ALDF v Veneman, No. 04-15788

BYBEE, Circuit Judge, with whom CALLAHAN, Circuit Judge joins, concurring:

I concur in the dismissal of the appeal pursuant to Fed. R. App. P. 42(b) and in the vacatur of the panel opinion. I write separately because I believe that this situation presents a very different set of considerations from the cases discussed in Judge Thomas's partial dissent.

This case involves a challenge to the United States Department of Agriculture's ("USDA") decision not to adopt a draft policy that would have provided guidance to various regulated entities on the treatment of nonhuman primates under the Animal Welfare Act. When USDA ultimately decided to abandon the draft policy, the Animal Legal Defense Fund filed suit alleging that USDA's decision was arbitrary, capricious, and an abuse of discretion. The district court granted USDA's motion to dismiss, and ALDF timely appealed. Over a vigorous dissent, a panel of this court reversed the district court. *Animal Legal Def. Fund v. Veneman*, 469 F.3d 826 (9th Cir. 2006).

After a *sua sponte* call, a majority of the active judges voted to rehear the case en banc. In a published order we stated that "[t]he three-judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court." *Animal Legal Def. Fund v. Veneman*, 482 F.3d 1156 (9th Cir. 2007). The case is currently calendared

for argument on June 18, 2007. We were informed by the parties on May 10, 2007, that they had reached a settlement and had agreed to dismiss the case with prejudice "provided that the panel's opinion and judgment are vacated."

A majority of the en banc panel has agreed to grant the motion to dismiss and vacate the panel's opinion. Six members of the en banc panel, relying on *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship,* 513 U.S. 18, 26 (1994), *Karcher v. May*, 484 U.S. 72 (1987), *Clarendon Ltd. v. Nu-West Indus., Inc.,* 936 F.2d 127, 129 (3d Cir. 1991), and *Matter of Mem'l Hosp. of Iowa County, Inc*, 862 F.2d 1299, 1300 (7th Cir. 1988), would not vacate the panel's opinion because "voluntary settlement by the parties does not justify vacatur." Dissent at 3. None of the cases cited in Judge Thomas's dissent, however, addresses the question before us: Having granted rehearing en banc, may we vacate our own panel opinion when the parties settle the case prior to reargument? The cases cited by the dissent all involve a request that the Supreme Court (or a court of appeals) vacate a *lower court opinion. Bonner Mall* involved the question of "whether appellate courts . . . should vacate civil judgments of *subordinate courts* in cases that are settled after appeal is filed or certiorari sought." 513 U.S. at 19 (emphasis added). The Court declined to vacate our decision on the motion of the parties, holding that there were no "exceptional circumstances" justifying such an order.

Id. at 29. Similarly, in *Karcher*, the Supreme Court dismissed the appeal when plaintiff office holders' successors in office declined to pursue the appeal, but rejected the plaintiffs' argument "that if we dismiss the appeal we must vacate the judgments below." 484 U.S. at 81.

Clarendon and *Memorial Hospital* both involve situations where the court of appeals was asked to vacate the decision of the district court pursuant to the parties' settlement agreement; both courts concluded that vacatur was not appropriate. *Clarendon*, 936 F.2d at 129; *Mem'l Hosp*., 862 F.2d at 1300. *But cf. Nat'l Union Fire Ins. v. Seafirst Corp*., 891 F.2d 762, 768-69 (9th Cir. 1989) (rejecting "the Seventh Circuit's rule [in *Memorial Hospital*] to 'always deny these motions' . . . . We find some merit in those sentiments but decline to adopt such an inflexible rule. To do so would raise the cost of settlement too high. The better view, in our opinion, is to consider the equities and hardships in resolving the question."); 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3533.10 at 432 (2d. ed. 1984) ("The parties should remain free to settle on terms that require vacation of the judgment."); *Id*. at 763 (Supp. 2007) (discussing a decision to vacate the panel decision after rehearing en banc had been granted, but before oral argument and noting: "The fact that rehearing had been granted may justify the further decision

to vacate the panel decision, since it shows at least some ground for concern with the panel decision. This setting also may reduce the risk that one party is seeking to buy its way out of an adverse precedent.").

The parties have not asked us to vacate the district court's opinion, a request that would fall squarely within *Bonner Mall*. Rather, we have been asked to vacate *our own opinion*, an opinion that we have already ordered not be cited as precedent. The marginal difference between what we have already ordered—that the panel opinion not be cited as precedent—and what the parties have jointly requested—that we formally vacate the opinion—is minuscule.

Moreover, the parties have not requested anything extraordinary. It is common practice among of the courts of appeals to vacate the panel opinion in the order granting rehearing en banc. *See, e.g.*, *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 310 F.3d 785 (3d Cir. 2002) ("having voted for rehearing en banc in the above appeal, it is ordered that the Clerk of this Court vacate the opinion and judgment [of the panel].") (emphasis omitted); *Amos v. Maryland Dept. of Pub. Safety & Corr. Serv.*, 205 F.3d 687 (4th Cir. 2000) ("After a majority of the active judges of this Court voted to grant the . . . petition for rehearing en banc, we vacated [the panel's] judgment); *Byrne v. Butler*, 845 F.2d 501, 507 (5th Cir. 1988) (en banc) ("[t]he grant of a rehearing en banc

