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I Say Dissental, You Say Concurral

Increasing numbers of circuit judges are writing dissents from, and concurrences in, orders denying rehearing en banc—colloquially known as dissentals and concurrals. Not everyone is happy about this practice, and some judges have lamented their proliferation. The authors here argue that this has become an entrenched feature of the federal appellate process, and it's a good thing too.

After losing an en banc vote back in 1960, Judge Clark penned a dissental mildly chiding the Second Circuit for having failed to take the case en banc.[1] Judge Friendly took umbrage, impugning the legitimacy of a practice that enabled

> any active judge [to] publish a dissent from any decision, although he did not participate in it and the Court has declined to review it en banc thereafter, a practice which seems to us of dubious policy especially since, if the issue is of real importance, further opportunities for expression will assuredly occur.[2]

One of Judge Friendly's successors, Judge Pooler, recently reiterated his complaint. She disparaged dissentals as "oddities" with "as much force of law as if those views were published in a letter to the editor of [the authors'] favorite local newspaper."[3] Judge Pooler lamented:

1. United States v. N.Y., New Haven & Hartford R.R., 276 F.2d 525, 549 (2d Cir. 1960) (Clark, J., dissental).
2. *Id.* at 553 (Friendly, J., concurral).
3. United States v. Stewart, 597 F.3d 514, 519 (2d Cir. 2010) (Pooler, J., concurral).

> the unsuccessful request for an en banc rehearing becomes an occasion for any active judge who disagrees with the panel to express a view on the case even though not called upon to decide it. By employing the simple tactic of calling for an en banc poll, active judges provide themselves with an opportunity to opine on a case that was never before them.[4]

This practice, she concluded, works "mischief" by undermining the original panel's message with "further advisory opinions" that are "unnecessary" and only "muddy[] the waters."[5]

Despite such objections, dissentals have persisted, even flourished. It's time we put the legitimacy debate behind us and embraced the dissental as an established and useful part of the appellate process.

* * *

There is a significant body of thoughtful literature about why judges in the American tradition exercise the right of public dissent. Justice Brennan described dissents as "appeal[s] to the future," and argued that "[t]hrough dynamic interaction among members of the present Court and through dialogue across time with the future Court, we ensure the continuing contemporary relevance and hence vitality of the principles of our fundamental charter."[6] Chief Justice Hughes called dissents "appeal[s] to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."[7] Justice Cardozo described the dissenter as "the gladiator

4. *Id.*

5. *Id.* at 519-20; *see also, e.g.*, Defenders of Wildlife v. EPA, 450 F.3d 394, 402 (9th Cir. 2006) (Berzon, J., concurral), *rev'd*, 551 U.S. 644, 673 (2007); Indep. Ins. Agents of Am., Inc. v. Clarke, 965 F.2d 1077, 1080 (D.C. Cir. 1992) (statement of Randolph, J.). Many of these examples are chronicled by Indraneel Sur in *How Far Do Voices Carry: Dissents from Denial of Rehearing En Banc*, 2006 WIS. L. REV. 1315, 1328-31.

6. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 432, 438 (1986).

7. CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES – ITS FOUNDATION, METHODS AND ACHIEVEMENTS: AN INTERPRETATION 68 (1928).

making a last stand against the lions."[8] Indeed, the seeds planted by dissenting judges sometimes germinate and grow into stout trees.[9]

Among the recognized legitimate reasons for dissenting are the following: to encourage a higher court to reverse; to dissuade a coordinate court from following the majority; to express a hope that the same court in the future will overrule today's majority; to provide an educational tool to students of the law and the public; and to sound a call to arms to the political branches.[10] No one has suggested that the *Citizens United* or *Ledbetter* dissents are "of dubious policy," "unnecessary," or that they work "mischief" or "muddy[] the waters." Quite the contrary.[11] Justice Brandeis was beatified for *Olmstead*;[12] Justice Harlan, canonized for *Plessy*.[13]

A dissent is a public disagreement with the actions of a body of which you are a member. It is a declaration that you would do something different—usually the exact opposite of what the group is doing. Dissents are most commonly associated with published opinions, but they certainly are not so limited. There are dissents from procedural orders,[14] from jurisdictional

8. BENJAMIN N. CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 34 (1986); *see also* Sur, *supra* note 5, at 1318 n.13 (citing works by Justices Scalia, Ginsburg, and Brennan, and Judges Wald and Lipez).

9. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 214 (1986) (Stevens, J., dissenting); Olmstead v. United States, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting); Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

10. *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876, 979 (2010) (Stevens, J., dissenting) ("At bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt."), *echoed in* President Barack H. Obama, State of the Union Address (Jan. 27, 2010) ("I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities."); Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting) ("Once again, the ball is in Congress' court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII."), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub L. No. 111-2, 123 Stat. 5 (to be codified in scattered sections of 29 U.S.C. and 42 U.S.C.).

11. *See, e.g.*, Lani Guinier, *The Supreme Court 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 44 (2008) ("The oral dissent[] delivered by Justice[] . . . Ginsburg in the October 2006 Term ha[d] a latent power, a power that does not come from simply questioning the position of judicial colleagues with a pinched view of the role of . . . gender in our democracy.").

12. *Olmstead*, 277 U.S. at 471 (Brandeis, J., dissenting).

13. *Plessy*, 163 U.S. at 552 (Harlan, J., dissenting).

14. *See, e.g.*, *In re* Cement Antitrust Litig., 673 F.2d 1020, 1028 (9th Cir. 1982) (Boochever, J., dissenting) ("I respectfully dissent. I think that Judge Muecke properly certified his recusal

orders,[15] from dismissals for mootness,[16] from the grant or denial of certificates of probable cause,[17] from certificates of appealability,[18] and from referral of a case to a state court for resolution of a state-law issue[19]—to name just a few. In fact, there's nothing a collegial court does that is so trivial it does not occasionally give rise to a dissent—yet no one bats an eyelash. Why then the apoplexy about dissentals?

Dissental detractors, like Judge Friendly, claim that dissentals are illegitimate because the authors were not members of the panel that originally decided the case. But that misses the point: The judge is not dissenting from the panel opinion, but from the order of the full court declining to take the case en banc. That criticism will necessarily involve a discussion of the merits, but the same is true of an en banc call. If it were truly illegitimate for an off-panel judge to criticize the panel's opinion, then en banc calls could only be made by the judges who decided the case—the judicial equivalent of the fox guarding the henhouse.

Odd as it may seem, that *was* the law once (at least in the Ninth Circuit), and it provoked the first-ever dissental, authored by Judge Denman.[20] The law

order, pursuant to 28 U.S.C. § 1292(b), and that we should have accepted the interlocutory appeal."), *aff'd mem.*, 459 U.S. 1191 (1983).

15. *See, e.g.*, United States v. Castillo, 464 F.3d 988, 990 (9th Cir. 2006) (Bybee, J., dissenting) ("I believe that we cannot dismiss this case for want of jurisdiction without seeking en banc approval."), *vacated*, 496 F.3d 947 (9th Cir. 2007) (en banc).

16. *See, e.g.*, Suntharalinkam v. Keisler, 506 F.3d 822, 828 (9th Cir. 2007) (en banc) (Kozinski, J., dissenting) ("We ought to be chary in finding mootness in a situation such as this . . . .").

17. *See, e.g.*, Weeks v. Jones, 52 F.3d 1559, 1574 (11th Cir. 1995) (Kravitch, J., concurring in part and dissenting in part) ("I would grant Weeks's requests for a certificate of probable cause and for a stay to allow for oral argument.").

