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A DECADE OF REVERSAL: THE NINTH CIRCUIT'S  
RECORD IN THE SUPREME COURT THROUGH  
OCTOBER TERM 2010

*Diarmuid F. O'Scannlain\**

Thank you for inviting me to speak with you today.

Reflecting on the beginning of another Supreme Court term next month, I thought I would take the opportunity to reflect on how cases from my own court have fared over the past decade.

I would like to start with a review of my court's performance before the Supreme Court from October term 2000 through October term 2009. I will then say a few words about the October term 2010.

I

The Ninth Circuit's record, I am afraid to say, has been strikingly poor. From the 2000 term to the 2009 term, the Supreme Court rendered full opinions on the merits in 182 cases from the Ninth Circuit.<sup>1</sup> In 148 of those cases, the Supreme Court reversed or vacated our decision.<sup>2</sup> In other words, our court got it wrong in eighty-one percent of

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1 See O'Scannlain, *supra* note \*, at 1557.

2 *Id.* at 1557–58.

its cases that the Supreme Court agreed to hear. That's a .190 batting average.<sup>3</sup>

By contrast, in the past decade, the other twelve circuits had a combined reversal rate of only seventy-one percent—ten percent lower than that of the Ninth Circuit.<sup>4</sup> Consider, as well, that over the same period, the Supreme Court's reversal rate of state-court decisions was only about seventy-six percent.<sup>5</sup> So, even the state courts, as a whole, appear to be better at interpreting federal law than the Ninth Circuit.<sup>6</sup>

Even more telling than the reversal rate itself, however, is the number of unanimous reversals. Seventy-two of the 148 Ninth Circuit cases reversed during the last decade were at the hands of a unanimous Supreme Court.<sup>7</sup> Put differently, in about one-half of all the cases in which our court was reversed, not a single justice agreed with the Ninth Circuit's decision. To quote Akhil Amar of Yale Law School: "When you're not picking up votes of *anyone* on the [Supreme] Court, something is screwy."<sup>8</sup>

To add insult to injury, our court was summarily reversed fifteen times—that is, reversed by a short, unanimous opinion, without the benefit of briefs on the merits or oral argument.<sup>9</sup> Summary reversals are, in the words of Chief Justice Roberts, "bitter medicine," because they are reserved for cases in which the lower court's error is so "apparent" that neither briefing nor argument is necessary.<sup>10</sup> Unfor-

3 *See id.*

4 *Id.* at 1558.

5 *Id.*

6 I calculated the Supreme Court's reversal rate of the other twelve circuits and of state-court decisions based on the *Harvard Law Review's* annual statistics for the 2000–2008 Terms. *See, e.g., The Supreme Court, 2000 Term—The Statistics*, 115 HARV. L. REV. 539, 546–47 tbl.II(D), (E) (2001), and my own data for the 2009 and 2010 Terms. I should also mention that the overall reversal rate at the Supreme Court in the last decade was around seventy-four percent. This rate is skewed upward because it includes the disproportionately high Ninth Circuit reversal rate. Accordingly, I have not highlighted this statistic, because it obscures the extent to which the Ninth Circuit's reversal rate is an outlier.

7 O'Scannlain, *supra* note \*, at 1558.

8 Akhil Reed Amar & Vikram David Amar, *Does the Supreme Court Hate the Ninth Circuit? A Dialogue on Why That Appeals Court Fares So Poorly*, FINDLAW (Apr. 19, 2002), <http://writ.news.findlaw.com/amar/20020419.html>.

