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En banc review has declined during the past decade

Trend has troubling implications, since en banc review is usually only option for reconsidering major circuit panel rulings.

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In 1941, the U.S. Supreme Court first ruled that the U.S. circuit courts of appeals had authority to sit en banc, expressing the hopeful view that en banc hearings would foster "effective judicial administration," avoid intracircuit conflict and promote finality of decisions. *Textile Mills Securities Corp. v. Comm'r of Internal Revenue*, 314 U.S. 326, 334-35 (1941).

A dozen years later, Justice Felix Frankfurter argued that "[r]ehearings are not a healthy step in the judicial process" and that the almost routine filing of en banc petitions "is an abuse of judicial energy," resulting in "needless delay." *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U.S. 247, 270 (1953). Nearly half a century later, that tension still exists.

The appellate rules are designed to limit the number of en banc petitions because of the burden they impose on judicial resources. Federal Rule of Appellate Procedure 35(a) states that en banc review is "not favored" and will not be ordered unless it is "necessary to secure or maintain uniformity of the court's decisions" or the appeal raises a question of "exceptional importance." Fed. R. App. P. 35(a). Rule 35 requires that an en banc petition begin with an explicit statement that en banc review is necessary on one of those grounds.

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Local circuit rules seek to discourage counsel from petitioning for en banc review. The U.S. courts of appeals for the 3d and 11th circuits require counsel to include a statement of personal belief, "based on a reasoned and studied professional judgment," that full court consideration is necessary under Rule 35's standards. 3d Cir. Loc. App. R. 35.1; 11th Cir. R. 35-5(c). The 5th Circuit includes a "Caution" to attorneys that they have a "duty to the court" and its limited resources to observe the strictures of Rule 35, see 5th Cir. R. 35.1, and its internal operating procedures label en banc petitions "the most abused prerogative of appellate advocates." Several circuits expressly note that sanctions may be assessed against counsel who file frivolous en banc petitions. See, e.g., 2d Cir. R. 35.1(e); 5th Cir. R. 35.1; 8th Cir. R. 35A(2).

Although there is little evidence that these rules have reduced the number of en banc petitions filed, the percentage of cases reviewed and decided en banc has certainly declined. In 2000, the 12 circuit courts (excluding the Federal Circuit) decided 73 cases en banc, representing 0.27% of their overall dispositions on the merits. A small number, to be sure, but two-thirds larger than the 44 cases decided en banc in 2010, which was 0.14% of all appeals resolved on the merits. See Judicial Business of the U.S. Courts, Administrative Office of the U.S. Courts, Table S-1; www.uscourts.gov/Statistics/JudicialBusiness.aspx.

Within individual circuits, the downward trend is similar. The 9th Circuit, for example, decided just 15 cases en banc in 2010 (0.24% of all appeals decided on the merits), down from 23 in 2000 (0.48%). The 8th Circuit dropped from nine en banc cases in 2000 (0.48%) to just three in 2010 (0.13%). See id., Table S-1.

THE 2D CIRCUIT'S EXAMPLE

The trend has some troubling implications, since, as a practical matter, en banc review is the only option for reconsidering a decision of consequence by a circuit panel, given the paucity of cases in which the Supreme Court grants certiorari. The 2d Circuit's experience highlights those implications. In recent years, the 2d Circuit has declined en banc petitions in a few cases of

real consequence, such as *Zhong v. U.S. Dep't of Justice*, 489 F.3d 126 (2d Cir. 2007), involving exhaustion of administrative remedies in immigration appeals; *Ricci v. DeStefano*, 530 F.3d 88 (2d Cir. 2008), a first-impression case challenging an employer's race-based decision to disregard the results of a promotional examination; and *Kiobel v. Royal Dutch Petroleum Co.*, 2011 U.S. App. Lexis 2200 (2d Cir. 2011), a recent decision on whether the Alien Tort Statute applies to corporations.

In *Ricci*, the lengthy concurring and dissenting opinions accompanying the en banc denial dwarfed the original panel decision, which, as Judge José Cabranes pointed out in dissent, was merely a per curiam affirmance adopting the reasoning of an unpublished district court decision. 530 F.3d at 89. Judge Dennis Jacobs' dissent criticized the circuit's "tradition of hearing virtually no cases in banc," and concluded: "I do not think it is enough for us to dilate on exceptionally important issues in a sheaf of concurrences and dissents arguing over the denial of in banc review." Id. at 94.

Second Circuit judges are hardly alone in issuing concurring and dissenting opinions in en banc denials, a practice that has grown as the frequency of en banc review has declined. The practice allows judges to express their views — to the Supreme Court, to judges in other circuits or to the district court on remand — on important issues that escape full court review. The influence of such opinions is impossible to gauge, but they are viewed as inappropriate by some judges. See, e.g., *U.S. v. Stewart*, 597 F.3d 514, 519 (2d Cir. 2010) (Pooler, J., concurring) ("the unsuccessful request for an en banc rehearing becomes an occasion for any active judge who disagrees with the panel to express a view on the case even though not called upon to decide it.")

CONTROVERSIAL PROCEDURES

En banc procedures have generated controversy as well. Rule 35 provides that a majority of active, nondisqualified judges in a circuit may order an appeal heard or reheard en banc. Timing can affect the calculations, particularly when judicial vacancies are in play. In *Kiobel*, after the 2d Circuit denied en banc review, a second, ultimately unsuccessful, en banc petition was filed on the ground that a new judge had been sworn in before the first en banc denial order had been entered, and that judge should have had the opportunity to vote (and break the 5-5 tie) on the petition.

The disqualification of judges in en banc proceedings can affect not only the vote on a petition, but also the court's ability to comply with the quorum requirements of 28 U.S.C. 46. Some circuits specifically provide in their local rules that, if the number of nondisqualified judges available to vote on an en banc petition is less than a majority of all of the circuit's active judges, there is no quorum to vote and the case is ineligible for en banc review. See 1st Cir. R. 35.0(a); Fed. Cir. R. 47.11.

But what if there is a quorum to vote on an en banc petition, but no quorum later to hear the appeal on the merits? The 5th Circuit faced this issue, with a strange result. In *Comer v. Murphy Oil*, 607 F.3d 1049 (5th Cir. 2010), a majority of nine active, nondisqualified judges voted to rehear a case en banc, thereby vacating the panel opinion and judgment. Later, one of the nine judges was recused, leaving an en banc court of only eight of the 5th Circuit's 16 active judges. The court determined that it had lost its quorum — which it defined as a majority of all active judges, including the disqualified judges — and could no longer hear the case en banc. The court further concluded that, lacking a quorum, it was powerless to reinstate the vacated panel decision. Id. at 1053-55. The result: The appeal was dismissed and the district court decision, which had been reversed by the original panel, stood.

Some circuits avoid this problem by considering a quorum to be a majority of the active judges who are not disqualified from hearing a case. E.g., 11th Cir. Internal Operating Procedure 8. The dissenting judges in *Comer* unsuccessfully pressed this option and other alternatives that would have allowed the appeal to be heard — including asking the chief justice of the U.S. Supreme Court to assign a judge from another circuit to sit on the en banc panel pursuant to 28 U.S.C. 291, and waiting to hear the case en banc until a vacancy on the 5th Circuit was filled. Id. at 1055-56 (Davis, Dennis, JJ. dissenting).

In the end, counsel would do well to learn the idiosyncrasies of en banc practice in the relevant circuit, but also to be realistic about the long odds of obtaining full-court review, a promise which Frankfurter warned long ago "arouses false hopes in defeated litigants and wastes their money." *Western Pacific Railroad*, 345 U.S. at 270.

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