

# SUPREME COURT REVERSALS: EXPLORING THE SEVENTH CIRCUIT

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Reversals are a hot topic. No longer is the meaning of reversals relegated to scholarly journals for analysis of judicial behavior. In recent years, due in large measure to criticism of the record of the U.S. Court of Appeals for the Ninth Circuit,<sup>1</sup> interest in reversals has found its way into the daily news media and has become the focus of articles, speeches and blog debates.<sup>2</sup>

This is a dramatic change. It was not that long ago that the highly respected Judge Frank M. Coffin of the First Circuit described the role of a federal appellate judge in much more humble, much less visible terms:

The appellate judge lacks the broad-ranging influence of the legislator and the specific levers of power of the executive. And he possesses almost no visibility. The appellate judge's immediate audience are his colleagues who sat with him when an appeal was argued. A slightly wider audience are the lawyers and parties in the litigation. Later, the audience may include a few more judges, lawyers, and law professors who someday will read his opinion. Reaction, favorable or unfavorable, is rare, confined to a law review comment, a reference in another court's opinion, or possibly an affirmance or reversal by the Supreme Court, months or even years after the work is done. Unlike the trial judge, whose decisions often place him uncomfortably in the headlines, editorials and cartoons, the appellate judge is generally a media cipher.<sup>3</sup>

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1. This criticism is discussed in: Kevin M. Scott, *Supreme Court Reversals of the Ninth Circuit*, 48 ARIZ. L. REV. 341 (2006). See also Stephen J. Wermiel, *Exploring the Myths About the Ninth Circuit*, 48 ARIZ. L. REV. 355 (2006).
2. For one such blog dispute, see *O'Reilly Echoed Right Wing Falsehood that Supreme Court Overturns 9th Circuit at a "Record Rate,"* Media Matters (Dec. 15, 2005), <http://mediamatters.org/items/200512150016> (last visited Apr. 3, 2008).
3. FRANK M. COFFIN, *THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH 7* (1980).

Today, there is truly a new image for federal judges, a federal appellate judiciary that has a loyal almost-groupie-like following<sup>4</sup> and a set of statistical enthusiasts who take a back seat only to the zeal of sports statistical buffs.

The heightened interest in the issue of the significance of reversals is undoubtedly fueled in part by this new and growing interest in the circuits and their judges. The blog, *How Appealing*,<sup>5</sup> devoted to the work of appellate courts, has brought new attention to the circuits among lawyers and non-lawyers, alike. Sometimes there is even a focus on the circuits as social structures at the blog, *Above the Law*,<sup>6</sup> which relates personal news and developments about circuit judges and circuit law clerks.

This essay will briefly explore several issues related to reversals, meaning the reversal of federal circuit court decisions by the U.S. Supreme Court. The focus is to examine the impact that reversals may have on the reputation of a circuit court. In particular, this essay will explore why the Ninth Circuit seems to be more widely criticized than, say, the Seventh Circuit, although neither court has a stellar reputation when measured in terms of Supreme Court reversals.

First, this essay will consider the significance of the Supreme Court's increased use of decisions reversing or vacating and remanding federal appeals court rulings. Second, this essay will consider the record of individual circuit courts, examining the Seventh Circuit in comparison to the Ninth Circuit and to other circuits. Third, this essay will provide brief case studies of the Supreme Court and the Seventh Circuit, which received little or no publicity or public comment. Fourth, this essay will consider and compare the role that a few individual judges play, not so much in contributing to the reversal statistics, but in shaping the image of a circuit through news media coverage, commentary and academic analysis.

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4. Consider the recent comments made by David Lat, blogger at Above the Law, <http://www.abovethelaw.com/>. His previous blog was called Underneath Their Robes for which Lat wrote under the online name, Article III Groupie. Asked by an interviewer about his interest in circuit court judges, Lat replied, "They are the closest thing America has to an aristocracy. They're life-tenured; they make decisions of great importance that affect millions of people, and within the legal community, they are idolized." Adele Nicholas, *Four Questions for David Lat*, Inside Counsel, Aug. 2007, <http://www.insidecounsel.com/section/litigation/1333?pagenum=6> (last visited Apr. 3, 2008).
  5. <http://howappealing.law.com/> (last visited Apr. 3, 2008).
  6. <http://www.abovethelaw.com/> (last visited Apr. 3, 2008).

## I. MORE SUPREME COURT REVERSALS

The critical thing to know about Supreme Court reversals is that there are more of them—at least as a percentage of the Court’s argued cases. The more difficult question is: why is the Supreme Court consistently reversing more often?

For most of the last half of the 20th Century, the Supreme Court’s reversal rate,<sup>7</sup> including state and federal courts, was above 50% and below 70%.<sup>8</sup> A few times in this period, the reversal rate even dipped below 50%.<sup>9</sup> Only a half dozen times did the reversal rate go over 70%, and most of those were during the Warren Court years when the Supreme Court was charting many a new course.<sup>10</sup> To put the statistics in slightly different—and more functional—form, during the lifetime of most currently living students of the Supreme Court, while the Court was more likely to reverse than to affirm, the likely outcome would have been considered a close call statistically.