9 O'Scannlain, *supra* note \*, at 1558.

10 *Spears v. United States*, 555 U.S. 261, 268 (2009) (Roberts, C.J., dissenting).

tunately, approximately one in ten Ninth Circuit cases reviewed by the Supreme Court results in a summary reversal.<sup>11</sup>

While about half of the cases reversing the Ninth Circuit were decided by a unanimous court, a mere fourteen percent were decided by a five-to-four vote along traditional “conservative-liberal” lines.<sup>12</sup> Thus, though it is true that there have been five so-called “conservatives” on the court over the past decade, the fact remains that in the vast majority of cases, it is not just the conservatives who are voting against the Ninth Circuit. In the 2002 term, for example, the Supreme Court reversed the Ninth Circuit eighteen times. Justice Breyer voted to reverse the Ninth Circuit eleven of those times.<sup>13</sup> Given the number of unanimous reversals, as well as the general frequency with which even so-called “liberal” justices vote to reverse, it is safe to say that reversing the Ninth Circuit is much more than just a matter of ideology.

It is also worth noting that Justice Sonia Sotomayor’s arrival at the court in 2009 has not improved the Ninth Circuit’s success rate. In the 2009 term, the Supreme Court rendered full opinions on the merits in fifteen cases from the Ninth Circuit.<sup>14</sup> Eleven of the fifteen were reversals, and five of the reversals were unanimous.<sup>15</sup>

Beyond reversal rates, another metric of a circuit’s performance is the amount of times the Supreme Court grants certiorari in its cases. After all, because the Supreme Court often grants cert because it senses a problem, a circuit that is doing well, arguably, receives relatively few writs of certiorari. Sadly, the Ninth Circuit does poorly in this area as well.

In the past decade, about thirty percent of the Supreme Court’s writs of certiorari to federal courts of appeals were issued to the Ninth Circuit.<sup>16</sup> Even though the Ninth is the largest circuit and decides roughly one-fifth of the cases before the federal appellate courts, thirty percent is still a disproportionately large share of cert grants.

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11 In addition to the fifteen summary reversals by a *unanimous* Supreme Court during the 2000–2009 Terms, there were three summary reversals by a *non-unanimous* Court during the same period. O’Scannlain, *supra* note \*, at 1559 n.5.

12 Twenty-one of the Ninth Circuit’s 148 reversals were at the hands of a 5-4 vote along traditional “conservative-liberal” lines. *Id.* at 1559 n.6.

13 *Id.* at 1559.

14 *Id.* at 1562.

15 *Id.*

16 See Roy E. Hofer, *Supreme Court Reversal Rates: Evaluating the Federal Courts of Appeals*, 2 LANDSLIDE, no. 3, Jan./Feb. 2010, at 4.

## II

There is one area in which the Ninth Circuit's record is especially troubling: writ of habeas corpus cases. It seems that at least once every term, the Supreme Court has to remind us about the proper standard of review in habeas proceedings under the Antiterrorism and Effective Death Penalty Act (affectionately called "AEDPA").<sup>17</sup>

For those unfamiliar with the statute, AEDPA prohibits federal courts from granting habeas relief to state prisoners on constitutional claims adjudicated in state court, unless the state-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court,"<sup>18</sup> or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."<sup>19</sup> Review of state-court decisions under AEDPA is thus highly deferential; for habeas relief to be warranted, the state court decision "must be shown to be not only erroneous, but objectively unreasonable."<sup>20</sup>

This rule reflects the deference that federal courts owe to the states as a matter of federalism. It also reflects the fact that there are simply too many state criminal convictions and not enough federal judges for federal courts to give each state criminal defendant a full rehearing under habeas corpus.

## A

But, again and again, the Supreme Court is forced to remind us of this rule. For instance, recently, the Supreme Court determined that "the Ninth Circuit did not observe [the] distinction"—between a decision that is "unreasonable," and a decision that is merely "incorrect."<sup>21</sup> Instead, the Supreme Court concluded that the Ninth Circuit, in granting a state criminal defendant a new trial, inappropriately "substituted its own judgment for that of the state court."<sup>22</sup>

In another instance, a case called *Waddington v. Sarausad*,<sup>23</sup> the Ninth Circuit took up the cause of a defendant who had been convicted of acting as the driver in a drive-by shooting outside a Seattle

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17 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2254(d) (2006)).

18 28 U.S.C. § 2254(d)(1).

19 28 U.S.C. § 2254(d)(2).

20 *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (per curiam).

