

How the Ninth Circuit Fares in the Supreme Court: The Intercircuit Conflict Cases¹

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I. INTRODUCTION

When observers examine how any individual court has fared at the hands of the U.S. Supreme Court, they usually restrict their attention to the cases that the justices have taken directly from that court. Thus we hear that, in a recent Supreme Court term, such-and-such a court has been reversed or vacated in ten of twelve cases or has been affirmed in four of seven cases. Those writing about such statistics often appear to forget that the Supreme Court regularly reverses or vacates more frequently than it affirms, with a “baseline” reversal rate between sixty

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percent and two-thirds.³ Nonetheless, that a court has a high proportion of its cases reversed in any term receives particular attention, especially when the justices have decided more than a few cases from that court. This has focused attention on the United States Court of Appeals for the Ninth Circuit, the largest federal appellate court, because of instances in which virtually all the cases to which the Supreme Court has granted review from that court were reversed. Receiving particular recent attention was the 1996 Term, where 27 of 28 Ninth Circuit cases were reversed or vacated,⁴ and the 1983 Term, in which the reversal rate for the Ninth Circuit was similar.

Although the statistics based on cases taken directly from Court X are important, taken alone they provide an incomplete picture. That is because the Supreme Court also rules on the decisions of that court indirectly, that is, in cases taken from other courts. Although the picture from the latter rulings might not change the justices' level of support for the decisions of Court X, the Supreme Court may support that court more, or less, frequently in indirect rulings than in the rulings in cases taken directly from it. Were the proportion of support or disagreement quite different from that in the Supreme Court's direct review of Court X's cases, ignoring this information by relying only on direct affirmances and reversals would definitely leave a distorted view. In short, adding this dimension provides a more complete, or less incomplete, picture of the extent to which the Ninth Circuit is in tune with the Supreme Court. One must also consider whether the Supreme Court has mentioned the lower court's opinion and the justices' tone in doing so.⁵

In one sense, any decision of the Supreme Court speaks to the rulings of Court X even if the latter are nowhere mentioned in the Supreme Court's opinion. If Court X has ruled on a subject and a Supreme Court decision on that subject sustains, modifies, undercuts, or directly contradicts that ruling, lawyers will be quick to call it to the attention of Court X's judges in the next relevant case. If Court X has spoken in a particular way about an issue and the Supreme Court

³ See, e.g., STEPHEN L. WASBY, *THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM* 219 (4th ed. 1993).

⁴ See Marybeth Herald, *Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and the Congress*, 77 OR. L. REV. 405 (1998).

⁵ Examination of justices' remarks, positive or negative, about Ninth Circuit cases in all cases the justices reviewed from other circuits, whether or not involving an intercourt conflict, is beyond the scope of this study. For such examination of Supreme Court opinions in cases from a federal district court after the Ninth Circuit had reviewed them, see Stephen L. Wasby, *The District of Oregon in the U.S. Supreme Court*, 39 WILLIAMETTE L. REV. 851 (2003).

overturns another court's identical statement, the Supreme Court has effectively overturned the former court as well as the one from which it had taken the case it reviewed; likewise, in upholding the statement of another court which is similar to Court X's ruling, it has effectively affirmed Court X's position.

Yet there are cases in which the rulings of Court X are explicitly before the Supreme Court in cases taken from other courts. This is particularly so in the principal category of cases to which the Supreme Court grants review, those in which there is an intercircuit conflict on the point of law at issue.⁶ If the justices accept a case from the Third Circuit to rule on an issue on which the Ninth Circuit has taken a contrary stance, the Supreme Court's action affirming or reversing the Third Circuit directly implicates the Ninth Circuit's position. In this hypothetical, when the Third Circuit's position is affirmed, the result is a de facto reversal of the Ninth Circuit; where the Third Circuit is reversed, the outcome is an implicit affirmance of the Ninth Circuit's position. In the 1996 Term, for example, in *Boggs v. Boggs*, the Supreme Court, while overturning a Fifth Circuit ruling denying ERISA preemption, noted that a Ninth Circuit ruling was "in substantial conflict" with the Fifth Circuit,⁷ and, in so doing, implicitly upheld the Ninth Circuit.

A. The Present Study

Does the picture provided by the Supreme Court's treatment of a court's rulings in cases taken from other courts differ from the picture given by the results from decisions taken directly in that court? To illustrate how the picture provided by intercircuit conflict cases indeed may differ from the usually-presented "raw score," the justices' rulings on intercircuit conflicts in which cases from the United States Court of Appeals for the Ninth Circuit are part of the conflict are examined and compared with the Supreme Court's treatment of cases taken directly

⁶ The Court's Rules state an intercircuit conflict as a matter to be considered in granting certiorari. See Supreme Court Rule 10, in which "the character of the reasons the Court considers" are noted when: "(a) a United States court of appeals has entered a decision in conflict with the decision on another United States court of appeals on the same important matter[.]" SUP. CT. R. 10(a) (effective May 1, 2003). Among the important studies discussing intercircuit conflicts as a basis for the grant of certiorari 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), as well as the work of Arthur D. Hellman, e.g., Arthur D. Hellman, *Light on a Darkling Plain: Intercircuit Conflicts in the Perspective of Time and Experience*, 1998 SUP. CT. REV. 247.

⁷ 520 U.S. 833, 839 (1997).

from that court.⁸ The present study, while focusing on one decade, encompasses more than two decades. Receiving detailed examination are cases the Supreme Court decided in October Terms (“O.T.”) 1980-1989 and 1990-1999, the latter receiving greater attention, with a brief addendum carrying matters forward through the 2003 Term.

The article begins with the most recent complete decade of the Supreme Court’s terms – O.T. 1990 - 1999. After findings from the decade are presented, the types of cases in each of five terms (O.T. 1995-1999) are discussed. Findings from the previous decade, O.T. 1980 - 1989, are then provided. In the most recent decade, the Supreme Court had almost total control of its docket through its certiorari jurisdiction,⁹ which produces almost all the cases entailing intercourt conflicts. This makes the period commencing in the late 1980s the most fertile one for exploring the Court’s treatment of intercourt conflict cases. Virtually all of the Court’s remaining appeal jurisdiction—except for voting rights cases, particularly on reapportionment—had been removed in the mid-1980s, and the full effect of the severe reduction in appeal cases had taken effect in the Supreme Court by O.T. 1990, although appeal cases still showed up as late as O.T. 1989¹⁰ because the change was applicable only to cases filed after passage of the statute.¹¹

When appeal cases were a significant portion of the Court’s docket, a smaller proportion of the Court’s rulings were in intercourt conflicts.

⁸ The latter – cases taken directly from the Ninth Circuit – are not separated into those which entail an intercourt conflict and those which do not; whether the Ninth Circuit fares differently in those two categories is beyond the scope of this Article. However, the rate at which the justices reverse the Ninth Circuit suggests that the court of appeals does less well in intercourt conflict cases taken directly from the Ninth Circuit than in the intercourt conflict cases taken from other circuits in which a Ninth Circuit case is part of the conflict.

In October Term 1996, for which we do have data, ten of the 28 cases from the Ninth Circuit that the Supreme Court decided involved intercourt conflicts. In two, other circuits had also adopted the rejected Ninth Circuit position, which had been the majority one, while in five cases, the Ninth Circuit was the lone court in conflict with multiple courts which adopted the position the Supreme Court upheld. See Herald, *supra* note 4, and Stephen L. Wasby, *The Ninth Circuit and the Supreme Court: Relations Between Higher and Lower Courts* (1998) (paper presented at annual meeting of the American Political Science Association; on file with author).

⁹ 28 U.S.C. § 1257 (2000). See RICHARD H. FALLON, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 468 (5th ed. 2003) (“In 1988, Congress completed the gradual transition from mandatory to discretionary review of state court decisions by amending 28 U.S.C. § 1257 to eliminate appeals as of right and to make all state court judgments reviewable only by writ of certiorari.”).

¹⁰ See, e.g., *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 41 n.15 (1989) (Court states that although “in the near future our appellate jurisdiction will extend only to rare cases” the Court will “assume that the appeal is proper.”).

