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Intercircuit Conflicts in the Courts of Appeals

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ARTICLE

INTERCIRCUIT CONFLICTS IN THE COURTS OF APPEALS*

Stephen L. Wasby**

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PART I. INTRODUCTION

Each U.S. court of appeals draws to some extent upon other circuits' cases. Unlike the Supreme Court with its almost entirely discretionary jurisdiction, the courts of appeals have mandatory jurisdiction and thus must decide all the cases before them. Any circuit court of appeals can at times defer a decision until another court, particularly the Supreme Court, has decided the issue before it. However, in the courts of appeals, with the parties' urging the judges are likely to look laterally at the actions of the other courts of appeals which have faced the same or similar issues.

The most routine use of other circuits' cases is to support various, often non-central points. Beyond that, however, judges of any one court of appeals note whether other circuits' cases join and support, or diverge from and are in conflict with, the law of their own circuit. References to intercircuit conflicts are found in majority opinions, as when judges say why their court's position is preferable to that of some other circuits; in dissents from the panel opinion, when a judge says the majority is creating an intercircuit conflict; and in dissents from denial of en banc reconsideration of a case, when similar arguments are made. This activity—particularly how courts of appeals respond to the possibility that their actions will create intercircuit conflicts, including their attempts to limit intercircuit conflict before cases are taken to the Supreme Court—has received little scholarly attention.¹

1. The major exception is Arthur D. Hellman, *Precedent, Predictability, and Federal Appellate Structure*, 60 U. PITT. L. REV. 1029 (1999). That article reports a study commissioned by the Federal Judicial Center (FJC), after Congress, in the Judicial Improvements Act of 1990, asked the FJC to study "the extent and effect of unresolved

soon as they first appear, it is suggested that some courts of appeals have shifted position, thus eliminating the inter-circuit conflict. However, this has never led to systematic treatment of how the courts of appeals in fact dealt with incipient or actual inter-circuit conflicts, so that we remain with a virtual absence of work on the topic.

To help repair that omission, this article presents an examination of how courts of appeals deal with those conflicts as they decide cases that may produce a conflict or may reinforce a side in a pre-existing conflict. The purpose here is not to perform a statistical analysis of the frequency with which the issue of inter-circuit agreement or divergence takes place or of the proportion of certain types of responses. Instead, it is a look at inter-circuit conflict through the eyes of court of appeals judges, with the focus on *process*. Court of appeals judges' treatment of real or claimed inter-circuit conflicts is illustrated by examples. In looking at those cases, we limit our attention to those aspects of the case implicating inter-circuit conflict. Our interest is not in the details of the doctrinal analysis in which the judges engage in their published opinions but in the types of discussion they have about the questions before them.³ Here one must remember that there are cases in which inter-circuit conflict is the Supreme Court's focus when it grants review, but in the court of appeals, there was no discussion of real or possible conflict. This may have been because the conflict had not yet developed or because some interpretations of the point at issue had not yet been put on the table.

I do not take issue here with the assumption, implicit in most discussion of inter-circuit conflicts, that all inter-circuit conflicts should be eliminated or at least kept to a bare minimum. For present purposes, I take that debatable assumption as a given, because it is an important part of the background against which judges deal with the issue, and because most of their discussion seems to be based on its implicit acceptance.⁴ Nevertheless, one must keep in mind that the assumption *is* debatable. One might argue, for example, that differing interpretations of a legal point should be allowed to "percolate" before the Supreme Court intervenes to eliminate

3. The reader may examine those cases which are cited to obtain a better feel for the relative importance of the inter-circuit conflict issue within the case.

4. See, e.g., *United States v. Gwaltney*, 790 F.2d 1378, 1388 n.4 (9th Cir. 1986) ("Unnecessary conflicts among the circuits are to be avoided."). The question, of course, is what constitutes an "unnecessary" conflict.

This article provides an exploration of federal appellate judges' treatment of the case law of other circuits in connection with actual and claimed intercircuit conflicts. As such, it is a departure from the attention usually given to intercircuit conflicts from the perspective of the U.S. Supreme Court, which keeps tabs on intercircuit conflicts as lawyers claim they develop. In that line of scholarship, there are several principal questions examined. One is when, on the basis of its Rule 10(a) that intercircuit conflict will be a consideration in granting certiorari, the Court does grant review to those conflicts and when it does not, as well as the reasons why it does so. Another, related question is whether the court deals sufficiently with such conflict or whether more capacity to announce national law is needed.²

Despite the many studies of this genre, comparable attention has not been given to how lower courts have treated intercircuit conflict. In these studies, in connection with mention of the notion that conflicts should be allowed to "percolate," that is, that the Supreme Court should not try to resolve them as

conflicts between federal judicial circuits." *Id.* at 1036. While Hellman examines instances where one court of appeals does *not* draw on potentially dispositive out-of-circuit cases, the present article provides instances in which judges *have* used such cases. Hellman deals only with cases containing dissents, while the present article draws on any cases, whether or not the panel is internally divided. The two articles also use somewhat different perspectives in discussing use of cases from another circuit: Hellman focuses on whether uncertainty within other circuits would be reduced by making binding the ruling of the first court to deal with a question, while the present article provides instances where that has happened on a *de facto* basis.

2. Major work on intercircuit conflicts and the extent to which the Supreme Court resolves them includes: SAMUEL ESTREICHER & JOHN E. SEXTON, *REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS* (1988); Estreicher and Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 *NEW YORK U. L. REV.* 681 (1984); *New York University Supreme Court Project*, 59 *NEW YORK U. L. REV.* 823 (1984).

Important related works are H.W. PERRY, *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1991), and DORIS M. PROVINE, *CASE SELECTION IN THE UNITED STATES SUPREME COURT* (1980).

Of particular importance is the more recent work Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 *U. PITT. L. REV.* 693 (1995), and Arthur D. Hellman, *Light on a Darkling Plain: Intercircuit Conflicts in the Perspective of Time and Experience*, 1998 *SUPREME COURT REVIEW* 247. A professor at University of Pittsburgh School of Law, Hellman was deputy director of the Commission of Revision of the Federal Court Appellate System (the Hruska Commission) in the early 1970s and then chief of staff attorneys for the U.S. Court of Appeals for the Ninth Circuit. His frequent work on the subject made him the logical candidate for the Federal Judicial Center-sponsored study noted above. See Hellman, *supra* note 1. Much of Hellman's work is related to the proposal to divide the Ninth Circuit. See, e.g., Arthur D. Hellman, *Dividing the Ninth Circuit: An Idea Whose Time Has Not Yet Come*, 57 *MONT. L. REV.* 261 (1996).

the conflict.

Court of appeals judges' consideration of other circuits' cases and of claims of intercircuit conflict does not take place in separate, discrete steps in the decision of a case. Rather it occurs at a number of loci in the decision-making process as part and parcel of a seamless web of judicial decision-making. The initial and most basic place for consideration of possible intercircuit conflict is the three-judge panels which decide the vast majority of cases in the U.S. court of appeals. In discussing the case before them after receiving briefs and hearing argument, the members of the panel will examine and discuss cases from outside the circuit, particularly in the absence of circuit precedent on point. Not only must they deal with pre-existing intercircuit conflict, but they may also face claims, by lawyers or their panel colleagues, that to adopt a particular position would be to create an intercircuit conflict.

Once the panel issues its disposition, a claim of an intercircuit conflict may be raised either by lawyers petitioning for rehearing or rehearing en banc, or by judges outside the panel ("off-panel judges") who are stimulated by party initiative or act independent of it to monitor their colleagues' work. Those judges may "stop the clock" to ask the panel to reconsider its position. Or, if the panel will not amend its opinion in a manner acceptable to the off-panel judge, that judge may ask the court to rehear the case en banc to adopt a position that would not cause an intercircuit conflict.⁵

Data for this paper are drawn from two sources. One is published opinions of the U.S. courts of appeals from the 1990s, including dissents from denials of rehearing en banc.⁶ The other

5. Intercircuit conflicts are also debated within *en banc* courts, a matter outside the scope of this article.

6. To supplement the author's files, a WESTLAW scan using the command `TE (CIRCUIT /5 CONFLICT!)` & `DA(AFT 1989)`, that is, "circuit" within five words of "conflict," was performed for Ninth Circuit cases from 1990 through late 1999 to capture as many mentions of intercircuit conflict as possible, even if unusable cases also appeared. The scan produced headnotes and text embodying a reference to conflict for 329 cases; both published opinions from the *Federal Reporter* and so-called "not-for-publication" memorandum dispositions, which WESTLAW posts for the Ninth Circuit, were included. Because "conflict" also appears in reference to *intracircuit* conflict and other inter-court conflict, between the Ninth Circuit and Supreme Court or between federal and state court rulings, as well as in such concepts as "conflicting testimony" and "conflict of interest," of the 329 cases mentioning "conflict," only 135 cases involved references of any sort to intercircuit conflict.

The opinions in the 135 "good hits" were then examined to determine the context of the specific language about intercircuit conflict and to see if discussion of other circuits' rulings appeared elsewhere in the opinion. This step is a necessary step because

is case files. The latter are important because published opinions do not tell us about the *process* by which the judges have considered claims of intercircuit conflicts or even whether judges have discussed such conflicts when no judge chooses to mention them in the court's disposition. The casefiles do record the judges' discussion as they decide cases and agree on the disposition they will issue.

The judges of the Ninth Circuit have their chambers at dispersed locations throughout the circuit in addition to circuit headquarters at San Francisco. They are scattered from Seattle, Portland, and Boise in the north, to Phoenix, San Diego, and Los Angeles in the south, and to Fairbanks, Alaska, and Honolulu outside the contiguous forty-eight states. Most communication among the judges is neither face-to-face nor spoken on the telephone. This is the case for several reasons. One is that the judges are aiming toward a written product. They also use written communication because of their geographic dispersion; because panels of the court rotate, so that judges who sit together one month likely sit with other colleagues the next; and because some sit (are "on calendar") while others are in their chambers working on opinions. The judges communicate with each other about cases primarily by means of the court's internal e-mail system, with memoranda and draft opinions printed out in the recipient's chambers. There they become a hardcopy record of judges' communication with each other. In the appropriate case file, they join in-chambers memoranda between clerks and judge and an occasional notation about a telephone call.⁷

only one judge—likely to be the dissenter— may write explicitly of an "intercircuit conflict" but the other judges may have discussed the same cases without referring to "conflict." This suggests that the search, while over inclusive as noted, may also have been under inclusive to the extent that the judges, without ever using the "magic words" of "circuit conflict," discussed other circuits' doctrine that differed from the Ninth Circuit's position. *Herman v. Tidewater Pac. Inc.*, 160 F.3d 1239 (9th Cir. 1998), provides an example. It was a "hit" because of the mention of "conflicts" with respect to a subsidiary issue but did not "hit" on the panel's far more extensive discussion of the case's chief issue, on which the circuits had taken diverse positions but with respect to which the word "conflict" does not appear in the text of the opinion. Under-inclusiveness is not a serious problem here, as the present study does not undertake to calculate the proportion of cases in which the intercircuit conflict issue is raised, but instead deals with how conflict is handled when it is raised.

7. For detail on communication among Ninth Circuit judges, both before and after installation of the e-mail system, see Stephen L. Wasby, *Communication Within the Ninth Circuit Court of Appeals: The View from the Bench*, 8 GOLDEN GATE U. L. REV. 1 (1977); Stephen L. Wasby, *Communication in the Ninth Circuit: A Concern for Collegiality*, 11 U. PUGET SOUND L. REV. 73 (1987); Stephen L. Wasby, *Technology and*

The files used in this study are those of one Ninth Circuit judge, from closed cases in the mid-1980s through the mid-1990s. Basing a study on the files of only one judge does mean that there are many Ninth Circuit cases for which published opinions are available but information about the preceding within-panel discussion is not. Nonetheless, material in a single judge's files is quite likely to be reasonably representative of communication within a court of appeals. The reason is that in due course any judge sits with all other judges of the court. As a result, any one judge's files contain communications to and from many colleagues, including those not on panels with the judge but who have communicated in their role as off-panel monitors.

The case files are fairly complete for most cases,⁸ although occasionally context makes clear that some memos have not reached the file. The files contain communications among the three members of a panel considering a case;⁹ communications with off-panel judges who have commented on, and requested changes in, the panel's disposition; and communication within the entire court in relation to requests to rehear cases en banc.¹⁰

Like any internal court communication, the materials in these files are confidential, and the author was allowed access to them on that basis. When published opinions are discussed, they will, of course, be cited as per normal practice. However, because the material drawn from the case files is confidential, it will for the most part be presented without mention of the name of the judge whose memorandum is being quoted and often without mention of the name of the case. Materials presented in this article without attribution or citation are drawn from these

Communication in a Federal Court: The Ninth Circuit, 28 SANTA CLARA L. REV. 1 (1988); and Stephen L. Wasby, *Technology in Appellate Courts: Electronic Mail in the Ninth Circuit*, 73 JUDICATURE 90 (1989).

8. There may be variations from one chambers to another in the types of documents retained. It is also possible that a judge willing to grant access to files in closed cases to someone not on the court's staff, even if fairly knowledgeable about the courts, might leave more rather than less material in those files. The author's impression from discussions with judges is that they are too busy with the press of everyday business to have time to sort through case files selectively to create a favorable "paper trail." Few have a systematic "deaccession policy" for documents.

9. As with the Supreme Court, there is no transcript of the judges' post-argument deliberation of a case. There is a "conference memo" prepared by the presiding judge, summarizing the judges' positions to a greater or lesser extent and memorializing the writing assignment.

10. The latter material is particularly complete in these particular files because, as the court's en banc coordinator, the judge oversaw activity after a panel had issued its disposition even when not participating in the within-panel discussion (if any) with respect to intercourt conflict.

confidential materials, and as a result, the reader should not be looking for the types of citations that would appear as a matter of course in the usual law review article engaging in doctrinal analysis.

After this introduction, Part II provides some background on the intercircuit conflict issue. Part III contains discussion of whether judges' mention of intercircuit conflict is a rhetorical device. Some attention is also given there to the role of intercircuit conflict in holding en banc courts and to the relation between court of appeals' treatment of conflicts and the Supreme Court. Parts IV and V constitute the principal part of the article. Part IV is a discussion of the judges' use in their opinions of cases from other circuits, with a particular focus on treatment of intercircuit conflict, and their responses to dissenters' claims of such conflict. In Part V, we turn to see how questions of intercircuit conflict are handled during the decision-making process leading to an opinion. The article concludes with a brief summary and with a suggestion for further needed research.

Most discussion of intercircuit conflict begins with the mention of the conflicts in the judges' opinions. That warrants using public mention as our starting point before we move on to the previously-unexamined process by which the judges grapple with claimed intercircuit conflict. Separation of pre-opinion activity from the ultimate formal disposition also makes some sense because matters discussed within the panel may not be visible in the ultimately filed opinion; this is likely if disputes over other circuits' rulings are resolved there. That may occur when a judge who complained about an intercircuit conflict chooses not to file a separate writing, as a result of having obtained some modification of the majority opinion, from a feeling that publication may call more attention to the case than is warranted, or from a lack of passion to proceed. An off-panel judge's claim of intercircuit conflict in a "stop clock" memo or en banc call may likewise not result in a published dissent from a denial of rehearing en banc. Here we must remember that judicial opinions are not reports of the exchanges or bargaining that took place before the opinion was put into final form, so that judges do not report discussion of possible or actual intercircuit conflicts.¹¹

11. For example, a Fourth Circuit case that figured prominently in a Ninth Circuit panel's internal discussion received no mention in the opinion in the case. See *United*

policy-making does not mean that, from the perspective of court of appeals judges, such conflicts are not an important matter. We can begin to obtain some sense of the importance of the matter at that level of the court system if we put aside an implicit assumption that resolution of those conflicts is possible only when they arrive at the Supreme Court's docket. To the extent that court of appeals judges do pay attention to inter-circuit conflict, they may reduce it by preventing it from developing or by eliminating it in its infancy. If instead of attending to the Supreme Court's treatment of conflicts, we look at how they are treated in the courts of appeals' published opinions and during the intra-court discussion that leads up to those opinions, what becomes clear is that court of appeals judges are sensitive to conflicts and do pay considerable attention to what their colleagues in other circuits are doing when the same issues face more than one court.

Attention to inter-circuit conflicts only after they arrive at the Supreme Court, and the lack of attention to the process by which the court of appeals themselves deal with inter-circuit conflict, may result from the related implicit and inaccurate assumptions of "circuit independence" and "mutual ignorance." These notions are that, in developing the rulings which are in conflict, each court of appeals acts with full independence of all the others, and that court of appeals judges lack awareness of other circuits' rulings which conflict with their own decisions. Indeed, the portrayal by advocates of the need for additional capacity to deal with the "flood" of inter-circuit conflicts almost seems to be depicting the courts of appeals as manufacturing such conflicts without heed to other circuits.

The picture presented here is quite different. While not all court of appeals judges address claims of inter-circuit conflicts in great depth, and sometimes do not address them at all, "the name of the game" seems to be conscious consideration of the possibility of such conflicts, coupled with an effort to avoid them. In short, appellate judges take seriously the charge to reduce or minimize such conflicts before they reach the Supreme Court. We find that judges express concern for maintaining national uniformity in the law¹⁷ and —as will be discussed more fully—

17. See, e.g., Judge Kleinfeld's statement that "on this matter of national tax policy there is something to be said for uniformity among the circuits," so that the claimant's argument was not "so strong as to justify a conflict" between the Ninth Circuit and another court. *King v. United States*, 152 F.3d 1200, 1202 (9th Cir. 1998). In another case, he stated that "Because of the importance of predictability to commercial relations,

take seriously the norm that they should not casually create intercircuit conflicts. Their paying heed to other circuits' decisions is part of their participation in a coherent institution,¹⁸ and it allows us to speak of the courts of appeals, sometimes thought of as "regional", as part of a coherent national system.¹⁹ Indeed, many of the times that the Supreme Court has taken a case to resolve an intercircuit conflict, that conflict has already been discussed below.²⁰ In short, cases from circuits which are in conflict or at least in tension with each other do not simply float up, each independent of the others, to the Supreme Court.

To be sure, there are instances when two courts of appeals are unaware of a conflict between their decisions because the lawyers did not call the conflict to the court's attention or because vagaries of timing "hid" one case from the other court. Additionally, there can be instances where two U.S. courts of appeals come up with the same result, or end up in conflict, without explicitly drawing on each other.²¹ Hellman suggests that where "the disagreement involves a narrow issue that does

as well as deference to our sister circuits, we shall not lightly create an intercircuit conflict affecting commerce nationally." *Portland 76 Auto/Truck Plaza Inc. v. Union Oil Co. of California*, 153 F.3d 938, 943 (9th Cir. 1998).

18. "Because judges identify strongly as members of an institution, . . . they respond to the views of other judges not because it was strategically useful for them to do so in terms of their own policy preferences but because they were professionally committed to the notion of coordinated institutional doctrine." Anne Bloom, *The Post Attitudinal Moment: Judicial Policymaking Through the Lens of New Institutionalism*, 35 LAW & SOC'Y REV. 219, 226-227 (2001).

19. There is some evidence that state courts, although not part of a single "system" as are the U.S. courts of appeals, likewise pay attention to each others' rulings in much the same way. See Carey Goldberg, *Massachusetts Case Is Latest to Ask Court to Decide Fate of Frozen Embryos*, N.Y. TIMES, November 5, 1999, at A20 ("But legal experts say a consensus of sorts has been emerging, though it is nonbinding and has come out of the state courts, which watch each other's decisions as they make their own.").

20. Arthur Hellman, *Never the Same River Twice: The Empirics and Epistemology of Intercircuit Conflicts* 31 (April 2000) (paper presented to Midwest Political Science Association) (on file with author) ("Most often, the acknowledgment of conflict will be found in the court of appeals decision that is brought for review."). In noting intercircuit conflict, the Supreme Court acknowledges that this has taken place. See discussion *infra*.

21. The latter may have been the situation with the two cases—a Sixth Circuit case and a Ninth Circuit case—on *in rem* civil forfeiture that the Supreme Court reviewed together. *U.S. v. Ursery*, 518 U.S. 267 (1996) (decided together with *United States v. \$405,089.23*). The Supreme Court majority said the two lower courts had the "same view." At least in the material the Supreme Court quoted there was no explicit reliance by one court on the other. Of particular note is the finding that in roughly one-third of the cases Hellman examined in his Federal Judicial Center study of intercircuit conflicts, "neither the majority nor the dissent cited any out-of-circuit precedents on the issue that gave rise to disagreement within the panel." Hellman, *supra* note 1, at 1057.

panel to reconsider its disposition, or seeking to have the court rehear a case en banc. At those times, although an inter-circuit conflict may be the central or determinative issue or may even be the only issue before the court, in order to reinforce their position they often include other elements with the inter-circuit conflict claim. These elements include whether the court has developed an intra-circuit conflict,³⁴ which only an en banc court may eliminate just as only an en banc court may overrule past circuit precedent, and whether there is a conflict with the Supreme Court. And a third is the creation of inter-circuit conflict.

One can see the combination of some of these elements in a dissent from the court's denial of en banc rehearing. There the dissenting judges complained that the panel's ruling "contradicts the plain language of the [statute], conflicts with a prior decision of this circuit, and creates a needless inter-circuit conflict with all courts of appeals that have addressed the issue."³⁵ In another case, a dissenting judge complained not only about the inter-circuit conflict he alleged the majority was creating, but also said the court's decision also contravened a Supreme Court decision and created a conflict within the circuit.³⁶ Not only may claims of inter-circuit conflict be entangled with other elements, but they may also be related, for example, when an inter-circuit conflict is said to be mirrored by intra-circuit divisions.³⁷

The mixture of intra- and inter-circuit conflict claims is illustrated in two cases in which the panel itself called *sua sponte* for en banc hearing before issuing its ruling. In the *Shabani* drug conspiracy case,³⁸ briefs and oral argument had convinced the panel "that Ninth Circuit opinions are in conflict."³⁹ Although not the basis for the panel's en banc call,

34. See, *inter alia*, Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in a Large Appellate Court*, 56 U. CHI. L. REV. 541 (1989), Arthur D. Hellman, *Breaking the Banc: The Common-Law Process in the Large Appellate Circuit*, 23 ARIZ. ST. L.J. 915 (1991); Stephen L. Wasby, *Inconsistency in the U.S. Courts of Appeals: Dimensions and Mechanisms for Resolution*, 32 VAND. L. REV. 1343 (1979).

