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# Exploring the Myths about the Ninth Circuit

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Stephen J. Wermiel*

When the U.S. Court of Appeals for the Ninth Circuit issued its original ruling invalidating the Pledge of Allegiance in 2002,[1] the decision provoked a flood of thoughtful commentary and debate in newspapers and academic journals. It also produced another type of reaction, reflected in the remarks of Speaker of the U.S. House of Representatives Dennis Hastert (Republican, Ill.), who said, "Obviously, the liberal Court in San Francisco has gotten this one wrong."[2]

Hastert's comment is just one example of a perception held by many politicians, legal commentators, and journalists that the country's largest court of appeals—it covers nine states and two territories, and presently has twenty-eight active judges authorized and twenty-three senior judges[3]—is a bastion of liberalism run amok. In its most persistent form, this perception holds that the Ninth Circuit is so out of control that the Supreme Court of the United States must devote considerable time and energy to reining in the judges and correcting their decisions.

Elsewhere in this symposium, Kevin Scott has done a laudable job of providing a statistical basis for discussion of the relationship between the Supreme

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1. Newdow v. U.S. Cong., 292 F.3d 597 (9th Cir. 2002), *amended by* 328 F.3d 466 (9th Cir. 2003), *rev'd sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004). The ruling was later modified so that it did not strike down the federal statute that created the Pledge, but only school-mandated, teacher-led recitation of the Pledge under California school district policy. *See Newdow*, 328 F.3d 466.

2. Bob Egelko, *Pledge of Allegiance Ruled Unconstitutional; Many Say Ruling by S.F. Court Hasn't a Prayer After Appeals*, S.F. CHRON., June 27, 2002, at A1.

3. *See* Fed. Judicial Ctr., History of the Federal Judiciary, http://www.fjc.gov/history/home.nsf (last visited Apr. 2, 2006); Ninth Circuit Court of Appeals, Home Page, http://www.ca9.uscourts.gov (go to List of 9th Circuit Judges) (last visited Apr. 2, 2006).

Court and the Ninth Circuit.[4] The statistics tend to support a Supreme Court preoccupation with the rulings of the Ninth Circuit and a greater-than-normal propensity by the Justices to overrule its decisions.[5]

This Essay does not attempt to "recrunch" those numbers, but instead suggests that the statistical evidence proves relatively little about the relationship between the Supreme Court and the Ninth Circuit, because the quantitative questions are only a starting point and must be combined with qualitative analysis to shed any real light on the controversy. Even modest, random, anecdotal, qualitative examination of the relationship between the two Courts casts doubt on the popular "liberals run amok" critique of the Ninth Circuit.[6]

This Essay suggests that the Ninth Circuit suffers less from a genuine runaway tendency toward renegade judicial decisionmaking and more from a bandwagon effect of political criticism perpetuated by media commentary.[7] Moreover, the sometimes breathless fascination with Supreme Court reversals of Ninth Circuit decisions, as if to suggest revelation of an important new trend, reflects a very short memory. Precisely the same controversy occurred in the early 1980s, coinciding roughly with the discovery by young Reagan Administration conservatives that they could gain political mileage out of calling attention to the frequency of Ninth Circuit reversals by the Supreme Court.

The controversy was substantial at the time. As Harvard Law School Professor Laurence Tribe suggested in the *Los Angeles Times* with respect to the 1980s controversy, "The rate at which that court's decisions were reversed by the Supreme Court last term has no genuine significance, and certainly does not prove there was any attempt by the Supreme Court to 'discipline' the 9th Circuit's judges."[8]

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4. Kevin M. Scott, *Supreme Court Reversals of the Ninth Circuit*, 48 ARIZ. L. REV. 341 (2006).