21 *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (per curiam), *rev'g* 288 F.3d 1097 (9th Cir. 2002).

22 *Id.*

23 555 U.S. 179 (2009).

school that arose from a gang dispute.<sup>24</sup> A jury in a Washington state court found the defendant guilty of second degree murder, but the Ninth Circuit determined that the defendant deserved a new trial, because one of the jury instructions at trial was too ambiguous.<sup>25</sup> The Supreme Court reversed, and criticized the Ninth Circuit for “dissect[ing]” and “exaggerat[ing]” parts of the record to justify its ruling.<sup>26</sup> In short, the Supreme Court asserted that the Ninth Circuit “failed to review the state courts’ [decisions through a] deferential lens.”<sup>27</sup>

Or take *Uttecht v. Brown*.<sup>28</sup> In that case, a jury in Washington State found the defendant guilty of a horrendous murder and determined unanimously that he should receive the death penalty.<sup>29</sup> The Ninth Circuit, however, overturned the sentence, because our court believed that the Washington trial court improperly excluded a potential juror who had expressed misgivings about the death penalty.<sup>30</sup>

The Supreme Court again reversed and held that the Ninth Circuit did not accord the Washington state court enough deference and thereby “failed to respect the limited role” the federal courts should play in reviewing state criminal convictions and sentences.<sup>31</sup> This passage echoed the Supreme Court’s sentiments in a prior case which also reversed the Ninth Circuit. In that case, the court explained that AEDPA “leaves primary responsibility with the state courts” for determining who has violated state laws and punishing the offenders and “authorizes federal-court intervention only when a state-court decision is objectively unreasonable.”<sup>32</sup>

## B

So, why does the Supreme Court have such difficulty compelling the Ninth Circuit to follow AEDPA? The answer, in part, can be gleaned from the Constitution itself. Article III creates one “Supreme Court” and leaves it to Congress whether to create other federal courts, described as “inferior” to it.<sup>33</sup> As Professor Henry Hart of

24 *Id.* at 181–82.

25 *Id.* at 182.

26 *Id.* at 195.

27 *Id.* at 194.

28 551 U.S. 1 (2007).

29 *Id.* at 4–5.

30 *Id.* at 5. See *Brown v. Lambert*, 451 F.3d 946 (9th Cir. 2006).

31 *Uttecht*, 551 U.S. at 10.

32 *Woodford v. Visciotti*, 537 U.S. 19, 25, 27 (2002) (per curiam), *rev’g* 288 F.3d 1097 (9th Cir. 2002).

33 U.S. CONST. art. III, § 1.

Harvard Law School put it, this structure implies that one of the Supreme Court's "essential role[s]" is to maintain the uniformity of federal law.<sup>34</sup> But, as Professor Amar has noted, the Supreme Court is "limited in [its] ability to discipline . . . lower court judges."<sup>35</sup>

The Supreme Court does not enjoy control of the judiciary in the way that the president controls the executive branch. That is, the Justices cannot appoint, promote, or remove lower judges. In that sense, the Supreme Court is weak compared to the high courts in some European systems where the judiciary is a kind of "self-sustaining civil service bureaucracy."<sup>36</sup> Similarly, the Supreme Court cannot control the judiciary in the way that a manager controls his employees. It cannot reduce salaries, incentivize through bonuses, or offer stock options. Therefore, while the federal judiciary is arranged as a hierarchy, the Supreme Court lacks the motivational tools frequently employed by other hierarchical superiors, so ensuring compliance by lower courts in adhering to its doctrine proves relatively difficult. Instead, the Supreme Court may only control the inferior courts through reviewing their decisions on a case-by-case basis.<sup>37</sup> To borrow a phrase from economics and political science, the Supreme Court and lower courts face a "principal-agent" dilemma, and the Supreme Court's primary tool in controlling lower courts is the reversal power. The Supreme Court is well aware of this sanctioning mechanism. In a seminal piece describing the Court's certiorari process, H.W. Perry noted that Supreme Court clerks "frequently talked about the need to 'slap the wrist' of a judge below" through reversal.<sup>38</sup>

This institutional structure makes it difficult to compel obedience to broad principles whose application is very fact-dependent, hence the Supreme Court's difficulty controlling the Ninth Circuit's AEDPA jurisprudence. There is an enormous volume of habeas cases each year.<sup>39</sup> Indeed, in 2010, almost 20,000 habeas petitions were filed in

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34 Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953).

