POLICY STATEMENT ON *EN BANC* ENDORSEMENT OF PANEL DECISIONS

January 17, 1996

As the court has long recognized, *see, e.g., Irons v. Diamond,* 670 F.2d 265, 267-68 and n.11 (D.C. Cir. 1981), cases occasionally arise in which action by the court *en banc* may be called for, but the circumstances of the case or the importance of the legal questions presented do not warrant the heavy administrative burdens of full *en banc* hearing. The members of the court continue to subscribe to the view that, provided that certain safeguards are maintained, a panel of the court may seek for its proposed decision the endorsement of the *en banc* court, and announce that endorsement in a footnote to the panel's opinion.

The kinds of panel decisions the full court has endorsed in the past by means of this substitute for *en banc* hearing, and for which the court reaffirms the propriety of its use, include, but are not necessarily limited to:

(1) resolving an apparent conflict in the prior decisions of panels of the court;

(2) rejecting a prior statement of law which, although arguably dictum, warrants express rejection to avoid future confusion;

(3) overruling an old or obsolete decision which, although still technically valid as precedent, has plainly been rendered obsolete by subsequent legislation or other developments; and

(4) overruling a more recent precedent which, due to an intervening Supreme Court decision, or the combined weight of authority from other circuits, a panel is convinced is clearly an incorrect statement of current law.

Prior to seeking the endorsement of its decision by the *en banc* court, a panel

should satisfy itself that no further briefing or argument on the question presented would benefit the court in disposing of the question. The panel also should be satisfied that deciding the question is necessary to an adequate disposition of the case. And, finally, the panel must determine that the parties have had a fair opportunity to address the question in their submissions to the panel; if not, the panel should ask for supplemental briefing.

When a panel has decided to seek *en banc* endorsement for a proposed decision, the opinion shall be circulated to the full court, along with a substantive memorandum explaining the factual and legal background of the panel's decision and the need for *en banc* action. In order to ensure that the court has an adequate opportunity to consider the panel request, the time for circulation of the proposed opinion shall be extended from one week to one month. Before publishing its opinion, the panel must obtain the affirmative agreement of every member of the court not recused. Finally, regardless of the number of recusals, those voting to endorse the panel's decision must constitute an absolute majority of the active members of the court. Upon obtaining the agreement of the court, the panel shall announce the *en banc* court's endorsement of its decision as in the past, by means of a footnote citing *Irons v. Diamond.*

Nothing in the foregoing statement of the court's policy is intended to affect other established procedures or rules allowing for *en banc* review, or to limit a panel's discretion to decide a case without resort to *en banc* endorsement. In other words, a panel may always decide a case under existing precedent, leaving to the parties the determination whether to seek *en banc* review. A panel may also determine that a statement in a prior

decision was dictum, not requiring *en banc* action to reject; that a prior holding has been superseded, and hence is no longer valid as precedent; or that the panel's decision is within its authority to extend existing law. Finally, a panel of the court retains its authority to seek full *en banc* hearing and disposition of an appeal in lieu of issuing a panel decision.