1-1-1985

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Recommended Citation
69 Judicature 361

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Table 1 Record of Solicitor General, 1963-1982

Petitions for *certiorari* by Solicitor General

	Filed	Granted	Per cent granted	Per cent of all petitions for *certiorari* granted	Per cent of cases decided in favor of government's position*
1963	29	16	55	9	69
1964	36	29	81	7	75
1965	30	21	70	7	61
1966	30	25	83	7	75
1967	38	24	63	10	63
1968	27	22	81	7	64
1969	37	19	51	5	58
1970	45	31	69	6	67
1971	39	27	69	9	70
1972	52	36	69	6	71
1973	61	39	64	6	75
1974	66	47	71	5	70
1975	50	38	76	7	77
1976	48	37	77	6	60
1977	57	33	58	5	63
1978	52	37	71	6	67
1979	55	43	78	6	66
1980	50	31	62	6	72
1981	57	45	79	5	82
1982	66	39	59	4	67
Total	925	639	69.1	6.45	68.6

*The tabulation of "cases decided in favor of government's position" includes all cases in which the Solicitor General participated whether on *certiorari* or appeal, and whether as counsel for the government or as *amicus* on behalf of another party.

Source: U.S. Department of Justice, *Annual Report* 1973, 1978, 1983.

In January 1985, Harold J. Spaeth presented the results of a survey of the first 14 terms of the Burger Court (1969-1982), concluding that the Court does not differ in the treatment of federal circuit court decisions depending on which circuit they emanate from.[1] His analysis included two significant findings:

- With the exception of the D.C. Circuit, federal circuit court decisions are treated as an undifferentiated mass from which the Justices select cases for review.[2]
- Circuits dominated by appointees of President Carter fare no better or worse than those not so dominated.[3]

I believe both of these conclusions are premature. The record of the most recent two terms of the Burger Court convincingly demonstrates the overwhelming impact of a factor which Professor Spaeth's data did not take into account: the influence of the office of the Solicitor General (see Table 1),[4] and the data gives rise to a strong inference that that influence was used to "target" the circuit most dominated by Carter appointees for special attention: the Ninth. The Ninth Circuit is the largest of the federal circuits, including the far western states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington.

The Solicitor General's record

The overall record compiled by the office of the Solicitor General in recent years can only be described as phenomenal. In fiscal 1984, 2,861 *certiorari* petitions were filed seeking review of opinions of the

1. Spaeth, *Supreme Court disposition of federal circuit court decisions*, 68 JUDICATURE 245 (1985).

2. *Id.* at 250. Spaeth explains the significantly higher reversal rate of the D.C. Circuit in terms of three factors: "the large number of cases to which the United States is a party, the court's special relationship with the Solicitor General, and an acceptance rate of *cert* petitions more than double the rate of the next highest circuit." *Id.* at 249.

The possible explanations for the D.C. Circuit's higher Supreme Court reversal rate are explored in Note, *Disagreement in D.C.: The relationship Between the Supreme Court and the D.C. Circuit and Its Implications for a National Court of Appeals*, 59 N.Y.U.L. REV. 1048 (1984). The authors attribute it to ideological incompatibility of the D.C. Circuit and the Supreme Court. In considering the role of the Solicitor General, they reject the suggestion that the behavior of the Solicitor may be an independent cause of the D.C. Circuit's high reversal rate in part because the circuit's affirmance rate in cases in which the Solicitor General sought reversal was *higher* than in cases in which the Solicitor General did not participate during the 1980, 1981, 1982 and 1983 Terms. *Id* at 1063. That pattern continued in the 1984 Term. Compare Tables 4 and 5. In the Ninth Circuit, the rate of affirmance in cases in which the Solicitor General sought reversal was substantially *lower* than the cases in which he did not participate in both the 1983 and 1984 Terms. Compare Table 4 (overall affirmance rate of 6.9 per cent and 22.6 per cent) with Table 5 (overall affirmance rate of zero).

3. Spaeth, *supra* n. 1, at 249. Spaeth identified the Fifth, Sixth and Ninth Circuits as dominated by Carter appointees, yet found in the three terms ending in 1982 that they were upheld at close to or above their overall level. The Ninth Circuit, he reported, "was upheld at a 39 per cent rate—3 points above its overall level." *Id* at 249. Spaeth also notes that the proportions of decisions upheld or overturned within any given circuit display considerable variation from one term to another, offering several examples of this phenomenon. *Id* at 250.