5. The view that there has been a deep ideological divide between the Ninth Circuit and the Supreme Court is supported in one study of the October Term 1996 in which the Ninth Circuit was upheld once and reversed twenty-seven times. *See* Marybeth Herald, *Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and the Congress*, 77 OR. L. REV. 405, 407 (1998). *But see* Erwin Chemerinsky, *The Myth of the Liberal Ninth Circuit*, 37 LOY. L.A. L. REV. 1 (2003); Jerome Farris, *The Ninth Circuit—Most Maligned Circuit in the Country—Fact or Fiction?*, 58 OHIO ST. L.J. 1465 (1997).

6. A more thorough examination that calls into question the out-of-control image of the Ninth Circuit can be found in Stephen L. Wasby, *How the Ninth Circuit Fares in the Supreme Court: The Intercircuit Conflict Cases*, 1 SETON HALL CIRCUIT REV. 119 (2005).

7. For an alternate view, suggesting that the Ninth Circuit is more heavily populated by Democratic appointees than other circuits and is far more likely to have all-Democratic-appointed three-judge panels, see Jess A. Velona, *Partisan Imbalance on the U.S. Courts of Appeals*, 89 JUDICATURE 25, 31–32 (2005).

8. Laurence H. Tribe, *Letter to the Editor: Supreme Court Reversals of 9th Circuit Decisions*, L.A. TIMES, Jan. 5, 1985, at B2.

## I. THE CONTROVERSY

The premise at the core of the controversy is that judges of the Ninth Circuit march to their own frequently liberal beat, do not heed the rulings of the Supreme Court, and are out of step with the High Court's direction. This premise manifests itself in two ways:

One manifestation is that legal scholars and media and political commentators follow the Supreme Court's reversal rates of the various circuits with a statistical fascination equaled only in fantasy baseball leagues. This results in dissemination of numbers showing frequent reversal of the Ninth Circuit and a corresponding assumption that the numbers establish the premise: frequent reversals must mean a liberal, out-of-step circuit being reminded by the Supreme Court that the Justices are in charge. The reversal rates lead to a number of observations:

First, the Ninth Circuit has been at the high end of reversal rates, not just over the past decade, but over the past thirty years. In some years, the Ninth Circuit's reversal rate has far exceeded the norm. In the 1984 term, the Supreme Court reversed the Ninth Circuit twenty-seven times in twenty-eight cases. In the 1996 term, the Supreme Court reversed the Ninth Circuit ninety-five percent of the time.[9]

Second, more recently, the Ninth Circuit's reversal rate has not been out of line with the other circuits; but Ninth Circuit cases have represented a disproportionate share of the Supreme Court's argument docket, and unanimous reversals have been disproportionately high.[10]

Third, the Ninth Circuit is not alone in experiencing high reversal rates, but it has had more bad years than some other circuits. The Ninth Circuit has also carried more of the burden of negative commentary, although other circuits, for example, the Fifth,[11] have experienced some similar box-score analysis.

Finally, some decisions of the Ninth Circuit take on a liberal notoriety that is hard to escape. Among these are the ruling striking down the California three-strikes law[12] and the Pledge ruling.[13]

The second way the premise is manifested is that the image generated by the repetition of the statistics takes on a life of its own in the news media[14] and in

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9. Jeff Chorney, *For 9th Circuit: Lots of Scrutiny and 9–0 Reversals by High Court*, RECORDER (S.F.) (July 1, 2005), *available at* http://www.law.com/jsp/article.jsp?id=1120122313700 (describing Supreme Court reversal of Ninth Circuit in the term ending in June 2005 and including a chart showing previous reversal rates).

10. *Id.*

11. Allen Pusey, *Taking the Fifth to Task*, DALLAS MORNING NEWS, July 25, 2004, at H1 (describing the Supreme Court's reversal of all six cases it heard from the Fifth Circuit in the 2003 term).