¹¹ 28 U.S.C. § 1257; see *supra* note 9.

A significant number of cases in the appeal jurisdiction came from the state courts, whose rulings might conflict with those of other state courts but not with rulings of the federal courts of appeals.¹² Moreover, rather than waiting for an intercircuit conflict to develop, as it could do with cases in its certiorari jurisdiction, the Court had to take appeal cases, and in those cases, the justices did not indicate disagreement among the lower courts in interpretation of the issue before them.¹³ Although there may have been a smaller *proportion* of Supreme Court cases involving intercircuit conflicts in the 1980s than in the 1990s, the *number* of such cases was large because the Court accepted and decided so many more cases than in the 1990s, when its plenary decision output was less than ninety cases per term.¹⁴

One other aspect of intercircuit conflict cases requires comment. In any particular term, Supreme Court cases taken directly from any court of appeals were decided in that court within a relatively short period of time, approximately a year.¹⁵ That may also be true for some of the other lower court rulings involved in the conflicts, in which petitions for certiorari may have been filed. Thus, two of the four cases the justices mentioned in *Martin v. Hadix* as representing the position opposite to that of the case under review were noted as “cert. pending”¹⁶ and all the cases cited were very recent or only one and two years old, perhaps a result of the newness of the statute at issue. Often, however, when an intercircuit conflict prompts the justices to review a case, some of the cases constituting the conflict may have been decided some time earlier – indeed, several years before – because a conflict does not necessarily develop instantly or within a few months but may have been long in the

¹² While federal court-state court conflicts are among the factors the justices consider in deciding whether or not to grant review, such conflicts are not included in the data for this study.

¹³ In those appeals cases disposed of by summary affirmances, there could be no notation of inter-court conflict as there was no opinion.

¹⁴ See Arthur D. Hellman, *The Shrunk Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 406; see also Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 578 (2003) (“During all the years of the Burger Court and up through the first year of the Rehnquist Court, the Court decided about 150 cases per year. During the years of the second Rehnquist Court, the Court has decided only about half that many cases.”)

¹⁵ See, e.g., *Wilson v. Layne*, 526 U.S. 603 (1999) (the Court decided a circuit split within one year after the Fourth Circuit ruled that qualified immunity was proper because the right allegedly violated was not “clearly established”).

¹⁶ 527 U.S. 343, 352 (1999). Generally the justices hold “cert. pending” cases until they decide the case they did agree to review, and they then either deny review or grant, vacate, and remand (GVR) in light of the newly decided case.

making.¹⁷ Either the conflict may have existed for some time before the justices concluded that a recent case adding to one side of the conflict warranted a grant of certiorari, or all the circuits which had decided the issue over several years had agreed, with another circuit having created the conflict only recently,¹⁸ thus prompting the justices' decision to deal with it.

B. A Note on Data

The data utilized in this somewhat rudimentary study are in certain ways rough and approximate. However, without being able to say a priori that the Ninth Circuit's record would look better or worse after adding these cases to those the justices took directly from that court, if the new data reveal a distinct difference from the picture shown by the regularly-used "raw score" count, we should be put on notice that by continuing to rely solely on that measure, we are providing far from a complete or accurate picture. In this article, the cases cited by the Supreme Court as being in conflict are used to see whether the position taken in the Ninth Circuit case cited conforms to what the Supreme Court then decides or is contrary to the position the justices adopt. The cases used in this study are those which the Court cites as creating or being part of an intercircuit conflict, either in the text when it gives such a conflict as the reason for granting certiorari, in the footnote attached to that text, or at some later point in the opinion.¹⁹ Cases not directly cited but otherwise clearly identifiable, as when they are referred to as collected in a cited lower court ruling, are also used, although it requires going beyond the Supreme Court opinion for data.

Because the Supreme Court at times only cites examples of cases on either side of the conflict without appearing to provide a complete listing of all circuits that have taken positions on the issue ("E.g., Jones

¹⁷ See, for example, *Beck v. Prupis*, 529 U.S. 494 (2000), in which the Supreme Court resolved a conflict that included a 1990 Ninth Circuit ruling, *Reddy v. Litton Indus.*, 912 F.2d 291 (9th Cir. 1990), to which the justices had denied certiorari in 1991.

¹⁸ See, for example, *Harris Trust & Savings Bank v. Salomon Smith Barney*, 530 U.S. 238, 244 (2000), in which the Court stated that in 1999, the Seventh Circuit had "departed from the uniform position of the Courts of Appeals." The Ninth Circuit case was *Landwehr v. DuPree*, 72 F.3d 726 (9th Cir. 1995).

¹⁹ In addition to noting intercircuit conflicts that lead the justices to grant review, the Supreme Court at times has also noted *intracircuit* conflict. See, for example, *United States v. Mendoza-Lopez*, 481 U.S. 828, 830 n.1 (1987), there, in a footnote to an immigration case from the Eighth Circuit, Justice Marshall stated, "Respondents have at no point raised, and we do not express any opinion regarding, the propriety of the group deportation procedure used in this case. Compare *United States v. Barraza-Leon*, 575 F.2d 219, 219-220 (9th Cir. 1978), with *United States v. Calles-Pineda*, 627 F.2d 976, 977 (9th Cir. 1980)."

v. Smith, holding X, and Green v. Hill, holding Y.”), this method will result in an undercount of cases from any particular court. When the Supreme Court refers to “many other lower courts,” without providing a citation,²⁰ that the present method provides an undercount is clear.²¹ In this initial exploration, we limit ourselves to cases explicitly cited, on the theory that those generally are the ones the Supreme Court considered sufficiently significant to mention.

Also noted but not receiving extended treatment here are instances in these intercircuit conflict cases when the Supreme Court has referred, either positively or negatively, to Ninth Circuit law not involved in an intercircuit conflict. For example, in a 1997 case from the Eighth Circuit, the justices, noting that “the Courts of Appeals have adopted different standards . . . for deciding whether a federal instrumentality may sue in federal court to enjoin state taxation where the United States is not a complainant,” upheld the Ninth Circuit’s position, based on an earlier First Circuit case, as well as the First Circuit’s later, modified position.²² On the other side, in ruling on a Seventh Circuit case on standing, when Justice Scalia criticized several courts of appeals for their practice of proceeding by assuming jurisdiction to decide the merits (the “doctrine of hypothetical jurisdiction”), three of seven cases he cited were from the Ninth Circuit.²³ While dissenting Justice Stevens called this part of Justice Scalia’s opinion “pure dictum” and as “com[ing] to the same thing as an advisory opinion,”²⁴ there is no question that the Court had disapproved of the Ninth Circuit practice.

In recording data, a “plus” sign is given to lower court rulings in which the lower court’s position and the Supreme Court’s holding are in agreement, and a “minus” sign to those in which the courts have taken contrary stances. When in a single case, the justices decide more than one issue implicating an intercircuit conflict, and the Court supports a

²⁰ See, for example, *Coil Indus. Joint Venture v. Federal Savings & Loan*, 489 U.S. 561, 568 (1989), where the Court observed, “We granted certiorari to resolve the conflict in the lower courts over” the issue. See also *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2000); *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 (1983).

²¹ For present purposes, the same is true when the sources cited are difficult to access, as in a reference to cases cited in an addendum to a brief.

²² *Arkansas v. Farm Credit Servs. of Cent. Ark.*, 520 U.S. 821, 830 (1997). A further example is *Williams v. Taylor*, 529 U.S. 420 (2000), in which the Supreme Court took the same position on a particular issue as had all courts of appeals, including the Ninth Circuit. As Justice Kennedy put it, “[W]e agree with the Court of Appeals and with all other courts of appeals which have addressed the issue. See, e.g., *Baja v. Ducharme*, 187 F.3d 1075, 1078-1079 (9th Cir 1999)” and then citing cases from five other circuits. *Id.* at 432.

²³ *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 93-94 (citing cases).

