

Time for a Divorce? Splitting the Ninth Circuit Court of Appeals

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Abstract

Much attention has been focused on the Ninth Circuit Court of Appeals. To some degree, the attention has been self-created, with high profile decisions on three-strikes laws, punch-card ballots, and the constitutionality of the Pledge of Allegiance generating substantial media coverage and reaction from elected officials. This attention mirrors an ongoing debate about the wisdom of splitting the Ninth Circuit into two smaller circuits. Arguments about splitting the Circuit center on the source of the Circuit's high reversal rate. There are two competing explanations for that reversal rate: the judges of the Ninth Circuit are more ideologically distant from the Supreme Court than judges on other Circuits, or the size of the Ninth Circuit prevents the circuit majority from correcting "wrong" decisions by panels, a problem augmented by the Ninth Circuit's reliance on the limited *en banc* procedure.

This paper sorts out the cause of the Ninth Circuit's reversal rate by looking at the Court's relationship with the Supreme Court over the past twenty years. By looking at merits reversals, including unanimous reversals, and attempting a broader assessment of the Ninth Circuit's status vis-à-vis the other circuits and the Supreme Court, I ultimately argue that both size (though indirectly) and ideological orientation influence the Ninth Circuit's high reversal rate. These findings have broad implications for how we model the behavior of court of appeals judges and their relationship with the Supreme Court.

Time for a Divorce? Splitting the Ninth Circuit Court of Appeals

Recent high-profile decisions by the Ninth Circuit, most notably the removal of “under God” from the Pledge of Allegiance¹ and the temporary halt of the 2003 California gubernatorial recall election², have generated calls to split the Circuit into at least two new circuits. Supporters of the split make two primary arguments. Some believe that the Ninth Circuit, by far the largest circuit in the country, is too large to create and maintain a coherent body of law to govern its territory. The Ninth Circuit, according to this argument, has passed some tipping point beyond which no judge can realistically be expected to keep pace with the law being created by the myriad panels that decide cases, spread over more than one million square miles. Others argue that the decisions made by the Ninth Circuit are more liberal than decisions made by other circuits and that conservative regions of the Circuit are governed by law made by judges who do not share their values. Politicians from Arizona to Alaska have expressed interest in different splits of the Ninth Circuit, with the undercurrent of many of these proposals to relieve their states of the perceived liberal rulings of the Ninth Circuit judges.

The controversy over the source of the Ninth Circuit’s status illustrates several features of interest beyond the long-running debate over whether and how the Circuit should be split. The continuing controversy rests on an important indicator of judicial quality, the frequency with which a circuit is reversed by the Supreme Court. More so, perhaps, than decisions which generate public ire, critics of the Ninth Circuit (including, on occasion, its own judges) point to the Circuit’s frequency of reversals by the Supreme Court as evidence that the Circuit needs to be split. The source of this high reversal rate, though, offers insight in to our understanding of how court of appeals judges behave and the extent to which influences in the environment of

¹ *Newdow v. US Congress*, 328 F.3d 466.

² *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 882; rev’d *en banc* 344 F.3d 914.

appellate judges affect their behavior. Ascertaining the source of the Ninth Circuit's high reversal rate, whether it be the size of the Circuit or the ideological disagreement with the Supreme Court, offers the prospect of helping to resolve a tension between visions of the nature of decisions made by appellate judges.

In this paper, I explore the arguments behind the possible sources of the Ninth Circuit's reversal rate and the relationship between those sources and how scholars view the behavior of court of appeals judges. In short, an ideological explanation of the reversal rate for the Ninth Circuit (or, by extension, any other circuit) suggests that those who view court of appeals judges as motivated by their policy preferences offer the most compelling explanation of the Ninth Circuit's high reversal rate. If, however, there is a relationship between size of a circuit and the number of cases the Supreme Court reverses, then those who argue that court of appeals judges are sensitive to efforts to make good law (but fail due to circuit size) may have a more compelling argument. Ultimately, of course, neither vision of appellate judging exists exclusive of the other, but understanding the relative role of these factors may facilitate a better understanding of what factors are relevant to the decision-making of court of appeals judges.

The Reversal Rate of the Ninth Circuit and Possible Explanations

Over the past 50 years, the Ninth Circuit has been reversed by the Supreme Court an average of 10.78 times. The next closest circuit, the Fifth Circuit, was reversed an average of 7.42 times. The frequency of the Ninth Circuit's reversals has been even greater in recent times: over the past 21 terms (since the Fifth Circuit was split), the Ninth Circuit has been reversed an average of 14.48 times, with the next closest circuit (the Fifth) reversed 5.14 times per term over the same time period. This disparity grows even more impressive if one considers that the Supreme Court's caseload has been decreasing steadily since the late 1980s. Figure 1 plots the number of reversals per term for the Ninth Circuit (a three-year moving average), as well as the

proportion of Supreme Court reversals that come from Ninth Circuit decisions. Even using a moving average, one can observe the familiar “spikes” in Ninth Circuit reversal frequencies in the 1983 and 1996 terms (Herald 1998; Wasby 1998).

Figure 1 Here

While the reversal rate itself may be sufficient cause of concern, criticism of the Ninth Circuit also focuses on the frequency with which the reversal by the Supreme Court is unanimous. Taking the subset of cases used to calculate Figure 1 that were decided by 8-0, 8-1 and 9-0 votes (allowing for the occasional dissent), it is also clear that the number of unanimous reversals for the Ninth Circuit is astonishingly high, with proportions often greater for unanimous reversals than for reversals decided by a closer vote.

Figure 2 Here

There is little dispute that the Ninth Circuit is reversed more frequently than other circuits, and that, even if one accounts for the workload of the circuit, the frequency with which the Ninth is reversed is an anomaly (Posner 2000; but see Farris 1997). Two recent congressional reviews of the Ninth Circuit effectively highlight the different possible explanations of the frequency of reversals of Ninth Circuit cases. The first attempt, which culminated in the report of the Commission on Structural Alternatives for the Federal Courts of Appeals (the White Commission), focused on the impact of the circuit’s size on its ability to maintain uniform law within the circuit. The Ninth Circuit, with 28 authorized judgeships, has 11 more judgeships than the next largest Circuit (the Fifth) and has two more judgeships than the Fifth Circuit did at the time it was split into two circuits.

According to the most common line of argument, the problem with the Ninth Circuit is not just size but the inadequacy of devices the Ninth Circuit employs to maintain uniformity of panel decisions. Federal law permits circuits with more than 15 active judges to use a limited *en*

banc procedure, which means that *en banc* review is not handled by all of the active judges, but by a subset of the active judges which may not leave any of the judges from the panel decision on the *en banc* panel. The Ninth Circuit is the only circuit that employs this device. Criticism of the Ninth Circuit focuses on the inability of the limited *en banc* to act as an effective substitute for full *en banc* review. Justice Scalia summarized the thrust of this argument when he said that there is a “disproportionate segment of [the Supreme] Court’s discretionary docket that is consistently devoted to reviewing Ninth Circuit judgments, and to reversing them by lop-sided margins, [which] suggests that [the limited *en banc*] error reduction function is not being performed effectively” (Scalia 1998).

Scalia’s argument has received empirical support. Posner (2000) studied the relationship between circuit size and the frequency a circuit is reversed.³ He concluded that a positive relationship did, in fact, exist. Of interest, the Ninth Circuit’s rate of summary reversal exceeded even what its size would predict. There are several possible explanations for Posner’s results, which I will turn to in more detail, but this represents the core of one of the most common arguments about the source of the Ninth Circuit’s high reversal rate.