12. Andrade v. Attorney Gen., 270 F.3d 743 (9th Cir. 2001), *rev'd sub nom.* Lockyer v. Andrade, 538 U.S. 63 (2003).

13. Newdow v. U.S. Cong., 292 F.3d 597 (9th Cir. 2002), *amended by* 328 F.3d 466 (9th Cir. 2003), *rev'd sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

legal commentary,[15] so that the runaway liberal court becomes a recurring theme used to explain legal developments that may have no connection to this image. Commentary on important rulings is sometimes filtered through the prism of a runaway court, rather than considering decisions on their merits. Debatable but plausible rulings, albeit controversial, become products of the scofflaw liberal judges of the Ninth Circuit.

This Essay first examines some Ninth Circuit cases to raise questions about the image of a conservative Supreme Court regularly correcting renegade liberal judges. Next, the Essay examines some of the commentary to demonstrate how it perpetuates the premise of the Ninth Circuit as out of control.

The identification of judges in this Essay by the President who appointed them is intended as a proxy for whether they may be likely to be liberal or conservative. The point of this identification is not to reduce the federal judiciary to partisan labels. Rather, it is intended as a measure of how likely it is that decisions by particular judges should be considered part of a trend of liberal jurists disregarding the mandate of the Supreme Court.

## II. THE CASES

The difficulty with the statistical analysis is that it suggests an image that is much more complex and nuanced than the numbers can demonstrate. Even in the years of the Ninth Circuit's worst records in the Supreme Court, the relationship between the two courts has never been a monolithic one capable of a single explanation or transmitting a single message. While anecdotal evidence is all that this Essay has to offer, the anecdotes do demonstrate a number of important internal differences that the statistics do not. Of course, anecdotes alone do not allow us to be comprehensive in our conclusions.

The anecdotal themes include:

First, some Supreme Court reversals of the Ninth Circuit involve cases of first impression; the two courts may have reached different results, but the Ninth Circuit only became wrong because the Supreme Court *subsequently* took a different view.

Second, while there are many examples of unanimous reversal of the Ninth Circuit, there are also many cases in which the Supreme Court vote was five-to-four; once again, the Ninth Circuit may have been wrong, but the Supreme Court vote indicates that the decision was close.

Third, some reversals of Ninth Circuit opinions involve panel opinions written by judges appointed by Republican Presidents Ronald Reagan, George H.W. Bush, or George W. Bush; therefore, it is erroneous to claim that the

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14. *See, e.g.*, Ellen Hale, *Western Eccentricity Rules in 9th Circuit Court of Appeals: Liberal Judges, Supreme Court Often Tangle*, CHI. SUN-TIMES, Nov. 24, 1996, at 33.

15. *See, e.g.*, Eric Schippers, *Break the Wild West Circuit*, PALM BEACH DAILY BUS. REV., Dec. 16, 2002, at A24.

reversals all fall on decisions by judges appointed by Democratic Presidents Jimmy Carter or Bill Clinton.

Fourth, even when the panel opinion was written by a Democratic judicial appointee, many of the reversals occur in cases in which the panel included judges appointed by Republican Presidents.

Finally, when the Supreme Court reverses the Ninth Circuit in intercircuit conflict cases, the Ninth Circuit's position was sometimes shared by other circuits.

There are numerous examples to illustrate these points, and no attempt was made here to be exhaustive or to quantify the cases in each category. Rather, the point is that even a sampling of examples is sufficient to suggest what is missing from much statistical analysis in this field.

### *A. First Impression*

Examples of cases of first impression that were counted to push up reversal rates go back more than two decades. In *Universal City Studios v. Sony Corp. of America*,[16] the Ninth Circuit became the first court of appeals in the country to consider whether the use of then relatively new television recording technology—the Sony Betamax—constituted copyright infringement by allowing users to record and reuse the on-air programs produced by other companies. The Ninth Circuit found that the Sony devices did infringe the copyrights of program producers.[17] The opinion was written by Judge John F. Kilkenny, appointed by President Dwight D. Eisenhower to the U.S. District Court and elevated by President Richard Nixon to the Ninth Circuit.[18] The Supreme Court reversed in 1984, requiring two oral arguments and then ruling by a five-to-four vote that there was no infringement.[19]