²⁴ *Id.* at 122 (Stevens, J., dissenting).

lower court on one issue while disagreeing with it on the other, the case is scored as mixed (+/-) or a “split” result, counted as .5 support rather than 1.0 support. Each case is given the same weight, although some may object that “landmark” cases, or what are taken to be such cases, such as the “assisted suicide” case²⁵ or the “spotted owl” environmental case,²⁶ are more important than those on “small” points of civil procedure. In short, some may wish to argue that some cases are more equal than others, but for present purposes each case counts the same as each other case.

There are instances when the division between or among circuits on a legal question is fairly straightforward, with circuits lining up cleanly on either side, and with lower courts’ positions at direct odds with that the Supreme Court adopts. However, scoring the lower court’s ruling in relation to the Supreme Court’s resolution is not always easy. This is true when the courts of appeals have adopted a range of positions²⁷ and the justices’ holding is at a point on the continuum quite near, but not exactly identical to, that of the lower court on which the observer is focusing. In this study, the basic rule is that if the Supreme Court does not adopt the Ninth Circuit’s position, the case is scored “minus” even if the lower court’s position is midway between the adopted and rejected positions. That is, “not Supreme Court” is “no.” This is so because of two reasons: one is that because the Supreme Court’s position is the rule the lower courts must now apply, regardless of how “close” their previous position was to the one the justices adopted. The other is that it is difficult to construct an appropriate metric for determining how near or close the lower court position was to the Supreme Court’s holding. However, in some instances a “(+)” or “(-)” has been assigned when the Supreme Court neither directly supports nor opposes the lower court position but takes a position quite close to the latter’s view. Thus, a “(+)” would be assigned if the justices reach the same basic result as the lower court but adopt somewhat different reasoning in doing so.²⁸ From the perspective of the lower court, this scoring system is conservative because it makes it

²⁵ *Washington v. Glucksberg*, 521 U.S. 702 (1997), *rev’g* *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996).

²⁶ *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429 (1992).

²⁷ See, for example, *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 56 (1987), where the Court referred to the “three-way conflict in the Circuits” in a case not involving the Ninth Circuit.

²⁸ See, for example, *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 185-186 (1977), where the Court indicated three positions. While the justices explicitly rejected the Third Circuit’s position, they did not rule on whether the Eighth Circuit’s or Ninth Circuit’s position was correct.

less likely that the court of appeals will receive credit for having adopted a position the Supreme Court approves.

Reliance is placed on what the Supreme Court says about lower court cases, that is, its characterization of those rulings –usually the statement of the holding that appears in parentheses following the case citation– if that allows a clear inference as to the side of a conflict on which a lower court ruling falls. At times, while not engaging in extensive discussion, the Court reports the lower court rulings in a sentence or more, but most often only citations are provided and little more is said. When the Supreme Court opinion indicates only that cases are on opposite sides of an issue but does not indicate their holdings (e.g., “Compare *Jones v. Smith* with *Green v. Hill*.”), the court of appeals’ opinions have been examined to make a determination; this is also necessary when the direction of the Supreme Court’s citation is unclear.²⁹

This method is certainly not as precise as would be the case if one engaged in the far more labor-intensive task of comparing every Supreme Court ruling on an intercircuit conflict with the text of cited lower court rulings or, even more onerous, the corpus of a lower court’s doctrine. Yet it should provide a basic picture that may prompt other observers of the relation between the Supreme Court and lower courts to look further. That should certainly be the case if there is divergence between how a court fares in intercircuit conflict cases from other circuits and how it fares when the justices directly review its cases. On the other hand, if the two sets of data converge, then the “raw score” data for cases taken directly from a court might continue to be seen as broadly indicative of how the court was treated by its judicial superiors.

II. FINDINGS: 1990 - 1999 TERMS

We now turn to examine the Ninth Circuit’s record in the Supreme Court’s 1990-1999 Terms based on the intercircuit conflict cases from other circuits in which the Ninth Circuit was part of the conflict. The principal finding is that in all ten terms, the Ninth Circuit fared better in the Supreme Court’s rulings on intercircuit conflicts in cases taken from other courts of appeals than in Ninth Circuit cases reviewed directly.³⁰ In all ten terms, the Supreme Court had reversed or vacated well more half the latter, whereas in intercircuit conflict cases taken from other circuits,

²⁹ See, e.g., *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 n.1 (1982). There, after the listing of courts whose decisions conflicted with the Third Circuit (from which the case came), there is a “Cf.” cite with several cases listed. The meaning of “Cf.” citation to a Ninth Circuit case is not clear.

³⁰ Not included are cases in which certiorari is granted and the case is vacated and remanded (GVR), usually for consideration in light of an earlier Supreme Court ruling.

the justices supported the Ninth Circuit position in at least half such cases in four terms and, even when ruling against the Ninth Circuit in less than fifty percent of a term's cases, upheld the lower court's position at a higher rate than in the Ninth Circuit's cases that were directly reviewed, and often by substantial percentage differences. Over the ten-year period, in these cases Ninth Circuit law was sustained at a 49 percent rate, as compared to roughly 20 percent in cases taken directly from the Ninth Circuit, a difference of 29 percent. Adding the "intercircuit conflict" and "direct" cases, the Ninth Circuit position was sustained just under one-third of the time (31.9%), not a shabby showing considering that the Supreme Court takes cases primarily to reverse them.

How the Ninth Circuit fared in the cases the Supreme Court took directly from it provides a baseline. The rate at which the justices affirmed the Ninth Circuit in cases reviewed directly from that court, although averaging roughly twenty percent, ranged from a low of 3.6 percent in the infamous 1996 Term and a 10 percent affirmance rate in O.T. 1999, to a high of just under one-third – 31.3% and 32.6% in O.T. 1991 and O.T. 1992, respectively; no particular trend was evident over the decade. For the remainder of the terms, the affirmance rate stood at about 20 percent – slightly over in O.T. 1993 (21.4%) and 1998 (23.7%), right at that proportion (20.6%) in O.T. 1997, and below in O.T. 1990 (15.4%) and 1995 (17.9%).

Likewise, the justices' support of the Ninth Circuit in intercircuit conflict cases taken from other circuits had a considerable range – 61.9 percentage points – from a low of 23.1 percent (O.T. 1995) to a high of 85 percent (O.T. 1996). Again, no particular trend is evident as the proportion of support varies over time while averaging almost one-half (48.8%). Of particular note, in addition to O.T. 1996, is O.T. 1999, when the Ninth Circuit position was supported in two-thirds of the intercircuit conflict cases in which its rulings were involved, and the two terms in which the Ninth Circuit position was supported in half the cases – O.T. 1990 (53.8%) and O.T. 1998 (50%). In five other terms, support for the Ninth Circuit was from one-third (O.T. 1994) to somewhat less than half (45.8%, O.T. 1991), so that it fell below one-third in only one term, O.T. 1995 (23.1%).

Table I Ninth Circuit Court of Appeals in the Supreme Court, 1990-1999				
	(A) Intercircuit	(B) Direct	Diff (A - B)	Overall (A + B)
*1999	66.7% 11 (1+) - 6	10% 1 - 9	+56.7%	46.4% 13 - 15
1998	50% 5 (1 spl) - 5	23.7% 4 (1 spl) - 14	+26.3%	33.3% 9 (2 spl) - 19
1997	42.9% 6 - 8 (+ on non conflict pt)	20.6% 3 (1 spl) - 13	+22.3%	30.6% 9 (1 spl) - 21
*1996	85.0% 8 (1 spl) - 1 (other: 1+ 1-)	3.6% 1 - 27	+81.4%	25.0% 9 (1 spl) - 28
1995	23.1% 3 - 10	17.9% 2 (1 spl) - 11	+5.2%	20.4% 5 (1 spl) - 21
1994	33.3% 3 - 6	20.6% 3 (1 spl) - 13	+12.7%	25.0% 6 (1 spl) - 19
1993	40.0% 3 + 1(+) - 6 (also: +)	21.4% 2 (2 spl) - 10	+18.6%	29.2% 6 (2 spl) - 16
1992	43.3% 6 (1 spl) - 8	32.6% 7 (1 spl) - 15	+10.7%	36.8% 13 (2 spl) - 23
1991	45.8% 5 (1 spl) - 6	31.3% 5 - 11	+14.5%	37.5% 10 (1 spl) - 17
1990	53.8% 7 - 5 (1-) (also +1 conf w/ state)	15.4% 2 - 11	+38.4%	34.6% 9 - 17
Total 1990-1999	48.8% 59 (4 sp) - 62	19.6% 30 (7 spl) - 134	+29.2%	31.9% 89 (11 spl) - 196

How *much* better did the Ninth Circuit do in intercourt conflict cases from other circuits than in cases the justices took directly from that court? If the proportion of affirmance in Ninth Circuit “direct review” cases is subtracted from the proportion of support for the Ninth Circuit position in intercourt conflict cases from other circuits, the difference averaged almost 30 percent (29.2%) but with a very wide range – a full 76.2 percentage points. The difference was less than 10 percent in only one term, O.T. 1995, the term in which the justices’ support for the Ninth Circuit in intercourt conflict cases was lowest. However, even then it remained higher than its support for that court in direct review cases, shrinking the margin to 5.2 percent so that, while the two separate measures of support come close to converging in that term, they do not do so. Thus, at least in the 1990’s, support for the Ninth Circuit is never greater in cases taken directly from that court.

