Vanderbilt Law Review

Volume 32
Issue 6 *Issue 6 - November 1979*

Article 2

11-1979

Inconsistency in the United States Courts of Appeals: Dimensions and Mechanisms for Resolution

Stephen L. Wasby

Inconsistency in the United States Courts of Appeals: Dimensions and Mechanisms for Resolution*

*By Stephen L. Wasby***

TABLE OF CONTENTS

I.	INTRODUCTION	1343
II.	EXISTENCE OF INCONSISTENCY	1346
III.	VARIATION IN INCONSISTENCY	1351
IV.	GRAVITY OF THE PROBLEM	1353
V.	CAUSES OF INCONSISTENCY	1357
VI.	PARTICIPATION BY "EXTRAS"	1360
VII.	MECHANISMS FOR RESOLVING INCONSISTENCY	1363
	A. En Bancs	1364
	B. Screening	1366
	C. Circulation of Opinions	1369
VIII.	CONCLUSION	1372

I. INTRODUCTION

*Inter*circuit inconsistency, that is, doctrinal conflict between the United States Courts of Appeals has, it is alleged, been on the rise in recent years. Claims have been made that the Supreme Court is not adequately resolving such conflict, despite the Court's statement in its Rule 19 that intercircuit conflict is one basis for the

* Financial assistance for the research reported here came from the Office of Research and Projects, Southern Illinois University at Carbondale, and from the Penrose Fund of the American Philosophical Society. Office space during my stay in San Francisco was graciously provided by Hastings College of Law through the "good offices" of Dean Marvin Anderson. I wish particularly to thank Dorothy Robyn, Graduate School of Public Policy, University of California, Berkeley, and Professor Thomas Kerr, Hastings College of Law, for assistance in developing the questionnaire; and Susan Hickman and Michael Wepsiec for tabulation of data gathered by Becky Colford Murphy, Don Frazier, and John Rink. My deepest appreciation is extended to the judges of the United States Court of Appeals for the Ninth Circuit, who tolerated extensive questioning from a social scientist and "court-watcher."

Discussion of inconsistency as a problem, of the areas of the law in which inconsistency more frequently occurs, and of its causes, is based in part on the formulation by Michael Wepsiec, Ninth Circuit Border Searches: Doctrines and Inconsistency (May 1978) (Honors Thesis, Department of Political Science, Southern Illinois University at Carbondale), for which the author was faculty adviser. Wepsiec drew on material abstracted from the author's Ninth Circuit interviews. I am much indebted to Mr. Wepsiec for use of material from his manuscript and for his permission to do so.

** Professor of Political Science, State University of New York at Albany. A.B., Antioch College, 1959; M.A., 1961, Ph.D., 1962, University of Oregon.

granting of certiorari. After investigating the problem, the Commission on Revision of the Federal Court Appellate System (the Hruska Commission) recommended the establishment of a National Court of Appeals to increase the federal courts' capacity to provide consistent doctrine at the national level.[1]

A more serious problem, at least for lawyers and district court judges, is doctrinal conflict within a circuit, that is, *intra*circuit inconsistency. It is a problem because lawyers advising their clients have difficulty deciding which precedents to follow and district court judges are unsure what rules to apply in the cases they must decide. This Article provides an examination of intracircuit inconsistency in the United States Court of Appeals for the Ninth Circuit. The Ninth, which is the second-largest federal appellate court in terms of the number of active judgeships, is studied from the perspective of the court's judges.[2] Allegations have been made that intracircuit inconsistency is a particular problem in the Ninth Circuit, because of that court's large number of active-duty judges and its use of more "extra" judges—senior circuit judges, district judges, and visiting judges from outside the circuit[3]—than any other circuit. Because intracircuit inconsistency is not unique to the Ninth Circuit and appears to exist in all circuits, the picture presented here is of general interest. Although the United States Courts of Appeals vary in size (both geographically and in terms of the number of judges) and in workload, all face the problem of intracircuit inconsistency, and are even more likely to have to contend with it as a result of the judgeships added by the Omnibus Judgeship Bill of 1978.[4]

1. *See* COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 30-32, 37-44 (1975) [hereinafter cited as STRUCTURE AND INTERNAL PROCEDURES].

2. At the time of the study upon which this Article was based, the Circuit with the most active judgeships was the Fifth with fifteen. The Ninth Circuit, with thirteen, was followed by the District of Columbia, Second, Third and Sixth Circuits, with nine each; the Seventh and Eighth Circuits, with eight each; the Fourth and Tenth Circuits, with seven each; and the First Circuit, with three. 28 U.S.C. § 44(a) (1976). Including new judgeships to be added pursuant to the Omnibus Judgeship Bill of 1978, Pub. L. No. 95-486, 92 Stat. 1629 (Oct. 20, 1978) (codified in scattered sections of 28 U.S.C.), the Fifth Circuit remains the largest circuit in terms of active judgeships, with twenty-six, and the remainder of the circuits will have the following number of judgeships: Ninth Circuit, twenty-three; District of Columbia, Second, and Sixth Circuits, eleven; Third and Fourth Circuits, ten; Seventh and Eighth Circuits, nine; Tenth Circuit, eight; and First Circuit, four.

3. *See* Wasby, "Extra" Judges in "The Court Nobody Knows:" Some Aspects of Decision-Making in the United States Courts of Appeals, (September, 1979) (paper presented to the American Political Science Association, Washington, D.C.).

4. Pub. L. No. 95-486, 92 Stat. 1629 (Oct. 20, 1978) (codified in scattered sections of 28 U.S.C.). Section 3(b) of the Act created thirty-five additional judgeships in the courts of appeals.

This Article is based on an extensive study of the United States Courts of Appeals for the Eighth and Ninth Circuits that focused on two interrelated questions. The first question was how judges in geographically large circuits communicate with each other when they are not all stationed in the same city.[5] The focus of this Article is on the second question—the problem of intracircuit inconsistency. The study is based on largely open-ended interviews with the Ninth Circuit's active-duty and senior circuit judges and with some active-duty and senior district judges who had sat most frequently with the court of appeals over the period between 1971 and the interviews, which were conducted in 1977.[6] It is part of an effort by students of the judicial process, who have concentrated their work on the Supreme Court of the United States, to pay more attention to the lower federal courts. It is thus an addition to the work of Schick,[7] Howard,[8] Richardson and Vines,[9] Goldman,[10] and Atkins and Green,[11] and should help make better known what one circuit judge calls "The Court Nobody Knows."[12] In examining the courts, it is important to understand judicial decision making as viewed by its direct participants. Their explanations may, of course, be ration-

5. *See* Wasby, *Communication Within the Ninth Circuit Court of Appeals: The View from the Bench,* 8 GOLDEN GATE U.L. REV. 1 (1977).

6. Fifteen Ninth Circuit appellate judges were interviewed—all but one of the eleven active-duty judges then serving (there were two vacancies, since filled)—as well as five of the seven judges on senior status. Ten district court judges, from California and Oregon, were also interviewed. The interviews ran from one hour to two hours. Because of some time pressures, not all judges answered all the questions.

7. *See* M. SCHICK, LEARNED HAND'S COURT (1970). Schick's work is the only book-length study of a United States Court of Appeals.

8. *See* Howard, *Role Perceptions and Behavior in Three U.S. Courts of Appeals,* 39 J. POL. 916 (1977); Howard, *Litigation Flow in Three United States Courts of Appeals,* 8 LAW & SOC'Y REV. 33 (1973) [hereinafter cited as *Litigation Flow*]; Howard & Goldman, *The Variety of Litigant Demand in Three United States Courts of Appeals,* 47 GEO. WASH. L. REV. 223 (1978).

9. *See* R. RICHARDSON & K. VINES, THE POLITICS OF FEDERAL COURTS (1970).

10. *See* Goldman, *Voting Behavior on the United States Courts of Appeals, 1961-1964,* 60 AM. POL. SCI. REV. 374 (1966); Goldman, *Conflict on the U.S. Courts of Appeals, 1965-1971: A Quantitative Analysis,* 42 U. CIN. L. REV. 635 (1973); Goldman, *Conflict and Consensus in the United States Courts of Appeals,* 1968 WIS. L. REV. 461.

11. *See* Atkins, *Decision-Making Rules and Judicial Strategy on the United States Courts of Appeals,* 25 W. POL. Q. 626 (1972); Atkins & Green, *Consensus on the United States Court of Appeals: Illusion or Reality?,* 20 AM. J. POL. SCI. 735 (1976); Atkins & Zavoina, *Judicial Leadership on the Court of Appeals: A Probability Analysis of Panel Assignment in Race Relations Cases on the Fifth Circuit,* 18 AM. J. POL. SCI. 701 (1974); Green & Atkins, *Designated Judges: How Well Do They Perform?,* 61 JUD. 358 (1978).