The *Sony* reversal came in the middle of the 1983 Term in which the Supreme Court reversed the Ninth Circuit in twenty-five out of twenty-six cases, and it was part of the first wave of attention to this pattern of Supreme Court reversals. While this reversal counts in the statistics, it demonstrates little or nothing about the relationship between the two courts. The Ninth Circuit took one view of how to fit new technology into existing copyright law; a bare majority of the Supreme Court took another view. Yet this case added to the statistics that were the basis for the formation of the Ninth Circuit's reputation as an out-of-control circuit.

There are more recent examples of cases of first impression. In its 2004 Term, the Supreme Court reversed the Ninth Circuit's ruling in *Raich v. Ashcroft*,[20] in which the circuit panel had ruled that the state's allowance of the use of marijuana for local medicinal purposes was beyond the regulation of Congress under the Commerce Clause of the U.S. Constitution. The novel question was

16. 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984).
17. *Id.* at 968–72.
18. *See* Fed. Judicial Ctr., Biographical Directory of Federal Judges, http://www.fjc.gov/public/home.nsf/hisj (last visited Apr. 2, 2006) [hereinafter Judges Directory].
19. Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417 (1984).
20. 352 F.3d 1222 (9th Cir. 2003), *vacated*, 125 S. Ct. 2195 (2005).

resolved in a panel opinion by Judge Harry Pregerson, appointed to U.S. District Court by President Johnson and elevated to the Ninth Circuit by President Carter.[21] The Supreme Court reversed, six-to-three, ruling that the Commerce Clause provided ample authority for application of the federal Controlled Substances Act[22] to restrict state-approved use of medical marijuana.[23] Yet far from being an example of a rogue, liberal court being pulled back by a conservative one, the panel arguably made a good faith effort to apply the federalism rulings of the Rehnquist Court, only to be reversed by a Supreme Court majority seeking to limit the scope of the Court's new federalism jurisprudence. The majority opinion was written by Justice John Paul Stevens, and the dissent by Justice Sandra Day O'Connor, who made clear that the Ninth Circuit had followed the correct analysis, at least from the standpoint of those responsible for the Supreme Court's principal federalism decisions.

### *B. Closely Divided Supreme Court*

There is no shortage of examples in which reversal of the Ninth Circuit was by a deeply divided Supreme Court. While these cases statistically count as reversals, they suggest that the issues are close or that they predictably bring out the fault line of ideological divide. This was the case in *Lockyer v. Andrade*,[24] the Supreme Court decision in favor of the California "three strikes" law. The Supreme Court's reversal of the Ninth Circuit was by a five-to-four vote and fell along ideological lines. Did this mean the lower court was out of line? Perhaps it seemed that way to five members of the Supreme Court, but not to the other four. With the Court so divided and Justice O'Connor casting the deciding vote and writing the majority opinion, it is hard to say that this counts as an example of a runaway circuit court opinion.

### *C. Decisions Authored by Republican Appointees*

There are also cases in which the reversal pattern does not fit the model for controversy of liberal judges reversed by conservative justices. In *Lingle v. Chevron U.S.A.*,[25] the Supreme Court reversed the Ninth Circuit unanimously, but in doing so rejected the use of an established test to determine whether a Hawaii law was a regulatory taking of private property. The Hawaii law limited the rent an oil company may charge a dealer that leases a gas station owned by the company. The panel opinion, which applied the existing test that a regulation may be a taking if it "does not substantially advance legitimate state interests,"[26] was written by Judge Robert Beezer, appointed to the Ninth Circuit by President Reagan.[27] One of the two panel members appointed by Democratic Presidents, Judge William Fletcher, wrote a dissent. The Supreme Court opinion, written by Justice

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21. *See* Judges Directory, *supra* note 18.
22. Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified as amended at 21 U.S.C. §§ 801–904 (2000)).
23. Gonzales v. Raich, 125 S. Ct. 2195 (2005).
24. 538 U.S. 63 (2003).
25. 544 U.S. 528, 125 S. Ct. 2074, 2082–83 (2005).
26. *Id.* at 2077 (citing Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).
27. *See* Judges Directory, *supra* note 18.