4. Table 1 permits a comparison of the 1983-85 data reported in this article with the Solicitor General's record for the previous 20 years.

Table 2 ***Certiorari*** **petitions from decisions by U.S. Courts of Appeals, fiscal year 1984**

Circuit	Total cases disposed of by U.S. Courts of Appeals	*Certiorari* petitions filed	Per cent of decisions in which petitions filed	Petitions granted	Per cent granted
1st	493	117	23.7	12	10.3
2nd	1,224	260	21.2	24	9.2
3rd	1,360	271	19.9	19	7.0
4th	884	242	27.4	8	3.3
5th	1,702	285	16.7	6	2.1
6th	1,499	315	21.0	21	6.7
7th	1,204	238	19.8	7	2.9
8th	875	174	19.9	6	3.4
9th	2,051	443	21.6	46	10.4
10th	909	124	13.6	5	4.0
11th	1,596	306	19.2	15	4.9
D.C.	530	86	16.2	17	19.8
Totals	14,327	2,861	20.0	186	6.5

Source: 1984 *Annual Report of the Director of the Administrative Office of the United States Courts.*

Table 3 ***Certiorari*** **petitions from decisions by U.S. Courts of Appeals filed by Solicitor General, 1983-84 and 1984-85 Terms**

Circuit	Petitions filed by Solicitor General 1983-84	1984-85	Petitions granted 1983-84	1984-85	Per cent granted 1983-84	1984-85
1st	1	0	1	0	100.0	—
2nd	1	1	1	1	100.0	100.0
3rd	4	5	4	5	100.0	100.0
4th	2	4	2	4	100.0	100.0
5th	3	2	2	1	66.7	50.0
6th	3	6	3	4	100.0	66.7
7th	2	2	2	1	100.0	50.0
8th	2	3	1	2	50.0	66.7
9th	17	11	14	10	82.4	90.9
10th	3	0	3	0	100.0	—
11th	3	2	2	2	66.7	100.0
D.C.	8	7	7	3	87.5	42.9
Totals	49	43	42	33	85.7	76.7

Compiled from Supreme Court Proceedings reported in *United States Law Week*, Volume 52 (1983-84) and Volume 53 (1984-85).

The disproportionate number of cases emanating from the Ninth Circuit is immediately apparent.

U.S. Courts of Appeals. Only 186, or 6.5 per cent were granted (see Table 2).[5] During the 1983-84 Term, the Solicitor General filed 49 petitions seeking review of opinions of the U.S. Courts of Appeals; 42 were granted, or 85.7 per cent. The 1984-85 Term approximated this record, with 33 out of 43, or 76.7 per cent of the Solicitor's petitions from court of appeals decisions being granted (see Table 3).

Once a petition is granted, the Solicitor General also enjoys a greater rate of success in the outcome of the case than other litigants. The reversal rate for all courts of appeals decisions reviewed by the Supreme Court during the 1983-84 Term was 69.2 per cent. The rate for the 1984-85 Term was 61.9 per cent (see Table 4). Of the 37 courts of appeals decisions heard on the petition of the Solicitor General during the 1983-84 Term, 32 were reversed or vacated and 5 were affirmed (see Table 5).[6] The Solicitor General succeeded in 86.5 per cent of his cases! While the overall reversal rate dropped 7.3 per cent during the 1984-85 Term, the Solicitor General's success rate for the most recent term went up: of the 25 cases reviewed on petition by the Solicitor, 22.5 were vacated or reversed, and 2.5 were affirmed (see Table 5).[7] The Solicitor succeeded in 90 per cent of his cases. Commenting on the Solicitor's recent success, one court watcher concluded,

It is hazardous to try to generalize these patterns into a conclusion about the direction of the Court. For now, however, a prudent lawyer would be reluctant to bet against the federal government in the Supreme Court.[8]

The purpose of this article is not to marvel at the remarkable success rate of the Solicitor General, but to inquire whether the power that this success generates is utilized to manipulate the docket of the Supreme Court. The Solicitor General's recent success should be analyzed in terms of whether *he* treats federal circuit decisions as an "undifferentiated mass" from which cases are selected for review, and whether circuits dominated by Carter appointees fare better or worse in *his* process of selection. Since the Solicitor General dominates from 20-30 per cent of the Court's federal docket, the answers to these inquiries will ultimately affect the validity of any conclusions whether the Court differs in the treatment of federal circuit court decisions depending on which circuit they emanate from.