According to annual statistics compiled by the National Law Journal,<sup>11</sup> from the Supreme Court’s October Term 1984<sup>12</sup> to the October Term 2000, the reversal rate went over 70% only once in 17 years.<sup>13</sup>

It is curious, then, that for the past six terms, the Supreme Court’s reversal rate has been at a consistent high of 70% or above. According to the National Law Journal statistics, the reversal rates were: October Term

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7. Reversal rates are calculated in different ways, and comparison of different measures is often difficult. Some studies include only federal circuit courts and exclude state and federal district courts. Other studies count only pure reversals and not decisions vacating and remanding cases or decisions affirming in part and reversing in part. Still other studies include per curiam summary dispositions on the merits while others examine only fully briefed and argued cases. In this essay, every effort will be made to explain the source of statistics used.

8. LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER, *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 244–45 (4th ed. 2007).

9. *Id.*

10. *Id.*

11. For an example of the original, annual charts in the *National Law Journal*, see David Lauter, *In Moderate Pursuit of Conservative Goals*, NAT’L L.J., Sept. 2, 1985, at S–3, S–4.

12. Supreme Court Terms run by law from the first Monday in October to late June the following year. They are commonly referred to by the year in which the first Monday in October fell. The term that began in October, 1984, and ran to June, 1985, would be the October Term 1984.

13. The *National Law Journal* figure for October Term 1996 is a 71% reversal rate. The Supreme Court Compendium shows a lower 65.9% figure for October 1996. EPSTEIN ET AL., *supra* note 8. The difference may be explained in that the *National Law Journal* says its statistics include per curiam decisions in which the Supreme Court may rule summarily on the basis of a petition but without full briefing and oral argument. See, e.g. Marcia Coyle, *In The First Full Term . . .*, NAT’L L.J., Aug. 1, 2007, at 6. The Supreme Court Compendium includes only fully briefed and argued cases.

2001–75%; October 2002–74%; October Term 2003–76%; October Term 2004–71%; October Term 2005–70%; and October Term 2006–74%.

Thus any discussion of reversals and trends in the performance of particular circuits must take into account that the Supreme Court is reversing lower courts more consistently than at any time in more than 40 years.<sup>14</sup>

Is there any way to explain this development of more consistent reversals? The short answer is that there is no simple, unitary explanation. The justices have been silent on the subject, giving no acknowledgment that they even recognize the existence of a trend or of a change in practice. Indeed, the only public reference to reversals and the circuits by a justice in recent memory was the comment in July 2007, by Justice John Paul Stevens at a Ninth Circuit Judicial Conference, that the spotlight on the Ninth Circuit's reversal rate is "misleading."<sup>15</sup>

One possible explanation which might seem obvious is somewhat problematic. It seems logical to conclude that, since the Court is dominated by a conservative majority, at least four members of that majority<sup>16</sup> are regularly voting to grant review in cases in which they think the lower court was wrong. The flaw in this explanation is that those four votes would typically have come from among five conservatives, two of whom recently retired or died—Justice Sandra Day O'Connor who retired on January 31, 2006, and Chief Justice William H. Rehnquist, who died on September 3, 2005—and were replaced by Chief Justice John G. Roberts Jr., and Justice Samuel A. Alito Jr.<sup>17</sup>

This explanation assumes that the replacement of Rehnquist and O'Connor with Roberts and Alito made no real difference and that the voting to hear cases in order to reverse continued apace. While it is certainly possible that the trend simply continued unabated, the fact that both new justices arrived from federal appeals courts—Roberts from the D.C. Circuit and Alito from the Third Circuit<sup>18</sup>—might suggest that they would be less enthusiastic about rushing to overrule the circuit courts. On the other hand, both Roberts and Alito were exposed to circuit court decision making that they

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14. One indication of the degree of change is found in the work of veteran court commentator Prof. Henry J. Abraham. As recently as 1986, Prof. Abraham observed about the Supreme Court in a leading work on the judiciary, "More often than not the tendency is to affirm the intermediate appellate tribunal, but by no means inevitably." HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 173 (5th ed. 1986).

15. Pamela A. MacLean, *9th Circuit Reversal Rate Is Misleading*, NAT'L L.J., July 30, 2007, at 14 (recounting Stevens speech in Honolulu to Ninth Circuit Judicial Conference).

16. Petitions for writs of *certiorari* are granted on the vote of four justices.

17. <http://www.supremecourtus.gov/about/members.pdf> (last visited Apr. 3, 2008).

18. <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Apr. 3, 2008).

believed was out of line with precedent and to judges whose judicial approach differed sharply from their own. So both men may have arrived quite willing to continue the pattern of voting to review circuit rulings that they deemed to be deserving of reversal.

Another factor may also seem obvious but is worth noting. The new highs in reversal rates in the last few years correspond in time to new lows in the number of cases being decided by the Supreme Court. While the phenomenon of the shrinking number of argued and decided cases<sup>19</sup> is also unexplained by the justices,<sup>20</sup> there may be a simple relationship between the two patterns. As the Court hears fewer cases, the justices are looking more actively for cases that require correction and are more willing to pass up interesting cases that may lead to affirmance of the lower courts. It is not difficult to see how justices might find an imperative in the need to reverse some decisions and a less compelling need to put the Supreme Court's imprimatur on cases with which they agree.

