one might imagine, considerable time and effort goes into preparing for an en banc rehearing, on the part of both court staff and the judges' chambers. There is also extra burden and expense on the litigants. For these reasons, the Federal Rules of Appellate Procedure restrict the types of cases that may receive en banc review: ordinarily, en banc rehearing ''will not be ordered unless: (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.''[18]

The Federal Rules of Appellate Procedure further require a majority of the active judges on the court to vote in favor of rehearing en banc before it can be granted, as discussed above.[19] Thus, even if an appeal ostensibly merits en banc rehearing under the Rules, a majority of active judges must nevertheless be persuaded to vote in favor.[20] Collectively, these factors severely limit the occurrence of en banc rehearings.

Recent Resurgence in En Banc Rehearings

Having discussed the dramatic change in the Fourth Circuit's composition and the court's en banc rehearing process, we're poised to understand what lessons can be gleaned from the court's recent en banc rehearings. In the three-year period starting with the 2010-2011 term – the term during which the majority of the court shifted from Republican-appointed to Democratic-appointed – and concluding with the most recent full court term (the 2012-2013 term), the court has reheard 10 appeals en banc.[21] As an absolute number, this isn't very many. But it nevertheless represents a five-fold increase over the preceding three-year period, a period in which Republican appointees commanded the majority of the court. During the 2010-2011 term alone, five appeals were reheard en banc, while another five were reheard over the ensuing two terms. In the present court term, 2013-2014, the court has already heard another appeal en banc. One must look a decade into the past to find another example of five cases being reheard en banc during a single court term (the 2002-2003 term).

Looking back even further, though, we see that five en banc rehearings during a single term (or 10 en banc rehearings during a three-year period) is far from an all-time high. In fact, the number of en banc rehearings in any given term peaked in the mid-90s when 18 appeals were reheard en banc in the 1995-1996 term alone. Subsequently, the number of en banc rehearings per court term steadily declined, hitting their nadir during the period spanning the 2004-2005 to the 2009-2010 terms. During that six-year period, there were only eight en banc rehearings, or about one en banc rehearing per year. By the latter part of this period, en banc rehearings were almost non-existent: there was only one each in the 2007-2008 and 2008-2009 terms and none in the 2009-2010 term.

Part of the decline can be explained by the fact that the court shortened its oral argument weeks from five days to four days between the 2001-2002 and the 2002-2003 terms, and then subsequently decreased the amount of court weeks it convened in Richmond each term from eight to six weeks before the 2004-2005 term. These changes collectively reduced the number of oral argument days from 40 to 24 during each court term. It would be logical to assume that a decrease in the number of appeals being orally argued in the first place corresponded with a decline in the frequency of en banc rehearings as well.

But perhaps a bigger part of the explanation is that the Fourth Circuit's conservative majority had become so comfortably entrenched by the 2004-2010 period that it was able to resist Democratic appointees' attempts to muster a majority to vote in favor of granting en banc rehearing in a particular matter (let alone to sway an outcome toward the liberal position following an en banc rehearing). Indeed, during the 2004 to 2010 period, there were fourteen cases in which Democratic appointees dissented from a decision not to rehear a case en banc.[22] Of these, only in four instances did a single

[17] The court maintains an Office of Staff Counsel that assists the judges on appeals that are resolvable without oral argument. *See* Federal Rule of Appellate Procedure 34 (excusing the requirement for oral argument when the panel of three judges assigned to the case agrees that the appeal is frivolous, the dispositive issue or issues have been authoritatively decided, or the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument).

[18] F.R.A.P. Rule 35(a).

[19] *Id.* (''A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc.''). *See* also Local Rule 35(b) (''A majority of the circuit judges who are in regular active service and who are not disqualified may grant a hearing or rehearing en banc.'').

[20] A vote can arise one of two ways. A party may petition for en banc review. F.R.A.P. 35(b) (''A party may petition for . . . rehearing en banc.''). Alternatively, ''[a] poll on whether to rehear a case en banc may be requested, *with or without a petition*, by an active judge of the court or by a senior or visiting judge who sat on the panel that decided the case originally.'' Local Rule 35(b) (emphasis added).

[21] *Barbour v. Int'l Union*, 640 F.3d 599 (4th Cir. 2011); *Henry v. Purnell*, 652 F.3d 524 (4th Cir. 2011); *Aikens v. Ingram*, 652 F.3d 496 (4th Cir. 2011); *United States v. Vann*, 660 F.3d 771 (4th Cir. 2011); *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011); *Suhail Najim Abdullah Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012) (consolidating and rehearing two appeals en banc: *Al-Quraishi v. L-3 Servs.*, 657 F.3d 201 (4th Cir. 2011) and *Al Shimari v. CACI Int'l*, 658 F.3d 413 (4th Cir. 2011)); *Centro Tepeyac v. Montgomery County*, 722 F.3d 184 (4th Cir. 2013); *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council Baltimore*, 721 F.3d 264 (4th Cir. 2013); *Blakely v. Wards*, 738 F.3d 607 (4th Cir. 2013); *U.S. v. Aparicio-Soria*, 2014 BL 10241 (4th Cir. Jan. 14, 2014).