18. *See, e.g.*, Ramirez Cardenas v. Thaler, 651 F.3d 442, 447 (5th Cir. 2011) (Garza, J., dissenting) ("I would exercise our authority under Rule 2 of the Rules of Appellate Procedure to suspend the relevant portion of Rule 22 and would deny [the] COA. I therefore must dissent.").

19. *See, e.g.*, Carroll v. United States, 923 F.2d 752, 754 (9th Cir. 1991) (Kozinski, J., dissenting) (urging "the Arizona Supreme Court to just say no").

20. *See* Crutchfield v. United States, 142 F.2d 170, 177 (9th Cir. 1943) (Denman, J., dissental). Judge Denman was still at it in 1952, when, as Chief Judge, he complained about "[t]he cavalier refusal of the court to consider the contentions of the corporation's petition" and "[t]he shabby treatment of the litigant and his counsel in refusing to consider their contentions and authorities . . . ." W. Pac. R.R. v. W. Pac. R.R., 197 F.2d 994, 1018 (9th Cir. 1951) (Denman, C.J., dissental) (not a divorce case). Judge Denman was vindicated posthumously by the adoption of Federal Rule of Appellate Procedure 35, which "provides that [en banc] suggestions will be directed to the judges of the court in regular active service." FED. R. APP. P. 35 advisory committee's note.

was an ass in that regard[21] and was eventually changed.[22] Everyone now accepts that off-panel judges can disturb a panel decision by writing internal memos urging that it be reheard en banc. No one claims such judges are meddling or that they're insufficiently familiar with the facts or law. Off-panel judges have to know the case as well as or better than the panel judges if they hope to pull off a successful en banc call. En banc memos are usually as sophisticated as the panel opinion, sometimes more so. If the call is unsuccessful, they get turned into equally sophisticated dissentals.

Dissental naysayers also seem to argue that it's inappropriate to dissent from a discretionary decision, such as whether to go en banc. But orders denying discretionary relief are no less subject to reasonable disagreement than those resolving the merits. Nothing in the law is more discretionary than the denial of certiorari, yet the Justices routinely register certsents,[23] sometimes with immediate and dramatic effect.[24] Justice White filed certsents whenever he believed there was a conflict in the circuits.[25] Justices Brennan and Marshall certsented in all capital cases.[26] Certsents occasionally prompt a response.[27] Twenty-one of the twenty-three Justices who have served on the Court in the last four decades have authored certsents.[28] These go back to at least 1938 when Justices Black and Reed certsented, without opinion, in *Mooney v. Smith*.[29]

21. *Cf.* CHARLES DICKENS, OLIVER TWIST 461 (Penguin Books 1966) (1837-1839) ("'If the law supposes that,' said Mr. Bumble, squeezing his hat emphatically in both hands, 'the law is a ass—a idiot.'").

22. FED. R. APP. P. 35.

23. *See, e.g.*, Sorich v. United States, 129 S. Ct. 1308, 1311 (2009) (Scalia, J., certsent) (arguing that certiorari should be granted to "squarely confront both the meaning and the constitutionality of [18 U.S.C.] § 1346").

24. *See, e.g.*, Skilling v. United States, 130 S. Ct. 393 (2009) (granting certiorari to consider the proper scope of 18 U.S.C. § 1346); Weyhrauch v. United States, 129 S. Ct. 2863 (2009) (same); Black v. United States, 129 S. Ct. 2379 (2009) (same).

25. *See, e.g.*, Kennedy v. United States, 469 U.S. 965, 965 (1984) (White, J., certsent) ("Because the decision of the Court of Appeals in this case conflicts with [a] decision of the Court of Appeals for the First Circuit . . . , I would grant certiorari." (citing United States v. Canus, 595 F.2d 73 (1st Cir. 1979))).

26. *See, e.g.*, O'Bryan v. McKaskle, 465 U.S. 1013, 1013 (1984) (Brennan & Marshall, JJ., certsent) ("Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, we would grant certiorari and vacate the death sentence in this case." (citing Gregg v. Georgia, 428 U.S. 153, 227, 231 (1976))).

27. *See, e.g.*, Knight v. Florida, 528 U.S. 990, 990 (1999) (Thomas, J., certcurral); *id.* at 993 (Breyer, J., certsent).

28. *See infra* Appendix A.

29. 305 U.S. 598 (1938) (mem.).

There have been hundreds in the intervening seven decades. While Justice Stevens has spoken out against certsents,[30] he routinely dissented from orders refusing to file certiorari petitions of vexatious litigants unless they paid the filing fee.[31] To each his own.

By our count, 45 judges have filed some 290 dissentals in over 230 cases in the Ninth Circuit. This includes 41 of the 71 who have served as active judges since 1970.[32] And all but 10 of those 71 have joined dissentals written by others.[33] Hundreds more dissentals have been filed in the courts of appeals nationwide.[34] Some judges are so dissental-happy they file two in the same case.[35]

Dissentals often generate heated debate.[36] Invariably, they address issues that are of great moment at the time.[37] Earlier this year, the Seventh Circuit

30. *See, e.g.*, Singleton v. Comm'r, 439 U.S. 940, 942 (1978) (Stevens, J., certcurral).

31. *See, e.g.*, Shieh v. Kakita, 517 U.S. 343, 344 (1996) (Stevens, J., dissenting).

32. *See infra* Appendix B.

33. *See infra* Appendix C.

34. *See, e.g.*, United States v. McKnight, No. 10-2297, 2012 WL 364049, at *2 (7th Cir. Feb. 6, 2012) (Posner, J., dissental) ("The appeal presents an important question that deserves the attention of the full court . . . ."); Isaacs v. Kemp, 782 F.2d 896, 897 n.1 (11th Cir. 1986) (Hill, J., dissental) ("Dissents from orders denying rehearing en banc have proliferated in our court . . . to the point where the practice may be said to have become institutionalized." (emphasis omitted)); Walker v. United States, 327 F.2d 597, 600 (D.C. Cir. 1963) (Wright, J., dissental); Fooks v. United States, 246 F.2d 629, 637 (D.C. Cir. 1957) (Bazelon, J., dissental); Mitchell v. Household Fin. Corp., 208 F.2d 667, 672 (3d Cir. 1954) (Biggs, C.J., dissental).

35. *See* Beaty v. Brewer, 649 F.3d 1071, 1072 (9th Cir. 2011) (Reinhardt, J., dissental); *id.* at 1076 (more Reinhardt, J., dissental).

36. *See, e.g.*, Novak v. Beto, 456 F.2d 1303, 1304 (5th Cir. 1972) (Wisdom, J., dissental) ("With deep distress and profound regret I note the refusal of a majority of the members of this Court to give en banc consideration to this case."); *id.* at 1308 (Coleman, J., concurral) ("Without the slightest qualm or misgiving I voted to deny rehearing en banc in this case."); Chessman v. Teets, 239 F.2d 205, 223 (9th Cir. 1956) (Lemmon, J., concurral) ("Chessman has been accorded all due process except the long overdue process of his execution. By such execution, perhaps, the blot upon . . . California's juristic escutcheon will be, if not wholly erased, at least partly dimmed."); *id.* at 223-24 (Denman, C.J., dissental) ("Though it may well be a matter of life or death to Chessman, Judge Lemmon would have it that the Supreme Court in its opinion overruled, sub silentio, its several holdings that any important appellate proceeding is a part of the due process of the Fourteenth Amendment. . . . It is absurd to argue in any case, that the Supreme Court, by mere silence on a contention not presented to it, decides that contention adversely to the party making it. A fortiori is the absurdity of such a contention in a capital case.").