## II. LOOKING AT THE CIRCUITS

### A. The Numbers

Discussion of reversals of circuit court opinions has long been dominated by a negative focus on the Ninth Circuit.<sup>21</sup> Conservatives have taken to mocking the Ninth Circuit's record of reversals in the Supreme Court, suggesting that the statistics establish proof that the Ninth Circuit is populated with liberal renegade judges who are out-of-step with the mainstream of American law.<sup>22</sup>

Examining the reversal statistics, however, suggests that other circuits ought not to sit smugly by while commentators skewer the Ninth Circuit. Take the record of the Seventh Circuit. In October Terms 1986, 1987, 1989, 1996, 1998 and 2005, the Seventh Circuit's reversal rate was higher than the

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19. Linda Greenhouse, *Dwindling Docket Mystifies Supreme Court*, N.Y. TIMES, Dec. 7, 2006, available at <http://www.nytimes.com/2006/12/07/washington/07scotus.html> (last visited Apr. 3, 2008).

20. For a full discussion of the decline in Supreme Court decisions, see Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403.

21. For a recent example of criticism aimed at the Ninth Circuit, see Brian T. Fitzpatrick, *Disorder in the Court: The 9th Circuit is overturned more than any other appeals court. Its size may be a factor*, L.A. TIMES, July 11, 2007, available at <http://www.latimes.com/news/opinion/la-oe-fitzpatrick11jul11,0,6274474.story> (last visited Apr. 3, 2008).

22. *Id.* ("In other words, it is no coincidence that, when you hear about a bizarre ruling issued by a federal court of appeals, it very likely came from the 9th Circuit."). The author of this column was a law clerk to Justice Antonin Scalia.

Ninth Circuit's.<sup>23</sup> And in October Terms 1987, 1988, 1989, 1990, 1996, 1998, 1999, and 2005, the Seventh Circuit's reversal rate was higher than the average for the Supreme Court that term.

It is true, of course, that the number of cases the Supreme Court hears from the Ninth Circuit makes the impact of the reversal statistics seem more dramatic. In the past 22 years, the Court heard some 260 cases more from the Ninth Circuit than from the next most reviewed, the Fifth Circuit.<sup>24</sup> It is also true that in that 22-year-period, the number of reversals for the Ninth Circuit is greater than the total for any other three circuits combined. However, the Ninth Circuit is bigger than all other circuits and decides more cases. This does not entirely explain the Supreme Court's fascination with hearing cases from the Ninth Circuit, but size is certainly part of the answer.

Analysis of reversal statistics need not be limited to the Seventh and Ninth Circuits. The Sixth Circuit has an overall reversal rate since October Term 1984 of nearly 64.96%, not that far behind the Ninth Circuit's leading 72.95%. The Tenth Circuit is not far behind the Sixth at 63.63%, followed by the Eighth at 62.29% and the D.C. Circuit at 61.22%.

If high reversal rates are a reason for a circuit to hang its collective head, then only one circuit may stand tall statistically. The Third Circuit is the only federal appeals court with a reversal rate over the last 22 years that is under 50%—47.5% to be precise. But even the Third Circuit has had several recent terms in which 100% of its reviewed rulings were reversed by the Supreme Court.

When the Supreme Court is operating in reversal gear, none of the circuits may escape scrutiny, and all of the circuits are theoretically vulnerable to criticism that the reversal statistics raise questions about their judicial performance.

## B. The Misleading Impact of Reversal Statistics

As a general proposition, far too much significance is attached to reversal rates as a measure of the caliber of a circuit's performance or abilities. I have argued elsewhere that the reasons for reversals are far from monolithic and do not always reflect error or criticism of the circuit court.<sup>25</sup>

Consider several categories of decisions. First, when a circuit decides a case of first impression, the Supreme Court may ultimately take a different view. But that dispute is a toss-up in which the Supreme Court is only right

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23. See Appendix I.

24. See Appendix II.

25. Wermiel, *supra* note 1.

because it has the last word. Second, when the Supreme Court reverses by a 5–4 vote, it is difficult to argue that the circuit ruling was out-of-line or way off-base; after all, four justices agreed with the circuit. Although making the observation in a somewhat different context, Judge Richard A. Posner of the Seventh Circuit observed this point when he said, “In any split decision by the Supreme Court, to say that one side is ‘right’ and the other ‘wrong’ is usually a naive reaction.”<sup>26</sup> Third, the Supreme Court may reverse a three-judge panel’s opinion where the panel was made up of liberal and conservative judges who agreed with each other on the outcome or where the circuit opinion was actually written by the appointee of a Republican White House; it is difficult to fit this type of reversal into a mold of Supreme Court justices holding in check renegade circuit judges. Fourth, when the Supreme Court reverses one circuit, but that circuit’s view of the law was shared by several other circuits, it is unfair to criticize the reversal rate of the court that was targeted by the justices. This explains at least some cases in which the Supreme Court selects a disproportionate number of decisions from the Ninth Circuit to use as vehicles for resolving circuit conflicts.<sup>27</sup>

In all of these examples, criticism of a circuit for its reversal rate by the Supreme Court is misplaced. None of these examples can fairly be seen to reflect negatively on a circuit or on its judges. Many cases that fall into these categories have been included in the statistics that form the basis of criticism of the Ninth Circuit.