Previous work on *en banc* review finds a positive relationship between *en banc* review and Supreme Court review of a case. George and Solimine (2001), looking at the Second, Fourth and Eighth Circuits, found that *en banc* review of a case increases the likelihood of review by the Supreme Court, suggesting that the courts of appeals and the Supreme Court agree (at least to an extent) which cases pose interesting and difficult questions (196). If the intent of the *en banc* review by the circuit is to “correct” a decision and avoid Supreme Court reversal, then George and Solimine’s findings would be difficult to explain. This would suggest

³ Posner’s dependent variable was the number of summary reversals, which he takes as an indicator of judicial quality.

that the use of the *en banc* review by the Ninth Circuit would not be the cause of its high reversal rate (as its function—identifying important cases—is no different than a full *en banc* in other circuits).

Hellman (2000; see also Wasby 2001) tests the proposition that the high reversal rate of the Ninth Circuit is due to the absence of an effective internal mechanism to reverse errant panel decisions before they make it to the Supreme Court⁴. Hellman compared Ninth Circuit decisions reversed by the Supreme Court between 1994 and 1998 to the cases decided *en banc* in the same time period. He concludes that the fault for the reversal rate does not appear to lie with the failure of the *en banc* process. He notes that “there is a wide gap between the Supreme Court’s perception of the Ninth Circuit panel decisions that are both wrong and important and the perception of the Ninth Circuit’s own judges” (2000, 444). Hellman suggests, in agreement with Herald (1998), that the source of this perceptual gap is ideological disagreement between the Ninth Circuit decision and the intention of the Supreme Court.

This suggests the second argument for the frequency of reversals of the Ninth Circuit: ideological disagreement between the Supreme Court and the Ninth Circuit—in particular, persistent Ninth Circuit liberalism in the presence of increasing Supreme Court conservatism. This is the thrust of the latest congressional effort to split the Ninth Circuit. Representative Michael Simpson (R-Idaho), sponsor of the Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003, illustrated this point in his reaction to the *Newdow* decision. He said that *Newdow* “clearly demonstrates the circuit is too large and no longer accurately

⁴ Hellman, a long-time defender of the Ninth Circuit, points out that the decision to rehear a case *en banc* is handled the same way as in other circuits—with all active judges (and panel senior judges) having the opportunity to vote on whether a case should be taken *en banc*.

represents the people of the intermountain West... I think it stands as overwhelming proof that this court's illnesses cannot be easily mended.”⁵

The undercurrent of ideological disagreement has strengthened, in part to the unpopular *Newdow* decision by the Ninth Circuit, and this ideological disagreement remains the focus of most journalistic accounts of the Ninth Circuit (Egelko 2002; Kasindorf 2003; Liptak 2002; Mauro 1996, 1997; Ringel 2003; Walsh 2003) and editorial commentary (Amar 2003; Blake and Hobson 2003; Levey 2003; Lithwick 2003). This coverage of the Ninth Circuit, though it focuses on a few cases or a few judges, touches an underlying truth. Between 1990 and 1996, the Ninth Circuit reached the liberal outcome 41.2% of the time, a fraction neared only by the Second (39.9%) and the District of Columbia (39.2%) Circuits. By comparison, the Fifth, Seventh and Eighth Circuits all rendered liberal decisions less than 23% of the time. The liberalism of the Ninth Circuit is not particularly new: since reaching a low point of 26.9% in 1978, it has only once dropped as low as 30%. Figure 3 demonstrates the liberalism of the Ninth Circuit, based on cases in the Court of Appeals Database (Songer 1999).

Figure 3 Here

Interestingly, despite persistent criticism of the Ninth Circuit, very little detailed analysis of the aberrant nature of the Ninth Circuit has been conducted, a void I seek to fill in this paper. Using data on reversals of the Circuits since 1980 I attempt to sort through the competing explanations for the Ninth Circuit's high reversal rate. Doing so facilitates an appreciation of the consequences of splitting the Circuit and also offers some important insights in to the factors that prove relevant to the behavior of court of appeals judges.

In an important way, the debate over the Ninth Circuit's reversal rate reflects some features of the controversy over the field of forces that influence the behavior of court of appeals

⁵ http://www.house.gov/apps/list/press/id02_simpson/pr2_28pledge.html Accessed March 16, 2004.

judges. While one aspect of the debate over the motivations of court of appeals judges is the extent to which judges engage in sincere or sophisticated behavior (for an excellent recent example, see Hettinger, Lindquist, and Martinek 2004), such a debate assumes that court of appeals judges are motivated by their policy preferences. The decisions that court of appeals judges make may be just as likely to be influenced by attempts to make good law. To a substantially greater degree than Supreme Court justices, court of appeals judges may be affected by their desire to make good law. The motivation for this may be simply to maximize efficiency—consistent law, even though it may contradict judges’ policy preferences, makes judging easier and increases the consistency of results for litigants. This is particularly likely to be relevant to court of appeals judges, who face ever-increasing workload pressures. Making good law may also be accomplished by seeking accurate interpretation of the law (Baum 1997).

Many of the same people who argue that the source of the Ninth Circuit’s reversal rate is its size would never seriously consider the role of ideology in judicial decision making. Cross and Tiller, in what may be a self-serving characterization, contend that “much of the [legal] scholarship simply assumes the sincere application of legal doctrine without considering the possibility that it may at times be nothing more than a convenient rationalization for political decision-making” (1998, 2156). Despite Hellman’s acknowledgment that ideological disagreement may explain the Ninth Circuit’s high reversal rate, the leading quantitative analysis (Posner 2000) fails to model ideology in any way. This stands in contrast to the political science literature, which has, for at least forty years, recognized the role of ideology in the behavior of court of appeals judges (Goldman 1966). The reversal rate of the Ninth Circuit offers an opportunity to explore the relative impact of policy preferences and the desire to make good law on the behavior of court of appeals judges.

Hypotheses

There are two components of size that can affect the operation of any court. The first is simply the magnitude of the court—the number of judges serving on a circuit. Much of the logic behind splitting the Ninth Circuit stems from this argument. With 28 authorized judgeships (26 of which are filled) and 20 senior judges carrying a caseload, the Ninth Circuit has nearly 50 judges participating in panels on a regular basis.

H1: The more judges a circuit has, the more frequently it will be reversed by the Supreme Court.

There are actually two arguments here. First, more judges (and more panels) means more decisions that could be reversed by the Supreme Court. Second, as the number of judges increases, the ability of the circuit majority to maintain effective oversight of the panels decreases, and “wrong” decisions become more likely—independent of the caseload each of the judges face. This argument tends to make the assumption that a majority of the judges of a circuit, using *en banc* review (or the threat thereof), monitors panel decisions and reviews decisions that may be reversed by the Supreme Court, effectively preempting the Supreme Court. *En banc* review also serves to resolve intra-circuit conflicts—panel decisions which conflict with one another.

This argument is not without complications. As it rests on the assumption that judges pursue legal goals (attempt to make good law), it is difficult to extricate the rationale of this argument from the notion that the Supreme Court reverses decisions it finds ideologically incompatible. A modification of the first hypothesis may solve this problem. If one assumes for the moment that *unanimous* Supreme Court decisions are those which represent non-ideologically driven error correction of lower court decisions, then it may be the case that the larger a circuit grows, the more problems it will have monitoring panel decisions for legal correctness, and that function becomes more likely to be filled by the Supreme Court. This would mean that if there is a positive relationship between circuit size and *unanimous* reversals,

then we have evidence that circuit size negatively affects the ability of a circuit to maintain control on the legal quality of panel decisions.

H1a: The more judges a circuit has, the more frequently it will be reversed unanimously by the Supreme Court.

