Research Note

"EXTRA" JUDGES IN A FEDERAL APPELLATE COURT: THE NINTH CIRCUIT

STEPHEN L. WASBY*

I. INTRODUCTION

Much attention has been devoted recently to *inter* circuit doctrinal conflicts in the United States Courts of Appeals (Commission, 1975b: 30-32, 37-44). Less attention has been paid to the equally—if not more—serious problem of *intra* circuit doctrinal conflict, which causes difficulties for lawyers attempting to advise clients and for district judges trying to apply circuit law (Wasby, 1979). Observers have suggested that decreased frequency of communication among appellate judges leads to less consistency in their decisions. Where judicial interaction is infrequent, because of increased numbers of judges on a court or the judges' geographic dispersion, the "law of the circuit" tends toward disharmony (Commission, 1973: 19-20, and 1975b: 130; also Friendly, 1973: 45). The existence and extent of intracircuit inconsistency may thus be viewed as dependent variables, the number of judges and the judges' geographic dispersion, or both, as independent variables, and communication among judges as a key intervening variable.

---

* An earlier version of this article was presented at the meetings of the American Political Science Association, Washington, D.C., September 2, 1979. Financial assistance was provided by the Office of Research Development and Administration, Southern Illinois University at Carbondale, and the Penrose Fund of the American Philosophical Society. Office space during a sabbatical stay in San Francisco was graciously provided by Hastings College of Law through Dean Marvin Anderson.

I wish particularly to thank Dorothy Robyn, Graduate School of Public Policy, University of California, Berkeley, and Professor Thomas Kerr, Hastings College of Law, for assistance in developing the questionnaire; Susan Hickman and Michael Wepsiec, for tabulating data; J. Woodford Howard, Richard Richardson, and Peter G. Fish for substantive and stylistic comments on earlier versions of this article; and Joel Grossman, for appropriate prodding and editorial assistance. My deepest appreciation is extended to the judges of the U.S. Court of Appeals for the Ninth Circuit, who tolerated extensive questioning from a social scientist "court-watcher."

The research reported here focused on one element in this proposition—the use of "extra" judges. For a United States Court of Appeals, extra judges include the court's own circuit judges who have taken senior status, and all judges who sit "by designation." The latter include active duty and senior circuit judges from within the circuit and visiting judges, including circuit and district judges from other circuits and judges of the specialized federal courts.[1] Atkins (1972: 630) has argued that temporary assignment of such judges increased both the number of judge combinations sitting as three-judge panels and the "probability of inconsistent decision-making." Similar concerns were expressed in the extensive testimony heard by the Commission on Revision of the Federal Court Appellate System (Hruska Commission).

The Ninth Circuit was particularly subject to criticism for such alleged inconsistency. Former Solicitor General Erwin Griswold, who focused his criticism on the Ninth Circuit (Commission, 1973: 10, 28) observed more generally:

> You get a visiting District Judge from X Circuit . . . and a District Judge from somewhere and maybe a judge from the Court of Appeals, and they are all fine, conscientious, able people; but the notion of stability . . . is very widely missing . . . (Commission, 1973: 16).

Such criticism, echoed by others (see, e.g., Hellman, 1980: 942 n.30), makes the Ninth Circuit an appropriate court in which to examine the use of extra judges. The judges of that court are especially widely dispersed, and this affects communication (Wasby, 1977). The Ninth Circuit also makes more extensive use of extra judges than does any other circuit (McDermott and Flanders, 1979: 56). Its chief judge has said it has "more district judge assignments, or nearly as many, as in all of the other circuits of the United States combined" (Commission, 1973: 910; see also Fish, 1979: 156).

This research note, based on interviews conducted in 1977 with circuit and district judges in the Ninth Circuit,[2] affords just an initial glimpse of a subject with considerable identification and measurement problems. For one thing, it is difficult to determine which opinions each judge wrote. A

---

[1] Green and Atkins (1978) call all extra judges, including the court's own senior circuit judges, "designated judges," and some apply the term visiting judges to district judges from within the circuit (see Commission, 1975a: 1132).

