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Under Supreme Court review: An evaluation of the United States Court of Appeals for the Ninth Circuit, 1994-2005

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UNDER SUPREME COURT REVIEW: AN EVALUATION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 1994-2005

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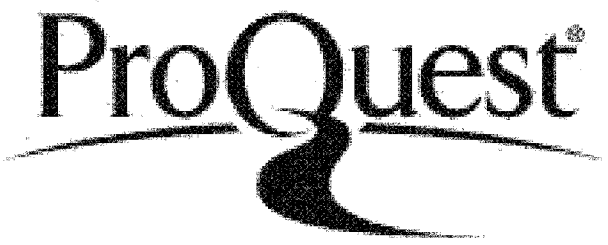

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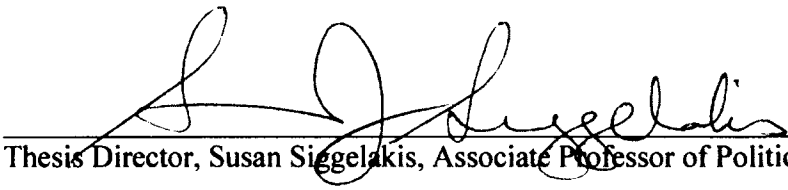

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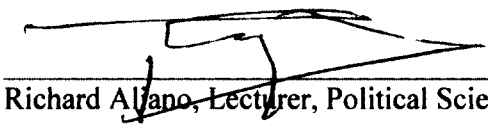

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ABSTRACT

UNDER SUPREME COURT REVIEW:
AN EVALUATION OF THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT, 1994-2005

by

Matthew Coker

University of New Hampshire, September 2012

The United States Court of Appeals for the Ninth Circuit is one of the most controversial courts in the United States due, in large part, to its high rate of reversal by the United States Supreme Court. The existing scholarship advances several potential explanations for the Ninth Circuit's reversal rate, particularly the Ninth Circuit's reputation as a very liberal court. This study evaluates the Ninth Circuit cases reviewed by the Supreme Court during the 1994-2004 terms to determine whether there are explanatory patterns to the Supreme Court's disposition of cases from the Ninth Circuit over time. Examining the effects of the membership of the original three-judge panel, the presence of a government appellant, and the application of the due process guarantees, this study identifies substantial differences between the Ninth Circuit and the Supreme Court.

CHAPTER I

THE NINTH CIRCUIT CONTROVERSY

The United States Court of Appeals for the Ninth Circuit is one of the most controversial courts in the United States. The Ninth Circuit has a higher rate of reversal by the Supreme Court than any other circuit court.[1] The Ninth Circuit also leads the federal appeals courts in the number of summary reversals (Supreme Court reversals without briefing or oral arguments) and unanimous reversals.[2] Assessing the Ninth Circuit's performance, Supreme Court Justice Scalia stated in his letter to the White Commission that there is a "disproportionate segment of this [Supreme] Court's discretionary docket that is consistently devoted to reviewing Ninth Circuit judgments and to reversing them by lop-sided margins."[3] The Ninth Circuit's reputation as a "bastion of liberalism"[4] has been reinforced through political, public, and media attention and controversial rulings such as *Newdow v. United States Congress* (2002) (on the Pledge of Allegiance)[5] and *Compassion in Dying v. Washington* (1996) (on physician-assisted suicide).[6]

While consensus exists within both the legal and the political science communities as to the existence of the Ninth Circuit's checkered reputation, little explanatory consensus exists for the Ninth Circuit's high reversal rate. Much of the previous academic work has addressed the circuit's demographics: the characteristics of circuit size, personnel, and territory that are perceived to most contribute to the circuit's

reputation. The Ninth Circuit's jurisdiction is the largest territorial allotment amongst the circuit courts, covering nine states (California, Arizona, Oregon, Washington, Nevada, Hawaii, Alaska, Montana, and Idaho) and two territories (Guam and the Northern Marina Islands),[7] a contributing factor in both the circuit's heavy case load and its diverse constituency.[8] With twenty-eight authorized active judgeships, the Ninth Circuit is the largest federal intermediate-appellate court in terms of personnel, having eleven more judges than the next largest circuit.[9] Furthermore, due to its size, the Ninth Circuit is permitted to use a limited en banc review procedure.[10] En banc review normally involves the rehearing of a three-judge panel decision before the full circuit; the limited en banc review procedure employed by the Ninth Circuit requires only eleven judges: the chief judge and ten randomly assigned judges, who may or may not have been members of the original panel.[11] In addition to reflecting larger questions about judicial politics,[12] the Ninth Circuit's reputation as a far-left court is considered a prominent factor in the Supreme Court's review of the circuit.[13] Congress has considered proposals to divide the circuit for decades, including that by the 1999 Commission on Structural Alternatives for the Federal Courts of Appeals (the White Commission) study, which recommended the split.[14]

Much of the existing scholarship reflects a division between legal analysis (in which judges are generally considered to be motivated primarily by the application of existing law), and behavioral political science (in which judges can be considered political actors advancing policy considerations).[15] While the debate over the motivations of judges can be directed towards any level of the United States' court system, it becomes especially noteworthy in consideration of the Ninth Circuit because the circuit's

perceived liberal tendencies factor into most evaluations. Scholars have used both quantitative and qualitative methods of analysis to assess the performance of the Ninth Circuit both relative to its sister circuits and to the United States Supreme Court. Most scholarship focuses on two primary areas of consideration: evaluating the merits of the Ninth Circuit's liberal reputation and judicial performance or considering the organizational structure of the Ninth Circuit (the number of judgeships, the limited en banc procedure).

Examining the Ninth Circuit cases reviewed by the Supreme Court for patterns among those cases offers another avenue for assessing the circuit's performance. Many factors relating to the Supreme Court's disposition of a case are not illuminated solely by the reversal statistics. Broader patterns of judicial behavior could potentially be found within this information. Considerations such as the relevant legal question and application of particular types of law, the composition of the Ninth Circuit panel, whether the case was reheard en banc before appeal to the Supreme Court, the vote of the Supreme Court justices, and whether the United States government or a government representative was an appellant to the case all offer potential insight into evaluating the Ninth Circuit's performance as an intermediate level appellate court. Examining the actual cases reviewed by the Supreme Court, the cases that informed Justice Scalia's assessment, allows for a greater understanding of the Ninth Circuit's judicial behavior based on the circuit's output. The circuit's output subject to Supreme Court review offers a fuller picture of the dynamics between the court levels than the circuit's reversal statistics alone. Additionally, this approach promotes further insight into the complex

relationship between the intermediate United States Courts of Appeals System and the United States Supreme Court at the systemic level.

Chapter Notes

1 Scott, Kevin M (2006) "Supreme Court Reversals of the Ninth Circuit" *Arizona Law Review* Volume 48, pages 341-354

2 Posner, Richard (2000) "Is the Ninth Circuit Too Large? A Statistical Study of Judicial Quality" *The Journal of Legal Studies* Volume 29, No. 2, pages 711-719, University of Chicago Press

3 Hellman, Arthur D (2000) "Getting It Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals" *UC Davis Law Review* Volume 34, pages 426-467
Scott, Kevin M (2006) "Supreme Court Reversals of the Ninth Circuit"

4 Wermiel, Stephen J (2006) "Exploring the Myths About the Ninth Circuit" *Arizona Law Review* Volume 48, pages 355-366

5 *Ibid*

6 Farris, Jerome (1997) "Ninth Circuit – Most Maligned Circuit Court in the Country – Fact or Fiction" *Ohio State Law Journal* Volume 58, pages 1465-1472

7 Solimine, Michael (2005) "Judicial Stratification and the Reputations of the United States Court of Appeals" *Florida State University Law Review* Volume 32, pages 1331-1364
Wermiel, Stephen J (2006) "Exploring the Myths about the Ninth Circuit"

8 Herald, Marybeth (1998) "Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and the Congress" *Oregon Law Review* Volume 77, pages 405-496

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12 Cross, Frank B (2003) "Decisionmaking in the U.S. Circuit Court of Appeals" *California Law Review* Volume 91, pages 1459-1515
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13 Lindquist, Stefanie A, Susan B. Haire, Donald R. Songer (2007) "Supreme Court Auditing of the U.S. Courts of Appeals: An Organizational Perspective" *Journal of Public Administration Research and Theory* Volume 17, pages 607-624
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14 Hellman, Arthur D (2000) "Getting It Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals"

15 Scott, Kevin M (2006) "Supreme Court Reversals of the Ninth Circuit"
Cross, Frank B (2003) "Decisionmaking in the U.S. Circuit Court of Appeals"

CHAPTER II

THE NINTH CIRCUIT AND THE SUPREME COURT

Each year the Supreme Court reviews and decides with written opinion less than one percent (1%) of the cases submitted to it, averaging around eighty cases per year.[1] In the October 2009 term (cases heard and decided between October 2009 and September 2010), the Supreme Court affirmed seventeen lower court decisions and reversed sixty-five.[2] Of these, four decisions from the Ninth Circuit were affirmed, eleven were reversed or vacated.[3] This 73% reversal rate is a notable improvement over the 88% reversal rate for the 2008 term, in which fifteen of the seventeen Ninth Circuit cases reviewed were reversed or vacated,[4] or the 96% reversal rate in the 1996 term.[5] Statistically, the Supreme Court is more likely to reverse a lower court decision than to affirm it.[6] Yet, the reversal rate for the Ninth Circuit is consistently among the highest systemwide.[7] Ninth Circuit Judge Diarmuid O'Scannlain notes that collectively between the 2000 and 2009 terms, the Ninth Circuit was reversed in 148 out of 182 cases heard by the Supreme Court, 72 of which were unanimous reversals.[8] Judge Richard Posner's statistical comparison of the Ninth Circuit with its sister circuits between 1985 and 1997 demonstrates that the Ninth Circuit leads the circuit courts in the number of summary reversals, non-summary reversals, and unanimous non-summary reversals.[9] While Erwin Chemerinsky argues that the rate of Ninth Circuit reversals is consistent with the median of circuit court reversals nationwide;[10] a 1984-2004 comparison between the Ninth

