

PERCEPTION ISN'T REALITY: THE NINTH CIRCUIT'S RELATIONSHIP WITH THE U.S. SUPREME COURT

Sean SeLegue

The Ninth Circuit has long been known as having a “special” relationship with the Supreme Court, although it’s not necessarily the kind of “special” relationship one would long for. It’s often reported that Ninth Circuit decisions are reversed by the high court with extraordinary frequency. While the Ninth Circuit’s reversal rate is indisputably on the high side, many are surprised to learn that the Ninth Circuit’s reversal rate may not be as out of the ordinary as it is often presented. In the last two complete Supreme Court terms, several other circuits have had similarly high reversal rates.

REVERSAL RATES COMPARED

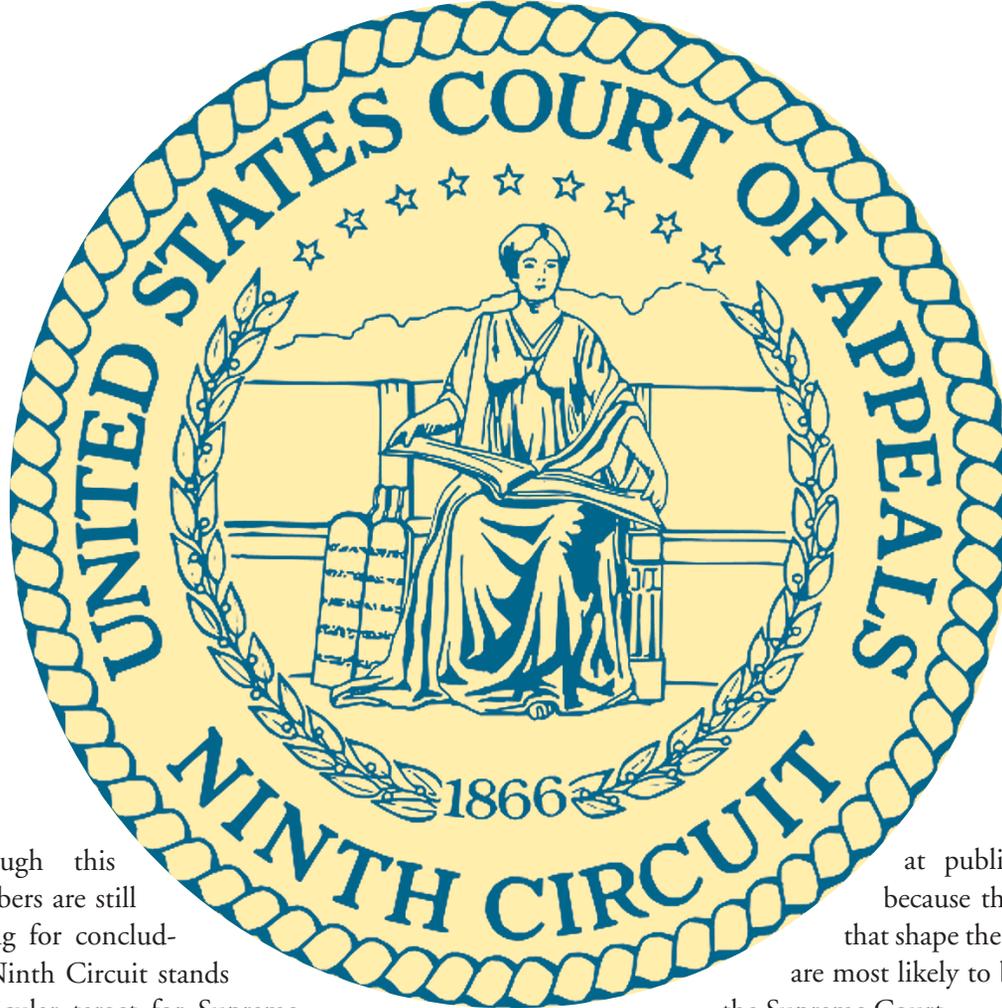
Let’s start with the common wisdom that the Supreme Court reverses the Ninth Circuit more often than not. True enough. Statistics from the last two completed Supreme Court terms confirm that Ninth Circuit decisions taken up by the Supreme Court do, in fact, tend to be reversed much more often than they are affirmed. In October Term 2008, of the sixteen Ninth Circuit decisions reviewed by the Supreme Court, the Court issued an unqualified affirmance in only one case. In the following year, October Term 2009, the Supreme Court heard fifteen cases and issued unqualified affirmances in four—

a 27 percent affirmance rate. And it is true that these mean that the Ninth Circuit is among those circuits with the highest reversal rate.