The Ninth Circuit record

When the total number of *certiorari* petitions granted is compared to the number of petitions filed, the variations from circuit to circuit appear negligible. While the highest rates of petitions granted appear in the D.C., Ninth, First and

5. Direct appeals from decisions of the U.S. Courts of Appeals have not been included in the tables or analysis presented in this article. As noted by the Federal Judicial Center, REPORT OF THE STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT (1972) at p. 34: "More than 99 per cent of all courts of appeals decisions are now reviewed in the Supreme Court only by *certiorari*." The Study Group recommended that the tiny fraction of cases in which a statutory right of appeal remained be brought within the *certiorari* jurisdiction.

6. The figures in Table 5 do not coincide with the figures in Table 3, since the cases in which *certiorari* petitions were ruled on in the 1983-84 Term were not necessarily decided during that Term, and the decisions would include some cases in which *certiorari* was granted during the previous Term. In addition, the figures in Table 3 include cases in which the Court granted review and simultaneously vacated the judgment below for reconsideration in light of an intervening precedent. See Hellman, *Granted, Vacated, and Remanded—Shedding Light on a Dark Corner of Supreme Court Practice*, 67 JUDICATURE 389 (1984). The figures in Tables 4 and 5 include all cases in which formal opinions were issued, whether after oral argument or by summary reversal.

7. *See* n. 6, *supra*.

8. Stewart, *A Fast Start for the Federal Government*, A.B.A.J. 108, 113 (March, 1985).

Table 4 Outcome of decisions of the U.S. Courts of Appeals reviewed by the Supreme Court, 1983-84 and 1984-85 Terms.

Circuit	Number upheld 1983-84	Number upheld 1984-85	Total reviewed 1983-84	Total reviewed 1984-85	Per cent upheld 1983-84	Per cent upheld 1984-85
1st	2.0	2.5	7	5	28.6	50.0
2nd	5.0	6.0	9	11	55.6	54.5
3rd	5.5	3.5	13	9	42.3	38.9
4th	4.5	3.0	8	7	56.3	42.9
5th	3.5	0.5	8	3	43.8	16.7
6th	4.0	7.0	8	15	50.0	46.7
7th	4.5	4.0	6	10	75.0	40.0
8th	2.0	2.0	10	6	20.0	33.3
9th	2.0	7.0	29	31	6.9	22.6
10th	1.0	3.0	6	6	16.7	50.0
11th	2.0	6.0	7	10	28.6	60.0
D.C.	1.0	0.5	9	5	11.1	10.0
Totals	37.0	45.0	120	118	30.8	38.1

Compiled from the official reports of U.S. Supreme Court opinions for the 1983-84 and 1984-85 Terms, utilizing the same procedure described by Spaeth, "Supreme court disposition of federal circuit court decisions," 68 *Judicature* 246-47 (1985). Docket numbers rather than case citations are counted, so "consolidated" cases are separately counted. Bifurcated dispositions affirming in part and reversing in part are treated as half upheld and half overturned.

Table 5 Outcome of decisions of the U.S. Courts of Appeals reviewed on petition by Solicitor General, 1983-84 and 1984-85 Terms

Circuit	Number upheld 1983-84	Number upheld 1984-85	Total reviewed 1983-84	Total reviewed 1984-85	Per cent upheld 1983-84	Per cent upheld 1984-85
1st	0	0	1	0	0.0	—
2nd	0.5	0	3	0	16.7	—
3rd	1.5	1.0	5	2	30.0	50.0
4th	0	1.0	1	2	0	50.0
5th	0	0	0	1	—	0
6th	1.0	0	2	2	50.0	0
7th	1.0	0	1	1	100.0	0
8th	0	0	2	2	0	0
9th	0	0	15	12	0	0
10th	0	0	2	1	0	0
11th	0	0	1	0	0	—
D.C.	1.0	0.5	4	2	25.0	25.0
Totals	5.0	2.5	37	25	13.5	10.0

Compiled from the official reports of U.S. Supreme Court opinions for the 1983-84 and 1984-85 Terms.

Second Circuits (see Table 2), the overall data hardly supports an inference that any circuit is being "targeted" for special treatment.