37. *See, e.g.*, Hamdi v. Rumsfeld, 337 F.3d 335, 357 (4th Cir. 2003) (Luttig, J., dissental), *cited in* 542 U.S. 507, 526 (2004); Falwell v. Flynt, 805 F.2d 484, 484 (4th Cir. 1986) (Wilkinson, J., dissental), *rev'd sub nom.* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).

refused en banc rehearing in *United States v. Holcomb*, but every single one of the court's active judges authored or joined a concurral or dissental.[38] The three opinions (one concurral and two dissentals) grapple fully with the merits and each other. But for their captions, they look, smell, walk, and talk like the opinions of an en banc court. It would be hard to dispute that the Seventh Circuit had a de facto en banc in *Holcomb*. Chief Judge Easterbrook's concurral was, in fact, nominated for the 2011 Green Bag Exemplary Legal Writing contest under the category "Opinions for the Court" rather than under "Concurrences, Dissents, Etc."[39] Can anyone say with a straight face that these three opinions, involving every active judge of the Seventh Circuit, added nothing useful to the law?

Proliferation and institutionalization of dissentals makes perfect sense. As appellate courts grow, each judge has less of an opportunity to sit on the panels that decide the burning issues of the day. Dissentals have become a way for judges to express a view on the merits of important cases decided by their courts when the luck of the draw does not assign them to the original three-judge panel. There is every indication that dissentals serve an important function and are taken seriously by courts, the public, the academy, and the legal profession:

- They are cited by the Supreme Court in its opinions.[40]
- Supreme Court Justices ask questions about them during oral argument.[41]

38. 657 F.3d 445 (7th Cir. 2011).

39. *Recommended Reading*, *in* THE GREEN BAG ALMANAC & READER 2012, at 9, 9 (Ross E. Davies & Ira Brad Matetsky eds. 2011), *available at* http://www.greenbag.org/green_bag_press/almanacs/almanac_2012_excerpts.pdf.

40. *See, e.g.*, Bobby v. Bies, 556 U.S. 825 (2009) (citing and quoting a dissental by Judge Sutton seven times in a seven-page opinion (citing Bies v. Bagley, 535 F.3d 520, 531-32 (6th Cir. 2008) (Sutton, J., dissental))); Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 188 (2008) (citing 484 F.3d 436, 437 (7th Cir. 2007) (Wood, J., dissental)); Whorton v. Bockting, 549 U.S. 406, 419-20 (2007) (citing 418 F.3d 1055, 1058 (9th Cir. 2005) (O'Scannlain, J., dissental)); Johnson v. California, 543 U.S. 499, 505 (2005) (citing 336 F.3d 1117, 1117 (9th Cir. 2003) (Ferguson, J., dissental)); *see also* Sur, *supra* note 5, at 1350-51 & nn.158-59.

41. *See, e.g.*, Transcript of Oral Argument at 49-50, Salazar v. Buono, 130 S. Ct. 1803 (2010) (No. 08-472) (Ginsburg, J.) ("But there was something that I did want to ask you about, Judge O'Scannlon's [sic] opinion. He said, if—if you prevail and you are right, what happens in Arlington Cemetery, where there's the Argonne Cross Memorial and the Canadian Cross of Sacrifice, both right here in Arlington, what happens to them?" (referencing Buono v. Kempthorne, 527 F.3d 758, 760 (9th Cir. 2008) (O'Scannlain, J., dissental))).

- They are relied upon by Supreme Court Justices in totally different cases.[42]
- They are considered by other courts in deciding whether to follow the panel opinion.[43]
- "[T]he Solicitor General of the United States and private litigants quote from rehearing dissents when petitioning or fending off arguments . . . ."[44]
- "Several rehearing dissents have promoted the development of the law by stimulating law professors to write articles and law students to write commentaries."[45]
- They are cited in casebooks and treatises.[46]
- They have been authored by Supreme Court Justices in their former lives as circuit judges.[47]

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42. *See, e.g.*, United States v. Jones, 132 S. Ct. 945, 955 (2012) (Sotomayor, J., concurring) (citing United States v. Pineda-Moreno, 617 F.3d 1120, 1125 (9th Cir. 2010) (Kozinski, C.J., dissental)); Chickasaw Nation v. United States, 534 U.S. 84, 91 (2001) (citing Little Six, Inc. v. United States, 229 F.3d 1383, 1385 (Fed. Cir. 2000) (Dyk, J., dissental)); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621 (1997) (citing Kamilewicz v. Bank of Bos. Corp., 100 F.3d 1348, 1352 (7th Cir. 1996) (Easterbrook, J., dissental)).

43. *See, e.g.*, Khan v. Filip, 554 F.3d 681, 687 n.2 (7th Cir. 2009) ("[S]even other circuits agree with our interpretation, and the Ninth Circuit's refusal to rehear *Ramadan* en banc prompted a strongly worded dissent from nine judges." (citing Ramadan v. Keisler, 504 F.3d 973, 973 (9th Cir. 2007) (O'Scannlain, J., dissental))); Johnson v. Governor of Fla., 405 F.3d 1214, 1227-34 (11th Cir. 2005) (en banc) (following a dissental rather than the panel opinion (citing Farrakhan v. Washington, 359 F.3d 1116, 1116 (9th Cir. 2004) (Kozinski, J., dissental))); *see also* Sur, *supra* note 5, at 1354-55 & nn.170-73.

44. Sur, *supra* note 5, at 1352-53 (footnotes omitted).

45. *Id.* at 1358 (footnotes omitted); *see, e.g.*, Richard Briffault, *The Return of Spending Limits: Campaign Finance After* Landell v. Sorrell, 32 FORDHAM URB. L.J. 399, 415-16 (2005) (analyzing the dissentals in Landell v. Sorrell, 406 F.3d 159, 167 (2d Cir. 2005) (Walker, C.J., dissental); *id.* at 174 (Jacobs, J., dissental); *id.* at 178 (Cabranes, J., dissental); *id.* at 179 (Raggi, J., dissental)); Sur, *supra* note 5, at 1357-58 & nn.183-84; Patrick J. McDonald, Note, Cerqueira v. American Airlines*: What Are the Appropriate Limits of an Air Carrier's Permissive Refusal Power?*, 20 GEO. MASON U. C.R. L.J. 111, 127 (2009) (analyzing the dissentals in Cerqueira v. Am. Airlines, Inc., 520 F.3d 20, 20 (1st Cir. 2008) (Torruella, J., dissental); *id.* at 23 (Lipez, J., dissental)).

46. *See, e.g.*, JAY DRATLER & STEPHEN M. MCJOHN, INTELLECTUAL PROPERTY LAW: COMMERCIAL, CREATIVE, AND INDUSTRIAL PROPERTY § 3.01 n.11.9 (2006) (explaining that patent applicants should try to avoid product-by-process claims (citing Atl. Thermoplastics Co. v. Faytex Corp., 974 F.2d 1279, 1293 (Fed. Cir. 1992) (Newman, J., dissental))); RICHARD A. EPSTEIN, TORTS § 19.3.3 n.65 (7th ed. 1999) (explaining the contours of the right of publicity (citing White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1512 (9th Cir. 1993) (Kozinski, J., dissental))).

