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Rule 23 inherently imposes difficulties upon the courts. The time and energy expended by the judicial process and the development of imaginative and flexible procedures will not be easy. But if consumers are to be afforded redress, if the poor class member is to be represented, if wrongdoers are to be deterred and if rule 23 is to succeed, courts cannot refuse their responsibilities.

Since the Supreme Court has granted certiorari in *Eisen* final resolution is on the horizon. By refusing to rehear en banc[104] the Second Circuit has deprived both the Supreme Court and the legal community of the full benefit of its expertise.[105] It is possible that *Eisen* will be returned by the Supreme Court for an en banc appraisal by the Second Circuit.[106] Also it is possible that the Supreme Court will find that the Second Circuit lacked jurisdiction in the first instance.[107] It is hoped that the Supreme Court will squarely face and definitely clarify some of the uncertainty that *Eisen III* has caused. Whether the Court will accept the emasculation of rule 23 as a flexible and imaginative judicial tool is a question of momentous importance to consumer, environmental and antitrust advocates. Hopefully the Court will cast a vote of confidence in the ingenuity of the federal courts and the viability of rule 23.[108]

DENIAL OF REHEARING EN BANC

Boraas v. Village of Belle Terre

The Second Circuit in *Boraas v. Village of Belle Terre*[1] declined to rehear en banc the decision rendered by a panel of the court. The

104 479 F.2d at 1020.

105 It was felt that rehearing would only generate "diverse views, necessitating ultimate resolution by the Supreme Court." *Id.* at 1021 (Mansfield, J., concurring).

106 In Western Pac. R.R. Corp. v. Western Pac. R.R. Co., 345 U.S. 247 (1953), the Court stated that en banc power is "a necessary and useful power — indeed too useful that we should ever permit a court to ignore the possibilities of its use in cases where its use might be appropriate." *Id.* at 260, *quoted in Eisen III*, 479 F.2d at 1025 (Oakes, J., dissenting from denial of rehearing en banc). *See* Civil Aeronautics Bd. v. American Air Transp., 344 U.S. 4, 5 (1952).

107 In granting certiorari the Supreme Court requested the parties to prepare and argue whether a district court's denial of class action status could be appealed under 28 U.S.C. § 1291 (1970). 42 U.S.L.W. 1053 (U.S. Oct. 16, 1973). An appeal is only permissible from a final order. *See* note 15 *supra*, where *Eisen I* and the "death knell" doctrine are treated.

Hopefully the Supreme Court on certiorari in *Eisen* will recognize the "death knell" doctrine as a proper jurisdictional basis for the Second Circuit's decision, and will go on to the merits of *Eisen III*, rather than leave rule 23 a hollow procedure. *See generally* Note, *Interlocutory Appeal from Order Striking Class Action Allegation*, 70 COLUM. L. REV. 1292 (1970).

108 *See* note 80 *supra*.

1 476 F.2d 806 (2d Cir.), *rehearing denied*, 476 F.2d 824, *prob. juris. noted*, 42 U.S.L.W. 3226 (U.S. Oct. 11, 1973) (No. 73-191).

panel had applied a modified equal protection test[2] and held a village ordinance providing that no more than two unrelated persons could occupy a single family residence violative of the Constitution.[3]

The Federal Judicial Code provides that a majority of the circuit judges in active service in a circuit may order an en banc rehearing of a decision of a panel of the court of appeals.[4] In *Belle Terre*, the court of appeals was evenly divided on the question (4-4) and en banc rehearing was denied.[5]

Judge Timbers, in a dissent from the denial of the rehearing, argued that en banc reconsideration was necessary because a modified equal protection standard should not have been applied by the *Belle Terre* panel in light of the most recent Supreme Court decision on equal protection.[6] He further contended that recent panel decisions were inconsistent and thus it was impossible for courts in the Second Circuit to determine what equal protection standards should be applied.[7] Thus, Judge Timbers believed that an en banc rehearing of

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[2] The *Belle Terre* panel formulated a test whereby even if a valid zoning objective were established, the ordinance would violate the Constitution unless the means chosen were in fact substantially related to that end. *Id.* at 814.

[3] *Id.* at 818. The panel majority was composed of Judges Mansfield and Oakes. Judge Timbers dissented.

