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Federal Procedure - Appellate Practice - Duty of the Court of Appeals to Grant Rehearings En Banc

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FEDERAL PROCEDURE—APPELLATE PRACTICE—DUTY OF THE COURT OF APPEALS TO GRANT REHEARINGS EN BANC—In a suit for accounting, petitioners were denied relief in the district court[1] and a division of the Court of Appeals for the Ninth Circuit affirmed by a two-to-one vote.[2] Petitioners then applied for a rehearing before the court of appeals en banc. With one dissent, the rehearing was denied by the division, and the request that the rehearing be en banc was stricken as "being without authority in law or in the rules or practice of the court."[3] Petitioners moved to vacate the order denying the request for a rehearing en banc on the ground that such a request was authorized by statute[4] and required the attention of the full court. The court of appeals, en banc, refused to consider the motion on its merits.[5] On certiorari from the Supreme Court, *held,* orders of the division and full court vacated and cause remanded for further proceedings.[6] Though petitioners have no statutory right to compel each member of the full court to give formal consideration to an application for a rehearing en banc, the procedure adopted by the court of appeals for the exercise of the en banc power should not arbitrarily deny consideration of a litigant's suggestion that his case is an appropriate one to be heard by the full court. *Western Pacific R. Corp. v. Western Pacific R. Co.*, 345 U.S. 247, 73 S.Ct. 656 (1953).

To accommodate the different volumes of litigation, the several circuits vary in membership from three to nine judges.[7] Although cases are normally heard and determined by a panel or division of not more than three judges, the Supreme Court has held that the court of appeals may properly hear or

[1] Western Pac. R. Corp. v. Western Pac. R. Co., (D.C. Cal. 1949) 85 F. Supp. 868.

[2] Western Pac. R. Corp. v. Western Pac. R. Co., (9th Cir. 1952) 197 F. (2d) 994.

[3] Id. at 1012.

[4] 28 U.S.C. (Supp. V, 1952) §46(c) reads: "Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit."

[5] Western Pac. R. Corp. v. Western Pac. R. Co., (9th Cir. 1952) 197 F. (2d) 994 at 1013. The circuit thus followed the practice established by divisions of the Ninth Circuit in Northwestern Mutual Ins. Co. v. Gilbert, (9th Cir. 1950) 182 F. (2d) 256; Fruehauf Trailer Co. v. Myers, (9th Cir. 1950) 181 F. (2d) 1008; Kronberg v. Hale, (9th Cir. 1950) 181 F. (2d) 767; Bridges v. United States, (9th Cir. 1952) 201 F. (2d) 254.

[6] In separate opinions, Justice Frankfurter concurred, principal case at 268, and Justice Jackson dissented, principal case at 273.

[7] 28 U.S.C. (Supp. V, 1952) §44(a).

rehear cases en banc,[8] and this rule has been codified[9] in section 46(c) of the Judicial Code.[10] The need for rehearings en banc by those courts which sit in divisions[11] stems primarily from the possibility of intra-circuit conflicts[12] which must either be resolved or avoided. Similarly, questions of importance[13] or cases of magnitude[14] make desirable the authoritative determination of the full court. Although to some extent rehearings by the full court tend to defeat the purpose of appointing additional judges to overburdened circuits, it would seem that determinations en banc are appropriate whenever it is likely that a majority of all the active judges would reach a result different from that reached by the panel assigned to hear the case.[15] It is in attempting to define rules governing the procedure by which the en banc power is to be exercised that difficulties arise,[16] for the language of section 46(c) gives no direction as to the procedure to be followed.[17] The decision of the principal case makes clear that the en banc power is to be exercised at the discretion of the court of appeals, there being no statutory right in a defeated party to compel each member of the full court to give formal consideration to a petition for rehearing en banc.[18] Nevertheless, in the exercise of its "general power to supervise the administration of justice in the federal courts,"[19] the Supreme Court further holds that whether the responsibility for the initiation of rehearings en banc is retained by the full court or delegated to the division,

[8] Textile Mills Securities Corp. v. Commissioner, 314 U.S. 326, 62 S.Ct. 272 (1941), affirming the decisions of the Court of Appeals for the Third Circuit and thereby overruling the earlier conflicting decision of the Ninth Circuit in Lang's Estate v. Commissioner, (9th Cir. 1938) 97 F. (2d) 867. See also United States ex rel. Robinson v. Johnston, 316 U.S. 649, 62 S.Ct. 1302 (1942), and Civil Aeronautics Board v. American Air Transport, Inc., 344 U.S. 4, 73 S.Ct. 2 (1952).