- They are cited by Congress.[48]
- They come up at confirmation hearings.[49]
- They are the subject of commentary by the press,[50] are occasionally glorified by Hollywood,[51] and are routinely blogged about.[52]

In the days when federal courts of appeals were much smaller, en banc activity was relatively rare. This is because most judges participated in a significant number of key decisions, and this usually kept circuit law in line with the views of a majority of the court's active judges. But as courts have grown, outlier panels happen more frequently, commensurately increasing the number of en banc calls. During the course of those internal debates, off-panel judges

47. *See, e.g.*, Rancho Viejo, LLC v. Norton, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissental); Koehler v. Bank of Berm. (N.Y.) Ltd., 229 F.3d 187, 187 (2d Cir. 2000) (Sotomayor, J., dissental); Artway v. Att'y Gen. of N.J., 83 F.3d 594, 595 (3d Cir. 1996) (Alito, J., dissental); Fin. Inst. Emps. of Am., Local 1182 v. NLRB, 750 F.2d 757, 757-58 (9th Cir. 1984) (Kennedy, J., dissental); Goldman v. Sec'y of Def., 739 F.2d 657, 660 (D.C. Cir. 1984) (Ginsburg, J., dissental); Chaney v. Heckler, 724 F.2d 1030, 1030 (D.C. Cir. 1984) (Scalia, J., dissental).

48. *See, e.g.*, H.R. REP. NO. 102-836, at 8 n.27 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2553, 2560 n.27 (analyzing the need to amend the Copyright Act to overturn two Second Circuit decisions (citing New Era Pub'ns Int'l, APS v. Henry Holt & Co., 884 F.2d 659, 662 (2d Cir. 1989) (Newman, J., dissental))); S. REP. NO. 98-357, at 19 n.55, 36 n.138 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2348, 2365 n.55, 2382 n.138 (discussing the need for legislation to protect religious expression in public schools (quoting Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist., 680 F.2d 424, 426 (5th Cir. 1982) (Reavley, J., dissental))).

49. *See, e.g.*, *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 1257 n.94 (2006) (statement of Goodwin Liu, Assistant Professor of Law at Boalt Hall School of Law) ("Judge Alito dissented from the denial of rehearing *en banc* in another *Batson* case . . . ." (emphasis omitted) (referencing Simmons v. Beyer, 44 F.3d 1160, 1176 (3d Cir. 1995) (Greenberg, J., dissental, with Alito, J., joining)); *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 778-79 (2005) (statement of Carol M. Browner, EPA Administrator, 1993-2001) ("While Judge Roberts' dissenting opinion . . . is not definitive as to his position on the Commerce Clause power or on the Endangered Species Act, it is certainly worth noting that he rejected the . . . panel's unanimous opinion which specifically rejected a claim that Congress lacked the Commerce Clause authority to protect the 'hapless toad.'" (quoting *Rancho Viejo*, 334 F.3d at 1160 (Roberts, J., dissental))).

50. *See, e.g.*, Adam Cohen, *The Government Can Use GPS To Track Your Moves*, TIME, Aug. 25, 2010, http://www.time.com/time/magazine/article/0,9171,2015765,00.html (discussing United States v. Pineda-Moreno, 617 F.3d 1120, 1125 (9th Cir. 2010) (Kozinski, C.J., dissental)).

51. *See, e.g.*, CLAIMING THE TITLE: GAY OLYMPICS ON TRIAL (Aquarius Media 2009).

52. *See, e.g.*, Jonathan H. Adler, Atkins *and Double Jeopardy*, VOLOKH CONSPIRACY (Aug. 14, 2008, 9:42 AM), http://volokh.com/2008/08/14/atkins-and-double-jeopardy (discussing the opinion and dissental in Bies v. Bagley, 519 F.3d 324 (6th Cir. 2008)).

develop views—often strong and considered views—as to how the case should be decided. Those views might coincide with the ones expressed in the panel opinion, dissent, or concurrence, or they may be quite different.[53]

Judge Pooler is certainly right that dissentals are "advisory opinions," in the sense that they do not bind courts or litigants, but the same can be said of every dissent and most concurrences ever written. It can also be said for the many other sources of inspiration and guidance courts look to, such as decisions by courts of coordinate or inferior jurisdiction, restatements, treatises, law review articles, biblical references, the Talmud, the Koran, Roman law, Hammurabi's Code, the Napoleonic Code, Gratian's Decretum, Saint Thomas Aquinas, Sun Tzu, and decisions of various international tribunals—to name just a few. Dissentals and concurrals fall comfortably within Bryan Garner's definition of persuasive precedent.[54]

In addition to enriching the law, dissentals give judges an opportunity to focus public scrutiny on a particular case. The fact that a number of appellate judges took pains to voice their public disagreement with an opinion of their court is significant. It no doubt increases the likelihood of certiorari review[55] and stimulates change through the political process.[56]

Majority opinions are hardly sitting ducks for the criticism dissentals may heap on them. If a panel majority finds that a dissental scores some valid points, it can modify its opinion to eliminate the problem, something that happens regularly in the Ninth Circuit. Indeed, fear that internal criticisms will be taken public often causes judges to moderate outlier opinions so as to present a smaller target for public criticism and possible certiorari. One of us (yes, the hot one) is even aware of a case where the panel withdrew its opinion and reversed the result, after winning the en banc vote, in the teeth of a

53. *See, e.g.*, Abebe v. Mukasey, 554 F.3d 1203, 1204 (9th Cir. 2009) (en banc) (per curiam); *id.* at 1208 (Clifton, J., concurring in the judgment); *id.* at 1213 (Thomas, J., dissenting); Abebe v. Holder, 577 F.3d 1113, 1113 (9th Cir. 2009) (Berzon, J., dissental).

54. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 680-81 (2d ed. 1995).

55. *See, e.g.*, Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080 (2011) (reversing the panel and noting that "eight judges dissented from the denial of rehearing en banc" (citing al-Kidd v. Ashcroft, 598 F.3d 1129, 1137 (9th Cir. 2010) (O'Scannlain, J., dissental); and *id.* at 1142 (Gould, J., dissental))); Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 188 (2008) ("Four judges voted to grant a petition for rehearing en banc. . . . Because we agreed with their assessment of the importance of these cases, we granted certiorari." (citing Crawford v. Marion Cnty. Election Bd., 484 F.3d 436, 437 (7th Cir. 2007) (Wood, J., dissental))).

56. *See, e.g.*, H.R. REP. NO. 102-836, at 8 n.27 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2553, 2560 n.27 (citing New Era Pub'ns Int'l, APS v. Henry Holt & Co., 884 F.2d 659, 662 (2d Cir. 1989) (Newman, J., dissental)).

stinging dissental. And, of course, judges who think the dissental is wrong or unfair can file a concurral.[57] Not that it always helps.[58]

Dissentals don't create a substantial additional burden on the judiciary. It's easy to convert an en banc call to a dissental and an en banc opposition to a concurral. Moreover, if a dissental levels fair criticisms that the panel opinion does not answer, the opinion ought to be amended to take the new arguments into account. The law and the parties will suffer if panel majorities fail to modify their opinions in the teeth of cogent criticism. And if the panel believes that the opinion already meets all legitimate criticism, it should be content to leave well enough alone.

Finally, there seem to be judges who believe that some dissentals are legitimate while others are not. For example, Judge Berzon once argued that dissentals "pose a dilemma for those who believe the original opinion correct," give "a distorted presentation of the issues," and create "the impression of rampant error in the original panel opinion."[59] She has nonetheless filed her fair share of dissentals.[60] Even Judge Friendly jumped on the dissental bandwagon.[61] We've read many dissentals, long and short, and see no principled way of distinguishing those that work "particular mischief" from those that are swell.[62]

* * *

"Cases arguably warranting en banc review are those in which the stakes are unusually high or the law is especially unclear."[63] It does honor to the law,

57. Judge Friendly filed a concurral in *United States v. New York, New Haven & Hartford Railroad*, 276 F.2d 525, 553 (2d Cir. 1960) (Friendly, J., concurral), and Judge Clark referred to it as a "counterdissent," *id.* at 549 (Clark, J., dissental). We believe "concurral" more accurately describes an opinion concurring in the denial of rehearing en banc.