Circuit's reversal rate and the overall reversal rate for all courts shows that the Ninth Circuit's reversal rate was higher than the overall rate in all but three years.[11] In twelve of those years, the Ninth Circuit's reversal rate exceeded the overall rate by a difference of greater than 5%, with five years exceeding a 20% difference.[12]

While these numbers illustrate that the Ninth Circuit is more often than not reversed upon Supreme Court review, there is extensive debate within the scholarship as to the merits of assessing a circuit court on its Supreme Court reversal rate. While Posner and O'Scannlain find the reversal rate to be a significant problem for the Ninth Circuit,[13] Stephen Wermiel and Ninth Circuit Senior Judge Jerome Farris argue that reversal statistics by themselves cannot reflect accurately the performance of any court.[14] Both Stephen Wasby and Marybeth Herald note that, because circuit courts (such as the Ninth Circuit) are only evaluated on the cases taken directly from their circuit, if the Supreme Court supports the Ninth Circuit position in a case taken from another circuit, it would not factor into the statistical analysis of the circuit's term.[15] A study by Stefani Lindquist, Susan Haire, and Donald Songer suggests that the Ninth Circuit may be more closely observed by the Supreme Court, as they found that the Supreme Court increases its monitoring of circuits that it has heavily reversed in prior terms.[16] They argue that because the Supreme Court lacks normal organizational means to control the lower courts, it strategically uses its review resources to maximize its control over the judiciary.[17] They find a number of factors indicate statistically significant increases in Supreme Court monitoring of a circuit, including previously high Supreme Court reversal, large numbers of certiorari petitions, increases in en banc hearings and dissenting opinions, heavy reversal of district courts, and the ideological make-up of the

circuit.[18] These factors support the interpretation that the Ninth Circuit may be singled out on the basis of reputation, as Lindquist, Haire, and Songer conclude that "the identity of the circuit is one indicator the Court appears to use in assessing lower court outputs."[19] Herald discusses a similar finding in her review of the Supreme Court's 1996 term, which suggests that the Supreme Court is "micro-managing" the Ninth Circuit.[20]

The Supreme Court's discretionary docket has been advanced as an explanatory factor in the amount of attention the Ninth Circuit receives from the Supreme Court. The Ninth Circuit generates more petitions for certiorari[21] than any other circuit court of appeal;[22] which Lindquist, Haire, and Songer find results in increased Supreme Court auditing.[23] Some scholars have argued that the perceived ideological conflict between the Ninth Circuit and the Supreme Court is a result of a Supreme Court shift that the Ninth Circuit may not be acknowledging (particularly if it has not resulted in changes to Supreme Court precedent).[24] Herald finds that, in the cases reviewed from the Ninth Circuit during the 1996 term, the Ninth Circuit generally favored the individual against government, federal government over states, and states except in environmental cases, while the Supreme Court reversed in favor of government, state governments over federal, and individuals in cases involving property.[25] Kevin Scott's argument that "higher courts reverse lower courts in pursuit of making broader policy statements;"[26] supports the interpretation that the Ninth Circuit is adhering collectively to a different judicial philosophy than the Supreme Court. This, in turn, generates Supreme Court attention and precedent-setting reversals. Herald suggests that "the reversed cases have more to say about the philosophy of the Supreme Court, which has total discretion over its docket."[27]

Evaluating a circuit based on its reversal rate is subject to other limitations, specifically that there are factors in the disposition of cases that are not considered in the statistical score.[28] One consideration that cannot be discerned from the reversal numbers is whether the lower court's decision was "wrong" or "different."[29] Farris maintains that judges issue opinions, which are matters of interpretation rather than statements of fact and that the Ninth Circuit only fails in its performance if it does not thoroughly consider the case or if it does not follow Supreme Court precedent.[30] Scott finds that precedent applies less directly to cases at higher level courts due to the complexity of the cases,[31] and many Ninth Circuit cases may lack clear precedent, which would be consistent with Farris' argument. While this distinction can be made for every other intermediate court,[32] it does support the hypothesis that the Ninth Circuit may not necessarily be deciding cases "incorrectly." Chemerinsky argues that, while the Supreme Court is the final arbitrator of appeals in the United States, a conflicting decision between the Supreme Court and a circuit court does not necessarily indicate that the lower court's decision was incorrect in terms of legal reasoning or application.[33] He contends that "it is wrong to equate a reversal with a mistake by the lower court."[34] The lower court's decision may only become "wrong" after the Supreme Court rules differently.[35] Herald also finds that there are cases in which the Supreme Court agrees with the lower court's reasoning but not the result which still count as reversals.[36]

Another consideration in evaluating a Ninth Circuit reversal is the margin by which the Supreme Court reversed the decision. Chemerinsky, Farris, and Wermiel argue that if the Supreme Court decision was reached by a 5-4 or 6-3 majority, such a reversal is less likely to indicate a failure by the Ninth Circuit in deciding the case and

more likely a different application of legal principles.[37] However, Posner and Scott address this consideration by evaluating the Ninth Circuit's high rate of unanimous reversals,[38] with Scott finding that "the Ninth Circuit's proportion of lopsided reversals is greater than its proportion of reversals decided by a closer vote."[39] The Ninth Circuit leads the circuit court of appeals in unanimous reversals.[40]

Cases of inter-circuit conflict, in which two or more circuit courts of appeals reach different results on similar cases, may also be used to evaluate the performance of the Ninth Circuit.[41] Circuit precedents are binding only for the district courts in that circuit. However, due to the importance of uniformity in federal law, cases in which two or more circuit courts have established different precedents are strong candidates for Supreme Court review.[42] Though two or more circuits may share a position, only the circuit from which the case was taken is considered affirmed or reversed.[43] Wasby's study of inter-circuit conflict finds that from 1990-1999, "the Ninth Circuit fared better in the Supreme Court's rulings on inter-circuit conflicts in cases taken from other courts of appeals than in Ninth Circuit cases reviewed directly."[44] Wasby and Herald argue that the Ninth Circuit's record improves, albeit only slightly, when these cases are taken into account.[45] In cases reviewed directly from the circuit, the Ninth Circuit's position is sometimes shared by other circuits;[46] though Herald documents some cases during the 1996 term in which no other circuit supported the Ninth Circuit's position.[47] Interpreting the results of the term, Herald concludes that "the cases support the argument that the Ninth Circuit emphasized its own decisions and viewpoints to the exclusion of a broader, more national approach."[48]

The Ninth Circuit's high reversal rate raises concerns because of the implications the rate has on the status and application of law. Michael Solimine states that, while over time "there seems to be a homogenization of reputations among the circuits,"[49] some legal commentators, including attorneys and other federal judges, single the Ninth Circuit out as having a poor reputation.[50] Arthur Hellman finds this pattern of reversals raises doubts about the competency and legitimacy of intermediate court judges.[51] Some cases address issues that the Supreme Court will rule on regardless of the disposition of the lower court,[52] but such cases do not make up the majority of Ninth Circuit decisions.[53] Because the Supreme Court reviews such a small percentage of cases, it theoretically gives circuit court judges the opportunity to decide cases according to their judicial philosophy and policy goals.[54] Farris' argument that "the Supreme Court let stand as final 99.7 percent of Ninth Circuit's 1996 cases,"[55] is an indication of the limited nature of Supreme Court review rather than an affirmation of the Ninth Circuit's performance,[56] but it also illustrates a major concern over the Ninth Circuit's reversal rate. Because most Ninth Circuit decisions will not be subject to Supreme Court review, potentially "incorrect" decisions could stand without further consideration.[57] Debates about judicial political activity has caught the attention of politicians and the public, such as the controversy over the Supreme Court's 2009 *Citizens United vs. Federal Election Commission* ruling,[58] and the Ninth Circuit's high reversal rate and controversial cases are causing considerable interest in that debate.[59]

The Ninth Circuit and Politics

In assessing the behavior of circuit court judges, Scott addresses a debate between political scientists and legal scholars. This debate is between those who argue that judges are motivated by policy aims and those who argue that judges are motivated by the desire to make good law.[60] Scott cites four factors that indicate that lower court judges are more interested in making good law than policy: (1) the need to maximize efficiency in the court system,[61] (2) higher court judges hear more complex cases, which may require additional law,[62] (3) precedent applies more directly at lower levels,[63] and (4) the desire of lower court judges for promotion to a higher court position.[64] Scott finds that size, workload, and ideology are significant predictors of a circuit's reversal rate and argues that smaller and busier circuits are less likely to be reversed because the need for efficiency limits the opportunity for judges to create new policy.[65] A study by Frank Cross evaluates the circuit court of appeals using four models of judicial decision-making to determine which factors most influence circuit court judges.[66] He determines that the legal model, which holds that judges make decisions through systematic application of law, is the most significant factor in influencing circuit court judges.[67] However, Cross acknowledges notable evidence for the political model, which views judges as political actors who advance their policy preferences, even if they couch those preferences in legal theory.[68] The remaining two models, the strategic model – which suggests that judges will make decisions to avoid Supreme Court reversal, and the litigant-driven model – which suggests that litigants, not judges, drive circuit court precedent, Cross finds to be of little to no significance.[69] Cross argues that the political science verses legal scholarship debate is ultimately too reductive and that judges are likely to be influenced

by both factors, "acknowledging a material role for politics and strategy in judicial decision-making does not mean that legal reasoning is necessarily meaningless."[70]