[4] 28 U.S.C. § 46(c) (1970). An en banc court is composed of all the circuit judges in regular active service. The courts of appeal normally sit in groups of not more than three judges.

[5] 476 F.2d at 824. Chief Judge Friendly and Judges Hays, Mulligan and Timbers were in favor of rehearing the case. Circuit Judges Kaufman, Feinberg, Mansfield and Oakes were opposed to reconsideration. There is currently one vacancy on the court.

The 4-4 split prevented en banc reconsideration because although as many judges favored rehearing the case as opposed it, the statute specifically requires that a *majority* of the active judges agree to rehear the case. 28 U.S.C. § 46(c) (1970). *See* Zahn v. International Paper Co., 469 F.2d 1033 (2d Cir.), *rehearing denied*, 469 F.2d 1040, 1041 (1972) (opinion per Mansfield, J.), *aff'd*, 42 U.S.L.W. 4087 (U.S. Dec. 17, 1973). Judge Timbers has expressed some dissatisfaction with this result. *See* 476 F.2d at 825 & n.1.

[6] 476 F.2d at 825, 826-27. Judge Timbers cited the case of San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), wherein the Supreme Court applied the traditional limited scrutiny equal protection standard and upheld Texas' program for financing public education.

Under the traditional approach if a state of facts could reasonably be conceived to justify the classification involved, those facts are presumed to have existed at the time the classification was enacted. McGowan v. Maryland, 366 U.S. 420 (1961); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

In cases involving a suspect classification or the infringement of a fundamental right, the classification must pass a much stricter test. *See, e.g.*, Lindsey v. Normet, 405 U.S. 56 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969); Korematsu v. United States, 323 U.S. 214 (1944).

Judge Timbers argued, based upon the Supreme Court's application of the traditional test in *Rodriguez*, that the *Belle Terre* decision was an improper intrusion upon the power of local government to regulate land use. He contended that an en banc court should correct this error, rather than force the Village to obtain a "sure reversal" by the Supreme Court. 476 F.2d at 827.

[7] 476 F.2d at 825-26. Judge Timbers referred to the cases of *Belle Terre*, Aguayo v.

Belle Terre would create an opportunity for the court to reconsider the equal protection area and to clarify the Second Circuit's statements on the applicable standards.[8]

In a reply to the dissent, Judge Mansfield stated, first, that the panel decisions were neither inconsistent[9] nor in conflict with the Supreme Court;[10] second, an en banc statement of firm equal protection standards would not be productive because such standards must necessarily be kept flexible and adaptable;[11] and third, presumed that the en banc court would not be unanimous and thus the district courts would rely on Supreme Court decisions for primary guidance in any event.[12]

Although en banc proceedings do provide an important service,[13]

Richardson, 473 F.2d 1090 (2d Cir.), *petition for cert. filed*, 41 U.S.L.W. 3602 (U.S. Apr. 8, 1973) (No. 72-1416), and City of New York v. Richardson, 473 F.2d 923 (2d Cir.), *cert. denied sub nom.*, Wyman v. Lindsay, 41 U.S.L.W. 3655 (U.S. June 18, 1973) (No. 72-1451).

In *Aguayo*, Chief Judge Friendly noted that, in his view, the Supreme Court was developing a standard more stringent than minimal scrutiny but not as exacting as strict scrutiny. However, he concluded that whether the test be one of minimal scrutiny or strict scrutiny, the challenged New York statute passed muster. 473 F.2d at 1109.

Judge Kaufman, in *City of New York*, also said that recent Supreme Court decisions seemed to indicate that an expanded judicial inquiry would be permitted. However, he noted that the state had not produced even a minimally rational explanation for the statutory discrimination involved. 473 F.2d at 931.

Nonetheless, Judge Timbers believed that the equal protection standards applied in the three cases were "highly inconsistent." He felt that the court had a present duty to eliminate the uncertainty surrounding equal protection standards and not to wait for further Supreme Court or Second Circuit decisions to do so. 476 F.2d at 826.

8 476 F.2d at 826.