O'Connor, reversed Judge Beezer but did not adopt Judge Fletcher's dissent. This hardly stands as a cause for alarm about a circuit that needs to be carefully watched.

### *D. Republican Appointees Voting with Majority*

There is also a group of cases in which the panel opinion was written by a judge appointed by a Democratic President. In these cases, there is more cause to scrutinize whether liberal judges are simply out of step with the more conservative superintendency of the law by the Supreme Court. Yet invariably this category, too, contains cases that reflect a complexity not developed by statistical analysis. This is most true when the panel includes one or more judges appointed by Republican Presidents who join the Court's opinion.

Consider *McNeil v. Middleton*, a unanimous Ninth Circuit panel ruling ordering a U.S. District Court to grant a habeas corpus petition in a second-degree murder case in which the panel said a woman was deprived of the ability to mount a defense and to have a fair trial.[28] The Supreme Court unanimously and summarily reversed the panel,[29] without briefing or oral argument. While the opinion was written by an appointee of President Clinton, Judge Richard Paez, it was joined in full by Judge Beezer, a Reagan appointee, and by Judge Ferdinand Fernandez, who was named to the U.S. District Court by President Reagan and elevated to the circuit by the first President Bush.[30] It is fair to say that liberal judges are sometimes criticized for being too sympathetic to habeas claims, but in this instance, the habeas claims were accepted not only by Judge Paez but also by two Republican appointees as well.

### *E. Circuit Splits*

Finally, there is a category of rulings in which the Ninth Circuit was reversed but was in agreement with the positions of one or more of its sister circuits. There are numerous instances of this. An example illustrates the point that the Supreme Court could just as easily have used the rulings of other circuits to reverse at another time, and it may be little more than a coincidence that a Ninth Circuit case was chosen.[31]

In *United States v. Martinez-Salazar*, the Ninth Circuit had found a Fifth Amendment due process violation when a judge refused to dismiss a juror for

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28. 344 F.3d 988, 1001–02 (9th Cir. 2003), *rev'd*, 541 U.S. 433 (2004) (per curiam).

29. Middleton v. McNeil, 541 U.S. 433.

30. *See* Judges Directory, *supra* note 18.

31. For alternate theories, see Jeff Chorney, *9th Circuit Dominates Top Docket*, RECORDER (S.F.), June 30, 2004, at 1, *available at* http://www.law.com/jsp/newswire_article.jsp?id=1088439705222 (published on July 1, 2004). The article quotes Professor Vikram Amar of Hastings College of Law, suggesting that there may be a residual "lack of trust" of the Ninth Circuit by the Supreme Court, left over from earlier years when the reversal rate was very high. In the same article, Professor Arthur Hellman of the University of Pittsburgh Law School also suggested that Supreme Court law clerks might take a closer look at cases from the Ninth Circuit.

cause in a criminal case, the defendant used a peremptory challenge against the juror, and the defendant ran out of peremptory strikes.[32] The panel opinion was written by Judge Michael Daly Hawkins, an appointee of President Clinton; it was joined by Judge Stephen Reinhardt, an appointee of President Carter and a frequent target for criticism of the Ninth Circuit. Judge Pamela Rymer, a U.S. District Court appointee of President Reagan, elevated to the Ninth Circuit by the first President Bush, dissented.[33] The Supreme Court unanimously reversed the Ninth Circuit in an opinion written by Justice Ruth Bader Ginsburg, who specifically noted[34] that the First[35] and Fifth Circuits[36] had adopted a position that shared the Ninth Circuit's view, while the Tenth[37] and Eleventh Circuits[38] disagreed with the Ninth. The Supreme Court, then, could have handled this issue in a case from another circuit; had it done so, the case would not have been reflected in the Ninth Circuit's reversal rates.