The second component of circuit size is related to workload. Circuit judges frequently complain about the impact of workload and much has been made of the impact of the increasing workload (Posner 1996) and reforms designed to cope with that increase while permitting the judges to focus on cases that present interesting legal questions (Baker 1994). What is not clear is the independent effect workload may have on the frequency of reversal of judges in a circuit. Workload is often hypothesized to affect the behavior of court of appeals judges. Hettinger, Lindquist and Martinek (2004) test the proposition that greater workload negatively affects the frequency of dissent, but find that it does not. Similarly, Posner (2000) finds no independent effect of workload on the number of summary reversals, but this seems at least a little bit counterintuitive. At the most straightforward level, the more cases judges decide, the more possible reversals there are for the Supreme Court. But increased workload should increase the importance of efficient disposition of cases and attenuate the impact of ideological preferences on the decisions made by court of appeals judges. The busier court of appeals judges become, the more likely they are to seek the most efficient resolution of cases and the more emphasis they will place on accuracy and consistency as means toward the end of judicial efficiency. This would imply that the busier judges are, the *fewer* reversals they should experience.

H2: The greater the workload of a circuit, the less frequently that circuit will be reversed.

In addition to criteria related to circuit size and workload, policy-based disagreements between court of appeals judges and the Supreme Court should produce more frequent

reversals. The greater the ideological distance between the Supreme Court and the courts of appeals, the more likely the Supreme Court will reverse any given lower court decision. If this behavior is aggregated to the circuit level, the greater the mean ideological distance between the Supreme Court and the circuit, the more often decisions from that circuit will be reversed.

H3: The greater the ideological distance between the Supreme Court and a circuit, the more frequently a circuit will be reversed.

This would be the core hypothesis of the attitudinal model (Segal and Spaeth 2002). If court of appeals judges and Supreme Court justices are motivated by their policy preferences, reversal of courts of appeals decisions would stem from ideological disagreement. This represents the argument which underlies support for (and opposition to) the split of the Ninth Circuit. Many of the supporters of such legislation are conservatives frustrated by what they perceive as the liberal yoke of the Ninth Circuit. Most proposals to split the Circuit either isolate California completely or leave very few states (Nevada, Arizona and/or Hawai'i) with California in the same circuit. The belief of supporters of splitting circuits is that a new Twelfth Circuit would better reflect the political orientation of the region (Simpson 2003).

The relationship between ideological distance and reversal frequency may be more nuanced than the straightforward relationship posited by Hypothesis 3. Using the Ninth Circuit as an illustration, there may be a few judges or panels that lift the circuit's reversal rate independent of the composition of the rest of the circuit.

H4: The more heterogeneous a circuit is, the more reversals it will experience.

If *en banc* reviews pull all decisions to the median of the circuit (or what the median of the circuit thinks the Supreme Court wants), then the heterogeneity of circuit preferences will not affect the reversal rate. If there is no centripetal force, allowing each panel's decisions to stand pending review by the Supreme Court, then heterogeneity would matter because a measure of

circuit ideology would not necessarily absorb liberal judges in a conservative circuit or the reverse. Van Winkle (1996) argues that judges who are circuit outliers exploit opportunities that place them in panel majorities to behave contrary to the preference of the circuit median. If judges do this, and the circuit does not monitor such behavior using *en banc* review, then those decisions might be reversed by the Supreme Court if the Court also disagrees with the circuit outliers, something that can be observed by controlling for the ideological distance between the circuit and the Supreme Court (Hypothesis 3).

Even if the behavior of circuit outliers is not so sophisticated, and they always behave sincerely, they will occasionally find themselves in panel majorities—more frequently if the circuit heterogeneity is greater. This would suggest that the variation in judge ideology would impact the frequency of a circuit’s reversal by the Supreme Court. In the context of the Ninth Circuit, even if the circuit median were relatively moderate (or even conservative), the presence of judges like Stephen Reinhardt would occasionally produce decisions that would be reversed by the Supreme Court, assuming he could find one other judge to agree with him. The more diverse the circuit is, the greater the probability of that occurring as well.

Data and Measures

Using the Supreme Court database (Spaeth 2003) and the case as the unit of analysis, I identified Supreme Court decisions that reversed the decisions of the circuit court of appeals in the 1980-2002 terms. I took a relatively broad definition of reversal, including reversals in part and Supreme Court decisions which vacate lower court decisions. Though there is controversy over the meaning of Supreme Court decisions that vacates a lower court decision and, particularly, GVRs (Segal and Spaeth 1996), at the very least these decisions imply that a lower court needs to reconsider its original decision. I then coded each circuit-year for circuit size, workload, ideological distance and ideological heterogeneity.

Circuit size is measured as the number of authorized judgeships per circuit (Hettinger, Lindquist and Martinek 2004; Posner 2000). Critics of the Ninth Circuit suggest that one of the problems created by circuit size is the inability of judges to work together and the lack of familiarity the judges have with their colleagues (Hellman 2003; but see Kozinski 2003). This denies judges the ability to sit on panels with their colleagues and can impair the collegiality that can act to stabilize circuit results. There may be other ways to measure circuit size, including number of appeals filed, number of merits terminations, or number of written opinions, but number of judgeships seems to come closest to measure the aspect of circuit size that so concerns critics of the Ninth Circuit. Even Arthur Hellman has admitted to reconsidering his opposition to splitting the Ninth Circuit given the prospect of a 35-judge Ninth Circuit, as has been requested⁶. Following Posner (2000), I also include a square of the number of judges, as a curvilinear relationship between size and frequency of reversal remains possible.

I use merit terminations per judge to measure of the workload of the circuit. The primary shortcoming of this measure is that it understates the contributions of senior and visiting judges. If a circuit relies heavily on either of those classes of individuals, the measure used here will overstate the amount of work active judges do, but that effect differs somewhat across circuits and across time. There is no “perfect” measure of workload, but merit terminations per judge has been used in previous work (Hettinger, Lindquist, and Martinek 2004; Posner 2000;) and remains a facially valid measure of the workload each circuit judge faces in a circuit.

⁶ A related concern is that the number of opinions issued by the Ninth Circuit makes it extremely difficult for one judge to keep up with circuit precedent, but including a separate measure of number of opinions issued would raise concerns of collinearity with the number of authorized judges.

Ideological distance proves to be extremely difficult to measure. There seems to be a growing consensus that the measure of court of appeals ideology developed by Giles, Hettinger and Peppers (2001) (hereafter GHP) is the preferred measure of the ideology of court of appeals judges. The GHP approach assigns court of appeals judges scores related to the circumstances of their appointment. Judges appointed in the absence of senatorial courtesy take on the ideology score of the appointing president (for GHP, the NOMINATE score). Judges appointed in the presence of senatorial courtesy take on the ideal point of the Senator (if there are two of the President' party, the average score) responsible for their appointment.

This is an extremely attractive option for court of appeals judges, but there is no way to compare GHP scores to ideology scores for the Supreme Court, which is necessary to measure ideological distance between the two levels. But important advances have been made in the past several years in inter-institution preference measurement. Bailey and Chang (2001), using positions taken by the president on legislation before the Senate and *amicus* briefs by the Solicitor General before the Supreme Court, tie all three branches together. Doing so serves my purpose of allowing the creation of measuring the ideological distance between the Supreme Court (the median justice) and each circuit of the courts of appeals (the average score for the judges on the circuit).

