

Supreme Court Reversal Rates: Evaluating the Federal Courts of Appeals

By Roy E. Hofer

When the subject of Supreme Court reversal rates arises, two common perceptions usually come to mind. First, the Ninth Circuit is the “rogue circuit.” Second, the Supreme Court only takes cases that it intends to reverse. An empirical study of Supreme Court dispositions of cases from the courts of appeals during the last 10 Terms¹ reveals that neither of these common perceptions is true.

Each year the federal courts of appeals collectively terminate an average of 60,467 cases, as shown in Table 1² (top of facing page). However, the Supreme Court only reviews an average of 64 cases per year, as shown in Table 2³ (bottom of facing page), which is about 0.106% of all decisions by the federal courts of appeals.

Due to various factors, such as size and subject matter jurisdiction, the number of appeals terminated by each court of appeals varies greatly. For instance, as shown in Table 1, in Fiscal Year 2008 the Federal Circuit terminated 1,745 cases, while the Ninth Circuit terminated 12,373; in 10 years, the Federal Circuit terminated a total of 15,781 cases and the Ninth Circuit terminated 114,199 cases. As shown in Table 2, the Supreme Court, in the past 10 Terms, has decided only 30 cases appealed from the Federal Circuit and 175 cases from the Ninth Circuit.⁴ Thus, the Supreme Court only reviewed 0.177% of the total number of appeals terminated by the Federal Circuit and only 0.151% of the total number of appeals terminated by the Ninth Circuit.

Figure 1⁵ (top of page 10) compares the Supreme Court’s rate of review⁶ for each of the courts of appeals over the last 10 years. The highest rate of review is for the District of Columbia, a mere 0.235%. The number of cases that the Supreme Court reversed as compared to the total number of appeals terminated presents an even lower percentage. Any reversal rate below 1% can hardly be considered high.

So how did the Ninth Circuit get the reputation for being the “rogue circuit”? Well, “figures don’t lie, but liars figure.” One measure of a circuit’s success “is the extent to which its decisions have been reviewed and reversed or vacated by the Supreme Court.”⁷

Reversal rates for each court of appeals would be very small, in the range of a tenth of a percent, if calculated as the total number of cases reversed⁸ over the total number of appeals terminated by that court. Conversely, if the reversal rate is calculated as the total number of cases reversed over the total number of cases reviewed by the Supreme Court, the ratio increases dramatically. So, in the big picture, i.e.,

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considering all of the appeals terminated by each circuit, reversal rates for all courts of appeals could be very low, if calculated by the former method, or very high, if calculated by the latter method.

For the purpose of comparing one court’s “performance” against another’s, it makes more sense to compare reversal rate calculated as the ratio of cases reversed over cases reviewed. On that basis, Figure 2 (top of next page) compares the Supreme Court’s reversal rates for all courts of appeals over the course of the last 10 Terms. Table 3 (middle of next page) shows the actual number of cases reversed and total cases reviewed, as well as the corresponding percentages used to create Figure 2.

The reversal rates in Figure 2 range between 55% and 84%. Interestingly, this comparison of reversal rates reveals that the Federal Circuit has the highest reversal rate at about 83.33%, and the Ninth Circuit has the second highest reversal rate at 80%. The Seventh Circuit has the lowest reversal rate at 55.26%. The median reversal rate is 68.29%.

If the courts of appeals were graded on their reversal rates according to a typical first-year law school grading curve,⁹ their grades would be as shown at below.

So the Ninth Circuit and the Federal Circuit end up at the bottom of their “class.” Do reversal rates of 80% and 83%, for the Ninth Circuit and Federal Circuit, respectively, compared to a median reversal rate of 68%, call for the label “rogue” courts?

On a more positive note, Figure 3 (top of page 11) compares affirmance rates¹⁰ to reversal rates for each court. The Supreme Court affirmed over 40% of all cases granted certiorari from the First, Seventh, and Eleventh Circuits. In fact, the median affirmance rate is about 31.71%, with only two courts falling below 25%, again, the Ninth and Federal Circuits. If the Supreme Court granted certiorari only to review cases that it intends to reverse or vacate, the affirmance rates should be significantly lower. These statistics indicate that the Court is more likely interested in taking cases to resolve circuit splits, to resolve uncertainty in the law, or to determine important legal or constitutional issues.