[2] Fifteen Ninth Circuit circuit judges—all but one of the eleven active-duty judges then serving (there were two vacancies) and five of the seven judges on senior status—were interviewed. Ten active-duty and senior district judges, from California and Oregon, drawn from those who had sat most frequently with the court of appeals over the previous half-dozen years, were also interviewed. The interviews were from one to two hours in duration. Several members of the Hruska Commission were also interviewed.

substantial percentage of the court's opinions are either *per curiam* or "Not for Publication" rulings, neither type bearing a judge's signature. Moreover, individual judges and types of judges vary in their propensities to sign or not to sign their opinions or to designate them for publication.

Determining inconsistency is also no easy task. Although a dissenting judge might point to intracircuit inconsistency created by the majority's opinions, disagreement *within* panels does not necessarily mean inconsistency *between* panels. Such inconsistency can and does develop even with *intra* panel unanimity, providing an "illusion of consistency" (Sickels, 1965), particularly if a panel is unrepresentative of the full court's modal position on a particular doctrinal issue (see Atkins and Zavoina, 1974).[3] Despite development of sophisticated methods for measuring inconsistency in broad categories of cases (Atkins and Green, 1976; see also McIver, 1976), precise analysis of inconsistency can result only from a close reading of cases in a specific issue area in which there are sufficient cases on a single point to create the possibility of conflict.

II. WHICH JUDGES PARTICIPATE?

During 1965-1969, almost half of all U.S. Court of Appeals panels included at least one designated judge, with 5.7 percent including two such judges (Green and Atkins, 1978: 363). There was considerable intercircuit variation. One-sixth of the panels contained a senior circuit judge from the same circuit, and over one-fourth of the panels included a district judge from within the circuit. Only six percent of all panels contained a visiting judge.

In the Ninth Circuit there was an increase in the use of extra judges in cases decided by three-judge panels during the period 1970-1975. There was a corresponding decrease in the proportion of panels composed of three active-duty circuit judges or even panels with two such judges and one extra judge. In 1970, active-duty circuit judges accounted for four-fifths of Ninth Circuit sittings,[4] senior circuit judges for only 3.1 percent. Active-duty district judges (8.6 percent) and senior

[3] In the present study, only one judge raised the issue, expressing concern that judges not be brought in by the chief judge to hear special cases or to "slant the result."

[4] A "sitting" is one judge deciding one case; a three-judge panel accounts for three sittings in each case. A panel is a combination of three specific judges; when judges A, B, and C sit together, they are one panel no matter how many cases they decide.

district judges (5.7 percent) from within the circuit together accounted for roughly one-seventh of the sittings. Visiting judges accounted for less than two percent.

The proportion of sittings by senior circuit judges increased in the succeeding years, largely because several active-duty circuit judges took senior status at about the same time. More significant, as active-duty and senior circuit judges accounted for a decreasing proportion of all sittings—to just under three-fourths in 1975—district judges from within the circuit accounted for an increasing proportion. By 1975, Ninth Circuit active-duty district judges were responsible for over one-eighth of the court's sittings, with senior district judges accounting for almost another ten percent. (For FY 1975-1978, district judges constituted the largest proportion of designated judges. See Fish, 1979: 155.) Participation by visiting judges of all categories remained very low—roughly two percent throughout the entire period.

At least two active-duty circuit judges sat on the great majority of the Ninth Circuit's panels from 1970-1975. Because only a small percentage of cases in the U.S. Courts of Appeals produce open disagreement (Goldman, 1973: 638), the circuit judges' position is likely to be determinative in a great majority of cases. The composition of the Ninth Circuit's panels nonetheless shows clearly that the court's work was no longer carried out only by the court's own circuit judges.[5] In 1970, although all panels had at least two active-duty circuit judges, only 37.5 percent of the panels (which decided over 40 percent of the cases that year), had three. The proportion of panels with either two or three active-duty circuit judges fell during the succeeding years so that, by 1975, less than ten percent of the court's output was being decided by panels of three active-duty circuit judges. In 1970, almost half the panels contained either an active-duty or senior district judge from within the circuit. After a decline in 1971, the proportion climbed to over half in 1972, and increased still further until, in 1974, such panels accounted for almost two-thirds of the court's total output. Out-of-circuit visiting judges did not sit on a large proportion of panels. The figure was 6.2 percent in 1970 and remained roughly stationary until 1975, when visitors served on panels deciding roughly one-eighth (13 percent) of the court's cases.

[5] Data are available from the author.