In the use of all of these anecdotes, there is a modest goal: to demonstrate that the reversal rate of the Ninth Circuit is made up of different component parts that are far more subtle and nuanced, and perhaps incapable of a single explanation, than statistical studies are able to show. Judges of all ideological stripes get reversed by a Supreme Court moving in different directions, most often conservative, but sometimes more moderate.

## III. THE COMMENTARY

It is difficult to document and assess the effect of a bandwagon of commentary. However, some useful observations are possible. The fascination in the news media with the record of the various courts of appeals and voting patterns may be traced to the early 1980s when President Reagan began to populate those courts with more conservative judges to join the moderate-to-liberal jurists placed on the bench by President Carter. As the circuits began to reflect the presence of conservatives, the media began to write about the circuits. This was reflected in a May 1983 series in the *National Law Journal*. At the time, Reagan had not yet placed any judges on the Ninth Circuit, but one article had a prescient quality:

> Finally, it comes down to politics. For example, the 9th Circuit has (23) judges—most appointed by Democrats and none appointed by President Reagan. The Supreme Court has nine justices—seven of whom were appointed by Republican presidents. "It's a matter of

32. United States v. Martinez-Salazar, 146 F.3d 653, 654 (9th Cir. 1998), *rev'd* 528 U.S. 304 (2000).

33. *See* Judges Directory, *supra* note 18.

34. *Martinez-Salazar*, 528 U.S. at 310–11.

35. United States v. Cambara, 902 F.2d 144, 147–48 (1st Cir. 1990), *abrogated by Martinez-Salazar*, 528 U.S. 304.

36. United States v. Hall, 152 F.3d 381, 408 (5th Cir. 1998), *abrogated by Martinez-Salazar*, 528 U.S. 304.

37. United States v. Brooks, 161 F.3d 1240, 1245–46 (10th Cir. 1998).

38. United States v. Farmer, 923 F.2d 1557, 1566 (11th Cir. 1991).

> personnel," said Johns Hopkins' Professor [J. Woodford] Howard. But, he added, "It can change very quickly."[39]

By the fall of 1984, the Knight-Ridder newspapers carried a report on the opening of the Supreme Court term by reporter Aaron Epstein, who described the Court's decision to review an antipornography law from the state of Washington. He noted that the law "was ruled unconstitutional by the liberal Ninth Circuit U.S. Court of Appeals in California, the most overruled appellate tribunal in the nation during the last Supreme Court term."[40]

That is just one instance of the link between the liberal Ninth Circuit and the reversal rate being tied together and published,[41] but it is significant for two reasons. First, it shows the connection between ideology and reversal rate being made in media commentary, although no information was offered to provide support for the connection. Second, this discussion of the image of the Ninth Circuit took place more than twenty years ago and seemed to have been almost entirely forgotten when, a decade later, a new generation of commentary about Ninth Circuit reversals burst on the scene as if it were a newly discovered phenomenon.

By 1985, the *National Law Journal* began to publish an end-of-the-term Supreme Court Review, which included a box score on the record of the circuits and of state courts in the Supreme Court. This continued to focus attention on reversal rates and on the Ninth Circuit's record, although that record seemed to fluctuate substantially.[42]

No doubt, as the commentary suggests, the Ninth Circuit was a comparatively liberal court in the early 1980s prior to Reagan appointees taking the bench. But this does not explain all of the reversals, although much of the commentary leaves the impression that it does. For example, in 1992, the *Los Angeles Times* reported:

> The U.S. 9th Circuit Court of Appeals, the largest judicial empire in the United States, seemingly cannot escape its reputation as a liberal haven. . . .
>
> A few years ago the liberal label was undeniably deserved, but no more.
>
> In 1984, the court, made up of predominantly liberal appointees, was reversed 27 of 28 times by the U.S. Supreme Court.
>
> Since then, the makeup of the 28-judge court has been radically altered by more than a dozen conservative appointments during the

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39. Kathleen Sylvester, *Playing Circuit Roulette: How Personalities, Politics Factor into High Court's Decisions*, NAT'L L.J., May 9, 1983, at 1.