35. Northwest Env'tl. Advocates v. City of Portland, 74 F.3d 945, 948 (9th Cir. 1996) (O'Scannlain, J., dissenting).

36. Indian Oasis-Baboquivari Unified Sch. Dist. No. 40 v. Kirk, 91 F.3d 1240, 1245 (9th Cir. 1996) (Reinhardt, J., dissenting).

37. See *In re Yochum*, 89 F.3d 661, 666 (9th Cir. 1996) ("This intra-circuit conflict mirrors the circuit split.")

38. United States v. Shabani, 993 F.2d 1419 (9th Cir. 1993), *rev'd*, 513 U.S. 10 (1994).

39. Unattributed quotations are taken from internal court communications to

make it less necessary for judges to monitor other circuits' rulings on a continuous basis.³²

In addition to what members of a panel learn from the attorneys in a case, their clerks, and their own reading, their colleagues also call to their attention real or possible conflicts that they have missed. This is most likely after the panel has filed its disposition, with an "off-panel" colleague making an internal request for reconsideration or a call for rehearing en banc, and often the panel will modify its opinion somewhat to take into account their colleague's concerns. However, a panel is able to alter its opinion more easily if it has not yet issued its mandate.³³

PART III. CONFLICT CLAIMS AS RHETORIC

Are conflicts "real" or are claims of conflict only used for rhetorical effect? Judges of varying ideological positions may agree on the presence of intercourt conflicts in some cases. Yet, the use made of claims that conflict is present, particularly where other judges say it does not, leads to the suspicion that such claims are also rhetorical devices. After examining that topic, in this section, we move on to look at the relation between claims of intercourt conflict and whether a court of appeals should sit en banc, and then briefly at how intercourt conflicts implicate the court of appeals' relation with the Supreme Court.

Judges claiming that their colleagues' actions will create an intercourt conflict almost invariably argue against such a conflict as they claim to seek intercourt uniformity. Judges do so most often while dissenting, "stopping the clock" to get the

32. Knowledge of other courts of appeals' views also results from judges sitting in those courts. In such situations, visiting judges learn primarily about new procedures for handling cases. However, they also bring some of their own circuits' law with them. One judge talks about having "insinuated" himself into the law of another court by using "some liberal ideas from the Ninth Circuit." When the court on which he was sitting relied on its own old circuit precedent, he concurred separately to argue that the case was wrongly decided. The court of appeals then sat en banc to correct the law. Interview with Judge Alfred T. Goodwin, 9th Cir. Court of Appeals, in Sisters, Ore. (October 10 1999). See also *Morstein v. Nat. Insurance Services, Inc.*, 74 F.3d 1135 (11th Cir. 1996) (panel decision, Goodwin J., concurring), *rev'd en banc*; 93 F.3d 715 (11th Cir. 1996).

33. See, e.g., *United States ex rel. Long v. SCS Business & Technical Institute*, 173 F.3d 890, 891 (D.C. Cir. 1999) (supplemental opinion) ("In the same week that our opinion issued, the Fifth Circuit held that the Eleventh Amendment bars a False Claims Act *qui tam* suit in federal court Since our sister circuit implicitly challenged our jurisdiction . . . and our mandate has not issued, . . . we think it appropriate to . . . explain why we believe we should stick with the order of decision we adopted.").

intercircuit conflict was also implicated, both because the Ninth Circuit cases cited to a Fifth Circuit ruling, which in turn was based on the conflicting doctrine from that circuit, and because, as the panel noted, “This circuit stands alone in its interpretation” of the relevant statute. Then in the *Butros v. INS* case,⁴⁰ when the panel had sought *en banc* hearing because of an intracircuit conflict, a judge who had sat on the allegedly conflicting case wrote to distinguish it, but in so doing, introduced mention of an existing intercircuit conflict.

In the debate over “en-bancing” some cases, conflict with Supreme Court precedent has been added to the combination of intracircuit and intercircuit conflict. In a labor election case,⁴¹ a judge stopped the clock “because the opinion is arguably in conflict with Supreme Court and Ninth Circuit precedent”; here too intercircuit matters were also implicated because an earlier Ninth Circuit ruling the present panel used drew on a Fifth Circuit case. Although in a later memo, the “calling” judge made clear that his “major concern is to keep Ninth Circuit law intact,” he added the claim of intercircuit conflict. In another case, concerning the law of search and seizure, this judge again combined claims, saying “the decision conflicts with Supreme Court precedent and with our own. It also needlessly creates an intercircuit conflict.”

The likelihood that a dispute over an intercircuit conflict will be mixed with other issues is particularly true for a mandatory jurisdiction court. A certiorari court could limit its consideration to the issue causing the intercircuit conflict. However, there is an expectation that a mandatory jurisdiction court, although it can apply canons of judicial restraint to avoid reaching some issues presented, is expected to reach most of them. If the issue containing the conflict is important, judges may have no way out but to decide what stance to take on the intercircuit conflict and to decide as well what weight to give that issue relative to other major factors.

When a judge combines all these elements, it may be another way of saying, “This is a *really* bad decision.” Such combining of claims thus gives rise to the question of whether intercircuit conflicts are “real” or are (simply) used as a

which the author was allowed access. They are used without citation to the case or to the judge making the statement.

40. 990 F.2d 1142 (9th Cir.1993) (en banc).

41. *Am. W. Airlines v. Nat'l Mediation Bd.*, 969 F.2d 777 (9th Cir. 1992), *amended by*, 986 F.2d 1252 (9th Cir. 1992).

rhetorical device to gain an advantage for the position being advocated, as is done in certiorari petitions to get the Supreme Court's attention. The claimant may believe that a conflict actually exists or there may be a colorable argument that there is indeed a conflict in rulings. However, exaggeration is likely, with opposing parties left to debunk the claim by showing that cited cases are inapposite or by distinguishing them. At times the claim seems to be little more than a mask for dislike of the result the majority has reached, made not to protect the principle of uniformity in national law, but because one judge does not prefer the proposed result. The many calls for rehearing en banc made by judges known to be at one end of the ideological spectrum or the other gives further credence to the notion that those calls are something of a cover for result orientation.

Because a judge who piles claim on claim may create a stronger position than if the claim were limited to only one element, it is not unusual to find that a dissenting judge complaining about his majority colleagues, or an off-panel judge complaining about a panel, will combine a complaint about an intercircuit conflict with complaints about other sins committed by the majority. We see this in Judge Kozinski's dissent to the *Gaudin* en banc's holding that materiality is an element of the offense of making a false statement in a matter within a government agency's jurisdiction. He called the majority's opinion a "tsunami":

It's not every day, after all, that we provoke a conflict with every other regional circuit, defy Supreme Court authority, implicitly overrule several lines of our own case law—thereby creating a spider web of secondary circuit conflicts— and pave the way for successful habeas petitions for scores, perhaps hundreds, of prisoners convicted of a broad range of federal crimes.⁴²

At times, litanies like these make it appear that a judge may be throwing mud at the wall in the hopes that some will stick – claiming intercircuit conflict, intracircuit conflict, and conflict with the Supreme Court, as well as crimes against man and nature—and they reinforce the notion that claims of intercircuit conflict are used as a rhetorical device.

The question of whether intercircuit conflict claims are

42. *United States v. Gaudin*, 28 F.3d 943, 954 (9th Cir. 1994) (Kozinski, J., dissenting). Despite the hyperbole, the Supreme Court, which not infrequently listens to Judge Kozinski, affirmed. 515 U.S. 506 (1995).

Judge) was said to have been like Chief Justice Burger in wanting a rule that the court must go en banc if there was to be an intercircuit conflict. While the court declined to adopt such a rule—perhaps because if a case were going to go to the Supreme Court, the en banc process would add another year—the court did have a rule that a panel creating an intercircuit conflict should notify the court to that effect.⁴⁶ Under this regime, in a case where a government petition for rehearing alleged an intercircuit conflict, Judge Wallace wrote to his colleagues, “Our General Orders indicate that if the suggestion contains as one of its grounds the allegation that the opinion initiates a conflict with another court of appeals, the panel is to advise us,” and therefore “[i]t is incumbent upon the panel to advise the court of this alleged conflict.”⁴⁷

The Ninth Circuit has since added procedures by which attorneys in the court’s Case Management Unit monitor certain types of cases and notify the entire court about them; among those cases are those in which the panel expressly disagrees with another circuit. This procedure, a result of the work of the court’s Evaluation Committee, makes it unnecessary for a panel to advise colleagues of the conflict, but Judge Wallace’s point is met.⁴⁸

It is also interesting to note what happened when the Supreme Court, in reversing a Ninth Circuit decision, noted that, although not the basis of the reversal, an intercircuit

46. For the practice in another circuit, see this note in a Fifth Circuit case: “In accordance with Court policy, this opinion, being one which initiates a conflict with the rule declared in another circuit, was circulated before release to the entire Court, and rehearing en banc was voted by a majority of the non-recused judges in active service . . .” *Riley v. St. Luke’s Episcopal Hosp.*, 196 F.3d 514, 516 n.* (5th Cir. 1999).

47. Memorandum from Judge J. Clifford Wallace, to all 9th Circuit judges (December 17, 1991) (on file with author) (regarding, *Soler v. Scott*, 942 F.2d 597 (9th Cir. 1991), *vacated*, *Sivley v. Soler*, 506 U.S. 969 (1992)). In another case, there was a contretemps over the meaning of the rule. Judge Wallace stopped the clock so a panel which had consciously created a circuit conflict could comply with the provisions of the General Orders by informing the court of the circuit split. Another judge then pointed out that the rule did not apply because the relevant party “has never alleged that there is an inter-circuit conflict,” not even in response to an order requesting the parties’ views on whether the case should be heard en banc. The panel opinion’s author also pointed out that the panel had already commented on why it had rejected the cases from two circuits (As the amended opinion read, “This holding puts this circuit in conflict with two other circuits.”) Those responses led Judge Wallace to withdraw his “stop clock.” (In this and other instances without citation to a case or identification of judges, material is taken from case files made available to the author.)

48. See David R. Thompson, *The Ninth Circuit Court of Appeals Evaluation Committee*, 34 U.C. DAVIS L. REV. 365 (2000).

(mere) rhetoric or something more bears on the dispute among political scientists studying the judiciary as to whether (only) attitudes and ideology explain judges' voting, or whether law counts for something in that explanation. To the extent that a judge with known ideological proclivities engages in serious examination of a range of options from other courts, and explains why the position he or she adopts is ultimately to be preferred, one might say that the legal notion of "avoiding intercircuit conflict" in fact does mean something independent of ideology. However, if judges of easily identifiable ideological persuasion repeatedly claim "intercircuit conflict" in a way that would seem to be a cover for seeking particular results, attitude may be said to trump the "legal" explanation.

A. *Conflicts and Sitting En Banc.*

Independent of whether or not judges' claims concerning intercircuit conflict are rhetorical tools used to achieve a sought-after policy result, such claims affect decision-making within a court of appeals because the presence of an intercircuit conflict may affect the decision as to whether the court should rehear a case en banc. The Ninth Circuit's present formal position is that an intercircuit conflict regarding a rule of national application is a basis for the court's taking a case en banc.⁴³ Indeed, in a recent case, a judge even used the *possibility* of one to argue that the court should go en banc.⁴⁴ Likewise, *nonexistence* of an intercircuit conflict can be proffered as reason for *not* hearing a case en banc. In a rare concurrence from a rejection of suggestion to rehear en banc, Judge Kleinfeld observed for himself and two other judges that factors which "probably explain the court's decision not to rehear the case en banc" included the facts that "[t]he court's decision was compelled by well established precedent. There is no inter- or intra-circuit conflict."⁴⁵

There are judges who believe strongly that the presence of a (claimed) intercircuit conflict is reason for an en banc hearing. Indeed, Judge J. Clifford Wallace (later the Ninth Circuit's Chief

43. 9th Cir. R. 35-1.

44. *Espinoza-Gutierrez v. Smith*, 109 F.3d 551, 557 (9th Cir. 1997) (on denial of rehearing) (Kozinski, J., dissenting) ("A direct conflict with another circuit doesn't yet exist, but one may be on the horizon.").

45. *Monterey Mech. Co. v. Wilson*, 138 F.3d 1270, 1272 (9th Cir. 1998) (on denying rehearing en banc) (Kleinfeld, J., concurring). This case also illustrates the interplay of intercircuit conflict with other elements.

PART II. BACKGROUND

In this section, we examine some background concerning intercircuit conflicts, including whether they are a “problem” and how courts of appeals avoid them. A principal reason why the Supreme Court is the focus of almost all discussion about intercircuit conflicts is that the presence of an intercircuit conflict is one criterion used by the Supreme Court in considering whether to grant review. Indeed, along with “the importance of the issue,” resolution of an intercircuit conflict is the reason stated most frequently for granting certiorari.¹² Another reason for this focus is that starting in the 1970s, policy debate about the federal court system centered on whether the national court system had sufficient capacity to resolve intercircuit conflicts. In particular, the question posed was whether the Supreme Court adequately performed that task or whether, as recommended by the Freund Study Group and by the Commission on Revision of the Federal Appellate System (the Hruska Commission), the perceived need for greater capacity to settle unresolved conflicts required a National Court of Appeals or comparable judicial body to assist the High Court.¹³

Neither the National Court of Appeals or any proposed variant was enacted, and the idea is no longer on the front burner. The retirement of Justice Byron White from the United States Supreme Court removed the “resident nag” who, in dissents from denials of certiorari, regularly reminded his colleagues of the intercircuit conflict cases the Court had refused to review.¹⁴ Moreover, the recent substantial decrease in the Supreme Court’s plenary docket has undercut the argument that the system lacks sufficient present capacity to resolve such conflicts. Important studies, particularly by Arthur Hellman, also demonstrated that the seriousness of the purported effect of intercircuit conflicts on national “primary actors” conducting

States v. Schram, 9 F.3d 741 (9th Cir. 1992).

12. See the studies discussed and cited at STEPHEN L. WASBY, *THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM* 215 (4th ed. 1993).

13. Commission on Revision of Federal Court Appellate System, *Structure and Internal Procedures* 29-31 (1975).

14. His statements were noted by the lower courts. See, e.g., *United States v. Cannon*, 29 F.3d 472, 475 (9th Cir. 1994) (“circuit courts now conflict on the proper standard for evaluating ‘pretextual stop’ claims.” *Citing Cummings v. United States*, 112 S.Ct. 428 (1991) (White, J., dissenting)).

their activities in more than one circuit, was exaggerated.¹⁵ One might expect lawyers attempting to get the Supreme Court's attention to emphasize intercircuit conflicts. However, these studies showed that not all such putative conflicts are clear and direct, as many are only "sideswipes" (that is, partial or oblique conflicts rather than direct ones) and many others can be eliminated by distinguishing cases. Moreover, conflicts allowed to "percolate" may resolve themselves as some circuits fall in line with other circuits and new statutes or regulations resolve other intercircuit disagreements.

In considering the dimensions of the "problem," we must also remember that not all issues are equally likely to result in different interpretations that vary from one circuit to the next. The issue must be one that recurs in several circuits. Examples are federal criminal and civil procedure, which are national in scope, and some areas of regulatory policy such as labor-management relations. Even where an issue is recurring across the circuits, in the Ninth Circuit, "no pattern is discernible in terms of the issue areas."¹⁶ If, however, an issue arises exclusively or predominantly in one circuit, then the possibility of intercircuit conflict is reduced. For example, many of the Indian fishing rights cases arise in the Ninth Circuit; they also turn on treaties specific to a single tribe. In the 1970s, cases on border searches without warrants occurred primarily in the Ninth Circuit and to a lesser extent in the Fifth Circuit, the two circuits with extensive borders with Mexico. Another example is cases in admiralty, which occur in a larger but still limited number of circuits. When jurisdictional statutes place most appeals in one court, as is true for the District of Columbia Circuit hearing cases regarding environmental regulations, by definition there can be no intercircuit conflict. And interpretations of state law under federal diversity-of-citizenship jurisdiction are often specific to a single circuit, although not invariably so.

That the "problem" of unresolved intercircuit conflicts is presently considered of diminished importance for national

15. See, e.g., Arthur D. Hellman, *Caseload, Conflicts, and Decisional Capacity: Does the Supreme Court Need Help?*, 67 JUDICATURE 28 (1983); Arthur D. Hellman, *The Proposed Intercircuit Tribunal: Do We Need It? Will It Work?*, 11 HASTINGS CONST. L. Q. 375 (1984).

16. Stefanie A. Lindquist, *The Judiciary as Organized Anarchy: Inter-Circuit Conflicts in the Federal Appellate Courts 12-13* (April 2000) (paper presented to Midwest Political Science Association) (on file with author).

not control the merits of the appeal, . . . the judges might not think it worthwhile to seek out guidance from out-of-circuit case law.”²² However, instead of assuming that this “mutual ignorance” occurs regularly, our working assumption should be that judges are usually made aware of at least other circuits’ published opinions. Indeed, at times, judges are aware of cases even prior to their being decided; they may know, for example, that another court of appeals has heard argument in a case²³ or that it has decided to take a case en banc.²⁴

The courts of appeals are provided with information and also monitor each other so that each court is aware of other courts’ relevant rulings. Supporting evidence for this claim is that the Supreme Court from time to time has noted that one circuit was aware of other circuits’ rulings, and may even have taken them into account.²⁵ In its 1971 ruling in *Rosenberg v. Yee Chien Woo*, the Court noted that the Second Circuit, having “dealt at length with the Ninth Circuit opinion in this case,” had “expressly declined to follow the Ninth Circuit interpretation of the statute.”²⁶ And, in *Aldinger v. Howard*, an instance where the lower court maintained an intercircuit conflict, Justice Rehnquist commented that the Ninth Circuit, the source of the case being reviewed, had said that it “was not unaware of the widespread rejection of its position in almost all other Federal Circuits.”²⁷

Still another notation of one court being aware of the contrary ruling by another court came in *United States v. Hughes Properties, Inc.*, where Justice Blackmun pointed to the Claims Court’s having noted conflict with a court of appeals:

22. Hellman, *supra* note 1, at 1063.

23. See, e.g., *Granzeier v. Middleton*, 173 F.3d 568, 574 n.2 (6th Cir. 1999) (On December 1, 1998, the Fourth Circuit heard oral arguments in the appeal of *Koenick v. Felton*, 973 F.Supp. 522 (D.Md.1997) (holding that a state statute creating a public-school holiday from the Friday before Easter through the Monday after Easter does not violate the Establishment Clause.)).

24. For an instance in which the judges noted that the en banc might serve to eliminate the intercircuit conflict, see *Chandler v. United States Army*, 125 F.3d 1296, 1302 (9th Cir. 1997) (“It may be that the intercircuit conflict will be obviated, because the Sixth Circuit is reconsidering a recent application of *Murdock* [the conflicting case] en banc.”).

25. To determine whether the Supreme Court grants review to resolve the conflicts which the courts of appeals have discussed, one would have to trace cases from a court of appeals in which intercircuit conflict was discussed to determine if the Supreme Court accepted those cases and, if it did so, how it treated and perhaps resolved the conflict, a task not undertaken in this article.

26. 402 U.S. 49, 52, n.2 (1971).

27. 427 U.S. 1, 3 (1976).

The Claims Court further acknowledged that its ruling was in conflict with the decision of the Court of Appeals for the Ninth Circuit in *Nightingale v. United States*,²⁸ having to do with another Nevada casino, but it declined to follow that precedent and specifically disavowed its reasoning.²⁹

While the Supreme Court does speak of the courts of appeals' treatment of intercircuit conflicts, we have to keep in mind Hellman's observation that "[w]hether the Court refers to a conflict - or gives any reason for hearing the case - may depend on how the opinion is written and which Justice writes it." He notes that Justice Scalia "almost never explains why the Court granted review," and "[i]f he does allude to intercircuit conflict, he almost invariably does so in the course of making an argument on the merits."³⁰

Lawyers, also well aware of intercircuit conflicts as they develop, bring them to the court's attention by using them while arguing on their clients' behalf. And if judges considering a case were not aware of another court's actions before issuing their own ruling, a party's petition for rehearing will make them aware. It is certainly possible, however, that the lawyers will not catch such cases. Hellman notes that lawyers may have "framed their arguments so single-mindedly around the law of the circuit that they declined to research decisions of other circuits or refrained from citing them even if they were closely on point." If the judges "confined their analysis to the cases cited by the parties," other circuits' work would not be addressed.³¹

At least at the initial stages of the appellate process the judges largely depend on lawyers to bring to their attention relevant cases from other circuits, and to note possible or real conflicts. Yet, case searches by law clerks may reduce that dependence. A law clerk's search for "on point" cases often provides additional or more-up-to-date citations. Even if lawyers' citations were up-to-date when briefs were filed, intercircuit conflicts may have been created subsequently, prior to argument or decision in the case. While lawyers do file supplemental letter briefs citing such cases, clerks' *Insta-cite* searches to retrieve information during consideration of a case not only bring the relevant cases to the judges' attention but also

28. 684 F.2d 611 (1982).

29. 476 U.S. 593, 598-599 (1986).

30. Hellman, *supra* note 20, at 80.

31. Hellman, *supra* note 1, at 1058.

conflict between the Ninth Circuit and another court of appeals was implicated in the case. On the basis of this comment, on remand the Ninth Circuit sat en banc for further consideration of the case.⁴⁹

One aspect of the intercircuit conflict - en banc relationship is that an en banc ruling as part of an intercircuit conflict situation would make the issue even more visible to the Supreme Court.⁵⁰ There are judges who argue that, if the Supreme Court is going to decide an issue regardless of whether the lower court has sat en banc, resources should not be expended on an en banc sitting. Likewise, judges may argue that if an intercircuit conflict already exists, there is little need for the court of appeals to consider the issue en banc because the existence of the intercircuit conflict per se increases the likelihood the Supreme Court will decide the issue.⁵¹

It may also be the case that if the court of appeals chooses not to give en banc treatment to a case, the Supreme Court may have to take the case to clarify the law. In what amounted to a plea to the Supreme Court to take the case, Judge Stephen Reinhardt argued in his dissent from the Ninth Circuit's denial of *en banc* rehearing in *United States v. Koon*, that "the Supreme Court may yet provide Judge Davies with the guidance that our own court has refused to offer . . . perhaps the Supreme Court will deem it important to clarify the extent of the authority that sentencing judges possess to depart downwardly from the [Sentencing] Guidelines."⁵²

49. The case is *United States v. Jose*, 519 U.S. 54, 56 (1996) (per curiam) ("We express no opinion on the merits of the underlying dispute. The matter, indeed, is one that implicates an intercircuit conflict." *Id.* at 56.) On remand, Judge Hall, after noting this language, wrote, "In light of this intercircuit conflict, we decided *sua sponte* to consider the merits of this case en banc." *United States v. Jose*, 131 F.3d 1325, 1327 (9th Cir. 1997)(en banc). And, on the merits, the Ninth Circuit decided to agree with the ruling of the court of appeals with which it had earlier disagreed: "Upon reconsideration, we agree with the Fifth Circuit's reasoning and holding," thus overruling earlier Ninth Circuit cases that had relied on earlier (and later overruled) Fifth Circuit decisions. *Id.* at 1329.