When the number of petitions filed by the Solicitor General is broken down by circuit, however, the disproportionate number of cases emanating from the Ninth Circuit is immediately apparent. Although the Ninth is the busiest of the 12 circuits, it still only handles 14 per cent of the total caseload disposed of by all U.S. Courts of Appeals each year (see Table 2). In the 1983-84 Term, however, 34.7 per cent of the petitions filed by the Solicitor General from all 12 circuits were in Ninth Circuit cases, a total of 17 out of 49. That pattern is repeated in the 1984-85 Term, with 11 out of 43, or 25.6 per cent of the Solicitor General's petitions being filed in Ninth Circuit cases —24 of the 28 were granted, or 86 per cent (see Table 3).

The Solicitor's high rate of success is disproportionately reflected in the reversal rate of the Ninth Circuit which attracted so much attention after the 1983-84 Term.[9] While the Ninth Circuit was reversed in 27 out of 29 cases, over half of the reversals came in cases in which the Solicitor General petitioned for *certiorari*. The Ninth Circuit reversal rate dropped to 24 out of 31 in the 1984-85 Term, but again, 50 per cent of the reversals were in cases brought by the Solicitor General (see Tables 4 and 5).

Error correction

Several explanations might be offered for the disproportionate attention the Ninth Circuit is receiving from the Solicitor General. Most obvious is the suggestion that the Ninth Circuit hands down more erroneous decisions which require correction than emanate from other circuits. It might be argued that this explanation misconceives the role of the Supreme Court, however. The use of Supreme Court hearings merely to correct the errors of lower courts would involve the squandering of a scarce resource. The Solicitor authorizes only one out of every six requests to file *certiorari* petitions which he receives.[10] Presumably, every request involves a palpable claim of error. Cases should be selected on the basis of their broad-scale impact on the administration of justice. If the Solicitor perceived his role as correcting the errors of lower courts, he could certainly find dozens of cases to take up from each of the federal circuits every year.

There is certainly a plausible basis to suggest that the Burger Court itself is assuming a greater role of error correction. At least in criminal cases, the Court is resorting to the vehicle of summary reversal in more and more cases every term. During the 1983-84 Term, Justice Stevens wrote an unusual dissent to one of these reversals,[11] pointing out that this practice posed "disturbing questions concerning the Court's conception of its role."

> Each such case, considered individually, may be regarded it [sic] as a welcome step forward in the never ending war against crime. Such decisions are certain to receive widespread approbation, particularly by members of society who have been victimized by lawless conduct. But we must not forget that a central purpose of our written Constitution, and more specifically of its unique creation of a life tenured federal judiciary, was to ensure that certain rights are firmly secured *against* possible oppression by the federal or state governments.... Yet the Court's recent history indicates that, at least with respect to its summary dispositions, it has been primarily concerned with vindicating the will of the majority and less interested in its role as a protector of the individual's constitutional rights.[12]

Justice Stevens cited 19 examples of summary dispositions in the previous three terms, *all* decided on the petition of the warden or prosecutor, and all successful "in obtaining reversal of a decision upholding a claim of constitutional right."[13] During the 1984-85 Term, Jus-

9. See, *e.g.*, Overend, *9th Circuit is '0 for 22' in High Court Reviews*, Los Angeles Times, June 25, 1984, at p. 1; Carrizosa, *High Court Term Brings 27 Reversals for Ninth Circuit*, Los Angeles Daily Journal, July 13, 1984, at p.1; Bartlett, *A Rare Victory for Court in S.F.*, San Francisco Chronicle, June 27, 1984, at p.12; Baker, *Activists on the Ninth Circuit Strike Out*, Wall Street Journal, September 25, 1984, at p.28; Maher, 'Engine, Engine Number 9...,' California Lawyer, February, 1985, at p. 39.

10. Remarks of Rex E. Lee, Solicitor General, delivered at Ninth Circuit Judicial Conference, Seattle, Washington, August 16, 1984, at p. 4.

11. Florida v. Meyers, — U.S. —, 80 L.Ed.2d 381, 104 S.Ct. 1852 (1984).

12. Id. at 80 L.Ed.2d at 386, 104 S.Ct. at 1855. Compare Florida v. Rodriguez, 469 U.S. —, —, 105 S.Ct. 308, 83 L.Ed.2d 165, 171-75 (1984) (Stevens, J., dissenting).

13. *Id.* at —, n. 3, 80 L.Ed.2d at 387, n. 3, 104 S.Ct. at 1855, n. 3.

