THOMAS, Circuit Judge, with whom HAWKINS, MCKEOWN, WARDLAW, GOULD, and FISHER, Circuit Judges join, concurring in part and dissenting in part:

I concur in the dismissal of the appeal pursuant to Fed. R. App. P. 42(b). However, I respectfully dissent from the portion of the order vacating the panel opinion.

In this case, neither party filed a petition for rehearing en banc. Rather, we decided *sua sponte* to rehear the case. Following the order granting rehearing *en banc*, ALDF filed a motion to dismiss its appeal pursuant to Fed. R. App. 42(b). Its reasons were purely tactical: It did not want to expend the time and commit the resources to prepare for an *en banc* argument, and it did not wish to risk an adverse *en banc* result. In the normal course, if we had simply granted the motion, the appeal would be dismissed and the judgment of the district court would remain intact. Under such a circumstance, although the panel opinion would remain as part of the record, it would be subject to our usual order filed when rehearing *en banc* is granted, which provides that the panel opinion is designated as a non-precedential decision. *See ALDF v. Veneman*, 482 F.3d 1156 (9th Cir. 2007) ("The three-judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en

banc court.").

One would think that the government would be entirely satisfied with that outcome. It had, after all, acquiesced in the precedential, published panel opinion by declining to seek rehearing. Our *sua sponte* decision to rehear its case gave the government an immediate windfall; by our operating rules, the opinion had been designated as non-precedential, so the government was left in a much better position than it would have been had we left the parties to their own devices. However, the government asked for something more. It conditioned its consent to dismissal on the *en banc* court's entering an order *vacating* the panel decision.

Vacatur is an "extraordinary remedy." *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship,* 513 U.S. 18, 26 (1994). It removes all precedential value from a decision, rendering an opinion a legal nullity. *Id.* at 22. "[T]he general rule [is] that when a court vacates an order previously entered, the legal status is the same as if the order never existed." *United States v. Jerry*, 487 F.2d 600, 607 (3d Cir. 1973). If the opinion has not been published in book form, an order vacating the opinion may prevent it from ever being published.[1] In that event, the

[1]*See* Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. Rev. 1471, 1499 (1994) (describing the practices of West Publishing Company). In fact, it was in part the fact that vacated opinions sometimes vanished from the historical record that caused us to alter our form order granting

opinion may be lost from the historical record of the case; it is certainly lost as a means of developing the law because even its value as non-precedential persuasive authority is removed. For all these reasons, the party seeking vacatur carries a burden of establishing equitable entitlement to vacatur. *Bonner Mall*, 513 U.S. at 26.

Of course, vacatur is entirely appropriate if a case has "become moot due to circumstances unattributable to any of the parties." *Karcher v. May*, 484 U.S. 72, 83 (1987). However, the Supreme Court has made it quite clear that voluntary settlement by the parties does not justify vacatur, even when the settlement agreement calls for vacatur. *Bonner Mall*, 513 U.S. at 29. The Supreme Court has also held that a party's change of litigating heart does not justify vacatur. In *Karcher*, the Supreme Court considered a case much like the one at bar. The plaintiff office-holders were replaced, and their successors declined to pursue the

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rehearing *en banc* to omit any reference to *vacating* the panel opinion and to substitute our current language which simply designates the opinions as non-precedential. West's practice when it encounters a vacatur order is to issue a notation withdrawing the opinion from its bound volume. *See, e.g., Finau v. INS* 277 F.3d 1146 (9th Cir. 2002) ("The opinion of the United States Court of Appeals, Ninth Circuit, in *Finau v. INS*, published in the advance sheet at this citation, 277 F.3d 1146, was withdrawn from the bound volume because decision was withdrawn and vacated."). In the digital age, of course, some vacated opinions remain in electronic circulation and, if the opinion is vacated after it has been published in the official reporters, it remains "on the books." However, if this occurs, it is a matter of chance, not the product of deliberate choice.

appeal. The Supreme Court dismissed the appeal but declined to vacate the underlying decisions. *Karcher*, 484 U.S. at 83 ("This controversy did not become moot due to circumstances unattributable to any of the parties. The controversy ended when the losing party–the New Jersey Legislature–declined to pursue its appeal. Accordingly, the *Munsingwear* procedure is inapplicable to this case.").