50. H.W. PERRY, DECIDING TO DECIDE, *supra* note 2, is the leading treatment of the justices' consideration of factors used in granting certiorari. It fails to discuss whether en banc rulings provide a "signal" used by the Supreme Court, so the discussion here is speculative. A recent study finds that the granting of certiorari is definitely related to the court of appeals having sat en banc. Tracey E. George and Michael E. Solimine, *Supreme Court Monitoring of the United States Courts of Appeals En Banc*, 9 SUP. CT. ECON. REV. 171, 196-197 (2001).

51. For further discussion of reasons why the court of appeals would or would not sit en banc, see George and Solimine, *supra* note 50, *passim*.

52. *United States v. Koon*, 45 F.3d 1302, 1308 (9th Cir. 1995) (Reinhardt, J.,

B. Circuit Conflict and the Supreme Court.

How judges deal with intercircuit conflict is also linked to the court of appeals' relation to the Supreme Court. The importance of intercircuit conflict as a criterion for the Supreme Court's selection of cases has often been noted. If a court of appeals creates an intercircuit conflict, the Supreme Court is more likely to grant certiorari in the case. The fact that lower court judges wish to avoid having their rulings reviewed may serve as a pragmatic brake on creating intercircuit conflict. This is over and above the norm that, in the interest of nationally uniform law, such conflicts should not be created. Even if the pressure of being the court to create a conflict is removed when an intercircuit conflict already exists, by "weighing in" on the issue and lining up on one side of the conflict or the other, the court may increase the likelihood that the justices will perceive that the conflict is of sufficient importance to warrant granting certiorari. However, one must also keep in mind that there are judges like the one who says he "always took the view that we should not hesitate to create splits if we thoughtfully and carefully concluded that [another] Circuit was wrong," doing so to "hold the Supreme Court's toes to the fire," to force the justices to deal with an issue.⁵³

In any event, when the justices decide a case regarding an issue on which the circuits disagree, what the Supreme Court meant becomes part of the intercircuit dispute, and intercircuit conflict may turn on interpretations of the justices' statements. This was the case when Ninth Circuit judges deciding *Catholic Soc. Servs. v. Thornburgh*⁵⁴ tried to determine which view from the D.C. Circuit to adopt in interpreting *McNary v. Haitian Refugee Center*,⁵⁵ and when Ninth Circuit Judge Harry

dissenting). The Supreme Court did grant review, affirming the Ninth Circuit in part, reversing in part and remanding. *Koon v. United States*, 518 U.S. 81 (1996).

53. With the Supreme Court's relatively light docket, he observed, "I was never convinced . . . that we had a public duty to hold en banc to lighten their burden." He added, "some of our number actually found it intellectually stimulating to challenge the Supreme Court from time to time," although, he added, they "usually were rewarded by a Nine Zip reversal." E-mail from Judge Alfred T. Goodwin, Circuit Judge, 9th Circuit Court of Appeals, to author (July 29, 1999) (on file with author); interview with Judge Alfred T. Goodwin, Circuit Judge, 9th Circuit Court of Appeals, in Pasadena, Cal. (Oct. 10, 1999) (on file with author).

54. 956 F.2d 914 (9th Cir. 1992), *vacated by* *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43 (1993).

55. 498 U.S. 479 (1991). The Ninth Circuit's ruling was *vacated by* *Reno v. Catholic Social Services*, 509 U.S. 43 (1993).

Pregerson, in the 1993 *Casey v. Lewis* prison conditions case, complained that the panel majority relied on two cases from other circuits which “rely on mischaracterizations of Supreme Court decisions” and also provided no basis for what he claimed was the majority’s departure from Ninth Circuit precedent.⁵⁶ It can also be seen in the District of Columbia Circuit’s statement, in the course of disagreeing with two other circuits that “[w]e think our sister circuits have paid insufficient attention to [the] Supreme Court’s decision.”⁵⁷

PART IV. MENTION AND DISCUSSION IN PUBLISHED OPINIONS

In this part of the article, we turn to a detailed examination of the judges’ mention and discussion of cases from other circuits. While in Part V, we will look at their discussion during the decision-making leading up to the release of their published opinions, in this part, we look at what the judges say in those opinions. Here, we turn first to noncontentious citation of cases from other circuits, including the tendency to go along with what those other courts have said and to avoid intercircuit conflict. We then treat how judges deal with intercircuit conflict, either claimed or acknowledged, followed by a look at responses by the majority to dissenters’ claims of intercircuit conflict.

A. Noncontentious Citation.

When courts of appeals consider case law from other circuits, most references to those rulings are without dispute or contention. General citation practice leads a court to cite not only to its own earlier cases, but also to cases from other courts on various points of law. One such use is to provide an example of a general point. Another is as part of a string citation of cases supporting positions being taken. This illustrates that many courts have taken the same position, as in the claim that “[a]ll the circuits which have spoken on this point have agreed that . . .” As Hellman notes, “When a judge chooses to cite out-of-circuit authority, the precedent generally will be one that supports the position taken in the opinion.”⁵⁸

56. *Casey v. Lewis*, 4 F.3d 1516, 1529 (9th Cir. 1993) (Pregerson, J., concurring in part and dissenting in part).

57. *United States ex rel. Long v. SCS Bus. & Technical Inst.*, 173 F.3d 870, 882 (D.C.Cir. 1999).

58. Hellman, *supra* note 1, at 1067.

U.S. courts of appeals may engage in mutual citation, and one circuit may even cite to another circuit's ruling that has cites to the initial circuit's decision. For example, Judge Goodwin quoted a Third Circuit case which indicated the side of a circuit split the Ninth Circuit had adopted,⁵⁹ and in another case, he noted a Tenth Circuit case which had "agreed with the Ninth Circuit's analysis."⁶⁰ Another example shows that judges do not always draw on other circuits' majority opinions but may instead utilize dissenting judges' views. In acknowledging a conflict with the Fourth Circuit while refusing to change Ninth Circuit precedent, Judge Leavy, in *Rambo v. Director*, referred to the dissent in the Fourth Circuit which had pointed out the direct conflict of the Fourth Circuit majority with the Ninth Circuit.⁶¹

If the issue before the court of appeals is one of first impression nationally, by definition there will be no rulings from other circuits with which to agree or disagree. However, an issue is likely to have arisen elsewhere even if it is one of first impression in the circuit. This will likely lead the judges considering the matter to mention what other circuits have done, even if those rulings do not become a major part of the court's analysis. Where "no precedent of the home circuit proves helpful in resolving" the question before the court, Hellman says, "we would expect at least one of the participants to cast a wider net in the hope of finding persuasive authority more closely on point."⁶²

Thus, in an important ruling on sanctions against lawyers under Rule 11, Judge Schroeder alluded to other circuits' rulings, observing that, because the issue was a new one,

59. *McGuire v. City of Portland*, 91 F.3d 1293, 1294 (9th Cir. 1996) (citing *Balgowan v. N. J. Dept. of Trans.*, 84 F.3d 656 (3rd Cir. 1996)), *op. withdrawn on reh'g*, 108 F.3d 1182.

60. *United States v. Jackson*, 167 F.3d 1280, 1284 (9th Cir. 1999) (citing *U.S. v. Bush*, 70 F.3d 557 (10th Cir. 1995)); *see also* *United States v. Alvarez-Sanchez*, 975 F.2d 1396 (9th Cir. 1992), *rev'd* 511 U.S. 350 (1994). This discussion produces the possibility of a sort of autoregression, with a court citing another court citing the first court, which had earlier cited the other court, etc.. *See* *United States v. Edwards*, 13 F.3d 291, 294 (9th Cir. 1993), noting that the Fifth Circuit, in its *Lopez* ruling, had "considered and rejected our reasoning in [*United States v.*] *Evans*," 928 F.2d 958 (9th Cir. 1991), indicates what can happen.

61. *Rambo v. Dir., Office of Workers' Comp. Programs*, 28 F.3d 86, 87-88 (9th Cir. 1994) (noting *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985) (Warriner, J., dissenting)), *rev'd* *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291 (1995).

62. Hellman, *supra* note 1, at 1061.

“relatively few decisions have as yet percolated up to the courts of appeals.” She then characterized those “decisions to date” as “reflect[ing] the drafters’ stated intent to curb delay and expense caused by the filing of unsupported pleadings and motions” and noted “a dominant theme in the comments made by the Rules’ proponents at the time of its adoption and by its implementers in the court decisions since its adoption.”⁶³

In another decision, on application of Supreme Court rulings on the filing of petitions for attorney’s fees in Social Security disability cases, Judge Schoeder also made noncontentious mention of what other courts of appeals had said. The Ninth Circuit, she said, “decline[d] to be the first [circuit] to reach . . . [the] inequitable result” of denying attorney’s fees for a failure to file for them within thirty days of a final judgment. On her way to that conclusion, she spoke of “the federal courts’ then prevailing practice,” which the Supreme Court had seemed to approve; what “a majority of the federal courts of appeals” had held; and what “federal courts had uniformly held” prior to a recent Supreme Court decision which the Ninth Circuit declined to apply retroactively.⁶⁴

Even when there is no dispute about the validity of a point for which an out-of-circuit case is cited, and no claim that the circuits differ on the issue, use of out-of-circuit citations without corresponding ones from within the judge’s own court affects the decision to publish the disposition. The absence of within-circuit citations in a draft disposition suggests that (a) there is no law of the circuit on point; (b) the circuit is deciding the question, no matter how simple, small, or trivial, for the first time; and (c) by adopting the out-of-circuit position, even if *de facto* and without fanfare, the opinion is creating new circuit law. The rule is that decisions creating new circuit law should be published. In such situations, either the writing judge will note to fellow panel members that publication is required under circuit rules, or another member of the panel is likely to raise the issue, suggesting either that missing in-circuit precedent be found or that the ruling be published.

An example is provided by a deportation case, in which Judge Goodwin sent his concurrence to the disposition author while saying, “but I think it should be published even though it

63. *Golden Eagle Distrib. Corp. v. Burroughs Corp.* 801 F.2d 1531,1537-1538 (9th Cir. 1986), *rehearing en banc denied*, 809 F.2d 584 (9th Cir. 1987).

64. *Holt v. Shalala*, 35 F.3d 376, 378-381 (9th Cir. 1994); *see also* *Shalala v. Schaefer*, 509 U.S. 292 (1993).

wasn't argued. The reason for publication includes: . . . citation of a 5th Circuit case, and . . . a 1st Circuit case."⁶⁵ In another case,⁶⁶ however, the author, in a memo to other members of the panel, argued that reliance on Sentencing Guidelines "(with reference to other circuit decisions)" was "sufficient to justify not publishing," particularly as he had "always been reluctant to publish screening decisions on first impression issues for the circuit." However, he was willing to publish saying, "I feel that we have clear guidance from other circuits," a statement which also illustrates the phenomenon of "going along" with other circuits.

B. *Going Along and the Norm of Avoidance.*

What happens when another U.S. court of appeals has decided a procedural or substantive issue? Does it have any effect on the next panel from any circuit facing that issue? At a minimum, those judges must decide at least that the other circuit's position is acceptable so that they can go along with it. And, as is implicit in Judge Schroeder's comments (noted above), judges of one court of appeals often do go along with others' rulings on the issue. As Hellman observes, "Circuit judges today generally respect the decisions of other circuits."⁶⁷ And another observer has remarked that "circuit court judges are influenced to some degree by the 'weight' of authority on a given matter."⁶⁸

This can occur even when only one other circuit is cited,⁶⁹ or perhaps two. Thus, in *Martinez-Serrano v. I.N.S.*, concerning whether an alien's filing of a motion to reopen and reconsider tolled the time for appealing a deportation order, the Ninth Circuit panel observed, "The Circuit has not dealt with this issue. The Second and Fifth Circuits, however, have dealt directly with this issue," and had adopted the same rule. The panel then adopted that rule while quoting an earlier case to

65. Memorandum from Judge Alfred T. Goodwin, to 9th Circuit Panel (July 13, 1993) (on file with author) (regarding Yao v. I.N.S., 2 F.3d 317 (9th Cir. 1993)).

66. United States v. Beck, 992 F.2d 1008 (9th Cir. 1993).

67. Arthur D. Hellman, *The Unkindest Cut: The White Commission Proposal to Restructure the Ninth Circuit*, 73 SO. CAL. L. REV. 377, 383-384 (2000). See *id.* at 384 n.2 for examples.

68. Lindquist, *supra* note 16, at 12. This is like the situation in which state courts look to the "majority position" on contract or tort law issues as indicated in the Restatements.

69. See *e.g.*, Taylor v. Phoenixville Sch. Dist., 174 F.3d 143 (3rd Cir. 1999) (agreeing with the Seventh Circuit that a plaintiff's unmedicated state was the basis for determining whether the person was disabled).

say, "Absent a strong reason to do so, we will not create a direct conflict with other circuits."⁷⁰

One reason for "going along" may be simple agreement with the other circuits' position. However, it is also possible that the issue on which the court has been offered competing positions falls within the judges' zone of indifference, that is, where it does matter to them one way or another what they do. Given other courts' prior, and consistent, rulings, there is little or no reason for them to stake out a different position. This is related to the fact that adopting other circuits' prior case law is also a matter of convenience. Although the judges do not put it this way, adopting the contrary position would require additional work to justify doing so. Moreover, when many courts which have considered the issue are in agreement, perhaps because each followed the lead of the court(s) which "got there first," a sort of hydraulic pressure to adhere to the existing consensus develops.⁷¹ This makes it even simpler for the court now facing the issue to find the other circuits' position to be acceptable and thus to follow it. Thus we see statements like "[f]ollowing the analysis of our sister circuits,"⁷² and "Most of our sister Circuits that have considered this question have also reached the conclusion we reach here today."⁷³

This following-along could be seen as well when the Second Circuit turned aside a litigant-proposed position that four other courts of appeals had "expressly rejected," particularly when that interpretation also "has been implicitly foreclosed by two of our previous decisions."⁷⁴ One can see the strength of the hydraulic pressure in Judge Guido Calabresi's statement that, because "my views have found no adherence among the other circuits," and had as well "been forcefully rejected in my own court," he was "bound both by comity and the respect that I feel

70. *Martinez-Serrano v. I.N.S.*, 94 F.3d 1256, 1259 (9th Cir. 1996) (citing *United States v. Chavez-Vernaza*, 844 F.2d 1368, 1374 (9th Cir. 1987)).

71. "Stare decisis and the norm of consistency may amplify the general tenor of early published opinions interpreting a remedial statute if judges seek interpretations that are consistent with the published decisions of their colleagues." Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC'Y REV. 869, 899 (1999).

72. *Singleton v. Cecil*, 176 F.3d 419, 420 (8th Cir. 1999) (en banc) (where other circuits were following Supreme Court precedent).

73. *Benjamin v. Jacobson*, 172 F.3d 144, 162 (2nd Cir. 1999) (en banc). See also *Johnson v. Oregon Department of Human Resources*, 141 F.3d 1361, 1367 (9th Cir. 1998).

74. *Davis v. United States*, 961 F.2d 867, 875 (9th Cir.1992).

for my siblings to give great weight” to that fact, although, in this instance it did not prevent him from declaring that those judges had decided the issue incorrectly.⁷⁵ Indeed, this indicates that, while speaking of comity, judges may be disinclined to follow where comity leads unless a case is within their zone of indifference. Nonetheless, the hydraulic pressure from other circuits’ consistent interpretations also provides strong ammunition for a prospective dissenter, or an off-panel judge seeking an en banc rehearing, who argues against the creation of a conflict.

The likelihood is that one court will go along with its sister courts even when there is doubt about how to resolve the case.⁷⁶ When four courts of appeals had interpreted a statute one way, while none had adopted a contrary interpretation, the Ninth Circuit adopted the majority position although “the question is close, and the statute could reasonably be construed either way.” Judge Kleinfeld for the panel did find “textual support for the construction reached by the other circuits,” but he also said that “we have been much influenced in the construction we adopt by the desire to avoid intercircuit conflict” and “there is virtue in uniformity of federal law as construed by the federal circuits.”⁷⁷

This introduces us to the *norm of avoidance* of intercircuit conflict. This is essentially a default position that, other things being equal, not only should intercircuit conflicts not be created, but, more strongly, judges should seek to *avoid* creating or perpetuating such conflicts. Most judges appear to accept this norm that intercircuit conflict is to be avoided. They do not always value cross-circuit uniformity simply for its own sake, as they are willing to hold to their own position because they believe the other courts were wrong. There is, however, no question but that some judges, believing there ought to be national uniformity in the law, are serious about avoiding intercircuit conflict as a matter of principle. They will assert that their own circuit should not intentionally create an intercircuit conflict and should be careful to distinguish other circuits’ cases with which their own circuit’s rulings are

75. Benjamin v. Jacobson, 172 F.3d 144, 189 (2nd Cir. 1999) (en banc) (Calabresi, J., concurring in result).

76. See King v. United States, 152 F.3d 1200 (9th Cir. 1998) (“Though proper resolution of the case is not without doubt”). *Id.* at 1202. See also Portland 76 Auto/Truck Plaza v. Union Oil Co. of Cal., 153 F.3d 938 (9th Cir. 1998) (“[h]ow to construe the statutory language is difficult”). *Id.* at 942.

77. James v. Sunrise Hosp., 86 F.3d 885, 889 (9th Cir. 1996).

creating an intercircuit split. In dealing with the requirement that securities fraud be pleaded with particularity, the *Glenfed Securities Litigation* en banc court, disagreeing with the panel's reliance on two Second Circuit cases, immediately concluded that the Ninth Circuit should not adopt the Second Circuit's view of the matter.¹³⁸ On an important constitutional question, before the Supreme Court ruled to the contrary, the Ninth Circuit panel "recognize[d] that our decision upholding the constitutionality" of the Gun Free School Zones Act "will create an intercircuit conflict" with the Fifth Circuit's *Lopez* ruling but pointed to the Ninth Circuit's prior case law as compelling its decision. Otherwise, said the panel, it would have to ask for an en banc hearing to deal with the *intracircuit* conflict that would be created by following the Fifth Circuit would create. As the panel disagreed with the Fifth Circuit's analysis, the judges applied the court's earlier precedent "without recommending an en banc hearing."¹³⁹ (As we know, it was the Fifth Circuit's position the Supreme Court upheld.¹⁴⁰)

At other times, acknowledgment of intercircuit conflict-creation is relegated to a footnote. For example, Judge Canby, in dealing with a statute underlying a Social Security disability regulation, used a note to observe for the court, "Our holding brings us into conflict with the Sixth Circuit," which had found the statute ambiguous. "With all respect to the majority of the Sixth Circuit panel," he stated, "we simply find no ambiguity in that statute's direction to the Commissioner."¹⁴¹ Likewise, a panel in a Sentencing Guidelines case said in a footnote, "We note that our reading of § 3A1.1 places us in conflict with several other circuits."¹⁴² This illustrates the point that because court of appeals judges must deal with many cases, they have little surplus time in which to engage in intensive analysis of relevant cases if they do not feel it essential. Thus, "If a judge, after studying the decisions of his own circuit and of the Supreme Court, concludes that the outcome of a case should be *x*, the judge may see no reason to closely analyze the decision of

138. *In re Glenfed Securities Litigation*, 42 F.3d 1541, 1545 (9th Cir. 1994).

139. *United States v. Edwards*, 13 F.3d 291, 294 (9th Cir. 1993).

140. *United States v. Lopez*, 514 U.S. 549 (1995).

141. *Newman v. Chater*, 87 F.3d 358, 361 n.3 (9th Cir. 1996).

142. *United States v. O'Brien*, 50 F.3d 751, 755 n. 3 (9th Cir. 1995). It is interesting that the West note for this case made note of the intercircuit disagreement: "The Court of Appeals, Tang, Senior Circuit Judge, disagreeing with the First Circuit, held that . . ." *Id.* at 751.

another circuit that appears to reach a contrary outcome.”¹⁴³

Nonetheless, there is a normative expectation that conscientious judges will explain why they depart from, or do not join, other circuits. An example occurs in *Zimmerman v. Oregon Department of Justice*.¹⁴⁴ In ruling that Title II of the Americans with Disabilities Act did not apply to employment, Judge Graber explained at some length why, “mindful that most courts have held that Title II applies to employment,” the court did not agree with other circuits’ interpretation. Only when her analysis of their rulings led to the conclusion that “we simply do not find them persuasive” did she state, “We realize that our decision creates an inter-circuit split of authority,” adding that “Although we are hesitant to create such a split, and we do so only after the most painstaking inquiry, we must follow the unambiguously expressed intent of Congress.”¹⁴⁵

When the majority ruled in the 1993 *Stanton Road Associates* case that the Superfund statute did not authorize attorney’s fees to private litigants as part of response costs in cleaning up contaminated property, it spent considerable time examining the Eighth Circuit’s analysis, by which the judges were “unpersuaded.”¹⁴⁶ The importance of providing explanations can also be seen in a case on the timing of transfers between individuals, where Judge Hall, having examined other courts’ rulings, commented in a footnote, “We believe that the reasons we have cited in the text of our opinion are sufficiently strong to justify our departure from the course plotted by our sister Circuit.”¹⁴⁷

One circuit may draw on other circuits’ writings not so much to support its own position as to reject the contrary position. This of course increases rather than reduces or eliminates contention between the circuits. In a relatively small number of cases in Hellman’s sample, “The opinion acknowledged out-of-circuit authority that was contrary to its position and explicitly rejected it.”¹⁴⁸ One occurred when the

143. Hellman, *supra* note 1, at 1086-1087.

144. 170 F.3d 1169 (9th Cir. 1999).

