Resolving Intra-Circuit Splits in the Federal Courts of Appeal

By: Michael Duvall[1]

Abstract

It is not uncommon for two panels of the same circuit court to reach conflicting conclusions after considering the same issue. Consequently, a subsequent panel addressing the issue will face a precedential quandary, because each party to the appeal will have precedent favoring its position. In order to resolve these dilemmas, known as intra-circuit conflicts, many federal courts of appeal have developed principles to guide the third panel. Not surprisingly, these courts have crafted different approaches, thus creating an inter-circuit conflict regarding intra-circuit conflicts.

This article provides an overview of the development of precedent in federal circuit courts through the use of three-judge panels and introduces the predicament of an intra-circuit split. The article then outlines the conflicting approaches to resolving these splits and evaluates their respective advantages and disadvantages.

Three-Judge Panels and the Doctrine of *Stare Decisis*

Every federal court of appeals is authorized to decide cases using three-judge panels.[2] These panels decide the vast majority of cases, as *en banc* hearings are generally disfavored.[3] Three-judge panels are not separate courts; they speak on behalf of the circuit. Therefore, a decision issued by a panel is entitled to deference from later panels under the doctrine of *stare decisis*. According to that principle, a panel presented with a case that is legally and factually indistinguishable from a prior case should reach the same result as did the prior panel.[4]

In order to reinforce this doctrine, every circuit court has prescribed the prudential rule that a later panel may not overrule a decision issued by a prior panel; only the *en banc* court or the Supreme Court may take that step.[5] Later panels steadfastly adhere to this prior panel

---

[1] Michael Duvall is an associate at Bryan Cave LLP and was a law clerk to the Honorable Pasco M. Bowman, II, United States Court of Appeals for the Eighth Circuit, in Kansas City, Missouri. This article does not necessarily reflect the views of Bryan Cave, Judge Bowman, or the judges of the Eighth Circuit.

[2] 28 U.S.C. § 46(b).

[3] FED. R. APP. P. 35(a).

[4] *Brewster v. Comm'r*, 607 F.2d 1369, 1373 (D.C. Cir. 1979) (per curiam).

[5] *Union of Needletrades, Industrial and Textile Employees v. INS*, 336 F.3d 200, 210 (2d Cir. 2003); *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc); *United States v. Walton*, 255 F.3d 437, 443 (7th Cir. 2001)(quoting *Colby v. J.C. Penny Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987); *Jones v. Angelone*, 94 F.3d 900, 905 (4th Cir. 1996); *Nationwide Ins. v. Patterson*, 953 F.2d 44, 46 (3d Cir. 1991); *Brown v. First Nat'l Bank in Lenox*, 844 F.2d 580, 582 (8th Cir. 1988); *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985); *Mother's Rest., Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566, 1573 (Fed. Cir. 1983); *Bonner*

precedent rule by frequently citing their disagreement with a previous panel's decision while simultaneously following it as the law of the circuit.[6]

A later panel, however, may reach a result inconsistent with that of a prior panel in limited circumstances. If an intervening statute, Supreme Court decision, or *en banc* decision sufficiently undercuts the previous decision, the later panel may reach an inconsistent result.[7] In some circuits, a later panel may overrule a decision of a prior panel if the later panel circulates its opinion to the court's active judges for their approval.[8] Further, some circuits recognize that in "relatively rare instances" where subsequent authority provides "sound reason" to believe that the first panel would now reach a different result, the later panel may choose not to follow the prior panel.[9]

These exceptions are narrow, however, as later panels are "for the most part, bound by prior panel decisions closely on point."[10] Accordingly, a prior panel decision that has definitively resolved an issue ordinarily directs the outcome of a later case involving that same issue.

What Are Intra-Circuit Splits and How Do They Happen?

