

Supreme Court GVRs and Lower-Court Reactions

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We seek to understand the Supreme Court's "Grant, Vacate, and Remand" (GVR) dispositions and the reaction to those dispositions by the U.S. Court of Appeals. Drawing on data from four Court terms, we trace the reaction of the lower courts to GVR orders, culling information about the meaning of the GVR to those lower courts from their responses and from our interviews with several unnamed circuit court judges. We then code the lower-court decisions to systematically detail how circuit courts react to GVRs.

KEYWORDS: GVR, compliance, monitoring, courts of Appeals, supreme Court, implementation

The U.S. Supreme Court, despite its "least dangerous branch" status, has become a major player in American politics. Its decisions often capture the attention of the entire country, and they can, at times, undo the work of the elected branches. However, the Court, unlike Congress, does not have at its disposal very many tools to be sure its decisions are implemented. Indeed, the Supreme Court has an effect only when those charged with the implementation of its decisions, most often the lower federal courts, comply with its rulings. As Early notes, "a decision by the High Court is . . . final, but has little more vitality than the lower courts are willing to give it" (Early, 1977:7).

Gaining compliance has been seen as a difficult task, given the institutional structure of the Court and the size of the federal and state judiciaries (Hellman, 1983b; Benesh, 2002b).¹ However, much research has considered the question of whether or not lower courts comply with Supreme Court precedent, largely finding that they do (see, e.g., Songer, Segal, and Cameron, 1994; Benesh,

¹Compliance can be a tricky concept to define. A common definition of compliance in the context of Supreme Court–lower court interaction is one offered by Segal, Songer, and Cameron: "In the judicial hierarchy, 'congruence' implies that an appeals court and the Supreme Court decide a case the same way, given the facts in the case" (1994:675). Applying this idea to GVRs, then, we would expect that a compliant lower court would carefully consider the order, the precedent mentioned in it, and then amend its decision as necessary in a way that comports with its understanding of how the Supreme Court would decide the case, if given the opportunity.

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2002b; Benesh and Reddick, 2001; Songer and Sheehan, 1990; Johnson, 1987). That research often concludes that the lower court complies because of its perception that it should; e.g., that it complies because of what the Supreme Court *is* rather than what it *does* (Benesh, 2002b; on subordinates responding to authority merely because they are the authority in general, see Simon, 1997).

One circuit judge, in a confidential interview, cited Justice Jackson's relatively famous aphorism when asked about the relationship between the Supreme Court and the lower courts: "We are not final because we are infallible, but we are infallible only because we are final" (Jackson, J., concurring, *Brown v. Allen*, 344 U.S. 443, 540 [1953]).² And all of them noted that, given their inferior position, it was their job to comply with the Supreme Court. According to one: "if five of them say that our take in *Smith v. Jones* is not well-founded, that's it, school's out, take what they said, apply it to the facts, move on. And I would say that if there were nine justices up there that I agreed with all the time or not."³ The normative power of the Court with respect to its lower-court "agents," then, has the potential to be powerful (Pacelle and Baum, 1992).

In this article, though, we explore the effect of a set of cases not considered by the previous research on point, by considering circuit court reactions to "Grant, Vacate, and Remand" (GVR) dispositions by the Supreme Court. Unlike the U.S. Courts of Appeals, the U.S. Supreme Court is not (supposedly) in the business of error correction (Early, 1977; Hellman, 1983b; Perry, 1991; Armbruster, 1998). The Court should decide, according to its own rules, only those cases that are "of . . . general public importance or concern" (quoted in Hellman, 1983b:800). One circuit judge put it this way: "Well, they [the Supreme Court] don't decide cases. They decide issues."⁴ Therefore, the Court's behavior in cases they Grant, Vacate, and Remand, in light of some intervening event, seems to be an odd phenomenon.

One clerk, quoted by Perry, said that these GVRs can be explained via "the Zorro concept—where they strike like lightning to do justice" (Perry, 1991:100). Indeed, "justice" may require the Court to correct an error brought to its attention, especially when doing so is as easy as issuing a GVR order to the lower court (Armbruster, 1998). Perhaps not "justice" but monitoring is the Court's motive. So, rather than hear more cases on the merits to be sure lower courts are compliant and that national law is coherent, the Court might gather cases together and remand them to the circuits in light of fully argued decisions. The circuits, for their part, are expected to examine the Supreme Court's precedent carefully. Indeed, sometimes the circuit court panels to whom GVRs are issued call for briefs from the parties on the applicability of the precedent to the decision,⁵ and then decide whether to change the previous disposition.

²Confidential interview by author, April 16, 2007 (on file with S. Benesh).

³Confidential interview by author, April 16, 2007 (on file with S. Benesh).

⁴Confidential interview by author, April 16, 2007 (on file with S. Benesh).