### III. TWO CASE STUDIES: OCTOBER TERMS 2005 AND 2006

#### A. October Term 2005

In the October Term 2005, the Ninth Circuit’s rate of reversal by the Supreme Court—83% or 12 of 14 cases—drew the usual media scoffing, commentary and notoriety.<sup>28</sup>

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26. Howard A. Bashman, *20 Questions for Circuit Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit*, *How Appealing* (Dec. 1, 2003), [http://howappealing.law.com/20q/2003\\_12\\_01\\_20q-appellateblog\\_archive.html#107025481874565902](http://howappealing.law.com/20q/2003_12_01_20q-appellateblog_archive.html#107025481874565902) (last visited Apr. 7, 2008).

27. A circuit conflict occurs when two different federal appeals courts decide the same issue of federal law but reach different results. Rule 10 of the Supreme Court identifies circuit conflicts as a primary reason for Supreme Court review of a case. SUP. CT. R. 10, *available at* <http://www.supremecourtus.gov/ctrules/2007rulesofthecourt.pdf> (last visited on Apr. 3, 2008).

28. The *Fulton County Daily Report*, in an account of the Ninth Circuit Judicial Conference, reported, “And at the Ninth Circuit conference Monday, a presentation by Vikram Amar, a professor at Hastings College of the Law, said recent U.S. Supreme Court decisions should provide plenty of grist for future criticism. ‘I don’t think there’s any way around the fact that the Supreme Court keeps a close eye on what the Ninth Circuit does, and is more critical of its work product,’ he said. ‘They’re

There was no commentary about the Seventh Circuit's record after the October Term 2005. After all, the Supreme Court only reviewed two Seventh Circuit cases after oral argument and one in a *per curiam* summary decision. Unnoticed because of the lack of public comment that the Seventh Circuit enjoyed was the fact that the Seventh Circuit received not a single vote from the justices of the Supreme Court that Term. In a sense the record was not 0–3, but 0–26.<sup>29</sup> Moreover, in one of the cases, the October 2005 term marked the third time the Supreme Court reversed the Seventh Circuit in the same case.<sup>30</sup> Yet there is no commentary suggesting the Seventh Circuit is recalcitrant or populated by liberal renegades who must be reined in by the Supreme Court. In fact, there is no commentary at all noting the Seventh's Circuit record in October Term 2005.

So let us briefly examine that record. The first case considered by the Supreme Court from the Seventh Circuit was decided without argument and briefing, a summary reversal in an unanimous *per curiam* opinion. The case, *Eberhart v. United States*,<sup>31</sup> rejected a government claim that a motion for a new trial should have been time-barred. The Seventh Circuit had accepted the government time bar in an opinion by Judge Joel M. Flaum, joined in full by Judges William J. Bauer and Richard A. Posner.<sup>32</sup>

This example, while a clear and unanimous reversal, serves to illustrate the earlier point, as well, that statistics miss the nuances and differences that may explain reversals. The Supreme Court seemingly went out of its way to observe in this decision:

We finally add a word about the approach taken by the Court of Appeals. Although we find its disposition to have been in error, we fully appreciate that it is an error shared among the circuits, and that it was caused in large part by imprecision in our prior cases. . . . This was a prudent course. It neither forced

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less patient with the Ninth Circuit.” Justin Scheck, *Circuit Breakers Attack Case Overload*, FULTON COUNTY DAILY REPORT, July 19, 2006, at 9.

Also, describing one Ninth Circuit ruling, a newspaper editorial remarked, “We know this came as a shock to some of its Republican critics, but the U.S. 9th Circuit of Appeals has injected some common sense into the debate” over an Arizona issue. *Surprise! 9th Circuit source of common sense: English-learner fine rollback acknowledges years of changes*, MESA TRIBUNE, Aug. 28, 2006, available at 2006 WLNR 14895609.

29. Justice Alito did not participate in one case, so there were a total of 26 votes cast in the three cases.

30. *Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9 (2006), reversing *Scheidler v. Nat'l Org. for Women, Inc.*, 91 F. App'x 510 (7th Cir. 2004). The Supreme Court had previously considered the case and reversed the Seventh Circuit as *Nat'l Org. for Women v. Scheidler*, 510 U.S. 249 (1994), reversing and remanding 968 F.2d 612 (7th Cir. 1992), and *Scheidler v. Nat'l Org. for Women*, 537 U.S. 393 (2003), reversing and remanding 267 F.3d 687 (7th Cir. 2001).

31. 546 U.S. 12 (2005).

32. *United States v. Eberhart*, 388 F.3d 1043 (7th Cir. 2004).



the issue by upsetting what the Court of Appeals took to be our settled precedents, nor buried the issue by proceeding in a summary fashion. By adhering to its understanding of precedent, yet plainly expressing its doubts, it facilitated our review.<sup>33</sup>

Similar disclaimers could undoubtedly be made by the Supreme Court in some Ninth Circuit cases, but the Supreme Court does not seem favorably disposed to offering kind words to the judges of the Ninth Circuit.