12. *See also* Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law,* 82 HARV. L. REV. 542 (1969); Haworth, *Screening and Summary Procedures in the United States Courts of Appeals,* 1973 WASH. U. L.Q. 257.

alizations. However, because they are in "the crucible of experience," studies of how they view the world in which they operate remain significant, and can assist in the development of explanations of judicial behavior. Since the United States Courts of Appeals are the "final resting place" for upwards of ninety-five percent of all federal cases, either because they are not appealed or because the Supreme Court denies review,[13] aspects of the decision making processes of those courts are surely worthy of study.

II. EXISTENCE OF INCONSISTENCY

Former Solicitor General Erwin Griswold has been the individual who has focused most explicitly on intracircuit inconsistency in the Ninth Circuit. In a 1972 lecture, he commented on the "diversity of decision" within the courts of appeals, using the Ninth Circuit as an example of a court in which the fact that a question had already been decided by the court "makes no difference" because another panel "may take a different view of the problem."[14] In his 1973 Hruska Commission testimony, it was clear that he was not using the Ninth Circuit simply as an example. He had "formed the impression," he said, "that in the Ninth Circuit very little attention was paid to the question of intracircuit conflicts," because the judges "endeavored to do justice in the case as they thought it appeared to them." One could find, he claimed, "another panel ten days later deciding essentially the same question the other way without any reference to the first case."[15] He—and others in the Department of Justice, he asserted—felt that the Ninth Circuit judges "regarded it less a matter with which they should be concerned as to whether they were consistent with other panels even after it was quite specifically pointed out to them."[16]

While Dean Griswold was the primary proponent of the argument that there was considerable intracircuit inconsistency in the Ninth Circuit, he was not the only person to mention the subject before the Hruska Commission. Judge Robert Schnake of the Northern District of California mentioned having been faced with "two rather recent Ninth Circuit opinions, one going one way and one

13. *See Litigation Flow, supra* note 8, at 41-44.

14. Address by Erwin N. Griswold, 29th Annual Cardozo Lecture, Association of the Bar of the City of New York (November 21, 1972), *reprinted in* COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, FIRST PHASE HEARING: AUGUST-OCTOBER, 1973, at 468 [hereinafter cited as FIRST PHASE].

15. FIRST PHASE, *supra* note 14, at 10. Griswold tried to file petitions for rehearing en banc, but "learned rather quickly that ordinarily those petitions were denied." *Id.*

16. *Id.* at 28.

conceivably going another . . .," but he noted this occurred only rarely.[17] Two practicing lawyers also commented on the subject. G. William Shea, President of the Los Angeles County Bar Association, while not using the word "inconsistency," did mention a "great variance in the panels and their approach to problems" in the antitrust area, leading to "quite a divergence." He added that "even Judge Ely, in his most recent opinion . . . makes reference to this disparity of view in his own circuit."[18] Attorney Marcus Mattson, also of Los Angeles, asked by a Commission member specifically about intracircuit conflicts in the civil area, said that there were no such cases he could cite, and added his opinion that the Ninth Circuit had done "pretty well" in that respect. He did, however, suggest that "the panel will have some effect on the outcome of a case," adding, "[t]hat is not all bad. It is bad but not all bad."[19]

One other statement about the Ninth Circuit's inconsistency deserves mention here, because of where it was published—the *American Bar Association Journal*—and the attention it received in the circuit. James N. Gardner, a former Ninth Circuit law clerk, wrote an article claiming that the court of appeals used its "Not for Publication" cases to hide intracircuit inconsistency.[20] Apart from the issue of the propriety of unpublished opinions, it was clear that he felt the court was inconsistent in the area of law on which he focused (border searches): "Not only is the Ninth Circuit inconsistent in deciding what facts are sufficient to constitute a founded suspicion [necessary for a "stop"], its various panels cannot even agree on the threshold issue of what standard of review to apply to a trial court's founded suspicion determination."[21] Both Gardner's article and Dean Griswold's comments were referred to by the judges in the interviews for this Article.

The Ninth Circuit judges interviewed were asked about judges' and lawyers' perceptions of the existence of inconsistency, as well as their own views as to whether inconsistency occurred and the extent to which it was a problem. Fourteen of fifteen circuit judges said that district judges and lawyers in the circuit feel there is inconsistency in the Ninth Circuit's decisions.[22] One remarked that

17. *Id.* at 885.

18. *Id.* at 953.

19. *Id.* at 965.

20. Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A.J. 1224 (1975).

21. *Id.* at 1226.

22. The remaining judge, who answered that he did not know, said that the district judges in his state might kid him about "What did you [circuit judges] do?" but neither they nor the lawyers had complained, nor had he asked about the matter.

the "lawyer thinks that right after losing a case," while another said that there is inconsistency in any court's decisions, a reflection of how one reads a case.

District court judges may well have difficulty trying to ascertain the "law of the circuit" or "circuit precedent." Judge Ben Duniway, testifying before the Hruska Commission, said that he had heard district judges complain that they didn't know what the law of the circuit was on a question. He added that in some cases those judges were "quite right."[23] In the interviews, the circuit judges who had been district judges were asked whether, as district judges, they had perceived any inconsistency in the Ninth Circuit's decisions. Two had and two had not. Yet three of the four had experienced difficulty in trying to determine the "law of the circuit" applicable to their cases. One judge who had not perceived inconsistency felt he had been able to reconcile the decisions in his own mind, but he noted that he differed from some district judge colleagues with whom he used to "kick around" the subject. Moreover, he conceded that there was "difficulty in trying to understand what a panel said."[24] At least for him, difficulty in determining the "law of the circuit" differed from "inconsistency" in the Ninth Circuit's decisions.

Only four current district judges indicated whether they had difficulty in trying to determine the "law of the circuit." Again, two did and two did not. It happened "not frequently [but] occasionally," said one, while another said the same problem existed concerning the United States Supreme Court's decisions. One judge claimed ability to eliminate any difficulty in determining what law to apply because "I can distinguish [a case] if I want to." Another district judge who complained that it was "very difficult to know what the state of the law is" was clearly directing his ire principally at the Supreme Court, not at the Ninth Circuit. He argued that some Supreme Court opinions were "so long and have so many notes and concurring and dissenting opinions" that you "have to take a week off to understand what they had in mind." Although he perceived "a general thread of consistency" in the Ninth Circuit's rulings, this judge thought that inconsistency was bound to happen

Material which appears in quotation marks without attribution is drawn from the transcripts of the interviews conducted by the author. To protect the anonymity of Judge Shirley Hufstedler, then the Ninth Circuit's only female circuit judge, the male pronoun is used throughout.

23. FIRST PHASE, *supra* note 14, at 897.

24. Three cases, he noted, might make it easier to determine the law of the circuit than would one, because the cases taken together "would indicate an approach, which could then be applied." *See also id.* at 492 (remarks of Judge C. Clyde Atkins).

when a court turns out as many opinions as that court does.

When the judges were asked more directly about Ninth Circuit internal inconsistency, there was virtual unanimity that it existed: thirteen of fifteen circuit judges and all eleven district judges responding said so. Two former district judges qualified their responses: inconsistency occurred only "to a limited degree" and "in a limited sense." A colleague, who remarked that the only inconsistencies were inadvertent and "ones we've overlooked," called attention to the court's rule that one panel is not to overrule another panel. That rule, which the judge said meant that no inconsistency was intentional, had been discussed with the Hruska Commission when Commission member Congressman Charles Wiggins had asked Judge John Kilkenny whether there was a Ninth Circuit rule "that the members of the panel are bound by other decisions of the Ninth Circuit." Answered the judge, "Yes, an absolute rule. And it is seldom, it is seldom that we get in a position where we do have these intracircuit conflicts on account of that rule."[25] Judge Alvin Rubin, now of the Fifth Circuit, discussing a similar rule, said that "once a panel of a circuit formulates a rule of decision in one case, the other judges of the circuit are bound to follow that precedent, right or wrong, in future cases, at least until it is reconsidered by the entire court sitting en banc."[26]

Another Ninth Circuit judge, in more extended remarks, argued that it was "hard to find a situation where one [panel] says A is law and another says B is law." Those, he said, were corrected. What did "drive people up the wall" were problems "in applying a given body of law to the facts," where "people look at situations in different ways."[27] This judge also argued, in comments relevant to

25. *Id.* at 818. Schick notes that during Judge Learned Hand's tenure as the Second Circuit's Chief Judge, that court's "tradition [was] to adhere to previous panel decisions, especially those that [were] recent. There have been innumerable instances where judges have declined to dissent because 'the law of the Circuit has apparently been determined to the contrary, and so I shall join in my brothers' disposition.'" SCHICK, *supra* note 7, at 114. While there were "no hard and fast rules requiring intermediate appellate judges to abide by long-standing precedents of their own court . . . or rulings by other panels within the circuit," nonetheless the Second Circuit's members "generally tend[ed] to follow precedent and previous panels." Because of the court's refusal at that time to hear cases en banc, "the judges at times were squarely faced with the question of whether to adhere to earlier decisions that they disagreed with." *Id.* at 319. Schick notes an instance when a Second Circuit panel followed a previous ruling of the court, decided by a 2-1 vote, although all three judges agreed with the minority opinion in the earlier case. Dickinson v. Mulligan, 173 F.2d 738 (2d Cir. 1949), *reversed sub nom.* Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1950); *Id.* at 115. For a discussion of en banc sittings of the Ninth Circuit as a mechanism to resolve conflict, see notes 68-69 *infra* and accompanying text.