⁵See Seventh Circuit Rule 54, which says, "When the Supreme Court remands a case to this court for further proceedings, counsel for the parties shall, within 21 days after the issuance of a certified copy of the Supreme Court's judgment pursuant to its Rule 45.3, file statements of their positions as to the action which ought to be taken by this court on remand." Available online at www.ca7.uscourts.gov/Rules/rules.htm (visited February 18, 2008). Judges in other circuits also mentioned this as a potential next step after receiving a GVR. See, e.g., *Hernandez v. Denton*, 929 F.2d 1374 (9th Cir. 1990), where Judge Schroeder, writing for the panel, says, "We have given further consideration after requesting briefs from the parties as to the bearing of that decision on this case" (at 1374). And the Fourth Circuit rule on remands notes that judges "may require additional briefs and oral argument." Available online at www.ca4.uscourts.gov/pdf/rules.pdf

Academics know so little about this process.⁶ What happens when the Supreme Court GVRs a case? How often is the disposition changed as a result? How often is the lower court compliant with the spirit of the GVR? What do the lower-court judges think of this practice of remands without substantive instructions? Using data from the 2003, 2004, 2005, and 2006 terms of the Supreme Court and their lower-court progeny, along with interviews with circuit court judges, these questions are explored and directions for future research provided.⁷

GRANT, VACATE, AND REMANDS

GVRs were a long-ignored type of Supreme Court decision.⁸ Until law professor Arthur Hellman wrote an article about them in the *Pittsburgh Law Review* in 1983, they went largely unnoticed. Even after Professor Hellman's *Pittsburgh Law Review* article and subsequent *Judicature* article (Hellman, 1984), scholars really paid these dispositions little heed until a 2004 symposium in the *Arizona State Law Journal*. Though that symposium considered remands in general, many of the articles focused on GVRs. Political scientists have all but ignored these decisions with the singular exception of Pacelle and Baum's article on remands, which, again, considers all sorts of remands of which GVRs are but one type (1992). The Spaeth database (Spaeth, various years), for example, includes them and codes anything of substance from them only when they are accompanied by a dissent, which is rare.⁹

But these dispositions are important, and, in most terms, well eclipse the number of decisions resulting in written opinions (see Tables 1 and 2). So what are they, and when does the Supreme Court employ them?

When litigants petition the Supreme Court for review, the Court can take one of a number of actions (see, e.g., Stern et al., 1993). The chief justice (absent a contrary opinion by one of the other justices) can "dead-list" the case, denying the petition for cert without discussing the case at conference. Nearly 70 percent of cases petitioned to the Court suffer such a fate (Stern et al., 1993:229). If a case instead makes the "discuss list," it will be discussed at conference where

(visited February 18, 2008). This idea was mentioned by all judges we interviewed, especially in reference to "close" cases.

⁶One of the leading works on point calls it "the most puzzling mode of disposition in the Court's repertory" (Hellman, 1983b:836).

⁷To collect our data, we first printed all of the Court's orders for the four terms under study. These are available on the Supreme Court's Web site, www.supremecourtus.gov (visited February 18, 2008). We then searched LEXIS using the party names as given in the Supreme Court's order to find the lower court's reaction to the GVR disposition. We surely missed some cases (the Supreme Court provides only the name of the case and sometimes chooses one of many parties, sometimes even misspelling the parties' names, along with the circuit, so some were difficult to find) and others may not have been decided by the circuit court as of this writing. For those we did find, we coded a host of variables of interest, some of them discussed in this article. To supplement this data collection, we also spoke to four circuit court judges. For the purposes of this article, they remain entirely anonymous, including any mention of their home circuits. All of the judges were extremely accommodating, and we very much appreciate the substantial time they gave us.

⁸This section draws heavily on Benesh (2008).

⁹This is especially true given that it appears that the justices use a "rule of six" in deciding to hand down a GVR order. In other words, six justices have to agree to GVR a case before it happens; hence, there is not much room left for dissent (Perry, 1991:100). Note, though, that there do exist GVRs with four dissenters, which casts some doubt on the tenacity of this "rule" (Martin, 2004:n. 96).

TABLE 1
Frequencies of GVR Dispositions

<i>October Term</i>	<i>GVR to Circuit</i>	<i>GVR to State Court</i>	<i>Total</i>
2003	25 (63%)	15 (38%)	40
2004	742 (98%) ^a	13 (2%)	755
2005	75 (84%) ^b	14 (16%)	89
2006	61 (23%) ^c	208 (77%) ^d	269
Total	903 (78%)	250 (22%)	1,153

Source: Author-collected data (via www.supremecourtus.gov).

^a701 of these were in light of *Booker v. U.S.*

^b41 of these were in light of *Booker v. U.S.*

^c1 of these was in light of *Booker v. U.S.*

^d203 of these were in light of *Cunningham v. California*.

Justices will vote whether or not to grant the petition. If four justices so vote, the case is granted cert. Justices need not cast votes at the first conference at which a petition is considered, but rather might ask the chief to “relist” the case, holding it over to the next conference before making a decision on it, usually pending a cert decision on another case but sometimes for reasons unknown to the observer (see Spaeth, 2004). The Court may also choose to place a stronger “hold” on the case, postponing the cert decision until the Court issues a ruling in a similar case to which they have decided to give plenary hearing. Once the decision in the similar case is announced, the held cases are “GVR’d” in light of the new case. Justice Scalia has said that the Court “regularly holds cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be ‘GVR’d’ when the case is decided” (*Lawrence v. Chater*, 516 U.S. 163, 181 [Scalia, J., dissenting] [1996]). The Court may also GVR a case to which it has granted cert in light of some intervening event, including the passage of a statute or the confession of error by the solicitor general. The Court may also grant cert only on specific questions presented by the parties, or instruct the parties to brief and argue additional questions. The Court sometimes grants cert and then decides the case summarily, on the briefs, without oral argument. These can be simple orders, summarily reversing the lower court’s decision, or more substantial per curiam opinions on the merits.