35 Amar & Amar, *supra* note 8, at 3.

36 *Id.*

37 *Id.*

38 H.W. PERRY, JR., DECIDING TO DECIDE 267 (1991).

39 During OT2009, federal district courts heard 20,564 federal habeas cases, including capital and non-capital cases. See STATISTICS DIV., JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2010 ANNUAL REPORT OF THE DIRECTOR 145 (2010). During that same period, federal circuit courts (excluding the Federal Circuit) heard 6512 federal habeas cases, including capital and non-capital cases. The circuit courts heard a total of 43,737 cases during this time. Thus, the habeas cases accounted for seventeen percent of the docket. See *id.* at 123–24.

federal court, and habeas cases constituted seventy percent of the cases decided in the federal courts of appeals.<sup>40</sup>

Moreover, habeas petitions often turn on the particular facts of the case. For instance, habeas courts must often determine whether a particular error was prejudicial or whether a particular decision of the petitioner's trial counsel was unreasonable. For questions such as these, there will almost never be Supreme Court authority that is squarely on point. Accordingly, despite all of its statements about the importance of AEDPA deference, the Supreme Court is forced continually to exercise certiorari review in order to compel the Ninth Circuit to apply those principles to individual cases.

### III

In the most recent Supreme Court term, from October 2010 to June 2011, our record has arguably gotten worse. The Supreme Court issued opinions in twenty-five cases from the Ninth Circuit, and has reversed us in eighteen of those cases, twelve of which were unanimous.<sup>41</sup> While our overall reversal rate in the 2010 term is nearly ten percent below that of the previous decade, in context the Ninth Circuit's performance remains underwhelming. First, our seventy-two percent reversal rate in the 2010 term far exceeded the sixty-four percent reversal rate of the remaining circuit courts *combined*, closely tracking the Ninth Circuit's historical distance from other circuits' reversal rates.<sup>42</sup> Second, approximately one out of every two Ninth Circuit cases reviewed by the Supreme Court was reversed unanimously.<sup>43</sup> This value is most significant in demonstrating just how distant the Ninth Circuit's reasoning has diverged from that of *all* nine justices on the Supreme Court. In fact, fifteen percent of the Supreme Court's entire October term 2010 docket was composed of unanimous reversals of the Ninth Circuit, a staggering number of sanctions for our noncompliance.<sup>44</sup>

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40 See *id.* at 145.

41 See *Circuit Scorecard*, SCTOUSBLOG (June 28, 2011), [http://sblog.s3.amazonaws.com/wp-content/uploads/2011/05/SB\\_circuit\\_scorecard\\_050311.pdf](http://sblog.s3.amazonaws.com/wp-content/uploads/2011/05/SB_circuit_scorecard_050311.pdf). Note that *Greene v. Camreta*, 588 F.3d 1011 (9th Cir. 2009), *vacated in part*, 131 S.Ct. 2020 (2011), is not included in my October term 2010 reversal rate of the Ninth Circuit, because the case was mooted *after* the Ninth Circuit reached its judgment.

42 The Supreme Court issued decisions in forty-five cases reviewing circuit courts (excluding the Ninth Circuit) during the 2010 term and reversed or vacated the circuit court decision in twenty-nine of those cases. See *Circuit Scorecard*, *supra* note 41.

43 See *Voting Alignment—All Cases*, SCOTUSBLOG (June 28, 2011), [http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/SB\\_alignment\\_OT10\\_final.pdf](http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/SB_alignment_OT10_final.pdf).