After 1972, the court—like the other U.S. Courts of Appeals (see Hoffman, 1981)—began to issue a large proportion of its opinions designated "Not for Publication." This procedure is intended to allow simple cases or those requiring only a straightforward application of circuit law to be dispatched with a brief statement; judges will then be able to devote greater attention to the cases in which the law is to be developed and opinions published. Each panel decides whether a case it has decided warrants a published or unpublished opinion. The distinction between published and "Not for Publication" opinions thus parallels the distinction between appellate courts' error-correcting and law-making functions (Hufstedler, 1971; Leflar, 1976: 1-6). Because extra judges may participate more in cases with published opinions than in unpublished rulings, or vice-versa (Green and Atkins, 1978: 365-366), participation in each type must be examined separately.

For the years 1973-1975, active duty judges participated more often in cases with unpublished opinions than might be expected on the basis of their overall participation in the court's cases. But the differences were modest. Senior circuit judges, on the other hand, sat disproportionately often in cases with published opinions. The difference between active duty and senior circuit judges in this regard may reflect different standards for opinion publication. More likely it results from the greater time available to "seniors" to write more extensive opinions and possibly also from the more frequent assignment of "seniors" to difficult cases (those, by definition, most likely to result in published opinions).

A similar difference was found in comparing active-duty and senior district judges sitting with the circuit court. Active-duty district judges accounted for a slightly larger proportion of sittings in "Not for Publication" rulings and fewer sittings in published cases. These two categories combined appeared slightly more frequently in published than in unpublished cases. No consistent pattern was evident for visiting judges.

III. ADVANTAGES AND DISADVANTAGES OF USING EXTRA JUDGES

All Extras

My interviews with Ninth Circuit judges uncovered some perceived advantages and disadvantages common to the use of any type of extra judge (see, e.g., Atkins, 1972: 630). All extra judges increase the "size of the 'circle' of people you have to

deal with."[6] Using more judges means having more "imperfect people," resulting in "some mistakes" and "less unanimity of thought." The size of the Ninth Circuit's caseload, and the large number of judges used to process it, create "difficulty in coordinating the flow of information." By contrast, if an appellate court had only three to five judges, all located in the same building, "they'd work things out," instead of needing *en banc* sittings of the court to resolve inconsistencies. "The presence of a whole lot of strangers dabbling in writing law" is also likely to cause the court to "lose harmony of decision and integrity of precedent," because the strangers lack regular judges' "long, continuous exposure" to circuit precedent. However, this was not thought true of the "seniors." Although seniors' views may be "less representative of the consensus of the court than those of the active circuit judges," with their service thus introducing "an element of instability," senior circuit judges "ease the workload without complicating the problem of coordinating the law of the circuit" (Carrington, 1969: 563).

Despite observers' claims, no judges volunteered that district or visiting judges helped cause inconsistency in the circuit. Asked specifically, six of nine circuit judges said that district judges contributed to inconsistency "idiosyncratically," "no more than [did] the mingling of the court's own judges." However, all three circuit judges who felt district judges contributed to intracircuit inconsistency thought the contribution to inconsistency was significant, causing "severe problems." Opinions divided as to whether judges from outside the circuit contributed to intracircuit inconsistency, but to the extent it existed, the problem was not considered serious, perhaps because visitors constitute only a small percentage of Ninth Circuit judge time.

Because litigants are said to "want two active members of the court on a panel" (see also Hellman, 1980: 942, n.30), participation by any "extras" creates a problem, particularly if the panel is not unanimous. According to the Association of the Bar of the City of New York, "circuit decisions by divided panels are substantially diminished if not emasculated as precedent" when the majority contains one or two extra judges (Commission, 1975a: 1123-1124). Most other observers agree that the presence of more than one "extra" judge is undesirable, particularly if the two "extras" are district or

[6] Material in quotation marks without attribution is drawn from interviews.

visiting judges. Lawyers complain especially about the problematic character of court of appeals' decisions in which a district judge has participated, and consider those decisions "less authoritative" (Note, 1963: 879). As a Ninth Circuit judge noted, "if the case is important and it is assigned to the district judge to write the opinion, the case has an unavoidable asterisk by it which impairs it." Similarly, "to the extent a visiting judge establishes new law within the circuit, it raises questions" and lessens the value of the circuit's decisions (but see Fish, 1979: 160).