TABLE 2
Case Dispositions on the Merits by Year

<i>October Term</i>	<i>Reviewing Circuits</i>	<i>Reviewing State Courts</i>	<i>Total</i>
2003	68	8	76
2004	70	12	82
2005	65	17	82
2006	64	7	71
Total	267	44	311

Source: *Harvard Law Review*, Table IIE, various November issues.

We focus here on GVRs, which issue from the Supreme Court when the Court determines that a lower court might benefit from a recent ruling (or other relevant event, as described below) in reevaluating its decision. In the Supreme Court's words, these are a "customary procedure" (*State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 161 [1945]), though debate among the justices as to the circumstances under which they are appropriate suggests that their use is not so clear. Indeed, most of the law-review literature on topic recounts debate, coming especially from Justices Scalia, Thomas, and Rehnquist, over their (over-)use (see, e.g., Armbruster, 1998; Martin, 2004). Generally, these orders, usually only a couple of sentences long, state that the petition for cert in the case is granted, the judgment is vacated, and the case remanded "in light of" some intervening Supreme Court decision. An example, in its entirety:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the First Circuit for further consideration in light of *Unitherm Food Sys. v. Swift-Eckrich*, 546 U.S. — (2006) (*Vazquez-Valentin v. Santiago-Diaz*, 04-1322, 2006).

While most often a case is GVR'd in light of another Supreme Court case, the Court also occasionally GVRs in light of a recently passed statute, a state court decision that impacts a diversity case, a new agency interpretation, or a confession of error by the solicitor general.¹⁰ In our data, for example, which includes reactions of circuit courts to Supreme Court remands, four circuit court cases were remanded in light of something other than a Supreme Court decision (of 116 circuit court cases under consideration). This includes two remanded in light of the REAL ID Act, one remanded in light of the Department of Labor's Wage and Hour Advisory Memorandum, and one remanded in light of the state's acknowledgment that the Texas Court of Criminal Appeals denied the petitioner's motion for rehearing.

The Court has given some guidelines about when it will issue a GVR. In *Henry v. City of Rock Hill* (376 U.S. 776, 1964), the Court said that a case will be remanded in light of another case when the Court is "not certain that the case [is] free from all obstacles to reversal on [the] intervening precedent" (at 776). The Court warned, though, that such a disposition "does not amount to a final determination on the merits" but that it "indicate[s] that we [find the in light of case] sufficiently analogous and, perhaps, decisive to compel re-examination of the case" (at 777). In *Lawrence v. Chater* (516 U.S. 163, 1996), the Court used a two-part test to decide whether a GVR may be an appropriate resolution for a given case:

Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate. (at 167)

However, the Court added that "if it appears that the intervening development . . . is part of an unfair or manipulative litigation strategy, or if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate" (at 168).

¹⁰Recently, the Court GVR'd a case without citing an intervening event. See *Youngblood v. West Virginia*, 547 U.S. 867 (2006), prompting a law-review comment criticizing the Court for overstepping its authority (Ku, 2008). There, the Court GVR'd in order to obtain "the benefit of the views of the full Supreme Court of Appeals of West Virginia on the *Brady* issue" (p. 870).

However, many lower courts do not have the benefit of studying these statements by the Supreme Court, so the meaning of the GVR may not be clear to them (Chemerinsky and Miltenberg, 2004). In early 2003, for example, case files from the Ninth Circuit show that the judges are not even certain what the abbreviation “GVR” means. In discussing the potential fate of one of their cases at the Supreme Court, one judge opined that the Court might GVR the case. Two of that judge’s colleagues responded, separately, to ask what a GVR was.¹¹ In addition, the numbers are such that while there may be a large number of such dispositions each term, any one court or especially any one judge will likely have little familiarity with the process. Our data and interviews support this quite dramatically. Indeed, one of our subjects could not recall the last time she or he had a case GVR’d to his or her panel (we had only a couple in which this judge had participated in our data set—hardly memorable to a judge who participates in hundreds of cases each year), and another turned down the interview on the basis of never having experienced a GVR.

Indeed, because of the uncertainty they obviously engender, some legal scholars argue that GVRs do a disservice to the lower courts (Chemerinsky and Miltenberg, 2004; Armbruster, 1998). Rather than a way for the Court to provide the lower court with information and maintain consistency in the law, some scholars, such as Hellman (1983a), see them as merely puzzling to the lower courts. Chemerinsky and Miltenberg say that “nothing in the last 20 years has provided any clarity as to how lower courts are to treat ‘GVR’ . . . orders. The confusion exists in the press, among lawyers and, most importantly, in the lower courts” (2004:513). They cite one instance in the California Court of Appeal where a judge on the panel suggested that a GVR order from the Supreme Court was a merits decision;¹² i.e., that their previous decision was automatically void, treating the GVR like a reversal by the high court (Hellman, 1984a). Other courts, reacting to the same “in light of” decision reacted differently, some reinstating their previous decision, others changing their decision far less than did the California court. Chemerinsky and Miltenberg argue that the Supreme Court should use GVRs less often and should be more careful to be sure that the intervening decision is truly on point when they do so.