[9] See reviser's notes, H. Rep. No. 308, 80th Cong., 1st sess., appx., p. A6 (1947): "This section preserves the interpretation established by the Textile Mills case, but provides in subsection (c) that cases shall be heard by a court of not more than three judges unless the court has provided for hearing in banc."

[10] Note 4 supra.

[11] The First and Fourth Circuits continue to have only three-judge membership. See 28 U.S.C. (Supp. V, 1952) §44(a).

[12] Compare Bartels v. John Hancock Mut. Life Ins. Co., (5th Cir. 1938) 100 F. (2d) 813, with In re Henderson, (5th Cir. 1938) 100 F. (2d) 820 (conflicting decisions on the same day due to change of one judge in panel deciding cases).

[13] Alexander v. United States, (9th Cir. 1949) 173 F. (2d) 867.

[14] The principal case involved the disposition of over $21,000,000 and required the application of novel statutory language affecting the fields of bankruptcy and taxes.

[15] See the dissenting opinion of Judge Pope in Bradley Min. Co. v. Boice, (9th Cir. 1952) 198 F. (2d) 790 at 792.

[16] In determining the cases in which to sit en banc, two methods have been followed in the Court of Appeals for the District of Columbia Circuit: (1) any judge or judges or any division may request such hearing or rehearing, or (2) any party to a case may by petition or motion request en banc proceedings. These requests and petitions are submitted to and ruled upon by all of the active circuit judges of the circuit. For cases ordering rehearings en banc, see Western Pac. R. Corp. v. Western Pac. R. Co., note 2 supra, at 1021.

[17] Note 4 supra.

[18] In at least one state jurisdiction, a party may under certain circumstances obtain a rehearing en banc as a matter of right. Mo. Const., art. V, §9 (e.g., when there is a dissent after a divisional hearing).

[19] United States v. National City Lines, 334 U.S. 573 at 589, 68 S.Ct. 1169 (1948).

the procedure adopted by the court of appeals must not indiscriminately curtail the use of the en banc power by preventing a litigant from suggesting that his case is an appropriate one to be reheard by the full court, or by precluding independent consideration of the merits of such suggestion. To the extent that this holding indirectly entitles the litigant to compel some consideration of the en banc issue, it renders possible an increase in the burdens of the court[20] and an additional delay and expense in obtaining final judgment. However, it would seem that if adequate consideration was given cases when originally assigned to divisions for hearing, this additional burden would be slight, even in a circuit in which the litigant is allowed to petition the full court. The question presented for determination would go only to the procedural issue and would require investigation somewhat comparable to that of the Supreme Court in considering petitions for writs of certiorari.[21] Compensating factors are found in the wider exchange of opinion within the circuits and in the avoidance of intra-circuit conflicts.

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[20] For rules by which the court of appeals could minimize increase of volume of petitions, see Western Pac. R. Corp. v. Western Pac. R. Co., note 2 supra, at 1020. Also, see the rules of procedure prescribed in the Third Circuit and the comment thereon in 14 F.R.D. 91 (1953). Following the decision of the principal case, the rules for the Ninth Circuit were amended by the addition of two paragraphs. "All petitions for rehearing shall be addressed to and be determined by the court as constituted in the original hearing. Should a majority of the court as so constituted grant a rehearing and either from a suggestion of a party or upon its own motion be of the opinion that the case should be reheard en banc, they shall so inform the Chief Judge. The Chief Judge shall thereupon convene the active judges of the court and the court shall thereupon determine whether the case should be reheard en banc." Western Pac. R. Corp. v. Western Pac. R. Co., (9th Cir. 1953) 205 F. (2d) 374 at 375. For application of the amended rule see Western Pac. R. Corp. v. Western Pac. R. Co., (9th Cir. 1953) 206 F. (2d) 495, in which the petitions for hearing and rehearing en banc were denied by the division.

[21] Cf. Boskey, "Mechanics of the Supreme Court's Certiorari Jurisdiction," 46 COL. L. REV. 255 (1946).