vacates the panel opinion, which thereafter has no force.") (internal quotation marks and citations omitted); *E.E.O.C. v. Jefferson County Sheriff's Dept.*, 2006 WL 3298341 (6th Cir. 2006) (en banc) ("The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court."); *United States v. Hardman*, 260 F.3d 1199 (10th Cir. 2001) (en banc) (ordering sua sponte rehearing of three cases and ordering that "[t]he panel opinions in these cases are vacated"); *Freund v. Butterworth*, 135 F.3d 1419, 1420 (11th Cir. 1998) (en banc) ("[I]t is ordered that the above cause shall be reheard by this court en banc. The previous panel's opinion is hereby vacated."); *United States v. Powell*, —F.3d—, 2007 WL 1119641, *1 (D.C. Cir. 2007) (en banc) ("Upon the Government's motion, the full court vacated [the panel] decision and granted rehearing en banc."); *Kirkendall v. Dept. of Army*, 159 Fed. Appx. 193, 194 (Fed Cir. 2006) (en banc) ("The petition for rehearing *en banc* is granted. The court vacates the panel's judgment and original opinion.").[1]

Moreover, this widely accepted practice *used to be our practice as well.*

[1] The First Circuit appears to grant en banc rehearing only on certain specified issues and decides on a case-by-case basis which portions of the original panel opinion to vacate. *See, e.g.*, *United States v. Padilla*, 403 F.3d 780 (1st Cir. 2005); *Narragansett Indian Tribe v. Rhode Island*, 415 F.3d 134, 135 (1st Cir. 2005). This is possible because of the circuit's small body of case law and the fact that there are only six active members of the court. I have not been able to find a definitive example of the Second, Seventh or Eighth Circuits' practice.

See Burlington N. & Santa Fe Ry. v. Int'l Bd. of Teamsters, 185 F.3d 1075 (9th Cir. 1999) (ordering the case be reheard en banc; "The three-judge panel opinion . . . is withdrawn."); *In re Gruntz*, 177 F.3d 729 (9th Cir. 1999) (same); *Hose v. INS*, 161 F.3d 1225 (9th Cir. 1998) (same). Judge Thomas indicates that we changed our practice in response to the practices of West Publishing, which often deletes the vacated opinion from its electronic databases and declines to print them in the bound volumes of the *Federal Reporter*.[2] Dissent at 2 n.1. Although we now declare the panel opinions "not precedential," we do not formally vacate them, apparently so that West will not wipe them from the annals of *F.3d*. I fully agree with Judge Thomas that there are good reasons for wanting a complete case history in the reporters, but we may wish to take this up with West instead of altering our en banc practice. In any event, whatever concerns we have had in the past about altering history by wiping panel opinions from the books are not realized in this case. The panel's opinion is published in 469 F.3d, which is already in a hardbound edition.

Our previous practice and the practices of our sister circuits make eminent sense. When we decide to rehear a case en banc, as the name suggests, we *rehear*

[2] Although historically West removed vacated opinions from its database, this practice may have recently changed. It appears that the full text of several recent opinions that have been vacated is still in its online Westlaw database.

the case and issue a new opinion and judgment on behalf of the court. In effect, we start over again. By granting rehearing en banc, we are not engaging in another level of appellate review. We do not affirm or reverse the panel; rather, we review the judgment of the lower court. Any decision we issue necessarily displaces whatever judgment and opinion the panel previously issued, whether or not it is consistent with the en banc opinion. It only stands to reason, then, that when the en banc court assumes control of the case, we either vacate the underlying judgment and opinion or treat them as vacated.[3]

In this case then, we are in a posture similar to settlement on the eve of oral argument. We do not hesitate to grant such settlements, irrespective of the importance of the issues or the time and preparation the panel has expended. *See Amos*, 205 F.3d at 687 (noting the court had granted rehearing and vacated the judgment; dismissing the case when, five days before oral argument en banc, the parties settled). When we dismiss the appeal, we will not, in accordance with *Bonner Mall*, vacate the district court's opinion without good reason. Here, consistent with *Bonner Mall*, the parties have not requested that we vacate the

[3] In cases in which we have ordered en banc review, LEXIS treats the panel opinion as having been vacated. For example, the LEXIS citation for this case, 469 F.3d 826, contains the following notation: "NOTICE: THIS OPINION WAS VACATED BY THE COURT."

district court's opinion. Indeed, they have asked the we leave the district court opinion in place by formally vacating the three-judge panel's opinion, which we have already declared non-precedential.

In this case the parties jointly ask us to do what we have historically done and what our sister circuits routinely do—strip a panel opinion of its precedential and persuasive authority by vacating it en banc. The request will facilitate settlement in this case, and I do not think the request is out of line. But I think it would be unfair to do as the dissent proposes, to dismiss the appeal, but not vacate the panel opinion. Effectively, we are not being asked "to vacate *because* the case [is] moot, but . . . to vacate *to make* the case moot." *Nat'l Union Fire Ins.*, 891 F.2d at 768. Because we do not know if the parties would agree to dismissal absent vacatur, it would be manifestly unfair to the parties to grant the motion, but on terms different from those they agreed to. In my view, if we were to refuse to vacate the panel opinion, as the parties have requested pursuant to their settlement, the only fair course of action would be to deny the motion on grounds of the inappropriateness of vacatur and proceed with en banc reargument. Adopting the dissent's halfway approach would result only in inequitable treatment of the parties and a disregard for our colleagues who voted to take this case en banc.

For the above reasons, I concur in the order.