While Justice Stevens has suggested that the decision to GVR is an “action on the merits” (Stevens, J. dissenting, *Board of Trustees v. Sweeney*, 439 U.S. 24, 26 [1978]), thereby asserting that the justices do examine the case they eventually GVR to be sure its new decision is relevant, and Hellman suggests that the Court checks for similarity of cases and real error (1983b), and the Supreme Court itself, in the *City of Rock Hill* case, suggests that a GVR indicates that the Court considers the “in light of” case to be “sufficiently analogous and, perhaps, decisive to compel reexamination of the case” (at 777), one judge in our interviews suggested that it was usually the case, in this judge’s experience, that the Supreme Court issues GVRs in an extremely haphazard way, usually resulting in the lower court merely reaffirming their previous judgment since the “in light of” case had little to do with their case. The Court itself has admitted that its summary dispositions cause uncertainty in the lower courts (Hellman, 1983a). But another of the judges we interviewed suggested that closely divided decisions were far more problematic than summary dispositions in terms of providing less-than-ideal guidance. And several gave the High Court more credit, noting that they have found the Supreme Court to be quite careful, offering

¹¹Material provided by Stephen Wasby, from his research in Ninth Circuit case files, on the condition that the judges’ names be kept confidential.

¹²The “in light of” case was *State Farm Mutual Automobile Insurance Co. v. Campbell* (123 S.Ct. 1513, 2003).

the lower court a chance to reconsider a case rather than simply denying review to it. The Court, according to one judge, “is probably saying, look, it may well be that the panel that decided that case no longer wants it to become final knowing what we’ve just done in this other case.”¹³ While one judge thought the Court’s behavior was fairly superficial and a housekeeping sort of device, most deemed the Court to be more genuine, one characterizing the Court as proceeding with “an abundance of caution.” Another of our judges expressed discomfort with and lack of interest in “psychoanalyzing the Justices,” arguing that she or he just does not know enough about psychology to try to ascertain what the justices intended or even to predict how they might vote in a given case before deciding it himself or herself. All of these circuit court judges asserted that they just do the best they can and, if they are wrong, assume the Supreme Court will reverse them. They are, after all, as one judge reminded us, “such inferior courts as Congress may from time to time ordain and establish.”¹⁴

POTENTIAL REASONS FOR THE GVR

There are, then, several asserted reasons for the Supreme Court’s behavior in granting cert, vacating the lower court’s decision, and remanding. It could be that GVRs are an efficient means for dealing with a burgeoning docket. As Chemerinsky and Miltenberg (2004) note: “A GVR order is so easy for the Supreme Court: it disposes of a case without needing to address its merits” (p. 526). Others highlight the “bang for the buck” theory, arguing that, even with decreased plenary caseloads, the Supreme Court can have a large impact via the GVR (Vladeck, 2005).¹⁵ And Justice Scalia himself, in dissent, makes the argument that GVRs are monitoring mechanisms, though he wishes they were not: “In my view we have no power to make such a tutelary remand, as to a schoolboy made to do his homework again” (Scalia, J., dissenting, *Lawrence v. Chater*, 516 U.S. 163, 185–186 [1996]).

Others argue that the Court could use GVRs to promote “equity among litigants,” which could be termed “judicial equal protection” (Revesz and Karlan, 1988:1118—Note, though, that their focus is on holds, which often, though not always, result in GVRs). The thinking is that an individual should not lose his or her case merely because he or she happened to have his or her case decided while the Supreme Court is considering a case that it eventually reverses—that “like cases be treated alike” (Revesz and Karlan, 1988:1118) or that a party is not denied the benefit of the correct ruling due to an “accident of timing” (Hellman, 1984:844). Not only does this serve equity concerns and help promote the uniformity of law, but it also has institutional benefits for the Court, allowing the Court to save its resources for hearing the best vehicle to make policy (Revesz and Karlan, 1988).¹⁶

¹³Confidential interview by author, April 16, 2007 (on file with S. Benesh).

¹⁴Confidential interview by author, April 16, 2007 (on file with S. Benesh).

¹⁵However, Martin claims that the GVR has actually created “perverse incentives that increase transaction costs, delay adjudication, burden both the Supreme Court and lower courts, and result in both systemic and individualized injustice” (2004:552) as litigants gain incentives to file even meritless appeals to keep a case alive.

¹⁶Other scholars have observed also that when a case is held and the Court denies cert, it may be a signal that the Court “thought that the decision it declined to review (or even to GVR) was consistent with its recent opinion” (Robertson and Sturly, 2006:217).