I adapt the GHP methodology by using Bailey and Chang (2001) preference scores for the presidents and senators. The circuit ideology is the mean of the active judges on the circuit (given rotating panels, the median may not be the correct measure, but there should be very little difference between the two). The Supreme Court ideology is the Bailey and Chang score for the median justice, and the ideological distance between the Supreme Court and a given circuit i in year t is:

$$\left| SCMedian_t - \overline{JudgeIdeo}_{it} \right| \quad (1)^7$$

Finally, to measure the heterogeneity of a circuit, I take the (sample) standard deviation of the circuit ideology. There may be a better way to measure this (the number or proportion of liberals or conservatives on a circuit, for example) that better captures the relationship between circuit composition, size and the possible combinations of panels, but the use of the standard deviation of the judges' ideology measures at least captures most of the aspects of what I hope to measure. Table 1 reports the summary statistics for judgeships, workload, ideology, and heterogeneity by circuit (1980-2002 for all Circuits save the Eleventh).

Table 1 Here

There is a fair amount of variation across the circuits on all of the measures. The Ninth Circuit is the circuit with the greatest average ideological distance, while the Fourth Circuit is the circuit closest to the Supreme Court. This provides an important validation check on the measure of ideological distance. While the Ninth Circuit has the most judges, the Fifth and Eleventh are the busiest on a per-judge basis. Table 1 also demonstrates how many more times the Ninth Circuit is reversed than any other circuit.

Analysis and Results

Time series tools are generally not well-adapted to panel data. I generated PACFs and ACFs for each circuit and found AR(1) processes for each of the circuits. This makes the data appropriate for analysis using the PAR(1) model suggested by Brandt and Williams (2001). The data is clearly mean-reverting, suggesting a PEWMA model (Brandt, et al. 2000) is

⁷ I thank Michael Bailey for his advice on using the Supreme Court scores. To address the possibility of a lag between the time cases are decided by the courts of appeals and decided by the Supreme Court, court of appeals ideology is measured by calendar year, while Supreme Court ideology is measured by term. One would expect a lag of about a year between the two decisions, and that is what this assumes. Because Bailey-Chang scores are only calculated through 1996 (the 1995 term), I fix the Supreme Court's ideology at that level (.03) for 1996-present.

inappropriate. The one point on which I differ from the PAR model is the problem of contamination: as the results suggest, there is clearly a positive contagion, making a negative binomial model the appropriate approach. Table 2 presents the results of models of the count of reversals for each Circuit between 1980 and 2002.

Table 2 Here

If one considers the number of reversals to be the product of variables relating to circuit size, workload, and ideological composition, it becomes clear that all of these factors, save workload, matter. The larger the circuit (the more authorized judgeships it has), the more frequently the circuit is reversed. The relationship, though, is not perfectly linear. Once the number of judgeships exceeds 25, the number of reversals to be expected by a circuit begins to level off, though the number of predicted reversals does not decline in the range of possible judgeships (currently between 6 and 28). This appears to provide initial evidence for the proposition that there is a positive relationship between circuit size and the number of reversals. Additionally, Column 1 reports a positive relationship for the ideological distance between the Supreme Court and the circuit. This confirms the expectation that the greater the ideological distance, the more frequently a circuit will be reversed. Perhaps most interesting are the two counter-intuitive findings that emerge from these results. First, ideological dispersion is *negatively* related to the number of reversals a circuit experiences. That is, controlling for ideological distance, the more diverse a circuit is ideologically, the *fewer* reversals it should expect. The other interesting finding is the non-relationship between workload and the number of reversals. Both of these counter-intuitive findings remain consistent across models, so I will address the implications once I have reviewed some of the other analyses.

Column 2 presents a fixed-effects model for the circuits, suggesting that some of the dynamics originally observed are really peculiar to individual circuits. This proves, in fact, to

be the case. Compared to a baseline of the Tenth Circuit, the Fourth, Fifth, Sixth, Ninth and District of Columbia Circuits experience substantially more reversals each term, while the First Circuit is reversed significantly less often than any other circuit. If one changes the excluded category to the Sixth Circuit, the circuit with the second most predicted reversals, the effect of the Ninth Circuit is still positive and significant ($p=.031$, two-tailed test). To some degree the choice of baseline circuits is arbitrary, but the Ninth Circuit stands out from the other circuits regardless of the comparison category. This effect is particularly interesting because the other variables are designed to explain the relevant factors of any circuit—their size, workload, and ideological distance from the Supreme Court.

The other interesting aspect of the results in Column 2 of Table 2 is that the relationship between circuit size, measured in judgeships, and the number of reversals is no longer significant (and is now negative), suggesting that the size is more properly considered a feature of each individual circuit than as some characteristic common to each of the circuits. Smaller circuits do tend to be reversed less often, while larger circuits do seem to be reversed more often, but the relationship is not a perfect one. This suggests that there is something to the individual circuits, including the Ninth Circuit, which transcends problems related to circuit size. Ideological distance (positive) and ideological dispersion (negative) remain significant predictors of the number of reversals a circuit experiences in a given term, independent of the individual effects of the circuits.

Looking jointly at Columns 1 and 2 of Table 2, it is clearly the case that ideological distance between the Supreme Court and each circuit is a reliable predictor of the number of reversals that a circuit will experience in a given term. The more intriguing finding may be the negative relationship between ideological diversity and the number of reversals. The literature strongly suggests that the more diverse a circuit is, at least in terms of number of judges who

differ from the circuit mean, the more diverse the output of the circuit (if one aggregates the panel decisions) will be. This would suggest that more diverse circuits, once the ideology of the circuit is controlled for, would produce more decisions the Supreme Court would seek to reverse. But a negative relationship between ideological diversity and number of reversals is more difficult to explain. It may be the case that judges in more diverse circuits feel greater pressure to conform to circuit norms, lest the output of the circuit be too inconsistent for litigants, attorneys and judges to follow, but at this point, this is mere conjecture. It should be noted that the Ninth Circuit, at least over the entire 1953-2002 period, is not a circuit of great ideological diversity. Its ideological distance (average of 1.91) is somewhat greater than the grand mean (1.22), but its average dispersion (1.55) is not much greater than the grand mean (1.42).

A more plausible explanation for this phenomenon may come from the Supreme Court's method of auditing decisions from the different circuits. Much of the work to date on the relationship between the Supreme Court and the courts of appeals has assumed that the Supreme Court observes the ideology of the opinion author (Cameron, Segal, Songer 2000) or the panel ideology. But the Supreme Court may pay attention to the signal sent by the entire circuit (Haire, Lindquist, and Songer 2001), more closely auditing circuits more ideologically distant than those closer (as my results suggest). The ideological heterogeneity of a circuit may affect the clarity of such a signal: the Supreme Court may find it easier to interpret a decision from an ideologically homogeneous circuit than from one with considerable heterogeneity. Much has been made of the costs the Supreme Court incurs by deciding to review lower court decisions (Cameron, Segal, and Songer 2000; Spitzer and Talley 2000), so there may be smaller costs associated with reviewing (and reversing) circuits who generate clearer signals, as indicated by more homogeneous ideology. This would mean that, all else being equal, the costs

of reviewing the decisions of heterogeneous circuits would be higher than the costs associated with reviewing the decisions of more homogeneous circuits, which would lead to more frequent reversals of ideologically uniform circuits (again, having controlled for circuit ideological distance from the Supreme Court). This would also explain how circuit outliers can exploit their status as temporary panel majorities without fear of reversal by an *en banc* review (Van Winkle 1996) and such behavior may benefit the circuit as a whole by raising the cost associated with Supreme Court review. In the context of the Ninth Circuit, the current Supreme Court may view any decision by the Ninth as suspect, but the sheer diversity of possibilities from a circuit of such size makes the precision of any guess based solely on the circuit of origin quite low.