44 For a convenient list of all OT2010 Supreme Court decisions noting how each Justice voted, see *id.*

I hate to sound like a broken record, but I would be remiss if I did not point out that six of our eighteen reversals in the 2010 term were in habeas cases, and five of those six were unanimous.<sup>45</sup> It appears that reminding the Ninth Circuit of its limited role in habeas review has become a significant portion of the Supreme Court's docket. And the Supreme Court does not seem too pleased to have to play this role. Indeed, the Court's rhetoric toward the Ninth Circuit has heated up. For example, just this past spring the Supreme Court called my court's terse rejection of a state court factual finding "as inexplicable as it is unexplained."<sup>46</sup>

## A

But two cases that the Supreme Court handed down in January 2011 are particularly notable. The first is *Swarthout v. Cooke*.<sup>47</sup> This case ended our circuit's brief experiment in acting as California's parole board of last resort. In California, prisoners are entitled to parole after serving their minimum sentences unless the board of parole determines that "the prisoner will pose an unreasonable risk of danger to society if released from prison."<sup>48</sup>

California law provides prisoners with a right to a parole hearing; various procedural guarantees and rights before, at, and after the hearing; and a right to subsequent hearings at set intervals if the board denies parole.<sup>49</sup> California law also requires that the board's decisions be supported by "some evidence" that the prisoner poses an unreasonable danger to the public.<sup>50</sup> A prisoner who is denied parole may challenge that decision in state court on the grounds that the board's decision was not supported by "some evidence" of future dangerousness.<sup>51</sup>

In a series of 2010 cases, the Ninth Circuit determined that California's "some evidence" standard is incorporated into the Due Process Clause of the Fourteenth Amendment.<sup>52</sup> Thus, federal habeas

45 See *OT10 Case List*, SCOTUSblog (June 28, 2011), [http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/SB\\_caselist\\_OT10\\_final.pdf](http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/SB_caselist_OT10_final.pdf).

46 *Felkner v. Jackson*, 131 S.Ct. 1305, 1307 (2011). In addition, the Supreme Court went on to hold that there was "simply no basis for the Ninth Circuit to reach [its] conclusion, particularly in such a dismissive manner." *Id.*

47 131 S. Ct. 859 (2011).

48 CAL. CODE REGS. tit. 15, § 2402(a) (2012).

49 See CAL. PENAL CODE, tit. 1, § 3041.5 (2012).

50 See *id.*; *In re Rosenkrantz*, 59 P.3d 174, 201 (Cal. 2002).

51 See *Rosenkrantz*, 59 P.3d at 210.

52 See *Pirtle v. Cal. Bd. of Prison Terms*, 611 F.3d 1015, 1020 (9th Cir. 2010) ("California's parole scheme gives rise to a cognizable liberty interest in release on

courts in the Ninth Circuit began reviewing California parole decisions for compliance with California's "some evidence" requirement.<sup>53</sup>

Even apart from the Ninth Circuit's dubious interpretation of the due process clause, its decision to review the merits of parole applications raised a number of practical problems. First, predicting whether a prisoner is likely to be dangerous in the future is an extremely complex task, and it seemed highly doubtful that we would be able to develop judicially manageable standards for determining how much evidence of future dangerousness constitutes "some evidence." Second, in a circuit that is already overworked and understaffed, we were inviting an enormous amount of new and difficult parole review cases.

For these reasons, among others, I joined a dissent from the denial of rehearing *en banc* written by Judge Sandra Ikuta, which called the decision to review California parole determinations "one of our oddest habeas decisions to date," and asserted that "the Ninth Circuit has not just misinterpreted the language of AEDPA, but has actually rewritten it."<sup>54</sup>

Well, I think you know where this is going. The Supreme Court summarily reversed us, and did so in colorful language, I might add. The Court said that "[t]he short of the matter" is that reviewing California parole decisions for compliance with California's "some evidence" standard "is no part of the Ninth Circuit's business."<sup>55</sup> And that was the end of that.