FREQUENCY OF THE GVR ORDER

Most of the scholarship on point argues that the use of the GVR has increased over time (see, e.g., Chemerinsky and Miltenberg, 2004; Hellman, 1984; Armbruster, 1998; Martin, 2004), especially since the 1960s. Martin notes that the number is fairly consistent, ranging from 5 to 100 per term (2004), though that does not seem altogether consistent. Indeed, the numbers are certainly influenced by specific cases (see Table 1), as discussed by Bruhl (2009).¹⁷ As can be seen there, 2004 was an extreme outlier due to the extensive GVR activity associated with *U.S. v. Booker* (543 U.S. 220 [2005]), the case that found the mandatory nature of the federal sentencing guidelines to be unconstitutional. Obviously, due to the prior decision in *Blakely v. Washington* (542 U.S. 296 [2004]), finding a state's similar guidelines to be unconstitutional, "everyone" sentenced under the federal guidelines appealed their sentences.¹⁸ So, ignoring that aberration, there were 40 cases in 2003, 54 in 2004, 48 in 2005, and 65 in 2006. In other words, barring major decisions like *Booker* at the federal level and *Cunningham* concerning the states, the Court uses GVRs frequently and consistently, but not to an overwhelming extent. However, they do GVR nearly as many cases as they treat fully these days, and many terms many times more, so the number is not inconsequential. The Court GVR'd 1,153 cases between 2003 and 2006 ("in light of" the four non-cases mentioned earlier as well as 58 unique Supreme Court decisions) and decided only 311 on the merits (see Tables 1 and 2). This certainly provides the potential for more frequent direct monitoring of the circuits by the Supreme Court, depending on how the circuits treat the GVR.

LOWER-COURT RESPONSE

According to our interviews, the law-review literature, and the Supreme Court itself, a lower court need not reverse its ruling merely because the Supreme Court issues a GVR; rather, the lower court is to examine the case cited by the Court in the order and then determine whether further action need be taken (see, e.g., Martin, 2004; *Henry v. City of Rock Hill*, 376 U.S. 776 [1964], but see some of the evidence cited in Hellman, 1984). Indeed, if we use as our definition of compliance that offered by Tarr (1977:35), we would focus not on changing outcomes, per se, but rather on the "proper application of standards enunciated by the Supreme Court in deciding all cases raising similar or related questions." Its converse, noncompliance, then, "involves a failure to apply—or properly apply—those standards."

Not all cases in which the circuit court affirmed the district court's ruling later reverse or vacate that district court decision as a result of having been issued a GVR order, nor are all cases in which the circuit court reversed the district court's decision subsequently switched to affirming it as a result of the GVR order (see Table 3). Indeed, the most populous category is the one where the circuit affirmed the lower court both before and after the GVR. However, contrary to Pacelle

¹⁷Our numbers are comparable to Bruhl's, though not exactly the same. We attribute this to our differences in data-collection methods and our definition of the focus of our respective studies.

¹⁸Interestingly, one of the judges with whom we talked expressed the opinion that the *Booker* remands did not have much effect—that the sentences were largely reinstated. "There's no point in having a sentencing commission," after all, "if we don't pay some attention to the guidelines," the judge said.

TABLE 3
Disposition Before and After GVR (non-Booker cases)* (Percentage of Total Number in Parentheses)

Disposition Before GVR	Disposition After GVR					Total
	Affirm	Reverse (at least in part)	Vacate (at least in part)	Remand	Dismiss	
Affirm	27 (23)	10 (9)	16 (14)	7 (6)	8 (7)	68 (59)
Reverse (at least in part)	14 (12)	9 (8)	1 (1)	3 (3)	2 (2)	29 (25)
Vacate (at least in part)	6 (5)	2 (2)	6 (5)	0 (0)	0 (0)	14 (12)
Remand	0 (0)	0 (0)	0 (0)	1 (1)	0 (0)	1 (1)
Dismiss	0 (0)	0 (0)	2 (2)	0 (0)	2 (2)	4 (3)
Total	47 (41)	21 (18)	25 (22)	11 (9)	12 (10)	116 (100)

Source: Author-collected data.

*Two cases did not exactly fit our disposition chart: one "deny" prior and "deny" after in a case concerning habeas corpus relief to a state litigant (*England v. Quarterman*, 242 Fed. Appx. 155 [2007] 5th Cir.), which we add to the Affirm/Affirm cell; one "petition granted" prior and "petition granted" after in a case involving a petition by a legal alien (*Penuliar v. Mukasey*, 528 F.3d 603 [2008] 9th Cir.), which we add to the Reverse/Reverse cell.

and Baum's (1992) contention that this evidences some sort of noncompliance, we do not think a mere failure to change disposition means the lower court did not take seriously its obligation to comply with the Supreme Court. As to the extent to which circuits comply with the Supreme Court order, again, compliance is tricky to measure (see Table 4). Relying on the ideas expressed by Tarr on the "proper application of standards," and Segal, Songer, and Cameron on "congruence," we operationalize the concept in four separate measures. First, we look to a close reading of the lower-court decision and the Supreme Court "in light of" case (or statute or memorandum, etc.). In reading each carefully, we code the lower court as either compliant or not with the spirit of the Supreme Court's order. We consider whether the lower court decision discusses the "in light of" case (or statute or other event) fairly, whether it distinguishes the Supreme Court case (or other intervening event) from the situation at issue in its own case credibly, and whether the Supreme Court case (or other intervening event) is squarely on point or not, given the facts of the lower

TABLE 4
Compliance with GVR (Non-Booker Cases) (Number of Compliant Cases in Parentheses)

October Term	Coded Complied*	Cite and analyze in light of case	Abandon Relevant Portion of Ruling	Shepard's "Followed"
2003	83% (15)	94% (17)	78% (14)	43% (9)
2004	92 (23)	80 (20)	72 (18)	47 (14)
2005	92 (22)	100 (25)	79 (19)	62 (16)
2006	92 (33)	95 (36)	78 (29)	49 (19)
Total	90 (93)	92 (98)	77 (80)	50 (58)

Source: Author-collected data.

