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## Maintaining Consistency in the Law of the Large Circuit: The Origins and Operation of the Ninth Circuit's Limited En Banc Court

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## **Maintaining Consistency in the Law of the Large Circuit: The Origins and Operation of the Ninth Circuit's Limited En Banc Court\***

Arthur D. Hellman

### Abstract

Once again, Congress is considering legislation to divide the largest of the federal judicial circuits, the Ninth Circuit Court of Appeals. The Ninth Circuit extends over nine western states, including California, and it has 29 active judges, almost twice the number of the next-largest circuit. Much of the debate over proposals for restructuring focuses on a feature unique to the Ninth Circuit, the limited en banc court (LEBC). In all of the other circuits, when the court of appeals grants rehearing en banc, the case is heard by all active judges. In the Ninth Circuit, the en banc court is composed of 11 judges – the chief judge and 10 other judges selected at random for each case from among the active judges. Eleven judges constitute little more than one-third of the full court. Proponents of restructuring argue that the LEBC cannot satisfactorily perform the functions of en banc rehearing – in particular, maintaining consistency in the law of the circuit.

This book chapter examines the origins and operation of the Ninth Circuit's limited en banc court. It draws on internal court memoranda and interviews with the judges; it also includes an empirical study of en banc balloting during the first six years under the LEBC rule.

The LEBC was authorized by legislation enacted by Congress in 1978. Even before the bill was passed, the Ninth Circuit's judges began discussing how the en banc function might be performed by a body composed of fewer than all active judges. The discussions continued over a period of two years before the en banc rule – still in force today, with minor changes – was adopted.

This book chapter traces in detail the evolution of the rule. It shows that the judges initially favored a nine-judge LEBC and a “permanent rotation” system, under which judges would serve for a designated period of time, with new judges rotating on at staggered intervals. Examining the process by which the judges shifted to the random selection approach provides a fascinating picture of judges working together to reshape

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\* This research paper constitutes Chapter 3, “Maintaining Consistency in the Law of the Large Circuit,” by Arthur D. Hellman, in *Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts*, ed. Arthur D. Hellman. Copyright (c) 1990 by Cornell University. The chapter is reproduced by permission of the publisher, Cornell University Press.

an institution within the court. It also sheds light on the judges' view of how an intermediate appellate court should function.

The chapter also examines the Ninth Circuit's efforts, during the first six years under the LEBC rule, to maintain consistency and coherence in the law of the circuit. The research shows that the formal en banc process is only one way in which the judges take steps to avoid conflicts between panel decisions. At the same time, en banc rehearing has not been not treated primarily as a device for maintaining consistency within the circuit. For example, review of the memoranda exchanged by the judges reveals that assertions of intracircuit conflict were made in fewer than half of the cases in which a judge called for a vote on rehearing a case en banc.

# 3

## *Maintaining Consistency in the Law of the Large Circuit*

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ARTHUR D. HELLMAN

Starting in the 1970s, prominent voices in the legal community have expressed concern that one Supreme Court of nine justices can no longer provide adequate authoritative guidance to maintain uniformity in the application of federal law. To increase the "national appellate capacity," they have proposed creating a new appellate court, such as an "Intercircuit Tribunal," that would serve as an auxiliary to the Supreme Court. But the prospect of a fourth tier within the federal judicial system encounters strong resistance from judges and lawyers alike. Other approaches to structural reform, such as creation of specialized appellate courts, have attracted even less support. Thus, even among those who agree with the diagnosis, the search continues for solutions.

Judge Browning has suggested that the need for increased appellate capacity can be met without creating additional courts through effective management of large circuits. The premise is that, with a smaller number of circuits, there will be fewer conflicts for the Supreme Court or any national court to resolve. Not everyone agrees with this premise, but even if it is correct, the success of the idea will depend on whether it is possible to maintain consistency and stability in the law of the circuit when cases are decided by hundreds of shifting three-judge panels on a large court. Otherwise, we would simply be trading intercircuit conflict for intracircuit conflict—a much more pernicious phenomenon.

The Ninth Circuit as it has existed since 1980 provides a unique testing ground for Browning's plan. The circuit extends over nine

states and two territories and generates almost one-sixth of all appeals in the twelve regional circuits. The court of appeals adjudicates about twenty-five hundred cases each year; more than nine hundred of them are decided by published opinions that can be cited as precedent. The decisions are made by as many as twenty-eight active judges, ten senior judges, and a long parade of visiting judges, almost invariably sitting in panels of three.

In theory, the large number of judges and the fact that decisions are made by panels of three should have no effect on the consistency of the law of the circuit. The reason is that the Ninth Circuit, like all the courts of appeals, is committed to the rule of intracircuit *stare decisis*: panel decisions are binding on subsequent panels unless overruled by the court *en banc*.<sup>1</sup> In addition, the court has put into place an elaborate series of mechanisms designed to maintain intracircuit consistency. Finally, where irreconcilable conflicts do develop, a mechanism is available to restore coherence to the law: review by an *en banc* panel of the court.

Notwithstanding all of the mechanisms and rules, many lawyers and trial judges believe that inconsistency continues to be a serious problem. For example, in a survey conducted for this volume, members of the Ninth Circuit Judicial Conference were asked if they agreed or disagreed with the statement, "When intracircuit conflicts do arise, the Court of Appeals generally resolves them through modification of opinions or *en banc* rehearings." Two-thirds of the district judges disagreed; among lawyer members the extent of disagreement was even higher. In contrast, the court of appeals judges tend to think that with occasional lapses the court has generally succeeded in maintaining consistency; only two of the twenty-one circuit judges who responded disagreed with the quoted statement.

Although the court of appeals judges may differ with their constituents on the extent of disuniformity in the court's decisions, they do not dispute the underlying premise: consistency in the law of the circuit is

<sup>1</sup>In some circuits a subsequent panel is permitted to overrule an earlier decision if the proposed opinion is circulated to the full court and the other judges agree (or do not vote for *en banc* rehearing). This procedure is sometimes referred to as a "mini *en banc*." See Steven Bennett and Christine Pembroke, "'Mini' In Banc Proceedings: A Survey of Circuit Practices," 34 *Cleveland St. L. Rev.* 531 (1986). Occasional *ad hoc* attempts by individual Ninth Circuit panels to invoke this procedure have always been rebuffed. There is a narrow exception to the general rule for panel decisions that are found to be inconsistent with intervening Supreme Court rulings. See *LeVick v. Skaggs Cos.*, 701 F.2d 777, 778 (9th Cir. 1983).



not only a virtue but a necessity if the system is to serve its intended functions. I share that view, and at the risk of reiterating the obvious, I note the principal concerns supporting the conclusion. First, the ideal of equality is violated when similarly situated persons receive disparate treatment because two panels of the same court have attached different legal consequences to facts that are identical in all relevant respects. Second, inconsistent appellate decisions create uncertainty about what the law requires or permits. That uncertainty encourages wasteful litigation; and where litigation cannot be avoided, the uncertainty adds to the costs and other burdens of court proceedings. Third, intelligent planning and structuring of transactions is frustrated when the relevant precedents in the governing jurisdiction give conflicting guidance on what the law is.

The values underlying these concerns are implicated far more seriously by conflicts within a circuit than by conflicts between circuits. If a district judge finds apparently conflicting authority from outside his circuit, he can ignore it, but if decisions within the circuit point in different directions, he must do his best to reconcile them. Similarly, a lawyer seeking to advise a client generally need not worry if another circuit has laid down a different rule, but if the apparently inconsistent holdings come from his own circuit, he ignores them at his peril.<sup>2</sup> The principal question addressed in this chapter, therefore, is whether the Ninth Circuit Court of Appeals succeeded in its efforts to maintain consistency in its law during the Browning years.<sup>3</sup>

### *Mechanisms for Avoiding Intracircuit Conflicts*

The measures adopted by the court of appeals to preserve uniformity can be broken down into three stages, with the second and third each involving successively greater commitments of judicial resources. First, a primary mechanism, designed to head off conflicts

<sup>2</sup>The distinction is not absolute, even when criminal penalties are involved. The Supreme Court sees no unfairness in convicting a defendant under an interpretation of a criminal statute rejected by the defendant's own circuit, as long as "the existence of conflicting cases from other Courts of Appeals [made a contrary decision by the Supreme Court] reasonably foreseeable." *United States v. Rodgers*, 466 U.S. 475, 484 (1984).

<sup>3</sup>For an earlier study, examining the subject from the perspective of the Ninth Circuit's judges, see Stephen L. Wasby, "Inconsistency in the United States Courts of Appeals: Dimensions and Mechanisms for Resolution," 32 *Vand. L. Rev.* 1343 (1979).

before decisions are issued, operates through the court's support staff and its three-judge panels. Next, backup procedures allow nonpanel judges to intervene without necessarily involving the full court. Finally, if all else fails, the safety valve of the en banc process gives all of the active judges a chance to participate in restoring coherence to the law.

The effort to maintain consistency begins in the Office of Staff Attorneys before any judge has seen a new appeal. Upon the filing of the briefs, the staff attorneys "inventory" the case using detailed issue-identification codes. This information is then fed into the computer, so that cases raising the same issue can be calendared before the same panel if scheduling constraints permit.<sup>4</sup> Where that is not possible, the different panels are informed of the pendency of the other cases.<sup>5</sup> Under the court's internal rules, "when identical issues are pending before two or more panels, the panel to whom the issue was first submitted has priority," and other panels are required to defer or vacate submission so that they can follow the law established by the first panel.<sup>6</sup>

The priority-of-submission rule comes into play only when later panels know that the issue has previously been submitted to another panel. Absent that knowledge, the first opinion to be filed controls. On occasion, confusion and ill feeling have been created when one panel published an opinion without realizing that one of the issues it addressed had been submitted to another panel at an earlier date. Successful operation of the rule thus requires accurate classification of issues by the staff attorneys and effective communication with the judges.