Put differently, support for the Ninth Circuit in intercourt conflict cases from other courts was greater than support for the Ninth Circuit in cases directly from that court by more than 10 percent in all but one term during the decade. In two terms, the difference was from 10 to 15 percent (O.T. 1992: 10.7%; O.T. 1991: 14.4%); it was in the 20 percent range in three other terms (O.T. 1993: 22.1%; O.T. 1997: 22.3%; O.T. 1998: 26.3%); and in one other, it exceeded one-third (O.T. 1990: 38.4%). The difference actually exceeded 50 percent in two relatively recent terms – O.T. 1999, when it was 56.7%, and O.T. 1996, when it was a monumental 81.4%. That last figure may seem astounding, but it results from a juxtaposition of the Court’s lowest recent one-term support for the Ninth Circuit in cases directly reviewed with its highest support for the Ninth Circuit in intercourt conflict cases taken from other courts of appeals.

The figures for O.T. 1996 and O.T. 1999 are particularly important, because these are the two terms during the 1990s in which the Supreme Court most frequently reversed the Ninth Circuit in cases taken directly from that circuit. Yet in intercourt conflict cases drawn from other circuits, these are the two terms in which the Ninth Circuit not only did better than it had done in “direct” cases but in fact did exceptionally well, as its position was validated upwards of two-thirds of the time. The juxtaposition of the high approval rate for Ninth Circuit rulings in intercourt cases from other circuits with high reversal of rulings in cases taken directly from the Ninth Circuit could not be more stark.

This is not to suggest that there is a correlation, much less a causal relationship, between the two phenomena. However, that approval rates in intercourt conflict cases and reversal rates in direct cases do not move in parallel reinforces the need to examine both figures for any

given Supreme Court term in order to get a more extensive, and thus more accurate, picture of how a court of appeals fares at the Supreme Court's hands. That juxtaposition severely underscores that the picture one obtains by restricting oneself to direct review cases provides an incomplete, nay, a distorted view. Where observers talked about the beating the Ninth Circuit received in O.T. 1996, they should have been talking *as well* about the high rate of support Ninth Circuit positions received in cases implicating intercourt conflicts.

That finding leads to an examination of the picture that would be obtained by combining the Supreme Court's treatment of cases the justices took directly from the Ninth Circuit and cases in which the Court took a stance on Ninth Circuit rulings when it decided intercourt conflict cases from other courts of appeals. This combination shows that the Ninth Circuit's position is upheld slightly under one-third of the time (31.9%). However, a particularly noticeable effect is that the range of support becomes compressed – to only 26 percentage points – as the already-noted high and low percentages are cancelled out. The lowest Supreme Court support for Ninth Circuit positions is now one-fifth (20.4%) in the 1995 Term, a result of the combination of the lowest level of support in intercourt cases and a relatively high reversal rate in cases taken directly from the Ninth Circuit, while the highest combined support is less than one-half – 46.4 percent in the 1999 Term, where the two-thirds support in intercourt conflict cases overcomes a very low affirmance rate (10 percent) in direct cases because the number of the latter is small (only 10 percent). Overall, the combined level of support is between 20 and 30 percent in four (consecutive) terms (O.T. 1993 - 1996), around the mid-30s in the three prior consecutive terms (O.T. 1990 - 1992) and O.T. 1997, and two-fifths or more in the decade's last two terms (40 percent in O.T. 1998, in addition to the already-noted 46.4 percent in O.T. 1999).

III. A LOOK AT SOME INDIVIDUAL TERMS

With the levels of support the Supreme Court has given the Ninth Circuit in the two types of cases and the resulting differences in support levels between the two types of cases now having been presented, a closer examination of the individual terms is in order. For these purposes, five terms – O.T. 1995-1999 – are discussed, with the most recent of those five terms presented first.

A. O.T. 1999

In its 1999 Term, while the Supreme Court affirmed only one of ten Ninth Circuit cases it took directly from that court, it supported the Ninth

Circuit's position in two-thirds of the intercircuit conflict cases taken from other circuits in which a Ninth Circuit case was part of the conflict. Most of the rulings were on matters of federal law and came in what were not landmark decisions.

Among the issues in which the Ninth Circuit's position was supported were when tax remittances were "paid";³¹ who was authorized to sue under the Employee Retirement Income Security Act ("ERISA");³² whether the Fair Labor Standards Act permitted an employer to force use of compensatory time;³³ what evidence is necessary to support a verdict under the Age Discrimination in Employment Act ("ADEA");³⁴ and two civil Racketeer Influenced and Corrupt Organizations Act ("RICO") matters—a statute of limitations issue and the necessary content of a conspiracy claim.³⁵ In addition, in a case concerning preemption under the National Traffic and Motor Vehicle Safety Act, both the Supreme Court and the Ninth Circuit had ruled in favor of preemption, but the Supreme Court's basis for that preemption differed from the lower court's.³⁶

Several questions related to federal criminal statutes: whether arson of a private residence not used for commercial purposes fell within the federal arson statute, implicating the scope of the Commerce Clause;³⁷ whether penalizing use of a "machinegun" was a separate offense or a sentencing factor;³⁸ and what elements of an offense were necessary to obtain a lesser included offense jury instruction.³⁹ There were also rulings on two issues of constitutional importance: the propriety and necessary elements of a public university activity fee for extracurricular student speech,⁴⁰ and whether state and local educational agencies were permitted to loan educational materials and equipment to private schools,⁴¹ in which two early important church-state rulings⁴² were overruled.

The smaller number of decisions in which the justices adopted the views of circuits whose positions were contrary to that of the Ninth Circuit included the issues of whether an heir's interest in an estate was

³¹ *Baral v. United States*, 528 U.S. 431 (2000).

³² *Harris Trust & Savs. v. Solomon Smith Barney*, 530 U.S. 238 (2000).

³³ *Christensen v. Harris Co.*, 529 U.S. 576 (2000).

³⁴ *Reeves v. Sanderson Plumbing Co.*, 530 U.S. 133 (2000).

³⁵ *Beck v. Prupis*, 529 U.S. 494 (2000); *Rotella v. Wood*, 528 U.S. 549 (2000).

³⁶ *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000).

³⁷ *Jones v. United States*, 529 U.S. 848 (2000).

³⁸ *Castillo v. United States*, 530 U.S. 120 (2000).

³⁹ *Carter v. United States*, 530 U.S. 255 (2000).

⁴⁰ *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000).

⁴¹ *Mitchell v. Helms*, 530 U.S. 793 (2000).

⁴² *Meek v. Pittenger*, 421 U.S. 349 (1975); *Wolman v. Walter*, 433 U.S. 229 (1977).