Table 6 Per cent of appeals reversed by U.S. Courts of Appeals after hearing or submission

Circuit	All cases 1983	All cases 1984	Criminal cases 1983	Criminal cases 1984
1st	18.6	20.6	17.9	7.8
2nd	13.7	16.4	8.2	9.5
3rd	13.8	13.0	10.7	6.4
4th	20.8	22.2	10.6	6.6
5th	17.5	18.9	8.2	12.4
6th	15.7	17.4	10.5	11.7
7th	15.8	12.4	5.5	3.7
8th	14.7	16.5	7.6	8.3
9th	16.9	16.5	12.2	15.6
10th	11.5	16.3	13.4	11.0
11th	17.5	13.0	5.6	7.0
D.C.	12.1	15.9	4.1	2.9
All circuits	15.9	16.3	9.4	9.7

Compiled from the *Annual Reports of the Director of the Administrative Office of the U.S. Courts*, 1983 and 1984, Table B-1.

Table 7 Per cent of criminal appeals reversed: Ninth Circuit vs. all circuits

	Ninth Circuit	All circuits
1971	15.3	12.6
1972	16.4	13.4
1973	16.3	12.5
1974	17.3	13.2
1975	18.8	11.8
1976	13.8	10.7
1977	12.3	10.3
1978	12.1	10.9
1979	12.0	10.3
1980	15.9	11.2
1981	15.2	11.9
1982	11.1	9.7
Average	14.7	11.5

Compiled from the *Annual Reports of the Director of the Administrative Office of the U.S. Courts*, 1971-1982, Table B-1.

tice Brennan returned to this theme, noting that eight more cases had been added to Justice Stevens' list during the current term, and concluding, "Because I find this one-sided practice of summary error correction inappropriate, I would vote merely to deny this petition for *certiorari*."[14]

An analysis of the origin of the 27 cases summarily reversed during the past four terms reveals a significant pattern—20 of the 27 emanated from the U.S. Courts of Appeals, of which eight, or 40 per cent, were Ninth Circuit cases. Four of the cases were before the Court on a petition for *certiorari* filed by the Solicitor General, the only four which involved direct appeals from a judgment of conviction. The other cases all involved federal *habeas corpus* proceedings, in which the petitions for *certiorari* were filed by state authorities. Curiously, all four of the summarily reversed cases brought to the Court by the Solicitor emanated from the Ninth Circuit.

Since the Burger Court is willing to devote more of its docket to the process of error correction in criminal cases, the Solicitor General appears to be selecting some cases for review on that basis. But it seems remarkable that such a disproportionate share of the cases deserving of such attention would be found in one federal circuit.

The suggestion that the Ninth Circuit hands down more erroneous decisions which need correction than do other circuits also appears implausible. A decision can only be labeled "erroneous," of course, if it is reversed by the Supreme Court. The decision of the Supreme Court is "infallible only because [it is] final."[15] The mere fact that the Ninth Circuit suffered three times as many reversals as any other circuit two years in a row may simply be attributable to the number of its cases brought to the Court by the Solicitor, rather than the overall quality of its decisions. One qualitative clue might be the degree of unanimity of the Supreme Court in Ninth Circuit reversals. If the rate of unanimity is significantly higher than that for other cases decided by the Court, one might infer that the "degree" of error in the Ninth Circuit cases reviewed is greater. Actually, the overall degree of unanimity in the Supreme Court's decisions reached the highest peak in many years during the past two terms—40 per cent of all published decisions in each term were unanimous.[16] The degree of unanimity in Ninth Circuit reversals was not substantially greater: 39 per cent of the 1983-84 reversals were unanimous, while 46 per cent of the 1984-85 reversals lacked dissents.[17]

Even when the unanimous reversals are individually analyzed, one is frequently left with the haunting question of why such a case ever found its way into the hallowed chambers of the United States Supreme Court. Many of these cases simply present no issue with any discernible impact upon the overall administration of justice, involving unique factual configurations which will rarely recur.[18]

Win-loss record

While an "erroneous" lower court decision from the perspective of the Supreme Court is one which is actually reversed, from the perspective of the Solicitor General it may simply be one which the government has lost in the lower court. One explanation for the larger proportion of Ninth Circuit cases on the Solicitor's Supreme Court docket may simply be that the government loses more of its cases in the Ninth than in other circuits.