But the Ninth Circuit is not alone in having high reversal rates. In October Term 2008, three circuits (the Fourth, Sixth, and Eighth) had 100 percent (or close to 100 percent) reversal rates. It’s intriguing to see the Fourth Circuit in this group, because it is commonly thought of as a conservative court. By contrast, the Ninth Circuit has a reputation for being a more liberal court that often finds itself in conflict with the Supreme Court. High reversal rates for several of the circuits were not unique to the 2008 term. In October Term 2009, four circuits had very high reversal rates comparable to the Ninth Circuit’s rate: the Fifth, Sixth, Eighth, and D.C. Circuits. It should be noted that the Sixth and Eighth Circuits made the list for two years in a row.

NUMBERS OF CASES REVIEWED

Another way of measuring the Supreme Court’s view of a circuit court’s decisions is to look at how many of the circuit court’s decisions are accepted for review. It would stand to reason that if the Supreme Court believed it needed to rein in a circuit, then it would tend to grant certiorari in a higher percentage of cases from that circuit.



Viewed through this lens, the numbers are still not compelling for concluding that the Ninth Circuit stands out as a particular target for Supreme Court review.

Before even considering this analysis, one has to consider the uniquely large size of the Ninth Circuit in the federal system. The Ninth Circuit decides far and away more cases than any other circuit. For calendar year 2009 (the last year for which statistics are available), the Ninth Circuit decided a total of 5,509 cases after briefing on the merits. The next busiest circuits (the Fifth and the Eleventh) decided only about 3,500 cases each, with the Second Circuit a close third at 3,230 cases. These figures include all decisions—published and unpublished.

When it comes to published decisions, the Ninth Circuit is not the leader in volume. The Ninth Circuit publishes only a small percentage of its decisions by comparison to some other circuits. Last year, the Ninth Circuit published about 660 decisions, which comes out to 11 percent of all cases decided after briefing. Some other circuits, while less busy overall, published a far higher percentage of decisions—as high as almost 40 percent in the First and D.C. Circuits. When considering the Supreme Court's propensity to get involved, it makes most sense to look

at published opinions, because they are the ones that shape the law and, hence, are most likely to be of interest to the Supreme Court.

For October Term 2009 (the last complete term), the Court granted certiorari in 14 cases or about 2.1 percent of all published Ninth Circuit cases. Other circuits had much higher grant rates. The Eleventh Circuit, for example, saw 10 of its decisions taken up for review out of 311 published decisions, a rate of 9.3 percent—much higher than the Ninth Circuit's grant rate. The Seventh Circuit by this measure looks very comparable to the Ninth Circuit, with 11 cases taken up out of 671 decisions, a rate of 1.6 percent. (And, incidentally, both of those circuits had very high reversal rates last term to boot.) Consequently, even by the alternative measure of number of cases reviewed, the Ninth Circuit is not the standout it is commonly reputed to be.¹

CONCLUSION

While other commentators might draw conclusions based on the substance of Supreme Court decisions arising from Ninth Circuit matters, and the tenor of those decisions, statistics from recent years do not support the

notion that the Ninth Circuit is a severe outlier among the circuit courts in terms of Supreme Court review. Indeed, given that the Supreme Court has steadily reduced the number of cases it decides in recent years, for reasons that are the subject of some debate, it would seem that the Court would have the capacity to tackle even more Ninth Circuit decisions than it presently does—if it wanted to more tightly control the Ninth Circuit than other circuits. Of course, it would be impossible as a matter of sheer numbers for the Supreme Court to micromanage the Ninth Circuit's case load.

What does all of this mean for practitioners? First, if you lose at the Ninth Circuit, you do not have a significantly higher chance of obtaining Supreme Court review than you would if you were before another circuit. Second, the next time you hear the Ninth Circuit being “dissed” as having a uniquely high reversal rate, you can point out these facts to amaze friend and foe with your wonky knowledge of the Ninth Circuit's actual track record.

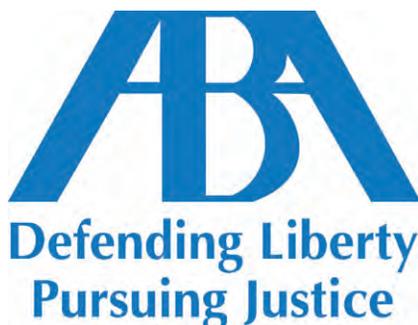
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Note:

1. A note on the statistics in this paragraph, which are not as precise as one would like but sufficient to form the basis for some conclusions: The figures on Supreme Court outcomes (reversal, affirmance) come from SCOTUSblog and are based on the Supreme Court's annual term, which begins each October. The figures on circuit court output (cases decided, percent published) are for the calendar year 2009 and come from *Judicial Business of the United States* published by the Administrative Office of the Courts. In addition, the author calculated the grant rate based on total number of published opinions per circuit, a methodology that implicitly assumes (no doubt, incorrectly) that at least one party to every published circuit court decision files a petition for certiorari. And, of course, these statistics do not take into account situations in which the Ninth Circuit's view on an issue that is the subject of a circuit split is either endorsed or repudiated in a Supreme Court case that originates from another circuit.

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