The inventory system works well overall, but it does not always prevent the situation of two panels considering the same issue at the

<sup>4</sup>For a more extended description of the inventory system, see Arthur D. Hellman, "Central Staff in Appellate Courts: The Experience of the Ninth Circuit," 68 *Calif. L. Rev.* 937, 957-64 (1980).

<sup>5</sup>The principal obstacle to having similar cases heard by the same panel is the court's practice of regional calendaring. Court sessions are held in San Francisco and Pasadena every month and in other cities at longer intervals. Cases are ordinarily scheduled for argument in the region or state of origin. Thus, if the same issue were to arise in cases from Oregon and Southern California, it would not ordinarily be possible to calendar them before the same panel. Even if the apparently similar cases come from the same district, simultaneous calendaring may be precluded because the appeals reach the court at different times or because one case is ready for argument long before the other.

<sup>6</sup>The rule now in force was not adopted until 1983. A similar rule was approved in August 1981 but rescinded a month later.



same time, each in ignorance of the other. This can happen for several reasons. In areas of the law characterized by elaborate reticulation of rules, the staff attorneys may not accurately predict which line of precedents will be viewed by the panel as most relevant. Novel issues may wind up in different classifications, especially if the cases are inventoried many months apart. Cases involving multiple issues present special problems, since the computer looks only for the first four, and an issue that appeared to be of lesser importance may turn out to be the one that is resolved differently by different panels. Procedural questions and those involving standards of review may cut across subject-matter areas in a way that does not become apparent until the opinions are published. Nor can the staff always anticipate the issues that may arise only if one of the questions emphasized by the parties is resolved in a particular way.

To a large extent, these limitations are unavoidable. Staff attorneys are not judges, nor can they devote the amount of time to a case that the judges do. Nonetheless, one reform might substantially improve the utility of the process: reclassification of cases upon the filing of the opinion. Although new decisions are made available to judges within days in slip opinion form and almost as quickly on computerized databases, these sources lack indexes or other finding tools. Moreover, the very issues that are most likely to fall through the cracks during the initial inventory (particularly issues of procedure, jurisdiction, and the scope of review) are equally likely to escape the eye of the judges as they browse through the slips. Finally, a written update from the staff attorneys' office would be especially useful during the period of greatest vulnerability: while the opinion is being reviewed by the nonwriting judges on the panel.<sup>7</sup>

Unlike the practice in some of the other courts of appeals, dispositions in the Ninth Circuit are not ordinarily circulated to nonpanel judges before filing. The only exception is when the staff attorneys have identified similar issues as currently pending before more than one panel. Then, if all works as it should, the opinion of the panel with

<sup>7</sup>This period may actually begin somewhat earlier, depending on the practices of the particular judge. Some judges have their law clerks prepare draft opinions that the judge then reviews and edits. Under this approach, a week or more may elapse between the time the law clerk finishes work and the time the judge puts the opinion in final form for circulation to the other panel members. Other judges do their own first drafts, then ask their law clerks to check the citations and look for errors or omissions. If the law clerk raises questions that the judge wishes to consider further, only limited additional research may be done before the opinion is sent to the other chambers.



priority of submission will be circulated to the other panels. Usually, the others will conform their dispositions to the first panel's holding, even to the point of abandoning a draft opinion that has reached an advanced stage of preparation. The upshot is that conflict is averted without the public's ever knowing that a contrary disposition was in the making.

Conformity does not always occur without some stress, however. Occasionally there are memoranda of protest or remonstrance before the turbulence subsides.<sup>8</sup> Moreover, if the issue is especially important, or if feelings run deep, the second panel may refuse to back down. Where that occurs, one or both panels will request en banc review so that a larger number of judges can establish the law of the circuit. This does not happen often, and the procedure is not necessary to prevent conflict, but it does provide an escape hatch for those situations where it is most obvious that differences in judges' "can't help" would otherwise control.<sup>9</sup>

The suggestion is sometimes made that for-publication opinions should be circulated as a matter of routine to all active judges before filing. But in a court that issues published opinions at the rate of more than seventy-five per month, the idea is not practical. Either the judges would give the opinions only the most superficial review, or the disposition of cases would be delayed to an extent that would understandably dismay litigants and the public.<sup>10</sup>

<sup>8</sup>Tension will not necessarily reflect disagreement over results. Frustration may occur when a panel that has completed its work quickly must wait for a panel that is proceeding at a slower pace to consider some antecedent or related issue. At one point the court considered modifying its rule to provide that the first panel would lose its priority if it did not reach a decision within a limited period of time. The change was not made, largely because of the court's strong commitment to panel autonomy and out of concerns for collegiality.

<sup>9</sup>In the six years 1981 through 1986 there were seven cases in which judges requested en banc review to settle an issue on which panels were prepared to differ. En banc hearing was granted in four of the cases.

<sup>10</sup>In the late 1980s it seemed to some court watchers that an equivalent practice had come in through the back door. A large number of cases, it appeared, were being amended after publication, sometimes more than once. The effect was to give published opinions a provisional status that in some ways created more uncertainty than the delays that would have been occasioned if the opinions had not been issued until nonpanel judges had had a chance to review them.

Amendments to a published opinion do not necessarily reflect disagreement within the court. Rather, a petition for rehearing may call attention to a mistake that must be corrected somehow. At the same time, the panel may continue to believe that the disposition is correct. Sometimes the judges struggle for months (occasionally aided by off-panel judges) in an effort to correct ill-advised or inaccurate statements without altering the result.

The second stage in the court's efforts to maintain uniformity thus begins with the filing of the panel opinion in slip form. Starting in 1985, these "slips" have been printed by a commercial firm in San Francisco and mailed to the circuit judges on the date of filing. Under section 5.3 of the court's General Orders (GO; the court's name for what other circuits refer to as Internal Operating Procedures), off-panel judges have twenty-one days from filing in which to communicate with the panel about concerns generated by the opinion. Judges expressing such concerns are not required to circulate their memoranda to the full court, though sometimes they do so.

The GO 5.3 procedure was not designed as a conflict-avoidance mechanism. Rather, its purpose is to give the panel a chance to correct misstatements or substantive omissions before the case is published in the Federal Reporter and even before a petition for rehearing is filed. If an off-panel judge has a "bottom-line disagreement" with the panel opinion, or believes that the opinion creates an intracircuit conflict or that the result is so wrong that an en banc hearing will be needed, the judge is expected to use the more formal procedures of GO 5.4, triggered by the filing of a petition for rehearing.<sup>11</sup> However, the line between misstatements or omissions, on the one hand, and conflicts or errors, on the other, is far from clear. Thus, judges who think that a panel opinion has muddied the law of the circuit do not always hold off in saying so until the losing litigant seeks to bring the problem to the attention of the full court. In at least five of the thirty-six cases that generated an en banc ballot in 1987, the exchange of memoranda between off-panel judges and members of the panel began before any petition for rehearing had been filed.<sup>12</sup>

The court's central legal staff also plays a role in this second phase of the effort to maintain uniformity. The court has instructed the staff to review all published opinions for potential conflicts with other opinions and to suggest modifications where appropriate to avoid inconsistency. From time to time staff attorneys do send memoranda calling panels' attention to apparent conflicts, and on occasion panels have made changes in their opinions in accordance with those suggestions. The court keeps no records on how often this happens, however, and

<sup>11</sup>Under the Federal Rules of Appellate Procedure, a petition for rehearing must be filed within fourteen days of the entry of judgment. Judgment is ordinarily entered on the date the opinion is filed. The time for filing a rehearing petition thus overlaps with the time in which judges may circulate GO 5.3 memos.

<sup>12</sup>For further discussion of communications between panel and off-panel judges, see Stephen L. Wasby, "Communication in the Ninth Circuit: A Concern for Collegiality," 11 *U. Puget Sound L. Rev.* 73, 104-6 (1987).



other staff duties generally take priority over the task of flagging possible inconsistencies. The responsibility for discovering conflicts thus rests primarily with the judges and with the lawyers.

### *The En Banc Process in the Ninth Circuit*

Notwithstanding their reliance on the conflict-avoidance mechanisms described in the preceding section, the court of appeals judges recognize that these devices will not always have the desired effect. When that occurs, the only remedy is to invoke the court's procedures for en banc hearing. Study of the en banc process should therefore shed light on the extent and significance of intracircuit conflict in the Ninth Circuit during the Browning years.

I have used the term *en banc process* rather than *en banc hearing* because there are really three levels of decision making. The first stage involves the determination whether to conduct a ballot on taking a case en banc. Any litigant may make the suggestion, but a vote is taken only if one or more judges request it. Second, there is the vote itself and the exchange of memoranda that precedes it. At that stage all active judges are eligible to participate, and if a majority of the non-recused judges vote in the affirmative the case will be heard en banc. Finally, there is the en banc court itself. That consists of eleven judges, the chief judge and ten other judges selected at random.

### The Origins of the En Banc Rule

In the Ninth Circuit, as in the other courts of appeals, cases are ordinarily "heard and determined" by three-judge panels (28 U.S.C. § 46(c)). Under the Federal Rules of Appellate Procedure, en banc hearing "is not favored and ordinarily will not be ordered except (1) when . . . necessary to secure or maintain uniformity of . . . decisions or (2) when the proceeding involves a question of exceptional importance." Within fourteen days of the filing of a panel opinion, litigants are permitted to "suggest" rehearing en banc,<sup>13</sup> and when they do, the petitions are circulated to all active judges. However, lawyers have not proved helpful in identifying true disuniformity or questions of "exceptional importance."<sup>14</sup> Lawyers' petitions may call attention to cases

<sup>13</sup>Litigants are also permitted to suggest initial hearing en banc, but it is rare for them to do so and even rarer for the court to accept the suggestion.