9 476 F.2d at 828. Judge Mansfield contended that the various panels were only commenting upon an apparent trend toward a greater degree of flexibility in the equal protection area and that these observations were not in conflict with one another. *Id.*

10 *Id.* at 828-29. Judge Mansfield argued that the equal protection standards applied in *Belle Terre* were in accord with the Supreme Court's formulation of those standards delineated in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). Secondly, he believed that the standards set out in *Rodriguez* would also require the striking down of the Belle Terre ordinance. The judge also drew a distinction between the essentially economic nature of the challenged state statute in *Rodriguez* and the personal right of association infringed by the Belle Terre ordinance. 476 F.2d at 828-29.

11 476 F.2d at 828. Equal protection is a "proteus-like" concept whose standards must be applied to a variety of situations involving significantly differing considerations. Thus, Judge Mansfield believes that a certain degree of flexibility is inevitable and it would serve little point to establish hard and fast rules.

12 *Id.*

13 The courts of appeal may use en banc meetings to resolve intracircuit conflict and to correct error, thus reducing the burden of the Supreme Court to do so. *See* Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir.), *rehearing denied*, 479 F.2d 1020, 1025 (Oakes, J., dissenting), *cert. granted*, 42 U.S.L.W. 3226 (U.S. Oct. 11, 1973) (No. 73-203); Note, *En Banc Procedure in the Federal Courts of Appeals*, 111 U. PA. L. REV. 220 (1962).

En banc consideration will result in the "law of the circuit" being determined by a majority of the circuit judges rather than by two members of a panel. Zahn v. International Paper Co., 469 F.2d 1033 (2d Cir.), *rehearing denied*, 469 F.2d 1040, 1041 (1972) (opinion per Mansfield, J.), *aff'd*, 42 U.S.L.W. 4087 (U.S. Dec. 17, 1973). *See Second Circuit Note*, 47 ST. JOHN'S L. REV. 345 (1972).

their value is normally outweighed by the need to maintain the smooth operation of the panel system.[14] Thus, in the federal system, en banc rehearings are not favored and will only be ordered when necessary to maintain the uniformity of decisions or when the case presents an issue of exceptional importance.[15]

The modified equal protection standard employed by the court in *Belle Terre* does not present a conflict sufficient to warrant an en banc meeting aimed at restoring circuit uniformity. Neither the Supreme Court nor the Second Circuit has expressly condemned the modified equal protection approach.[16] Since the Supreme Court must be the ultimate arbiter of the modified standard, an en banc meeting could not produce the finalized restatement envisioned by Judge Timbers.[17]

A finding that a case is or is not so exceptionally important as to mandate an en banc review must necessarily be based on the value judgments of the members of the court. Thus, the different circuits have held a variety of issues to be important enough to consider en banc.[18] *Belle Terre* involved the power of local government to use

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[14] The panel system is the most efficient means for disposing of the heavy caseload of the courts of appeals. Alexander, *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities (Part I)*, 40 N.Y.U.L. REV. 563, 576-77 (1965) [hereinafter cited as Alexander]. Judge Mansfield stated that in the Second Circuit an en banc rehearing can delay the final resolution of a case for up to six months. 476 F.2d at 827 n.2. Even more important, an en banc meeting disrupts the normal deliberations of the entire circuit.

The potential for disruption is enormous because the mere existence of the procedure encourages attempts to use it in any plausible situation. Alexander, *supra*, at 599-600; *see* Western Pac. R.R. Corp. v. Western Pac. R.R. Co., 345 U.S. 247, 270 (1953) (Frankfurter, J., concurring).

[15] FED. R. APP. P. 35(a) (1973).

[16] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), framed the issues in terms of the two-tiered approach. It did not comment on the acceptability of a modified test.

[17] En banc consideration could result in a definitive statement of the Second Circuit's position on the acceptability of a modified standard. However, in view of the cost of an en banc consideration, the court was justified in delaying such a meeting, at least until the Supreme Court has had an opportunity to confront and resolve the issues. The Village of Belle Terre was not prejudiced by the denial of the rehearing because it had no right to one, did not request it, and was free to appeal the panel decision to the Supreme Court (which it has done). *See* note 1 *supra*.

