

REMARKS CONCERNING PROFESSOR BRUFF'S PROPOSALS

Alex Kozinski*

Professor Bruff has articulated some thought-provoking ideas, and I believe his proposals deserve careful consideration. But I am not convinced that the problem of intercourt conflict is as serious as it may appear to be at first glance.

Although most of my time as a federal appellate judge has been spent on the Ninth Circuit, I have sat periodically on the D.C. Circuit and understand why intercourt conflicts arise. The D.C. Circuit takes seriously the notion of deferring to the judgment of administrative agencies; if other circuits followed the same approach, there would be less likelihood of conflicting decisions among them. However, the Ninth Circuit—and, I suspect, the other circuits as well—often adopts the language of deference but not the underlying philosophy that such rhetoric is meant to convey. Judges often speak of deference but perform equity.

Enough of why conflicts arise; the more important question is whether intercourt conflicts are indeed as serious a problem as Professor Bruff suggests. I don't think so. Inconsistency among the circuits is not such a bad thing. Congress often passes fairly complex and opaque statutes, and agencies expend a lot of time and energy developing policies to implement them. Experience gained from diverse parts of the country may teach an agency that its initial attempt at implementing a statute can be improved. An agency might conclude that an alternative method articulated by a court of appeals is better and should be adopted.

Conflicting decisions among the circuits may also encourage Congress to act to resolve the friction. The issues on which circuits divide tend to be fairly important and may be the sorts of issues that

* Judge, United States Court of Appeals for the Ninth Circuit. This is essentially a transcript of my extemporaneous remarks after Professor Bruff delivered his paper.

Congress should decide—but didn't on the first go-around. On such issues, Congress could resolve the conflict with the benefit of the circuits' explications of alternative solutions.

Furthermore, as a practical matter, applying different law in different circuits is not as hard on Administrative Law Judges as one might think. In general, ALJs have a good idea which circuit will hear a particular case if that case is appealed; in fact, it is usually the circuit where the ALJ sits. Moreover, it is not that hard for an ALJ to apply the appropriate circuit's law, or for the agency's reviewing authority to apply different bodies of law to different classes of appeals, depending on where the cases are geographically situated.

Of course, it does seem unfair to apply the law differently in different places. A person who receives a disabling injury in Salt Lake City may be better compensated than a person injured in Reno. But I do not believe that lack of uniformity is a problem that should worry us too much. We accept dissimilar outcomes in matters governed by state law, as well as in nonadministrative cases decided among the circuits. An occasional lack of uniformity is the price we pay for the flexibility of a decentralized legal system.

Consider the Tax Court. Although we do not think of it as an agency, in many ways it is similar to an administrative adjudicator. The Tax Court sends appeals to the regional courts of appeals, based on the residence of the taxpayer. Tax Court judges know exactly where an appeal from their decisions will be adjudicated. As I understand it, Tax Court judges treat reviewed Tax Court opinions as binding precedents, except where there is contrary authority in the applicable circuit. Thus, you'll see opinion after grudging opinion where the Tax Court judge writes in essence: "This is the Tax Court law, this is how the IRS Code ought to be construed, but I am bound by the Ninth Circuit's interpretation, so I will follow its contrary rule to resolve this case." Although I have not seen any studies of how the Tax Court works, my impression is that it functions fairly well. The Tax Court appears to have surmounted the problems of inconsistency, unfairness, and confusion.

There is no reason to believe there is any greater problem in administrative law, or any greater need for changes such as those proposed by Professor Bruff. In sum, when thinking about solutions to intercircuit conflicts, I think it's appropriate to keep in mind the adage: "If it ain't broke, don't fix it."