145. *Id.* at 1183-1184.

146. *Stanton Rd. Assocs. v. Lohrey Enters.*, 984 F.2d 1015, 1019 (9th Cir. 1993).

147. *In re Roosevelt*, 87 F.3d 311, 318 n. 14 (9th Cir. 1996). For an example from another circuit, see *United States v. Gatlin*, 216 F.3d 207 (2nd Cir. 2000), in which Judge Cabranes, presenting several reasons, analyzed why the Fourth Circuit’s position was being rejected. *Id.*, at 214-215.

148. Hellman, *supra* note 1, at 1078.

Judges' sensitivity to the position the Supreme Court takes on matters from their court can be seen when they demonstrate awareness that the Justices *might* overturn the Ninth Circuit's position. For example, commenting on a case that was central to resolution of the matter before the court, the Ninth Circuit observed in a footnote, "The viability of our holding in [U.S. v.] *Phelps* may be in question. The District of Columbia and Eleventh Circuits have disagreed with our holding on identical facts, and the Supreme Court has granted certiorari to the Eleventh Circuit to resolve the conflict."¹²⁴ In another instance, Ninth circuit judges had been concerned that the Justices' resolution might go in the other direction. The Supreme Court had granted certiorari, vacated, and remanded in *Brock v. Shirk*. The Ninth Circuit panel members, on remand, noted that in their initial ruling, which had "followed the controlling precedent of this circuit," they had "observed prophetically," in a footnote, "that other circuits have questioned [its] definition of willful, and that the Supreme Court will likely resolve the existing conflict." Observed the judges on remand, "The Court has indeed resolved the matter in *McLaughlin v. Richard Shoe Co.*"¹²⁵

There are also times when the lower courts' attention is attracted by the Supreme Court's *not* having resolved conflicts. One instance came when Ninth Circuit judges observed that "the Supreme Court's failure to resolve the circuit split has been the subject of much discussion and speculation in recent cases" in several courts.¹²⁶ The Supreme Court's inaction concerning a conflict means that the court of appeals are faced with the task

Pitrat v. Garlikov, 992 F.2d 224, 225 (9th Cir. 1993); see Patterson v. Shumate, 504 U.S. 753 (1992).

124. United States v. Garcia and Hambrick, 997 F.2d 1273, 1283 n.6 (9th Cir. 1993). The Supreme Court did indeed adopt the Eleventh Circuit's position, Smith v. United States, 508 U.S. 223 (1993)(trading gun for drugs is "use" of firearm in relation to drug-trafficking crime).

125. The initial panel ruling was Brock v. Shirk, 833 F.2d 1326 (9th Cir. 1987); the Supreme Court vacated and remanded, Shirk v. McLaughlin, 488 U.S. 806 (1988), in light of McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988). The ruling on remand is Brock v. Shirk, 860 F.2d 1545 (9th Cir. 1988). See also Tanner v. Sivley, 76 F.3d 302, 303 (9th Cir. 1996) ("The Supreme Court's decision . . . disposes of the issue in the case."), where the Supreme Court granted cert. to resolve an intercircuit conflict on whether a convicted defendant was entitled to credit against his sentence for pretrial time spent in a community treatment center.

126. State of Washington v. East Columbia Basin Irrigation District, 105 F.3d 517, 519 (9th Cir. 1997). For another indication of the Supreme Court's not having resolved a question implicating an intercircuit conflict, see Judge Fernandez's dissent in Windham v. Merkle, 16 F.3d 1092, 1108 and n.4 (9th Cir. 1998).

of resolving the conflict, although they do not invariably carry it out. Thus, in dealing with a question under revisions to the Immigration and Naturalization Act, the Ninth Circuit observed that “[t]he Supreme Court has not as yet resolved the inter-circuit conflict” concerning whether Congress had violated the prohibition on suspending habeas corpus— but then found that to be “irrelevant to our consideration” because the Ninth Circuit’s earlier ruling was binding on the panel.¹²⁷

Even worse from the courts of appeals’ perspective is that the justices can *create* inter-circuit conflict, as when a Supreme Court ruling results in varying positions across the circuits. For example, in a case in which the justices affirmed the Ninth Circuit, the appeals court panel noted, “In the wake of *Reliable Transfer*, the circuits have considered with sometimes conflicting results the issue of whether superseding cause may still be used to attribute fault in admiralty cases.”¹²⁸

4. *Choosing Sides in a Conflict.*

In judges’ eyes, there is a difference between *creating* an inter-circuit conflict and *joining* a pre-existing position in a conflict that has already developed. The latter is considered less serious, as one can see in seemingly routine mentions that a conflict exists. However, this does put the court in a much more difficult position than when several courts all are on one side of an issue. This difference between finding and creating an inter-circuit conflict can be seen in responses to dissenting judges who argue that an inter-circuit conflict is being created. In saying that the inter-circuit conflict predated the panel’s ruling, the panel majority is saying that even if the ruling is part of such a conflict, the panel did not create it; others did.

The Ninth Circuit was stepping into a pre-existing conflict rather than creating one when, in holding that a district court ruling on “inevitable discovery” was to be reviewed for clear error, it stated, “Our holding is in accord with the Eleventh Circuit However, it puts us in conflict with the Sixth Circuit.”¹²⁹ It also joined a pre-existing conflict in *Chandler v.*

127. *Magana-Pizano v. I.N.S.*, 152 F.3d 1213, 1217 n.7 (9th Cir. 1998).

128. *Exxon Co. v. Sofec*, 54 F.3d 570, 573-574 (9th Cir. 1995), *aff’d* 517 U.S. 830 (1996). The panel affirmed the Ninth Circuit’s previous position, finding it “not necessary to resolve here whether the Eighth Circuit has proscribed the use of superceding cause . . .” *Id.*, at 574. The earlier Supreme Court case is *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975).

129. *United States v. Lang*, 149 F.3d 1044, 1047 (9th Cir. 1998).

conflict? Of particular interest is the situation in which intercircuit conflicts lead to disagreement among the appellate judges facing them. In about fifty cases of the 260 in Hellman's study, "the judges who disagreed as to the outcome of the appeal before them also disagreed as to the import or authority of the out-of-circuit precedent."⁸⁴ In the typical case of this sort, both majority and dissenter "treat the same out-of-circuit decision as squarely on point," with one "embrac[ing] the other circuit's precedent, while the other would reject it."⁸⁵

1. *Distinguishing of Cases.*

How to deal with intercircuit conflict is often a matter of contention. Judges are often able to avoid involvement in a conflict by disputing parties' claims that a conflict exists, as when they say that "[t]he cases cited . . . from other circuits are not in conflict."⁸⁶ Closely related is the rejection of an argument in part because of the party's failure to call attention to any conflicting cases from other circuits;⁸⁷ there it is the *fact* of the presence (or absence) of intercircuit conflict which is important, not its substance. Judges may also reject the position of a colleague which, if adopted, might pose the existence of a conflict.

When the dissenting judge on a panel opposes adoption of the position of another court of appeals but does not persuade his colleagues, intercircuit conflict has not been created, at least for the time being.⁸⁸ An example of this situation from the Ninth Circuit is *United States v. Petty*.⁸⁹ In that case, the majority followed the seven courts of appeals to have considered the application of the Confrontation Clause in Guidelines sentencing, all of which had ruled against its application. In dissent, Judge Noonan spoke of his colleagues' "admirable desire for harmony with other circuits and understandable unwillingness to challenge the conventional wisdom suggested

84. Hellman, *supra* note 1, at 1073.

85. *Id.* at 1075.

86. *Lust v. Merrell Dow Pharmaceuticals*, 89 F.3d 594, 598 (9th Cir. 1996).

87. *See United States v. Adler*, 152 F.3d 929 (Table), 1998 WL 382702 (9th Cir. 1998).

88. *See Hellman, supra* note 1, at 1076, providing as an example, *Stanton Road Associates v. Lohrey Enterprises*, 984 F.2d 1015 (9th Cir. 1983). The conflict in that case, which is discussed below, was ultimately resolved in *Key Tronic Corp v. United States*, 511 U.S. 809 (1994).

89. 982 F.2d 1365 (9th Cir. 1993).

by their decisions” but thought that other principles override such comity.⁹⁰

Just as lawyers regularly avoid the effect of cases by distinguishing them, a strategy for judges is to distinguish the cases which are alleged to create a conflict. Conceding a conflict’s pre-existence is a potential response by a panel majority to a colleague’s claim that the majority’s position will create one. However, it is a response that does little to avoid the need to choose one side over another. That helps explain why, when faced with a claim that an intercircuit conflict exists or is about to be created, one response is to deny that the claimed conflict exists, primarily because the allegedly conflicting cases can be distinguished. When litigants or a colleague claim that adoption of a certain position would create an intercircuit conflict,⁹¹ the panel majority may respond by distinguishing the proffered cases. An example is a dissenting judge’s rejection of a case from another circuit, in which the judge characterized the case as having rejected the Ninth Circuit panel majority’s position. In response the majority said “we don’t see how” the other case could be so viewed because plaintiffs in the other circuit were in a different posture with respect to administrative agency action from those in the present case.⁹²

At times, there is not a direct disagreement or conflict over the basic holding or rule of law, but there is disagreement with another circuit’s approach or its reasoning, as when the Fifth Circuit said that an analogy drawn by the Second Circuit, “while conceptually clear, is flawed.”⁹³ The D.C. Circuit provided another example. Applying a Supreme Court ruling, the court “agree[d] with the Second Circuit’s conclusion but not with all of its reasoning.”⁹⁴ However, at other times, distinguishing another circuit’s work can be equivalent, or at least close, to rejecting it. This occurred when an Eleventh Circuit panel set aside cases

90. *Id.* at 1370 (Noonan, J., dissenting).

91. As to a litigant’s claim of conflict, see *Chandler v. United States Army*, 125 F.3d 1296, 1301 (9th Cir. 1997) (although in this case the court found itself “unable to avoid an intercircuit conflict” on another element of the case.) *Id.* at 1302.

92. *American Ass’n of Cosmetology Schs v. Riley*, 170 F.3d 1250, 1254 n. 4 (9th Cir. 1999). See also *Fajardo v. County of Los Angeles*, 175 F.3d 698 (9th Cir. 1999) (particularly Judge Pregerson’s response for the majority, at 701 n.4, to Judge Kleinfeld’s separate concurrence, at 703).

93. *United States ex rel. Foulds v. Texas Tech. Univ.*, 171 F.3d 279, 291 n.18 (5th Cir. 1999).

94. *Kalka v. Hawk*, 215 F.3d 90 (D.C. Cir. 2000) (applying *County of Sacramento v. Lewis*, 523 U.S. 833 (1998)).

arguably in conflict. Thus disagreement over application of cases from other circuits, whether on the basis that some can be distinguished, may occur without the judges engaging in a debate over an intercircuit conflict.⁷⁸ Instead of being dismissive of what other circuits have done even while disagreeing with them, the judges instead devote serious, extended attention to the competing positions in other courts' opinions.

The norm gives a claim of intercircuit conflict considerable weight. It prompts those said by their colleagues to have created such conflicts to treat those claims seriously and to give them due attention. Thus, a judge may make a claim of intercircuit conflict to prod colleagues into a response about a case because the claim places on them the burden of defending their position.

The strength of the norm may be seen in the oft-stated position that intercircuit conflict should be created only in extreme circumstances. That leaves the question, "What is 'extreme'?" However, the view is prevalent that "[w]e do not lightly create a conflict with other circuits"⁷⁹ and "we avoid unnecessary conflicts with other circuits"⁸⁰—although the latter likewise begs the question of what is "unnecessary." The norm is also particularly evident when a judge goes out of his or her way to note that a conflict is *not* being created—that one should not read the court's opinion as if it did conflict with another circuit's position.⁸¹

C. Responses to Claimed and Actual Conflict.

We begin by noting that there is some noncontentious

78. See e.g., *United States v. Isaacson*, 155 F.3d 1083 (9th Cir. 1998), in which both Judge Fletcher, for the majority, and Judge Fernandez, in dissent, discuss cases from the Fourth and Tenth Circuits. Judge Fletcher agrees with those courts' approach. See *id.* at 1085. Judge Fernandez finds that the Fourth Circuit's analysis does not conflict with other circuits' cases. See *id.* at 1089.

79. *Jones v. Gomez*, 66 F.3d 199, 204 (9th Cir. 1995).

80. *Hale v. State of Arizona*, 993 F.2d 1387, 1393 (9th Cir. 1993) (en banc). The panel in this case noted, "As Judge Rymer reminds us, we are to avoid creating intercircuit conflict when possible." (quoting *Gilbreath*, 931 F.2d 1320, 1328 n. 1 (9th Cir. 1991) (Rymer, J., concurring)). See also *United States v. Gwaltney*, 790 F.2d 1378, 1388 n. 4 (9th Cir. 1986) (in responding to a judge's dissent, the majority wrote, "Unnecessary conflicts among the circuits are to be avoided.") A case a year later than *Gwaltney* often cited for the same proposition is *United States v. Larm*, 824 F.2d 780, 784 (9th Cir. 1987). Both *Gwaltney* and *Larm* are cited in *United States v. Chavez-Vernaza*, 844 F.2d 1368, 1374 (9th Cir. 1987).

81. See *Candelore v. Clark County Sanitation Dist.*, 975 F.2d 588, 592 (9th Cir. 1992) (Kleinfeld, J., concurring).

mention of intercircuit conflict and then turn to judges' attempts to deal with claims of conflicts. If the fact of an intercircuit conflict may be case-determinative, or at least relevant to case outcome, the intercircuit conflict may simply be mentioned in passing, when judges state the relevant case law as background. Where previous conflicts have been resolved by the Supreme Court or by others, 'conflict as fact' will be mentioned, as when the Sentencing Commission has resolved disputes over interpretation of the Sentencing Guidelines, or when Congress has stepped in to resolve an intercircuit dispute. *Failure* to resolve an intercircuit dispute—particularly when the Supreme Court has not done so—will also be mentioned as a fact. Although court of appeals judges may wish that the Supreme Court had resolved intercircuit disputes, mention of such failure is not usually contentious.

There are also instances where a difference between circuits in interpretation of the law is not a matter to be resolved but instead is taken as constituting a legal fact relevant to the disposition of the present case. For example, in seeking to determine if a defendant official should be granted qualified immunity from suit, intercircuit conflict has been taken as evidence of the lack of clarity in the law which provides a basis for such immunity; for immunity to be denied, the law must be so clear that an official could know his acts violated someone's rights. If the U.S. courts of appeals cannot agree on the law, how can one expect it to be sufficiently clear for an official to know it?⁸² Conversely, the fact of the *absence* of an intercircuit conflict may be relevant. For example, a Ninth Circuit panel used that fact, among others, in denying an injunction sought by those who would have set aside California's Proposition 209.⁸³

Often, however, there is a definite disagreement among the judges as to whether there is a conflict, or there is a clear intercircuit conflict, with which the judges must contend. What do court of appeals judges do in that situation? What do they do upon finding themselves faced with a conflict, or a claim of a

82. See *Schroeder v. Kaplan*, 60 F.3d 834 (Table), 1995 WL 398878 n.2 (9th Cir. 1995) (dissenting judge, citing conflicts between Seventh Circuit and another circuit: "there was sufficient conflict among the circuits regarding the right to be free from exposure to ETS during this time to prevent a reasonable government official from understanding that there was a clearly established right"). See also *McClure v. City of Long Beach*, 104 F.3d 365 (Table), 1996 WL 740816 (9th Cir. 1996), citing *Lume v. Jensen*, 876 F.2d 1385 (9th Cir. 1989) (presence of intercircuit conflict taken as evidence that a right has not been fully established).

83. *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997).

from three other circuits permitting transfer of successive habeas petitions to the court of appeals because those courts “did not analyze §1631 or explain why it was appropriate authority for the transfer.”⁹⁵

In a Ninth Circuit instance, a panel majority, which noted that the Ninth Circuit had “not yet decided this issue,” first said that “our sister circuits have reached conflicting results” and then found all cases “denying Constitutional status to allocation” to be “factually distinguishable”; the panel also added that the reasoning of those cases was “unpersuasive” and their rule had not been adopted.⁹⁶ Likewise, when agreeing with the Seventh Circuit to hold that application of an amendment to the supervised release statute to defendants violated the Ex Post Facto clause, the Ninth Circuit distinguished a Third Circuit ruling that “appears to conflict with the Seventh Circuit’s decision.” The court went on to state that the Third Circuit ruling differed in not addressing a key matter, and “[f]or that reason, we elect, with all due respect, to follow the Seventh Circuit rather than the Third Circuit on this issue.”⁹⁷

2. *Acknowledging the Conflict.*

Although joining conflict is often unavoidable, at times judges only acknowledge a conflict by mentioning it and moving on without further discussion to decide the case. While, as we have noted, judges may assert the nonexistence of a conflict, many times they do acknowledge its existence. In a study of the Supreme Court’s 1989-1991 Terms, Lindquist found that in almost three-fourths of the cases she examined, “the majority opinion recognized the conflict in one form or another.”⁹⁸ As Hellman observes, “Acknowledgment of conflict can take a variety of forms”: through explicit rejection of another court’s precedent, declining to follow it, by “respectfully disagreeing”, by “reading the law differently”, or, ultimately, by choosing one side over another.⁹⁹ Although acknowledgment without action can occur even when the court’s own ruling is part of the inter-circuit conflict, it appears to be more likely when only out-of circuit cases conflict with each other.

95. Guenther v. Holt, 173 F.3d 1328, 1330 n.4 (11th Cir. 1999).

96. Boardman v. Estelle, 957 F.2d 1523, 1528-1529 (9th Cir. 1992).

97. United States v. Collins, 118 F.3d 1394, 1398 (9th Cir. 1997).

98. Lindquist, *supra* note 16, at 14.

99. Hellman, *supra* note 20, at 29.

In examples of judges acknowledging an intercircuit conflict without doing more, one panel noted simply, "There is a conflict of authority in other circuits whether *Younger* abstention may be applied to §1983 claims for monetary damages."¹⁰⁰ In a case on a sentencing enhancement for a defendant's leadership role in a crime, the judges only stated, "There is a conflict among the circuits" on that issue.¹⁰¹ And the judges dealing with whether Indian tribes could sue states or whether such suits were barred by Eleventh Amendment stated, "There is an existing circuit conflict on this issue."¹⁰² In this instance, one of the cases cited was the Eleventh Circuit's *Seminole Tribe* ruling, which the Supreme Court accepted and affirmed.¹⁰³ Likewise, in dealing with the constitutionality of the Child Pornography Protection Act (CPPA), the Fourth Circuit mentioned initially, "The federal courts of appeals that have considered this issue are split on its proper resolution." It then identified the circuits taking the respective sides. Having again stated this division and noting that they were "[m]indful of the conflicting views that have emerged,"¹⁰⁴ the judges then moved on to their own discussion of the matter.

In still another case, the Ninth Circuit pointed to a circuit split by saying, "As the Third Circuit has noted." Then it moved on to further discussion of Ninth Circuit law. What makes this case interesting is that one of the judges, concurring separately, first said concerning Eighth and Eleventh Circuit decisions that "Our circuit law clearly conflicts with these rulings," and then offered an explanation for the "conflict in circuits." He thought it "likely due to the fact that the Department of Labor regulations are not easily applied to public employees."¹⁰⁵

When acknowledging the existence of a conflict, judges may explicitly state that they are not resolving it. Thus, after noting that "[t]he circuits are divided about whether bankruptcy courts are 'courts of the United States'" so that they could award attorney's fees under certain statutes, Ninth Circuit Judge Cynthia Hall sidestepped the issue by writing for the court, "We express no opinion on the issue" – because it was not the

100. *Martinez v. Newport Beach City*, 125 F.3d 777, 781 n.4 (9th Cir. 1997).

101. *United States v. Neal*, 33 F.3d 60 (9th Cir. 1994) (Table).

102. *Spokane Tribe of Indians v. Washington*, 28 F.3d 991, 993 (9th Cir. 1994).

103. *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (11th Cir. 1994), *aff'd*, 517 U.S. 44 (1996).

104. *United States v. Mento*, 231 F.3d 912, 917 (4th Cir. 2000).

105. *McGuire v. City of Portland*, 91 F.3d 1293, 1296 (9th Cir. 1996).

drawing on out-of-circuit cases to support a different outcome or to assert that the majority is creating an intercircircuit conflict are quite likely to have been known to the other panel members through a memorandum from the judge raising the matter, as we will see in Part V. The panel members will also usually have exchanged views about the matter, and the majority judges and their clerks will have reviewed the proposed dissent and perhaps modified their opinion in response to it.

1. Absence of Response.

Dialogue over putative intercircircuit conflicts does not always occur. Indeed, we must first ask whether the majority responds to the dissenter at all. Given the importance of intercircircuit conflict, we might expect a dissenter's claim to be taken seriously and thus to receive a public response. Yet often there is no response from the panel majority, leaving numerous cases in which an intercircircuit conflict is discussed only by the dissenter who claimed it. This occurred, for example, when Judge Kozinski, saying that the majority's view conflicted with an earlier Ninth Circuit ruling "as well as the opinions of two other circuits," dissented to a holding that a subcontractor had a due process interest in moneys withheld for failure to comply with prevailing wage rates.¹⁵⁹ The majority, although referring to cases from other circuits to support its position on attorney fees, did not discuss the possible circuit conflict which Judge Kozinski said existed over the principal issue.

Of course, the majority's mention of cases to which the dissenter refers does not necessarily equal a response. This can be seen in a Perishable Agricultural Commodities Act (PACA) case involving whether a putative officer was "responsibly connected" to a company. The majority, speaking through Judge Schroeder, relied on District of Columbia Circuit case law but did not speak to whether, as Judge Kozinski claimed, it was thereby "creating a circuit conflict" because, as he claimed, "those cases do not support the majority's conclusion."¹⁶⁰

In another case, involving the method of calculating weekly wages for an injured seaman, Judge Reed (of the District of

159. *G & G Fire Sprinklers, Inc. v. Bradshaw*, 136 F.3d 587, 602 (9th Cir. 1998) (Kozinski, J., dissenting), amended, 156 F.3d 893, 907 (9th Cir. 1998). The Supreme Court granted certiorari, vacated and remanded, 526 U.S. 1061 (1999), in light of *American Mfr's Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999).

160. *Maldonado v. Dep't. of Agric.*, 154 F.3d 1086, 1089 and n.1 (9th Cir. 1998) (Kozinski, J., dissenting).