Use of "extra" judges produces other difficulties. The shorter hours and more variable schedules of senior circuit judges may create administrative problems. Senior judges often feel under less pressure and "can't be hurried or given orders." District judges' appellate court assignments may have negative effects on both their own court dockets and on the appellate court's ability to dispose of its caseload. Such assignments interrupt the "rhythm" of a trial and "raise havoc" with a trial judge's calendar, particularly in busy districts, because "we dump work on top of theirs instead of replacing it." Indeed, although "they don't *order* you to sit; they *ask*," some district judges come to feel it "an imposition" to serve with the court of appeals; securing consent of "proper" district judges may thus be difficult, with some of the "better" ones declining temporary appeals court service.[7]

Appellate judges also often have "to wait too long" for a district judge's opinions, especially in difficult appellate cases. Because the district judge's "tremendous burden" in trying cases leaves little time in which to become familiar with the circuit's lines of case law, "what is routine for the circuit judge is not for the district judge." Moreover, a district judge who has held an opinion too long "may be embarrassed to say he shouldn't have been given the case." (When district judges do not write the opinions assigned to them—most *do*—their return to the Ninth Circuit is "vetoed.") This general situation, reinforced by the need for revisions in district judges' opinions, leads the court to give district judges "the lighter cases," increasing circuit judges' workload; a senior circuit judge with a

[7] It is important that the circuit's chief judge make the contact with district judges who are to sit with the court of appeals. Some district judges "resent being contacted by the circuit executive . . ." However, "increasingly, . . . the circuit executive identifies possible judges . . . and determines the need; the chief judge handles the formal contact only" (McDermott and Flanders, 1979: 56, 57).

lighter caseload sitting on the same panel with a district judge exacerbates the problem.

Communicating with visiting judges after they depart also causes some problems. Telephone communication seems to be inhibited by the impossibility of arranging regular face-to-face contact. (The circuit's own regular judges, who do not all work together in the same location, also cannot see each other immediately; nevertheless they communicate frequently by telephone, even when in the same building.) An out-of-circuit or district judge may also assign higher priority to the work of his own court, contributing to further delays in writing circuit opinions (Schick, 1970: 79).

Notwithstanding these difficulties, the use of extra judges in the Ninth Circuit is dictated by caseload pressures (see also Lumbard, 1968: 33; Schick, 1970: 77). Without this additional judgepower, the circuit probably "couldn't survive." The need for extra judges to help avert a "national scandal" was accepted by virtually all judges interviewed. In evaluating such comments, however, one should remember that the assistance of outside judges is only one means of improving productivity. Others include screening (Flanders and Goldman, 1975; Haworth, 1973); bench memoranda from staff attorneys (Hellman, 1980); and the use of "Not for Publication" opinions (Hoffman, 1981). The latter two devices are already in use in the Ninth Circuit, and thus are part of the context of the respondent judges' opinions on the use of extra judges. Contrary to the impression inaccurately conveyed by *The Brethren* (Woodward and Armstrong, 1979), clerks are not considered "substitutable resources" for judges in the Ninth Circuit (Wasby, 1977: 11-14).

Senior Circuit Judges

All extra judges are not viewed identically. The clearest distinction is drawn, by both judges and other court personnel, between the court's own senior circuit judges and other extra judges. By virtue of their experience, senior circuit judges "may have task expertise superior to that of anyone else sitting on the panel and therefore be treated as functionally equivalent to circuit judges" (Green and Atkins, 1978: 361[8]).

[8] Green and Atkins (1978: 361) otherwise assert that senior status judges "no longer have formal legal status equal to that of their colleagues." However, senior judges have the same legal authority as active-duty circuit judges to decide a case, retain chambers and law clerks (but see Flanders and McDermott, 1978: 37-38), and to preside over panels. Until 1978, they could sit with an *en banc* court to rehear a case from a panel on which the senior judge

Although no longer occupying active-duty judgeships, senior circuit judges are still very much "part of the family." It is thus not surprising that Ninth Circuit judges' posture toward the participation by the court's seniors was extremely positive. Although they did not consider all seniors alike, all the circuit judges and the few district judges asked saw advantages in having them sit with the court. But eight of fifteen circuit judges interviewed felt there were also problems in having the seniors sit.

Senior judges do much more than provide another "warm body to share the work." Their willingness to take "the most difficult case on the calendar" was referred to as "amazing." It was said that they "crank out a first-rate product," although they do it because "they have twice as much time as we do and they know it." Not only is their "primary loyalty" to the court of appeals, but their "experience and wisdom" is "priceless to younger circuit judges"—a benefit likely to recur with the Ninth Circuit's addition of more than ten new judges as a result of the 1978 Omnibus Judges Bill and the inevitable movement of more regular judges to senior status.