Karcher and *Bonner Mall* specifically confronted the question of whether one court should be permitted to vacate an opinion of a different, subordinate court. Here, an *en banc* panel of this court has been asked to vacate the opinion of a three-judge panel of the same court. However, there is no principled distinction to be drawn between those situations, particularly where, as here, none of the three judges on the initial panel is a member of the *en banc* panel, meaning that none of the affected judges has a vote in the decision on vacatur. There is no suggestion in *Bonner Mall* that vacatur is an "extraordinary remedy" only some of the time. Indeed, once we consider the justifications underlying the Supreme Court's holdings, it becomes perfectly clear that there is no meaningful distinction between the situation we face and the situation the Supreme Court confronted.

One of the important reasons for courts to decline vacatur at the invitation of the parties is the preservation of public trust. As the Supreme Court put it in *Bonner Mall*:

> As always when federal courts contemplate equitable relief, our holding must also take account of the public interest. "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur."

513 U.S. at 26 (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting)). Chief Judge Easterbrook put it more forcefully in *Matter of Memorial Hosp. of Iowa County, Inc*, 862 F.2d 1299, 1300 (7th Cir. 1988):

> [A]n opinion is a public act of the government, which may not be expunged by private agreement. History cannot be rewritten. There is no common law writ of erasure.

An important aspect of maintaining the public trust is to assure that the judicial process is transparent. Eradicating historical precedent is antithetical to that goal.

Indeed, the act of eradication in this case might prove to be misleading. An affirmative vote of the majority of the non-recused members of our court to rehear a case *en banc* does not necessarily signify any particular outcome. The justification for rehearing a case *en banc* under Fed. R. App. P. 35 is based on whether rehearing is necessary to maintain uniformity of the court's decisions or whether the proceeding involves a question of exceptional importance. A judge's vote for or against rehearing en banc does not indicate that judge's vote on the

merits. Indeed, in the last full year for which we have complete data, fully 30% of the decisions of the *en banc* panel were in accord with the original decision of the three-judge panel. Because our *en banc* panel has not considered this appeal on the merits, vacatur leaves the incorrect and misleading impression that the *en banc* panel has considered and ruled on the merits of the three-judge panel opinion.[2]

A second compelling reason to avoid entering an order of vacatur at the invitation of the parties is that it gives the appearance, and perhaps the reality in some cases, of allowing the parties to manipulate court precedent. As Judge Easterbrook stated:

> When a clash between genuine adversaries produces a precedent, however, the judicial system ought not allow the social value of that precedent, created at cost to the public and other litigants, to be a bargaining chip in the process of settlement. The precedent, a public act of a public official, is not the parties' property. *We would not approve a settlement that required us to publish (or depublish) one of our own opinions, or to strike a portion of its reasoning.*

Id. at 1302 (emphasis added). The Third Circuit agreed with this assessment, stating:

As should be self-evident even without reference to the terms of Rule

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[2] For these reasons, I must respectfully disagree with the concurrence's suggestion that if we denied vacatur, it would be somehow unfair to those who voted for rehearing en banc. Those who voted to rehear the case have obtained precisely what our procedure provides in the order designating the panel opinion non-precedential. Any further equitable relief would be an affirmative remedy.

> 42(b), action by the court can be neither purchased nor parleyed by the parties. It follows that a judicial act by an appellate court, such as vacating an order *or opinion of this court* or the trial court, is a substantive disposition which can be taken only if the appellate court determines that such action is warranted on the merits. A provision for such action in a settlement agreement cannot bind the court.

Clarendon Ltd. v. Nu-West Indus., Inc., 936 F.2d 127, 129 (3d Cir. 1991) (emphasis added).[3] As the Supreme Court stated in *Bonner Mall*:

> Congress has prescribed a primary route, by appeal as of right and certiorari, through which parties may seek relief from the legal consequences of judicial judgments. To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would–quite apart from any considerations of fairness to the parties–disturb the orderly operation of the federal judicial system.

513 U.S. at 27.

In the case before us, the posture of the parties gives the very real appearance of attempted manipulation. The only rationale given by ALDF for filing its dismissal motion is that it just doesn't want to spend any time or resources on the case.[4] ALDF had not previously exhibited any litigation fatigue,

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[3]Notably, these quotations demonstrate that neither the Third Circuit nor the Seventh Circuit sees any principled difference between a court vacating a judgment of another court and a court vacating its own judgment. Nor do I, especially when we are in the posture of sitting *en banc* and vacating a panel decision.