Nevada, sitting by designation) pointed to a Seventh Circuit case and said the Ninth Circuit majority, by presumptively applying a statute, “has consciously created an inter-Circuit conflict.”¹⁶¹ The majority opinion, however, contains no mention of the Seventh Circuit case, much less of the purported conflict. Likewise, in a case about the application of the expedited review provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA), when the panel majority held a prisoners’ suit within the *Ex parte Young* exception to states’ Eleventh Amendment immunity,¹⁶² the panel made no response to Judge Beezer’s comment in dissent that he “would avoid the intercircuit conflict of decision in a matter of national concern that is created by the rejection of the [Fourth Circuit’s] holding in our court’s opinion.”¹⁶³

There was also no response when Judge Norris, who found the case of a Ninth Circuit plaintiff “on all fours with” a Fifth Circuit’s en banc ruling, claimed “the majority has created as intercircuit conflict with the Fifth Circuit” over Airline Deregulation Act preemption of state law claims.¹⁶⁴ (Later, the court, en banc, overruled the position the panel had taken.¹⁶⁵) Nor was there one in a case where the majority ruled that a retroactive amendment to a tax statute would violate due process; when he claimed, in a dissent, “The majority, in reaching a different conclusion [from other courts], creates a split among the circuits, as well as a conflict with our own, older precedent.”¹⁶⁶

Why doesn’t a majority respond? The press of business from other cases is one important consideration. The judges may already have considered the dissenter’s claims, and, having perhaps made accommodations to the dissenter and reworked its opinion several times, decide to stand by it, they see no reason to

161. *Matulic v. Director, Office of Workers Compen. Programs*, 154 F.3d 1052, 1061 (9th Cir. 1998) (Reed, J., concurring in part, dissenting in part).

162. *Ex parte Young*, 209 U.S. 123 (1908).

163. *Ashmus v. Calderon*, 123 F.3d 1199, 1210 (9th Cir. 1997) (Beezer, J., dissenting), *rev’d*, 523 U.S. 740 (1998).

164. *Harris v. Am. Airlines*, 55 F.3d 1472, 1477 (9th Cir. 1995) (Norris, J., dissenting).

165. *Charas v. Trans World Airlines*, 160 F.3d 1259 (9th Cir. 1998).

166. *Carlton v. United States*, 972 F.2d 1051, 1064 (9th Cir. 1992) (Norris, J., dissenting); *see also* *United States v. Spencer*, 981 F.2d 1083, 1092 n. 2 (9th Cir. 1992) (Reinhardt, J., dissenting), where Judge Reinhardt suggested that his colleagues had engaged in an “unnecessary and perhaps unwitting creation of an inter-circuit conflict” in holding there was no error in excluding an arrest report with information helpful to the defendant.”

the majority, but his claims were not discussed.¹⁷³

After the fact, an implicit dialogue of sorts may be said to have occurred if the majority, even though not providing a direct response, discusses the elements of the conflict about which the dissenter complains. For example, both sides spoke about same cases in the *Proa-Tovar* case.¹⁷⁴ The majority held that a deportation order could be challenged collaterally, and ruled that an appointed counsel's decision to forego an appeal was not a knowing waiver by the alien, who did not have to show prejudice. Acknowledging that three circuits had interpreted the Supreme Court's *Mendoza-Lopez* ruling¹⁷⁵ "to require a showing of prejudice in [a] collateral challenge," the majority stated that it was "a better reading of *Mendoza-Lopez* to read it as a bright-line rule and to the INS to make certain that every person deported as the result of an administrative hearing was adequately apprized, on the record, of his right to appeal."¹⁷⁶ In dissent, Judge Farris, after noting the majority's acknowledgment of other circuits' position, argued, "We should not create a conflict among the circuits to salvage the dicta" in a Ninth Circuit case."¹⁷⁷

A case several years later, on whether an administrator's failure to adjust an equity limit for inflation was unreasonable, provides another example. Judge Pregerson for the majority cited, and also discussed, cases from several circuits. He agreed that the dollar figure "was valid when first established" but disagreed with its continuing validity in the face of inflation. His further discussion dealt with those cases extensively. Dissenting

173. Another en banc case in which dissenters received no response also illustrates how intercircuit variation in legal interpretation can affect financial transactions which reach across circuit boundaries, yet one circuit is faced with having to rule on some aspect of those transactions. The case is *In re Robert L. Helms Construction and Development Co.*, 139 F.3d 702 (9th Cir. 1998)(en banc). A bankruptcy court had applied the law of its own circuit, but a contested transaction involved in the bankruptcy had taken place in another circuit which had different law. Judges Thomas and Hawkins complained that the Ninth Circuit, "[b]y imposing our view of how option contracts should be treated . . . on a Fifth Circuit bankruptcy, . . . unnecessarily intrudes upon the law of another circuit," and had created an intercircuit conflict with the Fifth Circuit but also "resolved the conflict by declaring Fifth Circuit authority inapplicable to a Texas bankruptcy," counter to the demands of "[c]omity and simple respect for our colleagues in another circuit." *Id.* at 707-708 (Thomas, J., concurring part, dissenting in part). Despite the strength with which this claim was made, the majority did not mention the case the dissenters had pressed.

174. See *United States v. Proa-Tovar*, 945 F.2d 1450, 1450 (9th Cir. 1991).

175. *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987).

176. 945 F.2d at 1453.

177. *Id.* at 1455 (Farris, J., dissenting).

Judge Kozinski, in claiming that the majority “raises a direct conflict with every other circuit that has considered the issue,” discussed the same cases.¹⁷⁸

The same sort of implicit dialogue between the panel and off-panel judges took place in a case involving the Indian Gaming Regulatory Act (IGRA). The panel disagreed with the Second Circuit’s use of legislative history but agreed with its result, and thus did not see an intercircuit conflict.¹⁷⁹ On the other hand, four judges who dissented from the denial of rehearing en banc thought the panel had decided the issue at hand “incorrectly, in a manner that conflicts with the Second Circuit’s interpretation of the same statutory language.” The Second Circuit, these judges said, had “arriv[ed] at a conclusion precisely opposite” to that reached by the Ninth Circuit panel; they did acknowledge that the Second Circuit’s “approach is supported by the Eighth Circuit” but thought the Second Circuit had “much the better overview of IRGA.”¹⁸⁰

2. *Types of Response.*

Despite these instances of non-response or of only implicit dialogue without explicit discussion, there are many instances where the majority does address the matter openly. Here we look at the types of responses the majority does make.

Although the dissenter usually says more about intercircuit conflicts than does the majority, there are instances in which there is extensive majority treatment of the cases which the dissenter only briefly claims cause an intercircuit conflict. For example, in *Craft v. Campbell Soup*, on whether the Federal Arbitration Act applies to labor or employment contracts, the majority noted early in its per curiam opinion, “Courts have developed two interpretations of these [statutory] provisions.” The judges then discussed the positions of the “majority of

178. *Gamboa v. Rubin*, 80 F.3d 1338, 1351-1352 (9th Cir. 1996) (Kozinski, J., dissenting); *Id.* at 1343-1344, 1347 (Pregerson, J.). Judge Kozinski went beyond claiming an intercircuit conflict when he said with respect to the other circuits’ cases that the majority “actually overrules them by precluding the agency from applying the regulation even where the regional circuit has upheld it.” *Id.* at 1351. Although the court did take this case en banc, it did not reach the merits, dismissing it for lack of a final judgment—a ruling in which Judge Kozinski joined. *Gamboa v. Chandler*, 101 F.3d 90 (9th Cir. 1996) (en banc).

179. *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1259 n. 5 (9th Cir. 1994)

180. *Id.* at 1252-1253 and 1253 n.1 (Canby, J., dissenting from denial of rehearing en banc).

more narrowly.”¹⁹²

These are numerous cases in which a majority distinguishes cases mentioned in the dissent. One instance related to Judge Ferguson’s claim that “the court today unnecessarily creates a conflict with the only other circuit to have considered” the issue of whether a district court should accept a foreign expert’s declaration as to the proper application of foreign law.¹⁹³ For the majority, Judge Brunetti directly stated the dissent’s contention and then said, “To the contrary, that case is easily distinguished;” he followed that assertion with a paragraph drawing such a distinction.¹⁹⁴ Several years before, when Judge Ferguson had likewise dissented on the basis that the majority in an ERISA case had created a conflict with three circuits, the majority both explained why a party’s reliance on one of the cases he cited was “misplaced” and then pointed to “significant differences” between an Eighth Circuit case he cited and the present case.¹⁹⁵

Another example is a case which implicated Supreme Court law as well as rulings of another circuit. It concerned to whom a ship’s seller owed a duty of protection from a dangerous defective condition, and for what items compensation could be recovered. Judge Noonan claimed the panel “abandon[ed]” the leading Supreme Court case “and puts this circuit in conflict with another major maritime circuit.”¹⁹⁶ The majority, however, while noting that “[T]he Fifth Circuit has developed some principles in this area,” concluded, “We are faced here with a slightly different situation” from the one addressed by the Fifth Circuit. Moreover, it said a later Fifth Circuit decision mentioned by Judge Noonan was “not in conflict with [the] principle” the panel had adopted.¹⁹⁷

The next year, when the majority held unconstitutionally vague the “decency and respect” standard Congress had required the National Endowment for the Arts to apply, Judge Kleinfeld

192. *Executive Software N. Am. v. U.S. District Court, Central District of California*, 24 F.3d 1545, 1564 (9th Cir. 1994)(Leavy, J., dissenting); *id.* at 1550.

193. *Universe Sales Co. v. Silver Castle*, 182 F.3d 1036, 1040 (9th Cir. 1999) (Ferguson, J., dissenting).

194. *Id.* at 1038-39.

195. *Thomas, Head & Greisen Employees Trust v. Buster*, 24 F.3d 1114, 1118 (9th Cir. 1994). For Judge Ferguson’s dissent, *see id.* at 1121.

196. *Saratoga Fishing Co. v. Marco Seattle Inc.*, 69 F.3d 1432, 1447 (9th Cir. 1995) (Noonan, J., concurring in part, dissenting in part).

197. *Saratoga Fishing Co.*, 69 F.3d at 1444. The case was reversed, *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875 (1997).

asserted, "Our decision today creates a conflict with the only other circuits to have confronted a similar issue."¹⁹⁸ The majority did not address other circuits' cases but talked about Supreme Court doctrine, it also addressed the dissent briefly by asserting that the two cases on which it relied "are distinguishable" and were decided before a recent Supreme Court ruling, *Rosenberger v. Rector & Visitors of University of Virginia*,¹⁹⁹ which had changed the legal landscape.²⁰⁰ Judge Kleinfeld in turn dealt with that brief effort by saying, "The majority tries to distinguish" two circuits' cases because of their timing in relation to the Supreme Court's decision, an attempt he obviously found unsatisfactory.²⁰¹

Despite these numerous instances of the majority distinguishing the dissenter's proffered cases, as one might expect, there are instances when majority and dissenters do "engage" over the latter's claim of an intercircuit conflict. *Blazak v. Ricketts* provides an example.²⁰² There the per curiam majority of Judges Tang and Brunetti held that an order granting habeas corpus was a final order and thus appealable even though the habeas court had not addressed punishment issues. Dissenting, Judge Beezer pointed to a recent Eleventh Circuit case to contrary, which he said "effectively reversed a conflict with the Eighth Circuit referred to by Justice White, so that both the Eighth and Eleventh Circuits held a position contrary to that of the Ninth Circuit."²⁰³ The majority responded, first stating Judge Beezer's position, "The dissent insists that the recent case of *Clisby v. Jones* . . . 'clearly undermined' the [Eleventh Circuit] decision in *Blake* (and, by virtue of its citation to *Blake*, the [Fifth Circuit] decision in *Young*)" on which the majority had relied. Saying, with respect to the dissenter's

198. *Finley v. National Endowment for the Arts*, 100 F.3d 671, 685 (1996) (Kleinfeld, J., dissenting). When several judges (including Judge Kleinfeld) later dissented from the court's denial to rehear the case en banc, their language was even stronger: "The majority's opinion does far more than give a hostile construction to a Congressional enactment in order to create a conflict with other circuits and Supreme Court precedent, and overturn a law." *Finley v. National Endowment for the Arts*, 112 F.3d 1015, 1016 n. 1 (9th Cir. 1997) (O'Scannlain, J., dissenting from denial of rehearing en banc). The Supreme Court did reverse. See, *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

199. 515 U.S. 819 (1995).

200. *Finley*, 100 F.3d, at 682 n. 21.

201. *Id.* at 686 (Kleinfeld, J., dissenting).

202. 971 F.2d 1408 (9th Cir. 1992).

203. *Id.* at 1417. See also *Kemp v. Blake*, 474 U.S. 998 (1985) (White, J., dissenting from denial of certiorari).

circuits” and of the “few courts” which had adopted the opposite position,¹⁸¹ and closely examined the analysis in the conflicting cases. Dissenting Judge Brunetti, on the other hand, observed only that “[T]oday, the majority goes against the great weight of circuit authority” and attached a footnote, “As the majority concedes, almost every circuit to have considered this question directly has held that the employment exclusion clause of §1 should be interpreted narrowly.”¹⁸²

At times, the majority discusses the cases cited by the dissenter but does not discuss the claimed inter-circuit conflict per se. An example, involving a claim that existing conflict had been made worse rather than created, is the *Butros en banc*.¹⁸³ This case involved the point at which an alien’s status is “finally determined” with respect to eligibility for discretionary relief from deportation. Writing one of two dissents, Judge Trott (joined by Judge Brunetti) spoke of the majority’s position as one that “aggravate[s] what is already a sorry state of inter-circuit conflicts.” He then noted the circuits in which “the current rule is that lawful status is terminated in connection with a petition for §212(c) relief when a deportation order becomes administrative final,” and those in which, by contrast, “the cutoff date of the accrual of the time needed for §212(c) eligibility is neither the date the deportation order becomes administratively final, nor the date the Board may no longer reconsider or reopen the case, but the date ‘upon which the INS commences the deportation proceedings;’” in the states of the Second Circuit, he added, “it is unclear what the rule on eligibility is.”¹⁸⁴ The majority said “we have no quarrel with” the relevant Board of Immigration Appeals ruling “as it was affirmed and interpreted” by the Second Circuit, nor with the Ninth Circuit’s earlier position, but did not discuss circuit conflict per se.¹⁸⁵

When the majority does respond to a dissenter’s inter-circuit conflict claim, it does not necessarily do so extensively. Thus, although the majority explicitly notes the conflict claim, its response concerning may be minimal. One such instance was the *Meinhold* case, in which the majority affirmed a district

181. *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1085-86 and n. 6 (9th Cir. 1998); see also *id.*, at 1091-1093.

182. *Id.* at 1094, n. 1 (Brunetti, J., dissenting).

183. *Butros v. Immigration & Naturalization Servs.*, 990 F.2d 1142 (9th Cir. 1993)(en banc).

184. *Id.* at 1151 (Trott, J., dissenting).

185. *Id.*, 1145-46.

court ruling that the government's legal position on discharging homosexuals from the military was not substantially justified.¹⁸⁶ Judge Kozinski, dissenting, thought that the majority's disposition "causes a conflict with four other circuits that have held the government may discharge members of the armed forces for saying they are homosexuals" and claimed that his colleagues did "not acknowledge these conflicts."¹⁸⁷ The majority did not run up the "Conflict!" flag. However, counter to Judge Kozinski, it did acknowledge the conflict without the use of the term when it discussed two of the cases Judge Kozinski cited; it treated one in a long sentence and noted that another did support the government's position.¹⁸⁸

Another instance of limited response came in a case applying the Higher Education Act's anti-injunction provision. Judge Reinhardt, dissenting, asserted that "the only other circuit to have considered the precise question presented by the instant litigation concluded that §1082(a)(2) does not bar declaratory relief," and also said that in "analogous contexts," the First Circuit had read an identical provision in another statute not to bar injunctive relief.¹⁸⁹ The majority's response was limited to a footnote on the First Circuit case, saying "we don't see how," given the posture of that case, Judge Reinhardt could so characterize it.¹⁹⁰

This case also illustrates that, just as a panel may deal with other circuits' cases cited by the parties by distinguishing them, so a panel majority may respond to a dissenter by distinguishing the cases supposedly creating a conflict. At times the majority's distinguishing of a case is not direct and might better be called finessing the case to which the dissenter has called attention. Thus, when Judge Leavy, dissenting, claimed that the majority's ruling that a district court had committed clear error in not exercising supplemental jurisdiction over pendent state law claims without giving written reasons "puts us in conflict with other circuits," the majority did not explicitly distinguish, but it¹⁹¹ did address those decisions, saying "other circuits construe the collateral order doctrine in this context more broadly . . . and

186. *Meinhold v. U.S. Dep't of Defense*, 123 F.3d 1275 (9th Cir. 1997).

187. *Id.* at 1281 (Kozinski, J., dissenting).

188. *Id.* at 1279.

189. *Am. Ass'n of Cosmetology Sch. v. Riley*, 170 F.3d 1250, 1256 (9th Cir. 1999) (Reinhardt, J., dissenting).

190. *Id.* at 1254.

191. *Id.* at 1254, n. 4.

claim, "This is not true," the majority proceeded to explain the Eleventh Circuit's position.²⁰⁴

PART V. DISCUSSION DURING DECISION-MAKING

We have discussed judges' treatment of intercircuit conflicts in their published opinions. We also need to examine whether and how the judges have dealt with claims of intercircuit conflicts prior to these written manifestations of their views, and it is to that we now turn. In some ways, judges' treatment of out-of-circuit cases and claims about them is not much different prior to the release of an opinion and after its release than in the opinion itself, but because we know so little about the internal processes of courts of appeals, it is important to give this our attention. Within-panel discussion cannot be matched with published outcomes for the many cases for which the former is not available, but we do have both within-panel exchange and the resulting opinion for some cases.

A. Within the Panel: Before Disposition.

Often, before judges release their opinions, their discussion of other circuits' rulings and of possible and actual intercircuit conflicts is simply a noncontentious mention of what other courts have done. During this time, one judge might suggest to another that use of an out-of-circuit case be revised. For example, Judge Goodwin, concurring generally in the author's draft opinion, said he "would prefer . . . to modify our discussion" of an Eighth Circuit case on which the district court had relied, and the ultimate opinion mentioned the case only to distinguish it.²⁰⁵ A somewhat atypical reason for mentioning a case, which illustrates an effect of court of appeals judges sitting in different circuits, came when a judge, scheduled to sit elsewhere the following month on a case involving the same bankruptcy issue as the one before him in the Ninth Circuit, suggested that the panel's draft opinion "fails to discuss the reasons set forth" in the latter circuit's case.²⁰⁶ The resulting opinion discussed both

204. 971 F.2d, at 1411.

205. *Erdman v. Cochise County, Ariz.*, 926 F.2d 877, 881 and n. 4 (9th Cir. 1991). Memorandum from Judge Alfred Goodwin to 9th Circuit panel (Jan. 22 1991)(regarding the *Erdman* case)(on file with author); see also *Radecki v. Amoco Oil Co.*, 858 F.2d 397 (8th Cir. 1988).

206. The reader is reminded that unattributed quotations are taken from internal court communications.

that case and a Third Circuit case.²⁰⁷

In a 1992 case concerning Federal Deposit Insurance Corporation (FDIC) efforts to remove a case to federal court,²⁰⁸ a judge wrote before argument to the other panel members about “a very recent Fifth Circuit case” concerning FDIC removal while a case was on state appeal.²⁰⁹ He did so to convey the view that “the dissenters in that case may have the better of the argument” so counsel should address that case during oral argument. After a conference discussion in which another member of the panel seemed to agree with the Fifth Circuit majority, the court decided that, given the posture of the case as it came to the court, the appeal should be dismissed. The opinion cited the Fifth Circuit case as well as one from the Eleventh Circuit²¹⁰ and noted that “[i]ssues of district court jurisdiction have recently been considered by other circuits,” but that in the present case, “we cannot address such questions at this time because there is no appeal before us from an appealable judgment or order.”²¹¹

At times judges talk of other circuits’ rulings to suggest or urge their use. In a case on the tax consequences of liquidated damages under the Age Discrimination in Employment Act (ADEA),²¹² one judge wrote to his colleagues, “I think we should join the Second and Eleventh Circuits” in holding such damages punitive in nature, while another panel member noted, “I am in substantial agreement with the Federal Circuit’s opinion” that the government had submitted. All three of the cases were among the many the court cited in its opinion.²¹³ In another case, where the Consumer Products Safety Commission was said to have improperly made paint a banned hazardous substance, the presiding judge’s post-conference memo called a Fourth Circuit ruling “the leading case.” The opinion called it “the only circuit decision dealing with similar issues of enforcement under

207. *In re Jensen*, 995 F.2d 925 (9th Cir. 1993). See *In re Penn Cent. Transp. Co.*, 944 F.2d 164, 168 (3rd Cir. 1991); *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 974 F.2d 775 (7th Cir. 1992).

208. *F.D.I.C. v. Letterman Brothers*, 980 F.2d 1298 (9th Cir. 1992).

209. *Matter of Meyerland Co.*, 960 F.2d 512 (5th Cir. 1992)(en banc).

210. *In re Savers Fed. Savings & Loan Ass’n*, 872 F.2d 963 (11th Cir. 1989).

211. 980 F.2d, at 1300.

212. *Schmitz and Schmitz v. C.I.R.*, 34 F.3d 790 (9th Cir. 1994).