Despite the doctrine of *stare decisis* and the prior panel precedent rule, later panels inevitably issue decisions that conflict with the decisions of prior panels. Any inconsistency between two panel decisions is not necessarily an intra-circuit split, however. A third panel will first attempt to reconcile the conflicting cases before concluding that a true intra-circuit split exists. The third panel may conclude that the decisions do not actually conflict because of a key factual distinction between the cases.

If the conflicting cases cannot be reconciled, however, a true intra-circuit split exists. Simply defined, an intra-circuit split refers to the situation where two panels have reached inconsistent conclusions when presented with the same issue, similar material facts, and the same controlling law. For example, one panel may have concluded that a statute authorizing suits against the government contains an implied exception in a specific circumstance, while another panel may have concluded that no such exception exists in that circumstance.[11] In another example, a panel may have concluded that in a diversity suit, the scope of closing argument is a

---

v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc); *Brewster*, 607 F.2d at 1373; *United States v. Lewis*, 475 F.2d 571, 574 (5th Cir. 1972).

[6] *See, e.g., Vue v. Gonzales*, 496 F.3d 858, 863 (8th Cir. 2007) (Bye, J., concurring); *United States v. McMannus*, 496 F.3d 846, 853, (8th Cir. 2007)(Melloy, J., concurring).

[7] *Williams v. Ashland Eng'g Co.*, 45 F.3d 588, 592 (1st Cir. 1995).

[8] *See, e.g., United States v. Allen*, 895 F.2d 1577, 1580-81 n.1 (10th Cir. 1990); *Heirens v. Mizell*, 729 F.2d 449, 449 (7th Cir. 1984).

[9] *Williams*, 45 F.3d at 592.

[10] *Id.*

[11] *McMellon v. United States*, 387 F.3d 329, 331-32 (4th Cir. 2004) (en banc) (citing *Tiffany v. United States*, 931 F.2d 271, 276-77 (4th Cir. 1991); *Faust v. S.C. State Highway Dep't*, 721 F.2d 934, 939 (4th Cir. 1983); *Lane v. United States*, 529 F.2d 175 (4th Cir. 1975)).

procedural issue governed by federal law, while another panel may have concluded that state law governs that substantive question.[12]

There are several explanations of how intra-circuit splits arise. One such explanation is that the second panel and the parties to a case failed to discover the previous panel's decision during the course of their research. Another explanation for an intra-circuit splits is that the second panel distinguished the two decisions when, in reality, the cases are not materially different. A more controversial reason for two panels reaching conflicting decisions, however, is that the second panel intentionally omitted discussion of the first case in order to achieve a different result. Regardless of the reasons for their creation, these intra-circuit splits signal uncertainty for the third panel.

Resolving Intra-Circuit Splits

In most federal courts of appeal, resolution of an intra-circuit split is straightforward: the earliest decision controls.[13] But in the Eighth Circuit, a third panel faced with conflicting decisions of two previous panels may choose which decision to follow,[14] and in the Ninth Circuit, a third panel is instructed to immediately call for the *en banc* court to resolve an intra-circuit conflict.[15]

The earliest-decided rule provides that when a third panel discovers conflicting panel decisions, and the third panel cannot reconcile the previous cases or distinguish the instant case, the third panel must follow the decision of the first panel.[16] Under this approach, only the *en banc* court may consider which of the conflicting decisions is best. The earliest-decided rule is considered an extension of the prior-panel-precedent rule and the doctrine of *stare decisis*.

Under the Eighth Circuit's approach, the third panel may consider several factors in choosing between conflicting decisions, including: whether other Eighth Circuit cases have followed one approach over the other, the prevailing view among other circuits, general developments in the law, reason, and common sense. The Eighth Circuit describes its approach as choosing which precedent to follow rather than as overruling a prior panel.[17]

---

[12] *Kostelec v. State Farm Fire & Cas. Co.*, 64 F.3d 1220, 1228 & n.8 (8th Cir. 1995) (citations omitted).