26. Rubin, *Views from the Lower Court,* 23 U.C.L.A. L. REV. 448, 452 (1976). Judge Rubin was with the Eastern District of Louisiana at the time of the Hearings.

27. Although the Hruska Commission's concern was inter- rather than intracircuit in-

the question of inconsistency, that because judging was a "lonely business" with the court coming to its rulings through "very private decisions," from which "appearance will emerge," he didn't care "how we appear as a result."

One of the two circuit judges who felt there was no inconsistency in the court's rulings warned against confusing inconsistency with development of the law in a new area, where the court was more willing to upset findings of fact. "The law develops that way," he said. The court "will be able to look back and see what the law is." In another conversation, discussing antitrust law, the judge said that one of the Ninth Circuit's basic standards had been modified and shifted, "but that's the name of the game" in a developing area of law.[28] The other judge argued that there was less inconsistency in the Ninth Circuit's decisions than one could find in conflicting lines of authority in the Supreme Court's decisions, but he warned that some inconsistency might develop once the court had twenty-three judges. This judge placed the burden of discovering inconsistency on the attorneys rather than the court.[29] He also specifically addressed Griswold's claims about the Ninth Circuit.[30] He and other members of the court had confronted Griswold, who, he claimed, had not produced "more than several Selective Service cases, at a time when the Ninth Circuit was handing down six a day."[31] Con-

---

consistency, its studies are important. The law professors who undertook an examination of inconsistency at the Commission's behest found "direct conflicts," "strong partial conflicts," and "weak partial conflicts." Concluded the Commission:

> Often the conflicts are direct and frontal, arising because two or more courts have come to opposite conclusions in cases which cannot be distinguished. Less direct conflicts, however, can also produce uncertainty and confusion in the national law. . . . Such divergences have also been termed "sideswipes," and it is clear that there are many more of them than direct conflicts.

STRUCTURE AND INTERNAL PROCEDURES, *supra* note 1, at 16. The two Commission studies can be found in the appendix of the Commission report. *See Illustrative Cases: Conflicts, Uncertainty, and Relitigation,* in *id.* at 76-90; *Conflicts and the Supreme Court: A Study of Petitions for Certiorari,* in *id.* at 19-110.

28. The standard was that of Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), on attempts to monopolize. *See* Barnum, *Antitrust, Ninth Circuit Survey: 1974-1975 Term,* 6 GOLDEN GATE U.L. REV. 365, 365-66, 385-87 (1976).

29. Hruska Commission consultant Professor Floyd Feeney noted that "the judgment as to whether a conflict exists or not is often quite a difficult one" and that "there is a natural tendency on the part of attorneys to assert any point that can be claimed as a conflict." STRUCTURE AND INTERNAL PROCEDURES, *supra* note 1, at 97. Professor Feeney's work is included in *Conflicts and the Supreme Court: A Study of Petitions for Certiorari,* in *id.* at 91-110.

30. *See* text accompanying notes 14-16 *supra.*

31. In the Hruska Commission hearings, Assistant U.S. Attorney Lawrence W. Campbell of Los Angeles testified that three Selective Service cases prosecuted by his office, involving identical facts, resulted in inconsistent decisions. Two Ninth Circuit panels decided in favor of the government "on a particular issue that was deemed dispositive of the appeals,"

ceding that cases on probable cause or founded suspicion[32] approached being inconsistent, he asserted that the court would take cases en banc where conflict appeared. He had also researched the cases cited in Gardner's article[33] and found no conflicts. He did, however, volunteer the comment that "the panel you draw will make a difference in close cases."

The district judges had had direct experience with the Ninth Circuit's inconsistency. When one had decided several environmental cases with common issues, he had been reversed on one of the issues, with another Ninth Circuit panel going the other way the same day. The Ninth Circuit took the cases en banc, however, and resolved the inconsistency. Other district judges noted that case results may differ depending on the panel which hears them. The law thus "moves slowly in jerks and starts." One of these judges noted some inconsistency between published and unpublished opinions, adding that the circuit judges had "some temptation" to reach contrary results in nonpublished cases.

III. VARIATION IN INCONSISTENCY

Almost all judges agreed that inconsistency occurs more frequently in some areas of the law than in others. Only one circuit judge and two district judges did not believe that this was the case. The other two district judges said they did not know, but one commented it was more likely in "borderline factual" situations. Circuits vary as to the subjects where intracircuit inconsistency appears most frequently, but circuit and district judges alike generally agreed that in the Ninth Circuit it occurred disproportionately in criminal law cases with "constitutional rights aspects."[34] Particularly significant was the search and seizure area, specifically border searches involving the "probable cause" and "founded suspicion" necessary before a stop can be made.[35] Also likely to produce inconsistency in the criminal law were gun cases, because, like stops and searches, they involved "minute fact situations." Habeas corpus cases and those involving post-conviction remedies[36] were also

while the third panel, "in a much longer opinion chose to go the other way," despite a dissent which pointed out the inconsistency. FIRST PHASE, *supra* note 14, at 956-57.

32. *See* note 35 *infra* and accompanying text.

33. *See* notes 21-22 *supra* and accompanying text.

34. One judge commented acerbically, "nor has the Supreme Court helped us out much," and a colleague observed that inconsistency "exists in only a few areas, primarily where the Supreme Court has failed to create a definite rule we could follow."

35. *E.g.*, Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966). *See generally* Weisgall, *Stop, Search and Seize: The Emerging Doctrine of Founded Suspicion*, 9 U.S.F.L. REV. 219 (1974).

36. *See* 28 U.S.C. § 2255 (1976).

prominently mentioned. One judge commented, however, that state habeas corpus had not been an area of inconsistency after the Supreme Court's decision in *Stone v. Powell.*[37] Apart from criminal procedure, inconsistency apparently was not concentrated in any particular areas. Several individual judges did, however, mention its occurrence in environmental cases, immigration (particularly deportation) cases, and in cases involving "nebulous concepts" such as negligence. A district judge also made the general suggestion that inconsistency occurred more in cases under new statutes "which need to be interpreted" and under amended statutes.

Inconsistency occurred in the search and seizure area "more than the whole rest of the field put together," according to one circuit judge. Roughly half the judges mentioning search and seizure specifically mentioned border searches or such closely related issues as "stops with aliens" or "founded suspicion" to make stops. Their view is consistent with the remarks of commentators who have alleged that the Ninth Circuit's judges have decided similar border search cases differently.[38] "Founded suspicion" is "a classic area," said one judge, emphasizing that it was impossible to achieve consistency except by having the same people decide all the cases. Even then they wouldn't be consistent, he added: "I can't remain consistent with myself."[39] On the other hand, one district judge felt that, despite inconsistencies, the law was "falling into place more" in the search area. Part of the reason for the greater inconsistency in this area of the law, the reason why the judges felt they "can't do anything about it," is that judges must deal with a "factual matrix" or "cluster of factual circumstances," which judges view "through their own filters." "Facts may appear to be identical but aren't," observed one district judge, one of whose colleagues added that "there are decisions on the facts both ways," a result of the large number of search cases.[40] Still another district judge drew a distinc-

37. 428 U.S. 465 (1976). In *Stone,* the Court held that a state prisoner may not be granted federal habeas corpus relief on the ground that evidence introduced in his trial was obtained by an unconstitutional search or seizure, if the state has provided a full and fair opportunity for litigation of the Fourth Amendment claim.

38. For example, Weisgall states that the cases in the area show "numerous discrepancies and inconsistencies." Weisgall, *supra* note 35, at 245. *See also* Klein, *The Doctrine of Founded Suspicion,* 6 GOLDEN GATE U.L. REV. 509, 515 (1976); Gardner, *supra* note 20.

39. Inconsistency with respect to the insanity defense was also thought "intrinsic." One judge noted that the court had heard De Kaplany v. Enomoto, 540 F.2d 975 (9th Cir. 1976), *cert. denied,* 429 U.S. 1075 (1977), en banc "because one panel tried to change the law," and the court would not take cases en banc when panels were applying the same law.

40. See the comments of Chief Judge John R. Brown of the Fifth Circuit:

> In dynamic areas of the law such as search and seizure, warrantless arrests and searches, the result frequently depends on nuances of the facts. From one set of facts to another,

tion between "direct conflict[s]" and cases that go "in different directions," which he said were more likely to be encountered.