213. See *Riechman v. Bonsignore, Brignati & Mazzotta, P.C.*, 818 F.2d 278 (2nd Cir. 1987) (cited at 34 F.3d 795 n. 7); *Lindsay v. Cast Iron Pipe Co.*, 810 F.2d 1094 (11th Cir. 1987) (cited at 34 F.3d at 795 n. 7); *Reese v. United States*, 24 F.3d 228 (Fed Cir. 1994) (cited at 34 F.3d at 794).

especially the asserted conflicts with other circuits”; he sent his colleagues a lengthy memo, saying he found other circuits’ cases “to be distinguishable on their facts,” with one “actually support[ing] Judge Hug’s proposed opinion.”²²³

Disagreement with other members of the court was also obvious in a case in which two panels dealing with the same issue were communicating about their differing positions. Judge Goodwin, writing to other members of the panel on which he sat, found “not persuasive” the citation by the other panel’s author of a Fourth Circuit case. He further observed that the Fourth Circuit had “expressed discomfort with its holding and reached its result only because it had to follow prior Fourth Circuit precedent.” At the same time, he said, “We believe Second Circuit precedent is in accord with our decision,” and that Second Circuit ruling became the basis for the panel’s opinion.²²⁴ The absence of further mention of the Fourth Circuit case illustrates that a case may be discussed within a panel but never appear in the opinion. Likewise, after Judge Goodwin mentioned to his colleagues that an earlier Ninth Circuit ruling had “explicitly adopted the Seventh Circuit standard” of a particular case, that out-of-circuit basis for the Ninth Circuit’s position is not again mentioned.²²⁵

B. After the Opinion is Filed.

What happens after a panel files its disposition? While for many cases, this is the last of the matter, in a significant number of instances, there is further activity. Not only may the parties seek rehearing or suggest rehearing en banc, but the court’s other judges may raise questions about the panel’s opinion without necessarily waiting for the parties to act. In this post-opinion period, the matter of intercircuit conflicts is quite

223. Memorandum from Judge Alfred T. Goodwin to 9th Circuit Panel (Mar. 9, 1994) (on file with author) and memorandum from Judge Alfred T. Goodwin to 9th Circuit Panel (Mar. 25, 1999) (on file with author) (regarding *Thomas, Head & Griesen Employees Trust v. Buster*, 24 F.3d 1114 (9th Cir. 1994)).

224. Memorandum from Judge Alfred T. Goodwin to 9th Circuit Panel (Aug. 24, 1993) (on file with author) (regarding *United States v. Schram*, 9 F.3d 741 (9th Cir. 1993); see also, *Ching v. Lewis*, 895 F.2d 608 (9th Cir. 1990)).

225. Likewise, in discussion leading to *Casey v. Lewis*, 4 F.3d 1516 (9th Cir. 1993), after Judge Goodwin mentioned to his colleagues that an earlier Ninth Circuit ruling had “explicitly adopted a Seventh Circuit standard” of a particular case, that out-of-circuit basis for the Ninth Circuit’s position is not again mentioned. Memorandum from Judge Alfred T. Goodwin to 9th Circuit Panel (Nov. 18, 1992) (on file with author) (regarding *Casey v. Lewis*, 4 F.3d 1516 (9th Cir. 1993)).

likely to be raised, either as part of the request that the panel reconsider its opinion or in the call for an en banc rehearing. That may take place even when the judge making the call does not subsequently dissent from denial of such rehearing.

We first look extensively at several individual cases to see how, with the panel opinion as the starting point, judges use cases from other circuits and the possibility of intercircuit conflict in their exchanges as to whether to rehear a case en banc. Then we discuss the judges' modes of reacting when faced with an intercircuit conflict; we end this section with some observations on judges' use of other circuits' work.

1. *Some Individual Cases.*

The first case which we examine extensively involved an appeal by Canadian citizens from a district court ruling upholding a summons issued by the IRS at the request of Revenue Canada under the tax treaty, for records held by their U.S. bank. The majority of the divided panel, concluding that "it was clear error to find the affidavits [supporting the summons] made a prima facie showing of legitimate purpose," reversed and remanded.²²⁶ Early in his opinion, Judge Boochever noted that one court (the Second Circuit²²⁷) "has suggested that the international character of treaty requests counsels against judicial intervention," but ruled the "political question" doctrine did not apply, so that the court would decide the case. He then noted that the government had urged the court to adopt the Second Circuit's position that, when a treaty partner requests a summons, the "legitimate purpose" notion should not apply. Distinguishing the Second Circuit case on the grounds that, after the summons there, Congress had changed the law,²²⁸ the panel "decline[d] the government's request" and held that "the good faith doctrine applies to summonses issued under the treaty."²²⁹

Judge Wright raised the issue of intercircuit conflict in his dissent. He said the panel had created a conflict by rejecting the Second Circuit position without "sound bases" to do so. The

226. *Stuart v. United States*, 813 F.2d 243, 250 (9th Cir. 1987), *rev'd.*, *United States v. Stuart*, 489 U.S. 353 (1989).

227. *United States v. Mfrs. & Traders Trust Co.*, 703 F.2d 47 (2nd Cir. 1983).

228. Interestingly, it did so by adopting the position of the dissenting justices in *United States v. LaSalle National Bank*, 437 U.S. 298 (1978).

229. *Stuart*, 813 F.2d at 249.

Second Circuit's ruling, he said, was "not undercut by the fact that TEFRA eliminated the requirement that one requesting information from the IRS not abandon the civil investigation intent," "was consistent with current law," and also "shows a healthy respect for the United States' responsibilities under an international treaty."²³⁰

Not surprisingly, later discussion within the court of appeals pivoted on the Second Circuit case and Judge Wright's dissent became the basis for others' support for rehearing en banc. Among the reasons offered by one of the panel judges for such rehearing was that "the majority needlessly creates an intercircuit split." This judge found "unavailing" the panel majority's "attempt to distinguish the Second Circuit case by reference to minor intervening change wrought by TEFRA."²³¹ Responding to a number of his colleagues, the author of the panel's opinion asserted, "There . . . is no conflict between the majority's opinion and the Second Circuit's." This was because the latter dealt only with a "judicial gloss" on a case with international ramifications, while here Congress had imposed "a mandate of the legislature" which courts were not free to ignore and which the Second Circuit had not had to confront. Given his conclusion that the case did not create an intercircuit conflict (nor an intracircuit one, as had also been argued), he said it was not "of sufficient importance for rehearing en banc." The case did not in fact receive a requisite vote to be heard en banc.

The second case involved a district judge's sentencing provision that a defendant, a state trooper found guilty of rape and murder, was not eligible for parole for 30 years. The panel majority affirmed, but Judge Norris disagreed about the limitation on parole eligibility. He claimed that the majority, instead of following Congress' intent, had followed a Tenth Circuit case which "did not interpret section 4205; it amended it."²³² Illustrating that off-panel judges often draw on a panel dissenter's views in calling for en banc rehearing, one judge made such a call, saying "Judge Norris's partial dissent makes

230. *Id.* at 253 (Wright, J., dissenting).

231. Agreeing with Judge Wright, Judge Goodwin's law clerk wrote that "[T]he majority attempts, vainly, to distinguish this case from a 2nd Cir. case coming down the other way. We're creating an intercircuit conflict for no good reason." Memorandum from Miriam Reed to Judge Alfred T. Goodwin (May 19, 1987) (on file with author).

232. *United States v. Gwaltney*, 790 F.2d 1378, 1393 (9th Cir. 1986) (Norris, J., concurring in part, dissenting in part). See *United States v. O'Driscoll*, 761 F.2d 589 (10th Cir. 1985).

the point better than I could.”

During the extended debate within the court on whether to go en banc, another judge, also referring to “Judge Norris’ powerful dissent,” argued against an en banc rehearing by pointing out that both the Eighth and Tenth Circuits had reached the same conclusion on the issue at hand, while “[n]o court appears to have reached the contrary result.” With “[f]orceful dissents” in both the Ninth and Eighth Circuits, this judge thought the Supreme Court, if it “wishes to consider the issue, . . . certainly has enough grist for the mill,” so he didn’t “think much would be added to the debate by generating a circuit conflict.” That would happen were the Ninth Circuit to rehear the case en banc and to adopt Judge Norris’s position.

Responding, Judge Norris commented that the recent Eighth Circuit case agreed with both the Tenth Circuit case and Ninth Circuit panel majority, which he conceded all on the panel had missed. Turning to the dissent by the Eighth Circuit’s chief judge agreeing with his own interpretation of the statute, he quoted from that opinion at length. He recognized that an en banc court might “ultimately agree with the Lay and Norris dissents, thereby creating a conflict in the circuits. But that is not a sin,” he said. He also called attention to an earlier case²³³ in which, during consideration of whether to take the case en banc, a judge had been critical of “the supposed vice of unnecessarily creating a conflict in the circuits;” there where, despite the creation of a conflict with several other circuits, the Supreme Court had affirmed the Ninth Circuit ruling.

Continuing debate over whether to rehear the case contained further discussion of whether the other circuits were correct and references to the dissents there. Judge Norris could not find a case adopting the interpretation of the relevant legislation advocated by his adversary on the court; he thought a Supreme Court ruling,²³⁴ an earlier Ninth Circuit decision, and an Eighth Circuit case were “to the contrary,” with the Ninth Circuit panel majority, the Tenth Circuit, and the more recent Eighth Circuit case “unsound innovations that find little support in statutory language, legislative history, or common sense.” Responding, the other judge was “not sure what Judge Norris finds . . . supporting his view” in those cases and found three

233. Paulsen v. Commissioner, 716 F.2d 563 (9th Cir. 1983), *aff’d*, 469 U.S. 131 (1985).

234. United States v. Addonizio, 442 U.S. 178 (1979).

the Consumer Product Safety Act” and quoted from it at two places, saying at one of them that “Our reading of the statute comports with that of the Fourth Circuit.”²¹⁴ Later, another member of the panel noted that the response to the petition for rehearing found the Fourth Circuit case and a cited Supreme Court case to be “directly analogous and ‘on all fours’ to the instant case” but noted that the former did not apply the Administrative Procedures Act, which petitioner felt should be addressed.

Potential dissenters may also turn to other circuits for case law favoring their position. Thus, the judge who was to dissent from the majority’s interpretation of the firearms statute in a case on enhanced penalties for multiple convictions from the same indictment, pointed for support to a Tenth Circuit en banc ruling on the subject.²¹⁵ In a later memorandum supporting the dissenter’s position, an off-panel judge pointed to the same case, saying, “You will see that the interpretation that [the judge] and I, and seven judges of the Tenth Circuit, believe to be a plausible one is indeed a plausible one.” That communication from an off-panel judge prompted the author “to reexamine our opinion.” However, having done so, he wished to retain the same result, but on the basis of the view propounded by another circuit.

As this suggests, when cases from more than one circuit are available for use, one may be chosen over the other based on its rationale. Thus, a conference memo in a RICO drug case²¹⁶ noted that on one of the issues, one of the judges “prefers the Tenth Circuit’s point of view . . . rather than the Second’s.” In the opinion in this case, a footnote indicated that the issue need not be addressed,²¹⁷ both cases were cited,²¹⁸ while the panel relied on the Third Circuit’s position on another issue.²¹⁹

While judges most often turn to other circuits’ majority opinions, they are also attracted to dissents elsewhere. However, they may shy away from choosing between the competing positions in other courts, as when Judge Goodwin observed that

214. *X-Tra Art v. Consumer Product Safety Com.*, 969 F.2d 793, 795-796 (9th Cir. 1992); see also *United States v. Articles of Hazardous Substance*, 588 F.2d 39 (4th Cir. 1978).

215. *United States v. Neal*, 976 F.2d 601 (9th Cir. 1992).

216. *United States v. Saccoccia*, 18 F.3d 795 (9th Cir. 1994).

217. *Id.* at 799, n. 3.

218. *United States v. McCormick*, 992 F.2d 437 (2nd Cir. 1993); *United States v. Koonce*, 945 F.2d 1145 (10th Cir. 1991).

219. *United States v. Esposito*, 912 F.2d 60, 65 (3rd Cir. 1990).

he “hesitate[d] to get involved in the D.C. Circuit’s debate” on whether a statute provided for a cause of action. He added, moreover, that getting involved in that debate was also unnecessary to resolve the Ninth Circuit’s case.²²⁰

Any such qualms did not seem to affect the judges in the *Catholic Social Services* immigration case, however. In developing the majority opinion, the author found that Chief Judge Patricia Wald of the D.C. Circuit had written a dissent which “effectively refutes” the majority opinion to which she was responding; the other panel members and judges from another panel agreed with this view.²²¹ The author, however, did exercise some caution when he told his colleagues that his opinion would hold that the courts had jurisdiction; he wanted to check with them on that point because “this is a threshold issue and we would be disagreeing with the D.C. Circuit.” Here one sees acknowledgment that a conflict with other circuits will be created with a choice being made to do so.

Likewise, a Tenth Circuit judge, using that circuit’s opinion-circulation procedures, informed not only fellow panel members but all the court’s judges that “the result reached in this proposed opinion splits us from the Third Circuit.” The panel adhered to this position, but not before Judge Goodwin (sitting by designation) suggested in his concurrence to the proposed opinion “that we deal directly with the [Third and Fourth Circuit] cases that appear to go against us”²²² – an illustration of the felt need to deal seriously with cases that create conflicts.

Disagreement among judges may also arise. Illustrating the dialogue that can be provoked, a judge’s claim in a proposed dissent that the majority was creating an intercircuit conflict caused Judge Goodwin, who had already concurred in Judge Hug’s majority opinion, “to want to study the matter further –

220. Memorandum from Judge Alfred T. Goodwin to 9th Circuit Panel (Apr. 5, 1994) (on file with author) (regarding *In re Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir. 1994)).

221. *Catholic Social Services, Inc. v. Thornburg*, 956 F.2d 914 (9th Cir. 1992). See Memorandum from Judge Alfred T. Goodwin to 9th Circuit Panel (Feb. 23, 1990) (on file with author) (indicating that another panel member also agreed). Judge Goodwin’s law clerk, Mary Rose Alexander, in a memorandum to Judge Goodwin (Sept. 5 1990)(on file with author) advised the judge that “Judge Wald’s dissent appears to have the better argument on both the legislative history and the plain meaning of the statute,” and that the Wald dissent “compellingly refutes” cases from other circuits “as inconsistent with Supreme Court jurisprudence”.

222. Memorandum from Judge Alfred T. Goodwin to 9th Circuit Panel (Feb. 11, 1994) (on file with author) (regarding *Homeland Stores, Inc. v. Resolution Trust Corp.*, 17 F.3d 1269 (10th Cir. 1994)).

revise it further to respond directly to the dissent. When the dissent is to a denial of rehearing en banc, one would not expect the panel to respond in public; a concurrence in a denial of en banc rehearing is extremely rare. As any response from the panel would have taken place in the intra-court discussion of the en banc call, one would not expect to see a published response. One can see this in the lack of response to Judge Norris' dissent from denial of en banc rehearing in *Act Up! / Portland v. Bagley*. He first claimed that the majority "repudiates the settled law of several circuits, including our own," and then said that the majority has cited "as the villain" in "inflicting such damage on the fabric of qualified immunity law" a Supreme Court summary reversal, which he said cannot bring about change in the law. A more cynical view for the lack of response is that the calls for rehearing en banc have been heard regularly, and frequently, from the same judges, leading to a "Cry Wolf" reaction.

Even when dealing directly with cases raised by the dissenter's intercircuit conflict claim, the majority may treat them much more briefly than does the dissenter. This may be because the latter, having already failed to persuade panel colleagues, may be attempting to catch the attention of other colleagues who monitor slip opinions; here the dissent paves the way for an en banc call just as a dissenter from the court's failure to grant en banc rehearing may be seeking to attract the Supreme Court's attention.

One might expect that, because of the importance of an en banc decision, claims of intercircuit conflict made by dissenters to an en banc opinion would receive a response. However, even in those situations, such claims by the dissenter may go unanswered. This was true with *Roy v. Gomez*.¹⁶⁷ There the Ninth Circuit en banc majority held it was not harmless error to omit, from instructions on aiding and abetting, the requirement that the jury find that the defendant intended to encourage or facilitate the principal's offense. Although devoting much of his discussion to what he believed was the majority's improper application of Supreme Court opinions, Judge Wallace, in dissent, added his assertion that the majority had created intercircuit conflict by refusing to apply one Supreme Court ruling rather than a Scalia concurrence to which he said it had improperly looked.¹⁶⁸

167. 81 F.3d 863 (9th Cir. 1996) (en banc).

168. *Id.* at 870 (9th Cir. 1996)(en banc) (Wallace, J., concurring and dissenting).

Another en banc case in which dissenters received no response also illustrates how intercircuit variation in legal interpretation can affect financial transactions which reach across circuit boundaries yet one circuit is face with having to rule on some aspect of those transactions. A bankruptcy court had applied the law of its own circuit but a contested transaction involved in the bankruptcy had taken place in another circuit which had different law. Claiming an intercircuit conflict, Judges Thomas and Hawkins complained that the Ninth Circuit, “[b]y imposing our view of how option contracts should be treated . . . on a Fifth Circuit bankruptcy, . . . unnecessarily intrudes upon the law of another circuit,” and had created an intercircuit conflict with the Fifth Circuit but also “resolved the conflict by declaring Fifth Circuit authority inapplicable to a Texas bankruptcy,” counter to the demands of “[c]omity and simple respect for our colleagues in another circuit.”¹⁶⁹ Despite the strength with which this claim was made, the majority did not mention the case the dissenters had pressed.

There was also no response from the en banc majority which ruled on a district court’s power to hear a case without addressing sua sponte whether the appeals court should decline jurisdiction.¹⁷⁰ In addition to criticizing the majority for not having considered a Seventh Circuit ruling that came after an earlier Ninth Circuit en banc,¹⁷¹ Judge Alarcon, in dissent, felt that the majority “creates an intercircuit conflict with those circuits that have addressed the question whether *Brillhart* abstention can be raised sua sponte.” His “research ha[d] revealed,” he said, “that every court that has addressed the question whether an appellate court can raise abstention sua sponte where the case involves the doctrines of federalism has answered in the affirmative.”¹⁷² One might have thought that Judge Alarcon’s extensive discussion would have been met by

Judge Wallace thought his colleagues misapplied *Brecht v. Abrahamson*, 507 U.S. 619 (1993), and *O’Neal v. McAninch*, 513 U.S. 432 (1995), and should not have looked to Justice Scalia’s concurrence in *Carella v. California*, 491 U.S. 263 (1989). The Supreme Court vacated and remanded with directions, *California v. Roy*, 519 U.S. 2 (1996), the equivalent of a reversal.

169. *In re Robert L. Helms Constr. & Dev. Co.*, 139 F.2d 702, 707-08 (9th Cir. 1998) (Thomas, J., concurring in part, dissenting in part).

170. *Government Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1233-34 (9th Cir. 1998) (en banc) (Alarcon, J., dissenting).

171. *Meyers v. County of Lake*, 30 F.3d 847 (7th Cir. 1994); *Acri v. Varian Assocs.*, 114 F.3d 999 (9th Cir. 1997) (en banc).

172. 133 F.3d at 1223-34 (Alarcon, J., dissenting).

Ninth Circuit dealt with the district court's designation of a defendant as a career offender, which depended on whether the person was "incarcerated" at a certain time. Here the judges "rejected a Sixth Circuit decision that reached 'the opposite conclusion.'"¹⁴⁹ In most cases of this type, the dissenter used the other circuit's ruling for support.¹⁵⁰ In most cases Lindquist examined, in which the majority opinion recognized conflict, "the deviating circuits acknowledged that their decisions would create a conflict but did not spend extensive time agonizing over that fact." Nonetheless, it is clear that conflict was created "knowingly" rather than through ignorance.¹⁵¹

An example of such explicit disagreement came in a case dealing with a statute of limitations question concerning RICO conspiracy. Here Judge Hall stated clearly why she disagreed with the Second Circuit's position interpreting a relevant Supreme Court case and explained the basis for her disagreement.¹⁵² A slightly more cautiously-stated, but nonetheless direct, disagreement came in a case where Seventh Circuit judges, while claiming their "highest regard for our Sixth Circuit colleagues and the concerns that motivated them to adopt the Justice Department's view" concerning the stay provision of the Prison Litigation Reform Act," could not agree that the statutory language "can be pushed this far."¹⁵³

Dissenters may also part company with other circuit's doctrine. For example, in responding to a claim that a video conference sentencing hearing violated the Federal Rules, Fifth Circuit Judge Henry Politz rejected reliance on a Ninth Circuit opinion for the proposition such sentencing was prohibited. Quoting from that opinion, he said, "I appreciate our sister circuit colleagues' concerns, but decline to accept their conclusion" because it "fails to recognize" an alternative meaning of the defendant's "presence."¹⁵⁴

The presence of a dissent in another circuit's case certainly provides a basis for departing from the intercircuit consensus. It

149. *United States v. Latimer*, 991 F.2d 1509, 1515 (9th Cir. 1993).

150. *Hellman*, *supra* note 1, at 1077.

151. *Lindquist*, *supra* note 16, at 14, 18.

152. *Grimmett v. Brown*, 75 F.3d 506, 517 (9th Cir. 1996) (dismissed as improvidently granted, *see* 519 U.S. 233 (1997)).

153. *French v. Duckworth*, 178 F.3d 437, 443 (7th Cir. 1999), *rev'd and remanded*, *see Miller v. French*, 120 S.Ct. 2246 (2000)).

154. *United States v. Navarro*, 169 F.3d 228, 241 (5th Cir. 1999) (Politz, J., dissenting).

gives support to a panel that chooses to create an intercircuit conflict. Thus, dealing with the question of whether the statute outlawing movement of firearms in interstate commerce applied to items that were stolen after they had traveled in interstate commerce, the Ninth Circuit panel engaged in ritual deference to another circuit (“While we hesitate to part company”), but found the Sixth Circuit’s dissenting judge’s “reasoning more persuasive” and adopted his position.¹⁵⁵ Drawing on a conflicting circuit’s dissenter in this fashion not only serves to legitimate one’s own position but shows that someone within the conflicting circuit believes that circuit “got it wrong,” even if that is not the specific language used in citing the dissent. Likewise, a dissenting judge may turn for support to the opinion of a fellow-dissenter in another circuit.

D. Responses to Dissenters’ Claims.

Particularly important are cases in which a dissenter—to the panel opinion or the denial of rehearing en banc—claims that the court is, creating an intercircuit conflict. An example is Judge Graber’s claim that the Ninth Circuit majority in *United States v. Fuchs* “creates but does not acknowledge a split with two of our sister circuits” on the issue of plain error as to omitted jury instructions.¹⁵⁶ Another, in a case concerning providing aid to a disabled parochial school student, is Judge Kleinfeld’s assertion that several other circuits (and the Supreme Court) “have all held to the contrary” of the Ninth Circuit’s position with one court doing so “in a case materially identical to this one.” Not only was it the case that “[t]he majority puts us at odds with three other circuits to have considered analogous issues,” but also “[t]he majority fails to adequately distinguish” the rulings of the other courts of appeals.¹⁵⁷

Because of the importance of such claims, we now examine responses to them. Faced with such claims, how does the majority respond? *Does* it do so? And if so, minimally or with extended discussion?¹⁵⁸ The claims made in a dissenting opinion

155. *United States v. Cruz*, 50 F.3d 714, 716 (9th Cir. 1995).