The second case that the Supreme Court considered from the Seventh Circuit was *Scheidler v. National Organization for Women*.<sup>34</sup> In this case, the Supreme Court ruled 8–0 that the federal Hobbs Act<sup>35</sup> could not be used against anti-abortion protesters in the absence of evidence of robbery or extortion. The unanimous decision was written by Justice Stephen Breyer; Justice Alito did not take part because he had not yet joined the Court yet when the case was argued in November, 2005. In this decision, the Supreme Court reversed the unanimous order of a three-judge panel made up of Judges Ilana D. Rovner, Diane P. Wood and Terence T. Evans.<sup>36</sup>

There are two interesting points about this reversal. First, Justice Breyer notes, politely but pointedly, “Decisions of this Court have assumed that Congress did not intend the Hobbs Act to have so broad a reach.”<sup>37</sup> He cites for this proposition the preceding reversal of the Seventh Circuit in the same case as well as a concurring opinion in that case by Justice Ruth Bader Ginsburg,<sup>38</sup> as if to say that the Supreme Court has already addressed this matter but the Seventh Circuit is not listening. It is also of note that Justice Breyer commented that other courts of appeals that had considered the scope of the Hobbs Act had reached the correct result. One case that he cited was decided—correctly in the Supreme Court’s view—by the Ninth Circuit.<sup>39</sup>

The third case considered by the Supreme Court from the Seventh Circuit in October Term 2005 was *Kircher v. Putnam Funds Trust*.<sup>40</sup> The Supreme Court ruled unanimously, in an opinion by Justice David H. Souter, that a district court order remanding a securities case to state court is not an

33. *Id.* at 19–20.

34. 547 U.S. 9 (2006). The history of decisions is discussed in *supra* note 30.

35. 18 U.S.C. § 1951.

36. *Scheidler v. Nat’l Org. for Women, Inc.*, 91 F. App’x 510 (7th Cir. 2004).

37. *Scheidler*, 547 U.S. at 20.

38. *Id.* “See *NOW II*, 537 U.S., at 405, 123 S.Ct. 1057 (noting that the Hobbs Act embodied extortion, which required the obtaining of property, not coercion); *id.*, at 411, 123 S.Ct. 1057 (GINSBURG, J., concurring) (coercion, which is not covered by the Hobbs Act, “more accurately describes the nature of petitioners’ [non-property-related] actions” (internal quotation marks omitted)).”

39. *Id.* at 21 (citing *United States v. Yankowski*, 184 F.3d 1071 (9th Cir. 1999)).

40. 547 U.S. 633 (2006).

appealable order under the Securities Litigation Uniform Standards Act of 1998.<sup>41</sup> The Supreme Court reversed an unanimous three-judge panel opinion written by Frank H. Easterbrook, who is now chief judge of the Seventh Circuit, and joined by Kenneth F. Ripple and Diane P. Wood.<sup>42</sup> This final example was also a case that involved a split in the circuits. It seems that the Ninth Circuit had this one right, too, since its decision is cited on the opposite side of the Seventh Circuit's in a footnote in Justice Souter's opinion.<sup>43</sup>

The point of examining these three cases and the record of the Seventh Circuit in the October Term 2005 is not to suggest that the Seventh Circuit should be subjected to scorn or ridicule for securing not a single Supreme Court justice's vote in three cases. Rather, the point is to question whether the Ninth Circuit is singled out for unfair treatment and scrutiny in public debate and commentary, when there is much to examine and discuss about the performance of other circuits, including the Seventh.

#### B. October Term 2006

In the Supreme Court Term from October 2006 through June 2007, the Supreme Court reviewed three more decisions from the Seventh Circuit, reversing or vacating two and affirming one. When the Supreme Court reversed the Seventh Circuit in the case of *Hein v. Freedom from Religion Foundation*,<sup>44</sup> many news media stories did not mention that it was Judge Richard Posner's decision that was overturned.<sup>45</sup> In *Freedom from Religion Foundation v. Chao*,<sup>46</sup> Judge Posner ruled, 2–1, that taxpayers had standing in federal court to challenge the use of federal funds to pay for regional conferences to promote faith-based organizations as eligible for federal social services contracts.

The Supreme Court, in an opinion by Justice Alito, ruled 5–4 that the Seventh Circuit had improperly extended a narrow exception to the general rule that taxpayers do not have standing to challenge the expenditure of federal funds. The narrow exception was recognized earlier by the Supreme

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41. 28 U.S.C. § 1447(d).

42. *Kircher v. Putnam Funds Trust*, 403 F.3d 478 (7th Cir. 2005).

43. *See Kircher*, 547 U.S. at 639 n.6 (citing *Abada v. Charles Schwab & Co.*, 300 F.3d 1112 (9th Cir. 2002)).

44. 127 S.Ct. 2553 (2007).

45. *See, e.g.*, Linda Greenhouse, *Justices Reject Suit on Federal Money for Faith-Based Office*, N.Y. TIMES, June 26, 2007, available at 2007 WLNR 12009797. *See also*, Jon Ward, *High Court rejects Suit to Restrict Faith Groups*, WASH. TIMES, June 26, 2007, available at 2007 WLNR 13542997.

46. 433 F.3d 989 (7th Cir. 2006).

Court in *Flast v. Cohen*,<sup>47</sup> allowing taxpayers to bring Establishment Clause challenges to Congressional authorizations for spending involving religion. Judge Posner extended the exception to a program in which the federal funds were being spent at the President's discretion and not by direct Congressional authorization. Proposing his own new standard, he suggested that taxpayers should have standing any time "the marginal or incremental cost to the taxpaying public of the alleged violation of the establishment clause [is more than] zero."<sup>48</sup> "The Court of Appeals did not apply *Flast*<sup>49</sup>; it extended *Flast*," Justice Alito wrote.<sup>50</sup> "At a minimum," Justice Alito wrote, "the Court of Appeals' approach . . . would surely create difficult and uncomfortable line-drawing problems."<sup>51</sup> While the dissenters would have found standing in this case, they did not embrace or even discuss Judge Posner's test,<sup>52</sup> meaning he received no support at all from the Court for his view.