Finally, taking a closer look at the Federal Circuit’s performance over the last 10 Terms reveals that the reversal rate

Grade Report

First Circuit	A–
Second Circuit	B–
Third Circuit	B
Fourth Circuit	B+
Fifth Circuit	B–
Sixth Circuit	C+
Seventh Circuit	A
Eighth Circuit	B
Ninth Circuit	C–
Tenth Circuit	C
Eleventh Circuit	B+
District of Columbia	B
Federal Circuit	D

for patent-related cases is about 92.3%. This statistic is subject to some skepticism because the Supreme Court reviewed only 13 patent-related cases (only one was affirmed). Table 4 (below) is a complete list of patent-related cases reviewed in the Supreme Court from October Terms 1999 through 2008. Obviously, Federal Circuit patent decisions have not fared well before the Supreme Court.

Congress created the Federal Circuit in 1982,¹¹ vesting appellate jurisdiction in the court for all cases arising under the Patent Act. Major goals for this specialized court of appeals include “to promote uniformity and stability in the interpretation of patent law, to resolve the problems produced by differing views of regional circuit courts on the value of patents, and to eliminate the resultant forum shopping.”¹² The Federal Circuit has resolved differing views between circuit courts and reduced forum shopping. However, the Federal Circuit does not always have the final word and, therefore, patent law is not uniform and stable until the Supreme Court acts.

Since the inception of the Federal Circuit, the Supreme Court has only reviewed and decided 21 of its patent-related cases.¹³ During the Federal Circuit’s first 15 years, the Supreme Court reviewed only five of its patent-related cases. Uniformity and stability seemed to be well within the Federal Circuit’s grasp. But in the last 10 years, the Supreme Court has reviewed 13 of its patent-related cases. In fact, the Supreme Court reviewed three of these cases in each of the years 2001, 2005, and 2006. Though the sample size of patent-related cases reviewed and decided by the Supreme Court is small, the trend is clear. The Supreme Court is actively seeking to assert its views in patent law rather than letting the Federal Circuit determine the fate of patent law on its own.

Up until 1998, the Federal Circuit had the final say in almost all patent-related cases. Now patent appellants not only have a greater chance of reaching the Supreme Court, but they have an even greater chance of receiving a favorable reversal once certiorari is granted. In fact, reversal seems nearly certain.

Although patent law has faced numerous changes, especially since 1998, the changes are not altogether unpredictable. For instance, the Supreme Court seems to favor fact-specific balancing-type tests over the Federal Circuit’s bright-line rules.¹⁴ Does the Supreme Court’s reversal rate of Federal Circuit cases, taken together with the Supreme Court’s past rejections of the Federal Circuit’s bright-line rules, reveal a trend for predicting the outcome of the current pending patent case at the Supreme Court, *Bilski v. Kappos*?¹⁵ ■

Endnotes

1. Supreme Court Terms begin on the first Monday of each October.
2. “Total Appeals Terminated” refers to the total number of cases disposed, whether on the merits or otherwise, by any of the courts of appeals for the First through Eleventh Circuits, the District of Columbia Circuit, or the Federal Circuit. This includes civil and criminal cases regardless of how the appeal was terminated. The Administrative Office of the U.S. Courts provides annual Federal Court Management Statistics, <http://www.uscourts.gov/fcmstat/index.html>. Note that statistics are kept by fiscal years ending September 30 for each year. The latest statistics available are for Fiscal Year 2008, which ended September 30, 2008. Appeals from state courts, district courts, and the Court of Military Appeals are excluded.
3. These statistics were obtained from the Granted/Noted Cases