[18] For example, the District of Columbia, Third and Ninth Circuits, have sat en banc to hear cases involving subversive activities, while the Fourth and Fifth Circuits have considered civil rights litigation en banc. For case citations and further examples see Alexander, *supra* note 14, at 588-89.

The Second Circuit recently has declined to grant en banc consideration in a number of important matters. *See, e.g.*, Zahn v. International Paper Co., 469 F.2d 1033 (2d Cir.), *rehearing denied*, 469 F.2d 1040 (1972), *aff'd*, 94 S.Ct. 261 (1973) (jurisdictional amount for unnamed plaintiffs in environmental class action); Scenic Hudson Preservation Conf. v. FPC, 453 F.2d 463 (2d Cir.), *rehearing denied*, 453 F.2d 494 (1971), *cert. denied*, 407 U.S. 926 (1972) (license issued by Federal Power Commission challenged on environmental

zoning laws to eliminate "undesirable" patterns of residence, as well as the implementation of a new equal protection standard. Since these issues are matters of great legal, political and social concern, it would seem that *Belle Terre* should have been reviewed en banc. However, the Second Circuit has ruled that a case may be of such extraordinary importance as to virtually assure Supreme Court consideration. In such a case, en banc reconsideration would only serve to delay the ultimate resolution of a vital issue and, therefore, should not be granted.[19] *Belle Terre* properly can be placed within this small category.[20]

The Supreme Court has ultimate responsibility for defining equal protection standards. An en banc review of *Belle Terre* could only result in further speculation about whether the Supreme Court would or would not accept a modification of the two-tiered approach. In order to obtain a definitive ruling on this issue, the Second Circuit properly refused to obstruct the path to speedy Supreme Court review.

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grounds); Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir.), *rehearing denied*, 479 F.2d 1020 (1973), *cert. granted*, 42 U.S.L.W. 3226 (U.S. Oct. 16, 1973) (No. 73-203) (notice and manageability of rule 23 class actions).

However, it did convene en banc to decide the Pentagon Papers case. United States v. New York Times Co., 444 F.2d 544 (2d Cir.), (en banc), *rev'd*, 403 U.S. 713 (1971). It also agreed to review a panel decision vacating an order requiring an international computer company to produce certain allegedly privileged documents for the government's inspection in an antitrust action. IBM Corp. v. United States, 471 F.2d 507 (2d Cir. 1972), *vacated*, 480 F.2d 293 (en banc), *petition for cert. filed*, 42 U.S.L.W. 3033 (U.S. July 10, 1973) (No. 72-1661); Lanza v. Drexel & Co., 479 F.2d 1277 (2d Cir. 1973) (en banc), was heard by the Second Circuit sua sponte on the question of independent director liability under rule 10b-5.

[19] Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir.), *rehearing denied*, 479 F.2d 1020, 1021 (Oakes, J., dissenting), *cert. granted*, 42 U.S.L.W. 3226 (U.S. Oct. 16, 1973) (No. 73-203). However, the decision not to grant en banc review of *Belle Terre* was vindicated by the intention of the Supreme Court to consider the case. *See* note 1 *supra*. Interestingly enough, Judge Oakes did not favor en banc review of *Belle Terre*. *See* note 5 *supra*.

[20] *Belle Terre* provides an excellent example of the subjective nature of the "importance" ground. Judge Timbers felt that the equal protection issue presented a "substantial question of unusual importance." 476 F.2d at 825. However, Judge Mansfield came to the conclusion that *Belle Terre* was not "one of those truly extraordinary cases" that should be reviewed en banc. 476 F.2d at 829.

Thus, there are three possible resolutions of the en banc issue, each one resting on a subjective determination of what is "important": (1) the issue is unimportant and should not be reviewed en banc, (2) the issue is important and should be reviewed by the full court of appeals, or (3) the issue is too important to wait for an en banc review and should be reviewed as soon as possible by the Supreme Court. The key to the en banc issue thus lies in standards that are necessarily elusive. The result in any given case is unpredictable.

It is also worth noting that the members of the *Belle Terre* panel each voted to sustain his own panel position. The two members of the majority voted to deny review, while the dissenting judge voted for rehearing. Theortically, the issues presented by the merits of the case and the considerations attending the en banc device are to be independently determined. There is, however, an irresistible temptation to defend prior decisions.