Senior circuit judges' lack of energy is, however, a potential problem. Seniors "are necessarily an uncertain and fluctuating resource, dependent upon the uncertainties of [their] age, health, and idiosyncracies . . ." (Lumbard, 1968: 34). Yet Ninth Circuit judges find no problems if senior judges "are not senile" or "enfeebled," and no such symptoms have surfaced recently in the Ninth Circuit. The court has certain informal strategies or "gentle ways" for dealing with problems like that of a judge approaching senility. These include limiting a judge's participation ("even though he might complain"), or moving the judge to less important work. Because the two other judges on a panel and their law clerks also read briefs and opinions, a disabled senior circuit judge would be far less of a problem than would "a senile, arbitrary senior district judge" sitting alone.

The increasing rigidity of seniors' legal views may be another problem. That a senior circuit judge's "precepts may be fairly well frozen" after fifteen years' service on the court

---

had sat, but could not participate in the vote to hold an *en banc* court, nor were they members of the circuit's judicial council who sit as its administrative body. The Carter Administration recommended that senior circuit judges be deprived of authority to preside over panels, but, until such formal limitations are imposed, that authority is withdrawn only when a circuit's judges have agreed among themselves that seniors will not preside—not likely to occur until active-duty judges agree they would not preside on reaching senior status. See Wasby, 1980: 600 n.43.

may make it difficult to convince the judge "to see the light of new legislation or new theories enunciated by the Supreme Court," or to depart from prior law. The problem is, however, a "subtle one":

> Every man in his career is painting a picture—a career unfolds, one takes one position after another, trying to maintain jurisprudential consistency. The longer you are there, the more complete the picture. Senior status is no time for a new canvas; all you are doing is touching it up.

Senior judges were perceived as likely to approach a case with a mental set of "more pronounced" conceptions which would dictate their actions. Yet this was not necessarily a disadvantage: "That's another description of wisdom."

District Judges

Ninth Circuit appellate and district judges agreed (the former unanimously) that there are both advantages—for the court as an institution and for the district judges themselves—and problems in having district judges sit with the appellate court. Ten of fourteen Ninth Circuit judges also wished to continue district judges' participation in appeals court work even after additional circuit judgeships were created. The need for district judge participation as "part of their training experience" was conceded even by a hostile Ninth Circuit judge who "would be overjoyed to get rid of them all."

If service on the appeals court was considered a good training experience for district judges, many appeals court judges preferred to work with senior district judges. These judges often had "longer exposure to the law of the circuit"; they also had more flexible schedules which permitted more fine tuning in the assignment of appropriate cases to them.

A principal benefit of using district court judges, over and above workload reduction, was the different perspectives which they brought to appellate panels. Often, it was said, they would read the record in a case differently. Where a circuit judge might ask, "was there error?" a district judge would ask, "was there a fair trial?" Circuit judges, however, have other ways of obtaining the perspectives of district judges, for example, through more frequent meetings between the two groups of judges, or even by having circuit judges sit as district judges for two weeks a year in another circuit (see Schick, 1970: 77).[9] This

[9] Sending the circuit judge to another circuit avoids the potentially embarrassing situation, which had occurred in courts where appeals judges sat as trial judges, of a circuit judge sitting as a district judge being reversed by a panel of his appellate colleagues (see Schick, 1970: 77, n.8; Wasby, 1980: 596).

is an important experience for those who had not been district judges: "No one can know the burdens of a district without having been there." One circuit judge exclaimed: "We'd all be weaker if all of us had been district judges and also if none had been. It's the mix, the balance, that's important." But it was also common to hear a different perspective, that "all trial judges are not appellate judges," and that "just because Congress confirmed a district judge doesn't mean he's eligible to be an appellate judge."[10]

Appellate judges are concerned, however, with the problem of institutional loyalty which affects the behavior of district judges sitting on the circuit court. "Their lifetime dedication is to a different institution," one judge observed. Another stated that "the longer a person sits on the district court, the less qualified he is to sit on the court of appeals." There are several dimensions to the problem. District judges may simply be disinclined to reverse other district judges, with whose problems they sympathize and with whom they may have strong personal ties. Or they may be over-sensitive to reversals because of their own experience.[11] This disinclination may create a "built-in skewing toward affirmance"; district judges who seem unable to overcome it are not asked again to sit with the appellate court. On the other hand, senior district judges, no longer actively involved in the trial process, were regarded as more neutral about affirming or reversing. It may also be that a district judge who has served for a long time cannot appreciate, when serving on an appellate court, that a higher court is not available "to straighten them out" because of the limited frequency of Supreme Court review (see Howard, 1973: 44).

