

Supreme Court of the United States
Washington, D. C. 20543

September 9, 1998

CHAMBERS OF
JUSTICE ANTONIN SCALIA

The Honorable Byron R. White
Chairman, Commission on Structural Alternatives
for the Federal Courts of Appeals
Washington, D. C. 20544

Dear Byron:

Chief Judge Hug was kind enough to send me a copy of the letter to you of August 29, written on behalf of past, present and yet-to-be Chief Judges of the Ninth Circuit, which challenges my assertion that a disproportionate number of cases from the Ninth Circuit are regularly taken by this Court for review, and a disproportionate number reversed.

The letter contends—without citing any data—that the percentage of this Court’s discretionary docket devoted to reviewing CA9 judgments (18% over the past six terms combined) “corresponds very closely to the percentage of cases decided in the Ninth Circuit, as compared to the total in the country.” Letter at 4. As far as I can discern, this latter percentage represents a fraction, the numerator of which is all cases decided on the merits in CA9, and the denominator of which is all cases decided on the merits in all Federal Circuits—a figure that averages 17.2% over the five terms ending with OT 1996 (the figures for OT 1997 are not yet available). It is meaningless, however, to compare *that* percentage (CA9’s share of the United States Circuit Court docket) with CA9’s share of this Court’s *entire* docket—which includes, of course, many cases taken from *state* courts. A proper evaluation would compare CA9’s share of Circuit Court business with CA9’s share of this Court’s docket *devoted to Circuit Court cases*. That comparison shows that during the five-year period in which CA9 disposed of an average of 17.2% of all Circuit business, CA9’s cases occupied an average of 25.3% of this Court’s Circuit docket—a share that is larger by almost half.

October Term	CA9’s Share of US Circuit Court Docket [†]	CA9’s Share of SCt Docket Devoted to Reviewing US Circuit Courts [‡]
1997	Not Available	21.5%
1996	18.7%	32.3%
1995	16.2%	20.3%
1994	15.9%	26.2%
1993	17.1%	23.7%
1992	18.1%	24.2%

[†] These numbers are compiled from the annual reports of the Director of the Administrative Office of the United States Courts. The percentages refer to the Ninth Circuit’s share of the total number of appeals decided on the merits during the twelve-month period ending September 30 that corresponds roughly to the indicated Supreme Court Term. The Director’s statistics do not include cases from the Federal and Armed Forces Circuits.

[‡] To facilitate comparisons, these numbers exclude cases from the Federal and Armed Forces Circuits.

The Chief Judges also assert—again, without citing any data—that the Ninth Circuit’s record during OT 1997 of being reversed 82.4% of the time falls within the “historical norm for the Court’s reversals nationwide.” *Id.* During the last six terms, however, this Court’s nationwide reversal rate has never exceeded 71.1%. For every term within that period, CA9’s reversal rate has appreciably—sometimes drastically—exceeded the national average. And the gap is even more pronounced when one compares CA9’s reversal rate, not with the combined reversal rate for all courts, but with the more relevant figure of the combined reversal rate for all courts *other than CA9*: Averaging the figures for the last six terms, CA9’s reversal rate is 81%, and the average for all other courts 57%.

October Term	CA9’s Reversal Rate	Nationwide Reversal Rate Including CA9	Nationwide Reversal Rate Excluding CA9
1997	82.3%	58.9%	53.3%
1996	95.2%	71.1%	62.7%
1995	83.3%	61.0%	56.9%
1994	70.6%	66.3%	65.2%
1993	85.7%	52.9%	42.5%
1992	68.2%	64.2%	63.1%

There must be added to the inordinate frequency of reversal, of course, the likewise inordinate frequency with which reversal has been by a unanimous or near-unanimous Supreme Court, as described in my earlier letter.

There is, in short, no doubt that the Ninth Circuit has a singularly (and, I had thought, notoriously) poor record on appeal. That this is unknown to its Chief Judges may be yet another sign of an unmanageably oversized Circuit.

Sincerely,



cc: Chief Judge Procter Hug, Jr.