## B

But perhaps the most significant habeas reversal of our court to date came in *Harrington v. Richter*,<sup>56</sup> also decided this previous January. Joshua Richter was convicted of murder in California state court.<sup>57</sup> Richter brought a habeas petition claiming that his trial

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parole," which "encompasses the state-created requirement that a parole decision must be supported by 'some evidence' of current dangerousness." (internal quotation marks and citations omitted)); *Pearson v. Muntz*, 606 F.3d 606, 609 (9th Cir. 2010) ("[C]ompliance with the ['some evidence'] requirement is mandated by federal law, specifically the Due Process Clause.").

53 See *Pearson*, 606 F.3d at 609 (holding that "federal courts [must] examine the reasonableness of [California courts'] application of the California 'some evidence' requirement, as well as the reasonableness of [those courts'] determination of the facts in light of the evidence").

54 *Pearson v. Muntz*, 625 F.3d 539, 541 (9th Cir. 2010) (Ikuta, J., dissenting from denial of rehearing *en banc*) (internal citation omitted).

55 *Swarthout v. Cooke*, 131 S.Ct. 859, 863 (2011).

56 131 S. Ct. 770 (2011).

57 *Id.* at 777.

counsel was deficient in failing to consult blood evidence experts in planning a trial strategy and in preparing to rebut expert evidence the prosecution might—and later did—offer.<sup>58</sup> Richter’s claim was denied by the California states courts, a federal district court, and a Ninth Circuit panel.<sup>59</sup> A Ninth Circuit en banc panel, however, granted Richter’s habeas petition.<sup>60</sup>

The Supreme Court unanimously reversed. The Court began its opinion by declaring that judicial “resources are diminished and misspent, . . . and confidence in the writ [of habeas corpus] and the law it vindicates [are] undermined, if there is judicial disregard for the sound and established principles that inform its proper issuance. That judicial disregard,” the Court continued, “is inherent in the opinion of the Court of Appeals for the Ninth Circuit here under review.”<sup>61</sup> Then, after stressing AEDPA’s extremely deferential standard, the court added, in an almost scolding tone, that “[i]t bears repeating that even a strong case for relief does not mean the state court’s contrary conclusion was unreasonable. If this standard is difficult to meet,” the Court explained, “that is because it was meant to be.”<sup>62</sup>

I think there are three points worth stressing about *Richter*. The first, and most obvious, is the harsh tone of the opinion. The tone could simply reflect the Court’s frustration with having to reiterate the same AEDPA principles year after year only to have them ignored by the same court of appeals, or perhaps, something more deliberate is going on. It could be that, recognizing that it cannot correct every misuse of the writ, the Supreme Court has chosen to use a shaming mechanism by which it picks the worst judicial offenders each year and loudly points out their errors for the public to see. Modern political science research supports this general proposition: the Supreme Court will frequently utilize its discretionary docket to strategically audit cases from ideologically distant lower courts.<sup>63</sup>

Second, the *Richter* court focused directly on its difficulty in policing general standards such as the requirements to make out an ineffective assistance of counsel claim. It attempted to solve this problem by requiring “a specific legal rule” that has been “squarely established”

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58 *Id.*

59 *Id.* at 782–83.

60 *See id.* at 776–77.

61 *Id.* at 780.

62 *Id.* at 786 (internal citations omitted).

63 *See generally* Charles M. Cameron et al., *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court’s Certiorari Decisions*, 94 AM. POL. SCI. REV. 101 (2000) (delineating a study about how the Supreme Court uses its power of review to sanction lower courts).

by the Supreme Court in order to justify habeas relief.<sup>64</sup> The Court said that “evaluating whether a rule application was unreasonable requires considering the rule’s specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.”<sup>65</sup> Moving to the case at hand, the Court found that, while “in some cases counsel would be deemed ineffective for failing to consult or rely on experts, but even that formulation is sufficiently general that state courts would have wide latitude in applying it.”<sup>66</sup>