The problem of district judges' disinclination to reverse is exacerbated when a district judge dissents from an opinion on which two circuit judges agree. However, a senior Ninth Circuit judge who felt that district judges dissented with increasing frequency did not believe that this "contributed to differences between panels." Moreover, it is not clear whether there is pressure on district judges from the circuit judges not

[10] Such views—not universally held—do not, of course, appear to lessen the strong advantage district judges have in being considered for positions on the U.S. Courts of Appeals, apparent in selections for judgeships created by the Omnibus Judgeship Act of 1978, nor deter the American Bar Association predilection for nominees with prior judicial experience.

[11] Reversals based on differing ideologies about the criminal justice system, reinforced by perceptions that the reversing judges were without trial experience, particularly irritate some district judges.

to dissent (see Commission, 1973: 794, testimony of Judge John Kilkenny).

In assessing the role and importance of district judge participation in Ninth Circuit panels, a reciprocal function of such assignments should not be overlooked. District judges also benefit from appellate service. They have an opportunity "to do some missionary work concerning trial court problems." They obtain a better understanding of the appellate perspective on such matters as jurisdiction, the importance of making adequate findings and preparing a proper record, and common reasons for appellate reversal of district court rulings. Such knowledge, which "has clearly improved the quality of their work as district judges" (Commission, 1973: 969), reduces the tendency of district judges to see an appellate case "as a contest between the trial judge and the appellant." It also reduces the "built-in hostilities between district judges as a class and circuit judges as a class" (see Carp and Wheeler, 1972: 378). The service of district judges on courts of appeals also provides recognition that district judges "are equally smart but just occupying different places in the organization," all part of one judicial system.

Visiting Judges

All circuit and district judges responding agreed that there are advantages in having out-of-circuit judges sit with the court of appeals, although one judge intimated that the benefit accrues more to the visitor's court than to the visited circuit. Three of the fifteen circuit judges and four of ten district judges felt there were also problems. Six of nine circuit judges found differences between visitor circuit judges and visitor district judges. They preferred the former because they "would know more about the appellate process" and because "lawyers might be more satisfied with an appellate judge," but conceded that most visiting district judges possess appellate experience from sitting with their own circuits and were "every bit as good" as circuit judge visitors had been.

The "broadened philosophy" and "different outlook" acquired as a result of contact with visiting judges are considerable advantages; this "tremendously beneficial cross-fertilization" serves to "provide continuity among the circuits." Visiting judges, "not as wrapped up in the work of the [visited] circuit," also impart information about administrative procedures such as calendaring techniques and "shorthand" methods to dispose of backlog. The positive response to

visitors was expressed in distress that the Chief Justice had limited intercircuit travel because of congressional criticism—not a new problem (see Schick, 1970: 78; generally, see Fish, 1979). One circuit judge thought that Congress should *require* circuit judges to sit in another circuit once each year or for one month every two years.

Some Ninth Circuit judges did voice concern that visiting judges, who "require special handling," did not know the Ninth Circuit's procedures. This was, however, "only mechanical" and "minor," and could be resolved by a procedures manual. Visitors' lack of knowledge of, and familiarity with, Ninth Circuit law, potentially a far more serious problem, was mentioned by fewer judges. A Hruska Commission member claimed that visiting judges "don't follow the Ninth Circuit's decisions; they read only their own cases." But a Ninth Circuit judge disagreed: visiting judges did not disrupt circuit law making because "they bring all their learning and more of their precedents" (see also Schick, 1970: 80-82). Yet his colleagues expressed concern that "a judge not of this circuit [is] making law here" because the visitor "relies on the law of his own circuit." If a case involved lawyers' efforts to get the Ninth Circuit to adopt a rule from the visitor's circuit, further problems existed for the panel in assigning the writing of the opinion. Ninth Circuit Judge Ben C. Duniway had testified earlier that visiting judges make "institutional unity" more difficult because many of them, at the court only for short periods of time, "do not feel that need for such unity as keenly as we do" (Commission, 1973: 889). Echoing this view, the Ninth Circuit judge most negative about visitors said some visiting judges exhibited a "kind of 'freebooting' mentality" in which the visitor "won't be here long [so he] will shake them up," leaving the visited circuit with a result which the visitor is "not around to defend."