58. *See, e.g.*, *al-Kidd*, 598 F.3d at 1130 (Smith, J., concurral), *rev'd*, 131 S. Ct. 2074; Defenders of Wildlife v. EPA, 450 F.3d 394, 402 (9th Cir. 2006) (Berzon, J., concurral), *rev'd*, 551 U.S. 644, 673 (2007).

59. *Defenders of Wildlife*, 450 F.3d at 402 (Berzon, J., concurral).

60. *See, e.g.*, Abebe v. Holder, 577 F.3d 1113, 1113 (9th Cir. 2009) (Berzon, J., dissental); Molski v. Evergreen Dynasty Corp., 521 F.3d 1215, 1216 (9th Cir. 2008) (Berzon, J., dissental); S. Or. Barter Fair v. Jackson Cnty., 401 F.3d 1124, 1124 (9th Cir. 2005) (Berzon, J., dissental).

61. Chasins v. Smith, Barney & Co., 438 F.2d 1167, 1174 (2d Cir. 1970) (Friendly, J., dissental).

62. A category into which Judge Pooler would presumably lump her own dissentals. *See, e.g.*, Rosario v. Ercole, 617 F.3d 683, 688 (2d Cir. 2010) (Pooler, J., dissental); United States v. Fell, 571 F.3d 264, 295 (2d Cir. 2009) (Pooler, J., dissental).

63. Sur, *supra* note 5, at 1318.

promotes justice, and serves the interests of an informed public when citizens learn that appellate judges have given difficult and important cases exacting scrutiny—not just one judge or even the three-judge panel, but an entire court of appeals.

As Judge Clark put it in the case that started out this essay, "I do believe the court gains standing by encouraging free and thorough canvassing of these issues without the deadening influence of constraining restrictions."[64] Dissentals are here to stay. Get over it.

Alex Kozinski is the Chief Judge of the United States Court of Appeals for the Ninth Circuit and a longtime dissentaler. See, e.g., *Int'l Olympic Comm. v. S.F. Arts & Athletics, 789 F.2d 1319, 1320 (9th Cir. 1986)*, spurned by *483 U.S. 522 (1987)*.

James Burnham is a former law clerk to Chief Judge Kozinski who survived his two-year clerkship from June 2009 to June 2010, but just keeps coming back for more. The views herein do not necessarily reflect the views of James's current employer, Jones Day, on the merits of dissentals or concurrals (or anything else).

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64. United States v. N.Y., New Haven & Hartford R.R., 276 F.2d 525, 549 (2d Cir. 1960) (Clark, J., dissental).

APPENDIX A

Supreme Court Justices Who Have Authored Certsents Since 1970

Justice	Certsent Example
Alito	Harper v. Maverick Recording Co., 131 S. Ct. 590, 590 (2010)
Black	Eilers v. Hercules, Inc., 403 U.S. 937, 937 (1971)
Blackmun	Lawson v. Dixon, 510 U.S. 1171, 1171 (1994)
Brennan	Trapper v. North Carolina, 451 U.S. 997, 997 (1981)
Breyer	Office of the President v. Office of the Indep. Counsel, 525 U.S. 996, 996 (1998)
Burger	Russell v. Catherwood, 399 U.S. 936, 936 (1970)
Douglas	Shumar v. United States, 423 U.S. 879, 879 (1975)
Ginsburg	Padilla v. Hanft, 547 U.S. 1062, 1064 (2006)
Harlan	Wiseman v. Massachusetts, 398 U.S. 960, 960 (1970)
Kagan	None[65]
Kennedy	Trans Union LLC v. FTC, 536 U.S. 915, 915 (2002)
Marshall	McCray v. New York, 461 U.S. 961, 963 (1983)
O'Connor	Nw. Airlines, Inc. v. Duncan, 531 U.S. 1058, 1058 (2000)
Powell	Shell Oil Co. v. Dep't of Energy, 450 U.S. 1024, 1024 (1981)
Rehnquist	Huch v. United States, 439 U.S. 1007, 1007 (1978)
Roberts	Virginia v. Harris, 130 S. Ct. 10, 10 (2009)
Scalia	Concrete Works of Colo., Inc. v. City and Cnty. of Denver, 540 U.S. 1027, 1027 (2003)
Sotomayor	Williams v. Hobbs, 131 S. Ct. 558, 558 (2010)

65. Although Justice Kagan has never authored a certsent, she joined Justice Sotomayor's certsent in *Buck v. Thaler*, 132 S. Ct. 32, 35 (2011) (Sotomayor, J., certsent).

Souter	Durden v. California, 531 U.S. 1184, 1184 (2001)
Stevens	None
Stewart	Drake v. Zant, 449 U.S. 999, 1001 (1980)
Thomas	Borgner v. Fla. Bd. of Dentistry, 537 U.S. 1080, 1080 (2002)
White	Kennedy v. United States, 469 U.S. 965, 965 (1984)

APPENDIX B

Dissentals Authored in the Ninth Circuit, 1943-2011[66]

Year	Case	Judge(s)
1943	Crutchfield v. United States, 142 F.2d 170, 177	Denman
1949	Independence Lead Mines Co. v. Kingsbury, 175 F.2d 983, 992	Denman
1949	Alexander v. United States, 173 F.2d 867, 868	Denman
1952	W. Pac. R.R. v. W. Pac. R.R., 197 F.2d 994, 1012, 1016, 1020	Denman, Fee
1952	Bradley Mining Co. v. Boice, 198 F.2d 790, 791	Pope
1955	Ly Shew v. Dulles, 219 F.2d 413, 416	Denman
1956	Strand v. Schmittroth, 235 F.2d 756, 756	Chambers
1956	Chessman v. Teets, 239 F.2d 205, 221	Denman
1967	Lenske v. United States, 383 F.2d 20, 30	Chambers
1971	Lee Fook Chuey v. INS, 439 F.2d 244, 251	Carter
1971	United States v. Hayden, 445 F.2d 1365, 1380	Jertberg
1971	Munoz v. U.S. Dist. Court for Cent. Dist. of Cal., 446 F.2d 434, 436-37	Chambers, Trask, Carter
1972	Struck v. Sec'y of Def., 460 F.2d 1372, 1378	Duniway
1973	Naughten v. Cupp, 476 F.2d 845, 847	Chambers
1973	United States v. Springer, 478 F.2d 43, 46	Chambers
1973	Lau v. Nichols, 483 F.2d 791, 805	Hufstedler
1973	United States v. Price, 484 F.2d 485, 485	Wallace
1973	Plazola v. United States, 487 F.2d 157, 158	Hufstedler
1973	United States v. Hoctor, 487 F.2d 270, 272	Carter
1974	Adams v. S. Cal. First Nat'l Bank, 492 F.2d 324, 340	Hufstedler
1975	MacCollom v. United States, 511 F.2d 1116, 1125	Wallace