<sup>14</sup>See Neil D. McFeeley, "En Banc Proceedings in the United States Courts of Appeals," 24 *Idaho L. Rev.* 255, 267-74 (1987-88).

that warrant a second look, but beyond that first stage the entire en banc process rests with the judges.

Traditionally, the determination whether to hear a case en banc has been made by the same group of judges that would decide the merits if the hearing is granted: all the circuit judges in regular active service.<sup>15</sup> However, when Congress expanded the Ninth Circuit Court of Appeals from thirteen to twenty-three judgeships in the Omnibus Judgeship Act of 1978, it also made special provisions for large circuits. Section 6 of the act authorized any court with more than fifteen active judges to "perform its en banc function by such numbers of members of its en banc court as may be prescribed by rule of the court of appeals." Although two of the twelve circuits are now eligible to exercise this option, only the Ninth Circuit has done so. Under Circuit Rule 35-3 (formerly Rule 25), the en banc court<sup>16</sup> consists of the chief judge and ten additional judges drawn by lot from the active judges of the circuit.<sup>17</sup> The power to select cases for en banc hearing remains, as the statute apparently requires, with the full court.

The present Ninth Circuit rule emerged from lengthy discussion that began even before Congress enacted the authorizing legislation.<sup>18</sup> As early as May 1977, when the omnibus judgeship bill was stalled by an impasse over division of the Fifth Circuit,<sup>19</sup> some members of the Ninth Circuit Court of Appeals were exchanging memoranda on possible methods for composing an en banc court of less than all the active judges.<sup>20</sup> In February 1978 the matter was included on the agenda for the "Symposium," the judges' annual retreat, which took place at Rancho Santa Fe near San Diego.<sup>21</sup> There the judges gave their ap-

<sup>15</sup>There is one exception to this equivalence: under current law, senior judges do not vote on the decision to go en banc, but they are "eligible to participate . . . as a member of an in banc court reviewing a decision of a panel of which [the particular] judge was a member." See 28 U.S.C. § 46(c).

<sup>16</sup>Circuit Rule 35-3 refers to the "en banc court." The court's internal rules sometimes refer to the "en banc panel."

<sup>17</sup>The rule provides that any judge who is not drawn for any of three successive en banc courts will automatically be placed on the next en banc court.

<sup>18</sup>The account in this chapter is based on interviews and on internal memoranda that were made available to me with the stipulation that I not quote from confidential material or identify individual judges' positions.

<sup>19</sup>See Deborah J. Barrow and Thomas G. Walker, *A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform* 195 (Yale University Press, 1988).

<sup>20</sup>A few of the judges had discussed the subject at hearings held by the Commission on Revision of the Federal Court Appellate System (Hruska Commission) in 1975. The commission endorsed the basic idea of a limited en banc court in its June 1975 report but opted for seniority as the basis for selecting the members.

<sup>21</sup>For an account of the origins of the Symposium, see Chapter 14.



proval to proposed legislation that would have explicitly authorized the Ninth Circuit to reduce the number of judges on the en banc court.<sup>22</sup> They then turned to the composition of the limited en banc court and debated the issue at some length. When Judge Browning indicated that he would like to have a proposed rule to present to Congress if asked, the judges adopted in principle a rule that provided for a nine-member en banc panel consisting of the chief judge, the members of the original three-judge panel, and additional judges selected by lot for each case.<sup>23</sup>

The impasse in Congress was finally broken by a compromise provision that became section 6 of the Omnibus Judgeship Act.<sup>24</sup> The compromise was announced on September 20, 1978, and within days the matter was placed on the agenda for the November meeting of the court. Some discussion took place at that meeting, but the judges recognized that they needed more time to think about the issues individually before they would be ready to confer as a group, and the topic was put off until December. When the judges convened for their regular December meeting, however, they concluded that the complexity and sensitivity of the issues required still further thought and, perhaps, a more informal atmosphere for discussion. The subject was thus set for consideration at the Symposium scheduled for February 1979, again at Rancho Santa Fe.

In the meantime, ideas and comments flew back and forth in a remarkable exchange of memoranda. From late October through early January, at least eleven of the thirteen active judges and three senior judges took part in a vigorous and earnest debate over the best way of constituting the en banc court.<sup>25</sup> Significantly, there was no debate over two crucial points. First, no judge questioned the threshold decision that the court would exercise the option afforded by the new law to reduce the size of the en banc court.<sup>26</sup> Second, all judges agreed that

<sup>22</sup>This particular proposal appears to have been drafted within the court. Similar proposals had been discussed in correspondence between judges and members of the House Judiciary Committee in connection with the pending judgeship bill.

<sup>23</sup>It is not clear whether the draft rule was ever submitted to Congress. The conference committee considering the omnibus judgeship bill did discuss various ways of composing a limited en banc court. See *Congressional Record*, Oct. 7, 1978, pp. 34546-47 (remarks of Sen. Kennedy).

<sup>24</sup>Barrow and Walker, *supra* note 19, at 215.

<sup>25</sup>Strangely enough, the fact that the judges had adopted a rather detailed rule "in principle" at the February 1978 Symposium appears to have carried no weight with anyone. None of the memoranda even allude to the earlier decision.

<sup>26</sup>I cannot find any record of the court's actually having voted on this point before the

the determination whether to take a case en banc would continue to be made by the full court.<sup>27</sup> Of lesser importance, it was also assumed that the chief judge would serve as a member of the en banc court.

Two issues received greatest attention in the exchange of memoranda. The first was the size of the en banc court. The numbers discussed ranged from seven to fifteen, with nine receiving the greatest support. Judges who placed a high value on efficiency pressed for an en banc court of seven or nine to avoid the delays and procedural complications inherent in a larger decisional group. Other judges argued that unless the en banc court included a majority of the full court of twenty-three it would not satisfy the values of representation and participation.

The second and more complex question was how the judges should be selected. Two basic approaches soon emerged. Under the "ad hoc" model, the judges (other than the chief judge) would be chosen on some random basis for each en banc case. Under the "permanent rotation" system, the judges would serve for a designated period of time, with new judges rotating on at staggered intervals.<sup>28</sup>

Superimposed on these questions were others. Should members of the original three-judge panel sit by right on the en banc court? What role, if any, should seniority play in the selection of the judges? For example, should the judges be chosen from two separate pools, one composed of the more senior half of the active judges, the other composed of the junior group?<sup>29</sup> Once a case was selected for en banc consideration, should other members of the court be permitted to participate informally in the en banc decisional process or to issue their own opinions?

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Pasadena Symposium in March 1980. At the 1978 Symposium the judges did express support for legislation authorizing a limited en banc court, but they did not commit themselves to adopting such a provision; in any event, the vote could not have been binding under the 1978 act until a sixteenth judge had been appointed. From all available evidence, it appears that there was a consensus from the beginning that the court would implement section 6.

<sup>27</sup>Some judges flirted briefly with the idea of requiring less than a majority of the active judges to select a case for en banc consideration, along the lines of the Supreme Court's "rule of four." This approach appeared to run contrary to the language of the statute, and no mention of it appears in the later memoranda.

<sup>28</sup>"Permanent rotation" was the phrase used by the judges, although as indicated in the text, only the chief judge would sit as a permanent member.

<sup>29</sup>Early in the debate, some judges argued that judges should not become eligible for the en banc court until they had served on the circuit for a year. This idea aroused opposition and soon disappeared.



After four months of exchanging views largely through written memoranda, the debate climaxed in a four-hour discussion at the February Symposium. In what must have been an exhilarating if exhausting session, the judges began by talking about the function and purpose of the en banc procedure, the criteria for selecting en banc cases, the benefits derived from the process by the court, and criticisms of current procedures. The discussion then turned to the composition of the limited en banc court. There was widespread recognition that in designing a system the judges would have to take into account two competing values. On one side, the interest in stability and continuity suggested a rotation system. On the other, the interest in collegiality pointed to the ad hoc model, which would enable all members of the court to participate actively in the process within a short period of time.

In the course of the meeting, however, a third consideration—one that appears not to have been mentioned at all in the initial memoranda—came to the fore: the desirability of avoiding distortion in the voting on taking a case en banc. The premise was that the determination whether to hear a case en banc should not turn on the anticipated result; the concern was that knowledge of who would sit on the en banc court would lead at least some judges to vote on that basis. The judges also began to realize that a random selection of the en banc panel after the vote on rehearing would probably produce fewer en bancs. Because the members of the court would not know who the deciders would be, they would not vote for en banc unless there was a true conflict in the circuit or the case was so clearly important that it had to go en banc no matter who would sit on the panel.<sup>30</sup>

When the discussion ended, it appeared that the idea of a permanent rotation system, with changes or rotations of some members of the en banc court every six months and eventual service by all active judges within a two-year period, had garnered general support. At the same time, the judges were becoming increasingly sensitive to the concerns about maintaining collegiality and avoiding distortion in the initial en banc voting—concerns that could most easily be met through a pure ad hoc system. The judges may also have been influenced by the fact that the court was committed to random assignment of cases to

<sup>30</sup>Although there is no evidence that the judges considered the point, the actual operation of the rule suggests that "voting in the dark" (as one judge termed it) would also permit en banc rehearing when a panel's decision was so obviously aberrant that it would be overturned by a majority no matter who was chosen. See, e.g., *Jensen v. City of San Jose*, 806 F.2d 899 (9th Cir. 1986), reversing 790 F.2d 721 (9th Cir. 1986).

three-judge panels. If the policy made sense in that context, as just about everyone agreed it did, why should it not be extended to en banc business?<sup>31</sup> But there was no need to reach an immediate decision.<sup>32</sup> The judges had already agreed not to take action until the sixteenth judge had been appointed, and now one member of the court was asked to draw up and present for future consideration three options for limited en banc procedures.

Consistent with the results of the “consensus votes,” the task was assigned to a judge who had championed the permanent rotation system. But when the judge reported to his colleagues two weeks later, he had changed his mind. After further reflecting on the argument that many judges would find their votes on en banc hearings colored by knowledge of who would sit on the en banc court, the judge concluded that the ad hoc system was preferable, at least initially. Further thought had changed other minds as well, and the court was now ready to move toward a new consensus in favor of random selection.