*For some circuit court decisions, coding compliance was impossible. These include cases in which the circuit merely remands to the district court without comment and those that are rendered moot by the Supreme Court's GVR. These are not included in the table.

court's case. Ninety percent of the cases received our code for compliant with little significant deviation across the terms considered here (see Table 4). In our view, the circuits do indeed do their best, in good faith, to comply with the Supreme Court's GVR, just as they tell us in the interviews that they do.¹⁹

Our second measure of compliance is a seemingly easy one: if the circuit court cites and treats the "in light of" case or event, we code it as compliant. We seek, in this measure, to ascertain whether the circuit is seemingly taking seriously the Court's intervening decision (or intervening event), or whether instead it is ignoring it. Fully 92 percent of all circuit cases do indeed substantively interpret and discuss the "in light of" event, with some deviation across terms. (Notably, the 2004 term seems deviant, wherein only 80 percent of cases did so.) It is clear, then, that at least the circuits are engaging the "in light of" case or event before coming to a resolution on remand, even if they find some reason to determine that it either does not apply to their case (because, for example, the facts are too different) or does not require a reversal of their earlier decision because, even with the new precedent or even in spite of the change in law, the lower court still should be affirmed.

Implicit in the GVR order is the notion that should the Supreme Court's new decision be controlling, the lower court ought to abandon that portion of their decision most relevant to it. We include a measure of compliance that codes whether the circuit abandons the relevant portion of its decision even if it goes on to affirm the case on some other basis than that on which the GVR is based. In 77 percent of circuit cases, the relevant portion of the decision is indeed abandoned (again, with little deviation from term to term). This suggests that those cases in which the circuits do not change their dispositions may nonetheless, as expected, still be considerably compliant. The changes owed to the Supreme Court's GVR are simply not dispositive.

Finally, we *Shepardized* the "in light of" decision to ascertain into which treatment category *Shepard's* placed the subsequent circuit court decision. We found far more positive than negative treatment; 50 percent of cases were coded as "followed," at least in part, whereas only 11 percent were coded as having "distinguished" the Court's precedent, which was the most negative treatment we found used in reference to the circuits' treatment of the "in light of" decision (and in three of those cases in which the lower court distinguished the Court's decision, it is also coded as having followed it; see Table 4). Many cases were merely coded as "citing" the Supreme Court case, which is interesting, but certainly no indication of noncompliance.²⁰ Over the three terms, the percentage of cases in which the circuit was coded as following the Supreme Court decision, at least in part, hovered around half.

¹⁹It is true, though, that sometimes the circuit court, rather than issuing a substantive ruling in response to the GVR, merely remands it back to the district court for resolution. The judges we interviewed considered this a commonsense way to deal with the Supreme Court's behavior, but we deemed such a reaction neither automatically compliant nor noncompliant. Some of those cases that were merely remanded to the district court without any accompanying opinion drop out of our analysis because they are coded as missing on our various compliance measures. (Twelve such cases are included in our data set.) Others, when accompanied by a written opinion, are coded substantively as either complying or not complying with the spirit of the Court's GVR order.

²⁰Some have questioned the use of *Shepard's Citations* to ascertain the treatment accorded to Supreme Court precedent. However, Spriggs and Hansford (2000), in an extensive analysis of both reliability and validity, find that *Shepard's* codes are quite reliable (i.e., they are able to replicate their coding of over 80 percent of the cases they considered) and, for the most part, valid (beyond a concern with the heterogeneity of certain treatment categories).

TABLE 5
Compliance by Circuit (non-Booker cases)* (Number of Compliant Cases in Parentheses)

Circuit	Percent Coded Complied	Percent Citing and Analyzing ILO Case	Percent Abandoning Affected Portion	Shepard's Followed (at least in part)	Average Compliance Rate (%)
1	100 (1)	100 (1)	100 (1)	100 (1)	100
2	75 (9)	92 (11)	67 (8)	64 (7)	75
3	67 (2)	100 (4)	75 (3)	75 (3)	79
4	80 (4)	100 (6)	60 (3)	80 (4)	80
5	100 (22)	95 (21)	82 (18)	45 (10)	81
6	100 (8)	88 (7)	63 (5)	63 (5)	79
7	100 (5)	100 (5)	80 (4)	20 (1)	75
8	100 (6)	67 (4)	83 (5)	17 (1)	67
9	73 (11)	94 (15)	67 (10)	39 (7)	68
10	100 (4)	75 (3)	100 (4)	100 (4)	94
11	95 (18)	95 (18)	89 (17)	74 (14)	88
Fed	0 (0)	100 (1)	0 (0)	0 (0)	100
DC	100 (3)	100 (3)	75 (2)	100 (3)	100%
Total	91 (94)	93 (98)	77 (80)	56 (60)	79

Source: Author-collected data.

*Missing cases mean that the total numbers of cases may differ across measures (e.g., there is no *Shepard's* code when the Court GVRs in light of a statute; cases declared moot are not included in the coded compliance column; etc). The total number of cases for the first column (complied) is 103; for the second (citing), 106; 104 cases total for the third column (abandon); and 108 total cases for the last column (*Shepard's*). The average compliance rate is the average of the percentages in each of the four compliance operationalizations.

