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Expert Analysis

En Banc Review In the Second Circuit




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Much has been written about the Second Circuit's decision (by a panel that included now-Associate Justice Sonia Sotomayor) to affirm the district court's grant of summary judgment to the City of New Haven in *Ricci v. DeStefano*. *Ricci* was subsequently reversed by the U.S. Supreme Court and became a major topic of discussion during Justice Sotomayor's confirmation hearing. Commentators and senators cited Judge Jose Cabranes' forceful dissent from the Second Circuit's decision not to grant a rehearing en banc, particularly his comment that the case raised "novel questions of constitutional and statutory law" that the Second Circuit's decision had "failed to grapple with."

But perhaps somewhat lost in the extensive analysis of the merits of *Ricci* is a lurking question best presented by another dissent (by Chief Judge Dennis Jacobs) from the denial of en banc review: Has the Second Circuit's reluctance to rehear cases en banc gone too far?

Chief Judge Jacobs' Critique

Chief Judge Jacobs used his dissent in *Ricci* to criticize the "Circuit tradition of hearing virtually no cases in banc."[1] Chief Judge Jacobs, citing Rule 35 of the Federal Rules of Appellate Procedure, noted that en banc rehearing is proper when necessary to make a court's decisions coherent and that "issues of exceptional importance that may divide the circuits should be subject to in banc review." Otherwise, he reasoned, Supreme Court intervention becomes necessary where it otherwise could have been avoided.

Chief Judge Jacobs characterized the contrary view as "occluded" and as running counter to the criteria set forth in Rule 35. He went on to accuse his colleagues of "leaven[ing]" discretion "by caprice" and concluded that "to rely on tradition to deny rehearing in banc starts to look very much like abuse of discretion."

This was not the first time that Chief Judge Jacobs tried to alter the Second Circuit's reluctance to hear cases en banc. For

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example, in *Zhong v. U.S. Dep't of Justice*, Chief Judge Jacobs argued that "our in banc practice is so rusty and cumbersome that its desuetude will allow a single panel to skate past full court review."[2]

A few years before, in *Muntaqim v. Coombe*, then-Judge Jacobs wrote as follows: Unless our in banc practice is to become a dead letter altogether, this is a circumstance in which our full Court should convene. It is not a proper solution for us to forgo in banc review "without prejudice," and thus expressly reserve an opportunity to hear the case as a full court if the Supreme Court does not: the Court of last resort is on First Street, not on Foley Square.[3]

What makes Chief Judge Jacobs' mission to expand the use of en banc review in the Second Circuit all the more striking is that many of his predecessors have used their authority as chief judge to enforce the very tradition he is seeking to alter.

Prior Chief Judges' Positions

For more than a half century, the chief judges of the Second Circuit have tried to limit the use of en banc review. Learned Hand, who was chief judge from 1948-1951, "strongly disapproved" of en banc rehearings and "never voted to convene a court en banc."[4] The U.S. Court of Appeals for the Second Circuit did not hear its first case en banc until 1956, eight years after Congress codified a 1941 Supreme Court ruling allowing for the practice.[5] Chief Judges Charles Clark (chief 1954-59),[6] Irving Kaufman (1973-80),[7] Wilfred Feinberg (1980-88),[8] James Oakes (1988-92),[9] Jon Newman (1993-97),[10] and John Walker (2000-06)[11] all have defended the Second Circuit's tradition of rarely rehearing cases as a full court, and Chief Judge Feinberg has noted the considerable impact of the Second Circuit's chief judges' views.[12]

As a result, the Second Circuit has heard fewer than 40 cases en banc over the past 30 years, an average of barely more than one a year.[13] In contrast, the U.S. Court of Appeals for the Ninth Circuit has heard 52 cases en banc over the course of just three recent years; and although other circuits do not hear as many cases en banc as the Ninth Circuit, the Second Circuit consistently hears fewer cases en banc than any other circuit.[14]

As then-Chief Judge John Walker noted in 2001, Over the seven years between 1994 and 2000, …[t]he national rate [of in banc rehearing] was roughly 7.9 time

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greater than that of the Second Circuit…. Based on historical experience, a litigant is four to five times more likely to receive an in banc hearing in the First Circuit, the circuit with the next lowest in banc rate, than in the Second Circuit.[15]

There has been no marked change in the Second Circuit's en banc practice since Judge Walker's study.[16]

It is too early to tell whether Chief Judge Jacobs' mission will be successful. So far, the Second Circuit has granted en banc review only once since Chief Judge Jacobs' *Ricci* dissent.[17] In fact, the Second Circuit is actually on pace to hear fewer cases en banc this year than it has in recent years.

Benefit of Increased Review

While there may have been sound policy reasons behind the Second Circuit's traditional position of refraining from sitting en banc—and far be it from us to question the wisdom of Judge Learned Hand or his learned successors—we believe that the changing landscape of appellate review warrants a reappraisal of this position.

Defenders of the Second Circuit's tradition often point to the availability of potential Supreme Court review. For example, in *Ricci*, Judge Robert Katzmann argued that the "difficult issues" presented were already "sharply defined for the Supreme Court's consideration."[18] Similarly, in *Landell v. Sorrell*, Judges Robert Sack and Katzmann explained that "[i] f the dissenters are correct that the panel majority opinion fails to pass constitutional muster, a rehearing en banc of the panel decision would only forestall resolution of issues destined appropriately for Supreme Court consideration."[19]

But over the past several decades, the Supreme Court has steadily decreased the number of cases that it decides each term.[20] And, given how few cases the Supreme Court hears, it is difficult to predict whether any particular case is "destined" for Supreme Court review. The idea that there are cases that are "too important to en banc"[21]—because of the presumed likelihood that certiorari will be granted—may be less true now than ever before.