Search cases, particularly where the exclusionary rule[41] was at issue, were also more likely to produce inconsistency because, according to a circuit judge, "some judges have higher thresholds of indignation" than do others: "some feel all wiretapping is evil and resolve all cases against the government," while others resolve all cases for the government "which is trying to protect us." A district judge also drew attention to the effect on inconsistency of appellate judges' differing ideologies. Two Ninth Circuit judges, he said, closely follow Packer's Due Process Model[42] and, in action he thought unfair, "systematically reverse convictions below almost on the ground they were criminal convictions." The presence of these judges on a circuit panel produces results different from those rendered by other judges, he said, noting that those appellate judges had not experienced "a hotly contested criminal trial."[43] Another area in which this judge felt results were affected by the judges' predilection was antitrust. The judge claimed to be able to guess the result in such cases from the make-up of the panel.[44]

IV. GRAVITY OF THE PROBLEM

While judges generally agree that inconsistency exists, and exists more in some areas than others, proportionately more circuit judges (eleven of fourteen) than district judges (only five of eleven) felt inconsistency was a "problem," and two of the three circuit judges who said it was not a problem qualified their responses. One

---

as revealed in opinions, it can be a difficult process to attempt to distill what might be called the contemporary law of the circuit.

FIRST PHASE, *supra* note 14, at 523-24.

41. The exclusionary rule basically requires that evidence seized in violation of the Fourth Amendment, as well as evidence arrived at through utilization of the illegally-seized evidence, be excluded from use at trial. *See* Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule applied to the states through the due process clause of the Fourteenth Amendment); Weeks v. United States, 232 U.S. 383 (1914) (federal prosecutions).

42. The Due Process Model is one of two value systems identified by Packer as competing for priority in the criminal process. The Due Process Model has as its prime goal the minimization of errors in the criminal process, while the Crime Control Model has as its central theme the proposition that repression of criminal conduct is the most important function of the criminal process. For a discussion of Packer's models, see H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149-246 (1968).

43. He added that circuit judges, some of whom debate about "whether trial judges should give written instructions," "can't be serious" about the placement of a verb or an adjective in jury instructions in a complicated case which has lasted several weeks making a difference to a jury."

44. He called antitrust law "not law, not trust, not economics," but something which "deals with American folklore and ideology."

of the two said that it was not a problem "from a broad social standpoint," because usually the result in the case was clear, as where "the man was guilty anyway." However, said this judge, inconsistency was still a problem *to him;* he worries about it and thinks it should not exist. Similarly, one district judge commented that inconsistency is bothersome because "the law should be pure." On the other hand, one of his senior colleagues did not find himself getting "terribly upset about it." In part this was because "we've always had it" and in part because there were "lots of other unfairnesses" in the system, including the matter of who gets arrested and who does not. He did, however, recognize that inconsistency was not fair because "some get off and others do not."

Although they were concerned about it, none of the judges who said inconsistency *was* a problem considered it extremely serious. Inconsistency did, however, cause problems for the court, for example, in terms of logistics. One judge said that it was a particular problem for an active court to have to take cases en banc to resolve inconsistencies because an en banc "takes a tremendous number of hours." Circuit judges also had the concerns of district judges in mind in making their evaluations. While inconsistency was thought not to be serious because it happens only infrequently, it was the "sort of thing district judges can grumble about." A stronger statement was made by a former district judge, who said that inconsistency was a problem at the district court level, especially in border search cases. In such cases, he said, district judges "didn't know what the hell law to apply." Another former district judge, who said that inconsistency was serious in a theoretical sense, thought that the problem was "more theoretical than real." He felt that district judges magnified the problem by paying so much attention to unpublished memorandum cases, in which the circuit panel was trying to decide "*that* particular case," never intending to distinguish the case from others. On the other hand, he argued, there is less inconsistency in the court's published opinions, in which the court tried to be more dispositive. People were made more excited by other irremediable problems, said one judge. On the other hand, said another, "If it troubles lawyers and district judges, it is a problem." This judge, who considered inconsistency a "moderately serious" problem, cautioned that there had been no "mass meetings" about it. These remarks and others suggest that inconsistency is seen as serious to the extent that it creates a public relations problem for the court: it is "not a matter of deep concern unless a charge [of inconsistency] is made." As other Ninth Circuit judges said, it "makes us look kind of bad," and "isn't good public image, not a healthy thing."

The district judges who thought that inconsistency was not a problem said it was "not glaring" or was "part of life." One remarked that it did not "make a great difference in the overall administration of justice."[45] Another specifically noted that the court would use an en banc hearing to resolve a "fundamental discrepancy." District judges who *did* think that inconsistency is a problem did not consider it a major one, although one "could hope for something better in precision of the law." A judge who found the incidence of inconsistency "minimal" thought it could be "cured administratively, by a computer and good administrators."[46] Another district judge, who said that inconsistency was not a problem for him, claimed that it was not a big problem for the court, either, but thought that it was more serious for litigants when cases depended on the "luck of draw of the panel, like the luck of draw of the trial judge." Describing the problem as "not as serious as I once thought," this judge reported that a greater familiarity with the law had led him to believe that "there is not as much inconsistency as some practicing attorneys think." He added that the court is acutely conscious of the problem. Nonetheless, he concluded, "If nothing is done about workload, with more judges coming, so that complex relationships will increase geometrically, it will increase the potential and the harm" from inconsistency.

Judges' perceptions of the seriousness of inconsistency can also be studied by inquiring whether and to what extent judges talk to each other about the problem. All of the circuit judges responding said that inconsistency was discussed within the court, although two said that such discussion was not frequent. Judges reported that such discussion took place between panels, within the court's committees, at meetings of the circuit council, and at the court's annual Symposium. One judge also quoted former Chief Judge Chambers: "We pray with each other" about it. Judges also discussed the topic on a one-to-one basis; only one circuit judge said this happened only rarely.

All but one of the ten district judges responding said the topic was discussed. Inconsistency would be discussed in a general way or there would be an occasional remark when decisions were handed down, with someone asking whether the judges had read some other

45. This judge felt that, in any event, courts don't make much difference in deterring crime; it is, he said, "like sand in a sieve."

46. The reference to the computer was a suggestion that the court keep track of cases with similar issues, so they could be heard by the same panel, or at least not handed down until different panels confronting the same or similar issues could consult with each other. *See* notes 77-78 *infra* and accompanying text.

case arguably on point. For others, however, the subject was discussed frequently in order "to ferret out the law and how we should follow it." "That's our bread and butter," observed one judge. Another pointed out that such discussion occurred most often when a district judge was reversed. The topic was raised both with district court colleagues and with circuit judges, although far more with the former than with the latter. Several district judges indicated, however, that such discussion took place only with other district judges, not with the circuit judges. Discussion of inconsistency between district judges and circuit judges occurred primarily in the context of individual cases, either when the district judge was writing the opinion for a panel or when two panels had cases with a similar issue. One veteran district judge remarked that when he was on a panel where another panel had the same problem, the two panels exchanged opinions and memoranda on how to avoid inconsistency. This judge thought that that was a good way to deal with the problem, as the issues were handled more thoroughly than they would have been had there been a face-to-face meeting of all the judges involved.

The judges were also asked whether inconsistency had been discussed during the circuit judicial conferences—the annual meetings of circuit and district judges and lawyers at which the circuit's business is examined and discussed.[47] Seven circuit judges said it had been discussed and three that it had not been, although one of these qualified his answer by saying it had not been discussed "on the floor" of the conference. Four judges said that they didn't know whether the subject had been raised, with one of these commenting that it should be. One of the newer circuit judges, who commented that judges "visit" about inconsistency when they are together, understood that there had been programs on the subject in the past. Another new member of the court, who said that the subject was discussed, indicated that "we didn't think there was any [inconsistency]." While the subject was not a "formal agenda item," said several others, it came up informally in various ways. Although a senior circuit judge stated that the topic had indeed been raised—by the district judges—the few district judges answering the question said the topic had not been discussed.

47. For one Ninth Circuit judge's views on the circuit judicial conference, see Wallace, *Judicial Administration in a System of Independents: A Tribe with Only Chiefs*, 1978 B.Y.U.L. REV. 39, 59-62.

V. Causes of Inconsistency

The judges had offered some explanations for inconsistency in the course of their comments about those areas of the law in which inconsistency was more likely to occur.[48] When the question of the causes of inconsistency was addressed directly in the interviews, the judges identified a variety of causes, but clearly felt that the principal cause was judges' attitudes or ideologies. This reason was offered by roughly half the circuit judges and half the district judges who responded. Many judges also named as a major cause of inconsistency either the size of the Ninth Circuit caseload or the large number of judges used to process that caseload. Virtually every cause the judges suggested was, however, internal to the court. Only one senior district judge who sat principally as a Ninth Circuit appeals judge mentioned an external cause of inconsistency: lack of guidance from the Supreme Court.