The difference in percentages between our coded compliance measure and *Shepard's* "followed" coding deserves comment. *Shepard's* codes a case as having "followed" the cited case only when the case is "controlling." Hansford and Spriggs, in discussing this treatment, note that the coding manual used by *Shepard's* coders suggests that the case must go beyond merely going along with the Supreme Court's decision to be coded as "followed" (2000:330). Language in an opinion that would beget a followed treatment code, then, includes "'controlling,' 'determinative,' 'such a conclusion is required by'" (Spriggs and Hansford, 2000). Given that we were looking more closely for the lower court following the spirit of the Supreme Court decision and less at the actual language the lower court uses, it is unsurprising that we would code the lower courts as being more compliant than the *Shepard's* coders did.

There are few dramatic differences by circuit as to compliance either, though the Second, Seventh, Eighth, and Ninth circuits appear to be a bit more noncompliant than the others, overall (see Table 5). One can surmise a relationship among the measures. Indeed, statistically speaking, the correlations among some of the measures are significant ($p < 0.000$): the *Shepard's* dummy, follow or not, is significantly correlated both with our coding of compliance ($r = 0.045$) and with the measure of whether the lower court abandons the affected portion of its ruling ($r = 0.407$). The abandon measure is also significantly correlated with our coded compliance variable ($r = 0.517$).

Overall, then, the Supreme Court engages often in this practice, and the circuits react in ways we might consider to be quite compliant: they cite and analyze the Court's ruling, they comply

with its spirit, they abandon portions of their rulings that are inconsistent, and they are largely considered to have treated the Court's ruling as determinative.²¹

AFTER THE REMAND

Given that there are a large number of cases in which the lower court reinstates its original ruling after reviewing the Supreme Court's "in light of" case, we know that a GVR does not automatically cause the lower court to rule differently on remand. We also know now that while that refusal to change its disposition is not always indicative of noncompliance, it sometimes demonstrates less-than-compliant behavior. An obvious next question, then, is whether the Supreme Court monitors the circuit court reaction to its GVR orders, which we might measure by looking at the extent to which responses to GVRs are appealed and then the extent to which the Supreme Court grants review. In other words, is the Supreme Court more likely to review an appeal of a circuit court's response to its GVR? And if it does hear the case, does it always reverse it, thus sending a signal to the lower court about its interpretation of the binding nature of the GVR order? While we know from the research and from our interviews that monitoring by the Court is not a necessary condition for compliance (see, e.g., Klein and Hume, 2003; Bowie and Songer, 2009), we also expect that cases paid appreciably more attention by the Court could potentially beget enhanced compliance by the circuits.

The judges we interviewed did express the sense that the Supreme Court was "watching" in these cases, though it did not appear that this sense was universal nor was it significant to them in their decision making. One judge basically told us that if they think the Supreme Court case is not on point or that the order is not determinative, they say that and move on. Another judge, more careful, stressed that she or he interpreted the GVR to be a "directive," and so, if she or he thinks the case is inapposite,

then our task is to explain that as carefully as we can. Ultimately it may turn out that we're wrong in our application. But we should painstakingly explain why we did what we did, and why we're making the particular application. And, for me, if the question is close whether we choose A or B, if A is closer to what you think the Supreme Court intends by sending it back, you ought to opt for A and not B.²²

Even when the Court's remand causes the circuit to change a portion of its reasoning, sometimes the disposition remains the same for some other reason, as noted and demonstrated earlier. So, again, they do their best and await the result. The aforementioned *City of Rock Hill v. Henry* case entails some back-and-forth between the Supreme Court and a state court over whether the "in light of" case controlled the lower court's disposition (see Hellman, 1983b:838), but given the number of petitions the Court receives each year and the nature of the cases receiving GVR treatment, it seems unlikely that the lower court would be again reviewed very often.

²¹The circuits do not, however, always publish their responses to Supreme Court GVRs. Indeed, in 47 percent of our cases (55/116), the circuit response was not published. Of course, the circuits vary broadly in their rules regarding publication and in the extent to which they publish decisions, so while this fact may seem to suggest something less than full compliance, not much should be made of these numbers (Benesh, 2002). Indeed, a 53 percent publication rate is quite a bit above the average rate of around 33 percent (see Benesh, 2001).

²²Confidential interview with the author, April 16, 2007 (on file with author).

TABLE 6
Supreme Court Monitoring After GVR (non-Booker cases)

<i>October Term</i>	<i>Cert Sought</i>	<i>Cert Granted</i>	<i>Reversed?</i>
2003	35% (7 of 21)	0% (0 of 7)	n/a
2004	33 (10 of 30)	30 (3 of 10)	75% (2 of 3)
2005	35 (9 of 26)	11 (1 of 9)	100 (1 of 1)
2006	33 (13 of 39)	15 (2 of 13)	50 (1 of 2)
Total	34 (39 of 116)	15% (6 of 39)	67 (4 of 6)

Source: Author-collected data.

Indeed, given Rehnquist's repeated arguments that those cases afforded GVR treatment are not "certworthy" under Rule 10 (Armbruster, 1998), they may be even less likely to be reheard. One of the judges we interviewed could not think of a case in which that had happened, adding "it's kind of important not to think that the Supreme Court is automatically gunning for you if they vacate and remand for reconsideration in light of. They're not necessarily. They just don't want to have to deal with 10 variations of a decision they just reached. And they think the lower courts for the most part will be capable of applying the Supreme Court's ruling."²³ So, although there are stories, is there any real, systematic evidence that the resolution of a case on remand from the Supreme Court via a GVR is more likely to attract the justices' attention on cert than any other cert petition?