In a second case, *Tellabs, Inc. v. Makor Issues & Rights Ltd.*,<sup>53</sup> the Supreme Court vacated the ruling of the Seventh Circuit and remanded the case for additional proceedings. The ruling was intended to resolve a split among the federal appeals courts over a provision of the Private Securities Litigation Reform Act of 1995 (PSLRA).<sup>54</sup> The law requires a securities plaintiff to present facts leading to the "strong inference" that the defendant acted with scienter, which means an intent to deceive or defraud.<sup>55</sup> In defining the term "strong inference," Judge Diane Wood of the Seventh Circuit said it could be met by facts that would convince the "reasonable person" that the defendant had intent.<sup>56</sup> Writing for the Supreme Court in an 8–1 ruling, Justice Ruth Bader Ginsburg said the appeals court standard was too deferential to plaintiffs and "does not capture the stricter demand Congress sought to convey . . . ."<sup>57</sup> Of interest here, the Seventh Circuit's decision was in conflict with, among others, a ruling in which the Ninth Circuit had earlier reached the same result at which the Supreme Court arrived.<sup>58</sup>

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47. 392 U.S. 83 (1968).

48. *Chao*, 433 F.3d at 995.

49. *Flast*, 392 U.S. at 83.

50. *Hein v. Freedom from Religion Found.*, 127 S.Ct. 2553, 2571 (2007).

51. *Id.* at 2570.

52. The dissent by Justice Souter, joined by Justices Stevens, Ginsburg and Breyer, appears at 127 S.Ct. 2584–2589.

53. 127 S.Ct. 2499 (2007).

54. 109 Stat. 737.

55. 15 U.S.C. § 78u–4(b)(2).

56. *Makor Issues & Rights Ltd. v. Tellabs, Inc.*, 437 F.3d 588, 602 (7th Cir. 2006).

57. *Tellabs*, 127 S.Ct. at 2504.

58. *See Gompfer v. VISX, Inc.*, 298 F.3d 893 (9th Cir. 2002).

In the third and final case, *Wallace v. Kato*,<sup>59</sup> the Supreme Court by a 7–2 vote settled a question about the statute of limitations in a civil rights damages suit<sup>60</sup> against police for an arrest that was contrary to the Fourth Amendment. The ruling affirmed the decision by Judge Wood for the Seventh Circuit.<sup>61</sup> Of particular interest, Judge Posner wrote a dissent from denial of rehearing en banc,<sup>62</sup> warning that Judge Wood’s opinion was “flouting conventional statute of limitations principles, forging a lonely path, and creating more work for the Supreme Court, which now faces an intercircuit conflict on a recurrent issue . . . .”<sup>63</sup> Yet Justice Scalia dispatched the issue fairly easily in a 10-page opinion, making no mention of a conflict among the federal circuits.

The interesting bi-play in these cases between the Seventh Circuit and the Supreme Court, like earlier cases discussed here, has received little attention or public comment. Had these cases involved the Ninth Circuit, however, there might have been substantial discussion and even criticism of the appellate record.

#### IV. THE CULT OF THE JUDGES AND CIRCUIT REPUTATION

A final question to consider is what role the reputation of individual judges plays in the status and treatment of different circuits. To examine this question, consider the most visible judges from the two Circuits.

Much of the criticism of the Ninth Circuit has focused on Judge Stephen Reinhardt. This goes back more than a decade, when the conservative magazine, *The Weekly Standard*, published an article entitled, “The Judge the Supreme Court Loves to Overturn.”<sup>64</sup> More recently, *Inside Counsel Magazine*, a publication that serves corporate counsel, published an article entitled *Holding Court*, which examined circuit judges who are having an impact on the law. About Judge Reinhardt, the article said, “Few attorneys

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59. 127 S.Ct. 1091 (2007).

60. The lawsuit was filed under 42 U.S.C. § 1983.

61. *Wallace v. City of Chicago*, 440 F.3d 421 (7th Cir. 2006).

62. *Id.* at 430.

63. *Id.* at 434.

64. Matt Rees, *The Judge the Supreme Court Loves to Overturn*, THE WEEKLY STANDARD, May 5, 1997, available at <http://www.theweeklystandard.com/Content/Public/Articles/000/000/001/414ilyss.asp> (last visited Apr. 3, 2008). Apparently the magazine reposted the article on its web site in recent years with a new intro line that says, “From the May 5, 1997 issue: Judge Stephen Reinhardt was notorious long before his 9th Circuit’s Pledge of Allegiance decision.” The latter reference is to *Newdow v. U.S. Congress*, 328 F.3d 466 (2003), *rev’d on other grounds sub nom.* *Elk Grove Ind. Sch. Dist. v. Newdow*, 540 U.S. 945 (2003) (Judge Reinhardt was a member of the panel that ruled against the Pledge of Allegiance but in which he did not write the panel opinion.).

have a neutral opinion about Judge Stephen Reinhardt. Loved by the left and loathed by the right, Judge Reinhardt has a well-earned reputation for being the nation's most liberal judge."<sup>65</sup>

Consider, then, how the most prominent members of the Seventh Circuit are portrayed. The *InsideCounsel* article says of Judge Richard A. Posner, that he is "an intellectual behemoth—not only is he a leading legal scholar, but also a well-known economic thinker . . . Judge Posner's intellectual cachet translates to national influence."<sup>66</sup> That is one of dozens, perhaps hundreds, of articles singing the praises of Judge Posner.