Inconsistency was never intentional, stressed several judges. "Panel A does not *want* to come out with a different result from another panel," said one district judge.[49] Inconsistency resulted instead from inadvertence or a "lack of adequate monitoring" of cases with common subject-matter so that decisions by different panels could be reconciled before being issued. One judge said that between the point at which a panel received a case and the time the case was decided there was a "critical time" in which other panels might decide related cases that might not come to the judges' attention. This problem is exacerbated by "delays in getting opinions out." Another circuit judge referred to a "blind spot" from issuance of the slip sheet to publication of bound volumes—when cases might escape judges' attention.[50] Still another judge suggested that the primary cause of inconsistency was lawyers' failure to call cases on point to the court's attention. Only one circuit judge noted the court's use of unpublished opinions as a potential cause of inconsistency. That judge, who said he knew about such conflicts from sitting on panels with identical issues, felt that inconsistency had increased in the last two to three years as unpublished opinions were used.[51] Because the parties could not cite prior unpublished opin-

48. *See* notes 34-44 *supra* and accompanying text.

49. We "hardly ever go haywire on findable precedent," said one circuit judge.

50. In 1977, the Ninth Circuit arranged to have West Publishing Company print its slip opinions and prepare an index which could be used to identify cases on any given topic. This served to reduce, but not entirely eliminate, the "blind spot" referred to here. *See* note 78 *infra* and accompanying text.

51. The actual shift from use of published memorandum orders to unpublished opinions occurred in late 1972, and thus had been in effect for over 4½ years at the time of this interview.

ions, he said that the judges remain unaware of a case with the same facts.[52]

Several judges were of the opinion that the court's volume of cases (its "tremendous caseload" and the "pressure of business") contributed to inconsistency. Said a senior circuit judge, addressing the matter at length, "More and more, we find, unwittingly, panels dealing with the same issues. An increase in the number of judges will increase it. We cannot keep up with what every other member of the court writes." Inconsistency, he added, is "not based on the willingness of the judge to disregard cases; at times they are not aware." It is just that there is "so damned much stuff" to contend with. This comment clearly shows the relationship between inconsistency and both caseload and number of judges. So does his colleague's observation that there is difficulty in coordinating the flow of information when the court uses more than fifty different judges;[53] increased caseload made precedent much harder to find. As another judge remarked, the larger the circuit—that is, the larger the number of judges—the more likely it is that inconsistency will occur. As a district judge put it, "The bigger the court, the more difficult it is to arrive at a consensus." Although some degree of predictability was desired by the judges, he said that they knew of no way to predict the predilection of a panel when the court drew on such a large number of individuals for panels. With many people, this judge said, you "don't have a court, you have many courts." Another district judge helped put the matter in perspective with his observation that "no matter how you divided up the Ninth Circuit, you'd have the same number of judges" and thus "would have the same inconsistencies as between circuits."

The law itself was thought to be a cause of inconsistency. Inconsistency resulted in areas in which the law is "difficult" or because the law was "so broad and unsettled" in the areas—like search and seizure—where inconsistency occurred most frequently. In such areas judges try to distinguish past cases from each other, thus

52. He said Gardner had "exaggerated" in his article and had been "somewhat unfair." During the Hruska Commission hearings, Dean Roger Cramton quoted Dean Griswold to the effect that use of unpublished opinions without precedential value "was essentially an outrage in which judges were purporting not to take their own prior decisions seriously and departing from stare decisis and not being really concerned about their fundamental obligation under a system in which equal justice under law is to treat litigants the same way, and to take their prior decisions seriously." COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, SECOND PHASE HEARINGS: 1974-1975, at 538 [hereinafter cited as SECOND PHASE].

53. The actual number was 70 per year, if one includes the court's own active-duty judges and the "extra" judges (senior circuit judges, district judges, and out-of-circuit "visitors").

creating at least the appearance of inconsistency.[54] "None of the judges would purposely overlook cases which go in another direction," said one judge, but some would try to distinguish these cases "and some of those efforts are flawed." According to one senior circuit judge, the greatest cause of inconsistency was "writing around" another decision. This occurs when there are "two opposing theories of law where the judges on each side are trying to avoid the effect of decisions on the other side."[55]

Many judges thought that the judges' ideologies were a major cause of inconsistency. One judge who had "never seen [Democrat-Republican] politics as such affect decisions" in criminal law said that politics played a part when the judges were deciding economic issues, for example, in Labor Board cases, in which this judge claimed to be able to tell when "staunch Republicans" are on the panel. "Strong philosophical disagreements" within the court and the presence of one or two judges who "want to reverse all criminal cases" led to a situation where, when certain judges are on a panel, there is "trouble like a conjunction of stars," requiring an en banc sitting of the court. A self-styled "strict constructionist" judge echoed this theme in observing that some judges wanted to "help defendants and punish the police or punish defendants and help the police." Judges' "different notions of justice," most "forthright in criminal areas, . . . reflect different approaches in society," said a circuit judge. He felt that judges cannot be convinced to change their minds about such notions, which color their perceptions of facts. Several other judges agreed that inconsistency resulted from differences in perception of fact. One said that it depends on how particular facts are evaluated by the judge.[56]

Commenting on this subject, a district judge said that "judges don't differ so much on the law but on how they view the facts." Because "the reasoning processes of individuals are different," the law is viewed differently by each individual judge, affecting how

54. Said one district judge, "Judges never say to hell with a case; they can distinguish it."

55. See the comments by Judge Alvin Rubin (E.D.La., now 5th Cir.):

> [A] panel of three other judges may feel either that the rule is "wrong" or that it should not apply to the case they are considering. So an understandable desire to decide today's case in accordance with the proclivities of the panel now sitting seems to lead to opinions that fail to accord to prior decisions the willing acceptance and wholehearted enforcement that trial judges are expected to accord appellate decisions. Instead, these later opinions seem to distinguish the earlier decisions on an ad hoc basis.

Rubin, *supra* note 26, at 452.

56. Recall the earlier discussion of areas in which inconsistency occurred most frequently; several judges there talked of judges looking at factual circumstances through their own perceptual filters. *See* notes 34-44 *supra* and accompanying text.

each applies the law to a set of facts. This judge argued that the circuit judges "find the facts 'up there' (in the court of appeals) whether they think they do or not."[57] Another district judge, of a different ideological persuasion, also spoke of Ninth Circuit judges' tendency to "rewrite the facts"—to the point where he didn't "recognize one of my cases when it comes down." The circuit judges, he felt, "end up deciding those cases the way they feel they ought to be decided," making "their statements of fact support their conclusions."

Differences between judges resulted not only from the effect of varying criminal justice ideologies on fact patterns. Differing attitudes affect intracircuit inconsistency in any area with new or nebulous concepts. Judges, often "people who know a governor or a president," may still have widely divergent views of the law in such areas. As a district judge explained, some judges are "advocates, always trying to make a point, trying to move the court over to their position, to change the law of the circuit," while others are content to adhere more closely to existing circuit precedent. Such disparate judicial philosophies may be based on different background and experience. One circuit judge called particular attention to differences between appellate judges who had been trial judges and those who had been academicians or "who have been on the circuit court so long that they had forgotten what the inside of a trial court looks like." The resulting rigid frame of mind would lead a judge to try to make a panel "digress" from what he thought its proper path.

VI. PARTICIPATION BY "EXTRAS"

None of the judges volunteered the opinion that district judges or judges from outside the circuit who sit with the Ninth Circuit, the so-called "extra" judges, helped cause inconsistency. When asked specifically about the use of "extra" judges, the circuit judges generally agreed that the participation of the circuit's own senior appellate judges or its district judges did not contribute to intracircuit inconsistency; opinion with respect to judges from outside the circuit was divided.

Agreement was clearest concerning the senior circuit judges. Only one of six circuit judges responding[58] felt that the "seniors" contributed to intracircuit inconsistency, and he did not feel that

57. As an example, he mentioned a "founded suspicion" case in which one of the two most liberal Ninth Circuit judges had reversed another judge in his district.

58. For reasons of time consumed by the interviews, not all judges were asked this set of questions.

they did so significantly. Six of nine circuit judges felt that district judges also did not contribute to inconsistency, with two more saying that they didn't know.[59] One of the six said they did so "no more than [did] the mingling of the court's own judges," and another said that they did not do so except in "aberrational circumstances." Indeed, still another circuit judge observed that district judges were more inclined to follow than to depart from a circuit judge majority. A district judge's causing inconsistency was "not unheard of," but seldom would a district judge write a "full-fledged dissent." A senior district judge who felt that district judges were dissenting with increasing frequency claimed, however, that this had "not contributed to differences between panels."