156. 218 F.3d 957, 967, 969-970 (9th Cir. 2000) (Graber, J., dissenting). Judge Graber’s claim of intercircuit inconsistency was joined with a number of other claimed errors in the majority’s position. *Id.*, at 967.

157. *KDM ex rel. WJM v. Reedsport Sch. Dist.*, 196 F.3d 1046, 1052-53, 1055 (9th Cir. 1999) (Kleinfeld, J., dissenting).

158. See Hellman, *supra* note 1, at 1065-75.

bankruptcy court but the district court that had awarded the fees.¹⁰⁶ In another instance, a panel dealt with whether the so-called “cause and prejudice” requirement was to be applied when a defendant challenged his guilty plea. The judges first noted “that a conflict exists in the circuits” and then observed that Ninth Circuit cases “appear to be more consistent with the answers reached by the Second and Third Circuits” than the Seventh Circuit.” However, the court still managed to sidestep resolution of the conflict because, said the court, that requirement did not prevent review of a defendant’s jurisdictional claim.¹⁰⁷

The stance of acknowledging-without-resolving does not mean the court will not later revisit the conflict issue and resolve it. One can see this with respect to the question of whether bankruptcy courts had jurisdiction to award attorney’s fees. The Ninth Circuit first noted that “[e]xistence of both an intra- and inter-circuit split was previously recognized by this Circuit” in a ruling which “did not address the issue.” Then, providing an extensive discussion and giving six reasons, the court adopted the Fourth Circuit’s view and rejected that of the Eleventh Circuit.¹⁰⁸ In a 1999 case, the panel noted that the court had earlier “noted a conflict among the other circuits on [the] question of whether, under the provision of Rule 60(b) that a judge may vacate a judgment “on motion,” there must be a motion from a party or whether the judge may do so *sua sponte*, but that the court “did not resolve” it. Now, however, the court would “conclude that the Fourth and Fifth Circuit position” allowing a judge to act on his or her own “makes better practical sense.”¹⁰⁹

106. *In re Cascade Roads*, 34 F.3d 756, 767 n.12 (9th Cir. 1994).

107. *Chambers v. United States*, 22 F.3d 939, 945 (9th Cir. 1994) (en banc). The court even added, in a note, “Our analysis has been consistent with the approach the Second Circuit took.” *Id.*, at 945 n. 11. In a later case, the court cited to *Chambers* as having noted an inter-circuit conflict but not resolved it. See *Gonzalez v. United States*, 33 F.3d 1047, 1949 (9th Cir. 1994). See also *Benjamin v. Jacobson*, 172 F.3d 144, 188 n.28 (2nd Cir. 1999) (en banc) (Calabresi, J., concurring). Second Circuit Judge Guido Calabresi, in a separate concurring opinion, suggested that a disagreement between the circuits was one between “conflicting obiters” and thus his court should not decide the issue until it was fully presented. *Id.* at 188 n.28.

108. *In re Yochum*, 89 F.3d 661, 666 n.3 (9th Cir. 1996).

109. *Kingvision Pay-Per-View v. Lake Alice Bar*, 168 F.3d 347 (9th Cir. 1999); the earlier case noted was *Clifton v. Att’y Gen. of Cal.*, 997 F.2d 660 (9th Cir. 1993).

3. Resolved Conflicts.

Related to responding to a claim of conflict by saying there is none, because cases can be distinguished, is to say that the conflict has been resolved. Here judges acknowledge that an intercircuit conflict exists but go on to argue that an intervening Supreme Court ruling has disposed of it. For example, in *Chan v. Society Expeditions*,¹¹⁰ the Ninth Circuit noted the Supreme Court's resolution of a conflict in *Conrail v. Gottschall*.¹¹¹ Because the Supreme Court takes some cases to resolve intercircuit conflicts, it is not surprising that courts of appeals judges talk of whether the justices have resolved such conflicts, even if such mention at times seems to be fairly routine.

Even when the justices do not rule directly on an intercircuit conflict, one of their decisions addressing an issue on which several courts of appeals have ruled prompts attention because it affects the work of those courts of appeals which then come to the issue. Thus, in a case on whether liquidated damages under the Age Discrimination in Employment Act (ADEA) were excludable from taxable income, the Ninth Circuit panel first indicated that "[u]ntil recently" the case law had "firmly established." It then noted that this prior analysis was changed by a Supreme Court ruling, although the author observed that courts had continued to reach the same result "even under the Supreme Court's more restrictive test."¹¹²

Congress' resolution of intercircuit conflicts is also mentioned from time to time. In one such instance, the Ninth Circuit, sitting en banc to review the criminal conviction of Judge Robert Aguilar, noted that Congress had obviated a conflict the Ninth Circuit had earlier created with the Second Circuit over the witness-tampering statute "by amending section 1512 to cover specifically non-coercive witness tampering." As Judge Hug observed for the court, "in removing the conflict . . . , Congress indicated what type of noncoercive conduct was meant to be proscribed . . ."¹¹³ In another case, after noting that there

110. *Chan v. Soc'y Expeditions*, 39 F.3d 1398 (9th Cir. 1994).

111. *Consol. Rail Corp. v. Gottschall*, 512 U.S. 532 (1994).

112. *See Schmitz v. Commissioner*, 34 F.3d 790, 792-793 (9th Cir. 1994) (holding back pay and liquidated damages excludable from gross income). The Supreme Court case is *United States v. Burke*, 504 U.S. 229 (1992).

113. *United States v. Aguilar*, 21 F.3d 1475, 1485 (9th Cir. 1994), *rev'd en banc*. The earlier Ninth Circuit case was *United States v. Lester*, 749 F.2d 1288 (9th Cir. 1984) (in conflict with *United States v. Hernandez*, 730 F.2d 895 (2nd Cir. 1984)). *See also* the discussion of this conflict, and of the resolution by Congress, in the subsequently-vacated

had been inter-circuit conflict over the application of Rule 35(a) of the Federal Rules of Criminal Procedure, the Ninth Circuit held that as a result of Congress' amendment of the Rule, "it is now clear that a district court is divested of jurisdiction once a notice of appeal has been filed from the original sentence."¹¹⁴ Congress is not the only non-judicial policy-making body providing resolution of inter-circuit conflicts that the courts then mention in passing. The courts have noted the U.S. Sentencing Commission's resolution of some conflicts when it amends the Sentencing Guidelines.¹¹⁵

Court of appeals judges have a particular interest in instances in which a Supreme Court ruling has undercut the cases which have created a circuit split, as this eases the task of those courts of appeals which might otherwise have to choose one position over another. For example, a district court relied on a Third Circuit case but the Supreme Court resolved a conflict between the Third and Fourth Circuits and impliedly overruled the Third Circuit case. As a result, the Ninth Circuit felt required to reverse the district court.¹¹⁶ A case on sentencing for conspiracy also illustrates this point. Judge Goodwin noted that the defendant "points to an apparent conflict among circuits" and an earlier Ninth Circuit case supposedly supporting her position, and cases from other circuits "which she contends support [its] logic." However, he said, "recent Supreme Court precedent appears to defeat" defendant's argument, with the *Edwards v. United States* "holding undercut[ing] the vitality" of the cases on which defendant had relied.¹¹⁷

Supreme Court resolution of an inter-circuit conflict is particularly likely to receive attention by the court whose earlier

panel opinion, *United States v. Aguilar*, 994 F.2d 609, 639 (9th Cir. 1993).

114. *United States v. Ortega-Lopez*, 988 F.2d 70, 72 (9th Cir. 1993). The Federal Rules are developed by the Judicial Conference of the United States, promulgated by the Supreme Court, and go into effect if Congress does not disturb them. Thus, one could argue that the judiciary, although not the Supreme Court itself, had been the prime actor resolving this inter-circuit conflict.

115. See the acknowledgment of Amendment 484, which "addresses an inter-circuit conflict regarding the meaning of the term 'mixture or substance'" in Section 2D1.1 of the Guidelines. U.S.S.G.App.C, Amend. 84, referred to in *United States v. Innis*, 77 F.3d 1207, 1209 (9th Cir. 1996), and *United States v. Millican*, 68 F.3d 482 (9th Cir. 1995)(Table), 1195 WL 623436.

116. *Saari v. Smith Barney, Harris Upham & Co.*, 968 F.2d 877, 879 (9th Cir. 1992); see also *Nicholson v. CPC Int'l Inc.*, 899 F.2d 221 (3rd Cir. 1989); and *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir.1990), *aff'd*, 500 U.S. 20 (1991).

117. *United States v. Jackson*, 167 F.3d 1280, 1284-1285 (9th Cir. 1999); see *Edwards v. United States*, 523 U.S. 511 (1998).

disposition the justices considered. We see this in the Ninth Circuit's mention in *Wilson v. Drake* that the Supreme Court had resolved an intercircuit conflict in reversing one of the court of appeals rulings in *United States v. Smith*.¹¹⁸ There was also a mention in a subsequent immigration case of the Supreme Court's resolution of a conflict that the Ninth Circuit had created with the D.C. Circuit.¹¹⁹

At times the Ninth Circuit's reference to Supreme Court action on intercircuit conflicts occurs when its position has been vindicated, as when, after the Supreme Court affirmed the Ninth Circuit in *Hallstrom v. Tillamook County*,¹²⁰ the Ninth Circuit applied that ruling to Clean Water Act regulations.¹²¹ However, Ninth Circuit judges are particularly likely to comment on Supreme Court action when the justices have dealt adversely with a position taken by the Ninth Circuit itself. In a sentencing case where the Supreme Court had undercut the Ninth Circuit, Judge Rea (of the Central District of California, sitting by designation) observed that *United States v. Niven*,¹²² a Ninth Circuit ruling on concurrent or consecutive sentences for aggregate losses from separate offenses, had "been criticized by at least one other circuit" and a "number of circuits . . . have not adopted the *Niven* rationale." He then observed "that the law has undergone a significant change since our decision in *Niven*," with "the precedential force of our holding in *Niven* . . . severely undercut, if not eliminated, by the Supreme Court's recent decision in *Witte v. United States*," which resolved the intercircuit conflict, as well as by post-*Witte* Ninth Circuit decisions.¹²³

118. *Wilson v. Drake*, 87 F.3d 1073 (9th Cir. 1996) (citing *United States v. Smith*, 499 U.S. 160 (1991)).

119. See *Naranjo-Aguilera v. I.N.S.*, 30 F.3d 1106, 1110 (9th Cir. 1994), referring to *Catholic Social Services v. Thornburgh*, 956 F.2d 914 (9th Cir. 1992) and *Ayuda v. Thornburgh*, 948 F.2d 742 (D.C. Cir. 1991), resolved by *Reno v. Catholic Social Services*, 509 U.S. 43 (1993).

120. 493 U.S. 20 (1989) (60-day notice requirement mandatory).

121. *Washington Trout v. McCain Foods*, 45 F.3d 1351 (9th Cir. 1995).

122. 952 F.2d 289 (9th Cir. 1991).

123. *United States v. Scarano*, 76 F.3d 1471, 1474-1475 (9th Cir. 1996). See *Witte v. United States*, 515 U.S. 389 (1995).

In another sentencing case, as to whether a convicted defendant was entitled to credit against his sentence for pretrial time spent in a community treatment center, the Ninth Circuit position that such credit should be granted had been "in conflict with those of other circuits." A later panel so observed in noting that the Supreme Court "granted certiorari on a Third Circuit case . . . in order to resolve this circuit split" and had then held the time was not in "official detention" and so credit for it should not be received.

United States Army, when the judges observed, "We are unable to avoid an intercircuit conflict, because the Sixth Circuit has rejected the First Circuit's position."¹³⁰

Despite the apparent need to choose, the court may still be able to avoid doing so. It did so, for example, in a case on exclusion of a defendant's confession because of deliberate delay between arrest and arraignment. The Ninth Circuit noted it had "never expressly chosen between an approach that requires suppression of non-safe harbor confessions if the court determines the delay to have been unreasonable (*McNabb-Mallory*) and an approach that allows admission of some non-safe harbor confessions given during an unreasonable delay in arraignment if the court believes that, on balance, suppression is not warranted," but the panel found that either way the confession should be excluded. However, it reached this result only after extensive discussion of other circuits' competing positions and after coming close to choosing between the standards when it observed that "most of our cases are more consistent with the Seventh Circuit balancing test than with the Second Circuit *McNabb-Mallory* bright line approach."¹³¹

When an intercircuit conflict cannot be finessed in some way, a court must choose one competing position over another. However, the presence of even one court on each side provides the panel with material to support either position.¹³² When faced with another question which the Ninth Circuit had not previously addressed—"whether the Coast Guard has 'exercised' statutory authority over the 'working conditions' on board uninspected vessels"—a panel said it "must turn to sources outside of our circuit law to answer the question." Yet, when it found that one circuit went one way, two the other, with another "less clear," it had to choose. The outcome was that "[w]e agree with the Secretary, the Commission and the Second and Eleventh Circuits" that the Secretary had the requisite authority and providing a reason for not adopting the reasoning

130. 125 F.3d 1296, 1302 (9th Cir. 1997). In the same case, the court rejected the Army's claim that a certain construction "would set up an intercircuit conflict with a Fifth Circuit case," explaining why the claim was "incorrect." *Id.* at 1301.

131. *United States v. Alvarez-Sanchez*, 975 F.2d 1396, 1396-1404 (9th Cir. 1992).

132. For an instance of a dissenting judge agreeing that "[t]he creation of a conflict is justified" while disagreeing with colleagues over the majority's invalidation of the statutory provision at issue because a Sixth Circuit judge's separate opinion properly found the relevant statute constitutional. See *French v. Duckworth*, 178 F.3d 437, 448 (7th Cir. 1999) (Easterbrook, J., dissenting).

of two other circuits.¹³³

When a conflict exists and more courts of appeals have adopted one of the competing positions, there may be a pull from the majority position. This is like the situation discussed earlier in which a court, rather than creating a conflict, goes along with circuits that had already decided an issue. At times, the court simply notes that its own view is “in accord with the majority view”¹³⁴ or that its caselaw “has been adopted by most of the circuits that have addressed the issue.”¹³⁵ In deciding to follow the prevailing view, the judges may nonetheless take the time to demonstrate the weakness of the minority position. A Tenth Circuit majority did this when it criticized the one circuit that had adopted a higher standard than “reasonable belief” as to whether a prospective arrestee lived in a residence, saying the Ninth Circuit “provided no rationale for adopting” its standard.¹³⁶

5. *Creating a Conflict.*

If joining one side or the other in a pre-existing conflict is not easy, creating a conflict (being the “bad guy”) is far more difficult. Yet at times court of appeals judges are willing to “take the bull by the horns,” they do so because they believe their position “is the better one.” As a Ninth Circuit judge, who said, “I never felt intercircuit conflict should be avoided,” observed recently, “If three conscientious judges after full consideration decide that if the rule from another circuit is not a good rule for the Ninth Circuit, they have their own duty and intellectual responsibility to decide the case.”¹³⁷

Judges are often quite direct in acknowledging that they are

133. *Herman v. Tidewater Pacific, Inc.*, 160 F.3d 1239, 1245 (9th Cir. 1998). This case also contained an instance of an acknowledgment that the court was creating a circuit split on another, subsidiary question – whether “the waters at issue here are within the boundaries of Alaska.” *Id.*, at 1243. For another example, where a court “respectfully disagree[d] with one circuit’s position” and “instead align[ed] with another circuit,” see *Drew v. United States*, 217 F.3d 193, 202-203 (4th Cir. 2000).

134. *United States v. One Toshiba Color Television*, 213 F.3d 147, 156 (3rd Cir. 2000)(*en banc*) (“The majority of courts of appeals to consider the fate of a prior forfeiture proceeding that violated notice requirements agree that a judgment issued without proper notice to a potential claimant is void.”).

135. *United States v. Gandia-Maysonet*, 227 F.3d 1, 5 (1st Cir. 2000) (standard in Rule 11 cases; also noting agreement with Rules and advisory committee notes).

136. *Valdez v. McPheeters*, 172 F.3d 1220, 1224-25 (10th Cir. 1999). The court also noted, “The actual status of law in the Ninth Circuit is open to question.” *Id.* at 1225 n.1.

137. Interview with Senior Judge Alfred T. Goodwin, Pasadena, Cal. (Jan. 25 2000).

cases (from the Tenth Circuit, the more recent Eighth Circuit case, and the panel majority) “reaching the same result semi-independently.” The last communication before the vote on rehearing en banc (which did not succeed) pointed to “a series of judicial and administrative pronouncements” which shared Judge Norris’s view of the statute. It concluded, “Most recently, Chief Judge Lay of the Eighth Circuit and Judge Posner of the Seventh Circuit have explicitly stated the apparent purpose of §4205 ‘is to allow release on parole before the earliest date allowed by subsection (a).’”

A somewhat later case, *Federal Labor Relations Authority v. U.S. Department of the Navy*,²³⁵ illustrates extensive use of other circuits’ rulings and the effect of action by the Supreme Court during the pendency of a case. Under federal labor law and the Freedom of Information Act (FOIA), a divided Ninth Circuit panel had enforced a Federal Labor Relations Authority order that government employees’ home addresses should be revealed. After a petition for rehearing which claimed an intercircuit conflict, two off-panel judges who were members of another panel with a similar issue “stopped the clock.” They argued that the panel majority had misapplied the FOIA as recently interpreted by the Supreme Court and that the majority was also in conflict with a Second Circuit decision which had “intelligently disposed” of an argument made by the Ninth Circuit panel.

The panel majority responded to explain that “the split existed before our decision was filed,” with “divided panels and en banc reconsiderations . . . common” on the issue.” Thus, they argued, taking the case en banc “will not create national uniformity,” something “[o]nly the Supreme Court or Congress can do . . . now,” with it “likely that the Supreme Court will grant certiorari in one or more of the cases,” which they said “it certainly should.” In their extensive discussion of the merits, the two judges noted their agreement with the Third Circuit’s en banc opinion on the subject.

A judge who had earlier called for en banc reconsideration was “not convinced that a circuit split currently exists” and thus did “not find . . . persuasive” the argument that en banc rehearing would not create national uniformity. This judge found the Third Circuit case on which the panel majority had relied to be based on a different FOIA exemption from the one

235. 958 F.2d 1490 (9th Cir. 1992).

used in the current case, so “there is currently uniformity on the issue of disclosure of federal employees’ mailing addresses.” Arguing that the possibility of Supreme Court consideration should not preclude further court of appeals examination of the issue, the judge said *not* taking this case en banc “will disrupt this uniformity” and “will result in a split within this circuit and among all the circuits.”²³⁶ This memorandum resulted in a further response from the majority. While acknowledging what had taken place in the Third Circuit, they noted agreement with their position by the Fifth Circuit—a decision they examined extensively, quoting from it at length—and indicated that several other circuits had the issue at various stages of consideration, with a Fourth Circuit en banc opinion to be issued.

Another judge, who had also made an en banc call in this case, provided additional consideration of the Fifth Circuit case. He felt it was “most useful because it serves both to sharpen and narrow the points of disagreement” he had with the position taken by the panel opinion’s author. He drew heavily on that case in a comparison with the panel opinion, and he argued that the Ninth Circuit’s ruling should be based on it. He also argued that the multi-factor test used by the Ninth Circuit “should be replaced by the approach followed in the Second, Seventh, and D.C. Circuits.”

Prompted by this analysis, some time later the panel author agreed that “the Fifth Circuit analysis is principled and completely sustainable and one that I could embrace,” which would allow avoidance of the problems the judge’s colleagues had raised. Shortly thereafter, the Supreme Court granted certiorari to the Fifth Circuit case, and, after some intracourt communication, the decision was made to await the Supreme Court’s ruling. “Ultimately,” argued the author of the panel opinion, “the Supreme Court’s guidance will resolve the issue for the many cases which have been litigated in every circuit in the country,” but withdrawing the panel’s already-filed opinion was said to be “inappropriate because the Fifth Circuit relied, to some extent, on our opinion in its decision.” (The Supreme Court, ruling that the names and addresses should not be made available, reversed the Fifth Circuit’s ruling.)²³⁷

236. “Moreover, even if the Supreme Court does grant certiorari, this should not prevent us from giving this issue the type of consideration that it deserves and that the other circuits have afforded it.”

237. See *U.S. Dep’t of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487 (1994).

In a case dealing with whether an incarcerated prisoner who had committed an offense leading to deportation was entitled to a prompt deportation hearing, discussion of other circuits' cases also included exchanges both within the panel and throughout the larger court. Although deciding that the alien had stated statutory causes of action, the panel itself was initially unsure of the direction to take. Both before and after requested supplementary briefing, it was "inclined to follow the Eighth Circuit" and "tentatively inclined to affirm on the basis of the 8th Circuit's holding" that the Immigration and Naturalization Service could not be required to hold such hearings on an alien's request. However, on the basis of other statutes, the majority upheld the alien's claim.²³⁸ This led Judge Rymer, citing the Eighth Circuit case without suggesting an intercircuit conflict, to dissent on the ground that the immigration statute was intended to benefit federal prisoners.

The government's suggestion for rehearing en banc claimed conflict with both the Seventh and Eighth Circuits. The majority responded that they had not decided on an implied right of action (the possible basis for an intercircuit conflict) but instead had used a statutory basis "consistent with Eighth Circuit precedent in an analogous situation." That did not satisfy an off-panel judge who first asked the panel to reconsider its opinion and then called for en banc rehearing. Asserting an intercircuit conflict, that judge said, "the result conflicts with decisions of four other circuits;" those courts "unanimously agreed" of the relevant statute and none had "allowed an incarcerated alien to maintain such an action." The judge did concede, however, "that none of these conflicting decisions explicitly addressed the issue of standing under the APA or the Mandamus Act," on which the panel majority had relied.