Lists published by the Supreme Court for each October Term. Each list includes information about each case granted certiorari by the Supreme Court, the court from which the case was appealed, the date that certiorari was granted, the final disposition, and the date of the final disposition. The disposition for each case was tallied and recorded for each circuit. The lists are published dating back to October Term 2006 at <http://www.supremecourtus.gov/orders/orders.html>. Older lists, dating back to October Term 2000, are not linked on the website but are still available as follows: <http://www.supremecourtus.gov/orders/05grantednotedlist.pdf>; <http://www.supremecourtus.gov/orders/04grantednotedlist.pdf>; <http://www.supremecourtus.gov/orders/03grantednotedlist.pdf>; <http://www.supremecourtus.gov/orders/02grantednotedlist.pdf>; <http://www.supremecourtus.gov/orders/01grantednotedlist.pdf>; <http://www.supremecourtus.gov/orders/00grantednotedlist.pdf>. The statistics for the 1999 Term were obtained by looking at every Supreme Court decision from that term and recording the final decision.

4. Cases that were dismissed as improvidently granted were not included.
5. “Rate of review” refers to the ratio of cases reviewed over appeals terminated, where “cases reviewed” refers to any case that the Supreme Court has affirmed, reversed, or vacated in full or in part.
6. These rates of review were calculated using appeals terminated in Fiscal Years 1999 through 2008, representing the time period from October 1, 1998, through September 30, 2008, whereas cases reviewed is obtained for October Terms 1999 through 2008, representing the time period October 1999 through July 2009. This time shift approximates the lag between the date that a case is decided by a court of appeals and the date that the case is reviewed and disposed of by the Supreme Court.
7. Meredith Martin Addy, *Is the Federal Circuit Ready to Accept Plenary Authority for Patent Appeals?* 4 J. MARSHALL REV. INTELL. PROP. L. 583, 593 (2005) (citing Richard H. Seamon, *The Provenance of the Federal Courts Improvement Act of 1982*, 71 GEO. WASH. L. REV. 543, 592 n.325 (2003)).

8. “Cases reversed” refers to any case that was reversed or vacated. Also included are certain cases that were “reversed in part, affirmed in part” and “affirmed in part, vacated in part” where the author determined that the judgment was more in favor of the petitioner.

9. The “grades” were calculated using a percentage grading curve, where the grade distribution is based on a normal distribution, i.e., bell curve, with standard deviation calculated from the reversal rates graphed in Figure 2. In 2003, the Association of American Law Schools conducted a study about law school grading curves. The results, along with an example of a percentage grading curve, can be found at <http://www.aals.org/documents/Attachment05-14.pdf>.

10. “Affirmance rates” refer to the ratio of cases affirmed over cases reviewed.

11. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

12. Addy, *supra* note 7, at 593 (citing Seamon, *supra* note 7, at 583).

13. Table 5 on following page is a table of all cases reviewed by the Supreme Court since the inception of the Federal Circuit.

14. See *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007) (rejecting Federal Circuit’s “teaching, suggesting or motivation” test as a rigid test for determining obviousness); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007) (rejecting Federal Circuit’s bright-line rule requiring a licensee to breach or terminate a license to establish an “actual controversy” and obtain standing to pursue a declaratory judgment action); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) (rejecting Federal Circuit’s categorical grant of permanent injunctions upon finding infringement and no invalidity); *Illinois Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006) (overruling Federal Circuit’s presumption of market power in a patented tying product); *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722 (2002) (rejecting Federal Circuit’s interpretation of prosecution history estoppel as a complete bar to patentability).

15. On June 1, 2009, the Supreme Court granted certiorari to the Federal Circuit for review of *In re Bilski*, 545 F.3d 943 (Fed. Cir. 2008). The questions presented are available at <http://www.supremecourtus.gov/qp/08-00964qp.pdf>.