The Ninth Circuit's liberal reputation is a fixture in the debate about whether judges are more motivated to create law or policy. Consensus exists within the scholarship that this liberal reputation exists. The debate over the liberal reputation of the Ninth Circuit instead centers on whether such a reputation is merited and whether that reputation is related to the Ninth Circuit's high reversal rate.[71] The circuit's liberal reputation dates to President Jimmy Carter, who, through the creation of ten additional judgeships, appointed fifteen judges to the Ninth Circuit during his presidency.[72] Wermiel asserts that the connection between the Ninth Circuit's reversal rate and ideology was started by President Ronald Reagan, [73] who appointed four judges to the Supreme Court, and along with President G.H.W. Bush, fourteen Ninth Circuit judges.[74] Susan Haire's study of Ninth Circuit judicial selection finds that Reagan and Bush appointments were generally utilized to advance policy goals, their appointees are more ideologically cohesive, while appointments made by Carter and President Bill Clinton were generally for partisan rather than policy reasons, such as pledges to increase diversity in the judiciary.[75] Haire notes that that Democratic appointees on the Ninth Circuit are more liberal than Democratic appointees on other circuits.[76] Chemerinsky observes that, in a comparison between the Ninth Circuit and the Supreme Court, while the Supreme Court has justices appointed by Democratic presidents, there are no strong liberals currently on the Court in the tradition of William Brennan, Thurgood Marshall, or William Douglas.[77] The Ninth Circuit has comparably liberal judges, indicating that its liberal judges may go further left than any sitting Supreme Court justice.[78] While several

scholars express reservations about evaluating the liberal-conservative orientation of judges based on the appointing president, due to factors such as senatorial courtesy, the non-partisan status of judging, and inconsistency between a judge's ideology and the ideology of the appointing president, it remains the most accepted evaluation of a judge's ideological preferences.[79]

The merits and satisfactory explanatory capabilities of the Ninth Circuit's liberal reputation is a source of substantial debate within the scholarship. Some scholars see the Ninth Circuit's liberal reputation as detrimental to the prestige of the circuit. Wermiel argues that poor use of statistics by politicians and the media is responsible for the Ninth Circuit's reputation as a "runaway liberal court;" and argues that a comprehensive understanding of the relationship between the Supreme Court and the circuit courts is needed to put the statistics in perspective.[80] Wermiel also expresses concern that the circuit's reputation influences the public's perception of controversial Ninth Circuit cases.[81] Herald finds that the ideological explanation is inconsistent with the circuit's current membership,[82] while Haire argues that "one cannot label such a large circuit as being ideologically homogenous."[83] In contrast, Posner argues that, if the Ninth Circuit is more liberal, it would explain the high reversal rate as unrelated to the circuit's performance.[84] Herald, Wermiel, and Farris note that the ideological explanation fails to account for the Supreme Court's reversals of Ninth Circuit judges appointed by Republican presidents (who are reversed at a similar rate as Democratic-appointed judges), and that it overlooks the fact that most three-judge panels involve appointees from both parties.[85] O'Scannlain also rejects the liberal hypothesis.[86] In his criticism of the Ninth Circuit, he argues that the large numbers of unanimous reversals that the Ninth

Circuit experiences contradicts the ideological claim.[87] Studies by Scott and Lindquist, Haire, and Songer suggest that the Supreme Court does take the circuit ideology into account in its review of the Ninth Circuit.[88] Scott finds that while ideologically heterogeneous circuits are reversed less frequently, the increased ideological distance between the circuit court and the Supreme Court increases the number of expected reversals.[89] Herald suggests that "the reversal rate reflects an ideological split that is more subtle and complicated than political partisanship,"[90] which is supported to some degree by some of the Supreme Court reversals. Both Wermiel and Chemerinsky cite cases in which the Ninth Circuit took a conservative position, which was later reversed by the Supreme Court.[91] While in some cases, the circuit may issue a broad ruling that is narrowed and changed by the Supreme Court without necessarily invalidating the arguments of the original decision.[92]

The Size of the Ninth Circuit

Congress has established thirteen circuit courts of appeal in the federal court system: the Federal Circuit (which has a specialized nationwide jurisdiction), the D.C. circuit, and eleven numbered circuit courts of appeal which are divided into exclusive geographical areas.[93] These appellate courts were originally created by the Evarts Act in 1891, with the Tenth and Eleventh circuits being established in 1926 and 1980 respectively.[94] The Ninth Circuit is the largest of these circuit courts, both in terms of territory and the number of authorized judgeships.[95] Some scholars hypothesize that the Ninth Circuit's high reversal rate can be attributed to its size and to the mechanisms, such as the limited en banc hearing, by which the circuit functions. Scholarship on the size of

the Ninth Circuit is frequently set against the backdrop of the continuing debate over whether the Ninth Circuit is too large to function properly, and if so, whether the circuit should be divided.

The size of the Ninth Circuit is cited frequently as a factor in explaining the Ninth Circuit's high reversal rate. The Ninth Circuit handles more cases per year than any other circuit court.[96] Herald argues that Congress' delays in filling vacancies on the Ninth Circuit contributes to the circuit's reversal rate because "eighteen judges [in 1997] are expected to do the work of twenty-eight."[97] Posner argues that the size of the circuit affects judicial quality on the Ninth Circuit because informal norms of quality control do not work as well in larger groups.[98] Posner's analysis finds that problems with the quality of judicial decision-making increase with the size of a circuit, and that adding judgeships reduces the judicial quality of the circuit.[99] Some criticisms of the Ninth Circuit suggest that the size of the Ninth Circuit prevents the judges from maintaining circuit consistency, in that the Ninth Circuit may establish contradictory rulings with its own circuit precedent.[100] However, Hellman's analysis of the Ninth Circuit's en banc process argues that the consistency hypothesis is unfounded, finding that the evidence indicates that "Ninth Circuit judges engage in extensive monitoring of their colleagues decisions."[101] Hellman's findings that the Ninth Circuit judges extensively review circuit activity supports Herald's conclusion that the Ninth Circuit may be eschewing a national approach to focus on its own circuit precedent.[102] Hellman finds that many judges on the Ninth Circuit are committed to the principle of panel autonomy and believe that "panels should be given wide leeway to resolve issues, even important ones, on which there is no controlling authority."[103] Scott's statistical analysis concludes that "the size of the circuit

is not strongly related to the frequency of reversal,"[104] and that the Ninth Circuit's reversal rate cannot be explained solely by its size.[105]

The limited en banc procedure used only by the Ninth Circuit is frequently considered the most prominent size-related explanation of the circuit's reversal rate. Normally, en banc hearings are held after the three-judge panel has issued its ruling, usually at the request of other judges on the circuit.[106] Judges on the circuit can initiate en banc procedures through a variety of means and, from 1994-1998, Ninth Circuit judges (who did not serve on the original panel) initiated en banc activity in 420 cases.[107] The Supreme Court urges circuits to rehear cases en banc when the panel ruling: (1) conflicts with circuit precedent,[108] (2) conflicts with Supreme Court rulings,[109] or (3) involves issues of "exceptional importance."[110] Studies by Wasby and Lindquist, Haire, and Songer suggest that rehearing a case en banc may attract Supreme Court attention.[111] Wasby also finds that many cases that are candidates for en banc hearing are cases the Supreme Court is likely to review anyway.[112] The Ninth Circuit is permitted to use the limited en banc procedure through a congressional statute; provisions for full court review exist, but have not been exercised.[113] Scott finds that the limited en banc procedure has a greater impact on the outcome of Ninth Circuit cases than the circuit's size.[114] While Hellman acknowledges that the limited en banc occasionally fails to correct decisions that the full en banc review might, his statistical analysis indicates an 80% probability of the limited en banc matching a full en banc.[115] His results indicate that the limited en banc review generally supports the majority view of the circuit's judges.[116] Hellman finds that increased use of the en banc procedure does benefit the Ninth Circuit cases during Supreme Court review.[117] While Wasby acknowledges that Ninth Circuit en

banc cases reviewed by the Supreme Court fared better than Ninth Circuit panel decisions, he argues that there is little evidence that en banc hearings in general affect the Supreme Court's disposition of a case compared to only holding a panel hearing.[118]

Conclusion

The Ninth Circuit has been subject to comparatively more scholarship than its sister circuits. Both political scientists and legal scholars continue to explore potential explanations for the circuit's high reversal rate, the merits of its liberal reputation, and the effects, if any, of the circuit's size. No single factor cited has explained conclusively the Ninth Circuit's checkered reputation and years of frequent Supreme Court reversal.

