

2011

Responding to the Loss of an En Banc Quorum (Update: PrawfsBlawg gets Results!?)

Aaron-Andrew P. Bruhl

William & Mary Law School, apbruhl@wm.edu

Repository Citation

Bruhl, Aaron-Andrew P., "Responding to the Loss of an En Banc Quorum (Update: PrawfsBlawg gets Results!?)" (2011). *Popular Media*. 376.

https://scholarship.law.wm.edu/popular_media/376

Copyright c 2011 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

https://scholarship.law.wm.edu/popular_media

FRIDAY, MAY 20, 2011

Responding to the loss of an en banc quorum (Update: PrawfsBlawg gets results!?)

(Update on 5/24: Last Friday I posted the item below suggesting a tweak to the Fifth Circuit rules. As a comment on the post points out, yesterday the Fifth Circuit issued notice of a proposed amendment taking an approach similar to what I proposed. Because I am so modest (and non-delusional) I will disclaim any causal effect. Nonetheless, I am not so modest as to refrain from suggesting that great minds think alike!)

As you probably know, there are a good many lawsuits out there concerning various aspects of climate change. One particularly interesting and unusual decision was the Fifth Circuit's decision in *Comer v. Murphy Oil*. Or rather non-decision, as we'll see.

To summarize the proceedings: The plaintiff landowners brought state tort claims against the defendants (mostly oil companies) on the theory that the defendants' contributions to global climate change increased the ferocity of Hurricane Katrina, thus damaging plaintiffs' property. The district court dismissed on justiciability grounds. A Fifth Circuit panel reversed and remanded for further proceedings on the merits. A rump of the en banc court, substantially diminished due to numerous recusals, then voted the case en banc. This vote had the effect, according to Fifth Circuit Rule 41.3, of automatically vacating the panel decision. (The Fifth Circuit is not unique in this regard, so the scenario described here could occur elsewhere.) After the en banc vote, yet another judge recused, arguably depriving the en banc court of a quorum. The majority of the remaining judges then decided that they lacked the power to proceed and that the only thing they could do was dismiss the appeal for want of a quorum. In particular, they decided that they could not undo the vacatur of the panel opinion, meaning that the district court's decision, which you'll recall the panel had reversed, remained in effect.

Now, the dissenting minority of the remaining judges took issue with this disposition on a number of grounds, including by disputing that the court had lost a quorum. For purposes of this post, let's assume that the court did indeed lose a quorum and that the en banc court could not proceed further. The outcome of this state of affairs in *Comer* was that the appellants did not get a decision from the court of appeals, thus arguably depriving them of their statutory right to an appeal and complicating their ability to seek further review. One way to avoid this result is to amend the circuit rules so that the decision to take a case en banc does not vacate the panel decision. Of course, one credible objection to that approach is that the court might not want the panel decision to be valid after it has been voted en banc; after all, the panel decision might have been taken en banc because the majority of the court disagrees with it. If that is the problem, though, why not just provide that the en banc vote depublishes or otherwise strips precedential effect from the panel opinion? See the advisory committee note to Ninth Circuit Rules 35-1 to 35-3. That way, the panel decision isn't binding on later panels or district courts, but the parties still have a merits disposition. Or, if you prefer, let the en banc vote continue to vacate the panel decision but amend the rule so that the subsequent loss of a quorum automatically reinstates the panel opinion but in unpublished non-precedential form.

To be sure, this is hardly the most pressing problem facing the federal courts, but this seems like a pretty easy fix, no?

Posted by Aaron Bruhl on May 20, 2011 at 05:03 PM in [Civil Procedure](#) | [Permalink](#)

TRACKBACK

TrackBack URL for this entry:

<http://www.typepad.com/services/trackback/6a00d8341c6a7953ef01538e9a97e3970b>