Table 1. Total Appeals Terminated in Fiscal Years 1999–2008

Court	Fiscal Year										Total Cases
	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	
First Circuit	1,323	1,365	1,515	1,758	1,573	1,643	1,888	2,027	1,752	1,776	16,620
Second Circuit	4,245	4,829	4,175	4,206	4,262	4,611	6,501	8,969	7,228	6,434	55,460
Third Circuit	3,199	3,162	3,594	3,784	3,801	3,787	4,268	4,157	4,066	3,990	37,808
Fourth Circuit	5,149	4,710	5,078	5,074	4,668	4,713	4,754	5,628	4,900	4,671	49,345
Fifth Circuit	8,593	8,535	8,784	8,390	9,135	8,100	7,496	8,881	9,578	8,086	85,578
Sixth Circuit	4,800	5,090	4,691	4,878	4,557	4,655	5,232	5,172	4,962	4,781	48,818
Seventh Circuit	3,444	3,601	3,616	3,293	3,390	3,294	3,706	3,803	3,280	3,281	34,708
Eighth Circuit	3,280	3,280	3,414	3,180	2,896	2,916	3,287	3,618	2,988	3,103	31,962
Ninth Circuit	8,402	9,216	10,372	10,042	11,220	12,151	13,399	13,424	13,600	12,373	114,199
Tenth Circuit	2,754	2,737	2,792	2,543	2,627	2,448	2,708	3,018	2,680	2,385	26,692
Eleventh Circuit	7,244	8,405	8,000	8,135	7,085	6,908	7,578	7,690	6,503	6,931	74,479
District of Columbia	1,655	1,582	1,391	1,303	1,182	1,155	1,158	1,195	1,309	1,285	13,215
Federal Circuit	1,410	1,518	1,500	1,357	1,575	1,836	1,662	1,460	1,718	1,745	15,781
Annual Totals	55,498	58,030	58,922	57,943	57,971	58,217	63,637	69,042	64,564	60,841	604,665

Table 2. Disposition of Cases by the Supreme Court

Court	Disposition	Fiscal Year										Total Cases
		1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	
First Circuit	Reversed	0	2	0	0	0	3	0	0	1	2	8
	Vacated	0	0	0	0	0	1	1	0	0	0	2
	Affirmed	1	0	1	1	0	0	1	1	1	2	8
Second Circuit	Reversed	3	3	4	3	2	2	6	3	1	11	38
	Vacated	0	0	0	0	0	0	2	0	1	0	3
	Affirmed	0	6	0	0	0	0	1	2	5	2	16
Third Circuit	Reversed	0	3	0	0	2	3	3	1	0	0	12
	Vacated	0	0	1	0	1	0	0	0	0	1	3
	Affirmed	1	3	0	0	1	1	0	0	0	1	7
Fourth Circuit	Reversed	4	2	6	3	0	2	3	0	1	3	24
	Vacated	0	0	2	0	1	0	0	1	1	1	6
	Affirmed	4	3	4	0	3	1	2	1	1	0	19
Fifth Circuit	Reversed	6	2	1	3	6	4	1	4	3	3	33
	Vacated	0	1	0	0	1	1	0	0	1	0	4
	Affirmed	4	3	0	0	0	2	1	1	1	2	14
Sixth Circuit	Reversed	3	5	9	7	4	6	1	5	1	4	45
	Vacated	0	0	0	0	0	4	0	1	1	1	6
	Affirmed	1	2	1	2	2	5	2	3	1	0	19
Seventh Circuit	Reversed	6	2	0	3	2	1	2	1	0	1	18
	Vacated	0	0	0	1	0	0	1	1	0	0	3
	Affirmed	2	2	2	1	2	1	0	1	6	0	17
Eighth Circuit	Reversed	1	1	7	0	5	1	1	3	2	1	22
	Vacated	0	0	1	1	0	2	0	0	1	1	6
	Affirmed	4	2	1	0	1	1	2	1	1	0	13
Ninth Circuit	Reversed	8	9	11	9	15	11	10	12	6	16	107
	Vacated	1	2	3	7	3	4	2	6	4	1	33
	Affirmed	1	4	5	7	6	3	3	2	3	1	35
Tenth Circuit	Reversed	1	3	3	1	3	3	1	2	1	2	20
	Vacated	0	0	0	0	0	0	0	0	1	0	1
	Affirmed	1	1	1	0	0	0	3	1	0	0	7
Eleventh Circuit	Reversed	2	3	5	2	2	5	4	2	3	0	28
	Vacated	0	0	0	0	2	0	0	0	0	0	2
	Affirmed	3	0	0	2	0	6	1	3	2	3	20
District of Columbia	Reversed	0	2	2	0	2	0	2	1	2	2	13
	Vacated	0	0	0	2	2	0	0	0	3	0	7
	Affirmed	3	0	2	3	0	0	0	1	2	0	11
Federal Circuit	Reversed	2	1	1	1	1	0	1	3	3	5	18
	Vacated	0	1	3	0	0	1	2	0	0	0	7
	Affirmed	0	0	1	1	0	1	0	1	1	0	5
Annual Totals		62	68	77	60	69	71	63	63	61	66	660

Table 3. Supreme Court Disposition of Cases by Circuit.