While the Ninth Circuit is reversed more often by the Supreme Court than any other circuit court, and has had years of extremely high reversal, the reversal rate functions mostly as a signal of a problem under Supreme Court review. The reversal rate alone lacks explanatory power. Factors such as the nature of judicial decision-making, inter-circuit conflict cases, and the Supreme Court's discretionary docket, reduce the authority of the statistical score. Farris maintains that circuit courts should not be driven by the risk of reversal: "the danger is not that an appellate court gets reversed, but that a court might let possible reversal deter decisive, full, and reasoned consideration of important issues."[119] Similarly, in his analysis of judicial behavior, Cross finds that the risk of reversal has little influence on the behavior of intermediate court judges.[120] However, some scholars acknowledge, even those who reject reliance on reversal statistics, that the Ninth Circuit's high reversal rate casts doubt upon whether the circuit is functioning properly. Both Cross and Scott acknowledge the division between

disciplines about the extent to which judges are influenced by politics.[121] Cross' analysis concludes that, even as judges are primarily motivated by law, they are influenced, if even subconsciously, by politics.[122]

The Ninth Circuit is not homogenous ideologically. While the circuit's liberal reputation at one time could be attributed mostly to the large proportion of Carter appointees, many of those appointees are no longer active judges,[123] and that reputation has persisted through the appointments of Reagan, G.H.W. Bush, Clinton, and G.W. Bush. The "liberal judge" theory, that holds that the Ninth Circuit's liberal reputation is the product of circuit dominance by a large number of liberal judges, is the most common manifestation of the liberal reputation assessment. The assessment suggests that the disconnect between the Ninth Circuit and the Supreme Court, as demonstrated by the high reversal rate, is a function of more liberal Ninth Circuit judges being overruled by more conservative Supreme Court justices. Herald's argument of a more complex ideological gap between the Ninth Circuit and the Supreme Court during the 1996 term[124] and Hellman's conclusion that the Ninth Circuit is primarily internally focused[125] each suggest a philosophical difference in judicial approach between the Ninth Circuit and the Supreme Court that is a more sophisticated explanation of the circuit's behavior than the "liberal judge" theory.

Analysis of the effects of the Ninth Circuit's size upon its reversal rate has to be positioned against the backdrop of the politically contentious debate over proposals to divide the circuit. If the Ninth Circuit's high reversal rate is primarily an effect of its territorial or judicial size, than some credibility attaches to the suggestion that splitting the circuit would improve its performance upon Supreme Court review. Posner argues

based on statistical evidence that the substantial size of the Ninth Circuit affects the quality of its judicial output.[126] However, statistical analysis by Scott and Hellman suggests that the experiences of the Ninth Circuit cannot be reduced solely to the question of circuit size.[127] While Scott's analysis finds the limited en banc procedure was more problematic than circuit size,[128] Hellman argues that Ninth Circuit judges continue to extensively monitor circuit output and that the limited en banc review procedure functions largely at similar efficiency to a full en banc review.[129]

Different theories relating to size, ideology, and statistical relevance have been addressed through qualitative and quantitative means to evaluate the reputation and judicial performance of the Court of Appeals for the Ninth Circuit. No single element has been found to explain conclusively why the Ninth Circuit generally fares poorly upon Supreme Court review. A period study of the Ninth Circuit cases that were reviewed by the Supreme Court might offer insight into the relationship between the Supreme Court and the Ninth Circuit by looking for particular patterns among those cases. Herald's analysis of the 1996 term provides a substantial amount of detail relating to the cases reviewed by the Supreme Court, but it was an in-depth review of a notoriously difficult term, in which the Ninth Circuit was reversed in all but one case. This study analyzes the interaction between the Supreme Court and the Ninth Circuit across an extended period; rather than a detailed assessment of cases, this study looks for patterns among the disposition of the cases, the Supreme Court vote, the panel composition, specific legal questions, and whether the government was a party to the case across several years of full terms. This research attempts to get a broader picture of the Ninth Circuit's performance

under Supreme Court review rather than focusing on one or more particular facets of the Ninth Circuit.

Chapter Notes

1 O'Brien, David M (2011) *Supreme Court Watch 2010*, pages 1-4 Norton

2 *Ibid*

3 *Ibid*

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5 Farris, Jerome (1997) "Ninth Circuit – Most Maligned Circuit Court in the Country – Fact or Fiction"

6 Wasby, Stephen L (2005) "How the Ninth Circuit Fares in the Supreme Court: The Intercircuit Conflict Cases" *Seton Hall Circuit Review* Volume 1, pages 119-145
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Posner primarily evaluates the eleven regional circuits – Posner finds the D.C. circuit has the highest rate of non-summary reversals, but argues that it is substantively different from the other circuits due to its jurisdiction. The Federal Circuit was omitted from the study for similar reasons.

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17 *Ibid*

18 *Ibid*

19 *Ibid*

20 Herald, Marybeth (1998) "Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and the Congress"

21 Writ of Certiorari: a request that the Supreme Court review the holdings of the lower court

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49 Solimine, Michael (2005) "Judicial Stratification and the Reputations of the United States Court of Appeals"

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CHAPTER III

SUPREME COURT REVIEW OF THE NINTH CIRCUIT

This paper examines the relationship between the Ninth Circuit and the Supreme Court by analyzing the Ninth Circuit cases the Supreme Court accepted for review over eleven Supreme Court terms, from 1994 to 2004. Supreme Court terms begin in October and officially conclude in September of the following year.[1] Most decisions are issued by the end of June.[2] This approach allows for a complete evaluation of the Ninth Circuit cases reviewed by the Supreme Court, those in which a writ of certiorari was granted, over the period of this study, rather than focusing on selected notable cases or specific attributes of the Supreme Court's docket. This study considers the Supreme Court's review under Chief Justice Rehnquist from October Term 1994, when Justice Breyer joined the Court, to October Term 2004, the last term served by Chief Justice Rehnquist. The stability of the Supreme Court's membership during this period minimizes the effect of Supreme Court composition as an intervening variable in this analysis.

The cases used in this study were collected from the printed version of the *United States Reports*, Volumes 513 to 545. Three volumes are published for each Supreme Court term covering the cases chronologically in order of decision. These are the official records of United States Supreme Court decisions.[3] All cases in which a writ of certiorari was granted to a case originating from the Ninth Circuit were included in this data set for analysis. The Supreme Court reviewed 206 cases from the Ninth Circuit from the 1994

term through the 2004 term. 203 resulted in a Supreme Court decision, either with full consideration (with briefing and oral argument) or summary consideration (without briefing or oral argument).[4] In two cases: *Grimmett v. Brown* 519 U.S. 233 (1996 Term) and *Ford Motor Co. v. McCauley* 537 U.S. 1 (2002 Term), the writ of certiorari was dismissed, and in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership* 513 U.S. 18 (1994 Term) the case was dismissed as moot. The case name and citation number, the Supreme Court disposition, the Supreme Court vote, the legal question considered by the Supreme Court, and whether the government was a party to the case as either an appellant or appellee were recorded from each case within the study period. This information was subsequently checked against the records of the Oyez Project, an online legal reference site from the Chicago-Kent School of Law for completeness and accuracy.[5] The Ninth Circuit decisions reviewed by the Supreme Court were accessed from Justia.com, which provided the make-up of the original Ninth Circuit panel and the en banc panel composition if applicable.[6]

This study utilizes the following variables to examine the Supreme Court's review of Ninth Circuit cases:

> DISPOSITION: The action taken by the Supreme Court after review of the Ninth Circuit case. Cases are either "Affirmed," "Reversed" (Reversed decisions can be remanded to the lower court), "Vacated" (Vacated decisions can be remanded to the lower court), "Affirmed in Part, Reversed in Part" (these cases can also be remanded to the lower court). For the purposes of this study, "Reversed" and "Vacated" are treated as the same disposition, as both outcomes signal Supreme Court disagreement with the Ninth Circuit decision. Whether a case was remanded to the lower court was not considered in this variable apart from documentation.
>
> VOTE: The Supreme Court vote. The majority of decisions issued by the Supreme Court include the votes of all nine sitting Supreme Court justices. Votes in which one or more justices did not participate in the decision

were documented by their own numeric code for the statistical analysis. Votes were coded from "1" indicating a 9-0 vote, to "11" indicating a 4-4 vote. While Supreme Court rules permit justices the option to sign onto only selected sections of opinions, for statistical efficiency, only approval and dissent were considered in coding the vote for each case. Concurring opinions are included in the majority vote count. Per curiam decisions (summary reversals) are documented by their own numeric code in the statistical analysis.

GOVERNMENT AS PARTY: Whether government was a party to the case as either an appellant or an appellee. "Government" refers to any form of government or government agent within the United States: this includes, but is not limited to, the United States as a party, any state within the United States, counties or cities within the United States, federal or state administrative agents, local law enforcement, district attorneys, or county officials. Cases involving Guam or U.S. territories were not coded as government cases. The government variable is coded "1" if the government is a party to the case and the Supreme Court ruled in favor of the government. The variable is coded "2" if the government is a party to the case and the Supreme Court did not rule in favor of the government. The variable is coded "3" if the government was not a party to the case, and coded "4" if the government was a party on both sides (such as a state-local or a federal-state) dispute. Cases in which the government files an amicus brief but was not actually a party to the case are coded "3;" while the government may have had a legal interest in the outcome it was not directly involved in the case.

DUE PROCESS: Whether the legal question in the case involved Due Process law. For the purposes of this analysis, "due process" is defined as any legal matter than invokes a legal due process guarantee (this includes criminal procedure cases that don't explicitly cite the due process clause) with the government as a party to the case. Due process cases that involve criminal guarantees (such as the Fourth Amendment) are coded separately from due process cases involving civil guarantees (such as the Fifth Amendment "takings clause").

EQUAL PROTECTION: Whether the legal question in the case involved the Equal Protection clause. For the purposes of this analysis, "equal protection" is defined as any legal matter that invokes the equal protection guarantee in which the government is a party to the case. Civil rights cases involving private parties (such as employment discrimination) without the government as a party are not coded as equal protection cases.

PANEL: The make-up of the original Ninth Circuit panel decision, coded by appointing presidential party. This study does not attempt to rate the ideological orientation of individual judges, it documents only whether the

judges on the panel were appointed by a Democratic or a Republican president. Appointment information was retrieved from the Federal Judicial Center database, which includes service information for federal judges, whether currently or no longer serving.[7] Panel composition can include three judges all appointed by either Democratic presidents or Republican presidents, panels made up of two Democratic appointees and one Republican appointee, or two Republican appointees and one Democratic appointee. This variable focused on the composition of the panel that issued the opinion, dissenting panel opinions were not included in the analysis. Whether a panel decision was reheard en banc is also documented by this variable, coded "5," as the Supreme Court decision refers to the en banc opinion in these cases, these cases are excluded from panel analysis.