The other important finding (actually, non-finding) is that the workload of a circuit has no effect on the number of reversals it experiences. As alluded to earlier, this may be the result of competing pressures on busy judges. Undoubtedly, each decision a judge makes could lead to a Supreme Court reversal, so judges on busier circuits make more decisions (per judge) that the Supreme Court could reverse if it chose to do so. This would lead one to hypothesize a positive relationship between workload and number of reversals. On the other hand, the increased workload might, as I suggested above, increase pressures on judges to substitute some other decision-making criteria for their ideological preferences. Foremost among these would be reliance on existing precedent and attempts to emulate as close as possible, given each unique case, prior decisions made in the circuit or on another circuit. This conformist pressure would decrease the likelihood that, for example, a liberal judge would make a liberal decision. Aggregated across judges and decisions, this would mean busier circuits are less likely to decide according to ideology, and would experience fewer reversals as a result (assuming some level of legal accuracy in their decisions). This would suggest a negative relationship between

workload and the number of reversals. It is possible that the null result here absorbs these competing possibilities.

In order to provide some context to these results, I plot the predicted number of reversals for three circuits, the First, Third and Ninth (based on Column 2 of Table 2). The Third Circuit is about average in size, while the First and Ninth Circuits are the smallest and largest circuits, respectively. Setting the other independent variables at their means (medians) demonstrates the dual effect of ideological distance and the independent impact of each of the circuits. If, hypothetically, each of the circuits were of equal size and dealt with equal caseloads, the Ninth Circuit would face 23.6 reversals per term if ideological distance were at its sample maximum (3.88), while the First and Third Circuits would expect 2.1 and 4.9, respectively.

Figure 4 Here

This, of course, is an abstraction: the Ninth is larger and more liberal than all of the other circuits. But its high reversal rate is not solely a fact of its size, workload, or ideological distance: there is some feature of the Ninth that distinguishes it from its fellow circuits beyond these factors.

Much of the criticism of the Ninth Circuit comes from the (disturbing) frequency with which it is reversed by unanimous Supreme Court decisions. This is the source of much of Justice Scalia's criticism of the ineffectiveness of the limited *en banc* proceeding. Accordingly, I tested the effects of the same independent variables on the number of unanimous (9-0, 8-0) and near-unanimous (8-1) reversals a circuit experiences in a given term. Table 3 presents the results.

Table 3 Here

Recall that one could hypothesize a greater effect for circuit size in this context than simply in the total number of reversals. If the consequence of circuit size is to increase the

number of clear errors made by a circuit, then there should be a positive relationship between the number of judgeships and the number of unanimous reversals. As Table 3 suggests, that relationship initially appears to exist, but once the individual circuits are accounted for, the relationship between circuit size and frequency of unanimous reversals no longer exists. To an impressive degree, then, the predictors of unanimous reversals are the same as the predictors of all reversals. Like the results in Table 2, there is a significant effect for the Ninth Circuit ($p=.011$, two-tailed test). Of the circuits more likely to experience reversals in Table 2, only the Fifth no longer demonstrates a statistically significant difference from the comparison (Tenth) Circuit. Interestingly, though the measurement of the contagion effect (α) is still significant, it is less clearly so in Column 2 of Table 3 than in any other model, suggesting that there is less of a contagion effect for unanimous reversals than for all reversals. Additionally, the positive relationship between ideological distance and reversal number remains, as does the negative relationship between ideological dispersion and reversal frequency, and both measures are consistently significant (and strongly so).

Discussion

Generally speaking, the hypotheses which receive the most support are those that suggest that the Ninth Circuit's high reversal tally are a product of its ideological distance from the Supreme Court and not a product of its size. In short, there appears ample evidence to support the conclusion that ideological distance from the Supreme Court is positively related to the frequency with which the Supreme Court reverses the circuit. There does not appear to be evidence that the size of a circuit is related to the frequency of reversal. This contradicts previous research (Posner 2000), but the possibility remains that his findings are spurious. I argue that a circuit's ideological distance and heterogeneity are important predictors of its reversal rates, hypotheses strongly supported by the data. Posner did not account for these

factors, though one might infer that he believe ideological distance explains the effect he observes for the Ninth Circuit beyond controls for circuit size and workload.

Returning to the question that initially motivated my research, the high reversal rate of the Ninth Circuit, the data analysis presented here offer some opportunities to assess the source of the Ninth Circuit's reversal rate. First, it does not seem fair to argue that the frequency of reversal of a circuit can be tied directly to the size of the circuit. The unique characteristics of each circuit obviate the argument that the Ninth Circuit's frequency of reversal is related solely to its size. Larger circuits tend to be reversed more often than smaller circuits, but the circuit-to-circuit variation denies simply relying on the Ninth Circuit's size as an explanation for its reversal rate. The Seventh Circuit, for example, is a circuit of average size, but its predicted reversal frequency is less than only the Ninth and Sixth Circuit if all of the other circuit traits are held constant. At the same time, it is clear that the high reversal rate of the Ninth Circuit transcends the circuit's ideological composition. Ideological distance is positively related to the number of reversals each circuit experiences, but there remains an independent effect for the Ninth Circuit beyond both size and ideological distance from the Supreme Court.

Beyond factors related to circuit size, workload, ideological distance and ideological dispersion, the Ninth Circuit's reversal rate still exceeds that of other circuits. The characteristic which distinguishes the Ninth from the other circuits—its use of the limited *en banc* procedure—may explain some of this variance (Wasby 2001). The relationship between the limited *en banc* and reversal rate is a difficult hypothesis to test rigorously because no other circuit uses the procedure. This does not mean that conjecture is the only option. I compared the Ninth Circuit before the implementation of the limited *en banc* to the Ninth Circuit after the procedure was implemented. If the limited *en banc* has an independent, positive effect on the frequency of reversals, then that may explain some of the differences between the Ninth Circuit

and the rest of the circuits. I replicated the models in Tables 1 and 2, looking solely at the Ninth Circuit between 1953 and 2002 to see if, once controls were implemented for increasing circuit size and ideological distance, the limited *en banc* procedure increased the number of Ninth Circuit decisions the Supreme Court reversed.

Table 4 Here

Table 4 reports the results for these analyses. Caseload is dropped because that data is only available between 1980 and the present, and the limited *en banc* was implemented in 1980. As a result, Judgeships and Judgeships² are significant, but this may be picking up some of the growth in caseload that occurs along the same trend as the growth in judgeships. The results support the argument that the limited *en banc* procedure has a strong positive impact on the frequency of reversal of the Ninth Circuit. The limited *en banc* has a significant, independent effect on the number of reversals and very nearly ($p=.053$, two-tailed test) has a significant effect on the number of unanimous reversals. This contradicts earlier work on the relationship between the limited *en banc* and reversal frequency (Hellman 2000) and confirms Justice Scalia's argument that the limited *en banc* fails to catch cases it should, forcing the Supreme Court to step in (Scalia 1998). That this effect persists in the presence of controls for growing circuit size and fluctuations in ideological distance and circuit heterogeneity is particularly interesting.

The substantive effects of the limited *en banc* for the Ninth Circuit are impressive. Using the models in Table 4 and setting the other variables at their means/medians for the Ninth Circuit, the predicted impact of the limited *en banc* on the number of reversals is 9.96 reversals per term. The limited *en banc* increases the number of unanimous reversals per term by 6.53, from 4.64 to 11.17 unanimous reversals per term. No other factor has a substantive effect that even comes close to that importance. These results strongly support the conclusion that the adoption of the limited *en banc* procedure has had an effect on the frequency with which the

Ninth Circuit is reversed. It is not circuit size itself that appears to be related to the number of reversals, but the mechanisms the Ninth Circuit has adopted to deal with the circuit growth. My research may serve to resolve a dispute in the literature as to the relationship between size and frequency of reversal (Hellman 2000; Posner 2000; Scalia 1998), but I also offer the first systematic test of the importance of ideological distance, which is clearly related to the frequency with which any circuit is reversed by the Supreme Court.