[4]ALDF's motion states: "Here, plaintiffs-appellants request that this appeal be dismissed because (1) the underlying case involves an extremely unusual set of

having aggressively pursued the case through the district court and then on appeal. However, after a majority of the active non-recused judges voted to rehear the case *en banc*, it apparently became suddenly tired. The motion to dismiss at this stage, coupled with ALDF's stated willingness to vacate the panel opinion, leaves one with the impression that it was willing to trade off what it thought was "good" precedent to avoid the risk of a "bad" decision from the *en banc* panel. On the other side, the government does not simply wish to have the district court judgment reaffirmed and the panel opinion designated as non-precedential; it asks us to expunge the panel decision from the historical record, to make it as inaccessible and non-citeable as possible. Of course, I may well be mistaken, but those are the impressions I draw from the motions filed by the parties.

The parties are certainly entitled to pursue their own litigating tactics. But when those strategies depend on us rewriting our own judicial history, we must

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circumstances that is unlikely to be replicated in future cases; (2) plaintiffs do not know which of the many issues raised by USDA, NABR, or Judge Kozinski will be the focus of the *en banc* proceeding, which will make it extremely difficult for the plaintiffs to prepare for the hearing; (3) neither the USDA nor NABR initially sought rehearing *en banc*; and (4) under all of these circumstances, the plaintiffs-appellants do not wish to spend additional time and resources litigating this case." ALDF's motion continues: "In addition, plaintiff-appellants are willing to have the panel decision in this case vacated and the district court's decision reinstated as the final decision in this case. Counsel for the USDA and counsel for NABR have stated that they do not oppose the motion under these conditions."

hesitate before lending our imprimatur. We depend on the public's confidence in the independence and integrity of our judgments. When parties, rather than the courts, shape precedent and process according to their private agreements or actions, public confidence is inevitably eroded. Parties should not be allowed, nor should we appear to allow them, to manipulate our jurisprudence.

Worse, in this case, is the fact that we acted *sua sponte* to rehear the case. The parties' collaboration to attempt to prevent rehearing *en banc* gives the appearance that the parties have been bargaining with the Court regarding the terms under which the Court would withdraw its *sua sponte* rehearing order.

Finally, the action to vacate the opinion infringes on the rights of our colleagues on the three-judge panel. One of the most important rights we have as Article III judges is the right to publish our decisions. Judges of our Court retain this right when they are in dissent. Indeed, by custom and through our General Orders, a dissenting judge can force publication of a disposition originally designated as an unpublished, non-precedential decision. Judges of our Court can register their views by publishing a dissent from a decision not to rehear a case *en banc*. Vacatur removes this right. It reduces an opinion originally intended for publication by the author to a lesser status even than decisions that the panel has affirmatively decided are not precedent-worthy. This is particularly true since, as

of January 1, 2007, we must now allow parties to cite even unpublished dispositions and unpublished orders as persuasive authority. 9th Cir. R. 36-3(b). For this reason, out of a sense of respect and collegiality to our colleagues, we must employ the extraordinary remedy of vacatur with great care when sitting *en banc*.

Despite these powerful considerations, I do not quarrel with the *en banc* panel's *power* to vacate the prior opinion. We have not adopted the approach of the Seventh, Third, and D.C. Circuits, which prohibits vacatur at the behest of the parties in all circumstances. *In re Memorial Hosp.*, 862 F.2d at 1300; *Clarendon*, 936 F.2d at 129; *In re United States*, 927 F.2d 626, 628 (D.C. Cir. 1991). As we made clear in *Nat'l Union Fire Ins. v. Seafirst Corp.*, the limitations on vacatur are "neither statutorily nor constitutionally required." 891 F.2d 762, 766 (9th Cir. 1989).

Rather, we have–in a manner consistent with the teachings of *Bonner Mall*–considered vacatur on its own equitable merits, making our assessment on the "the equities and hardships" involved in the particular case. *Id.* at 769; *see also Ringsby Truck Lines v. Western Conference of Teamsters*, 686 F.2d 720, 722 (9th Cir. 1982).

There are, of course, cases in which the particular "equities and hardships,"

id., would rise to the level of "exceptional circumstances," *Bonner Mall*, 513 U.S. at 29, justifying vacatur of an opinion in the context of a settlement between the parties. Indeed, there is an overarching equitable consideration that will be present and powerful in any such case: the considerable societal value in encouraging settlements and finality in litigation.[5] However, the fact of settlement alone is an insufficient rationale. As the Tenth Circuit put it when considering and rejecting a similar request by the parties to vacate a circuit court decision:

> The court is, of course, impressed with the importance of salutary settlements of controversies, with their consequent lessening of both the burden on the parties of costly litigation and the drain on judicial resources. Nevertheless, we are seriously troubled by the effort here, made for whatever reason, to cause the withdrawal of an opinion of this court and the nullification of its precedential effect. This arrangement of the parties, which would affect the precedent of this court, goes beyond the rationale of vacatur as explained in *Munsingwear*, i.e., to protect against future preclusive collateral estoppel effects on the parties to litigation, and reaches out to deprive our opinion of any precedential effect. Judge Posner has succinctly stated that the Seventh Circuit rejects such requests: "We vacate unappealable decisions, to prevent them from having a preclusive effect. We do not vacate opinions, to prevent them from having a precedential effect." *In re Smith*, 964 F.2d 636, 638 (7th Cir.1992).