EN BANC: Whether the Ninth Circuit reheard the case en banc prior to review by the Supreme Court. As the Supreme Court decision refers to the Ninth Circuit en banc decision on these cases, the composition of the original panel was excluded from the statistical analysis.

Hypotheses

The purpose of this study is to analyze the relationship between the Ninth Circuit and the Supreme Court based on the Supreme Court's review of cases originating from the Ninth Circuit. The Ninth Circuit has generated public and political interest due to its significantly high reversal rate; the most pressing explanations for the reversal rate relate to the Ninth Circuit's judicial performance. To best evaluate the relationship between the Ninth Circuit and the Supreme Court, this study focuses on three distinct, but related areas, in which the Ninth Circuit may be differing substantively from the Supreme Court: the composition of the Ninth Circuit panel, the treatment of government appellants or appellees, and the application of Due Process guarantees. This study evaluates the following three hypotheses:

H1: The more Democratic-appointed judges on the Ninth Circuit panel, the more likely the Supreme Court is to reverse the decision.

This is an empirical test of the "liberal judge" theory. The "liberal judge" theory holds that the Ninth Circuit's high reversal rate can be attributed to the circuit being dominated by liberal judges (initially Carter appointees), resulting in an ideological disagreement between more liberal Ninth Circuit judges and more conservative Supreme Court judges. This hypothesis tests the effect of political identification. While subject to limitations, the appointing presidential party is the most frequently accepted proxy for evaluating a judge's ideology.[8] While this study does not attempt to define the ideologies of individual judges, this study considers judges appointed by Democratic presidents, such as Carter or Clinton, to be more liberal than judges appointed by Republican presidents, such as Reagan or H.W. Bush. If the "liberal judge" theory is correct, we should expect to see higher reversal rates for panels that include more Democratic-appointed judges. We should expect to see panels that include more Republican judges reversed less frequently.

Ninth Circuit cases are heard by panels that include active judges (judges in full service assigned to the Ninth Circuit,) senior judges (judges who are no longer in active service, but continue to hear cases,) and visiting judges (judges from other courts assigned to a Ninth Circuit panel.)[9] Ninth Circuit panel selection procedures are designed to ensure that panels are composed of different combinations of judges, and that judges work regularly with other judges from the circuit.[10] Section 3.2 of the General Orders for the United States Court of Appeals for the Ninth Circuit requires that all panels include at least two judges assigned to the circuit, one of whom must be in active service.[11] Each judge is expected to hear eight monthly calendars of five panels each yearly, with each

active judge sitting with each other active judge and each senior judge the same number of times over a two year period to the extent possible.[12] Cases remanded to the Ninth Circuit after review from the Supreme Court are heard by the same panel as the original Ninth Circuit decision to the extent possible.[13]

As a test of political ideology, the "liberal judge" theory can additionally be evaluated by the Supreme Court vote. While Posner finds that the Ninth Circuit leads the circuit courts in terms of unanimous reversals,[14] if the Ninth Circuit's reversal rate can be attributed to differences in political ideology, we should still expect to see ideological splits between the liberal and conservative justices on the Supreme Court in a majority of cases. A large number of Supreme Court rulings that are unanimous or near unanimous would signal undivided Supreme Court disagreement with the Ninth Circuit ruling, suggesting a disagreement not based in political ideology.

This hypothesis was tested by running a cross-tabulations analysis that used the Ninth Circuit panel composition as the independent variable and the Supreme Court's disposition of the case as the dependent variable. The Supreme Court reversed far more of the 203 cases than it affirmed (either in whole or in part) and the reversal statistic is the largest group for more detailed analysis. The Supreme Court vote was analyzed using frequency charts. A cross-tabulations analysis that used the Supreme Court vote as the independent variable and the disposition as the dependent variable was also conducted.

The vote variable was utilized in two ways. The original vote variable was the Supreme Court vote as it appeared in the *United States Report* numerically coded; for statistical efficiency, only approval and dissent were measured – if a justice signed onto to selected parts of the majority decision or filed a concurring opinion, it was coded as an

approval. Most of the votes involved all nine sitting Supreme Court justices, but votes of 4-4, 7-1, 6-2 did occur infrequently throughout the period evaluated. These also were measured to obtain the most complete record of the Supreme Court's evaluation possible. A re-coded vote variable was created using the statistical analysis software to allow for simplified analysis of the Supreme Court vote: (Near) Unanimous (9-0, 8-1, and 8-0 decisions), Large Margins (in which 7 justices are on one side), Clear Majority (6-3 or 6-2 decisions), and Split Votes (5-4, 5-3, 4-4 decisions). A cross-tabulations analysis, testing disposition as the dependent variable and re-coded Supreme Court vote as the independent variable was also conducted.

H2: If the government is party to the case, the Supreme Court is more likely to reverse the Ninth Circuit in favor of the government.

In Herald's study of the 1996 term, Herald argues that the Supreme Court was more likely than the Ninth Circuit to rule in favor of the government.[15] This hypothesis is an extrapolation of Herald's findings to assess whether the relationship Herald found in the 1996 term persists across several Supreme Court terms. If the Ninth Circuit and the Supreme Court treat "government as appellant" cases differently, it could indicate a difference in judicial philosophy or judicial priority that extends beyond considering one court more ideologically liberal. While the "liberal judge" hypothesis tests the effect of judges' political orientations, this test of the treatment of government appellants in the Ninth Circuit and in the Supreme Court examines more complex facets of judicial behavior. This study treated all government appellants or appellees that appear as sole government party to the case equally; whether the appellant in question was the United States government, a state, or an administrative agency official. This treatment was

intended to measure how the Ninth Circuit and the Supreme Court respond to government appellants, rather than how the Ninth Circuit and the Supreme Court respond to a particular level of government. Additionally, applications of federal law originate at different levels of government. For example, most criminal procedure cases list the prison warden, a state level official, as party to the case.

This hypothesis was tested by cross-tabulation analysis that used government as party as the independent variable and Supreme Court disposition as the dependent variable.

H3: The Ninth Circuit is more likely to be reversed in cases that involve Due Process guarantees applied to criminal cases.

The Supreme Court and the Ninth Circuit address a vast range of legal questions. The legal questions considered during the period of this study encompassed, as a small sample, federal agency jurisdiction, employment discrimination claims, application of disability law, death penalty appeals, foreign sovereignty, First Amendment questions. Very few of the specific legal questions were addressed frequently enough during the period of this study to provide a statistically rich analysis of a particular type of case. Analyzing the application of Due Process guarantees in criminal cases involve a variety of legal questions, but still permit the analysis of possible differences in how the Supreme Court and the Ninth Circuit treat a particular classification of cases. This hypothesis further tests differences in judicial philosophy between the Ninth Circuit and the Supreme Court as based in the application of a particular type of law.

The Due Process hypothesis was evaluated using a layered cross-tabulation analysis with government as party as the independent variable, Supreme Court

disposition as the dependent variable, and Due Process as the layer variable. Because the definition of the Due Process variable includes government as a party to the case, the government as an appellant or appellee is used as the independent variable for this analysis. Cases in which the government was not a party to the case, or cases in which the government was a party on both sides of the case were not included in this analysis.

This study had attempted to measure the application of the Equal Protection clause between the Ninth Circuit and the Supreme Court; however, there were only twelve cases within the study period that met the criteria for being equal protection cases. This is too small a sample to provide viable analysis.

Chapter Notes

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11 *Ibid*

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CHAPTER IV

ASSESSING THE NINTH CIRCUIT

The Supreme Court accepted 206 cases from the Ninth Circuit between the 1994 term and the 2004 term; the Supreme Court issued a ruling in 203 of those cases. The vast majority of the Ninth Circuit decisions (78.2% or 161 cases) reviewed by the Supreme Court were reversed or vacated (see Table 1/Figure 1).

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Affirmed	37	18.0	18.0	18.0
	Affirmed In Part / Reversed In Part	5	2.4	2.4	20.4
	Reversed/Vacated	161	78.2	78.2	98.5
	Certiorari Dismissed	3	1.5	1.5	100.0
	Total	206	100.0	100.0	

Table 1: Case Disposition of Ninth Circuit cases reviewed by the Supreme Court 1994-2005

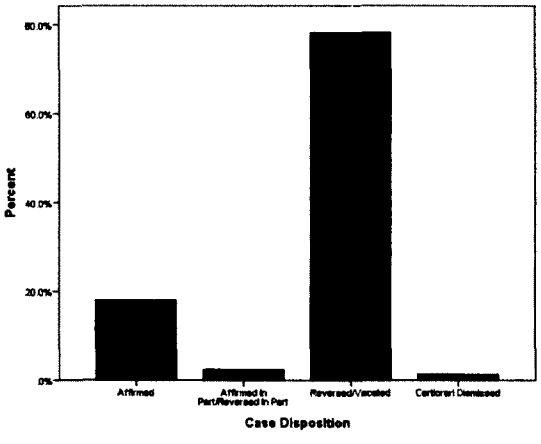

Figure 1: Case Disposition of Ninth Circuit cases reviewed by the Supreme Court 1994-2005

More Ninth Circuit cases reviewed by the Supreme Court were decided by unanimous votes than by close votes, even when the cases decided by a 5-4 and by a 6-3 vote are combined. Among the 203 cases in which the Supreme Court issued a decision, 41.7% of those cases were decided by a 9-0 vote, compared to 14.1% of cases decided by a 5-4 vote. The number of unanimous Supreme Court reversals (by a 9-0 or 8-0 vote) far exceeds the number of "close-vote" (5-4) reversals. Most of the unanimously decided cases were reversals (81.4%). Twenty-six cases were reversed by per curiam opinions (see Table 2/Figure 2).