These matters stood for nearly a year while President Carter proceeded at an agonizingly slow pace to nominate judges for the positions created by the 1978 legislation. In June 1979 Browning summed up the situation in a speech to a group of lawyers:

The court has . . . devoted many hours to considering the size, composition, and procedures of an en banc court of less than the full court of 23. We have gone through several changes of mind and come to about this: (1) the most acceptable model *may* be an en banc court of nine, consisting of the chief judge and eight associates drawn by lot; (2) further consideration . . . should await the arrival of our new judges so they too may participate in the discussions . . . ; and (3) the approach must be pragmatic—whatever proposal is adopted should be experimental, limited to no more than a year, for in this area experience is essential, and experience is now totally lacking. [Emphasis in original.]

The debate over the limited en banc rule resumed in early 1980, after nine of the new judges had joined the court. At the February court and

<sup>31</sup>The ad hoc model had the additional virtue of simplicity, and after wrestling at length with the mechanics of the alternative approaches, the judges may have placed a higher value on simplicity than they did when the meeting began.

<sup>32</sup>The 1979 Symposium did resolve one issue: it gave the coup de grace to the idea—which at one time had wide support—that judges who were members of the original panel should sit by right on the en banc court. No one advanced this suggestion when the discussions resumed in 1980.



council meeting the judges considered the issue briefly, then agreed to continue the discussion and reach a decision at the court's Symposium the following month in Pasadena. Again memoranda were circulated in advance of the meeting, although fewer judges participated and the effervescence that characterized the earlier interchange had abated considerably. One new idea came to the fore: several judges thought that the rule should include some provision for rehearing by the full court, either as an option in the initial voting or as a safety valve after the limited en banc panel had issued its decision.

When the judges convened in Pasadena, they began by discussing the composition of the en banc court in general terms, then took a series of votes to shape the en banc rule. The first step was to accept the basic plan for a limited en banc court. This the judges did, but in accordance with the late-emerging idea they tempered the concept by allowing for the possibility of a second rehearing by the full court.<sup>33</sup> Next came the issue of size. A motion that the en banc court consist of nine judges was defeated, as was a motion that set the number at thirteen. A proposal that the en banc court consist of a number constituting a majority of the full court failed on a tie vote. In retrospect, it is hard to believe that the judges would have adhered to a rule that for the foreseeable future would have yielded an even number (twelve out of twenty-three) and a real prospect of affirmances by an equally divided court. In any event, the options were rapidly diminishing, and the judges agreed that the en banc court would consist of eleven judges.

Finally the judges turned to the selection process. After formally agreeing that the chief judge should be a member of every limited en banc panel, the judges considered a motion that the remaining ten judges be chosen by random selection, with a corrective mechanism to ensure that no judge would be excluded too long from the panels. By this time, the outcome was no longer in doubt. The motion passed, and the permanent rotation model, once the preference of a majority, died without ever coming to a vote. The session came to an end with the approval of a motion authorizing Judge Browning to appoint a committee to draft rules of procedure that would embody the decisions just reached.

<sup>33</sup>In allowing for the possibility, the judges did not anticipate that the safety valve would be used very often. Probably not more than one or two judges thought that the full court should ever overrule the limited en banc court except perhaps in extremely unusual and unforeseeable circumstances.

Immediately upon his return to San Francisco, Browning designated three judges to serve on the committee, and two weeks later the committee circulated the draft of a proposed rule, along with revisions of the court's internal procedures relating to en bancs. The drafts were approved in principle at the court's April meeting, with the understanding that the committee would make several changes in wording and style. The committee proceeded in accordance with those instructions but concluded that the emendations it had made were substantial enough to warrant further scrutiny by the full court.<sup>34</sup> The judges considered the matter again at their June meeting and approved in principle the revised version. Meanwhile, the proposed procedures were circulated widely to district judges, members of the bar, and the public. Responses were received from lawyers and bar associations; comments and suggestions were also submitted by the court's staff. Final approval, with further slight revisions, came at the court meeting of August 15. Four days later the Clerk of Court drew names for the first limited en banc court. The historic experiment was under way.

The plan adopted by the court in August 1980 closely resembled the one outlined by Browning in June 1979, which in turn largely tracked the resolution suggested in the memorandum prepared for the judges after the 1979 Symposium. Three changes had been made, however. The number of judges on the en banc court was increased from nine to eleven; the idea of adopting the rule for only a limited period of time was dropped; and the provision for a second rehearing by the full court was added. The abandonment of the "experimental" label is particularly striking. The probable explanation is that after talking about the proposal for so long and in such detail the judges no longer saw it as such a leap in the dark; at the Symposium there was not even a motion to limit the time during which the rule would remain in effect. (The judges may also have felt that such a motion was unnecessary, on the theory that whatever the court did, it could undo.)

The court has now been operating under the plan for almost a

<sup>34</sup>Curiously, the rule as initially drafted by the committee provided for en banc hearing by the full court as an alternative to hearing by the limited en banc court. This option was not reflected in the proposed revisions to the General Orders, and when the disparity was called to the judges' attention, they revised the draft rule to make clear that rehearing by the full court could be ordered only after a decision by the limited en banc court. At first blush it is puzzling that the drafting committee could have misunderstood the intent of the judges as expressed at the Symposium, but perhaps the decisions did not emerge from the discussion with total clarity. For example, at least one of the judges who was present did not recall that a consensus had been reached for allowing rehearing by the full court under any circumstances.



decade. No judge has ever requested rehearing by the full court of a decision by the limited en banc court,<sup>35</sup> nor has the rule been revised in any substantial way. When the court expanded from twenty-three to twenty-eight judgeships, there was some talk of increasing the number of judges on the en banc court, but the proposal never reached the stage of a formal motion.<sup>36</sup> Later the possibility was raised of eliminating the provision that the chief judge would sit on every en banc panel. After a discussion that one participant remembers as "quite spirited," the judges chose not to make the change.<sup>37</sup>

### The Operation of the En Banc Process

Even before adoption of the limited en banc rule, the Ninth Circuit Court of Appeals had developed an elaborate set of procedures to govern the en banc process. The rules occupied eight pages of the General Orders, and a member of the court, designated the "en banc coordinator," supervised compliance with deadlines and monitored

<sup>35</sup>In July 1980, while the limited en banc rule was in the final stages of consideration, the judges voted to deny rehearing by the full court of a case submitted to the en banc court before any of the new judges had taken their seats. See *United States v. Penn*, 647 F.2d 876, 889 (9th Cir. 1980) (Fletcher, J., dissenting from denial of rehearing en banc). The 5-4 decision generated an intense emotional response, and almost certainly it would have been reversed if the full court had heard the case. Under these circumstances, the denial of further review signified a genuine commitment on the part of the judges to the principle underlying the new rule: a willingness to accept decisions with which they disagreed made by less than majority of the court.

On one later occasion a judge asked for a vote on withdrawing a case from the limited en banc court before it had issued a decision. The request was soon withdrawn "in the interest of institutional unity," and no balloting ever took place.

<sup>36</sup>A search of the court's records reveals no evidence that the idea was ever considered by the court's executive committee, let alone by the full court.

<sup>37</sup>Having the chief judge sit on every en banc panel was seen as serving at least three important purposes. First, it maintained continuity in procedure, especially in the assignment of opinions. It was thought that the chief judge would be better informed than anyone else about the caseloads of individual judges, the number of en banc opinions previously written by those judges, and the various subjective considerations that go into the distribution of work. Second, the court could benefit from having the person with the longest institutional memory presiding. Finally, at least some judges perceived a symbolic value in having the chief judge preside when the court was speaking as the whole court in the lawmaking role.

Other judges argued in favor of a full random draw presided over by the senior person drawn. Apparently, a majority of the court did not feel that the abstract value of undiluted randomness outweighed the perceived advantages of continuity in the central seat.

the constant flow of memoranda. In the eight years between the expansion of the court and the transfer of leadership to Judge Goodwin, the rules grew into an eighteen-page maze of such complexity that even experienced judges sometimes got lost.<sup>38</sup>

At the risk of oversimplification, I have chosen to treat as the starting point for the en banc process the panel's circulation of a notice pursuant to GO 5.4(b)(3) recommending rejection of a party's suggestion for rehearing en banc. Until that point, nonpanel judges who express concerns about an opinion are not obliged to share their memoranda with the full court. Moreover, although copies of an en banc suggestion are forwarded to all active judges immediately upon filing, nonpanel judges are not supposed to circulate memoranda commenting on the suggestion until the panel has expressed its view.

Once the 5.4(b)(3) notice is sent, a judge who has objections to the panel disposition can signal his concerns in one of two ways: through a "stop-clock" memo or through a request for en banc review. According to the General Orders, the purpose of a stop-clock memo is to suggest "further reflection by one or more judges [that] may be necessary or helpful in aid of early disposition of a possible en banc question." More concretely, the procedure is designed for cases in which the off-panel judge thinks that the panel may be able to meet his concerns by amendment and thus avoid an en banc vote. The judges are discouraged from using the stop-clock procedure to gain additional time in cases where from the beginning the concerns are so substantial that an en banc call is almost inevitable.

Stop-clock memos are circulated to all active judges, sometimes prompting further suggestions to the panel by other members of the court, still without a call for an en banc vote. Through this device, apparent inconsistencies in language or approach can be cleaned up without any public indication that judges other than those sitting on the panel have taken part in the process. Or the judge who initiated

<sup>38</sup>To some extent the increased complexity was inevitable: matters that can be handled informally in a court of thirteen require more structured processes in a court of twenty-three. However, some judges had the sense that the shifting ideological makeup of the court—an initial infusion of liberals under President Carter, followed by conservative appointments under President Reagan—also played a role. As one judge put it, "Certain things weren't done [in earlier times]. Judges started playing hardball under the old, more open-ended rules," and new rules had to be adopted "more or less under emergency conditions" to address particular problems. Not surprisingly, a series of ad hoc revisions over a period of eight years did not yield a particularly unified or coherent body of rules. (This type of rule growth is not unique. See *Aside, "The Common Law Origins of the Infield Fly Rule,"* 123 *U. Pa. L. Rev.* 1474 (1975).)



the process may be persuaded that the panel decision is acceptable after all.