IV. CONCLUSION

That the work of the U.S. Courts of Appeals, and particularly the Ninth Circuit, is no longer the work solely of within-circuit active-duty circuit judges, is clear. They are now regularly assisted by several types of "extra" judges, most notably the circuit's own district judges. It is also clear that the court's own judges are less concerned with participation by extra judges, even district and visiting judges, than are those critics who make occasional anguished complaints about extra judges and the problem of intracircuit inconsistency.

The Ninth Circuit's judges agree that inconsistency does occur in the court's rulings. It occurs more frequently in some areas of the law than in others, generally in search and seizures cases but more particularly in border search cases involving criteria for the "probable cause" and "founded suspicion" necessary for lawful stops (Wasby, 1979; Weisgall, 1974; Klein, 1976; Gardner, 1975). To the extent that increased use of "extra" judges accentuated ideological differences in such cases (Wasby, 1979: 1359-1360), the presence of those judges might have contributed to an increase in intracircuit inconsistency. Yet Ninth Circuit judges feel that extra judges' participation in the circuit's work contributes to neither the existence nor the severity of inconsistency.

There is also little evidence, despite some comments noted above, that extra judges are regularly given less important tasks. When less use of "designated" judges in important cases, defined as those in which a lower court ruling was reversed or modified, was hypothesized, there was little support for the hypothesis (Green and Atkins, 1978: 365-366). Nor does Ninth Circuit data, which allows an indirect test because "Not for Publication" rulings are only infrequently used for reversals and are thus arguably less important than published rulings, provide any different indication. Indeed, extra judges (senior circuit and district judges in particular) participated slightly more in published than in unpublished rulings, and the court's regular judges appear disproportionately more in "Not for Publication" rulings.

Such findings raise questions about whether extra judges occupy a functional status within a federal appellate court different from that held by active-duty circuit judges. The explanation for the findings is, however, not hard to find. Under the court's calendaring procedures, the weight of cases assigned to each panel is balanced, with "considerable effort . . . made . . . to make sure time-consuming cases are spread evenly among the panels" (Marvell, 1978: 321 n.11); more important, clusters of cases are constructed without knowledge of panel composition (Leavitt, 1978; Hellman, 1980). Less important cases are thus not intentionally assigned only to panels containing district or visiting judges. Moreover, even if one tried to match cases with panels on the basis of panel composition, few panels would be available for difficult cases because almost all Ninth Circuit panels have an extra judge.

Where does all this lead us? If U.S. Court of Appeals judges do not see appellate participation by extra judges as

contributing—much less contributing significantly—to intracircuit inconsistency, it may be that they are so close to the system in which they work that they are led to believe that inconsistency is not a problem of the same magnitude outsiders believe it to be (Wasby, 1979: 1355-1356). It is more likely, however, that just as work done for the Hruska Commission on intercircuit conflicts indicated there may be more "sideswipes" than direct conflicts (Commission, 1975b; see also Wasby, 1979: 1349-1350, n.27), Ninth Circuit lawyers have exaggerated conflicts between cases (Commission, 1975b: 97) and the contribution of extra judges to those conflicts.

REFERENCES

ATKINS, Burton M. (1972) "Decision-Making Rules and Judicial Strategy on the United States Courts of Appeals," 25 *Western Political Quarterly* 626.

——— and William ZAVOINA (1974) "Judicial Leadership on the Court of Appeals: A Probability Analysis of Panel Assignment in Race Relations Cases on the Fifth Circuit," 18 *American Journal of Political Science* 701.

——— and Justin J. GREEN (1976) "Consensus on the United States Courts of Appeals: Illusion or Reality?" 20 *American Journal of Political Science* 735.

CARP, Robert and Russell WHEELER (1972) "Sink or Swim: The Socialization of a Federal District Judge," 21 *Journal of Public Law* 359.

CARRINGTON, Paul (1969) "Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law," 82 *Harvard Law Review* 542.

COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM (1973) Hearings: First Phase. Washington, D.C. [cited as "Commission"].