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	9-0	86	41.7	42.2	42.2
	8-1	13	6.3	6.4	48.5
	8-0	5	2.4	2.5	51.0
	7-2	18	8.7	8.8	59.8
	7-1	2	1.0	1.0	60.8
	7-0	1	.5	.5	61.3
	6-3	20	9.7	9.8	71.1
	6-2	2	1.0	1.0	72.1
	5-4	29	14.1	14.2	86.3
	5-3	1	.5	.5	86.8
	4-4	1	.5	.5	87.3
	Per curiam	26	12.6	12.7	100.0
	Total	204	99.0	100.0	
Missing	System	2	1.0		
Total		206	100.0		

Table 2: Supreme Court vote on Ninth Circuit cases, 1994-2005

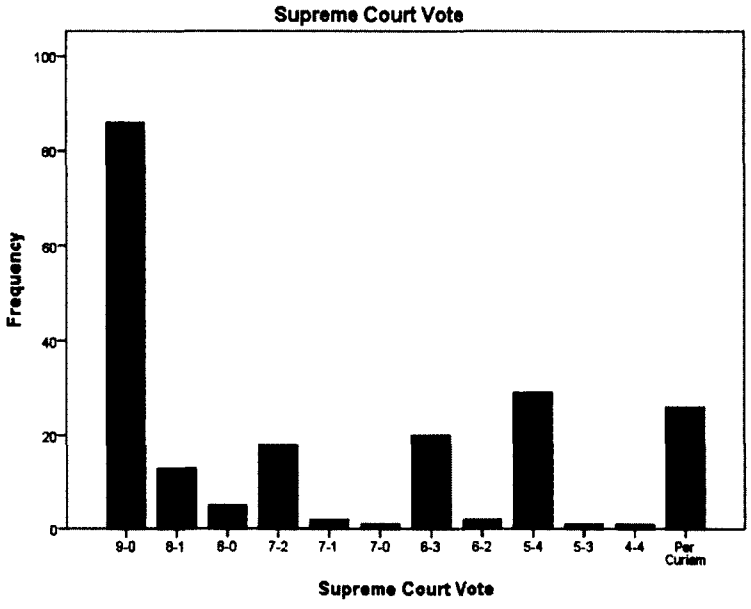

Figure 2: Supreme Court vote on Ninth Circuit cases, 1994-2005

The re-coded vote variable (which sorted the Supreme Court vote into (Near) Unanimous, Large Margins, Clear Majority, and Split Vote categories) demonstrates further patterns in the Supreme Court's review of the Ninth Circuit. Most reversals were decided by (near) unanimous margins (83.7%). Cases in which the judgment of the Ninth Circuit was affirmed were more likely to be decided by a split vote (35.5%) or a clear majority vote (31.8%) than by a (near) unanimous or large margin vote (see Table 3).

			Vote - 4 Categories				
			(Near) Unanimous	Large Margin	Clear Majority	Split	Total
Case Disposition	Affirmed	Count	13	6	7	11	37
		% within Vote	12.5%	28.6%	31.8%	35.5%	20.8%
	Affirmed In Part / Reversed In Part	Count	3	0	1	1	5
		% within Vote	2.9%	.0%	4.5%	3.2%	2.8%
	Reversed/Vacated	Count	87	15	14	19	135
		% within Vote	83.7%	71.4%	63.6%	61.3%	75.8%
	Certiorari Dismissed	Count	1	0	0	0	1
		% within Vote	1.0%	.0%	.0%	.0%	.6%
Total		Count	104	21	22	31	178
		% within Vote	100.0%	100.0%	100.0%	100.0%	100.0%

Table 3: Case Disposition by Vote

The findings relating to case disposition are consistent with the Ninth Circuit's reputation. Upon review, the Supreme Court reversed or vacated more of the Ninth Circuit decisions than it affirmed. The reversal rate is more of a signal than a defining statistic. It has been argued that, in terms of reversal, the Ninth Circuit potentially may not be distinct from other appellate courts;[1] the Supreme Court generally reverses more cases than it affirms.[2] As the Supreme Court's discretionary docket allows the Court complete control over the cases it accepts for review, most of its opinions aim to clarify a rule of law or to correct what the Court perceives as a wayward ruling.[3] However, as the Supreme Court averages around eighty cases per year,[4] the 206 cases accepted from the Ninth Circuit during the eleven year period of this study support the interpretation that the Ninth Circuit generates a substantial amount of attention from the Supreme Court. Frequent review and reversal reflects poorly upon the Ninth Circuit. Even if, to some

degree, reversal is consistent with the expectations of higher court review, the Ninth Circuit occupies a considerable portion of the Supreme Court's caseload.

The proportion of unanimous reversals is a more revealing statistic than the reversal rate as a means of evaluating the Ninth Circuit's performance. The Rehnquist Supreme Court was ideologically diverse, and generally perceived as split politically. If the majority of the Supreme Court reversals were by 5-4 or 6-3 votes (along ideological lines), the argument could be sustained that the reversal rate is a function of ideology rather than performance. However, even when the number of cases decided by 5-4 and 6-3 Supreme Court votes were combined, the Ninth Circuit was more frequently overturned by unanimous decisions. Unanimous reversals, which require collective agreement from the ideologically diverse Supreme Court justices, signal a strong disagreement in legal reasoning rather than a disagreement in political ideology between the Supreme Court and the Ninth Circuit. The frequency of unanimous reversals weakens the argument that the difference between the Ninth Circuit and the Supreme Court can be expressed as a function of politics.

The cross-tabulations analysis of the Ninth Circuit panel composition indicates that the inclusion of Republican-appointed judges on a panel does not decrease the incidence of the Supreme Court reversing the Ninth Circuit panel. There were 52 cases in this study in which the Ninth Circuit panel was composed entirely of Democratic-appointed judges. These panels were reversed in 76.9% of cases. The reversal rate is similar for the 75 panels comprised of two Democratic-appointed judges and one Republican-appointed judge which were reversed in 81.3% of cases, and the 52 panels of two Republican-appointed judges and one Democratic-appointed judge, which were

reversed in 82.7% of cases. While a notable drop in the reversal rate exists for panels of entirely Republican-appointed judges (60%), there were only 10 such panels, not reheard en banc, during the period tested in this study, which is too small a sample from which to derive statistically meaningful results (see Table 4/Figure 3).

			Panel, By Appointing Presidential Party					
			3 Democrat-Appointed	2 Democrat-Appointed, 1 Republican-Appointed	1 Democrat-Appointed, 2 Republican-Appointed	3 Republican-Appointed	Reheard En Banc	Total
Case Disposition	Affirmed	Count	11	10	9	4	3	37
		% within Panel	21.2%	13.3%	17.3%	40.0%	21.4%	18.2%
	Affirmed In Part / Reversed In Part	Count	1	3	0	0	1	5
		% within Panel	1.9%	4.0%	.0%	.0%	7.1%	2.5%
	Reversed/Vacated	Count	40	61	43	6	10	160
		% within Panel	76.9%	81.3%	82.7%	60.0%	71.4%	78.8%
	Certiorari Dismissed	Count	0	1	0	0	0	1
		% within Panel	.0%	1.3%	.0%	.0%	.0%	.5%
Total		Count	52	75	52	10	14	203
		% within Panel	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Table 4: Cross-tabulation Table: Case Disposition by Panel Make-up

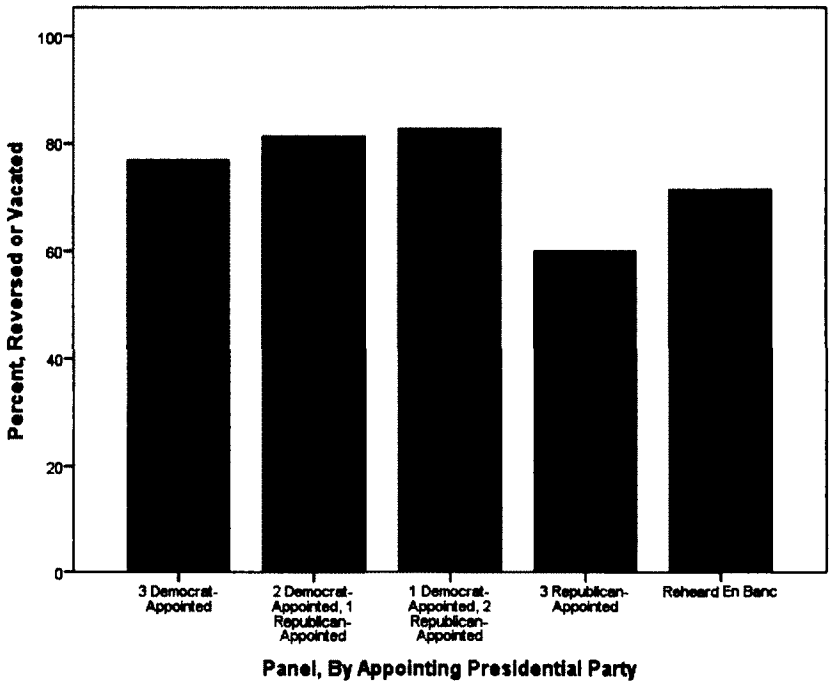

Figure 3: Case Disposition by Panel Make-up

Fourteen panel decisions were reheard en banc by the Ninth Circuit prior to Supreme Court review throughout the period of this study. These cases were omitted from the statistical tests on panel composition because the Supreme Court's ruling applied to the en banc decision rather than the original panel decision. As a group, this sample is too small for statistically significant analysis, but a breakdown of the panel composition indicates that of the fourteen cases reheard en banc: 1 case was originally decided by a panel of three Democratic-appointed judges, 1 case was originally decided by a panel with 2 Democratic-appointed judges and 1 Republican-appointed judge, 9 cases were from panels of 2 Republican-appointed judges and 1 Democratic-appointed judges, and 3 cases were originally decided by panels of three Republican-appointed judges. The Supreme Court reversed ten of the cases reheard en banc by the Ninth Circuit.