66. This list is current as of December 22, 2011.

1975	McDonnell Douglas Corp. v. U.S. Dist. Court for Cent. Dist. of Cal., 523 F.2d 1083, 1087	Chambers
1976	Wilson v. United States, 534 F.2d 130, 134	Hufstedler
1976	United States v. Scully, 546 F.2d 255, 271	Hufstedler
1976	United States v. Ryan, 548 F.2d 782, 792	Hufstedler
1976	United States v. Pacheco-Ruiz, 549 F.2d 1204, 1206	Chambers, Trask
1980	United States v. Penn, 647 F.2d 876, 889–90	B. Fletcher, Pregerson, Ferguson
1981	Miller v. Rumsfeld, 647 F.2d 80, 80	Boochever, Norris
1981	United States v. Goodheim, 664 F.2d 754, 756	Sneed
1982	William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 668 F.2d 1014, 1060	Wallace
1982	Ford Motor Co. v. FTC, 673 F.2d 1008, 1010	Reinhardt
1983	United States v. Harvey, 711 F.2d 144, 144	Kennedy
1983	Jerry T. O'Brien, Inc. v. SEC, 719 F.2d 300, 300	Kennedy
1984	Students of Cal. Sch. for the Blind v. Honig, 745 F.2d 582, 582	Sneed
1984	Fin. Inst. Emps. of Am., Local 1182 v. NLRB, 750 F.2d 757, 757-58	Kennedy, Norris
1985	Levine v. U.S. Dist. Court for Cent. Dist. of Cal., 775 F.2d 1054, 1055	Norris
1986	Int'l Olympic Comm. v. S.F. Arts & Athletics, 789 F.2d 1319, 1320	Kozinski
1986	United States v. Claiborne, 790 F.2d 1355, 1356	Kozinski
1986	Saldana v. INS, 793 F.2d 222, 222	Sneed
1986	Cubanski v. Heckler, 794 F.2d 540, 540	Kozinski
1986	Christian Sci. Reading Room Jointly Maintained v. City and Cnty. of S.F., 807 F.2d 1466, 1467	Norris

1987	Golden Eagle Distrib. Corp. v. Burroughs Corp., 809 F.2d 584, 584	Noonan
1987	Pangilinan v. INS, 809 F.2d 1449, 1450	Kozinski
1987	Sw. Marine, Inc. v. Campbell Indus., 811 F.2d 501, 502	Noonan
1987	Hall v. City of Santa Barbara, 833 F.2d 1270, 1282	Schroeder
1988	Duro v. Reina, 860 F.2d 1463, 1463	Kozinski
1988	Gutierrez v. Mun. Court of Se. Judicial Dist., 861 F.2d 1187, 1188	Kozinski
1989	United States v. Cunningham, 890 F.2d 199, 200	O'Scannlain
1990	United States v. Phelps, 895 F.2d 1281, 1282	Kozinski
1990	High Tech Gays v. Def. Indus. Sec. Clearance Office, 909 F.2d 375, 376	Canby
1990	McGuire v. Estelle, 919 F.2d 578, 578	Kozinski
1991	Cammack v. Waihee, 944 F.2d 466, 467, 472	Reinhardt, Pregerson, Kozinski
1991	Love v. United States, 944 F.2d 632, 633	O'Scannlain
1991	Nichols v. McCormick, 946 F.2d 695, 696	Norris
1991	Creech v. Arave, 947 F.2d 873, 888	Trott
1991	Richmond v. Lewis, 948 F.2d 1473, 1492	Pregerson
1991	Harris v. Vasquez, 949 F.2d 1497, 1539	Reinhardt
1992	McCalden v. Cal. Library Ass'n, 955 F.2d 1214, 1226, 1231, 1237	Kozinski, Reinhardt, Noonan
1992	Greenawalt v. Ricketts, 961 F.2d 1457, 1457	Schroeder, Reinhardt
1992	Klarfeld v. United States, 962 F.2d 866, 866	Kozinski
1992	United States v. Goland, 977 F.2d 1359, 1359	Pregerson
1992	Mata v. Ricketts, 981 F.2d 397, 399	Norris
1993	Elder v. Holloway, 984 F.2d 991, 992, 1000	Kozinski, Reinhardt
1993	Act Up!/Portland v. Bagley, 988 F.2d 868, 874	Norris

1993	White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1512	Kozinski
1993	Estate of Reynolds v. Martin, 994 F.2d 690, 690	Beezer
1993	Brewer v. Lewis, 997 F.2d 550, 550	Reinhardt
1993	United States v. Lopez-Vasquez, 1 F.3d 751, 756	O'Scannlain
1993	United States v. Koon, 6 F.3d 561, 565, 568	Reinhardt, Kozinski
1993	Garcia v. Spun Steak Co., 13 F.3d 296, 296	Reinhardt
1994	Fetterly v. Paskett, 15 F.3d 1472, 1472	Kozinski
1994	United States v. Weitzenhoff, 35 F.3d 1275, 1293	Kleinfeld
1995	United States v. Koon, 45 F.3d 1303, 1304, 1310	Reinhardt, O'Scannlain
1995	United States v. $405,089.23 U.S. Currency, 56 F.3d 41, 42	Rymer
1995	Moran v. Godinez, 57 F.3d 690, 691	Pregerson
1995	Walker v. S.F. Unified Sch. Dist., 62 F.3d 300, 301	Reinhardt
1995	Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250, 1252	Canby
1996	*In re* Extradition of Smyth, 72 F.3d 1433, 1433, 1438	Noonan, Reinhardt
1996	Nw. Envtl. Advocates v. City of Portland, 74 F.3d 945, 946	O'Scannlain
1996	Compassion in Dying v. Washington, 85 F.3d 1440, 1440, 1446	O'Scannlain, Trott
1996	Roulette v. City of Seattle, 97 F.3d 300, 311	Pregerson, Norris
1997	Espinoza-Gutierrez v. Smith, 109 F.3d 551, 551	Kozinski
1997	Finley v. Nat'l Endowment for the Arts, 112 F.3d 1015, 1016	O'Scannlain
1997	Guam Soc'y of Obstetricans & Gynecologists v. Ada, 113 F.3d 1089, 1090	O'Scannlain
1997	Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 711–12	Schroeder, Norris

1997	Am.-Arab Anti-Discrimination Comm. v. Reno, 132 F.3d 531, 532	O'Scannlain
1998	Rendish v. City of Tacoma, 134 F.3d 1389, 1389	Reinhardt
1998	San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters Local 1506, 137 F.3d 1090, 1090	Reinhardt
1998	Monterey Mech. Co. v. Wilson, 138 F.3d 1270, 1273, 1280	Reinhardt, Hawkins
1998	United States v. Parker, 146 F.3d 696, 697	Reinhardt
1998	Scott v. Ross, 151 F.3d 1247, 1248	Kozinski
1998	Holmes v. Cal. Army Nat. Guard, 155 F.3d 1049, 1050	Pregerson
1999	United States v. Harris, 165 F.3d 1277, 1277	Kozinski
1999	United States v. Mussari, 168 F.3d 1141, 1142	Kozinski
1999	United States v. Burdeau, 180 F.3d 1091, 1093	Kozinski
1999	Zimmerman v. Or. Dep't of Justice, 183 F.3d 1161, 1161	Reinhardt
1999	Planned Parenthood of S. Az. v. Lawall, 193 F.3d 1042, 1043	O'Scannlain
1999	*In re* Silicon Graphics Inc. Sec. Litig., 195 F.3d 521, 522	Reinhardt
1999	Wendt v. Host Int'l, Inc., 197 F.3d 1284, 1285	Kozinski
2000	Kleve v. Hill, 202 F.3d 1155, 1155	Kozinski
2000	Rich v. Woodford, 210 F.3d 961, 961, 965	Reinhardt, Kozinski, Wardlaw
2000	KDM *ex rel.* WJM v. Reedsport Sch. Dist., 210 F.3d 1098, 1099	O'Scannlain
2000	Bollard v. Cal. Province of Soc'y of Jesus, 211 F.3d 1331, 1331	Wardlaw
2000	Free Speech Coal. v. Reno, 220 F.3d 1113, 1114	Wardlaw
2000	Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 228 F.3d 998, 999	Kozinski
2000	United States v. Stephens, 232 F.3d 746, 747	O'Scannlain
2001	Abovian v. INS, 257 F.3d 971, 971	Kozinski
2001	United States v. Kaczynski, 262 F.3d 1034, 1034	Kozinski