Of the three circuit judges who did feel that district judges contributed to inconsistency, two, both of whom had been district judges, were quite outspoken; all three felt that district judges' contribution to inconsistency was significant.[60] One said that there were severe problems in having district judges sit with the Ninth Circuit, because they were not aware of trends of the circuit and thus were "out of step." District judges also were very busy. Arguing for district judges being given "credit" for sitting with the appeals court so they could take time off from district court duties to work on court of appeals cases, this judge thought the present arrangement an "imposition." He claimed that the current system also led the appeals court to give "lighter" cases to district court judges. The second judge, noting that the presence of district judges created "uncertainty" about circuit precedent, argued that the court loses "harmony of decision and integrity of precedent" when a "whole lot of strangers are dabbling in writing law"—an argument he also applied to the use of judges from outside the circuit. Part of the problem, this judge believed, involved communication: district judges did not participate in the Ninth Circuit's conferences and were not part of the circuit's process of ongoing internal communication. The comments by the third judge were less harsh. The presence of a district judge "increases the multiplicity of views," this judge observed. Some district judge-caused inconsistency was, he thought, "idiosyncratic," as when a judge simply decides not to follow the law of the circuit—just as "some judges refuse to go along with the Supreme Court."

59. Three district judges said that their district judge colleagues did not contribute to inconsistency; another said he didn't know.

60. All three agreed that it did not matter whether the district judges were active-duty or senior judges.

Ten circuit judges divided evenly as to whether out-of-circuit, or "visiting," judges contributed to inconsistency; another said he didn't know. The sparse comments offered by the judges reflect their view that the problem, to the extent it exists, is not thought to be serious. "They go along," said one senior circuit judge succinctly. It would be an "aberrational" circumstance in which they did contribute to inconsistency, said others, "possible" but "negligible," and significant only very rarely. One remembered an outside senior circuit judge who "went off the deep end in one case four years ago" but could recall no others. Nor had the district judges seen any other evidence of visitor-caused inconsistency. A district judge reported that a visiting judge with whom he had served was as well aware of the Ninth Circuit position as he was.[61] Those who did feel that the visitors contributed to inconsistency made relatively mild comments. For example, one thought that it occurred "more than with district judges." Another judge, who thought that visiting judges "don't feel compelled to keep up with the law of the [Ninth] circuit," suggested that it was not a significant problem unless many visiting judges sat with the court—but not many did so.

If the judges generally did not feel that participation by the "extras" directly contributed to the existence and extent of intracircuit inconsistency, responses to other questions seemed to indicate that the judges felt that the large number of judges participating in the court's work did magnify the problem of inconsistency—and certainly the "extra" judges increased the number of participants. In discussing why they felt that a court with a larger number of judges had a greater need for en banc sittings, the judges offered as one reason a higher frequency of inconsistency resulting from a large number of judges, the more judges there were, the greater was the possibility that any single judge would disagree with a panel's decision. Indeed, one judge felt that the number of conflicts would increase in a geometric fashion, the more decisions the court issued; a colleague disagreed, however, saying that the increase would be not geometric but only arithmetic. In either event, more judges meant more "imperfect people" who would produce "some mistakes" and "less unanimity of thought." On the other hand, if an appellate court had only three or five judges, all of whom were

61. That visiting judges try to inform themselves of the law of the visited circuit is reflected in the comments of a senior district judge with considerable experience both with the Ninth Circuit and outside the circuit. When he sat elsewhere, he said, he "tried to abide by the law of that circuit."

located in the same building, "they'd work things out,"[62] although "that is not necessarily good."

VII. Mechanisms for Resolving Inconsistency

When asked how they cope with inconsistency, the judges were virtually unanimous in stating that mechanisms were available to reduce or avoid the problem.[63] There was far less agreement, however, on what those mechanisms were. Moreover, judges disagreed on whether other mechanisms were available by which the court could avoid or reduce inconsistency. Two-thirds of the circuit judges—ten of fifteen—and all seven district judges responding said that such mechanisms existed; the mechanisms suggested by the judges were, however, generally like those already indicated as being used by the court.

Much reduction or avoidance of inconsistency results from action by individual judges; "judges have to do it themselves," said one. At bottom, said one senior circuit judge, limiting inconsistency depends on "my information and the information in the hands of the panel." Judges did say that they tried to increase their level of information. Asked what they did so their decisions would be consistent with circuit precedent, several judges talked of reading, studying, or paying particular attention to the court's cases. Some judges reported using the LEXIS computer system and "Shepardizing religiously" to avoid missing relevant cases.

The judges use a variety of other aids in their effort to remain current with the law. Two circuit judges keep notebooks, one being particularly careful to record "something out of line." The new West index system would, however, be better than his method, he said. Keeping a notebook, however helpful it might be, said the other judge, wasn't enough, because judges today do not have the time to do everything that a judge twenty years ago might have done. He found that he had to rely on his law clerks, but that was unsatisfactory since they were only with him for a year and "don't know what happened three or four years ago."

External stimuli were necessary to call possible inconsistencies to the judges' attention. Some judges rely on lawyers' briefs or oral

62. Judge Duniway remarked to the Hruska Commission that, after his experience on the California Court of Appeals, he was "astonished" that inconsistency did not develop in the Ninth Circuit. The reason, however, "was that at that time there were seven of us here in this building. We went to lunch together and we would inevitably talk shop and, there was another case pending involving a question you had, you almost automatically found out about it." First Phase, *supra* note 14, at 901.

63. Only one district judge said there were none.

argument. Said one district judge who felt that lawyers should point out existing circuit law, "If people do their work, it will be evident to the panel that a case exists." "You would hope," said another judge, "that lawyers would bring contrary authority to bear." Judge John Kilkenny, in comments to the Hruska Commission, noted that, when a case was docketed, counsel were notified "to inform us as to related cases so they can calendar together," something he felt helps significantly to eliminate conflicts.[64] One judge, who tried to read all the court's opinions—and had his clerks read all the court's opinions *and* memoranda—noted that some of his colleagues had said they could not read all the court's opinions because "with our flood of stuff, it is impractical."[65] As a result, the judges rely on lawyers to raise the issue of inconsistency through petitions for rehearing, which can lead the panel to revise its opinions. One mechanism for correction noted by Gardner is that "the three-judge panel that originally decided the case may correct the result at the behest of a party or *sua sponte*."[66] Rehearing petitions, however, simply increased the required reading, and at least one judge did not read petitions for rehearing en banc unless he was on the panel initially deciding the case. He did, however, read his *colleagues'* requests for en banc rehearings, as did another judge, particularly for cases heard by panels on which this judge had not sat: this practice let him "pick up aberrational cases" through "screams from the losing party."[67]

A. En Bancs

Among the mechanisms for resolving inconsistency which involve collegial action by the court, the most obvious was the holding of en banc sessions of the court to establish new precedent for the circuit, perhaps by reconciling conflicting rulings. En banc courts may, however, be called not to resolve intracircuit conflicts but to make major new policy decisions where the vast majority of a large court does not wish to be disfranchised from participation in the decision because they are not members of the panel deciding the issue.[68] Asked specifically about the relationship between court size

64. FIRST PHASE, *supra* note 14, at 826.

65. That concern seems to be shared by the judges of the other large court of appeals, the Fifth Circuit. "It is very burdensome for each judge to read and analyze all of the opinions of the other 14 judges." *Id.* at 392. (Statement by Judges Gewin, Morgan, Clark, Coleman, Godbold, Dyer, Simpson, and Bell).

66. Gardner, *supra* note 20, at 1225.

67. If a panel decision seemed inconsistent with the court's prior rulings, there would, he noted, be a "blizzard of memos," which increased once a decision was made to go en banc.

68. Howard has suggested that this is the predominant reason for the calling of en banc

and the need for en bancs, the judges agreed that as the number of judges on an appeals court increased, en banc sittings were needed more. Only one judge of fifteen thought that the need for en bancs did not change as the court's size increased and only one (generally opposed to en bancs) thought that, because of the greater panel autonomy which accompanied the increased number of judges, the need for en banc sittings actually *decreased* with court size. The judges also were asked whether the increase in the number of judges altered the *effectiveness* of en banc sittings of the court. Twelve of fifteen circuit judges felt that lessened effectiveness would result. One of the other three said that an en banc court would not be any more of a problem than a three-judge panel would be, but the other two were more hesitant. One said that effectiveness would remain unchanged only "up to a point," and the other was troubled by added judge time even without changed en banc effectiveness.

Differing reasons were offered for the lessened effectiveness of en banc sittings of a larger court. With more judges, it is more difficult to get all the judges together in one place at one time, with considerable time consumed in the process. Finding a mutually convenient time to meet was particularly difficult because judges' schedules were set several months in advance. Much additional time was consumed by the procedure surrounding an en banc, before and, especially, after it is held. One judge called all the "ying-yang" over whether the court should go en banc "oppressive," although he thought that the cases actually taken by the court en banc were not oppressive. Other judges pointed to the "much more ponderous procedure" after argument, involving time-consuming postargument discussion and circulation of opinions aimed at trying to shape an opinion of the court. The time between oral argument and disposition is much more extended than with a three-judge panel's disposition of a case. "More people are griping at footnotes and language" in the en banc opinion, as the court was "forever trying to hammer something out." A judge who called the en banc a "clumsy mechanism" also complained of "more people in the act, more disparity in view, and more writing to bring about an opinion." An attitude of "us versus them" would develop so that there would be more en bancs, particularly on significant questions. One judge commented that with a large number of judges, it was a little like "Quo Vadis," with two "teams," limiting the benefit of en banc

courts in the Fifth Circuit, the other extremely large U.S. Court of Appeals. Comments by J. Woodford Howard, panel on Decision-Making on Federal Courts of Appeals, American Political Science Association meetings, Washington, D.C. (September 2, 1979).

oral argument because some judges "don't ask questions, they make more argument" than in panels. The judge making these observations felt those arguments could be heard in conference; he wanted to hear the lawyers, something difficult with the "more adversary" atmosphere of an en banc.