[13] *See McMellon*, 387 F.3d at 332-33; *Hiller v. Oklahoma*, 327 F.3d 1247, 1251 (10th Cir. 2003); *Walker v. Mortham*, 158 F.3d 1177, 1188 (11th Cir. 1998); *Newell Cos. v. Kenney Mfg. Co.*, 864 F.2d 757, 765 (Fed. Cir. 1988); *Alcorn County, Miss. v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1166 (5th Cir. 1984); *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340, 354 (3d Cir. 1981).

[14] *Kostelec*, 64 F.3d at 1228 n.8.

[15] *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1479 (9th Cir. 1987) (en banc).

[16] *See Robinson v. Tanner*, 798 F.2d 1378, 1383 (11th Cir. 1986) (per curiam).

[17] *Eggleton v. Plasser & Theurer Export Von Bahnbaumaschinen Gesellschaft, MBH*, 495 F.3d 582, 588 (8th Cir. 2007).

In the Ninth Circuit a panel facing a true intra-circuit split "must call for *en banc* review, which the court will normally grant unless the prior decisions can be distinguished."[18] Under this approach, a third panel may not follow the earliest-decided rule or choose between conflicting precedents; that function is solely allocated to the *en banc* court.[19] The Ninth Circuit designed this approach to maintain uniformity among the circuit's decisions.

Critiquing the Approaches

Each of these approaches has advantages and disadvantages, as each approach is founded upon value judgments concerning the appropriate role of Article III judges. Although the earliest-decided rule is the most widely followed, both the Eighth and Ninth Circuits present compelling alternatives for resolving intra-circuit conflicts.

The primary advantage of the earliest-decided rule is that it is a bright-line rule: it promotes uniformity, consistency, and predictability within the circuit.[20] Under this rule, practitioners and judges can quickly ascertain the law of the circuit by reference to the dates of decision when two panels are in conflict.

The earliest-decided rule also discourages manufactured conflicts by rogue panels, as a second panel's ruling is given no effect if it conflicts with an earlier decision.[21] The rule, has therefore been described as "more respectful" of the prior panel precedent rule and the doctrine of *stare decisis*.[22] The rule quickly ends intra-circuit splits, forcing later panels to call for an *en banc* hearing rather than deviate from the precedent with which they disagree.[23]

The earliest-decided rule has many flaws, however. The rule is arbitrary: it requires blind adherence to the earliest panel decision rather than a reasoned analysis of conflicting precedents.[24] Furthermore, it does not consider whether the first panel was mistaken or whether the law has developed since that point.[25]

Ironically, the earliest-decided rule violates the rule it seeks to enforce (the prior panel precedent rule), as it requires a third panel to overrule the panel that created the split.[26] Judge Niemeyer of the Fourth Circuit, in an effort to promote the Eighth Circuit's approach, has seized on this difficulty and noted that the principle of *stare decisis* and the prior panel precedent rule are prudential: that is, they are judicially created to promote consistency and uniformity of decisions.[27] In contrast, statutorily authorized three-judge panels to decide cases on behalf of the

---

[18] *Atonio*, 810 F.2d at 1479.

[19] *See, e.g., United States v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992) (en banc) (per curiam).

[20] *McMellon*, 387 F.3d at 334; *Walker*, 158 F.3d at 1188.

[21] *McMellon*, 387 F.3d at 334.

[22] *Walker*, 158 F.3d at 1189.

[23] *McMellon*, 387 F.3d at 334 & n.2.

[24] *Id.* at 356-57.

[25] *Id.* at 357.

[26] *Id.* at 356.