In order for the "liberal judge" hypothesis to be demonstrated, an inverse relationship should exist between the Ninth Circuit panel composition and the Supreme Court's disposition of the case. As the number of Republican-appointed judges on the panel increases, the reversal rate should decrease. While the number of panels composed entirely of Republican-appointed judges was not sufficient for statistically relevant results (there were ten throughout the period of the study), an ample number of cases from panels composed entirely of Democratic-appointed judges, panels of 2 Democratic-appointed judges and 1 Republican-appointed judge, and 2 Republican-appointed judges and 1 Democratic-appointed judge were documented to observe the relationship between panel composition and the reversal rate. The reversal rate is consistent across the different panel compositions, panels composed of 2 Republican-appointed judges and 1 Democrat-appointed judge are reversed at the same (slightly but not statistically significantly higher) rate as panels composed entirely of Democratic-appointed judges. While the comparable lack of panels made up entirely by Republican-appointed judges (10 panels composed of 3 Republican-appointed judges verses 52 panels composed of 3 Democratic-appointed judges) suggests a prevalence of Democratic-appointed judges in the circuit, this is a function of demographics rather than an explanation of judicial performance. The results of the cross-tabulations analysis indicate, assuming Democratic-appointed judges are accepted as being more liberal than Republican-appointed judges, that panel composition does not necessarily improve the Ninth Circuit's performance under Supreme Court review. Even with more Democratic-appointed judges in the circuit, this test should demonstrate a difference in the reversal rate between panels with a majority of Republican-appointed judges and panels with a

majority of Democratic-appointed judges. The consistency of the reversal rate across panel composition weakens the political ideology argument as an explanation for the Ninth Circuit's performance. It also indicates that the "liberal judge" hypothesis, that the Ninth Circuit's high reversal rate is a function of too many liberal judges, does not withstand scrutiny statistically.

The consistency of the reversal rate across different types of panel composition and the proportion of unanimous Supreme Court reversals indicates that the possible disconnect between the Ninth Circuit and the Supreme Court is more complex than simply a conflict between a conservative-dominated Supreme Court and a liberal-dominated Ninth Circuit Court of Appeals. A unanimous reversal demonstrates that, across ideological lines, the Supreme Court expresses significant disagreement with the Ninth Circuit's decision. Furthermore, panels dominated by Republican-appointed judges are reversed at a similar rate as panels dominated by Democratic-appointed judges. This indicates that the "liberal judge" hypothesis, taken as a function of ideological explanation, cannot account for the frequency of Supreme Court reversal.

A distinction should be made between an ideological explanation of judicial behavior and a philosophical one. Based on the results of this statistical analysis, framing the Ninth Circuit's high reversal rate in ideological terms (Democrat-appointee vs. Republican-appointee, liberal vs. conservative) does not adequately explain its poor performance under Supreme Court review. The relationship between the Ninth Circuit and the Supreme Court cannot be reduced to disagreement between a Democratic-appointment dominated circuit court and a Republican-appointment dominated high court. However, liberal and conservative differences in judicial behavior can be

exercised in non-ideological (non-partisan) ways, such as how the Supreme Court and the Ninth Circuit approach different types of legal questions. A substantial difference in judicial philosophy could explain how the Ninth Circuit's high reversal rate crosses ideological lines.

Based on the cross-tabulations analysis, when the government (federal, state, county, or local) as a party or a government representative was a party to a case, the Supreme Court frequently reversed the Ninth Circuit in favor of the government. 92% of cases in which the Supreme Court ruled in favor of the government were cases in which the Supreme Court reversed the Ninth Circuit. Cases in which the Supreme Court ruled against the government were more evenly split between affirmed Ninth Circuit decisions (41.5%) and reversed Ninth Circuit decisions (53.7%) (see Table 5).

			Government Party			
			Government Party, Prevailed	Government Party, Against	No Government Party	Total
Case Disposition	Affirmed	Count	8	17	10	35
		% within Party	7.1%	41.5%	22.7%	17.7%
	Affirmed In Part / Reversed In Part	Count	1	2	2	5
		% within Party	.9%	4.9%	4.5%	2.5%
	Reversed/Vacated	Count	104	22	31	157
		% within Party	92.0%	53.7%	70.5%	79.3%
	Certiorari Dismissed	Count	0	0	1	1
		% within Party	.0%	.0%	2.3%	.5%
Total		Count	113	41	44	198
		% within Party	100.0%	100.0%	100.0%	100.0%

Table 5: Cross-tabulation Table: Case Disposition with Government Appellant or Appellee

The results of this analysis support the argument from Herald's study of the 1996 term.[5] The Supreme Court is much more favorable to the government appellant than the Ninth Circuit. In the vast majority of cases in which the Supreme Court ruled in favor of the government, it reversed the Ninth Circuit. When the Supreme Court ruled against the government, the Ninth Circuit's performance was more evenly split between decisions affirmed and decisions reversed. As a broader pattern of judicial behavior, the Ninth Circuit appears to be inclined largely to disfavor the government. The Supreme Court frequently counters this approach, as demonstrated by the correlation between Supreme Court rulings favorable to the government appellant or appellee that were cases in which the Ninth Circuit was reversed. When the Supreme Court ruling is not favorable to the government appellant or appellee, the percentage of cases in which the Ninth Circuit is reversed decreases significantly. This further suggests the possibility that the original Ninth Circuit ruling was not favorable to government, as these cases are upheld more frequently when the Supreme Court rules against the government appellant or appellee than when the Supreme Court rules in the government's favor.

The substantial difference in the treatment of government appellants and appellees between the Ninth Circuit and the Supreme Court is supportive of a difference in judicial philosophy argument. Without resorting to an overtly partisan distinction, the Supreme Court significantly favors government appellants, frequently reversing the Ninth Circuit in cases in which the original Ninth Circuit decision presumably was not favorable to the government.

Noted as recently as the 2010 term, the Supreme Court and the Ninth Circuit frequently clash over the treatment of criminal procedure cases.[6] Examining the

application of the Due Process clause during the period of this study allows for insight into the differences between the Ninth Circuit and the Supreme Court on the application of legal principles. While the definition of criminal Due Process, that the case invokes a legal due process guarantee with the government as a party to the case, is sufficiently broad to encompass a range of different legal questions, it is specific enough in its focus to illustrate if differences in judicial approach exist. 79 cases involved the application of a due process guarantee in a criminal procedure case. In the vast majority of these cases (70 cases, 88.6%), the Supreme Court reversed the Ninth Circuit. In nearly all cases (63 of 65 cases, or 96.9%) that involved a criminal procedure application of a due process guarantee where the Supreme Court ruled in favor of the government appellant or appellee, the Ninth Circuit decision was reversed or vacated. Cases that involved a criminal procedure application of due process not ruled in favor of the government were more evenly split, six cases affirmed, seven cases reversed (see Table 6).

Does Case Involve Due Process Clause				Government Party Outcome: Government Party, Prevailed	Government Party Outcome: Government Party, Against	Total
Involves Due Process – Criminal	Case Disposition	Affirmed	Count	2	6	8
			% within Outcome	3.1%	42.9%	10.1%
		Affirmed In Part / Reversed In Part	Count	0	1	1
			% within Outcome	.0%	7.1%	1.3%
		Reversed/Vacated	Count	63	7	70
			% within Outcome	96.9%	50.0%	88.6%
	Total		Count	65	14	79
			% within Outcome	100.0%	100.0%	100.0%

Table 6: Cross-tabulation Table: Case Disposition by Government Party in Due Process Cases

The Supreme Court's rejection of the Ninth Circuit's approach in due process related cases signals a strong disagreement between the Ninth Circuit and the Supreme Court in judicial approach. While Due Process law is not overtly partisan in nature, differences in criminal procedure cases can be defined in liberal and conservative terms. Consistent with the differences between the Supreme Court and the Ninth Circuit in their approach towards government appellants and appellees, the differences in judicial behavior demonstrated by the Due Process tests suggests a philosophical gap between the courts that cannot be defined in ideological terms.

The results of this analysis indicate that the relationship between the Ninth Circuit and the Supreme Court is more complicated than the liberal Ninth Circuit reputation permits at face value. The consistency of reversal across panel composition and the frequency of unanimous reversal signal that the disparity between the Ninth Circuit and the Supreme Court is not simply a function of the "liberal justice" hypothesis. It could indicate another manifestation of the Ninth Circuit's liberalism that is more sophisticated than a dominance of liberal justices. Strong reversal statistics for the analysis of government as a party to the case and the application of the due process clause indicate a substantial difference in approach between the Ninth Circuit and the Supreme Court on these types of cases.