The court kept no records on "stop clocks" before 1987. During the twelve-month period beginning April 1, 1987, stop-clock requests were filed in forty-seven cases. Nineteen of these led to requests for en banc rehearing. Amended versions of opinions were published in twelve of the remaining cases. On the basis of available records, it is not possible to determine how many of those amendments were triggered by assertions of intracircuit conflict; however, examination of the amendments suggests that concerns about conflict probably played only a minor role in the intracourt debates.

If the stop-clock correspondence does not resolve the disagreement, or if the gulf is so wide that the procedure would be a waste of time, the next step is to request an en banc vote. Even at this stage, the panel may amend its opinion in a way that satisfies the requesting judge. At this point, too, the parties are brought back into the picture. If the panel has not previously called for a response to the losing litigant's en banc suggestion, it does so. And if the en banc request comes *sua sponte*, both parties are given the opportunity to comment on the appropriateness of the case for en banc hearing.<sup>39</sup>

The formal request and the receipt of responses from the parties initiate the period during which the judges circulate memoranda supporting or opposing en banc review. Sometimes only one or two memoranda are circulated; other cases generate a blizzard of paper that may tax even the court's electronic mail system. The exchange of views may lead to modification of the opinion, and in some cases the requesting judge withdraws the request for an en banc vote.<sup>40</sup> Here, however, the process may leave its traces in the publication of an amended opinion with a notation that rehearing en banc has been denied.

Only if all of these procedures have failed does the court actually vote on a judge's request for en banc hearing. Those votes are, of course, important, but as the preceding account demonstrates, they represent only part of the en banc process in the Ninth Circuit. And in

<sup>39</sup>For most of the 1980s, no provision was made for ascertaining the views of counsel in cases in which the en banc process was initiated within the court. Only in August 1987 was the rule changed to ensure that the lawyers would have their say on whether the case was en banc worthy.

<sup>40</sup>Occasionally, a request is withdrawn to give the panel a chance to do further work on the case, only to be renewed because the new opinion does not satisfy the requesting judge's concerns.

considering the data on en banc grants and denials presented in the next section, it is important to remember that these are not the only cases in which judges other than those on the regular panel have participated in the formulation of the court's precedents.

### The Results of the Process: An Empirical Study

To ascertain the role of the en banc process in the court's efforts to maintain a consistent body of law, I examined all of the cases in the six years 1981 through 1986 in which a judge requested an en banc ballot.<sup>41</sup> This means that I excluded cases in which litigants suggested en banc rehearing but failed to persuade even a single judge that the procedure was warranted. Given the routine nature of many of these suggestions and the widespread misunderstanding of the purposes of en banc review, I have no doubt that casting the net wider would have uncovered at best a tiny number of additional unresolved conflicts at the cost of an enormous amount of effort. I am more troubled by the omission of cases that generated stop-clock memoranda or other exchanges of views short of an en banc ballot, but as previously indicated, the court kept no comprehensive records of those cases, and consideration of them must await another day. (I did include cases in which a judge asked for an en banc vote but withdrew the request before polling was completed.)

For purposes of the study, I was given access to the memoranda exchanged by the judges in the course of deciding whether to grant en banc review. I used those memoranda to identify the issues that were thought to require en banc resolution and the reasons one or more judges thought en banc review was necessary. Obviously, I cannot quote from those memoranda in a way that would identify particular cases or attribute positions to individual judges. The reader will have to take on faith the accuracy of my characterizations.

*The fate of en banc requests.* The first and most important finding is that en banc ballots were rarely requested and even more rarely successful. In the six years of the study there were fewer than 160 cases in which a judge called for a vote on en banc rehearing.<sup>42</sup> Fewer than

<sup>41</sup>A few cases generated two separate requests at different stages in their history, e.g., before and after the panel had issued its opinion or before and after the Supreme Court had directed reconsideration. One case was the subject of three separate ballots.

<sup>42</sup>For three reasons, the figures given in this section are not exact. First, the court kept no single comprehensive list of en banc calls during this period. My own list was



one-third of those cases—forty-nine in all—were actually heard en banc. In that same period, the court adjudicated more than twelve thousand cases, five thousand of which received published opinions. This means that en banc decisions accounted for less than 1 percent of the court's precedential rulings.

The raw figures alone thus suggest that en banc hearings played only a minor role in maintaining consistency in the law of the circuit. Scrutiny of the opinions and internal memoranda strongly reinforces that conclusion. More than half of the en banc requests made no assertion at all that the panel decision created an intracircuit conflict. In fifteen cases (about 10 percent of the total) the requesting judge acknowledged a controlling circuit precedent and sought en banc review for the purpose of overruling it.<sup>43</sup> The other nonconflict cases were a varied lot. In some, the memoranda emphasized the precedential significance of the panel's decision;<sup>44</sup> in others, the judges pointed to the number of people who would be affected,<sup>45</sup> the likelihood of

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compiled from two others, and it is possible that a case here and there slipped through the cracks. Second, there is room for disagreement over which cases to count. Should a case be counted if the request was withdrawn before the completion of the balloting? (As indicated in the text, I did count these cases if I knew about them, but it is possible that not all such requests were recorded in the lists I had, especially in the early years of the study period.) What about cases that were the subject of more than one en banc ballot? (Generally, if the balloting was completed, I counted the calls separately, but if the balloting was interrupted while the panel resumed work on the case, I did not.) Finally, the files of the cases I did study were not necessarily complete, and missing memoranda might well have caused me to modify some of my characterizations.

<sup>43</sup>It has been suggested that en banc hearing in cases of this kind does serve, albeit indirectly, to foster intracircuit consistency. The argument is that if the court fails to use the en banc process to correct an old precedent that a majority of the judges believe is wrong, the old case will die a slow death over the years by being distinguished in one decision after another. The effect will be to create confusion in the law of the circuit. I can see no ready way of testing this hypothesis: in cases of this kind in which en banc review was rejected, it is impossible to determine whether the judges were willing to live with an erroneous precedent or simply did not agree that the old case was wrong.

<sup>44</sup>Illustrations of this pattern can be seen in published dissents from denial of rehearing en banc. See, e.g., *Miller v. Rumsfeld*, 647 F.2d 80, 90 (9th Cir. 1981) (Norris, J., dissenting); *California State Council of Carpenters v. Associated General Contractors*, 648 F.2d 527, 545 (9th Cir. 1981) (Sneed, J., dissenting), rev'd, 459 U.S. 519 (1983); *International Olympic Comm. v. San Francisco Arts & Athletics*, 789 F.2d 1319, 1326 (9th Cir. 1986) (Kozinski, J., dissenting), aff'd, 483 U.S. 522 (1987); *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 809 F.2d 584 (9th Cir. 1987) (Noonan, J., dissenting).

<sup>45</sup>See, e.g., *United States v. Harvey*, 711 F.2d 144, 145 (9th Cir. 1983) (Kennedy, J., dissenting from denial of rehearing en banc).



Supreme Court review if the panel decision remained unreversed,<sup>46</sup> or simply the egregiousness of the panel's error.<sup>47</sup> The common thread was the absence of any suggestion that the panel decision posed an immediate threat to uniformity within the circuit.

This leaves barely seventy-five cases in six years in which a judge requested en banc hearing to resolve an intracircuit conflict. But even that figure overstates the role of conflict resolution in the en banc process. In more than one-quarter of the cases that I have classified as involving claims of conflict, concerns about inconsistency were clearly secondary to other reasons for questioning the panel decision. For example, in one case the initial memorandum described the issue as one of "great importance" without pointing to a conflict; a later memorandum by another judge went no further than to say that the panel decision was "not in keeping with the spirit of" a Ninth Circuit precedent that involved very different facts. In at least two of the "conflict" cases that did receive en banc consideration, the en banc opinion made no mention of the allegedly inconsistent decisions.

En banc requests that claimed intracircuit conflicts had about the same success rate as en banc requests generally: one in three. Of the successful calls, however, fewer than twenty generated an en banc decision that actually resolved a conflict.<sup>48</sup> In addition, three requests led panels to change the result of published dispositions, after which the requests were withdrawn. In about a dozen other cases the panel amended the opinion without changing the result; with two exceptions the modifications did not satisfy the requesting judge. Overall, there were no more than thirty cases in six years in which the en banc process led to the reversal or overruling of a decision asserted to be in conflict with another precedent.<sup>49</sup>

<sup>46</sup>In two of the cases that generated published dissents from the denial of en banc rehearing, the dissenting judges pointed out that the Ninth Circuit decision had created a conflict with another circuit. Both cases were reviewed by the United States Supreme Court. *Financial Inst. Employees v. NLRB*, 750 F.2d 757, 758 (9th Cir. 1985) (Kennedy, J., dissenting), *aff'd*, 475 U.S. 192 (1986); *Pangilinan v. INS*, 809 F.2d 1449 (9th Cir. 1987) (Kozinski, J., dissenting), *rev'd*, 108 S. Ct. 2210 (1988).

<sup>47</sup>See, e.g., *Students of California School for the Blind v. Honig*, 745 F.2d 582 (9th Cir. 1984) (Sneed, J., dissenting), *vacated*, 471 U.S. 148 (1985).

<sup>48</sup>An en banc decision was counted as having resolved a conflict if it overruled a precedent that the judges viewed as inconsistent with other Ninth Circuit cases or if it reversed the original panel *and* cited with approval an earlier ruling that was said to be in conflict with the panel decision.