Third, and most importantly, the *Richter* Court traced AEDPA deference back to first principles of habeas jurisprudence in a way which, I think, went further than the Court has ever gone in this area. The Court asserted that AEDPA “stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings.”<sup>67</sup> The Court stated that state court proceedings were “the central process” for habeas review and portrayed AEDPA as a “modified res judicata rule” which bars federal court relitigation of habeas claims unless there is “[an] extreme malfunction[ ] in the state criminal justice system[ ].”<sup>68</sup>

The implication of saying that Congress “stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings,” I think, is that Congress could have gone further and imposed a complete bar on federal court relitigation of habeas claims. This represents a fundamentally different view of the necessary role of federal courts in vindicating the rights guaranteed by the Suspension Clause than that adopted by some of the judges on my court.

For instance, my colleague, Judge Stephen Reinhardt, recently published an article in the *UC Davis Law Review*,<sup>69</sup> in which he describes AEDPA, correctly I might add, as forbidding federal courts from overturning a state court habeas determination “unless the ruling of the state court was not only wrong, but unreasonably so.”<sup>70</sup> He then asks, rhetorically, “Can this really be the law? Is AEDPA constitutional?”<sup>71</sup> The Supreme Court’s answer in *Richter* is a resounding “yes.” Judge Reinhardt appears to view the Suspension Clause as guar-

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64 *Richter*, 131 S. Ct. at 786.

65 *Id.*

66 *Id.* at 789.

67 *Id.* at 786.

68 *Id.*

69 Stephen Reinhardt, *Life to Death: Our Constitution and How It Grows*, 44 U.C. DAVIS L. REV. 391 (2010).

70 *Id.* at 408.

71 *Id.*

anteeing every state prisoner a de novo review of his conviction in federal court. By contrast, *Richter* tells us that state courts are fully capable of vindicating the right to habeas relief, and that Congress has wide latitude in restricting the involvement of the federal courts in this area.

#### IV

Given the Ninth Circuit's apparent difficulty in following Supreme Court precedent or properly interpreting many relatively straight-forward questions of federal law, we now come to the question, "What can be done about it?" All circuit courts have internal mechanisms in order to spot legal errors and correct them accordingly, central of which is the rehearing en banc process. My court will entertain en banc proceedings in cases where review is either "necessary to secure or maintain uniformity of the court's decisions" or there is a question of "exceptional importance."<sup>72</sup> While the en banc process is helpful, it frequently fails to spot and to correct all of our circuit's legal errors. In fact, three of the Ninth Circuit cases reversed by the Supreme Court in the 2010 term were decided by an en banc court.<sup>73</sup>

While en banc courts are undoubtedly a useful tool in ensuring doctrinal compliance with the Supreme Court and with our own circuit precedents, it is almost inevitable that the Supreme Court will have to intervene to enforce its doctrine. Empirical research has long suggested that, in deciding which cases to take, the Supreme Court relies on informal "cues" that lower information costs and winnow out marginal cases from those that provide the best vehicles for doctrinal enforcement.<sup>74</sup> For example, an amicus brief filed by the Solicitor General has a significant positive relationship to the eventual granting of cert, even controlling for other variables, thus suggesting that the Supreme Court pays close attention to such briefs.<sup>75</sup>

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72 FED. R. APP. P. 35(a)(1)-(2).

73 See RORY K. LITTLE & MICHAEL GAWLEY, ANNUAL REVIEW OF THE SUPREME COURT'S TERM, CRIMINAL CASES 40-46 (2011), available at <http://www.uchastings.edu/faculty-administration/faculty/little/2011-SupremeCourtSummariesFinal.pdf>.

74 See Joseph Tanenhaus et al., *The Supreme Court's Certiorari Jurisdiction: Cue Theory*, in JUDICIAL DECISION MAKING 111, 111-32 (Glendon Schubert, ed., 1963).