Chapter Notes

1 Chemerinsky, Erwin (2003) "The Myth of the Liberal Ninth Circuit"

2 O'Brien, David M (2011) *Supreme Court Watch 2010*
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CHAPTER V

CONCLUSION

Previous studies of the Ninth Circuit have focused on analyzing different characteristics of the circuit court as explanatory variables for the Ninth Circuit's controversial reputation. Much of the scholarship focuses on two primary explanations for the Ninth Circuit's high reversal rate: 1) the Ninth Circuit is the largest appellate court in terms of both territory and authorized judgeships, and 2) the Ninth Circuit's reputation as a liberal court. The size explanation essentially addresses the functionality of the circuit, directly or indirectly evaluating whether the Ninth Circuit should be split. The question of the Ninth Circuit's liberal reputation highlights differences between the Ninth Circuit and the Supreme Court that may be contributing to the Ninth Circuit's frequent reversal by the Supreme Court. The results of this study indicate a pronounced difference in judicial behavior between the Ninth Circuit and the Supreme Court that suggests that the circuit's output is a very strong explanation for the Ninth Circuit's high reversal rate. The cases reviewed in this study reveal significant differences between the Ninth Circuit and the Supreme Court in their respective approaches towards applying law.

This study examined the cases from the Ninth Circuit reviewed by the Supreme Court during an eleven-year period of consistent Supreme Court membership to determine whether the cases highlighted particular patterns of judicial behavior. This study focused on three different aspects of these cases: 1) the composition of the Ninth

Circuit panel, to test whether the composition of Democrat-appointed or Republican-appointed judges on the panel affected the reversal rate; 2) the presence of government or a government representative as appellant or appellee on the case, to assess if there was a difference between the Ninth Circuit and the Supreme Court in their respective treatment of government interests; and 3) the application of the due process clause, to test differences between the Ninth Circuit and the Supreme Court in their respective approaches towards a type of law. The results from this analysis suggest that the relationship between the Ninth Circuit and the Supreme Court is more complex than the political reputation of the Ninth Circuit implies.

The Ninth Circuit's liberal reputation is frequently defined as a function of political (rather than legal) ideology. The "liberal judge" theory stems from President Carter's fifteen Ninth Circuit appointments, and it attributes the Ninth Circuit's frequent reversal to a political conflict with a Supreme Court composed mostly of Republican-appointed justices. The theory, however, does not hold up to review. During the 1994-2005 period of this study, the number of unanimous Supreme Court reversals far exceeded the 5-4 or 6-3 reversals that would be consistent with an ideological explanation. Furthermore, the Ninth Circuit's reversal rate is consistent across different panel compositions. These results demonstrate that the political definitions of liberal and conservative (viewed as a Democrat vs. Republican conflict) cannot adequately explain the differences between the Ninth Circuit and the Supreme Court. However, this study indicated notable differences between the Ninth Circuit and the Supreme Court in their treatment of government appellants or appellees and in their application of the due process guarantees, which highlights liberal and conservative judicial (or philosophical)

differences. The Supreme Court is far more likely than the Ninth Circuit to support the government's position when the government appears as a party to the case. When the Supreme Court favored the government's position, it reversed the Ninth Circuit in 92% of cases; the Ninth Circuit's reversal rate improves substantially when the Supreme Court ruled against the government appellant. In 88.6% of cases invoking a due process protection, the Supreme Court reversed the Ninth Circuit's position; the majority of these cases were reversed by the Supreme Court in favor of government.

As supported by the statistical tests in treatment of government as a party and the application of Due Process law, significant judicial philosophy differences exist between the Ninth Circuit and the Supreme Court. These differences exist across party lines. The treatment of government appellants and the application of due process guarantees are concepts of judicial behavior that are not strictly defined in partisan terms. In not favoring a government appellant or in extending a due process guarantee, the Ninth Circuit may be exercising a "liberal" philosophy without being representative of either appointing presidential party. The judicial approach favored by the Ninth Circuit may apply broadly to the circuit's judges independent of the judge's political identification, as indicated by the consistency in reversal rate across different panel compositions. Additionally, because a circuit's output is heavily influenced by its own precedent, unless governed by existing Supreme Court precedent, the Ninth Circuit may be applying a technically "correct" approach to law which conflicts with the Supreme Court's approach to the same legal question.[1]

A difference in judicial philosophy between the Ninth Circuit and the Supreme Court, as evidence by the Ninth Circuit's "liberal" outcomes towards government

appellants and the due process cases suggests a more complex distinction between the Ninth Circuit and the Supreme Court than the "liberal judge" theory allowed. The philosophical, rather than political (or ideological) explanation of the Ninth Circuit's "liberal" approach and the Supreme Court's "conservative" approach explains how Ninth Circuit panels composed primarily of Republican-appointed judges are reversed at a similar rate as panels composed mostly of Democratic-appointed judges. It also accounts for the frequency of unanimous reversals by the Supreme Court. The philosophical difference also indicates that politicizing the Ninth Circuit's reversal rate has little overall benefit, because the Republican-appointed judges are part of the Ninth Circuit's "liberal" problem. While this explanation provides a greater understanding of the relationship between the Ninth Circuit and the Supreme Court, it also indicates that if corrective measures to lower the Ninth Circuit's reversal rate are necessary, such a shift will not be accomplished primarily by balancing the composition of judges.

This study approached the question of the Ninth Circuit's judicial reputation by focusing on the Ninth Circuit cases reviewed by the Supreme Court. By examining all the cases accepted for review by the Supreme Court, this study discovered patterns within the cases rather than focusing on broad reversal statistics or notable cases. Further studies can apply this approach towards the other regional circuit courts of appeal, to contrast the relationship between the Ninth Circuit and the Supreme Court to the relationship between its sister circuits and the Supreme Court. A study on the effects of panel composition can apply the same approach used to test the "liberal judge" hypothesis here to other circuit courts to examine the relationship between judicial partisan identification and the circuit's reversal rate. Further research should also be

directed towards the Ninth Circuit Court of Appeals. While the ideological explanation does not withstand statistical scrutiny, further assessment of the philosophical differences suggested by this paper is merited to understand the relationship between the Ninth Circuit, the Supreme Court, and the other circuit courts.

Chapter Notes

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APPENDIX

APPENDIX

LIST OF NINTH CIRCUIT COURT OF APPEALS JUDGES, 1994-2005

The following table lists the judges who served in the Ninth Circuit Court of Appeals in either an active circuit judge or senior circuit judge capacity (or both) during the period of this study. This list does not include the judges whose service to the Ninth Circuit concluded prior to 1994, or who were appointed after 2005.

Judge Name	Appointed By	Year Appointed	Senior Status	End of Service
Chambers, Richard	Eisenhower	1954	1976	1994
Merrill, Charles	Eisenhower	1959	1974	1996
Browning, James	Kennedy	1961	2000	2012
Wright, Eugene	Nixon	1969	1983	2002
Kilkenny, John	Nixon	1969	1971	1995
Cho, Herbert	Nixon	1971	1984	2004
Goodwin, Alfred	Nixon	1971	1991	-
Wallace, Clifford	Nixon	1972	1996	-
Sneed, Joseph	Nixon	1973	1987	2008
Hug, Procter	Carter	1977	2002	-
Tang, Thomas	Carter	1977	1993	1995
Fletcher, Betty	Carter	1979	1998	-
Schroeder, Mary	Carter	1979	2011	-
Skopil, Otto	Carter	1979	1986	-
Farris, Joseph	Carter	1979	1995	-
Alarcon, Arthur	Carter	1979	1992	-
Pregerson, Harry	Carter	1979	-	-
Ferguson, Warren	Carter	1979	1986	2008
Poole, Cecil	Carter	1979	1996	1997
Nelson, Dorothy	Carter	1979	1995	-
Canby, William	Carter	1980	1996	-
Boochever, Robert	Carter	1980	1986	2011
Norris, William	Carter	1980	1994	1997

Judge Name	Appointed By	Year Appointed	Senior Status	End of Service
Reinhardt, Stephen	Carter	1980	-	-
Beezer, Robert	Reagan	1984	1996	2012
Hall, Cynthia	Reagan	1984	1997	2011
Wiggins, Charles	Reagan	1984	1996	2000
Brunetti, Melvin	Reagan	1985	1999	2009
Kozinski, Alex	Reagan	1985	-	-
Noonan, John	Reagan	1985	1996	-
Thompson, David	Reagan	1985	1998	2011
O'Scannlain, Diarmuid	Reagan	1986	-	-
Leavy, Edward	Reagan	1987	1997	-
Trott, Stephen	Reagan	1988	2004	-
Fernandez, Ferdinand	H.W. Bush	1989	2002	-
Rymer, Pamela	H.W. Bush	1989	-	2011
Nelson, Thomas	H.W. Bush	1990	2003	2011
Kleinfeld, Andrew	H.W. Bush	1991	2010	-
Hawkins, Michael	Clinton	1994	2010	-
Tashima, Atsushi	Clinton	1996	2004	-
Thomas, Sidney	Clinton	1996	-	-
Silverman, Barry	Clinton	1998	-	-
Graber, Susan	Clinton	1998	-	-
McKeown, Margaret	Clinton	1998	-	-
Wardlaw, Kim	Clinton	1998	-	-
Fletcher, William	Clinton	1998	-	-
Fisher, Raymond	Clinton	1999	-	-
Gould, Ronald	Clinton	1999	-	-
Paez, Richard	Clinton	2000	-	-
Berzon, Marsha	Clinton	2000	-	-
Tallman, Richard	Clinton	2000	-	-
Rawlinson, Johnnie	Clinton	2000	-	-
Clifton, Richard	G.W. Bush	2002	-	-
Bybee, Jay	G.W. Bush	2003	-	-
Callahan, Consuelo	G.W. Bush	2003	-	-
Bea, Carlos	G.W. Bush	2003	-	-