<sup>49</sup>Arguably, the tally should include the seven cases in which en banc voting was

*The effect of en banc decisions.* When I began work on this project, I thought that an important part of the study would be to determine whether en banc decisions had succeeded in bringing consistency to areas of the law previously characterized by disarray. In light of the findings discussed thus far, that inquiry becomes largely irrelevant. The point is well illustrated by immigration law, the area most often mentioned by people who think that intracircuit conflict is a problem in the Ninth Circuit. In the six years of the study, judges requested en banc review in seventeen immigration cases, more than in any other area of the law except search and seizure. But rehearing was granted in only three of the cases, and none of them proved to be a major precedent.<sup>50</sup> Contrariwise, several immigration cases in which rehearing was denied played central roles in the later development of the law.

Outside of immigration law, no more than a dozen of the en banc decisions during the period of the study can be said to have become major reference points in the work of the court. The two most often cited opinions involved standards of appellate review.<sup>51</sup> Three cases, argued on the same day in 1984, attempted to clear up the admitted disarray in the court's decisions on the relevance of state remedies to the availability of relief under the Civil Rights Act of 1871.<sup>52</sup> There were six en banc rulings on searches and seizures and three on employment discrimination, but only one in each group proved to be a significant precedent.<sup>53</sup> In many important areas of federal law there was not a single en banc decision during the period of the study. Among these were antitrust, labor preemption, freedom of speech, freedom of religion, and police interrogation.

The conclusion is inescapable: en banc decisions contributed only

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triggered by the recognition that two panels with similar issues under submission were prepared to reach different results. See text at note 9. However, the judges appear to have assumed that, if en banc review was denied, one panel would back off, and indeed that is what happened in the three cases in which the request failed to gain a majority.

<sup>50</sup>The court also granted en banc review of three cases involving constitutional issues arising out of immigration proceedings. Two of these washed out without a decision on the merits, and the third was reversed by the Supreme Court.

<sup>51</sup>These cases, *United States v. McConney*, 728 F.2d 1195 (9th Cir. 1984), and *Matter of McLinn*, 739 F.2d 1395 (9th Cir. 1984), are discussed in detail in Chapter 2.

<sup>52</sup>The principal case was *Haygood v. Younger*, 769 F.2d 1350 (1985).

<sup>53</sup>The one important search and seizure case was *United States v. McConney*, better known for its holding on standards of appellate review. The employment discrimination case was *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987), rev'd on other grounds, 109 S. Ct. 2115 (1989).



minimally to the preservation of uniformity in the law of the circuit. But does that mean that the en banc *process* was a failure? Not necessarily. On the contrary, one possible explanation for the low incidence of en banc calls is that the mere availability of en banc review had a restraining effect on the three-judge panels. Judges knew that if they strayed from the law as established by earlier decisions, they would expose themselves to internal attack, an en banc call, and perhaps to the public rebuke of reversal by the en banc court. As a result, notwithstanding the hundreds of shifting three-judge panels and the widely perceived ideological division within the court, there simply were not very many intracircuit conflicts.

That is one way of interpreting the data, but it is not the only way. To begin with, some people will find it implausible if not ludicrous to suggest that the prospect of en banc reversal would ever influence life-tenured Article III judges to reach a decision other than the one indicated by their own reading of the applicable authorities. The phenomenon would seem especially improbable in the Ninth Circuit, where the composition of the en banc court depends on the luck of the draw and the judges have no way of knowing at the stage of panel deliberations (or indeed at the time of voting on en banc rehearing) who would sit on the particular case if it did go en banc.

Fear of reversal, however, is not the only way in which the en banc process may have affected the decisions of three-judge panels. There can be no doubt that the judges of the Ninth Circuit accept the principle of intracircuit stare decisis as an essential rule of the institution. At almost every Symposium, with no outsiders present, the judges "pray with each other" on the subject and renew their commitment to consistency. Against that background, the en banc process described in this chapter may have influenced the court's work in a way that the numbers cannot measure. Time and again, en banc requests generated thoughtful exchanges over the scope of a precedent and the obligations of stare decisis. Often the discussion was couched in a personal vein and manifested a self-conscious mode of analysis seldom seen in published opinions.<sup>54</sup> This flow of memoranda served as a constant reminder that to ignore relevant cases or draw untenable distinctions was to violate the underlying institutional and collegial agreements that bound the court together. The en banc process could thus be

<sup>54</sup>My impression is that with rare exceptions the memoranda exchanged in the en banc process were written by the judges themselves, with little assistance from law clerks.



viewed both as an instrument and as a symbol that helped the judges to internalize a commitment to consistency.

Yet such a commitment, even if widely shared, would not necessarily have kept intracircuit conflicts at the low level suggested by the en banc data. It is one thing to adhere to *stare decisis* as a principle; it is another to follow it in practice. Some judges may have been more concerned about reaching “correct” results in individual cases than about maintaining consistency between cases. Or the judges may have taken an extremely tolerant view of what constitutes a conflict. Or—of particular significance in the present context—the judges may have acted on a shared sense that the court could not increase its en banc activity in any significant measure without impinging dangerously on the time available for panel dispositions.

The data presented in this section tell us that during the period of the study the court was resolving conflicts through the en banc process at the rate of about five a year. The question that remains is whether this figure approximates the rate at which conflicts were created. Was the incidence of conflict really that low, or does the rather modest level of en banc activity reflect an unwillingness or inability on the part of the judges to use the process to maintain consistency? To find out, I undertook an empirical study not limited to en banc cases.<sup>55</sup>

### *Defining the Intracircuit Conflict*

The first step in measuring the extent of inconsistency in the Ninth Circuit’s panel decisions is to define the intracircuit conflict. Scholars, lawyers, and judges have struggled for years to answer the question, What is a conflict between circuits? The inquiry is no less difficult when the search is for conflicts within the circuit.

At one end, some people will look at a pair of cases involving the same kind of legal question, and if they see that the cases reach different results, immediately their suspicions are aroused. Their suspicions ripen into certainty if they read the cases and discover that the language or rationale of one decision, if taken to its logical extreme, would compel a different result in the other case.

In my view, however, that alone does not create a conflict. It is part of the genius of the common law that it does not take propositions—

<sup>55</sup>A more complete account of the study is found in Arthur D. Hellman, “Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court,” 56 *U. Chi. L. Rev.* 541 (1989). In the account here I have omitted many details and some minor qualifying observations.

holdings, rationales, or even principles—to their logical extremes. Instead, the proposition found to be controlling in one case comes up against a competing proposition, the lessons of experience, or even limitations inherent in the initial exposition. To see conflicts every time that happens is to disavow the flexibility and capacity for growth of our common law system.

But it is also possible (though not very common) to go too far in the other direction. In this view, as long as a careful lawyer *could* find a distinguishing feature, however obscure, that would justify differential treatment of apparently similar cases, there is no conflict. The amount of effort required to identify or understand the distinction would be irrelevant; it might even be irrelevant whether the distinction was actually relied on by the later court. That approach simply is not practical. It is not reasonable to expect busy lawyers and judges to prepare the equivalent of a law review note simply to understand the relationship between a pair of precedents relevant to advising a client or ruling on a motion.

As a rule of thumb, it is tempting to say that, if it takes a reasonably intelligent lawyer more than fifteen minutes to understand why two decisions are not in conflict, then for all practical purposes they are. For this project, however, I needed a somewhat more scientific definition, and I have come up with a hypothesis that I think is useful. The hypothesis consists of three sequential propositions, each of which addresses one of the possible relationships between a particular new decision and existing law in the circuit.

First, if losing counsel cannot point to relevant circuit precedents that reach results different from the panel's result in the case being considered, there is no possibility of conflict or uncertainty of the kind that arouses legitimate concern among judges and lawyers. Second, the cases that offer the greatest potential for conflict are those in which the panel distinguishes a circuit precedent that losing counsel has reasonably relied on as *requiring* (not simply supporting) a different result. Third, to the extent that the distinctions drawn by the later panel are clear and cogent, the potential for disarray will not be realized.

This formulation, I believe, will go far to assist in evaluating claims of intracircuit conflict and in distinguishing conflicts from the evolutionary shifts inherent in a common law system. Each of the elements requires brief elaboration.<sup>56</sup>

<sup>56</sup>For detailed explication, with numerous illustrations, see Hellman, *supra* note 55, at 555–70.



*Step one.* In determining whether a panel decision contains the seeds of intracircuit disarray, the threshold question is whether there is a relevant circuit precedent that reaches a result different from the panel's result in the case being considered. A precedent is "relevant" in this sense if a reasonable lawyer would invoke it as supporting a legal argument on a disputed proposition in the case. The "result" is "different" if, on the issue being considered, the earlier court ruled against the interest or claim that prevailed in the later case or vice versa.

Of particular significance, the first step of the analysis rests on the view that dictum, especially dictum that points in the opposite direction from the holding, cannot give rise to an intracircuit conflict. Some lawyers and judges will regard this approach as unduly narrow, but I think it follows from basic doctrines of precedent. In a democratic society, treating statements that do not contribute to the result as nonbinding dicta helps to confine the lawmaking powers of judges to the minimum necessary to serve the values underlying the doctrine of precedent. And from a utilitarian standpoint, such statements are properly treated as dicta because of the high likelihood that they will not have received thorough consideration.

*Step two.* If there is a relevant circuit precedent that reached a contrary result, the next question is whether the precedent is one that losing counsel reasonably relied on as *requiring* the same result. It is not enough that the earlier case is "relevant" in the broad sense contemplated by the first step—that is, that the earlier case would *support* the holding sought by losing counsel. Rather, counsel must be able to assert, with strong support in the relevant legal materials, that any distinctions between the two cases are irrelevant as a matter of law. For purposes of this inquiry I would deem the losing counsel's argument to be reasonable if (a) it was accepted by the district court; (b) it was accepted by a dissenter in the court of appeals; (c) it was accepted by other circuits; or (d) the panel itself recognized that the argument was strong (albeit ultimately unpersuasive). A precedent could also be "arguably compelling" if the earlier panel's rationale, taken as a whole, fit the facts of the later case as well. Conversely, a precedent could *not* be "arguably compelling" if the earlier decision explicitly adverted to facts or considerations not present in the later case.