40. Aaron Epstein, *Supreme Court to Hear Gay Rights Case*, MIAMI HERALD, Oct. 2, 1984, at 7A.

41. For another example, see *Carter-Appointed Judges Have High Reversal Rate*, SAN JOSE MERCURY NEWS, Dec. 16, 1985, at 1D (describing high reversal rates for Judges Warren J. Ferguson, Stephen Reinhardt, William C. Canby, and Betty Binns Fletcher).

42. *See infra* app. I.

> Reagan and Bush years. During the U.S. Supreme Court's 1990 term, the 9th Circuit's reversal rate dropped . . . putting it exactly in the middle of the 13 circuits, according to the Administrative Office of the U.S. Courts in Washington.[43]

This interesting use of the statistics for this term[44] neglects to mention that the year before, the Ninth Circuit was reversed 58% of the time compared to the averaged rate of 47% for all courts. And the author could not have known that two months after the news story was written, the Ninth Circuit's reversal rate for the Term of the Supreme Court, according to the *National Law Journal*, was 77%, compared to an all-courts average of 61%, putting the newly conservative Ninth Circuit substantially above the norm.[45] The trend of commentary continued in the last half of the 1990s, as the Ninth Circuit's reversal rate spiked above the rate for all courts on occasion. The focus remained on the numbers, and rarely was an effort made to examine the qualitative distinctions underlying the numbers.[46]

Political cartoonists got in on the act, too. They penned cartoons mocking the liberal leanings of the Ninth Circuit. An example, from the Cybercast News Service website by cartoonist Kevin Tuma, is included here.[47] The cartoons, humorous and often biting, add to the cacophony that surrounds the Ninth Circuit and make it harder for the rulings of the circuit to be generally accepted or even taken seriously.

By the time the pattern of Supreme Court treatment of the Ninth Circuit appeared to change, beginning in 2002, some commentary suggested that there were lasting residual effects. In the last several years the Ninth Circuit's reversal rate has been right at about the average, overall reversal rate.[48] However, cases from the Ninth Circuit have made up a substantial and disproportionately large fraction of the Supreme Court's argued docket, as much as one-third of the roughly seventy-five cases argued each term.[49]

This new phenomenon has evoked a number of possible explanations. One in particular, suggested by University of Pittsburgh Law School Professor Arthur Hellman, is cause for concern. An article in 2004 in *The Recorder*, a California legal newspaper and news service, reported, "'You have to wonder whether the [Supreme Court] law clerks don't take a special look at 9th cases,' said Hellman, who closely follows the 9th Circuit. It's like a 'self-reinforcing

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43. Alan Abrahamson, *Despite Image, Liberal Judges No Longer Rule 9th Circuit*, L.A. TIMES, Apr. 21, 1992, at A18.

44. Although the *Los Angeles Times* article, *id.*, refers to the 1990 Term, based on court statistics, it seems likely that the reference was to the 1989 Term of the Supreme Court, which ran from October 1989, through June 1990. It was during this period that the Ninth Circuit reversal rate dropped below the overall rate and moved the court into the middle range of reversals.

45. *See infra* app. I.

46. *See, e.g.*, Hale, *supra* note 14.

47. *See infra* app. II.

48. Chorney, *supra* note 31, at 1.

49. *Id.*

phenomenon because they've taken so many in the past that it becomes the focus of attention,' he speculated."[50]

## CONCLUSION

In a sense this last observation completes the cycle. Having been branded with a reputation for reversals and an image for runaway liberalism, the Ninth Circuit's decisions may now be subject to even closer scrutiny. This is so, regardless of whether the reputation was ever supported by fact or was merely a product of politics, bandwagons, and overemphasis of statistics.