While the government's win-loss record cannot be ascertained for appeals in civil cases, the record for criminal cases is readily available. With rare exceptions, all appeals from criminal cases are brought by defendants, so every reversal is a loss for the government. When the criminal reversal rate for the Ninth Circuit is compared with other circuits (see Table 6), this explanation appears plausible. The Ninth Circuit criminal reversal rate was highest of all circuits in 1984, and third highest in 1983. Closer examination of this reversal rate, however, suggests it has more to do with the nature of the caseload than the "liberality" of Ninth Circuit judges. When the criminal reversal rate in the Ninth Circuit is analyzed for the 12 year period preceding 1983-84 (see Table 7), it can be seen that the Ninth Circuit has always maintained a higher reversal rate than the other circuits, and that the 1983-84 rates are close to the 12-year average of 14.7 per cent for the Ninth Circuit. There is certainly no basis in this data to attribute a higher reversal rate to the influx of Carter appointees, since the average criminal reversal rate in the

14. United States v. Benchimol, 471 U.S. —, —, 85 L.Ed.2d 462, 467-68, 105 S.Ct. 2103, 2106 (1985).

15. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring):
"However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final."

16. *Supreme Court Review*, NATIONAL LAW JOURNAL, September 2, 1985, at p. S-3, indicating a steady climb in the proportion of unanimous decisions from a low of 25 per cent in the 1979-80 Term.

17. Compiled from official reports of U.S. Supreme Court opinions, 1983-85. It should be noted that the 40 per cent overall unanimity rate for the Supreme Court includes both affirmances *and* reversals. The unanimity rate for just reversals may be lower, so the unanimity rate in Ninth Circuit reversals would reflect greater disparity.

18. See, *e.g.*, United States v. Miller, 471 U.S. —, 85 L.Ed.2d 99, 105 S.Ct. 1811 (1985); United States v. Abel, 469 U.S. —, 83 L.Ed.2d 450, 105 S.Ct. 465 (1984); United States v. Powell, 469 U.S. —, 83 L.Ed.2d 461, 105 S.Ct. 471 (1984). Compare the conclusions reached by Estreicher & Sexton, *New York University Supreme Court Project*, 59 N.Y.U.L. REV. 481 (1984), described as an "unusually perceptive study of this court's docket" by Justice Stevens. California v. Carney, — U.S. —, —, 105 S.Ct. 2066, , 85 L.Ed.2d 406, 418 (1985) (Stevens, J., dissenting).

Ninth Circuit was higher before 1977 than after. While the government apparently does lose more appeals in the Ninth Circuit than in other circuits, this is not a new phenomenon, but a consistent pattern with a 15-year history.

Influencing en banc hearings

Another explanation for the disproportionate attention the Solicitor General is giving the Ninth Circuit involves a very practical process of case management. In addition to controlling all petitions for *certiorari* by federal authorities, the Solicitor also determines whether a rehearing *en banc* should be sought in a court of appeals. To the extent that the Solicitor can convince judges at the court of appeals level that the denial of a rehearing *en banc* is simply a prelude to Supreme Court review, and Supreme Court review means a substantial probability of Supreme Court reversal, he may be able to increase his rate of success on petitions for *en banc* hearings, and get at least some of the decisions he is unhappy with reversed without having to bother the Supreme Court.

The Solicitor's rate of success in petitions for *en banc* hearings in the courts of appeals is substantially lower than his success rate in petitions for *certiorari* in the Supreme Court. Over the course of the four year period from 1980-84, the 12 courts of appeals denied 81 per cent of the *en banc* petitions authorized by the Solicitor General.[19] The Solicitor is twice as likely to petition for *certiorari* in a case where his *en banc* petition is denied than in a case where no such petition was filed.[20] And the prospects for having such a *certiorari* petition granted and the case reversed is even higher than the Solicitor's phenomenal "normal" rate.[21] These convincing figures were the prelude to an ominous warning which Solicitor General Rex E. Lee delivered to the judges of the Ninth Circuit at their 1984 Judicial Conference in Seattle:

The spectre of judicial politics may be lurking in the background.

...Both at the *certiorari* stage and also the merits stage, we have had a higher rate of success—by about 20 percentage points in each instance—with our cases that have gone through an *en banc* denial, than is true of our cases in general... The fact that I have authorized *en banc* rehearing indicates a fair statistical possibility that a petition for *certiorari* may follow.[22]

Viewed from this perspective, the targeting of the Ninth Circuit for so many reversals may have been a prelude to the subliminal message presented to the Ninth Circuit judges: Avoid the embarrassment of so many Supreme Court reversals by granting more of our *en banc* petitions and cleaning up your own act.