*Step three.* The analysis thus far suggests that there is at least the appearance of conflict, and consequently a serious potential for uncer-



tainty, whenever a panel has distinguished a relevant circuit precedent that losing counsel has reasonably relied on as requiring a contrary result. But these circumstances do not necessarily mean that the conflict is genuine or that the coexistence of the two (or more) decisions creates significant uncertainty for lawyers and lower courts. Whether conflict has been avoided and uncertainty minimized depends on the cogency and clarity of the distinctions drawn by the later panel.

Cogency and clarity are distinct criteria. The former asks whether the distinction drawn by the later opinion is grounded, through reasoned explanation that comports with the norms of legal argumentation, in the policy considerations underlying the rules; the latter asks whether the distinction has been articulated in a way that later courts and lawyers can readily apply.

Step three differs from step two in that step two looks at the law as it existed before the later panel issued its decision; step three takes the decision and its rationale into account. But step three does not depend on whether the distinction drawn by the later panel can be found in the earlier opinion. What the later panel is obliged to respect is the result, not the stated rationale, of a precedent. Of course, the later panel cannot simply say that the earlier case was "different" or insist, without elaboration, that the facts are "distinguishable." Nor is it enough to offer a new verbal formulation without showing how the new rule requires (or at least permits) different results in the two cases. But if the later panel, making legitimate use of the "leeways of precedent," reformulates the "rule" of the earlier case in a way that preserves the result while allowing for a contrary result on the new facts, it has not done violence to the doctrine of stare decisis. Nor has it created a conflict. To put it another way, an unnecessarily broad statement of the "rule" of a case can properly be treated as dictum.

When I presented a preliminary version of this chapter to the Ninth Circuit Judicial Conference, commentators argued that this approach is too narrow. In their view, a later panel is obliged to respect not only the "rule" of an earlier case, but also the purpose of the rule, that is, what the earlier panel was attempting to accomplish. Some judges have gone even further, stating that the binding effect of a decision extends to anything that the earlier panel *intended* to be part of its resolution of an issue in the case. "Dicta" would be limited to statements that the earlier panel explicitly labeled as beyond the scope of its decision.

The narrower view, however, is firmly grounded in the theory of precedent as a device that at once recognizes and limits the authority of courts to make law as a corollary of their power to decide cases.

Under that theory the judges of one panel cannot, by casting their rule in unnecessarily broad terms, preempt later panels from reconsidering (or, more accurately, considering) aspects of the same legal problem that were not present in the earlier case. The contrary view would freeze the development of legal rules in a way that is quite inconsistent with the tradition of the common law. It would be especially pernicious in the federal courts, where gradual adjustment and modification of existing law enables a life-tenured judiciary to reflect, over time, changes in the will of the people as manifested in the election of a new president.

The three-step formulation does not fully address two precedential patterns that may create disarray in the law of the circuit. First, a later panel may fail to mention or distinguish an arguably compelling contrary precedent. If so, the panel has by definition created a conflict, because without an articulated distinction lawyers and other courts have no way of knowing which situations fall on one side of the line rather than the other.

Second, the discussion thus far has posited a situation in which no more than one or two circuit precedents are "relevant" to the question raised by a new appeal, and the object has been to determine whether the panel's decision has created, or is likely to create, an intracircuit conflict. But much of the concern about inconsistency in the law of the circuit has focused on a different phenomenon: a multiplicity of decisions already on the books addressing the same legal problem, with some coming out on one side, some on the other. For example, from 1981 through 1986 the court issued more than twenty-five published opinions construing the "extreme hardship" provisions of the immigration laws. In a period of only three years in the mid-1980s the court published fifteen opinions on the weight and credibility of subjective testimony on levels of pain in Social Security disability cases and nearly as many on the weight to be given to the testimony of the treating physician. More recently, a nine-month period generated six opinions by five different judges on the question whether an allegedly infringing work was "substantially similar" to a copyrighted work.

Issues like these have several characteristics in common. The litigated disputes are numerous. The legal rules are fact-specific. The governing law does not point strongly in one direction rather than another; often the law is in a state of evolution. Second-level rules may provide some degree of predictability, but they do not fully constrain the discretion vested in the panels by the primary rules. Finally, many of the issues implicate deeply felt choices between competing societal values.



Almost invariably, the combination of these circumstances will result in the phenomenon I have described: a large number of decisions on point, some supporting the claim in question, others rejecting it. And when that pattern occurs, it would be difficult if not impossible for any new panel to distinguish all of the contrary precedents in a way that is both clear and cogent. Thus, under the three-step analysis, I would generally conclude that a conflict exists. Indeed, intuition too would tell us that under the circumstances posited, a certain degree of disarray is inevitable, at least when the decisions are not invariably made by the same groups of individuals.

One caveat is in order, however. Lawyers often talk about "extreme hardship," "substantial similarity," "disparate treatment," and the like as though the phrases encompass unitary issues. Thus, if an alien seeks suspension of deportation on the ground of extreme hardship, counsel will probably regard all extreme hardship cases as "relevant" in the sense used here. Yet it is quite possible that, if one looked at the decisions carefully, one could identify discrete subcategories of cases in which there were no contrary results, or in any event no arguably compelling contrary precedents. Nevertheless, at this stage I shall make no attempt to pursue that line of inquiry; instead, I shall assume that multiple relevant precedents reaching different results do constitute intracircuit conflicts, and I will seek to determine whether instances of that pattern have created substantial disarray in the law of the circuit.

### *Measuring the Incidence of Intracircuit Conflict*

Armed with the theory just described, I proceeded as follows in my effort to estimate the extent of intracircuit conflict in the Ninth Circuit. I began by selecting two large samples of published opinions handed down by the Ninth Circuit, one group from 1983, the other from 1986. The sample for each period consisted of all Ninth Circuit panel decisions in every fifth volume of the Federal Reporter from that year. Each decision was analyzed in accordance with the three-step formulation. For cases not eliminated at the first stage (i.e., because there were one or more relevant circuit precedents that reach a contrary result), I also identified the precedent that most strongly supported the losing party.

For each case that was not excluded at the first step, I attempted to trace the subsequent history of the common issue to determine if the coexistence of arguably inconsistent decisions had created confusion or uncertainty. In other words, I did not assume the correctness of my



distinction between “supporting” and “compelling” precedents; rather, I sought to determine if that distinction would hold up in practice. In addition, I Shepardized all cases in the sample with a view to discovering actual or potential conflicts created by the panel’s failure to mention an apparently inconsistent ruling.

Indicia of confusion were apparent inconsistencies in the later decisions, disagreement within panels, disagreement between appellate panels and district courts, and frequent litigation. If one or more of these indicia were present, I examined the cases further to determine the extent to which the confusion was produced by the coexistence of the apparently conflicting decisions rather than by other factors. I also hoped to talk to lawyers and district judges to discover any evidence of confusion or disarray not manifested in published materials; however, that phase of the work remains incomplete.

I was particularly interested in uncovering conflicts created by a panel’s outright failure to mention relevant precedents that reached contrary results. My assumption was that, if silent conflicts existed, they would become manifest in later decisions when judges and law clerks, using a full array of research tools, discovered the arguable discrepancy.

The 1983 sample yielded a total of 175 cases.<sup>57</sup> In 40 percent of them the court cited no contrary precedents on any issue. Research into later caselaw revealed fewer than a dozen instances of what I would call omitted precedents—contrary decisions that should have been cited but were not. And in all but one of these cases the omitted precedents were at best supporting for the losing party. The panels did not create conflicts by failing to cite the contrary rulings; at worst the new decisions introduced some unnecessary uncertainty into the law.

What about the cases in which there *were* relevant contrary precedents? In the overwhelming majority, the earlier decisions were no more than supportive of the losing party. In fact, although I was not doing it consciously, I realized afterward that basically I was applying the fifteen-minute test alluded to earlier. And in most of the cases it took me no more than fifteen minutes to conclude that there were obvious distinctions between the contrary precedents and the sample case, and that no reasonable lawyer would have argued otherwise.

<sup>57</sup>The research proved much more time-consuming than I had (perhaps unreasonably) anticipated, and study of the 1986 sample was still in progress as this chapter went to press. For a detailed analysis of the 1983 sample, see Hellman, *supra* note 55, at 576–94.

That leaves perhaps twenty-five cases in which an existing precedent could be deemed “arguably compelling” for the losing side. However, a few of these were cases in which there were already multiple precedents pointing in different directions. I decided to treat these with the other multiple-precedent cases in order to permit a more accurate estimate of the number of intracircuit conflicts created in the course of a year.

In all but six of the step-three cases the 1983 panel articulated a distinction that I thought was clear and cogent—one that could be understood and followed even if it was not apparent in the earlier decisions. If we extrapolate from the sample, the results would suggest that about thirty such decisions were issued by the Ninth Circuit Court of Appeals during the year. However, the analysis cannot stop there. To question the clarity and cogency of a distinction is not to say that the panel has created a conflict; it is only to say that the panel’s decision has a strong potential for doing so. Unfortunately for the urge to quantify, the subsequent history of the issues in these cases provides a dubious base from which to estimate the total number of intracircuit conflicts created by panel decisions in the course of the year. The subset of cases is so small, and the outcomes turn out to be so varied,<sup>58</sup> that any attempt to extrapolate would be attended by a high margin of error. But this does not mean that no conclusions can be drawn from the data. On the contrary, perhaps the most significant finding is that in all but two of the cases the uncertainty created by the panel decisions had been largely if not entirely dissipated within three years.