Court	Fiscal Year								
	Reversed	Vacated	Affirmed	Reversed & Vacated	Total	Reversed	Vacated	Affirmed	Reversed & Vacated
First Circuit	8	2	8	10	18	44.4%	11.1%	44.4%	55.6%
Second Circuit	38	3	16	41	57	66.7%	5.3%	28.1%	71.9%
Third Circuit	12	3	7	15	22	54.5%	13.6%	31.8%	68.2%
Fourth Circuit	24	6	19	30	49	49.0%	12.2%	38.8%	61.2%
Fifth Circuit	33	4	14	37	51	64.7%	7.8%	27.5%	72.5%
Sixth Circuit	45	6	19	51	70	64.3%	8.6%	27.1%	72.9%
Seventh Circuit	18	3	17	21	38	47.4%	7.9%	44.7%	55.3%
Eighth Circuit	22	6	13	28	41	53.7%	14.6%	31.7%	68.3%
Ninth Circuit	107	33	35	140	175	61.1%	18.9%	20.0%	80.0%
Tenth Circuit	20	1	7	21	28	71.4%	3.6%	25.0%	75.0%
Eleventh Circuit	28	2	20	30	50	56.0%	4.0%	40.0%	60.0%
District of Columbia	13	7	11	20	31	41.9%	22.6%	35.5%	64.5%
Federal Circuit	18	7	5	25	30	60.0%	23.3%	16.7%	83.3%

Table 4. Patent-Related Cases Decide by the Supreme Court from October Terms 1999–2008.

CASE	TERM	DECIDED	DISPOSITION
<i>Nelson v. Adams USA, Inc.</i> , 529 U.S. 460 (2000)	1999	April 25, 2000	Reversed and remanded
<i>J.E.M. Agric. Supply v. Pioneer Hi-Bred, Int'l</i> , 534 U.S. 124 (2001)	2001	December 10, 2001	Affirmed
<i>Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.</i> , 535 U.S. 722 (2002)	2001	May 28, 2002	Vacated and remanded
<i>Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.</i> , 535 U.S. 826 (2002)	2001	June 3, 2002	Vacated and remanded
<i>Merck KGaA v. Integra Lifesciences I, Ltd.</i> , 545 U.S. 193 (2005)	2004	June 13, 2005	Vacated and remanded
<i>Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.</i> , 546 U.S. 394 (2006)	2005	January 23, 2006	Reversed
<i>Illinois Tool Works, Inc. v. Indep. Ink, Inc.</i> , 547 U.S. 28 (2006)	2005	March 1, 2006	Vacated and remanded
<i>eBay Inc. v. MercExchange, L.L.C.</i> , 547 U.S. 388 (2006)	2005	May 15, 2006	Vacated and remanded
<i>MedImmune, Inc. v. Genentech, Inc.</i> , 549 U.S. 118 (2007)	2006	January 9, 2007	Reversed and remanded
<i>KSR Int'l Co. v. Teleflex Inc.</i> , 550 U.S. 398 (2007)	2006	April 30, 2007	Reversed and remanded
<i>Microsoft Corp. v. AT&T Corp.</i> , 550 U.S. 437 (2007)	2006	April 30, 2007	Reversed
<i>Quanta Computer, Inc. v. LG Elecs., Inc.</i> , 128 S. Ct. 2109 (2008)	2007	June 9, 2008	Reversed
<i>Carlsbad Tech., Inc. v. HIF BIO, Inc.</i> , 129 S. Ct. 1862 (2009)	2008	May 4, 2009	Reversed and remanded

Endnote 13

Table 5. All cases reviewed by the Supreme Court since the inception of the Federal Circuit