The message loses much of its force, however, when we count up the number of Ninth Circuit cases that the Solicitor took to the Supreme Court during the past two terms which were *preceded* by a petition for *en banc* hearing in the Ninth Circuit. Of the 28 *certiorari* petitions filed, only 4 were preceded by an *en banc* petition. One of the 4 was granted and heard *en banc*. Actually, this rate of 14 per cent is substantially lower than the other federal circuits. During the same two terms, of the 64 petitions for *certiorari* filed from decisions of circuits *other than* the Ninth, 33, or 51 per cent, were preceded by petitions for *en banc* hearings, of which only *one* was granted![23] Thus, it appears that the Solicitor pursued *en banc* hearings with less frequency and greater success in the Ninth than in other circuits, at least in cases he subsequently presented to the Supreme Court. It would appear, then, that he was delivering his "message" in the wrong forum. In any event, the message was ignored. The number of *en banc* petitions granted in the Ninth Circuit continued to decline in 1985.[24]

Machiavellian politics?

The final possible explanation for the Solicitor General's preoccupation with the Ninth Circuit is the most Machiavellian. The Ninth Circuit is, without a doubt, the court most profoundly influenced by the judicial appointments of President Jimmy Carter: 15 of the 23 judges active on the court during the period in question were put there by him.[25] The embarrassment of an unusually high reversal rate for this court could achieve a number of political objectives. It could add credibility to the claim that President Reagan needed four more years to correct an "imbalance" in the federal judiciary. The impact of his judicial appointments, and the denigration of his predecessor's judicial appointments, played a prominent role in the political rhetoric of the 1984 presidential campaign. In the midst of that campaign, in the summer of 1984, newspaper stories were widely circulated under such headline banners as "Activists on the Ninth Circuit Strike Out."[26]

In addition to presidential politics, the spectre of judicial politics may also be lurking in the background. Chief Justice Warren Burger has made no secret of his determination to split up the Ninth Circuit, publicly labeling it an "unmanageable administrative monstrosity"[27] and criticizing the practice of limiting *en banc* hearings to a minority of the judges on the court.[28] The judges of the Ninth Circuit appear united in their opposition to bifurcation.[29] A public perception that the Ninth Circuit is seriously "out of step" with other federal courts can only help the Chief Justice's campaign to dismantle it.

An analysis of the Ninth Circuit decisions reversed by the Supreme Court supports the premise that ideological differences certainly play an important part in the confrontation. The judges appointed by President Carter are clearly responsible for the vast majority of the

19. Remarks of Rex E. Lee, *supra* n. 10, at 4.
20. *Id.*
21. *Id.* at 4-5.
22. *Id.* at 5.
23. Figures were compiled from the published decisions of U.S. Courts of Appeals in F.2d.
24. The Ninth Circuit granted 14 *en banc* hearings in 1983, 12 in 1984, and 9 in the first 10 months of 1985: 37 per cent of hearings granted were on petition by the Solicitor General. (Figures supplied to author by Cathy Catterson, Acting Clerk, U.S. Court of Appeals for the Ninth Circuit, October 18, 1985.)
25. Gottschall, *Carter's judicial appointments: the influence of affirmative action and merit selection on voting on the U.S. Courts of Appeals*, 67 JUDICATURE 164, 167 (1983).
26. See n. 9, *supra*.
27. Flaherty, *Inside the 'Invisible' Courts*, NATIONAL LAW JOURNAL, May 2, 1983, at p. 28.
28. Granelli, *9th Circuit Rejects Split; Wants Time to Experiment*, NATIONAL LAW JOURNAL, March 28, 1983, at p. 34. The Ninth Circuit utilizes a limited *en banc* court consisting of the chief judge and 10 additional judges drawn by lot for *en banc* hearings. See Rule 25, Rules of the U.S. Court of Appeals for the Ninth Circuit.
29. *Id.*

Table 8 Ninth Circuit judges concurring in decisions reversed by U.S. Supreme Court, 1983-84 and 1984-85 Terms

Carter appointees	Number of cases
Alarcon	3
Boochever	5
Canby	10
Faris	2
Ferguson	13
Fletcher	8
Hug	4
Nelson	5
Norris	6
Poole	4
Pregerson	8
Reinhardt	10
Schroeder	4
Skopil	5
Tang	11
Average for Carter appointees:	6.5
Non-Carter appointees	
Anderson	6
Browning	4
Choy	2
Duniway	2
Goodwin	6
Kennedy	3
Kilkenny	2
Sneed	2
Wallace	3
Wright	2
Average for non-Carter appointees:	3.2