The response reiterated the assertion that there was no conflict with other circuits. However, the judges also argued that the case was not worthy of en banc rehearing, and that the Supreme Court could take the case if it felt the panel had misinterpreted its recent rulings on standing under the APA. The off-panel judge then further urged a positive vote on rehearing en banc. That led the panel author to assert that the

238. *Soler v. Scott*, 942 F.2d 597, 606 (9th Cir. 1991). One judge's clerk had recommended reversing the district court's judgment for the INS, the position ultimately adopted, but Judge Goodwin's law clerk, finding the Eighth Circuit's "reading . . . is sound," had recommended affirmance. Memorandum from Ira Daves to Judge Alfred T. Goodwin (Sep. 25, 1990) (on file with author).

opinion in the case, which did involve “interesting legal questions upon which reasonable judges could differ,” “does not conflict with any decision in any other circuit. . . . does not conflict with any decision from this circuit. . . . [and] is based upon a reasonable reading of current Supreme Court precedent.” Thus, en banc rehearing was not warranted. (After en banc rehearing was voted down, the case went to the Supreme Court, which granted certiorari, vacated, and remanded with directions to dismiss as moot.)²³⁹

Still another case further illustrates the situation in which there is no public evidence that a possible conflict was examined, but where intercircuit conflict has been raised only after the panel has issued its opinion, and, with an off-panel judge involved, the matter is examined and the opinion stands. The case, under the Sentencing Guidelines, concerned the time from which a term of supervised release should be measured.²⁴⁰ After receiving the government’s PFR, the panel author suggested that, “because there is an apparent conflict between our opinion and the Eighth Circuit, we call for a response to the petition.”²⁴¹ Another member of the panel, while saying, “I am not sure there is a conflict with the Eighth Circuit because the issues were presented differently,” nonetheless agreed that a response should be obtained. After the response was filed, he continued in that view: “I don’t think there is a true conflict with the Eighth Circuit.”

At this point, with the panel having denied rehearing, an off-panel judge “stopped the clock” to inquire, “before the mandate issues, whether the panel has considered the conflict its opinion seems to create with the Eighth Circuit.” The panel author responded, assuring his colleague “that the panel carefully considered the Eighth Circuit’s decision and made a studied and calculated decision to reject it.”²⁴² The off-panel judge responded, indicating his understanding why the case did not appear in the panel’s opinion; it was, after all, “decided just weeks before our opinion issued;” however, he argued that the government “persuasively points out the conflict.” He now wished to know “and I suspect future defendants in analogous

239. *Sivley v. Soler*, 506 U.S. 969 (1993).

240. *United States v. Blake*, 88 F.3d 824 (9th Cir. 1996).

241. Memorandum from Judge Alfred T. Goodwin to 9th Circuit Panel (Aug. 26, 1996) (on file with author).

242. Memorandum from Judge Alfred T. Goodwin to Active 9th Circuit Judges (Oct. 25 1996) (on file with author).

situations may like to know” whether the panel had found the Eighth Circuit ruling “distinguishable, or just flat out rejected [its] analysis of the legal issue.” He also raised the question of whether litigants should know the panel’s basis for rejecting the out-of-circuit ruling. The author’s response to the off-panel judges and the remainder of the court suggested that the panel had followed an earlier circuit ruling rather than the Eighth Circuit.²⁴³ Declining to place an explanation of the reasoning in the opinion, he said, “We have already published our opinion along with our reasoning in the case. I assume that our differences with the Eighth Circuit are apparent to all readers.” The off-panel judge then withdrew his stopclock, concluding the matter.

2. *Modes of Reacting.*

We now turn to look more specifically at particular aspects of judges’ dealing with other circuits’ cases and intercircuit conflict. At times the judge claiming an intercircuit conflict is a dissenter on the panel initially deciding the case; perhaps more frequently, off-panel judges make the claim of intercircuit conflict. The panel itself may even seek en banc hearing in connection with a matter implicating intercircuit conflict, as when a panel made an en banc call because the judges wished to overrule a part of an earlier case “that is in conflict with our sister circuits”; that case was heard en banc.

The *United States v. DeSantiago-Martinez* case,²⁴⁴ commenting on the standard for a defendant’s appropriate waiver of the right to appeal a sentence, provides an example of a judge raising the issue of intercircuit conflict in support of calling for an en banc court subsequent to his dissent from the panel. Saying that the panel majority’s holding “has been explicitly disapproved of by one of our sister circuits,” he examined the Eleventh Circuit’s case on the subject and also noted the Fourth Circuit’s adoption of a rule like that of the Eleventh Circuit. When the panel majority responded that the Eleventh Circuit had responded to the panel’s earlier, rather than later amended, opinion which contained additional information, an off-panel judge insisted “there is an intercircuit

243. “We decided to follow the lead of our own court instead of that of another circuit on a petition for rehearing.” Memorandum from Judge Alfred T. Goodwin to Associates on 9th Circuit (November 5 1996) (on file with author).

244. *United States v. DeSantiago-Martinez*, 980 F.2d 581 (9th Cir. 1992).

conflict.”

*United States v. Veaz-Gonzales*²⁴⁵ is an example of an off-panel judge claiming intercircuit conflict. That judge felt that the panel’s opinion, with its holding that a defendant sentenced as a career offender could challenge prior convictions at sentencing, “puts us at odds with every other circuit which has considered the [relevant Sentencing Guidelines] amendment.” Joining that judge and recognizing that the Ninth Circuit might yet be right, a colleague said “If all the other circuits are wrong, then we should stand our ground,” but concluded, “[I]n this case, they are not wrong.” Another example, with the claimant saying the panel had opted for the “wrong” position, was *Reynolds v. Martin*.²⁴⁶ There, in calling for en banc rehearing, a judge said that the court had once again done just that in applying the Civil Rights Act of 1991 retroactively, and, “Once again, the justification for a holding [was] contrary to six other circuits.” (Having failed to persuade his colleagues to go en banc, this judge and three others dissented from the denial of rehearing en banc.²⁴⁷)

In a case on upward departures from the Sentencing Guidelines,²⁴⁸ debate within the court about cases from other circuits began early because the panel circulated its opinion before filing. The principal problem in the case was one of intracircuit conflict, but the work of other circuits was implicated because, as one off-panel judge put, the issue was said to have “caused problems in other circuits,” and the panel author was said to have relied on a Second Circuit case that had been undercut by later cases there. The mention of cases from other circuits continued without mention of “intercircuit conflict” for over a year until another off-panel judge raised the issue after the panel had amended its opinion.²⁴⁹ The amendment, which noted a conflict with the Second and Tenth Circuits and rejected the position of those courts, prompted an ultimately inconclusive dispute over the panel’s duty to inform the court of creation of the conflict, and the panel’s amended opinion stood.

245. 968 F.2d 321 (9th Cir. 1993).

246. 985 F.2d 470 (9th Cir. 1993).

247. *Estate of Reynolds v. Martin*, 994 F.2d 690 (9th Cir. 1993)(dissent from denial of rehearing en banc).

248. *United States v. Castro-Cervantes*, 911 F.2d 222 (9th Cir. 1990), *amended*, 927 F.2d 1079 (9th Cir. 1991).

249. *United States v. Castro-Cervantes*, 927 F.2d 1079 (9th Cir. 1991)(*amending* 911 F.2d 222 (9th Cir. 1990)).

Another instance came in a criminal case where the disputing judge made the panel's treatment of sufficiency of the evidence his principal concern. In addition to saying that the panel's action was "inconsistent with the precedents of the Supreme Court and this court," the judge asserted that "the panel's maverick approach is inconsistent with that of every other circuit." He argued, "I see no reason for us to be the first court to create a circuit split over what until now was thought to be such a clear-cut rule." The panel responded after another judge had chimed in by saying "the new standard puts us out of step with the rest of the country" and there was some further communication. Saying that "The so-called intra- and inter-circuit conflicts identified . . . are based on an extravagant misinterpretation of our opinion," the panel judges believed that the off-panel judge's principal concern was his disagreement with the panel's result; they did not think that warranted en banc reconsideration. Further discussing the claimed inter-circuit conflicts, they defended their action by saying that their formulation of the rule "is consistent with the law in all circuits, and has been explicitly employed in at least one other circuit." As a result, they said, "Thus, far from ameliorating an *inter-circuit conflict*, [the] en banc call, if successful, may well create one."

Other instances of off-panel judges claiming a circuit split appear in several of the calls for en banc rehearings by one of the circuit's more liberal judges. These also serve to illustrate the relation between inter-circuit conflicts, en banc rehearings, and the Supreme Court; they also illustrate the fact that a judge may appear to be seeking en banc rehearing not because of opposition to inter-circuit conflict in principle but because of the results the judge seeks. Among the judge's efforts were a call for en banc rehearing of two Sentencing Guidelines cases, which he felt "create a split between our circuit and the only other circuit to have decided the issue," and his call for review of two Superfund cases concerning legal fees as part of clean-up costs because the panel's rulings in both cases²⁵⁰ "create a circuit split" with the Eighth and Sixth Circuits. In the latter instance, the judge called for en banc "in the hopes of sparing the Supreme Court some unnecessary work . . . resolving the

250. See *United States v. Sanchez*, 967 F.2d 1383 (9th Cir. 1992); *United States v. Harrison-Philpot*, 978 F.2d 1520 (9th Cir. 1992).

conflict with the Sixth and Eighth Circuits.”²⁵¹

This judge could, however, also *seek* such conflicts out of the belief that the correct position was the one stated elsewhere. The *Wong* Sentencing Guidelines case is one such instance.²⁵² This judge said that the Ninth Circuit ruling “brings the Ninth Circuit into line with four other circuits, two of which . . . decided the issue en banc” so that “I cannot as yet claim a conflict in the circuits as a reason for taking *Wong* en banc,” the judge wished to join “a number of impassioned dissents” in those other cases. He stated that he was “not hesitant to create an intercircuit conflict,” instead of trying to avoid work for the Supreme Court. Instead, the judge said directly, “Because of the exceptional importance of this issue, I have no reluctance to put pressure on the Supreme Court by creating a conflict in the circuits” because the matter “has ‘percolated’ in the circuits long enough [and] it is time for the Supreme Court to resolve it once and for all.” Illustrative of the position that judges of the courts of appeals have to make choices concerning intercircuit conflicts, he declared, “the Ninth Circuit should step up to the plate and take our cuts at playing a leadership role.”²⁵³

Still another instance of an off-panel judge raising the issue of an intercircuit conflict came in a case concerning a Christmas display held by the panel not to be a violation of the Establishment Clause.²⁵⁴ Here a judge, drawing on the panel dissent, contended that the panel majority “creates a split among the circuits on the question of whether or not the guarantee of free expression can trump the Establishment Clause,” as “[t]wo other circuits have addressed this precise question and have reached the opposite conclusion.” Then, in the middle of the Ninth Circuit’s debate over whether to rehear the case en banc, the Supreme Court handed down its decision in the *Lamb’s Chapel* case.²⁵⁵ The dissenter believed that case “if anything, reinforces my dissent.” However, the two judges in the panel majority asserted that the Supreme Court decision “resolves the inter-circuit conflict that long preceded it” and they

251. Cf. *Key Tronic Corp. v. United States*, 30 F. 3d 1105 (9th Cir. 1993); *Stanton Road Associates v. Lohrey Enterprises*, 984 F.2d 1015 (9th Cir. 1993).

252. *United States v. Wong*, 2 F.3d 927, 929 (9th Cir. 1993).

253. In a footnote, he added, “While I agree that we should generally be cautious about creating conflicts in the circuits, we should avoid being overly cautious.”

254. *Kreisner v. San Diego*, 988 F.2d 883 (9th Cir. 1993).

255. *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 383 (1993).

further contradicted the claim by the off-panel judges that the panel had created a circuit split by saying, “The split by saying it existed before our decision.”

As this last rejoinder indicates, instead of claims that the panel has created an intercircuit conflict, there are assertions that the panel has continued such a conflict. In a case on qualified immunity, a judge claiming an intercircuit conflict said that in misreading a Supreme Court decision, the panel had gone against both earlier Ninth Circuit precedent and “the law of at least seven other circuits.” However, he also noted several circuits that had taken a contrary position. It was to those three circuits that the panel turned for support in responding.²⁵⁶

There was at least implicit agreement in this last case that an intercircuit conflict already existed. However, the judges may dispute whether a split exists or would, or might, be created and thus should be avoided. In asking the panel to rethink its opinion in a sentencing guidelines case,²⁵⁷ a judge stated “there is already a conflict in the circuits” caused by a Third Circuit case which “[t]he parties apparently failed to cite to the panel.” With a circuit split already present, the judge argued that the panel “should amend its opinion and discuss the Third Circuit case and base its choice between that approach and the Second Circuit’s on the merits of the respective alternatives rather than upon a no longer applicable need to avoid an already existing inter-circuit conflict.”

In a case on the availability of injunctions in labor cases, which the court did hear en banc,²⁵⁸ when a judge “stopped the clock” to tell the panel that its ruling “appears to conflict squarely with . . . other circuit courts of appeals,” the panel opinion’s author responded both that “The circuit split over this issue pre-dated our opinion” and that the conflict “aligns the Ninth Circuit with the majority of other circuits to consider this issue.” And we have already seen discussion of the question of the existence of an intercircuit conflict arising in the extended debate over whether to give en banc rehearing in *Federal Labor Relations Authority v. United States Department of the Navy* decision.²⁵⁹

256. *ActUp/Portland v. Bagley*, 971 F.2d 298 (9th Cir. 1992), *amended*, 988 F.2d 868, 880 (9th Cir. 1993).

257. *United States v. Warren*, 980 F.2d 1300 (9th Cir. 1992).

258. *Miller ex rel. NLRB v. California Pac. Medical Ctr.*, 991 F.2d 536 (9th Cir. 1993), *rev'd en banc*, 19 F.3d 449 (9th Cir. 1994) (en banc).

259. 958 F.2d 1490 (9th Cir. 1992).

3. Using Other Circuits' Work

Determining whether an intercircuit conflict exists is, of course, only preliminary to deciding whether to adhere to the new position that is alleged to create the conflict or to join the other circuits' case law. Where there is a preexisting conflict, the question becomes which available position to adopt; here within-circuit disagreements are likely to overlay positions that differ among other courts of appeals. An example of this latter situation can be found in the *Federal Labor Relations Authority* case. Faced with what they claimed was disagreement among the circuits, the Ninth Circuit panel majority replied to another panel working on a similar case by drawing on cases from other courts of appeals, particularly the Third and Fifth Circuits, to support positions in its own opinion. However, its arguments were met in turn with claims that the Third Circuit case was based on a different FOIA exemption and that the proposed opinion went beyond the Fifth Circuit's ruling.

An instance in which judges suggested that the Ninth Circuit should adopt the position of other circuits was the *Gaudin* case, on whether the materiality of false statements was a jury question or a matter of law.²⁶⁰ The situation in this case was somewhat complex because two judges who had signed onto the panel opinion made the argument that other circuits' law should be adopted; despite their initial vote, they voted to accept the parties' en banc suggestion, and who, and after an off-panel judge's en banc call, argued that "Every other circuit with an opinion on the issue has disagreed with *Valdez*," the pre-existing Ninth Circuit precedent.²⁶¹ They also pointed to an important subsequent Supreme Court ruling on the matter,²⁶² which they said made *Valdez* "no longer good law" and which required that the *Gaudin* panel ruling be reheard en banc "so that we may overrule *Valdez* and bring our law in line with that of every other circuit, the Court, our own precedent in analogous areas, and common sense." In fact, the court did grant en banc rehearing; the en banc court adopted the same position as the panel, and the Supreme Court granted review and affirmed the en banc court.²⁶³)

260. *United States v. Gaudin*, 997 F.2d 1267 (9th Cir. 1993).

261. *United States v. Valdez*, 594 F.2d 725 (9th Cir. 1979).

262. *Kungys v. United States*, 485 U.S. 759 (1988).

263. *United States v. Gaudin*, 997 F.2d 1267 (9th Cir. 1993) (en banc), aff'd, 515 U.S. 506 (1995).

If judges can urge the adoption of other circuits' positions they can also argue against using out-of-circuit caselaw. Thus, when an off-panel judge, alleging the creation of a circuit split, sought en banc review of two Superfund cases,²⁶⁴ the author of the panel's rulings argued to his court colleagues that the conflict was "unavoidable." This he said was because the ruling of one circuit was contained in only one paragraph and the majority was "unable to accept the Eighth Circuit's shallow analysis of this statutory interpretation."

In another case, an off-panel judge, agreeing with the panel dissenter, implicitly argued for adoption of the Second Circuit's position. He said that the majority had created a circuit split and that its "attempt to distinguish the Second Circuit case by minor intervening changes" produced by a statute "is unavailing." The response by the panel opinion's author was that there was "no conflict between the majority's opinion and the Second Circuit's" because the Congress had mandated a change and thus the Ninth Circuit faced a different situation. And where a Ninth Circuit judge argues for adopting the position of another circuit's dissenter, by definition the argument is that the majority position there should not be adopted. Thus, during the debate on whether the *Gwaltney* sentencing case²⁶⁵ should be reheard en banc, the dissenter from the panel opinion argued for adopting the position of dissenting Judge Lay in an Eighth Circuit case the panel had missed and not to adopt the position of the Eighth and Tenth Circuits.

PART VI. CONCLUDING COMMENTS

This article adopts the perspective of judges of the U.S. courts of appeals rather than a perspective focused on the U.S. Supreme Court to present an initial picture of how judges of the U.S. courts of appeals treat cases from other circuits, and particularly how they deal, or fail to deal, with claimed or actual intercircuit conflicts; this includes whether they acknowledge the existence of such conflicts and, if they do, how they confront them.

Examination of opinions primarily from the U.S. Court of Appeals for the Ninth Circuit and of communication among the judges prior to release of opinions demonstrates several things.

264. Key Tronic Corp. v. United States, 30 F.3d 1105 (9th Cir. 1993); Stanton Road Assoc's v. Lohrey Enterprises, 984 F.2d 1015 (9th Cir. 1993).

265. United States v. Gwaltney, 790 F.2d 1378 (9th Cir. 1986).

One is that, in the absence of an existing intercircuit conflict, courts of appeals judges will often go along with existing rulings on an issue, although at times they are willing to create a conflict. When an intercircuit conflict is claimed to exist, the judges respond in several ways. They may do no more than acknowledge the conflict. However, at times they do more. They distinguish cases claimed to conflict; they suggest that the conflict has been displaced by a Supreme Court ruling or congressional action; and, most directly, they take sides in the dispute. When a dissenter claims the presence of such a conflict, the majority at times makes no response. Yet there are numerous instances in which majority and dissenter, meeting normative expectations that judges will address each other's concerns, engage in an explicit discussion of the purported comments. And there are still other cases containing an implicit dialogue in which a "conflict" as such is not addressed but both sides discuss the same cases.

Intercircuit conflicts, real or perceived, are seldom the only issue in a case, and quite often they are far from being the core matter under discussion. Most frequently, circuit splits are often discussed in a case along with intracircuit conflicts and with conflicts that arise between court of appeals rulings and the Supreme Court. In short, it appears that seldom does a stop-clock or en banc call appear to rest on an intercircuit conflict alone. The varied elements in the mixture include claims that the panel has misread prior circuit precedent, created a within-circuit conflict, created an intercircuit conflict, and has decided a case contrary to ruling Supreme Court precedent. Indeed, intracircuit conflicts and alleged conflicts with Supreme Court precedent appear to receive higher levels of priority, and perhaps more attention, than intercircuit conflicts.

Not only are questions of intercircuit conflict piled atop claims concerning intracircuit conflict and about tension between Supreme Court precedent and court of appeals rulings. At other times, these matters are linked. There is, for example, a clear linkage between the presence of intercircuit conflict and taking cases en banc, as some judges feel that intercircuit conflicts are sufficiently important to make a case "en banc-worthy." This connection is related to the more general question of whether a court of appeals should sit en banc to deal with issues before they go on their way to the Supreme Court or should avoid expending resources because the cases will go to the Supreme Court in any event and will reach the justices

faster without an en banc hearing.²⁶⁶ If other circuits have decided cases in such a way that intercircuit conflict exists and those cases have been brought to the Supreme Court, the conflict-with-Supreme Court and intercircuit conflict claims may be intermixed.

While intercircuit conflict claims may become mixed with other issues, it is clear from this examination that potential and actual intercircuit conflicts do receive the attention of the courts of appeals. They do not either wantonly manufacture them or pass them on willy-nilly to the Supreme Court. While some individuals or panels of judges are not faint of heart with respect to creating such conflicts, for the most part the judges go along with other circuits' views rather than create conflict, and efforts are made to minimize the extent of intercircuit conflict.

The picture presented here, while extensive, is nonetheless preliminary. More attention to the perspective of court of appeals judges is needed. One could, for example, focus on how courts of appeals have dealt with the cases the Supreme Court cites when it grants review to resolve intercircuit conflicts, and how the justices deal with cases in which intercircuit conflict has already been discussed.

One could further add to our store of information by using any specific circuit as the focal point to examine questions like the following:

(1) How does the Supreme Court treat intercircuit conflict in those cases where the possibility of a conflict has been raised by a lower court judge and perhaps debated in that judge's court? Does the Supreme Court grant review to resolve those conflicts which have been discussed by the court of appeals?

(2) When the Supreme Court accepts a case from a court of appeals to resolve an intercircuit conflict, or, while taking another circuit's case, mentions ruling from the former court, are the cases the lower court considered when it dealt with a claim of real or putative intercircuit conflict the same cases the Supreme Court cites or do the justices refer to cases that the lower court has not discussed? The latter may be the situation if there is a lag between the lower court ruling and the granting of review, or if the court of appeals ruling to which cert is granted has simply applied earlier circuit precedent where intercircuit

266. This matter is explored in Stephen L. Wasby, *The Supreme Court and Court of Appeals En Bancs*, 33 MCGEORGE L. REV. (forthcoming), originally presented to the American Political Science Association, Washington, D.C. (2000).

differences were discussed. Timing is important. At times, most or all of the cases creating a purported conflict are decided within a short span of time and are brought to the Supreme Court almost simultaneously,²⁶⁷ while other cases involved in the conflict are much older, with certiorari having perhaps been denied in those cases.

(3) Conversely, did the lower court consider the cases the Supreme Court cited as creating an intercircuit conflict, and, if so, how did the lower court deal with those cases? How does that treatment compare with the Supreme Court's treatment? Whether the lower court did deal with the cases cited by the justices will be a function of timing—of when those cases were decided in relation to when the court of appeals being studied created circuit precedent on the issue.

The data and analysis that such studies would provide would add immeasurably to our knowledge of the operation of the federal court system. In particular, it would help redress the disproportionate attention to how the Supreme Court treats intercircuit conflicts. More important, it would serve to minimize the portray of the Supreme Court as always acting *on* the lower courts and would better demonstrate the continuing reciprocal interaction between the courts of appeals and the Supreme Court.

267. Compare the “cert. pending” status for some cases cited as part of a conflict.