Hellman finds that, during the period 1975–79, while most litigants sought appeal, only 12 of 53 received plenary consideration, and only 6 of those were reversed (Hellman, 1983b). In addition, 2 received summary treatment reversing or vacating. "For the most part, the Court simply denied certiorari, usually without any notation of dissent" (Hellman, 1983b:843). Our data include only 39 cases in which a petition for certiorari was sought (out of 116 cases)—a rate of 34 percent (see Table 6). Of those, only 6 were granted (5 percent of the total cases considered here) and 4 were reversed (67 percent). Given that the Court, between 2000 and 2010 considered only 0.11 percent of all cases decided by the Courts of Appeals (Hofer, 2010) and given that the most recent research to date suggests that only 20 percent of all circuit court cases are appealed, and the Court grants cert to fewer than 1 percent of these (Songer, Sheehan, and Haire, 2000:17), perhaps these cases are paid a bit more attention.

Even with this potentially higher likelihood of review, the chance of Supreme Court additional attention in these cases is small. The judges we interviewed, when asked why they attempt to comply with the Supreme Court, all said some variation on the following statement: "because they are the Supreme Court and that's our job." Here is one: "I am, as one individual judge, I'm not in the business of second-guessing the United States Supreme Court. They have the last word. Whether I think it's sound constitutional law or horrible constitutional law is absolutely

²³Confidential interview with the author, April 16, 2007 (on file with author). Another judge likened his or her memory to a bathtub in noting that he or she had not noticed whether the Court is more or less likely to hear appeals of formerly GVR'd cases: "The tendency in this business is that there's so much volume, that once you make a decision, once you put all the facts in your head. I could describe it as the bathtub mind. You sort of pull the plug and that stuff drains out and then you fill it up with another case."

irrelevant. When they decide an issue, we're done."²⁴ Indeed, precedent is often argued to be a strong constraint, especially when it is of the hierarchical type, and adherence to remand orders, at least according to Berch (2004), should be even more complete given their direct nature.²⁵ As our analysis shows, nearly all circuit court decisions comply with GVR orders, even when they reach the same disposition after the remand as they did before. When a case is squarely on point, none of the judges we interviewed would go any further; they would simply reverse their previous decision and move on. If the ruling is on point for only one part of a multi-issue decision, though, it will not always change the case outcome, and so the case might still be reaffirmed. One judge described it thus:

[in a] case where we have multiple issues, and we went on one—we acknowledge, of course, as we have to, our prior opinion relied on such and such issue and that that question is now foreclosed by the Supreme Court's decision in such and such—that issue is not necessarily dispositive of this whole case because there's also an argument for this, that, and you go into and say why. Those arguments, those issues survive even though Supreme Court has foreclosed one issue.

The data we collected support their claims.

CONCLUSIONS

While we have learned much here about Supreme Court–circuit court interaction via Grant, Vacate, and Remand orders and the circuit courts' response to them, there is much left to learn. It would be fruitful, for example, to consider the district courts as well, given that many cases are directly remanded to them from the circuit, immediately upon receiving the GVR order from the Court. (In our data, 11 cases were directly remanded to the district court by the circuit, and many more were vacated and remanded in response to the Court's order.) How do district court judges react to GVRs that get passed along to them? And how do they perceive the remands they receive from the circuits? Do they feel pressure to reverse their decisions, or are they, too, just taking a closer look at their ruling in light of this new development—perhaps reversing it, perhaps not? According to one of our judges, it is frequently the case that the best response to a Supreme Court GVR is to remand to the district court: "Most of them require some further development legally or factually and the district court's in a lot better position to do that."²⁶ Another said it was "natural" to so remand; that it "just makes a whole lot of sense." The action, then, in reaction to GVRs, may well be at the district court level.

We also think it would be useful to explore this process in specific issue areas to see whether some kinds of cases gain more compliance than others and which those are and why. In sentencing, Benesh (2008:Table 5) suggests quite a bit of variation in circuit response to *Booker*, especially shown via the very different standards for reviewing sentences on remand enacted by the various

²⁴Confidential interview with the author, April 16, 2007 (on file with S. Benesh).

²⁵However, Berch tells stories of noncompliance, arguing that summary remands provide too much leeway to lower-court judges (2004). One court, he says, complied with a remand order on a three-million-dollar verdict by reducing it by one cent (Berch, 2004).

²⁶Confidential interview with the author, April 16, 2007 (on file with S. Benesh).

circuit courts. It could certainly be that other areas with a large body of GVRs might be similarly revealing if examined more closely.

FUNDING

We thank the Graduate School at the University of Wisconsin-Milwaukee (UWM) for funding through the Research Growth Initiative and the Edison Initiative at UWM for funding through the Undergraduate Research Opportunity.

ACKNOWLEDGMENTS

We thank Stephen Wasby for data, reactions to issues, comments on earlier drafts, and advice on interviewing; Paul Collins and Chad Westerland for helpful comments on an earlier draft; and the judges who talked to us for this study, though they will remain completely anonymous in this article.

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