His colleague on the Seventh Circuit, now Chief Judge Frank H. Easterbrook, is treated almost as well. A profile when he became chief judge said he was "recognized by scholars as a leading intellect in the judiciary . . ."<sup>67</sup> The prolific nature of both men has been studied and commented upon in law reviews and elsewhere. Posner ranked first and Easterbrook second in a study of the number of opinions published by appeals court judges from 1998 to 2000.<sup>68</sup> In addition, Judge Posner has written numerous books while maintaining his reputation as the most prolific producer of court opinions. The respect for their decisions and other writings extends all the way to the Supreme Court, where both Judges Posner and Easterbrook are mentioned in Supreme Court decisions more often than Judge Reinhardt.<sup>69</sup>

Small wonder, then, that with the intellectual, almost cult-like following for Judges Posner and Easterbrook, that the Seventh Circuit faces relatively little public scrutiny and attention to its record in the Supreme Court. And this is so, even when the Seventh Circuit has what might be considered a very poor showing in the October Term 2005.

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65. Adele Nicholas,  *Holding Court*, INSIDECOUNSEL MAGAZINE, Aug. 1, 2007, available at <http://www.insidecounsel.com/section/litigation/1333> (last visited on Apr. 3, 2008).

66. *Id.*

67. Maria Kantzavelos, *Judge Easterbrook Takes Command of 7th Circuit*, CHICAGO LAWYER, January, 2007, at 12.

68. Stephen J. Choi & Mitu Gulati, *Mr. Justice Posner? Unpacking the Statistics*, 61 N.Y.U. ANN. SURV. AM. L. 19, Table 1 (2005).

69. Judge Reinhardt's name appears 20 times in U.S. Supreme Court decisions, according to a Westlaw search; almost all are simply references noting that he wrote the Ninth Circuit opinion on which the Supreme Court had granted certiorari.

Judge Easterbrook's name appears 57 times in Supreme Court opinions, although he has been on the bench for five fewer years than Judge Reinhardt. Among the 57, 15 are references to articles or books Judge Easterbrook has written, most on antitrust or securities law; 33 are substantive references to or discussions of Easterbrook opinions; and only 9 are references to his opinions on which certiorari was granted.

Judge Posner's name appears 99 times in a court tenure that is one year shorter than Reinhardt's. Judge Posner has been cited 42 times for his books and articles, 52 times in discussion of his decisions or work on judicial committees, and 6 times to note the granting of certiorari.

One interesting measure of regard for the Seventh Circuit is found in an unusual quarter. In law student notes and comments, the Seventh Circuit attracts a substantial amount of attention, and much of it is not favorable. For example, a comment in the *St. John's Law Review* took the Seventh Circuit to task for limiting the freedom of speech and press of college journalists, a decision written by Judge Easterbrook<sup>70</sup>. Another critical example is a *Yale Law Journal* comment on a ruling by Judge Posner rejecting a reporter's privilege.<sup>71</sup> A number of critical case comments have appeared in the *Harvard Law Review* and elsewhere.<sup>72</sup> One recent example faulted an opinion by Judge Posner ruling that police use of a Global Positioning Device (GPS) to monitor

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70. Joe Murphy, *Bait and Switch in Hosty v. Carter: The Seventh Circuit's Recipe for Limiting Free Speech Rights of College Journalists by Extending the "Hazelwood Doctrine" and Misusing Qualified Immunity*, 81 ST. JOHN'S L. REV. 429 (2007) (discussing *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005), *cert. denied*, 546 U.S. 1169 (2006)).
71. Jaynie Randall, *Freeing Newsgathering from the Reporter's Privilege*, 114 YALE L. J. 1827 (2005) (discussing *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003)).
72. *See Civil Procedure Class Action Certifications—Seventh Circuit Holds that Denial of Class Certification Can Have Preclusive Effect in State and Federal Courts—In Re Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, 333 F.3d 763 (7th Cir. 2003), 117 HARV. L. REV. 2031, 2035 (2004) (criticizing Easterbrook for bucking stare decisis and adopting a rule that “would unfairly and unwisely stake the viability of a class action on the outcome of a ruling that by its nature is tentative and subject to discretion”); *Criminal Law—Exclusionary Rule—Inevitable Discovery Doctrine Seventh Circuit Holds that the Inevitable Discovery Doctrine Does Not Apply to Evidence Seized in Impermissible Search of a Third Party—United States v. Johnson*, 380 F.3d 1013 (7th Cir. 2004), 118 HARV. L. REV. 794 (2004) (criticizing Posner for unnecessarily broadening the scope of the exclusionary rule to include instances where its application would have no significant deterrent effect); *Diversity Jurisdiction—Definition of Corporation Under 28 U.S.C. § 1332(c)—Seventh Circuit Holds that the Term “Corporation” Is Entirely State-Defined—Hoagland v. Sandberg, Phoenix & Von Gontard, P.C.*, 385 F.3d 737 (7th Cir. 2004), 118 HARV. L. REV. 1347 (2005) (suggesting Posner misinterpreted precedent, thus creating a rule that violates legislative intent and muddies the state and federal roles in determining diversity jurisdiction); *Criminal Law—Postsentence Administration—Seventh Circuit Upholds Federal Bureau of Prisons Interpretation of Federal Good Conduct Time Statute—White v. Scibana*, 390 F.3d 997 (7th Cir. 2004), 118 HARV. L. REV. 2037 (2005) (stating that the Seventh Circuit's wrongful characterization of the statute at issue led to a needlessly complex holding for a relatively simple statutory interpretation); *Constitutional Law—First Amendment—Seventh Circuit Holds that Public University Cannot Refuse to Recognize Student Group Based on Group's Violation of School Nondiscrimination Policy—Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), 120 HARV. L. REV. 1112 (2007) (criticizing the Seventh Circuit for failing to uphold derecognition of a campus group even though the sanction did not infringe on First Amendment rights, thus cutting off an avenue for the advancement of nondiscrimination in public schools); *Tort Law—Liability Insurers and Defense Costs—Seventh Circuit Affirms Dismissal of Insurer's Legal Malpractice Suit—TIG Insurance v. Griffin Winning Cohen & Bodewes, P.C.*, 444 F.3d 587 (7th Cir. 2006), 120 HARV. L. REV. 1715 (2007) (criticizing the Seventh Circuit for basing its decision on a relatively minor point and failing to address the crux of the problem presented by the case). *See also* Brendan J. Hammer, *Tainted Love: What the Seventh Circuit Got Wrong in Muth v. Frank*, 56 DEPAUL L. REV. 1065 (2007) (criticizing the Seventh Circuit for its narrow reading of *Lawrence v. Texas*, 539 U.S. 558 (2003) and restricting its protections for sexual relations between consenting adults).