There is another factor of interest here. Previous work has speculated that one of the functions of *en banc* review is to correct erroneous panel decisions (George 1999), but it is difficult to square this proposition with the finding that the Supreme Court is more likely to review cases decided *en banc* (George and Solimine 2001). The adoption of the limited *en banc* has increased the number of reversals the Ninth Circuit experiences, suggesting that error correction is one of the functions of *en banc* review (and the limited procedure, as Justice Scalia suggests, fails to accomplish this task). But *en banc* may also occur in more interesting cases—the kind of cases the Supreme Court is also more likely to hear—and this effect may trump the efforts by the courts of appeals to correct erroneous decisions. My results support, but do not directly test, this proposition.

Conclusion

Much has been made about the advantages and disadvantages of splitting the Ninth Circuit into two smaller circuits. My research demonstrates that doing so would likely not have the effect of reducing the frequency with which the two courts would be reversed by the Supreme Court. The current proposal under consideration by Congress would leave the old Ninth Circuit (California, Nevada, Arizona) with 24 active judgeships. Presumably, a circuit of such size would still have the option of deploying the limited *en banc* procedure, which appears to be a source of at least some of the problems of the current Ninth Circuit's problems.

Additionally, such a split would likely increase the distance between the old Ninth and the Supreme Court and make that circuit even more a target of Supreme Court reversals.

For residents of more conservative areas of the mountain West and Pacific Northwest, such a split would mean those regions would be governed by more conservative judicial rulings more closely aligned with their political preferences. But the Supreme Court would, in all likelihood, continue its stormy relationship with a new, smaller, Ninth Circuit. And critics of such a relationship could no longer point to circuit size as the reason for this continued disagreement. Ideological distance between the Supreme Court and any given circuit, a robust predictor of reversal frequency, suggests that an (even more) liberal Ninth Circuit would continue to see its decisions reversed with considerable frequency by the Supreme Court.

The implications of this research extend beyond an understanding of the consequences of splitting the Ninth Circuit. As suggested earlier, there appears to be a continuing divide as to how those in legal academia and those in political science view the Ninth Circuit and, more broadly, how both groups view the nature of judicial decision-making. In a way, both perspectives offer some insight to the source of the Ninth Circuit's high reversal rate: it is not the size of the Ninth Circuit itself, but the procedures the circuit has implemented to cope with its increased size that influence the frequency of reversal by the Supreme Court. At the same time, there is a persistent effect of both ideological distance (positive) and ideological heterogeneity (negative) on the frequency with which any circuit is reversed. This suggests that there is a continuing role for models of judicial decision-making that see judges as motivated by their policy preferences as well as for models that view judges as concerned about "getting it right" in a legal sense, regardless of their ideological predispositions. Future research should continue to integrate these two perspectives, and debate about the future of the

Ninth Circuit should be candid about the motivations of those who seek to preserve and those who seek to split the Circuit.

Table 1: Summary Statistics By Circuit, 1980-2002

	Reversals	Unanimous Reversals	Judgeships	Workload	Ideological Distance	Ideological Dispersion
First Circuit	1.57 (1.59)	.74 (1.10)	5.65 (.78)	301.04 (40.29)	1.64 (1.28)	1.78 (.55)
Second Circuit	3.96 (2.29)	2.00 (1.17)	12.65 (.78)	267.30 (48.45)	1.45 (.59)	1.24 (.17)
Third Circuit	3.48 (2.41)	1.70 (1.33)	12.78 (1.57)	334.35 (49.86)	1.50 (1.33)	1.28 (.19)
Fourth Circuit	4.48 (2.35)	2.13 (1.52)	13.09 (2.25)	436.61 (154.23)	.79 (.39)	1.12 (.09)
Fifth Circuit	5.65 (2.87)	2.87 (1.60)	16.21 (1.13)	547.70 (155.07)	.81 (.32)	1.67 (.21)
Sixth Circuit	4.78 (2.27)	2.13 (1.66)	14.87 (1.87)	351.17 (51.66)	.93 (.68)	1.67 (.21)
Seventh Circuit	3.74 (1.81)	2.04 (1.19)	10.65 (.78)	335.83 (53.27)	1.40 (1.10)	1.87 (.29)
Eighth Circuit	4.26 (2.43)	1.91 (1.44)	10.39 (.78)	385.00 (103.15)	1.21 (1.03)	1.26 (.15)
Ninth Circuit	14.17 (5.70)	7.48 (3.97)	27.13 (1.94)	348.04 (115.16)	1.91 (1.01)	1.55 (.16)
Tenth Circuit	2.65 (2.12)	1.26 (1.84)	10.78 (1.57)	325.96 (56.53)	.90 (.64)	1.26 (.15)
Eleventh Circuit	3.90 (2.17)	1.81 (1.29)	12.00 (.00)	581.67 (200.54)	.97 (.32)	1.09 (.23)
District of Columbia Circuit	4.26 (4.38)	1.87 (2.67)	11.83 (.39)	177.91 (.82)	1.15 (.82)	1.89 (.33)
All Circuits	4.75 (4.17)	2.33 (2.48)	13.18 95.09)	346.47 (146.22)	1.22 (.92)	1.42 (.39)

Standard deviations in parentheses. 11th Circuit is 1982-2002.

Table 2: Predictors of Number of Reversals, 1980-2002 Terms: Negative Binomial Coefficients

Variable	b (S.E.)	b (S.E.)
Reversals _{t-1}	0.0496*** (.0103)	0.0354*** (.0093)
Ideological Distance	.2167*** (.0459)	0.1757*** (.0487)
Ideological Dispersion	-.3263** (.1000)	-.4085** (.1488)
Judgeships	0.1232** (.0357)	-0.0511 (.0701)
Judgeships ²	-0.0020* (.0010)	0.0005 (.0018)
Merits Terminations Per Judge	-0.0002 (.0003)	0.0001 (.0004)
First Circuit	---	-0.7198* (.3276)
Second Circuit	---	0.3344 (.2010)
Third Circuit	---	.1545 (.2029)
Fourth Circuit	---	0.5089** (.1919)
Fifth Circuit	---	0.7424** (.2500)
Sixth Circuit	---	0.8229*** (.2192)
Seventh Circuit	---	0.4361* (.2015)
Eighth Circuit	---	0.3261 (.1783)
Ninth Circuit	---	1.7202** (.5174)
Eleventh Circuit	---	0.3422 (.2122)
District of Columbia Circuit	---	0.5943** (.2141)
Constant	0.2219 (.3777)	1.6707** (.5558)
LR χ^2 (d.f.)	198.32 (6)	231.05 (17)
Pr > χ^2	.0000	.0000
α	.0792***	.0448**

*p < .05, **p < .01, ***p < .001, two-tailed tests. N=273

Table 3: Predictors of Number of Unanimous Reversals, 1980-2002 Terms: Negative Binomial Coefficients

Variable	b (S.E.)	b (S.E.)
Unanimous Reversals _{t-1}	.0926*** (.0195)	.0782*** (.0185)
Ideological Distance	.1872** (.0599)	.1283* (.0652)
Ideological Dispersion	-.3801** (.1383)	-.6924** (.2076)
Judgeships	.1185* (.0482)	.0034 (.0978)
Judgeships ²	-.0017 (.0013)	-.0008 (.0024)
Merits Terminations Per Judge	-.0001 (.0004)	.0006 (.0005)
First Circuit	---	-.4252 (.4662)
Second Circuit	---	.4019 (.2801)
Third Circuit	---	.1958 (.2831)
Fourth Circuit	---	.3800 (.2732)
Fifth Circuit	---	.5440 (.3493)
Sixth Circuit	---	.8042** (.3085)
Seventh Circuit	---	.7691** (.2784)
Eighth Circuit	---	.2800 (.2541)
Ninth Circuit	---	1.8128* (.7095)
Eleventh Circuit	---	.0948 (.2961)
District of Columbia Circuit	---	.7499* (.2990)
Constant	-.4071 (.5107)	.7535 (.7803)
LR χ^2 (d.f.)	141.22 (6)	159.86 (17)
Pr > χ^2	.0000	.0000
α	.1005**	.0604*