——— (1975a) *Hearings: Second Phase 1974-1975*. Washington, D.C.

——— (1975b) *Structure and Internal Procedures: Recommendations for Change*. June, 1975. Washington, D.C.

FISH, Peter G. (1979) "Politics Rides the Circuits: State and National Itinerancy," 5 *Justice System Journal* 115.

FLANDERS, Steven and Jerry GOLDMAN (1975) "Screening Practices and the Use of Para-Judicial Personnel in a U.S. Court of Appeals: A Study in the Fourth Circuit," 1 (2) *Justice System Journal* 1.

——— and John T. McDERMOTT (1978) *Operation of the Federal Judicial Councils*. Washington, D.C.: Federal Judicial Center.

FRIENDLY, Henry J. (1973) *Federal Jurisdiction: A General View*. New York: Columbia University Press.

GARDNER, James N. (1975) "Ninth Circuit's Unpublished Opinions: Denial of Equal Justice," 61 *American Bar Association Journal* 1224.

GOLDMAN, Sheldon (1973) "Conflict on the U.S. Courts of Appeals, 1965-1971: A Quantitative Analysis," 42 *University of Cincinnati Law Review* 635.

GREEN, Justin and Burton M. ATKINS (1978) "Designated Judges: How Well Do they Perform?" 61 *Judicature* 358.

HAWORTH, Charles R. (1973) "Screening and Summary Procedures in the United States Courts of Appeals," 1973 *Washington University Law Quarterly* 257.

HELLMAN, Arthur D. (1980) "Central Staff in Appellate Courts: The Experience of the Ninth Circuit," 68 *California Law Review* 937.

HOFFMAN, Daniel N. (1981) "Nonpublication of Federal Appellate Court Opinions," 6 *Justice System Journal* (forthcoming).

HOWARD, J. Woodford (1973) "Litigation Flow in Three United States Courts of Appeals," 8 *Law & Society Review* 33.

HUFSTEDLER, Shirley (1971) "New Blocks for Old Pyramids: Reshaping the Judicial System," 44 *Southern California Law Review* 901.

KLEIN, Roberta (1976) "The Doctrine of Founded Suspicion," 6 *Golden Gate Law Review* 509.

LEAVITT, Michael R. (1978) *Calen9: A Calendaring and Assignment System for Courts of Appeals*. Washington, D.C.: Federal Judicial Center.

LEFLAR, Robert A. (1976) *Internal Operating Procedures of Appellate Courts*. Chicago: American Bar Foundation.

LUMBARD, J. Edward (1968) "Current Problems of the Federal Courts of Appeals," 54 *Cornell Law Review* 29.

MARVELL, Thomas B. (1978) *Appellate Courts and Lawyers: Information Gathering in the Adversary System*. Westport, CT: Greenwood Press.

McDERMOTT, John T. and Steven FLANDERS (1979) *The Impact of the Circuit Executive Act*. Washington, D.C.: Federal Judicial Center.

McIVER, John P. (1976) "Scaling Judicial Decisions: The Panel Decisionmaking Process of the U.S. Courts of Appeals," 20 *American Journal of Political Science* 749.

NOTE (1963) "The Second Circuit: Federal Judicial Administration in Microcosm," 63 *Columbia Law Review* 874.

SCHICK, Marvin (1970) *Learned Hand's Court*. Baltimore: Johns Hopkins University Press.

SICKELS, Robert J. (1965) "The Illusion of Judicial Consensus: Zoning Decisions in the Maryland Court of Appeals," 59 *American Political Science Review* 100.

WASBY, Stephen L. (1977) "Communication Within the Ninth Circuit Court of Appeals: The View from the Bench," 8 *Golden Gate University Law Review* 1.

——— (1979) "Inconsistency in the United States Courts of Appeals: Dimensions and Mechanisms for Resolution," 32 *Vanderbilt Law Review* 1343.

——— (1980) "Internal Communication in the Eighth Circuit Court of Appeals," 58 *Washington University Law Quarterly* 583.

WEISGALL, Jonathan M. (1974) "Stop, Search and Seize: The Emerging Doctrine of Founded Suspicion," 9 *University of San Francisco Law Review* 219.

WOODWARD, Bob and Scott ARMSTRONG (1979) *The Brethren: Inside the Supreme Court*. New York: Simon and Schuster.