[22] I found these cases by searching the Fourth Circuit database on Lexis.com for results containing the words ''dissenting

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Republican-appointed judge align with the Democratic appointees to vote in favor of an en banc rehearing[23] and only in one case did two Republican-appointed judges join in favor of granting en banc rehearing.[24] Thus, Democratic appointees stood almost entirely on their own; even the occasional cross-party support wasn't enough to tip the scales in favor of en banc rehearing. By contrast, Republican appointees found themselves on the losing side of a vote to grant en banc rehearing in only two cases.[25]

Forecasting More En Banc Hearings?

Of course, we now know that the incidence of en banc rehearings suddenly spiked in the 2010-2011 term, when the court reheard five appeals en banc. By this term, it should be remembered, four of Obama's six appointees had taken their seats at the Fourth Circuit bench, shifting the majority in favor of the Democratic appointees. As discussed above, the five en banc rehearings during this term – along with the five en banc rehearings over the ensuing two terms – quintupled the amount of appeals reheard en banc during the entire preceding three-year period, and easily surpassed the amount of en banc rehearings during the entire preceding six-year period (a mere eight total from the 2004-2005 term to the 2009-2010 term).

With only three full terms in which Democrats commanded the court's majority - and only 11 en banc rehearings to guide our inquiry – it is probably premature to forecast an upward trajectory in en banc rehearings over the coming years and to pin the recent en banc renaissance to a change in the court's ideology. However, the fact that so many en banc rehearings have occurred in such a short period of time – and after a sustained period of en banc dormancy – suggests that some type of marked shift has taken place within the hallowed halls of Richmond, and quite possibly an ideological one.

In Part Two of this series, we leave behind the numerical data and dig much deeper into the substance that can guide us in understanding whether there's been an ideological shift on the Fourth Circuit since Obama has made his appointments to the court. Consider this for now: remember the record number of en banc rehearings during the 1995-1996 term mentioned above? A study revealed that the court during that term ''reviewed liberal panel decisions much more frequently [en banc] than they reviewed conservative panel decisions, and that *each liberal panel decision that was reviewed was also reversed*.''[26] Are we now seeing a resurrection of this phenomenon, but in a liberal direction where conservative panel decisions receive the bulk of en banc reconsiderations and reversals? Stay tuned.

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from the denial of rehearing en banc'' from Sept. 1, 2004 through Sept. 30, 2010. It should be noted, however, that in two of these cases, Judge Gregory was the lone dissenting vote. *See United States v. Whorley*, 569 F.3d 211 (4th Cir. 2009) and *Buckner v. Polk*, 466 F.3d 280 (4th Cir. 2006). I apologize for my minor inconsistency insofar as I treat Judge Gregory as a Democratic appointee for purposes of this section alone. He is a Republican appointee even though he is considered one of the court's most liberal members, *supra* n. 11. Candidly, I struggled to find a consistent way to express the point in the text accompanying this footnote and I appreciate the minor indulgence on this point.

[23] *See News & Observer Publ. Co. v. Raleigh-Durham Airport Auth.*, 612 F.3d 301 (4th Cir. 2010); *Gomis v. Holder*, 585 F.3d 197 (4th Cir. 2009); *Ohio Valley Envtl. Coalition v. Aracoma Coal Co.*, 567 F.3d 130, 131 (4th Cir. 2009); and *Jordan v. Alternative Res. Corp.*, 467 F.3d 378 (4th Cir. 2006).

[24] *See Hatfill v. New York Times Co.*, 427 F.3d 253 (4th Cir. 2005) (Judges Wilkinson and Niemeyer voted to grant rehearing en banc).

[25] Judges Wilkinson and Shedd voted to grant rehearing en banc in *Miller v. Cunningham*, 512 F.3d 98 (4th Cir. 2007). Judges Widener, Niemeyer, and Shedd voted to grant rehearing en banc in *Richmond Med. Ctr. for Women v. Hicks*, 422 F.3d 160, 161 (4th Cir. 2005).

[26] Phil Zarone, ''Agenda Setting in the Courts of Appeals: The Effect of Ideology on En Banc Rehearings,'' 2 J. App. Prac. & Process 157 (2000).