Oklahoma Radio Associates v. F.D.I.C., 3 F.3d 1436, 1437 (10th Cir. 1993)

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[5]For this reason, I can well understand–and do not fault in any respect–the desire of the majority to forward this case to resolution.

There will, no doubt, be occasions in which vacatur is a desirable means to effect a satisfactory resolution of a dispute. But the parties here do not even offer that consideration as a rationale. The parties have not settled their disputes in any respect; they just wish us to apply an eraser to this appeal so they can litigate the same questions another day. Indeed, their only point of accord is that we should vacate all of the appellate proceedings and treat them as if they never existed.

And what has the government offered in this case to meet its burden of justifying the extraordinary remedy of vacatur? Nothing. It simply refused to consent to dismissal unless the panel opinion was vacated. No other rationale was offered. The bare threat of refusing to consent to a voluntary dismissal cannot possibly be sufficient to justify invoking the equitable remedy of vacatur, particularly when the government's consent is not required to dismiss this appeal. *See* Fed R. App. P. 42(b) ("An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court."). The government's position and ALDF's acquiescence in it may be founded in a view that judicial opinions are, as the Seventh Circuit put it, "the parties' property." *Mem'l Hosp.*, 862 F.2d at 1302. But they are not. The Seventh Circuit rejected this notion, and so should we. Rather than blithely accepting ALDF's expression of weariness and the government's insistence on removing all vestiges of what it considers

unfavorable precedent from the historical record, we ought to assess the vacatur request carefully, fully, and on its own merits, as would be consistent with our case law, *Seafirst*, 891 F.2d at 769, and *Bonner Mall*.

But we have done nothing of the sort in this case. We have not done a merits analysis. We have not performed an equitable balancing. We have not assessed whether the government has satisfied its burden to establish equitable entitlement to the extraordinary remedy of vacatur.

The concurrence defends the vacatur decision on the basis that some of our sister circuits issue, as a matter of practice, rehearing orders that vacate the panel opinions–as our circuit used to do. That practice, however, is of no significance in the context of the present discussion. Those orders are not entered at the behest of the parties; they are entered with the presumption that the *en banc* court will proceed to rehear the case on the merits and will issue an alternative opinion that will be both reasoned and precedential. Vacatur of published decisions at the behest of settling litigants is an entirely different matter.

We have two very thoughtful panel opinions in this case: the majority opinion by Judge Fletcher and the dissent of Judge Kozinski. We owe them more respect than to toss their opinions into the judicial scrapheap in an attempt to expunge them from the historical record purely for the parties' litigation

convenience. As Judge Easterbrook put it when confronting a similar situation in *Memorial Hospital*:

> The opinions written in this case record two judges' solutions to a legal problem. These opinions may be valuable for other litigants and judges; they may also be useful to Memorial itself at another time. They will be left as they are.

862 F.2d at 1303.

I would leave the panel opinions just as they are. Although we have designated the opinions as non-precedential and left the district court judgment as the final judgment in this action, the written opinions are an important part of the historical record.[6] Our precedent requires us to perform an equitable balancing of interests in deciding whether to employ the extraordinary remedy of vacatur. We have not done so, and the parties have not provided us with any reason but desire.

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[6]When the full court designates a panel opinion as non-precedential in the course of granting rehearing *en banc*, it is engaging in a fundamentally different process than when a panel elects to designate its own decision as non-precedential. In the latter case, the panel has made the reasoned decision that the disposition does not qualify for publication within the criteria set forth in Ninth Circuit Rule 36-2. However, when rehearing *en banc* is granted as to an opinion that has already been designated as precedential by the panel, the *en banc* panel is simply removing the precedential effect of the decision so that the *en banc* panel has the opportunity to revisit the merits and so that the panel's decision (which may be subject to revision) will not bind other panels of the Court while the case is being reheard. In such cases, the panel has already made the affirmative determination that its decision is worthy of publication. Thus, the published panel opinion was in no sense advisory or deemed unworthy of publication when it was rendered in the course of deciding this case.

I respectfully dissent from that portion of the order that directs vacatur of the panel opinion.