*p < .05, **p < .01, ***p < .001, two-tailed tests. N=273

Table 4: Predictors of Ninth Circuit Reversals, 1953-2002: Negative Binomial Coefficients

	All Reversals	Unanimous Reversals
Y_{t-1}	0.0085 (.0115)	0.0335 (.0234)
Ideological Distance	-0.0228 (.0896)	-0.1526 (.1229)
Ideological Dispersion	-0.2812 (.4010)	0.0782 (.5530)
Judgeships	0.2033* (.0858)	0.1874 (.1197)
Judgeships ²	-0.0053* (.0022)	-0.0053 (.0031)
Limited <i>En Banc</i>	0.6425* (.3189)	0.8798 [†] (.4543)
Constant	0.7696 (.5963)	-0.1113 (.8497)
LR χ^2 (d.f.)	23.58	24.49
Pr > χ^2	.0006	.0004
α	.0505**	.0714*

[†]p<.054, *p< .05, **p<.01 two-tailed tests. N=47

Figure 1: Ninth Circuit Reversals (Number and Proportion of All Reversals), 1953-2002

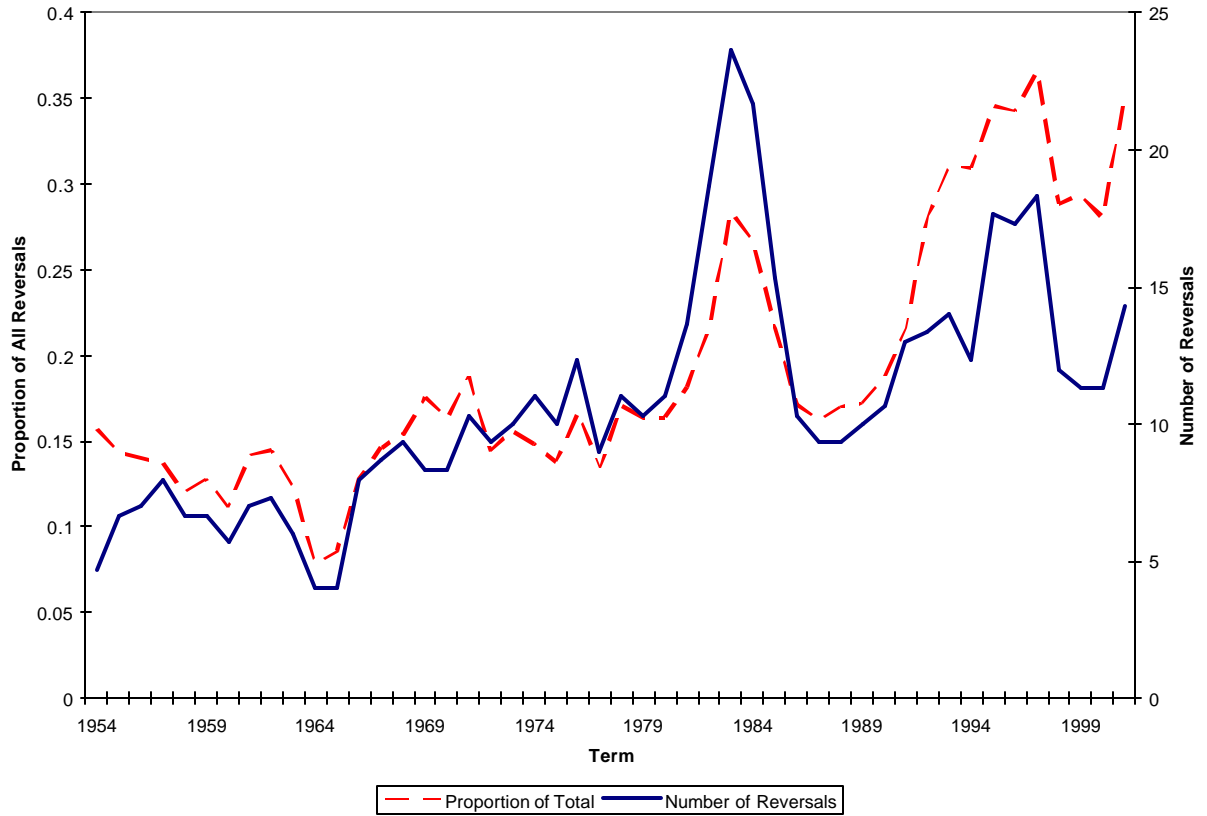
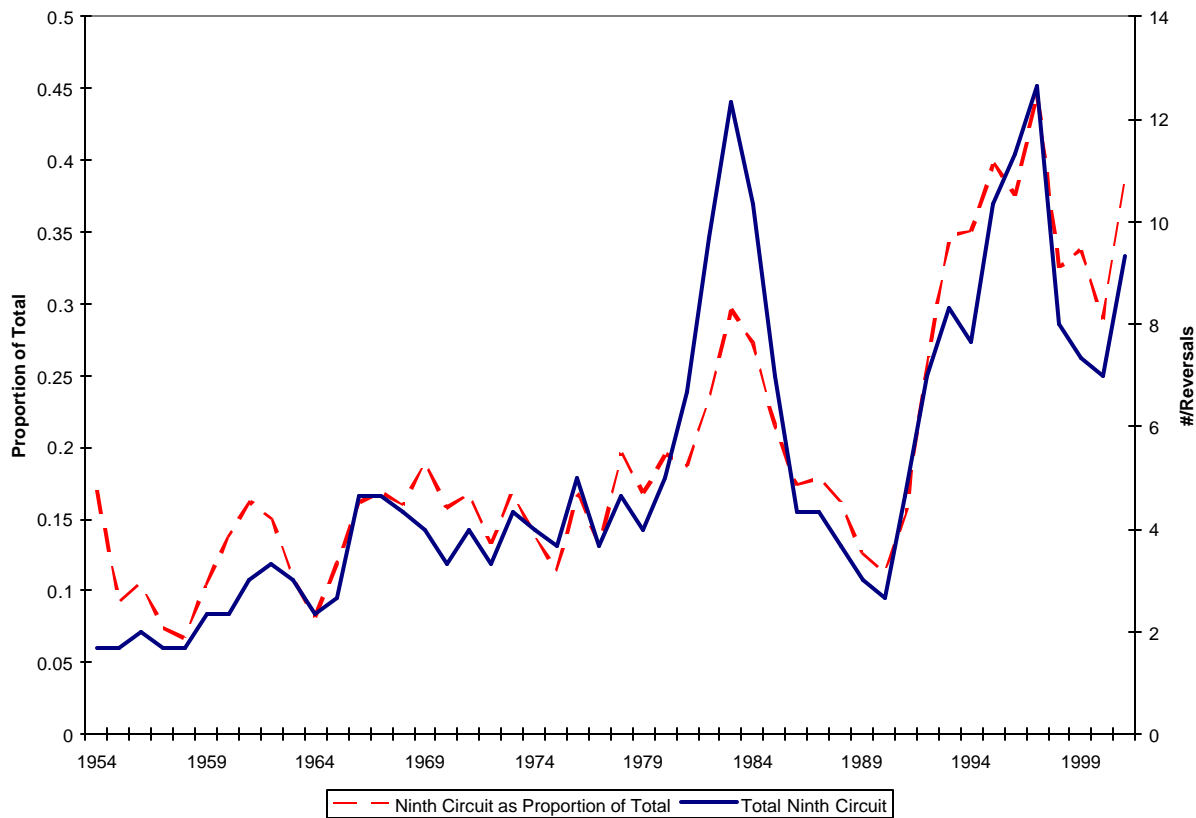