“property” under the federal lien statute;⁴³ whether Federal Arbitration Act venue provisions were permissive;⁴⁴ and what was the burden of proof for an officer’s liability for a corporation’s failure to pay taxes.⁴⁵ In the criminal sphere, the issues were whether one could represent oneself in a direct appeal from a criminal conviction⁴⁶ and when supervised release commenced in relation to date of release from prison.⁴⁷ The most important issue, which was also related to the Court’s growing federal jurisprudence, was whether the ADEA abrogated states’ Eleventh Amendment sovereign immunity.⁴⁸

In addition to these rulings in intercircuit conflict matters, the Supreme Court also spoke to Ninth Circuit rulings in two other cases involving rulings by several courts of appeals. In one, the Ninth Circuit was not involved in the intercircuit conflict that led the Supreme Court to take the case, but in one part of the opinion, the position of the Ninth Circuit and several other courts of appeals on a point relied on by petitioner was said to be “of questionable consistency” with the relevant Federal Rule.⁴⁹ In the other case, there was no intercircuit conflict: all the courts of appeals were on the same side of an issue, and the Supreme Court approved their position.⁵⁰

B. O.T. 1998

In the eleven intercircuit conflict cases in which a Ninth Circuit case was part of the conflict in O.T. 1998, the Ninth Circuit’s position prevailed in five and was overturned in five. The remaining case, which involved application of the Prison Litigation Reform Act (“PLRA”) attorneys’ fee provisions to cases pending when the statute became effective, was a “split decision” for the Ninth Circuit, which had ruled that the new law capped all fees paid post-statute even for prior work,⁵¹ while the justices upheld such a cap only for post-Act work.⁵²

The cases in which the Ninth Circuit’s position was upheld included the antitrust issue of whether certain group boycotts were *per se* violations;⁵³ the availability of a cause of action under the civil rights

⁴³ *Drye v. United States*, 528 U.S. 49 (1999).

⁴⁴ *Cortez Byrd Chips v. Harbert*, 529 U.S. 193 (2000).

⁴⁵ *Raleigh v. Ill. Dep’t of Revenue*, 530 U.S. 15 (2000).

⁴⁶ *Martinez v. C.A. of Cal.*, 528 U.S. 152 (2000).

⁴⁷ *United States v. Johnson*, 529 U.S. 53 (2000).

⁴⁸ *Kimel v. Fl. Bd. of Regents*, 528 U.S. 62 (2000).

⁴⁹ *Weisgram v. Marley Co.*, 528 U.S. 440, 453 (2000).

⁵⁰ *Williams v. Taylor*, 529 U.S. 420 (2000).

⁵¹ *Madrid v. Gomez*, 150 F.3d 1030 (9th Cir. 1998).

⁵² *Martin v. Hadix*, 527 U.S. 343 (2000).

⁵³ *NYNEX Corp. v. Discon*, 525 U.S. 128 (1998).

conspiracy statute for conspiracy to terminate an “at-will” employee;⁵⁴ and, in criminal procedure, whether a guilty plea or statements at a plea colloquy waived the right to silence at sentencing.⁵⁵ Also on this side of the ledger were two cases of somewhat broader significance – one on when a school board was liable under Title IX for student-on-student sexual harassment⁵⁶ and the *Greater New Orleans Broadcasting* case,⁵⁷ on the important First Amendment issue of whether a ban on broadcasting lottery information could be applied to advertisements of legal gambling from stations located where the gambling was legal.

The other side of the balance sheet included cases on appellate procedure, on the appealability of a sanctions order,⁵⁸ bankruptcy, on the rights of pre-bankruptcy stockholders in relation to senior creditors’ rights,⁵⁹ employment law, on the relation between Social Security Disability Insurance claims and suits for improper discharge under the Americans with Disabilities Act,⁶⁰ and criminal procedure, on the intent required under the federal carjacking statute⁶¹ and whether a warrant was required to seize a car thought to be forfeitable.⁶²

C. O.T. 1997

The 1997 Term was one in which the justices ruled against the Ninth Circuit in a majority of both cases taken directly from that court and those implicated in their rulings on intercircuit conflicts, although the lower court fared slightly better in the latter. The Ninth Circuit’s position was upheld in a bankruptcy case on certain pre-bankruptcy transfers⁶³ and in cases involving the amount of evidence necessary to withstand summary judgment in damages action against government official;⁶⁴ the prerequisites to federal suit over agency shop fees;⁶⁵ when state trial courts must instruct on lesser included offense in capital cases;⁶⁶ whether, in a suit to challenge parole revocation procedures, collateral consequences of a probation revocation would be presumed or

⁵⁴ *Haddle v. Garrison*, 525 U.S. 121 (1998).

⁵⁵ *Mitchell v. United States*, 526 U.S. 314 (1999).

⁵⁶ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

⁵⁷ *Greater New Orleans Broad. Co. v. United States*, 527 U.S. 173 (1999).

⁵⁸ *Cunningham v. Hamilton Co.*, 527 U.S. 198 (1999).

⁵⁹ *Bank of Am. v. 203 N. LaSalle St. P’ship*, 526 U.S. 434 (1999).

⁶⁰ *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999).

⁶¹ *Holloway v. United States*, 526 U.S. 1 (1999).

⁶² *Florida v. White*, 526 U.S. 559 (1999).

⁶³ *Fidelity Fin. Servs. v. Fink*, 522 U.S. 211 (1998).

⁶⁴ *Crawford-El v. Britton*, 523 U.S. 574 (1998).

⁶⁵ *Air Line Pilots Ass’n v. Miller*, 523 U.S. 866 (1998).

⁶⁶ *Hopkins v. Reeves*, 524 U.S. 88 (1998).

had to be shown;⁶⁷ and the effect on removal to federal court of the presence of a claim barred by the Eleventh Amendment.⁶⁸

The slightly more numerous cases in which the Supreme Court ruled in favor of those courts of appeals holding a position counter to that of the Ninth Circuit were the amounts obtained through “actual fraud” not subject to discharge in bankruptcy;⁶⁹ the federal government’s priority to be paid from an estate;⁷⁰ the NLRB’s standard concerning employer doubts about union majority support;⁷¹ and the basis for removal of state law claims to federal court under federal question jurisdiction.⁷²

Substantially represented among these cases were questions of criminal law and procedure. These were: the availability of an “exculpatory no” (mere denial of wrongdoing) in false statements to federal investigators;⁷³ whether a sentence for an alien returning to the U.S. after deportation on conviction of aggravated felony was a penalty provision or a separate offense;⁷⁴ the meaning of “carries a firearm” during a crime,⁷⁵ a case in which the Court also spoke approvingly of a related position taken by the Ninth Circuit and all other courts of appeals, which was thus not a matter of intercircuit conflict; and the effect of state restoration of civil rights on an enhanced sentence for a felon carrying a firearm,⁷⁶ in which the Ninth Circuit’s position, which Justice Kennedy categorized as an “intermediate” reading of the statute, had been reached in an *en banc* ruling.

D. O.T. 1996

The 1996 Term is the one that people call to mind when they think of the Supreme Court’s treatment of the Ninth Circuit. Of the twenty-eight cases the Supreme Court agreed to review from the Ninth Circuit – a number representing a disproportionate amount of the Supreme Court’s caseload – only one was affirmed. Yet far less visible was the fact that, in another ten cases in which the justices spoke of Ninth Circuit rulings that were part of the intercircuit conflict before the Supreme Court, the Court upheld the Ninth Circuit’s position in eight cases, held against the Ninth

⁶⁷ *Spencer v. Kemna*, 523 U.S. 1 (1998).

⁶⁸ *Wis. Dep’t of Corr. v. Schacht*, 524 U.S. 381 (1998).

⁶⁹ *Cohen v. de la Cruz*, 523 U.S. 213 (1998).

⁷⁰ *United States v. Estate of Romani*, 523 U.S. 517 (1998).

⁷¹ *Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359 (1998).

⁷² *Rivet v. Regions Bank of La.*, 522 U.S. 470 (1998).

⁷³ *Brogan v. United States*, 522 U.S. 398 (1998).

⁷⁴ *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

⁷⁵ *Muscarello v. United States*, 524 U.S. 125 (1998).

⁷⁶ *Caron v. United States*, 524 U.S. 308 (1998).