75 See Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1120 (1988) ("While we have not yet had the opportunity to analyze possible variations in the significance of briefs from all of these different types of organizations, we have isolated one important set of amicus briefs—those filed by the U.S. solicitor general. Because of the prestige

I propose that there is another mechanism available internally within my court which can alert the Justices to Ninth Circuit error and act as a stabilizing force for the rule of law: the dissent from order denying rehearing en banc. When my court fails to hear a case en banc, a judge may write a dissent from that order denying the rehearing. The Ninth Circuit's chief judge, Alex Kozinski, has labeled these dissenting opinions as "dissentials."<sup>76</sup> Consider briefly this previous Supreme Court term. Of the twelve unanimous reversals of the Ninth Circuit, four of those came from cases that had elicited a dissent from at least one of our members.<sup>77</sup>

Long-term tracking of dissental-writing within the Ninth Circuit suggests that dissentials often garner the attention of the Supreme Court. In the past twenty-five years, all currently-active Ninth Circuit Judges, in addition to now-Senior Judges Trott and Kleinfeld, have written 220 combined dissentials.<sup>78</sup> In the 152 cases in which at least one Ninth Circuit judge wrote a dissental, the losing litigant petitioned for cert at the Supreme Court.<sup>79</sup> Of those 152 cert petitions, sixty-five have resulted in a cert grant.<sup>80</sup> Therefore, an astounding 42.8% of all cert petitions stemming from Ninth Circuit cases involving a written dissental are granted by the Supreme Court.<sup>81</sup> As recently as the 2008 term, only roughly 1.1% of all cert petitions were granted by the Court.<sup>82</sup> Relative to this baseline rate of cert grants, a dissental by a Ninth Circuit judge increases a litigant's chance of receiving a cert grant by roughly 4200%.

Of course, it may often be that the significance or the incorrectness of a case both attracts a dissental and a cert grant. And it, admittedly, is quite difficult to disentangle these variables, but a few more statistics may be helpful in this regard. In fifty cases heard by the Supreme Court in which there was a Ninth Circuit dissental, the judgment of a Ninth Circuit panel has been reversed in all but three cases, far exceeding even the Ninth Circuit's typically high reversal rate.<sup>83</sup> Furthermore, sixty percent of those fifty cases were not only reversed,

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and experience of the solicitor general's office, its involvement often carries considerable influence in the Court's certiorari decisions.".)

76 See *In re Corrinet*, 645 F.3d 1141, 1146 (2011)

77 Diarmuid F. O'Scannlain, *Ninth Circuit Statistics: 1986–2011* (Aug. 1, 2011) (on file with author).

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.*

82 *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2272 (2009) (Roberts, C.J., dissenting).

83 O'Scannlain, *supra* note 77.

but were reversed *unanimously*.<sup>84</sup> To place that value somewhat in perspective, the Supreme Court unanimously reversed the lower court in only thirty-four percent of its cases this past term, excluding the Ninth Circuit's unanimous reversals in cases featuring a dissent.<sup>85</sup> Because the Supreme Court's treatment of Ninth Circuit cases involving a dissent appears to be qualitatively different from the other cases on its docket, I am inclined to believe that efforts within the Ninth Circuit to dissent from ill-founded denials of rehearing en banc are not for naught. While the burdens associated with undertaking a dissent are not insignificant and some judges have alleged that they are detrimental to collegiality on my court, the jurisprudential benefits that come with them more than merit a continuing and vibrant community of dissental writing on the Ninth Circuit. Expanding that community and coordinating dissental authorship to maximize their necessitated output are the next best steps in preserving the rule of law throughout the Ninth Circuit and correcting the legal errors that have plagued my court in recent years.

## V

In closing, I am reminded of a story I have heard about one trial judge within our circuit. The judge was eating lunch when her enthusiastic law clerk came running into her office. "Congratulations, your honor," the law clerk exclaimed, "you have been affirmed by the Ninth Circuit!" The judge thought for a second, and then responded, "Yeah, well, . . . I still think I'm right!"

I wish it were different, but the joke fairly reflects my court's unfortunate record before the Supreme Court. Hopefully, we will respond to the harsh words we received from the Supreme Court last term and reduce our reversal rate in the years to come.

But only time will tell.

Thank you.

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84 *Id.*

85 *Id.*