[27] *Id.* at 355.

circuit court, and this authorization includes the constitutional power to overrule prior circuit cases.[28] Because a second three-judge panel has the *power* to overrule a prior panel, a prudential rule *requiring* a third panel to disregard the second panel's ruling ignores the second panel's constitutional and statutory authority to decide cases.[29] Essentially, Judge Niemeyer contends that the earliest-decided rule elevates the prudential doctrine of *stare decisis* to a constitutional status.[30]

In contrast, the Eighth Circuit's approach acknowledges that the second panel, while acting imprudently, acted with constitutional authority when creating the circuit split. Because the third panel has no choice but to overrule one of the previous panels, it should do so according to reason rather than chronology.[31] Of course, the Eighth Circuit does not describe its approach as overruling a prior panel, but as choosing between the conflicting decisions. By choosing, however, the court implicitly overrules one panel. Thus, a third panel may consider whether the earliest decision was correct and whether the law has changed since that point.[32] Judge Niemeyer has also asserted that the Eighth Circuit's approach encourages a more worthwhile attempt at reconciling the conflicting cases or distinguishing the instant case, as well as a quicker determination that an *en banc* hearing is necessary.[33]

The primary concern with the Eighth Circuit's approach is that it encourages a panel dissatisfied with the decision of a previous panel to manufacture an intra-circuit split in order to alter the settled law of the circuit.[34] Future panels can also continue the split by choosing which line of precedent to follow on a case-by-case basis.[35] This creates confusion and uncertainty within the circuit.[36]

Both the earliest-decided rule and the Eighth Circuit's approach raise questions concerning the proper role of *en banc* review. The earliest-decided rule has been maligned as a hyperactive, unnecessary remedy considering a circuit's ability to resolve an intra-circuit split with an *en banc* hearing.[37] The Eighth Circuit's approach has been paradoxically trumpeted as promoting a faster *en banc* review[38] and criticized as stalling the *en banc* process.[39]

---

[28] *Id.*

[29] *Id.* at 356.

[30] *Id.* at 355. *See also Payne v. Tennessee*, 501 U.S. 808, 828 (1991) ("*Stare decisis* is not an inexorable command; rather it is a principle of policy and not a mechanical formula of adherence to the latest decision.") (internal quotations and citation omitted).

[31] *McMellon*, 387 F.3d at 356-57.

[32] *Id.* at 357.

[33] *Id.*

[34] *Id.* at 334.

[35] *Id.* at 333.

[36] *Id.*

[37] *Id.* at 356.

[38] *Id.* at 357.

Under the Ninth Circuit's approach, *en banc* review serves as *the* remedy for intra-circuit splits, quickly ending uncertainty within the circuit. There is little delay in initiating the *en banc* process, as a panel facing an intra-circuit split is prohibited from following either the earliest-decided rule or the Eighth Circuit's approach, and instead must immediately call for *en banc* review.[40] This approach promotes efficient resolution of intra-circuit conflicts and increased stability of circuit law.

The chief drawback to the Ninth Circuit's approach is that it may overuse the *en banc* process. Panels facing an apparent intra-circuit split may be hesitant to reconcile inconsistent cases or distinguish the instant case, prematurely opting to refer the case to the *en banc* court. This approach also deprives the full court of the benefit of a panel's reasoned analysis of conflicting precedents. Considering that *en banc* review is designed for exceptional cases,[41] and that it is a very time-consuming procedure,[42] the Ninth Circuit's approach may burden the circuit with cases that could be adequately resolved under the other approaches.

Setting aside the merits of each approach, when a practitioner encounters an intra-circuit split, he should first ascertain which of the approaches his circuit follows. If the circuit follows the earliest-decided rule, the analysis is simple, but a case in the Eighth or Ninth Circuit will require more extensive argument. Because resolution of these splits is a matter left to each individual circuit, an inter-circuit split is likely to continue concerning this issue. Accordingly, an appellate lawyer should familiarize himself with each approach to resolving intra-circuit conflicts.

---

[39] Howard J. Bashman, *Circuit Breakers: What Should a Three-Judge U.S. Court of Appeals Panel Do When Faced With Conflicting On-Point Authority*, 229 LEGAL INTELLIGENCER 5 (Oct. 13, 2003).

[40] *See Atonio*, 810 F.2d at 1478-79.

[41] *See* FED. R. APP. P. 35(a).

[42] *See Hart v. Massanari*, 266 F.3d 1155, 1171-72 & n.29 (9th Cir. 2001).