Compiled from published decisions of the U.S. Court of Appeals for the Ninth Circuit in F.2d.

decisions being reversed (see Table 8). This shouldn't surprise anyone, however. The Supreme Court Justices appointed by presidents Nixon and Reagan are just as clearly responsible for more of the reversals (see Table 9). Ideological differences are a factor, but that does not dispel the inference that the numbers may be manipulated and the drama of the confrontation contrived. The same ideological differences dominate the Fifth and Sixth Circuits, with President Carter filling two-thirds of their active judgeships.[30] Eighty per cent of the cases the Solicitor took to the Supreme Court from those two circuits in the past two terms were reversed (see Table 5). But the grand total of *cert* petitions filed by the Solicitor from both the Fifth and Sixth Circuits for both terms was 14, compared to 28 for the Ninth Circuit alone (see Table 3).

Table 9 Votes of Supreme Court Justices in Ninth Circuit reversals, 1983-84 and 1984-85 Terms

Justice	No. of cases in majority	No of cases in dissent
Burger, C.J.	49	2
Blackmun	46	5
Brennan	31	20
Marshall	30	21
O'Connor	48	3
Powell	41	3
Rehnquist	47	4
Stevens	36	15
White	48	3

Compiled from official reports of U.S. Supreme Court opinions.

Conclusion

The remarkable reversal record compiled by the U.S. Court of Appeals for the Ninth Circuit in the U.S. Supreme Court in the past two terms can be seen, at least in part, as the handiwork of the Solicitor General. It cannot be wholly explained by the court's higher propensity for error or stubborn refusal to reconsider its decisions *en banc*. Rather than reflecting a court which is ideologically "out of step," it may simply reflect a Justice Department which is carefully selecting its target. The perception of the Ninth Circuit Court of Appeals as a "liberal" court packed with Carter appointees is certainly a perception shared by the Justice Department. To the extent that that perception affects the selection of cases for Supreme Court review, it necessarily affects the validity of Professor Spaeth's conclusion that the Supreme Court does not differ in the treatment of federal circuit court decisions depending on which circuit they emanate from. □

30. Gottschall, *supra* n. 25, at 167.

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A reply and rejoinder

Reply

by Harold J. Spaeth

I hold no brief in support of or in opposition to Professor Uelmen's thesis concerning the reversal rate of the Ninth Circuit. I do submit, however, that he has not proven his case.

He asserts that two of the findings I reported, "Supreme Court disposition of federal circuit court decisions," 68 *Judicature* 245 (1985), are "premature." He bases his judgment on an analysis of but two terms of the Burger Court's decisions, notwithstanding my additional finding—encompassing 14 terms—that marked variations occurred in the manner in which the Supreme Court disposed of cases from specific circuits over the course of two or three terms. *Id.* at 250. Thus, any given circuit could expect a period or two during which its decisions would be upheld or reversed at a rate markedly variant from that attained over the entire 14 years.

Apart from the fact that Solicitor General Lee has himself labeled Uelmen's conclusions "dead wrong" in an article which appeared in the *Los Angeles Daily Journal*, December 18, 1985, at page 17, Uelmen's imputation of causality to an association between Lee and the treatment the Supreme Court accorded the Ninth Circuit is no more scholarly or scientific than attaching causality to a *post hoc, propter hoc* relationship. □

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Rejoinder

By Gerald F. Uelmen

The full statement by former Solicitor General Rex Lee, who was sent an advance copy of this article, as quoted in the *Los Angeles Daily Journal*, December 18, 1985, is as follows:

Lee, reached at his Washington, D.C., law firm, said he respected Uelmen's scholarship but called his conclusions "almost flattering and dead wrong." He said he "subconsciously" may have been more skeptical of Ninth Circuit decisions than those from other circuits but only because the Ninth Circuit's opinions had displayed "a judicial philosophy that is not favorable to the government." Lee said he and "many of the people in my office" developed an impression that "there were panels of the Ninth Circuit that were more likely to commit error or were more likely to make rulings that were opposed by the government than would the average Court of Appeals panel throughout the country." Said Lee, "That is quite different from setting out in advance to target a particular circuit for more intensive scrutiny."

Several inferences might be drawn from this statement, just as several inferences might be drawn from the data I've compiled. While the suggestion that considerations of judicial politics might affect the selection of circuit court decisions for the Supreme Court docket may be difficult to stuff into a computer, the possibility should not be dismissed out of hand. Political naivete is hardly a prerequisite to drawing scholarly or scientific conclusions.