Judges were thought to be reluctant to agree to hold en banc courts because of these difficulties: the "disincentives" to take a case en banc, said an active-duty circuit judge, "go up and up and up." One senior circuit judge noted that the active-duty judges were tired of en bancs and want to avoid them. The court seldom agreed to an en banc at a lawyer's request; a call for an en banc from within the court usually initiated the process, and "the call is always apologetic" in tone. That the more junior members of the court lacked familiarity with what a senior circuit judge called the en banc's "horrors" in consuming judge-time made them less reluctant to call for them, he said, and made it more likely that they would be held.

Problems with en banc proceedings had led the court to discuss using a "short" en banc, one involving less than the court's full active-duty membership. At the time of the interviews, however, agreement could not be reached on specific procedures. If, for example, only the most senior active-duty judges were to sit, there might be "stratification": the en banc would be disproportionately made up of judges appointed by one president, while those appointed by a later chief executive would not be able to sit. Yet the judges were fully aware of what was soon to happen; as one noted, "Congress will force us to have a foreshortened en banc, if we are to get more judges."[69] This judge, taking a position which he said diverged from that of his colleagues, said that he did not want a short en banc, because having an en banc with twenty-three judges would mean that en banc courts would seldom be called, a thought which pleased him.

B. Screening

Many judges also mentioned screening or monitoring devices and the circulation of opinions with the court as other principal means for reducing or avoiding inconsistency. Monitoring or screening in order to alert judges to cases which might create inconsistency

69. In the Omnibus Judgeship Bill of 1978, the Fifth and Ninth Circuits were given the authority to establish short en bancs, as long as only one en banc court existed at one time. Act of October 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629 (codified at 28 U.S.C. § 41 (1976)). It was anticipated by the sponsors that membership was not restricted on a geographic basis. *See* 64 A.B.A.J. 1641, 1641-42 (1978). The en banc court could, however, have variable membership.

is important because it provides the judges with crucial information. Concerning the need for expanded monitoring, one judge noted:

> Several of the judges and I have talked about a monitoring system so that when Panel X has Y case, they will know when they go on the bench—or shortly thereafter—that another panel has the same issue, in order to alert panels so they can get their heads together, and thus could avoid a confrontation issue or have one panel write and the other follow.

That this proposal closely followed the court's General Order on interpanel contact[70] may suggest the degree to which that rule was not being effectively implemented. Calendaring similar cases before a single panel would, of course, be preferable, but as the court's mechanisms for such calendaring were underdeveloped at the time of the interviews, the more immediate problem was to deal with cases already being decided by different panels. Each panel needs to know what other panels are doing so that, when they are dealing with cases containing common issues, the panels can have "more immediate communication," and can decide that one panel will decide its case(s) first, with the second "falling into line."[71] Some judges suggested that when similar issues are involved, an exchange of draft opinions could assist in reducing inconsistency.[72] In such situations, if one panel will "take the trouble" to distinguish the cases as to the facts, the possibility of inconsistency is removed with "no change in results." That *draft* opinions be exchanged is considered crucial for, as one district judge noted, once the slip opinion is published, "the panel is committed." Later resolution of inconsistency is much more difficult to accomplish although slip opinions can be amended. A suggestion with a broader reach came from a district judge who thought that in "important cases" the members of the court could read drafts of opinions from other panels before the opinions were released. Judge Goodwin had earlier urged the circulation of opinions "before anything is mailed out to the attorneys, or to the parties," so that the court could catch inconsistencies and "save the embarrassment of having to go through this en banc procedure when we have a conflict." He noted, however, that a majority of the court had not voted to accept the suggestion.[73]

Staff attorneys, law clerks, and "knowledgeable" people in the

70. U.S. Court of Appeals for the Ninth Circuit, General Order No. 8, April 1, 1974.

71. Wasby, *supra* note 5, at 7-8.

72. One judge later talked of the possibility of "computerized drafts" of opinions, something he called "twenty-first century electronics."

73. FIRST PHASE, *supra* note 14, at 821. Judge Kilkenny, with whom he was testifying, also said that the rule, used in the Tenth Circuit, "might be a good rule." *Id.* at 818.

clerk's office—all part of "the whole staff process"—were used to "pre-screen" or monitor cases. In 1975, Judge Goodwin had told the Hruska Commission that "We don't even know in advance of oral argument that another panel has the same question on another case; and we don't have an institutionalized way of finding out." Such a mechanism could be developed, "but it means using staff differently than we're doing now." As of that time, Goodwin felt that the court's staff was not adequate to cope with the problem of identifying cases with common issues.[74] By 1977 that situation had changed, yet a circuit judge observed that the process remained "diffused," with "responsibility not focused." "Someone must be charged with the duty," one district judge pointed out. According to a circuit judge, a "properly paid court executive with an adequate staff" would be able to "catch differences of opinion" when the panels decided cases and slip opinions were published, a backup to a pre-screening process. Another judge suggested greater and more efficient use of staff attorneys, and the clerk's office, and, more generally, the use of the central staff in more sophisticated ways to help avoid and reduce inconsistency. Indeed, shortly after these interviews, the court did act to strengthen its staff attorney system by establishing additional staff attorney positions and by hiring a new head for the staff attorney office.[75]

The judges considered staff attorneys to be particularly important for any screening or monitoring program; more than one judge said that reliance on their own law clerks was no longer sufficient if they were to keep on top of matters. One circuit judge, however, said it was his law clerks' "mission" to find cases related to the ones he was considering; another remained consistent with the court's decisions, after he had read cases, by arguing with his law clerks. Without the staff law clerks' work, a panel would find out that another panel had a similar question only coincidentally. Indeed, said one judge, the staff attorney system was *intended* to spot common problems before different panels. He felt that proper use of the staff attorney would be sufficient to solve the inconsistency problem. Other judges, although not as optimistic, nonetheless made clear their feeling that staff assistance was very important.

A circuit judge who claimed not to be an advocate of the use of computers in the law suggested that the proper information could be "put in a computer by a good computer programmer." Two dis-

74. SECOND PHASE, *supra* note 52, at 1010.

75. Professor Arthur Hellmann, formerly Deputy Executive Director of the Commission on Revision of the Federal Appellate Court System, who was named to the post, returned to teaching in mid-1979.

trict judges also mentioned computerization, one placing it among the "administrative methods" which could serve in "minimizing the minimal" inconsistency he saw in the court.[76] In suggesting additional mechanisms which might be used by the court, one judge urged that the LEXIS system for retrieval of information about cases be used more widely. "If everything were on LEXIS," this judge said, it "would limit the chances of inconsistency."Consonant with the prescreening idea was the suggestion that staff attorneys create a categorized inventory of cases in order better to identify potential and actual conflicts. In 1975, Judge Goodwin had stated, "Ideally, I would like to see our staff get hold of cases as soon as they are filed, tag them, mark them with radioactive carbon or something and then trace them so we don't have this intracircuit [inconsistency] problem."[77] Staff attorneys could easily feed necessary information to the judges in the course of preparing bench memoranda. Use of the West publishing system and the index of cases West had begun to prepare for the court to aid in reducing inconsistency was also suggested. One judge, who felt that inconsistency would be reduced if opinions were printed more quickly after they were decided, claimed that cases were printed and digested sooner under the West publishing arrangement than under the court's previous methods. Instead of six weeks elapsing between the filing of an opinion and the arrival of the West advance sheets, now there were only fifteen or twenty days between the filing of an opinion and the arrival of the slip sheet with West headnotes already printed on it. On the other hand, he noted, the new arrangement with West would not pick up all the cases some judges felt the court might need.[78]

C. *Circulation of Opinions*

An important way of reducing or avoiding inconsistency is communication among the judges, including the general "intramural

76. The computer has been used to assist the court in the calendaring of cases. *See* FEDERAL JUDICIAL CENTER, CALEN9: A CALENDARING AND ASSIGNMENT SYSTEM FOR COURTS OF APPEALS (1978).

77. SECOND PHASE, *supra* note 52, at 1010. *See also* FIRST PHASE, *supra* note 14, at 356, 363 (comments by Judge John Minor Wisdom of the Fifth Circuit). On the matter of an index of unpublished cases in order to avoid inconsistency caused by those cases, see the exchanges between Judge Robert A. Sprecher (7th Cir.) and Commission members Judge Roger Robb (D.C. Cir.) and Francis Kirkham and Executive Director Professor Leo Levin, SECOND PHASE, *supra* note 52, at 536-38.