Circuit position in only one – on the effect of a judge’s error in not submitting the materiality of a false statement to the jury.⁷⁷

In the remaining case, an appeal from a Benefits Review Board award which required treatment of two issues of statutory interpretation under the Longshoremen and Harbor Workers Compensation Act (“LHWCA”), the justices ruled against the Ninth Circuit position on one point, holding that, before a worker’s death, the worker’s spouse was not a “person entitled to compensation” for death benefits and thus did not forfeit the right to collect such benefits when she did not obtain the employer’s approval of settlements with third parties before her spouse’s death. However, they ruled for the Ninth Circuit view on the other issue, holding that because the Department of Labor is an “agency” to be named as respondent on review of a Benefits Review Board’s decision in a LHWCA case, the Director of the Office of Workers’ Compensation Programs could be named as respondent in the court of appeals.⁷⁸ Intercircuit conflicts on both points had given rise to the grant of certiorari. On the latter issue, the position of the Fourth Circuit, where the case originated, had conflicted with views of the D.C. and Ninth Circuit, which the Supreme Court adopted, but on the former issue, where the Fifth and Ninth Circuits were “in disagreement,” the justices rejected the Ninth Circuit’s position.⁷⁹

The range of topics in the cases in which the Ninth Circuit’s position was upheld was quite broad. Included were ERISA preemption of state community property laws;⁸⁰ whether punitive damages in a personal injury tort suit were taxable gross income;⁸¹ in bankruptcy law, the value of collateral retained for use in business;⁸² securities law; in employment discrimination, whether former employees were “employees” for purposes of Title VII’s anti-retaliation provision;⁸³ and two criminal matters – criminal liability for insider trading⁸⁴ and whether

⁷⁷ *Johnson v. United States*, 520 U.S. 461 (1997).

⁷⁸ *Ingalls Shipbuilding Inc. v. Dir., Office of Workers’ Comp. Programs*, 519 U.S. 248 (1997). There were two other cases, neither involving a conflict, in which the Court supported the Ninth Circuit in one and ruled against its position in the other. *United States v. Wells*, 519 U.S. 482 (1997); *United States v. LaBonte*, 520 U.S. 751 (1997).

⁷⁹ Petitioner *Ingalls Shipbuilding* had drawn on the Ninth Circuit position. In dealing with *Ingalls’* claim, Justice O’Connor made additional comments about Ninth Circuit law, as she quoted from an earlier Ninth Circuit case and cited another in talking about an issue the Court did not reach in this case.

⁸⁰ *Boggs v. Boggs*, 520 U.S. 833 (1997).

⁸¹ *O’Gilvie v. United States*, 519 U.S. 79 (1996).

⁸² *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953 (1997).

⁸³ *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

⁸⁴ *United States v. O’Hagan*, 521 U.S. 642 (1997).

certain sentences could be concurrent.⁸⁵ Also included was one of the first cases interpreting the habeas corpus provisions of the Antiterrorism and Effective Death Penalty Act (“AEDPA”), dealing with that law’s application to pending cases.⁸⁶

The last case, *Klehr v. A.O. Smith Corp.*,⁸⁷ concerned civil RICO statute-of-limitations rules, and it can be said to be only a temporary upholding of the court of appeals’ position. On the major aspect of the case, while explicitly rejecting the interpretation of one court of appeals, the justices, “recogniz[ing] that our holding . . . does not resolve other conflicts among the Circuits” which they felt the case’s facts did not require them to resolve, reserved judgment on the choice between the conflicting rules other circuits had adopted, in effect leaving all temporarily in place.⁸⁸ In a separate opinion, Justice Scalia complained that the majority had not reached the question presented and observed that the Court had granted certiorari to the Ninth Circuit case that was part of the conflict and had given it plenary treatment but had then dismissed certiorari as improvidently granted.⁸⁹

E. O.T. 1995

Interestingly, the previous term presented quite a different picture. The Ninth Circuit did far less well in October Term 1995 cases from other circuits taken to resolve intercircuit conflict cases implicating its decisions. Indeed, in this regard, it did least well of the ten years in the decade under examination. The Ninth Circuit’s position was sustained only with respect to two criminal procedure issues – cumulative punishment for a continuing criminal enterprise (CCE) conviction⁹⁰ and the standard of review concerning the basis for searches⁹¹ – and preemption of state claims under the Medical Device Amendments.⁹² In addition, the justices upheld a Tax Court ruling involved in a Ninth Circuit case, but the latter court had decided the case on other grounds.⁹³

⁸⁵ *United States v. Gonzales*, 520 U.S. 1 (1997).

⁸⁶ *Lindh v. Murphy*, 521 U.S. 320 (1997).

⁸⁷ 521 U.S. 179 (1997).

⁸⁸ *Id.* at 191. On other elements in the case, not entailing an intercircuit conflict, the justices cited the Ninth Circuit’s caselaw approvingly.

⁸⁹ See *Grimmett v. Brown*, 75 F.3d 506 (9th Cir. 1996), *cert. granted*, 518 U.S. 1003 (1996), *cert. dismissed*, 519 U.S. 233 (1997).

⁹⁰ *Rutledge v. United States*, 517 U.S. 292 (1996).

⁹¹ *Ornelas v. United States*, 517 U.S. 690 (1996).

⁹² *Medtronic v. Lohr*, 518 U.S. 470 (1996).

⁹³ *C.I.R. v. Lundy*, 516 U.S. 235 (1996). In another case, the Ninth Circuit was among the six courts of appeals on the side to which the government switched its position, leading the Supreme Court to grant certiorari, vacate, and remand (GVR) the decision before it. *Stutson v. United States*, 516 U.S. 193 (1996).

The range of cases in which the justices undermined the Ninth Circuit's position was considerable, extending from jurisdiction and civil procedure through economic regulation, including labor relations, to criminal law issues. The economic regulation issues included an employer's ERISA fiduciary duties⁹⁴ and the labor relations questions of treatment of "deadhead" transportation time under the Hours of Service Act⁹⁵ and National Labor Relations Act coverage of live-haul workers;⁹⁶ there was also a question of the federal government's sovereign immunity from damage suits under the Rehabilitation Act.⁹⁷ The criminal law issues both involved sentencing – a departure from the Guidelines in relation to a statutory minimum⁹⁸ and the effect of aggregated sentences on a defendant's jury trial rights.⁹⁹ There were two questions in the latter case, but having decided that there was no jury trial right where aggregated sentences exceeded six months, the justices said they did not need to reach the question of whether such right was eliminated by a judge's pretrial ruling that the aggregate sentence would not exceed six months.¹⁰⁰

IV. THE DECADE OF THE 1980S

We have presented findings for the 1990s along with a closer look at half the terms from that period. What can be learned by looking at the prior decade? The period from O.T. 1980 through O.T. 1989 covers the time when the Court's appeal jurisdiction was severely curtailed such that it all but ended. It was also a period of substantially greater output on the merits per term, so that the number of intercircuit conflict cases therefore remained high despite the jurisdictional alteration.

The picture from the decade of the 1980s is different from that of the 1990s in a number of respects. The Ninth Circuit fared better in the Supreme Court both in cases taken directly from the court of appeals and in intercircuit conflict cases taken from other circuits, leading to the greatest difference from the later decade—in the overall rate at which the court's position was upheld. As in the 1990s, overall the Ninth Circuit did better in the intercircuit conflict cases than in the cases directly reviewed, except for two terms in which the figures reverse—that is, the

⁹⁴ *Varity Corp. v. Howe*, 516 U.S. 489 (1996).

⁹⁵ *Brotherhood of Locomotive Eng'rs v. Atchison, Topeka & Santa Fe Railroad*, 516 U.S. 152 (1996).

⁹⁶ *Holly Farms Corp. v. NLRB*, 517 U.S. 392 (1996).

⁹⁷ *Lane v. Pena*, 518 U.S. 187 (1996).

⁹⁸ *Melendez v. United States*, 518 U.S. 120 (1996).

⁹⁹ *Lewis v. United States*, 518 U.S. 322 (1996).