Figure 2: Ninth Circuit Unanimous Reversals (Number and Proportion of All Unanimous Reversals), 1953-2002



**Figure 3: % Of Ninth Circuit Decisions that Were Liberal, 1925-1996
(3-Year Moving Average)**

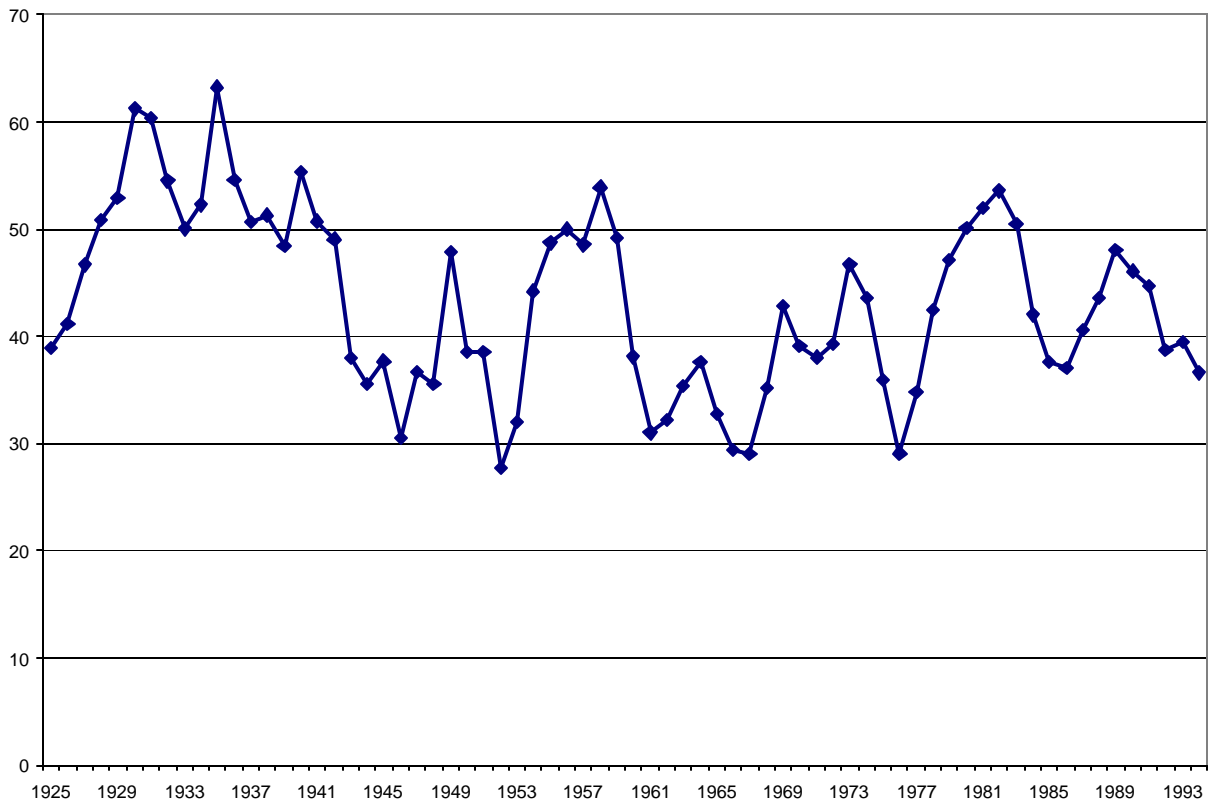
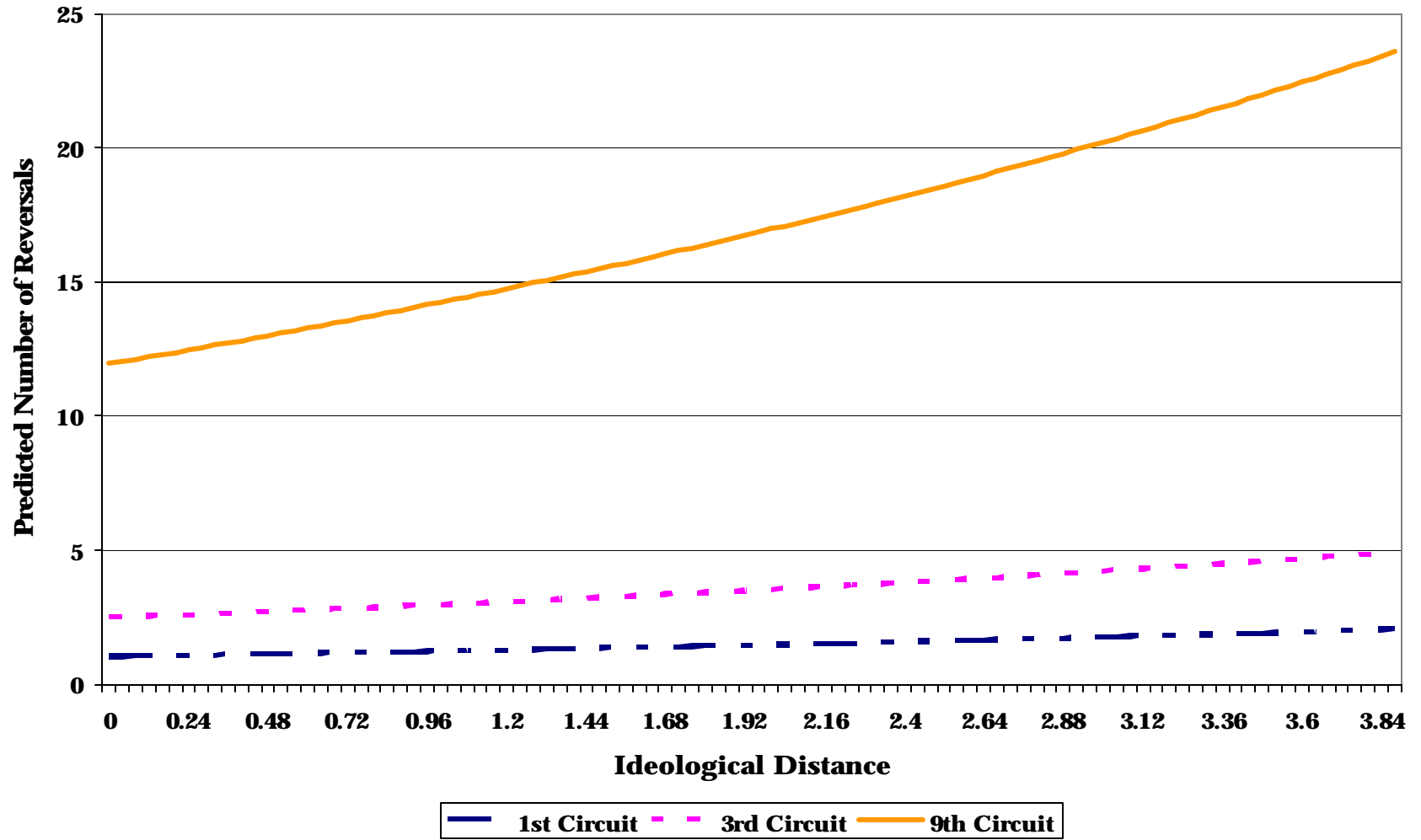


Figure 4: Predicted Number of Reversals by Ideological Distance from Supreme Court: First, Third and Ninth Circuits



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