2001	United States v. Recio, 270 F.3d 845, 846	O'Scannlain
2001	United States v. Orso, 275 F.3d 1190, 1192	Trott
2001	Anderson v. Calderon, 276 F.3d 483, 483	Reinhardt
2002	LaVine *ex rel.* LaVine v. Blaine Sch. Dist., 279 F.3d 719, 720	Reinhardt, Kleinfeld
2002	United States v. Chavez-Valenzuela, 281 F.3d 897, 897	O'Scannlain
2002	Spears v. Stewart, 283 F.3d 992, 996	Reinhardt
2002	Douglas v. Cal. Dep't of Youth Auth., 285 F.3d 1226, 1226	O'Scannlain
2002	Hason v. Med. Bd. of Cal., 294 F.3d 1166, 1167	O'Scannlain
2002	United States v. Sigmond-Ballesteros, 309 F.3d 545, 545	Kleinfeld
2003	Lawson v. Washington, 319 F.3d 498, 499	Berzon
2003	Mukhtar v. Cal. State Univ., Hayward, 319 F.3d 1073, 1075	Reinhardt
2003	Gentry v. Roe, 320 F.3d 891, 892	Kleinfeld
2003	Valeria v. Davis, 320 F.3d 1014, 1015	Pregerson
2003	Winn v. Killian, 321 F.3d 911, 911	Kleinfeld
2003	Newdow v. U.S. Cong., 328 F.3d 466, 471, 482	O'Scannlain, McKeown
2003	Silveira v. Lockyer, 328 F.3d 567, 568, 570, 592	Pregerson, Kozinski, Kleinfeld, Gould
2003	Suzuki Motor Corp. v. Consumers Union of U.S., Inc., 330 F.3d 1110, 1112	Kozinski
2003	Taniguchi v. Schultz, 332 F.3d 1205, 1206	Pregerson
2003	Johnson v. California, 336 F.3d 1117, 1117	Ferguson
2003	Vasquez-Lopez v. Ashcroft, 343 F.3d 961, 963	Berzon
2003	Haugen v. Brosseau, 351 F.3d 372, 375	Tallman
2004	Doe v. Tenet, 353 F.3d 1141, 1142	Kleinfeld
2004	Mena v. City of Simi Valley, 354 F3d 1015, 1015, 1019	Kleinfeld, Gould

2004	Belmontes v. Woodford, 359 F.3d 1079, 1080, 1086	Callahan, Bea
2004	Farrakhan v. Washington, 359 F.3d 1116, 1116	Kozinski
2004	Nordyke v. King, 364 F.3d 1025, 1025, 1026	Kleinfeld, Gould
2004	Collins v. Rice, 365 F.3d 667, 670	Bea
2004	Ileto v. Glock, Inc., 370 F.3d 860, 861, 868	Callahan, Kozinski
2004	Nunes v. Ashcroft, 375 F.3d 810, 811, 817	Tashima, Reinhardt
2004	Rivera v. NIBCO, Inc., 384 F.3d 822, 823	Bea
2004	United States v. Rivas-Gonzalez, 384 F.3d 1034, 1036, 1039	Pregerson, Wardlaw
2004	Providence Health Plan v. McDowell, 385 F.3d 1168, 1175	Thomas
2004	Thai v. Ashcroft, 389 F.3d 967, 967	Kozinski
2005	Williams v. Woodford, 396 F.3d 1059, 1059	Rawlinson
2005	Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 798, 806-07	Kleinfeld, Gould, Bea
2005	S. Or. Barter Fair v. Jackson Cnty., 401 F.3d 1124, 1124	Berzon
2005	United States v. Patterson, 406 F.3d 1095, 1095, 1101	Kozinski, Kleinfeld
2005	United States v. Vargas-Amaya, 408 F.3d 1227, 1227	Callahan
2005	Chen v. Gonzales, 411 F.3d 1049, 1049	Bea
2005	Gaston v. Palmer, 417 F.3d 1050, 1050	O'Scannlain
2005	Bockting v. Bayer, 418 F.3d 1055, 1056	O'Scannlain
2005	Musladin v. Lamarque, 427 F.3d 647, 647, 652	Kleinfeld, Bea
2005	Belmontes v. Stokes, 427 F.3d 663, 663	Callahan
2005	United States v. Omer, 429 F.3d 835, 835	Graber
2005	Tchoukhrova v. Gonzales, 430 F.3d 1222, 1223	Kozinski
2006	United States v. Stephens, 439 F.3d 1083, 1083	Tallman
2006	Kennedy v. City of Ridgefield, 440 F.3d 1091, 1091	Tallman

2006	United States v. Ortiz-Hernandez, 441 F.3d 1061, 1062	Paez
2006	United States v. Afshari, 446 F.3d 915, 915	Kozinski
2006	Brady v. Abbott Labs., 446 F.3d 924, 924	Hawkins
2006	Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc., 448 F.3d 1092, 1094	Bybee
2006	Defenders of Wildlife v. EPA, 450 F.3d 394, 395, 401	Kozinski, Kleinfeld
2006	United States v. Scott, 450 F.3d 863, 889	Callahan
2006	Brown v. Lambert, 451 F.3d 946, 955	Tallman
2006	Smith v. Mitchell, 453 F.3d 1203, 1203	Bea
2006	Harper v. Poway Unified Sch. Dist., 455 F.3d 1052, 1054	O'Scannlain
2007	United States v. Fort, 478 F.3d 1099, 1100	Wardlaw
2007	Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 895	Bybee
2007	Hoffman v. Arave, 481 F.3d 686, 686	Bea
2007	United States v. Baza-Martinez, 481 F.3d 690, 691	Graber
2007	United States v. Black, 482 F.3d 1044, 1045	Kozinski
2007	Sanchez v. Cnty. of San Diego, 483 F.3d 965, 966, 969	Pregerson, Kozinski
2007	*In re* Exxon Valdez, 490 F.3d 1066, 1068, 1071	Kozinski, Bea
2007	United States v. Ressam, 491 F.3d 997, 998	O'Scannlain
2007	United States v. Castillo-Basa, 494 F.3d 1217, 1218	Callahan
2007	United States v. Ziegler, 497 F.3d 890, 892, 899	W. Fletcher, Kozinski
2007	Sarausad v. Porter, 503 F.3d 822, 823	Callahan
2007	Ramadan v. Keisler, 504 F.3d 973, 973	O'Scannlain
2007	Irons v. Carey, 506 F.3d 951, 952	Kleinfeld
2007	Phillips v. Hust, 507 F.3d 1171, 1172	Kozinski
2007	Crater v. Galaza, 508 F.3d 1261, 1261	Reinhardt
2008	United States v. Jenkins, 518 F.3d 722, 723, 723	Kozinski, O'Scannlain
2008	Porter v. Bowen, 518 F.3d 1181, 1181	Kleinfeld