¹⁰⁰ The Ninth Circuit had found a jury right but that the judge's limiting the sentence cured any error. *Rife v. Godbehere*, 814 F.2d 563 (9th Cir. 1987).

rate in directly reviewed cases is better than that for intercircuit conflict cases—and another term in which there was no difference, that is, the same proportion of cases was upheld in each category. However, the difference between the two figures for the decade as a whole is roughly the same as that for the 1990s although slightly lower. Considerable differences from year to year remain, but the range in intercircuit conflict cases is more compressed while there is a greater range in the rate at which directly reviewed cases were affirmed and in the “difference” scores; the range for the combined (intercircuit and directly reviewed) cases is roughly the same as it was to be in the 1990s.

As with our examination of the 1990s, we first look at the Supreme Court’s treatment of the Ninth Circuit in cases taken directly from that court. The justices upheld the Ninth Circuit in somewhat over one-third (35.2%) of these cases throughout the decade, but the rate of affirmance ranged from a low of 7.1 percent in the 1983 Term – the decade’s equivalent of, and precursor to, the renowned 1996 Term – to a high of 57.1 percent. Indeed, in the last three terms of the decade, the Ninth Circuit was affirmed at least half the time (55.8%, 57.1% and 50%), and in two others (1981, 1986), the affirmance rate was over two-fifths – at the mid-40-percent level. In only one term other than O.T. 1996 was the affirmance rate as low as 25 percent.

In intercircuit conflict cases taken from other circuits, when a Ninth Circuit case was part of the conflict, in only two of the ten terms was the Ninth Circuit’s position upheld less than half the time; the figure fell only to 44.4 percent in O.T. 1986 and 40.9 percent in the 1989 Term. In four terms, the Ninth Circuit’s position was sustained in over 70 percent of the relevant cases, and in two of those terms (1980 and 1984), the rate was 75 percent. In O.T. 1983, like O.T. 1996 because of the very high reversal rate for directly reviewed Ninth Circuit cases, the Ninth Circuit’s position was sustained in three-fifths of the intercircuit conflict cases in which its rulings were involved, a rate close to the decade-long average of 60.1 percent.

Given that the rates at which the Ninth Circuit is upheld in the two categories of cases do not move in parallel, what are the differences in the rates? For the ten years, the difference averages to roughly twenty-five percentage points, somewhat less than for the 1990s, and the range is 62 percentage points, also a few points less than in the 1990s. The “width” of the range in the 1980s is accounted for by the fact that it extends from the 1983 Term, when the difference was over 50 percentage points (52.9%) because the 60 percent rate at which the Ninth Circuit position prevailed in intercircuit conflict cases accompanied the sharply lowest affirmance rate in directly reviewed cases, to -9.1 percent

in the 1989 Term, when the Ninth Circuit was upheld more in directly reviewed than in intercircuit conflict cases. As earlier noted, there was another term (1988) in which the difference was negative, that is, when directly reviewed cases were affirmed at higher rate than were cases in intercircuit conflicts, and one term (1986) in which there was no difference, as the justices upheld the Ninth Circuit an identical rate (44.4%) in both categories of cases.

Table II Ninth Circuit Court of Appeals in the Supreme Court, 1980-1989				
	(A) Intercircuit	(B) Direct	Diff (A - B)	Overall (A + B)
1989	40.9% 4 (1 spl) – 6	50% 8 – 8	-9.1%	46.3% 12 (1 spl) – 14
1988	52.6% 8 (1+) (2 spl) – 8	57.1% 11 (2 spl) – 8	-4.5%	55% 20 (4 spl) – 16
1987	71.4% 9 (1+) – 4	55.9% 9 (1 spl) – 7	+15.5%	62.9% 19 (1 spl) – 11
1986	44.4% 4 – 4 (1-)	44.4% 4 – 5	-0-	44.4% 8 – 10
1985	53.8% 5 (2+) – 6	31.6% 6 – 13	+22.2%	40.6% 13 – 19
1984	75% 5 (1+) – 1 (1-)	25.0% 8 – 24	+50%	35% 14 – 26
1983	60% 7 (2+) – 6	7.1% 1 (2 spl) – 25	+52.9%	25.6% 10 (2 spl) – 31
1982	72.2% 9 (4+) – 5	32.1% 8 (2 spl) – 18	+40.1%	47.8% 21 (2 spl) – 23
1981	50% 3 (2+) – 5	46.9% 7 (1 spl) – 8	+3.1%	48.1% 12 (1 spl) – 13
1980	75% 9 – 3	32.4% 5 (1 spl) – 11	+42.6%	50% 14 (1 spl) – 14
Total 1980-1989	60.1% 76 (3 spl) – 50	35.2% 67 (9 spl) – 127	+24.9%	44.9% 143 (12 spl) – 177

Combining intercircuit conflict cases with directly reviewed ones reveals that, as with the 1990s decade, the range of outcomes (the rate at which the Ninth Circuit's position is upheld) is compressed relative to the ranges for either type of case separately. The smallest rate at which the Ninth Circuit was upheld with the cases combined is 25.6 percent in the 1983 Term. This was the year of the "spike" in reversals, which served to offset the relatively high rate at which the court of appeals' position was upheld in intercircuit conflict cases. At the other end of the spectrum was the 1987 Term, when the Ninth Circuit's position was sustained over three-fifths of the time (62.9%); the rate dropped somewhat but remained above half (55.0%) in the following term. There are five terms in which the Ninth Circuit's views were sustained half the time or slightly below that (in the high 40's). We find only one term in addition to O.T. 1983 in which the combined rate is below 40 percent – the 1984 Term, following the "year of the spike," when the rate was 35 percent.

V. AND BRIEFLY FORWARD: INTO THE NEW CENTURY

To bring the picture from the twentieth century's last two decades up to date, a brief look at the first terms of the new century are in order, to provide some assurance that the patterns already identified did not change significantly. What, then, happened in the Supreme Court's 2000 - 2003 Terms? In the 2000 Term, the number of intercircuit conflict cases taken from other circuits but in which a Ninth Circuit case was part of the conflict remained relatively high –between ten and twenty, as in the previous two decades– but it is noteworthy that for the next three terms (O.T. 2001-2003), the number of such cases was only four or five per term.¹⁰¹

For all four terms, the Ninth Circuit fared quite well when the Supreme Court used cases from other circuits to state the law in intercircuit conflict situations in which a Ninth Circuit case was part of the conflict. Indeed, the Ninth Circuit did exceedingly well, never having its position upheld in less than fifty percent of such situations and being upheld in *all* such cases in the 2002 Term.¹⁰² As a result, the Ninth Circuit clearly did far better in such situations than in the cases taken directly from it, for which the reversal rate remained very close to 75

¹⁰¹ In O.T. 2000, one of the intercircuit conflicts came in a case which the Supreme Court took from a state court. *C & L Enters. v. Potawatomi Indian Tribe*, 532 U.S. 411 (2001). The same was true in O.T. 2003, when the Court decided *Missouri v. Seibert*, 124 S.Ct. 2601 (2004), from the Missouri Supreme Court.

¹⁰² *See, e.g., Grutter v. Bollinger*, 539 U.S. 306 (2003) (the University of Michigan Law School affirmative action case).

percent for each term. Thus, the Ninth Circuit's "advantage" in intercourt conflict cases from other circuits over its situation when its decisions were directly reviewed ranged from 26.5 percent (O.T. 2000) to two terms in which it stood at just above 33 percent and one term (O.T. 2002) in which it was an unusual 76 percent.

When directly reviewed Ninth Circuit cases are combined with the intercourt conflicts in which the Ninth Circuit was a part, the rate at which the Ninth Circuit's position was overturned, far from being a high rate of the sort which has received opprobrium, is rather respectable. Indeed, for all four terms, the figure extends from a low of only 32.1 percent in the most recently fully-completed term (O.T. 2003) to a high of 38.6 percent (O.T. 2001), with the other terms right above one-third.