The Ninth Circuit may in fact have been the most liberal circuit during the past twenty-five years. However, before the reputation of the circuit and its members is sullied by being mocked as too liberal and out of control, an effort should be made to move beyond a quantitative analysis that is necessarily detached from an examination of values and content. Any evaluation of the circuit should be based on the substance and nature of its rulings, not simply on a box score.

50. *Id.* (alteration in original).

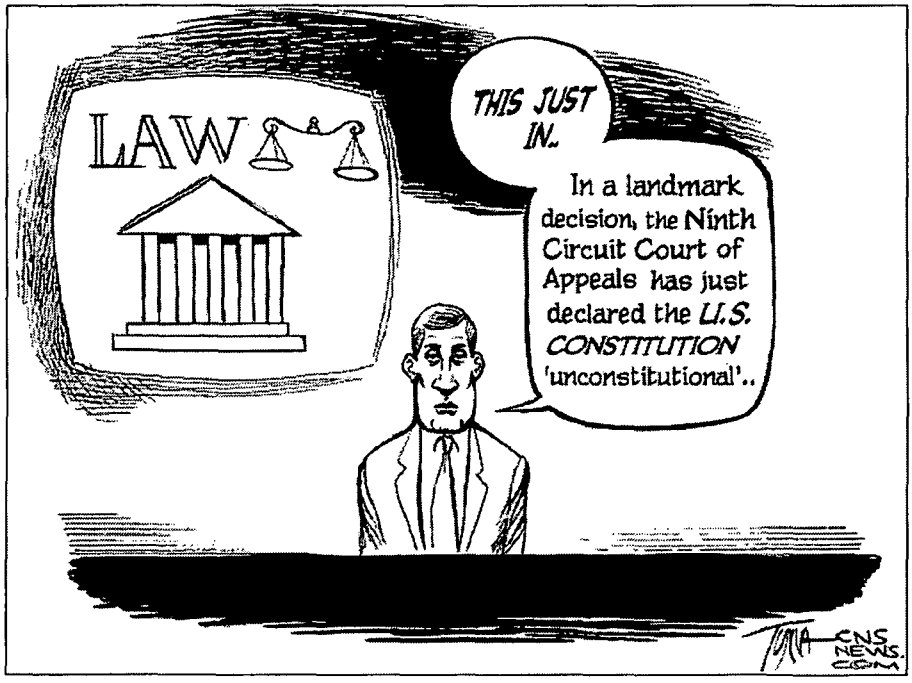
## Appendix I

| Court Term | Overall Reversal Rate | Ninth Circuit Reversal Rate |
|---|---|---|
| 1984 | 65% | 74% |
| 1985 | 59% | 62% |
| 1986 | 63% | 42% |
| 1987 | 53% | 47% |
| 1988 | 47% | 58% |
| 1989 | 59% | 47% |
| 1990 | 61% | 77% |
| 1991 | 66% | 69% |
| 1992 | 60% | 63% |
| 1993 | 50% | 73% |
| 1994 | 65% | 82% |
| 1995 | 58% | 83% |
| 1996 | 71% | 95% |
| 1997 | 60% | 82% |
| 1998 | 69% | 75% |
| 1999 | 58% | 90% |
| 2000 | 67% | 75% |
| 2001 | 75% | 76% |
| 2002 | 74% | 75% |
| 2003 | 76% | 77% |
| 2004 | 71% | 83% |

These figures are extrapolated from the *National Law Journal* annual Supreme Court Review. The overall reversal rate includes all courts, not merely circuit courts.[51]

51. For an example of the original, annual charts in the *National Law Journal*, see NAT'L L.J., Sept. 2, 1985, at S-4.

**Appendix II**

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