the movement of a suspect's vehicle was not a search for Fourth Amendment purposes.<sup>73</sup>

## V. CONCLUSION

The subject of Supreme Court reversals of circuit court opinions is a complex and nuanced one that should not turn on statistical analysis which provides fuel for liberal-conservative ideological debate. It is simply too easy to reduce the qualitative aspect of judicial decisionmaking to slogans and jargon that misses the complexity of the enormous task this country asks of its judicial system.

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73. *Recent Case: Seventh Circuit Holds That GPS Tracking is Not A Search*, 120 HARV. L. REV. 2230 (2007) (discussing *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007), *cert. denied sub. nom. Garcia v. United States*, 128 S.Ct. 291 (2007)).

## APPENDIX I

Supreme Court Term	Overall Reversal Rate	7th Circuit Reversal Rate	9th Circuit Reversal Rate	Worst Reversal Rate
1984	65%	60% (10)	74% (27)	100% = 5th, D.C.
1985	59	40 (5)	62 (16)	83 = 5th, 8th
1986	63	60 (5)	42 (19)	100 = 10th
1987	53	80 (5)	47 (17)	80 = 7th
1988	47	50 (10)	58 (19)	100 = 10th
1989	59	60 (5)	47 (15)	100 = 6th
1990	61	75 (8)	77 (13)	1st, 10th = 100 = 1st, 10th
1991	66	60 (5)	69 (13)	100 = 6th, D.C.
1992	60	50 (6)	63 (24)	86 = 4th
1993	50	38 (8)	73 (15)	73 = 9th
1994	65	28 (7)	82 (17)	100 = 8th
1995	58	57 (7)	83 (12)	100 = 5th
1996	71	100 (3)	95 (21)	100 = 1st, 2nd, 7th
1997	60	57 (7)	82 (17)	100 = 6th, 11th
1998	69	80 (5)	75 (16)	88 = 11th
1999	58	75 (8)	90 (10)	100 = 2nd
2000	67	50 (4)	75 (16)	100 = 1st, 11th, D.C.
2001	75	0 (2)	76 (17)	100 = 2nd, 3rd, 5th, 11th
2002	74	50 (2)	75 (24)	100 = 2nd, 4th, 5th, 10th
2003	76	50 (4)	77 (22)	100 = 2nd, 5th, 10th, 11th, D.C.
2004	71	50 (2)	83 (18)	100 = 1st, 2nd, 10th
2005	70	100 (3)	86 (14)	100 = 1st, 3rd, 7th, D.C.
2006	74	67 (3)	90 (21)	100 = 3rd, 90 = 9th, 80 = 5th

Note: This chart is adapted from the annual statistics reported by the *National Law Journal*. The statistics include *per curiam* summary decisions. Column Two reflects the overall reversal rate by the Supreme Court, term by term. Column Three reflects the reversal rate of the Seventh Circuit by the Supreme Court, with the number in parentheses providing the total number of cases from the Seventh Circuit. Column Four provides comparison data for the Ninth Circuit, also with the total number of cases from that circuit in parentheses. Column Five shows the worst circuit reversal rates for each term.



## APPENDIX II

## Reversal Rates Terms '84-'06

1st (25 of 45)	55.5% reversed
2nd (77 of 127)	60.62
3rd (57 of 120)	47.5
4th (81 of 136)	59.55
5th (98 of 161)	60.86
6th (102 of 157)	64.96
7th (71 of 123)	57.72
8th (76 of 122)	62.29
9th (294 of 403)	72.95
10th (56 of 88)	63.63
11th (79 of 136)	58.08
D.C. (60 of 98)	61.22
Total (1076 of 1716)	62.7%

Note: The statistics in this chart are adapted from the annual statistics published by the *National Law Journal*.