When Eight is Not Enough
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Losing litigants in federal court have a statutory right to appeal to the appropriate court of appeals from a final decision of a trial court. Under 28 U.S.C. § 46, such appeals are initially heard by panels of three judges. Yet, in a strange decision issued last month, the U.S. Court of Appeals for the 5th Circuit dismissed an appeal without addressing the merits because the court only had eight judges available to hear the appeal. How could this happen?

The plaintiffs in Comer v. Murphy Oil USA sued a number of energy companies, seeking to hold them liable for some of the hurricane damage to their property that was allegedly caused by the climate change brought about by the defendants’ greenhouse gas emissions. The district court dismissed the suit, finding the claims were not justiciable. On appeal, a three-judge panel of the 5th Circuit reversed, finding that the plaintiffs could proceed with their claims.

The defendants then sought a rehearing by the full court. In a 6-3 vote, the court granted the petition for rehearing, with seven judges not participating because of unexplained recusals. Shortly after the vote, however, another judge recused, leaving the court with only eight judges (out of 16 active judges) to hear the case. Five of those eight judges concluded that this left the court without a quorum, under 28 U.S.C. § 46(d), and they voted to dismiss the appeal.

Of course, with eight judges able to rule on the appeal, there were more than sufficient personnel to issue a ruling by a three-judge panel (and, indeed, one had already been issued in the case). But the five-judge majority concluded that, because the original panel decision had been vacated upon granting of the petition for rehearing en banc, and because the eight nonrecused judges lacked the authority to “conduct judicial business with respect to this appeal,” the court could not reinstate the original panel decision or reconstitute a three-judge panel to decide the appeal.

Three of the eight judges on the court dissented from the order dismissing the appeal, in two separate opinions. Both dissenting opinions pointed out that the majority failed to explain how the court, supposedly lacking authority to conduct any “judicial business in this appeal,” could direct the clerk of court to dismiss the appeal. Presumably, if the court were without authority to conduct any judicial business regarding the appeal, the case should have remained in limbo in the court of appeals until such time as a quorum of nonrecused judges existed to act on the case.

The dissenting judges also faulted the majority for elevating a local rule (which was the basis for vacating the panel decision) over a federal statute (which gave the plaintiffs a right to appeal), and for not taking advantage of various statutory and common law mechanisms to address the quorum issue. One possible solution, for example, would have been to petition the chief justice to assign a judge to act as a 5th Circuit judge for purposes of the case, in order to create a
quorum. This solution, however, would appear inconsistent with § 46(c) and a 1960 Supreme Court precedent (United States v. American-Foreign Steamship Corp.), which limit an en banc court to circuit judges in regular active service.

One dissenting judge, James L. Dennis, also disputed the majority’s determination that the eight nonrecused judges did not constitute a quorum under § 46(d). Section 46(d) defines a quorum as a majority of the judges “authorized to constitute a court, . . . as provided in paragraph (c).” According to Dennis, this means a majority of the nonrecused judges because when § 46(c) refers to “all circuit judges in regular active service,” it means only active, nonrecused judges — as explained in the advisory committee note accompanying the 2005 amendments to Rule 35(a) of the Federal Rules of Appellate Procedure, the rule governing en banc determination. Thus, Dennis contended, a quorum in Comer would be five judges, or a majority of the eight nonrecused judges.

While there are certain flaws in the dissenters’ reasoning, ultimately, the result in the case is untenable. A panel of the court of appeals decided the appeal in a decision that is procedurally and jurisdictionally unassailable. Subsequent events — a vote to rehear the case en banc and then the inability to honor that vote because of the supposed lack of a quorum — should not be used to thwart the decision of a duly constituted and statutorily authorized panel of the court. If the eight-judge nonquorum has sufficient authority to dismiss the appeal, it certainly has the similar authority to revoke, vacate, or otherwise nullify the rehearing vote that created the procedural quandary.

The Supreme Court regularly dismisses cases in which it previously granted a petition for certiorari after finding that the petition was “improvidently granted.” The 5th Circuit should have taken an analogous step here, dismissing the grant of rehearing and reinstating the panel decision. Any other result leads to the denial of litigants’ statutory right to appeal.

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