2008	Betz v. Trainer Wortham & Co., 519 F.3d 863, 865	Kozinski
2008	United States v. Burlington N. & Santa Fe Ry., 520 F.3d 918, 952	Bea
2008	Molski v. Evergreen Dynasty Corp., 521 F.3d 1215, 1216, 1220	Berzon, Kozinski
2008	United States v. Horvath, 522 F.3d 904, 907, 913	Bea, Kozinski
2008	Buono v. Kempthorne, 527 F.3d 758, 760	O'Scannlain
2008	Correll v. Ryan, 539 F.3d 938, 970	Callahan
2008	Witt v. Dep't of Air Force, 548 F.3d 1264, 1265, 1276, 1280	O'Scannlain, Kleinfeld, Kozinski
2008	Truth v. Kent Sch. Dist., 551 F.3d 850, 851	Bea
2008	Belmontes v. Ayers, 551 F.3d 864, 866	Callahan
2008	Barnes-Wallace v. City of San Diego, 551 F.3d 891, 892	O'Scannlain
2009	Golden Gate Rest. Ass'n v. City and Cnty. of S.F., 558 F.3d 1000, 1004	M. Smith
2009	United States v. Whitehead, 559 F.3d 918, 918, 921	Gould, Reinhardt
2009	Quon v. Arch Wireless Operating Co., 554 F.3d 769, 774	Ikuta
2009	United States v. Mayer, 560 F.3d 948, 951	Kozinski
2009	Lopez-Rodriguez v. Holder, 560 F.3d 1098, 1099	Bea
2009	Cooper v. Brown, 565 F.3d 581, 581, 635, 635, 635	W. Fletcher, Wardlaw, Fisher, Reinhardt
2009	De Mercado v. Mukasey, 566 F.3d 810, 812	Pregerson
2009	Nelson v. NASA, 568 F.3d 1028, 1038, 1050, 1052	Callahan, Kleinfeld, Kozinski
2009	Moore v. Czerniak, 574 F.3d 1092, 1162, 1166	Callahan, Bea
2009	Abebe v. Holder, 577 F.3d 1113, 1113	Berzon

2009	United States v. Paul, 583 F.3d 1136, 1136	O'Scannlain
2009	Winn v. Ariz. Christian Sch. Tuition Org., 586 F.3d 649, 658	O'Scannlain
2009	United States v. Hao Quang Tran, 586 F.3d 681, 681	Gould
2009	United States v. Amezcua-Vasquez, 586 F.3d 1176, 1176	O'Scannlain
2010	Conn v. City of Reno, 591 F.3d 1081, 1085	Kozinski
2010	United States v. Alderman, 593 F.3d 1141, 1141	O'Scannlain
2010	United States v. Lemus, 596 F.3d 512, 513	Kozinski
2010	United States v. Gonzalez, 598 F.3d 1095, 1100	Bea
2010	al-Kidd v. Ashcroft, 598 F.3d 1129, 1137, 1142	O'Scannlain, Gould
2010	Pintos v. Pac. Creditors Ass'n, 605 F.3d 665, 670, 672	Kozinski, Gould
2010	Schad v. Ryan, 606 F.3d 1022, 1026	Callahan
2010	Kawashima v. Holder, 615 F.3d 1043, 1046	Graber
2010	United States v. Pineda-Moreno, 617 F.3d 1120, 1121, 1126	Kozinski, Reinhardt
2010	United States v. Terrell, 621 F.3d 1154, 1155	M. Smith
2010	Cooper v. FAA, 622 F.3d 1016, 1022	O'Scannlain
2010	United States v. Edwards, 622 F.3d 1215, 1216	Gould
2010	Valdivia v. Schwarzenegger, 623 F.3d 849, 850	Bea
2010	Pearson v. Muntz, 625 F.3d 539, 541	Ikuta
2010	Landrigan v. Brewer, 625 F.3d 1132, 1140	Kozinski

2010	Doe *ex rel.* Doe v. Kamehameha Schs., 625 F.3d 1182, 1183, 1184	Kozinski, Reinhardt
2010	Pollard v. GEO Grp., Inc., 629 F.3d 843, 845	Bea
2010	Bryan v. MacPherson, 630 F.3d 805, 815	Tallman
2011	Teclezghi v. Holder, 628 F.3d 1055, 1056	Pregerson
2011	AmeriCredit Fin. Servs., Inc. v. Penrod (*In re* Penrod), 636 F.3d 1175, 1175	Bea
2011	United States v. Alvarez, 638 F.3d 666, 677, 687	O'Scannlain, Gould
2011	Beaty v. Brewer, 649 F.3d 1071, 1072, 1076	Reinhardt x 2
2011	Rosas-Castaneda v. Holder, 655 F.3d 875, 877	Kozinski
2011	Hrdlicka v. Reniff, 656 F.3d 942, 943	O'Scannlain
2011	Thompson v. Runnels, 657 F.3d 784, 784	Callahan
2011	Starr v. Cnty. of L.A., 659 F.3d 850, 851	O'Scannlain
2011	Trunk v. City of San Diego, 660 F.3d 1091, 1091	Bea

APPENDIX C

The following have served as active judges of the Ninth Circuit since 1970 but never authored a dissental:[67] Alarcón, Anderson, Barnes, Browning, Brunetti, Choy, Christen, Clifton, Ely, Farris, Fernandez, Goodwin, Hall, Hamley, Hug, Kilkenny, Koelsch, Leavy, Merrill, Murguia, D.W. Nelson, T.G. Nelson, Poole, Silverman, Skopil, N.R. Smith, Tang, Thompson, Wiggins, Wright.

Of those, the following have nonetheless joined dissentals written by others:

Judge	Year	Case
Alarcón	1992	Klarfeld v. United States, 962 F.2d 866, 866
Anderson	1987	Sw. Marine, Inc. v. Campbell Indus., 811 F.2d 501, 502
Browning	1976	Wilson v. United States, 534 F.2d 130, 139
Brunetti	1986	Saldana v. INS, 793 F.2d 222, 222
Choy	1974	MacCollum v. United States, 511 F.2d 1116, 1125
Clifton	2006	United States v. Stephens, 439 F.3d 1083, 1083
Ely	1976	Wilson v. United States, 534 F.2d 130, 139
Goodwin	1987	Sw. Marine, Inc. v. Campbell Indus., 811 F.2d 501, 502
Hall	1993	United States v. Lopez-Vasquez, 1 F.3d 751, 756
Hug	2000	Kleve v. Hill, 202 F.3d 1155, 1155
Koelsch	1976	Wilson v. United States, 534 F.2d 130, 139
Leavy	1988	Duro v. Reina, 860 F.2d 1463, 1463
D.W. Nelson	2003	Johnson v. California, 336 F.3d 1117, 1117
T.G. Nelson	2003	Suzuki Motor Corp. v. Consumers Union of U.S., Inc., 330 F.3d 1110, 1112
Poole	1991	Love v. United States, 944 F.2d 632, 633
N.R. Smith	2011	Hrdlicka v. Reniff, 656 F.3d 942, 943

67. This list is current as of December 22, 2011.

Tang	1992	United States v. Goland, 977 F.2d 1359, 1359
Thompson	1988	Gutierrez v. Mun. Court of Se. Judicial Dist., 861 F.2d 1187, 1188
Wiggins	1993	United States v. Lopez-Vasquez, 1 F.3d 751, 756
Wright	1974	MacCollom v. United States, 511 F.2d 1116, 1125