Furthermore, the Supreme Court itself has questioned whether circuit courts should be so reluctant to hear cases en banc. In *Groves v. Ring Screw Works, Ferndale Fastener Div.,* the Court explained that "[g]iven the panel's expressed doubt about the correctness of the [Sixth] Circuit precedent that it was following, together with the fact that there was a square conflict in the Circuits, it might have been appropriate for the panel to request a rehearing en banc."[22] And both Justice Anthony Kennedy and former Justice Sandra Day O'Connor have suggested that courts of appeals should sit en banc on cases likely to merit Supreme Court review.[23]

There is an additional practical reason why increased en banc review would be welcome. No three-judge panel can match the combined expertise and experience of the entire court. So, when a case raises an issue of exceptional importance, it would be worthwhile for the court to sit en banc to consider it.[24]

In light of these considerations, we believe that when a case presents difficult and important issues, en banc rehearing can be useful, whether or not subsequent Supreme Court review is likely.

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1. 530 F.3d 88, 92 (2d Cir. 2008) (Jacobs, J., dissenting from the denial of rehearing en banc).
2. 489 F.3d 126, 139 (2d Cir. 2007) (Jacobs, J., dissenting from the denial of rehearing en banc).
3. 385 F.3d 793, 795 (2d Cir. 2004) (Jacobs, J., dissenting from the denial of rehearing en banc).
4. Wilfred Feinberg, Unique Customs and Practices of the Second Circuit, 14HOFSTRA L. REV. 297, 311 (1986); James Oakes, Personal Reflections on Learned Hand and the Second Circuit, 47 STAN. L.REV. 387, 392 (1994-95).
5. Feinberg, Unique Customs, supra note 4, at 311.
6. Irving R. Kaufman, Do the Costs of the En Banc Proceeding Outweigh Its Advantages, JUDICATURE June-July 1985, at 8 ("The en banc proceeding raises far more questions than it settles," quoting Chief Judge Charles Clark).
7. Id. at 57 ("I am firmly convinced that [the en banc proceeding's] costs are too great, and its advantages too few, to warrant its use in all but the rarest circumstances").
8. Wilfred Feinberg, The Office of Chief Judge of a Federal Court of Appeals, 53 FORDHAM L. REV. 369, 376 (1984-85) ("My view…is that for the most part in bancs are not a good idea…").
9. Oakes, supra note 4, at 392-93 ("Our rule of thumb has been that most cases are either too unimportant or too important to en banc.").
10. Jon O. Newman, Foreword: In Banc Practice in the Second Circuit, 1989-1993, 60 BROOK. L. REV. 491, 502 (1994) ("the Second Circuit's pattern of rarely rehearing cases in banc has been sound policy").
11. John M. Walker, Second Circuit Survey: Forward, 21 QLR 1, 14 (2001) ("the Second Circuit's approach to in banc review… is sound").
12. Feinberg, The Office of Chief Judge, supra note 8, at 377 ("a chief judge can play a significant role in reducing the number of in bancs").
13. Newman, Foreword: In Banc Practice, supra note 10, at 492 (Second Circuit heard 19 cases en banc between 1979 and 1993); Walker, supra note 10, at 2-3 (7 cases between 1994 and 2000). We are aware of 10 cases heard en banc since 2000.
14. James C. Duff, Judicial Business of the United States Courts: 2006-08 Annual Reports of the Director, Table S-1, available at http://www.uscourts.gov/judbususc/jud-bus.html.
15. Walker, supra note 11, at 5.
16. Supra note 13; see also, e.g., *United States v. Cavera*, 550 F.3d 180, 187 (2d Cir. 2008) (en banc) ("This Court employs the en banc procedure sparingly.").
17. *Arar v. Ashcroft*, —F.3d—, 2009 WL 3522887 (Nov. 2, 2009) (en banc) (reh'g en banc granted Aug. 12, 2008).
18. 530 F.3d 88, 90 (2d Cir. 2008) (Katz-mann, J., concurring in the denial of rehearing en banc).
19. 406 F.3d 159, 167 (2d Cir. 2005) (Sack, J. and Katzmann, J., concurring in the denial of rehearing en banc).
20. See, e.g., Scotusblog, http://www.scotusblog.com/wp/stats-week-the-docket-in-historical-perspective/ (April 7, 2008)("[T]he conclusion of this Term will mark the culmination of the lowest output of any arbitrary 10-year stretch since the aforementioned beginning of the true modern era at the Court in 1926, and by quite a wide margin.").
21. Supra note 9.
22. 498 U.S. 168, 172 n.8 (1990); see also *United States v. Shabani*, 513 U.S. 10, 12 (1994) ("For reasons unknown, the Court of Appeals did not grant en banc review," where the Ninth Circuit panel's interpretation of a statute was not textually supported and conflicted with decisions in eleven other circuits).
23. Stephen L. Wasby, How Do Courts of Appeals En Banc Decisions Fare in the U.S. Supreme Court?, JUDICATURE January-February 2002, at 184 & n.6, 7.
24. See, e.g., *United States v. Fell*, 2009 WL 1684509, at 29 (2d Cir. June 17, 2009) (Sack, J., dissenting from the denial of rehearing en banc) ("I think that this is the rare case in which it makes institutional sense for us to render it as 'the Court' and not as a panel thereof…I think that an exchange of views among the members of the Court on these issues in this discrete context—with the benefit of briefing, argument, and deliberation—would be of considerable value to the Court and, through it, to the public").

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