VI. WHAT MIGHT THIS MEAN?

Some intercourt conflict cases do involve one-on-one conflicts, with only one circuit on each side of the issue. An example is *Boggs v. Boggs*, which is unusual in that Justice Kennedy not only noted the conflict but stressed its importance because of the size of the circuits involved.¹⁰³ However, far from all intercourt conflict cases involve such one-on-one conflicts but instead they usually require the justices to favor the position of several courts over one or more other courts. An example, also from O.T. 1996, is the Sentencing Guidelines case of *United States v. LaBonte*,¹⁰⁴ where, in reversing the First Circuit, the justices ruled against the Ninth Circuit position, which had adopted the First Circuit view, while five other circuits had ruled in the direction the Supreme Court adopted.

Multiple courts are usually on the side of the conflict the justices uphold. Thus, in any single case, several circuits are likely to have "+" scores, particularly when the justices have taken a case that creates a conflict with several other circuits and, by reversing that ruling, uphold all the others. Thus we might well expect that any court of appeals would have a better record in intercourt conflict cases than in cases taken directly from that circuit. Yet even if we do expect any court of appeals to do better in intercourt cases than in their "direct" cases, which the

¹⁰³ *Boggs v. Boggs*, 520 U.S. 833, 839 (1997) ("The division between the Circuits is significant, for the Fifth Circuit has jurisdiction over the community property States of Louisiana and Texas, while the Ninth Circuit includes the community property States of Arizona, California, Idaho, Nevada, and Washington.").

¹⁰⁴ 520 U.S. 751 (1997). One might note that, before the Sentencing Commission had amended its commentary in the way the Supreme Court found contrary to the statute, the Ninth Circuit had joined several other circuits in interpreting what was then the Commission's language as requiring application of the enhanced maximum term, the position the Supreme Court ultimately adopted.

Court is likely to take to reverse or vacate, the data from the intercircuit conflict cases are crucial if we are to have a more complete picture of how the law of a circuit fares in the Supreme Court.

In upholding – or rejecting – the Ninth Circuit’s position in cases taken from other circuits, the Supreme Court is not likely saying anything directly about the Ninth Circuit or its regard for that court. If other courts had adopted the Ninth Circuit’s position or had taken a stance consistent with it, then a defeat for the Ninth Circuit should not be viewed as one for or against, or even aimed at, the Ninth Circuit alone. However, in those few instances in which the Ninth Circuit is the only court on one side of an intercircuit conflict, the Supreme Court’s ruling might be taken as directed at that court. With those cases perhaps kept apart, overall the Ninth Circuit’s record reported here is not so much a statement about how the justices view the Ninth Circuit itself as a statement about the extent to which the Ninth Circuit and the Supreme Court read the law in the same way, where influence is more likely to run from the Supreme Court to the Ninth Circuit than vice-versa.

When the Supreme Court rules on the law of a particular circuit in the course of deciding a case from another court of appeals, the justices’ focus is on the latter, which statistics tell us was likely reviewed in order to be overturned. Other circuits’ decisions implicated in the justices’ ruling were not their prime concern but in a way are bystanders.¹⁰⁵ With more than one case on each “side” of most intercircuit conflicts on which the justices rule, no one court’s position stands out, except perhaps that of the court whose case was reviewed for having created a conflict or having made it more visible. This would serve to submerge any one court’s association with a doctrinal position the justices considered, at least relative to the identification that would occur when the case has been taken directly from that court. It would thus limit the possible “taint” that might arise from association with the position of another

¹⁰⁵ Because judges of the courts of appeals watch each others’ decisions and are aware of whether they are creating, or joining, intercircuit conflicts, there is a dynamic interaction between the vertical dimension of the Supreme Court - court of appeals relationship (the justices accepting cases to review intercircuit conflicts) and the horizontal dimension (appeals court judges observing, and responding to, each others’ actions). See Stephen L. Wasby, *Intercircuit Conflicts in the Courts of Appeals*, 63 MONT. L. REV. 119 (2002). An example of the Supreme Court’s referring to a lower court’s acknowledgment of a circuit conflict is *United States v. Johnson*, 481 U.S. 681 (1987), where Justice Powell pointed out that the Eleventh Circuit, whose case had been accepted for review, “acknowledged that the Court of Appeals for the Ninth Circuit, ‘in a case strikingly similar to this one, has reached the opposite conclusion.’ . . . It concluded, however, that” the Ninth Circuit case “was wrongly decided.” *Id.* at 685 (citations omitted).

court, such as the Ninth Circuit, if, as some have alleged, some justices have an animus toward that court.

It has been suggested that in evaluating certiorari petitions, the justices, or their clerks serving in the cert pool, do take into account the court from which the case comes and/or the judge who wrote the opinion there,¹⁰⁶ but there is no evidence to suggest that the clerks or the justices look beyond the fact of an intercircuit conflict, as a cue for taking a case, to the courts of appeals involved in the conflict when the decision is made to grant review. Therefore we cannot be sure whether the Ninth Circuit's presence in a case, either as the source of the case or through its presence in an intercircuit conflict, is in the front of the justices' minds. Thus we cannot ascertain whether its presence makes a difference or what inference we should draw when the Supreme Court reverses the Ninth Circuit at a high rate in cases taken directly from that court, and, of particular relevance, we remain unsure of what to make of the justices' treating the Ninth Circuit so well in intercircuit conflict cases taken from other circuits. Only if we knew that those at the Supreme Court involved in the process of deciding whether to grant review did take into account the "other" courts involved in an intercircuit conflict could we begin to say that upholding a court of appeals' position in an intercircuit conflict case taken from another court was really a direct comment on the former court's position.

VII. A LAST NOTE: WHAT COMES NEXT?

It has been clear at several points in this Article that the research begun here could be carried forward and how that might be done. For one thing, instead of relying on the cases the Supreme Court cites as constituting the intercircuit conflict with which the Court is dealing, which the justices often identify only as exemplars (with an "e.g."), one could look more deeply in certiorari petitions and briefs to find other cases which were implicated in the particular circuit split the justices attempt to resolve. The study could also be extended by examining separately the cases the Supreme Court has taken directly from the Ninth Circuit which involved an intercircuit conflict. Here it would be important to determine whether the Ninth Circuit was one of two or more

¹⁰⁶ See PERRY, *supra* note 6. Another observer notes the absence of evidence that the clerks in the "cert pool" go much beyond the cert. papers in examining cases to develop their memos to the justices, so that if the cert. petition or any opposition or amicus brief flagged other circuits' decisions, the pool memo might note them but would not likely do so otherwise. Private communication to author.

circuits on one side of a circuit split or whether it “stood alone”¹⁰⁷ and perhaps had created the intercircuit split that led the justices to grant certiorari to resolve the conflict. It would also be important to look at situations in which multiple circuits were on each side of an intercircuit conflict, and to see whether the circuit in which the observer is interested – be it the Ninth Circuit or some other court of appeals – had taken the “majority position” or was in a minority stance relative to its sister circuits.¹⁰⁸

This Article is a study of one circuit, although one to which particular attention has been paid because of the rate at which cases taken directly from it have been overturned. It is hoped that this Article will prompt others to examine what has happened with respect to other circuits – to determine how the law of those circuits has fared in intercircuit conflict cases taken from other circuits by comparison with cases which go directly from the circuit of interest to the Supreme Court. The topic is certainly an important one, and one to which therefore more attention should be given in order to extend the work begun in these pages.

¹⁰⁷ For example, in O.T. 2000, in *PGA Tours v. Martin*, 532 U.S. 661 (2001), the Ninth Circuit and the Seventh Circuit, the latter in a decision the day after the Ninth Circuit’s ruling, were in conflict. However, there were cases in which the Ninth Circuit was in conflict with three or four other circuits, e.g., *Doe v. Chao*, 540 U.S. 614 (2004). There was, however, another O.T. 2000 case in which the Ninth Circuit was on one side, and *nine* other circuits were on the other. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

¹⁰⁸ For an instance in which the Ninth Circuit was among circuits adopting the “majority” position, which the Supreme Court upheld, see *Clay v. United States*, 537 U.S. 522 (2003), in which six circuits were in conflict with two others. The Ninth Circuit’s position could also be upheld when it was in the “minority” position, as in *Devlin v. Scardelletti*, 536 U.S. 1 (2002), where there were four circuits against three, including the Ninth Circuit.