Twelve cases in the 1983 sample involved issues that had already generated multiple precedents pointing in both directions. Four decisions considered appeals by aliens seeking to avoid deportation on the ground of extreme hardship. Two involved claims of attempted monopolization under section 2 of the Sherman Act. Four cases arose out of criminal proceedings; all but one turned on fact-specific legal rules that by their nature require case-by-case interpretation.

How significant are the multiple-precedent issues? Several observations are suggested by the cases in the study. First, the issues tend to be concentrated in areas of the law like criminal procedure where legal rules do not directly influence the structuring of transactions or other primary activity. Second, many of the rules are heavily weighted in favor of deference to first-line decision makers. At the appellate level,

<sup>58</sup>See *id.* at 588–90.



the bulk of cases can be resolved without the need to examine the full range of the court's jurisprudence.<sup>59</sup> Third, in most instances the disarray caused by the existence of multiple relevant precedents eventually yields to a dominant trend or to some outside force.

In any event, the study suggests that the pattern exemplified by high-visibility issues like "extreme hardship" and "attempted monopolization" is not characteristic of Ninth Circuit jurisprudence generally. Nor is intracircuit conflict. To recapitulate: in the 1983 sample, nearly half of the cases did not cite any contrary precedents. When contrary precedents did exist, they were usually no more than supporting for the losing party. And when the losing party could cite arguably compelling precedents, the panel generally succeeded in distinguishing them in a way that avoided conflict for the future.

### *Inconsistency and the "Luck of the Draw"*

Neither the three-step test nor the empirical study addresses the concern expressed by some lawyers in the Ninth Circuit that the result in the court of appeals will often depend on the composition of the panel that hears the case. This is not because the phenomenon does not exist; even the court of appeals judges agree that it does. And it is understandable that lawyers would feel uncomfortable with what appears to be an element of the lottery in appellate outcomes. Nevertheless, I think the concern is misplaced.

First, any study that concentrates on published appellate decisions inevitably overstates the extent to which the law is unstable or uncertain. In the familiar metaphor, cases decided by published opinions stand at the apex of a much larger pyramid. For the vast majority of transactions and disputes, the law provides sufficient guidance that no rational person would think of going to court at all. Of the disputes that do wind up in court, many, perhaps most, involve the application of settled law to particular facts, so that litigation ends at the trial level. Even among the cases that are appealed, more than half are decided by unpublished opinions because they raise no new legal issues.

Second, it is important not to equate uncertainty or unpredictability with inconsistency. Inconsistency leads to uncertainty, but uncertainty may have many other causes. In particular, the legal consequences of

<sup>59</sup>The standard of review does not ease the burden of lawyers and adjudicators in the trial courts and agencies, yet even there it is likely that extended exegesis and comparison will be required only in close or difficult cases.

primary conduct may be unpredictable not because the precedents point in different directions, but because there are no precedents very closely on point. For example, the result may depend on the interpretation of a statute not previously construed. The Supreme Court may have recently handed down a decision that sets the law on a new course. The facts may bear little resemblance to those of cases already on the books. Or the facts may fall squarely between those of existing precedents. In situations like these, the outcome may well depend on the predilections of the panel that happens to hear the case. But there is no reason to expect that unpredictability of this kind would be more common in the larger circuit. Indeed, the larger circuit will probably have a larger number of precedents relevant to any given issue, and that in turn might actually reduce the number (or at least the proportion) of cases in which the panel has freedom to decide either way without creating a conflict.

Yet even if that proposition is accepted, it does not fully address concerns about the "luck of the draw," for there remains the argument that aberrant decisions (as distinguished from decisions that create conflicts) will be more readily corrected through en banc rehearing in the small circuit than in the large circuit. Two responses are in order. To begin with, the argument assumes that judges are predictable, even knee-jerk, in their responses to novel issues. That has not been the experience of the federal courts in the last few years, even after eight years of appointments by an administration more concerned with ideology than most. Thus, where the outcome is uncertain because of the absence of closely relevant precedents, en banc rehearing will not necessarily add to predictability. Beyond this, even judges with strong views about the substantive issues will temper them with a recognition of the institutional harm that would result from treating panel decisions as merely provisional pending consideration by the full court. Especially when one considers the shifts in national political power that have characterized the twentieth century, it is clear that the system would break down if judges were not willing to live with decisions that they would not have rendered if they had been on the panel.

Third, a certain degree of unpredictability is an inevitable consequence of panel autonomy—a principle on which the judges of the Ninth Circuit place a very high value. Their commitment can be seen in the court's unwillingness to use the "mini en banc,"<sup>60</sup> in the rejection of time limits that would qualify the priority-of-submission rule,

<sup>60</sup>See note 1.



and especially in the repudiation of the permanent rotation model for the limited en banc court. Judge Browning has argued that panel autonomy promotes stability in the long run, "because periodic shifts in the ideological roots of the majority [would otherwise] produce sharp and unsettling shifts in the law."<sup>61</sup> I think he is right, but it must be acknowledged that in the short run panel autonomy may undercut predictability and consistency. By "protect[ing] the opportunity of all, and not just the majority, to play a part in the development of the law," the present arrangements give latitude to the minority to announce binding rules that would be rejected if the full court were voting. Of course, panels must recognize that they operate as part of a larger institution, but the constraints imposed by that role operate only retrospectively. Panels are obliged to respect what other panels have done in the past; they have no obligation to anticipate what the court as a whole might do in the future. And even the retrospective obligation is limited by the "leeways" of precedent.<sup>62</sup>

It is possible to imagine a different approach, one that would call upon individual judges to give some weight to the position of the larger entity, at least when that position could be predicted with some confidence.<sup>63</sup> But the principle of panel autonomy is probably too deeply engrained to expect any group of federal judges to adopt that stance. More important, by permitting a dialectic between majority and minority perspectives, panel autonomy fosters the wise evolution of legal rules.

Finally, I believe that much of the concern about unpredictability in a multijudge court of appeals rests on an impatience with the case-by-case mode of adjudication that is the essence of our common law system. But over the years, society has concluded that that approach, with all its open-endedness, is preferable to the more structured regime of codification, especially in view of the availability of the legislative *deus ex machina* whenever disarray or lacunae in decisional law become too much to bear. For that reason as well as the others, I think

<sup>61</sup>Annual Judicial Conference, Second Judicial Circuit of the United States, 106 F.R.D. 103, 161-62 (1984) (remarks of Judge Browning).

<sup>62</sup>See Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 77-91 (Little, Brown, 1960).

<sup>63</sup>A hint of this attitude appeared in a discussion of whether a limited en banc panel could "dis-enbanc" a case after the full court voted to grant en banc rehearing. Some judges thought a limited en banc panel might take that step in order to avoid an en banc ruling that would not reflect the views of the entire court. If this were to occur, the members of the en banc majority would indeed be subordinating their own views to those of the larger entity. However, there is no evidence to suggest that this ever happened.

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it is sound to concentrate on inconsistency, which I agree reflects a malfunction in the system, and not to worry overmuch about unpredictability, which is to a large extent unavoidable.

### *Implications for the Future*

At the beginning of this chapter I suggested that the Ninth Circuit's efforts to maintain consistency in the law of the circuit deserve attention in part because the development of large, geographically organized appellate courts may provide an alternative to more radical structural reforms in the federal system. Yet in assessing the results of the study, it is necessary to keep in mind some important limitations.

First, I have made no effort to investigate possible conflicts in unpublished opinions. To be sure, from the standpoint of lawyers and district courts any such conflicts would be irrelevant because unpublished opinions cannot be cited as precedent. But they would be troublesome from the standpoint of the court's obligation to treat like cases alike—the more so since the profession has no way of monitoring this aspect of the court's work.<sup>64</sup> Thus, I hope that some other scholar will take a look at the unpublished opinions in the not-too-distant future.

Second, more work remains to be done in exploring the nature and extent of multiple-precedent issues. I acknowledge that, even where the three-part test would not necessarily lead to the conclusion that a conflict existed, the need to reconcile multiple precedents itself places a burden on judges and lawyers that must be taken into account in evaluating the workability of the large appellate court. At the same time, I do not think it unreasonable to assume at least a modest level of care in defining the "issue" in a case.

Third, even if the study could provide complete data on the incidence of actual conflicts, there would still be room for disagreement over the degree of freedom that panels ought to have in treating existing precedents. Just as with intercircuit conflicts, variations in approach that would be seen by some as nothing more than the common law "work[ing] itself pure from case to case"<sup>65</sup> will be regarded by others as creating an undesirable level of uncertainty and unpredictability.

<sup>64</sup>There is reason to believe that panel majorities sometimes agree to decide a case by unpublished memorandum as the price of avoiding a dissent.

<sup>65</sup>Graham Hughes, "Are Justices Just?" *N.Y. Rev. Books*, Nov. 19, 1981, at 41, 42 (quoting Lord Mansfield).



Fourth, the study cannot quantify the hidden costs of maintaining consistency in the large circuit: the additional burdens on the judges which will not be reflected in their published work. Members of the court acknowledge that they spend a substantial amount of time reviewing opinions and exchanging memoranda in order to iron out apparent inconsistencies without calling an en banc hearing.<sup>66</sup> Thus far, however, there is little evidence to suggest that these efforts have interfered with the judges' productivity.

Finally, evaluation of the findings of this study must be comparative, not absolute. Whatever the inadequacies of the Ninth Circuit's efforts to maintain a consistent law, and whatever the costs of those efforts, both must be weighed against the costs of alternative solutions to the crisis of volume in the federal appellate system.

<sup>66</sup>Indeed, at one point some members of the court actually suggested that the judges' overall caseload should be reduced so that they could shoulder the burden of monitoring the law of the circuit without a reduction in the quality of their opinions. Other judges pointed out that Congress was not likely to be sympathetic to this idea, and the suggestion was not pursued further.