



United States Court of Appeals
For the Fourth Circuit
255 West Main Street, Room 230
Charlottesville, Virginia 22902

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10/20/03

03-AP-012

J. Harvie Wilkinson III
Circuit Judge

Telephone: (434) 296-7063
Facsimile: (434) 293-6920

October 14, 2003

Honorable Anthony J. Scirica
Chief U. S. Circuit Judge
United States Court of Appeals for
the Third Circuit
22614 James Byrne U.S. Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106-1746

Honorable Samuel A. Alito, Jr.
U. S. Circuit Judge
United States Court of Appeals for
the Third Circuit
357 U. S. Courthouse
Newark, New Jersey 07101-0999

Re: Proposed Amendments to the Federal Rules of Practice and
Procedure - FRAP 35

Dear Tony and Sam:

I appreciate the effort that I know each of you has made on the proposed amendments to the Federal Rules of Practice and Procedure. Most of the amendments seem to me to be both useful and beneficial.

The amendment that concerns me the most is that to FRAP Rule 35. I am not certain why a difference in circuit practice needs to be replaced by a uniform command. This is not the type of rule that affects filing deadlines or to which practitioners need to conform their conduct.

The Fourth Circuit requires a majority vote of the active circuit judges before the en banc court is convened. Our rule reflects what I think is the sound notion that an en banc proceeding is one of special gravity and dignity, and represents the voice of the entire court. The possibility that the en banc

court could be convened by less than a majority of the active judges, and that a disposition could issue from a majority of the reduced court, seems to me to undermine the purpose of an institutional voice for which the en banc court was designed.

I am also concerned that the new rule would result in a larger number of en banc proceedings on our court. These proceedings consume an inordinate amount of resources. Overturning a panel opinion is always a source of internal tension and not to be undertaken lightly. And the increased resort to en banc proceedings will further represent a surfeit of process, in which some litigants are treated to second appellate proceedings while others are still waiting for their first.

I hesitate to take issue with such distinguished students of the appellate process, but I do think this particular amendment is ill advised.

Thank you for considering my views, and I hope to see you both soon.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jay".

J. Harvie Wilkinson III

cc: Honorable William W. Wilkins, Chief Judge (4CCA)
Peter G. McCabe, Secretary, Rules Committee Support Office