78. Because West only published slip opinions for cases ultimately to appear in *Federal Reporter*, not the "Not for Publication" cases, the index was limited to the former. One district judge said that he used the Sheppard citator to find relevant district court cases elsewhere in the circuit—perhaps ones likely to be appealed.

discussion" that occurs particularly if cases are being considered, or have been accepted by the court, for en banc hearing. Discussion between members of a panel, which often does not occur until after a case is argued although it does occur afterwards, was also suggested as an important, if obvious, inconsistency-reducing technique.[79] The Ninth Circuit also tried to have the judges, in the week after oral argument, circulate to all the other judges a short synopsis of cases likely to produce inconsistency.[80] This device "died, like most matters with more work," because some judges failed to write their memoranda and the court lacked a mechanism for "tracking" them. Moreover, this circulation of memoranda about issues likely to produce inconsistency was found to be difficult because of the "flood of paper we're in." This failure does not, however, imply the absence of other types of communication that may serve to identify inconsistency. For example, a judge who dislikes the decision of a panel on which he is not sitting may write to that panel. Such memoranda, particularly if stimulated by petitions for rehearing, often result in changes in opinions.[81] Moreover, several judges mentioned circulation of opinions before they were filed as a way of reducing and avoiding inconsistency because, in the words of a senior circuit judge, it allowed the court to "sort out stuff before it is far enough [along] to cause problems." Another senior judge mentioned the court's rule—"in the main disregarded"—that an opinion be circulated to other members of the court. The Third Circuit's rule that all opinions proposed for publication circulate within the whole court before being filed[82] "would catch three-fourths of the court's present inconsistencies," said one judge. Another circuit judge felt, however, that while that method works for the Third Circuit, it would fail in the Ninth. That judge thought that there were too many Ninth Circuit judges, who are often out of contact with each other for as much as four to seven weeks, for circulation of opinions to have much practical value in countering inconsistency.

Asked specifically whether they circulated opinions to judges

79. Wasby, *supra* note 5, at 3, 6.

80. Judge Ozell Trask had mentioned "some syllabi of some sort that will be circulated about opinions in question." SECOND PHASE, *supra* note 52, at 946.

81. *See* FIRST PHASE, *supra* note 14, at 379 (comments of Judge John C. Godbold). Judge Godbold stated that he had called his colleagues to say, " 'I have read your opinion in such a matter; and how about reading the following case, which I think you will find is directly contrary to what you have decided.' In both instances the judge wrote back and said, 'You are right, I will have to withdraw the opinion.' " Judge Godbold said he feared that he would turn out an opinion contrary to one recently decided by the court; in the instances he mentioned, he was "totally familiar" with the points and was aware that each ruling was "contrary to a case decided by this circuit within the past few months."

82. 3D CIR. INTERNAL OPERATING PROCEDURE CH. 5, § C.

other than those on the panel hearing a case, twelve of fifteen circuit judges indicated that they did so, but only rarely. When judges did circulate cases to judges who were not on the panel, it was usually part of an effort to coordinate with the rest of the court when another panel was considering a similar problem. On the other hand, only three of nine district judges reported following this practice, with one commenting that it was improper because the "other judges don't have a background on the case or familiarity with the briefs." Ten of twelve circuit judges thought the practice helpful,[83] but a question as to whether the practice would be helpful if it were expanded produced a mixed response. The judges were evenly divided on the issue[84] and those who felt greater circulation of opinions would be helpful hedged their views. For example, a district judge who favored the idea also thought that it might be too time-consuming and indicated that it couldn't be done well with all cases. Because of the time constraints, some judgment would have to be made as to the importance of a particular case before an opinion was articulated.

Court-wide circulation of opinions might well be useful in combatting inconsistency even if it were limited to cases which otherwise would have to be set for en banc hearing—to overrule a prior decision of the court, for example. Judge Eugene Wright commented to the Hruska Commission that while circulation of opinions outside a panel to the entire court was only rarely undertaken, it was done "if we happen to have a problem which under our own procedure involves the overruling of a prior opinion of the court" in order to obtain "observations or concurrence or objections before an opinion is filed."[85] A district court colleague whose view was colored by his perception that inconsistency was not a sufficiently serious problem to warrant the remedy also observed that it "wouldn't be cost-effective to do it across the board" because it would "water down" the existing practice of communication when other judges were aware of the issues. The circuit judge most strongly advocating the practice, who said that "judges could look [at the opinions] if they wanted," indicated that "beady-eyed law clerks" would catch inconsistencies. On the other hand, a colleague who opposed the idea thought that only a "speedreader" could read every opinion: the suggestion that all opinions be circulated "boggles the mind,"

83. One district judge, who did not himself engage in the practice, said he had been the beneficiary of it.

84. Seven circuit judges in favor, seven opposed; two district judges for, two against. One additional circuit judge said he did not know.

85. FIRST PHASE, *supra* note 14, at 728.

he said. Several other judges also mentioned the lack of time to read the opinion. They noted a problem in keeping up even with the court's slip opinions. Increased circulation of opinions would not be practicable, they thought, unless judges had additional staff to help read the opinions. While the judges would "pick up some useful ideas" from the practice, it would only work if the court were smaller and all the judges were in the same place. Judge Duniway argued before the Hruska Commission that full circulation of all opinions, debated within the court "many times," would result in an inordinate delay in the filing of opinions or else "you would not really read them and then it would be just circulated paper for no purpose."[86]

Those opposed to greater circulation of opinions to off-panel judges made similar comments. The court was "too big, too far apart [with] too many judges" for the device to be effective, said one senior circuit judge. Another, who felt that the Third Circuit started its practice when it was "overmanned," went further, saying the practice was bound to reduce both the quality and quantity of the court's decisions. A district judge believed that the results would be "negative" if it were done "automatically," particularly if the judges were to be expected to read the off-panel opinions critically. This, he observed, was difficult for circuit judges and worse for the district judges. He argued that the device should be used only if one had "a unique case with a judge skilled in a unique field." Unless a case were to result in a published opinion, the practice certainly was not useful because the opinions in "Not for Publication" cases told their readers too little, forcing judges to read the briefs if they were to understand the case. The off-panel judge would be further hindered, a district judge noted, by not having heard oral argument in the case and by not having the record before him.

VIII. CONCLUSION

Whatever view one adopts of the magnitude or gravity of intra-

86. *Id.* at 901. The judges, he said, had "almost without dissent every time it has come up, said, 'Look, we have got so much to read already. We have got so much paper work to do. We have got so many briefs to read. We have got our own cases to decide.'"

The judges of the Fifth Circuit, the other court with a large number of judges, had raised the same sorts of concerns. "Pre-release circulation of at least all signed opinions" would "in large measure" avoid intracircuit conflicts leading to en banc proceedings, but "the adoption of such a sound judicial standard is hardly feasible . . . in a court rendering an inordinate number of opinions." *Id.* at 392. (Statement of Judges Gewin, Morgan, Clark, Coleman, Godbold, Dyer, Simpson and Bell). Judge Bell later suggested that "such circulation is practical only in a smaller court;" it could not be done in the Fifth Circuit where "the opinion reading load . . . can only be described as oppressive." *Id.* at 454 (statement of Griffin Bell).

circuit inconsistency, mechanisms to resolve it are deficient. There was near unanimity among the judges that the mechanisms for avoiding or reducing inconsistency were not adequate; nine of ten circuit judges and three of four district judges said so. Although the one district judge who thought the mechanisms adequate said that inconsistency is "taken care of," the one circuit judge who thought the mechanisms adequate said that those he had noted would be adequate if used but were not being used now. This judge did think, however, that progress was being made. One judge reported that he could not yet tell whether the new mechanisms, such as the use of the West index, would solve the problem. Those judges who felt there were no additional mechanisms for the court to use said "we've exhausted them," and "are continually working on patching things up." Although a senior circuit judge pointed out that the court had some "fine administrative judges" working on the problem, another judge pointed to a large pile of slip opinions on his desk—opinions he had yet to read—to indicate the nature of the problem.

The comment by one circuit judge that "because I don't think there is a great problem, I'm not concerned," indicates that not all feel that inconsistency is a high-priority item for the court—a necessary prerequisite to solving the problem. Moreover, there is some feeling that the court's inability to make the problem of inconsistency go away is not necessarily bad. As stated by one circuit judge, "The great strength of a collegial court is that views are not homogenized." While many lawyers seek consistency as a means of achieving "equality before the law" and to gain guidance in providing advice to clients, we also need to recognize that cases are seldom "on all fours" with each other. Far more important, the courts in a complex social system need to be able to decide cases not in a straightjacket but with flexibility to adapt the law to changing developments.[87]

87. I am indebted to J. Woodford Howard for the comment which stimulated this concluding thought. *See* note 68 *supra*.