CASE	TERM	DECIDED	DISPOSITION
<i>Carlsbad Tech., Inc. v. HIF BIO, Inc.</i> , 129 S. Ct. 1862 (2009)	2008	May 4, 2009	Reversed and remanded
<i>Quanta Computer, Inc. v. LG Elecs., Inc.</i> , 128 S. Ct. 2109 (2008)	2007	June 9, 2008	Reversed
<i>Microsoft Corp. v. AT&T Corp.</i> , 550 U.S. 437 (2007)	2006	April 30, 2007	Reversed
<i>KSR Int'l Co. v. Teleflex Inc.</i> , 550 U.S. 398 (2007)	2006	April 30, 2007	Reversed and remanded
<i>MedImmune, Inc. v. Genentech, Inc.</i> , 549 U.S. 118 (2007)	2006	January 9, 2007	Reversed and remanded
<i>eBay Inc. v. MercExchange, L.L.C.</i> , 547 U.S. 388 (2006)	2005	May 15, 2006	Vacated and remanded
<i>Illinois Tool Works, Inc. v. Indep. Ink, Inc.</i> , 547 U.S. 28 (2006)	2005	March 1, 2006	Vacated and remanded
<i>Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.</i> , 546 U.S. 394 (2006)	2005	January 23, 2006	Reversed
<i>Merck KGaA v. Integra Lifesciences I, Ltd.</i> , 545 U.S. 193 (2005)	2004	June 13, 2005	Vacated and remanded
<i>Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.</i> , 535 U.S. 826 (2002)	2001	June 3, 2002	Vacated and remanded
<i>Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.</i> , 535 U.S. 722 (2002)	2001	May 28, 2002	Vacated and remanded
<i>J.E.M. Agric. Supply v. Pioneer Hi-Bred, Int'l</i> , 534 U.S. 124 (2001)	2001	December 10, 2001	Affirmed
<i>Nelson v. Adams USA, Inc.</i> , 529 U.S. 460 (2000)	1999	April 25, 2000	Reversed and remanded
<i>Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank</i> , 527 U.S. 627 (1999)	1998	June 23, 1999	Reversed and remanded
<i>Dickinson v. Zurko</i> , 527 U.S. 150 (1999)	1998	June 10, 1999	Reversed and remanded
<i>Pfaff v. Wells Elec., Inc.</i> , 525 U.S. 55 (1998)	1998	November 10, 1998	Affirmed
<i>Markman v. Westview Instruments, Inc.</i> , 517 U.S. 370 (1996)	1995	April 23, 1996	Affirmed
<i>Asgrow Seed Co. v. Winterboer</i> , 513 U.S. 179 (1995)	1994	January 18, 1995	Reversed
<i>Cardinal Chem. Co. v. Morton Int'l, Inc.</i> , 508 U.S. 83 (1993)	1992	May 17, 1993	Vacated and Affirmed
<i>Eli Lilly & Co. v. Medtronic, Inc.</i> , 496 U.S. 661 (1990)	1989	June 18, 1990	Affirmed
<i>Christianson v. Calk Indus. Operating Corp.</i> , 486 U.S. 800 (1988)	1987	June 17, 1988	Vacated and remanded

Figure 1. Supreme Court's Rates of Review by Circuit for October Terms 1999–2008

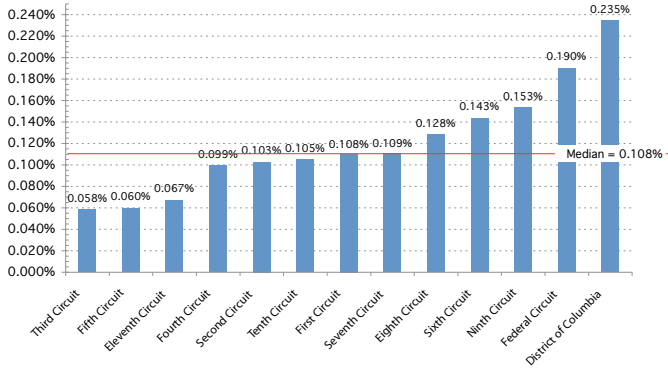


Figure 2. Supreme Court's Reversal Rates by Circuit for October Terms 1999–2008

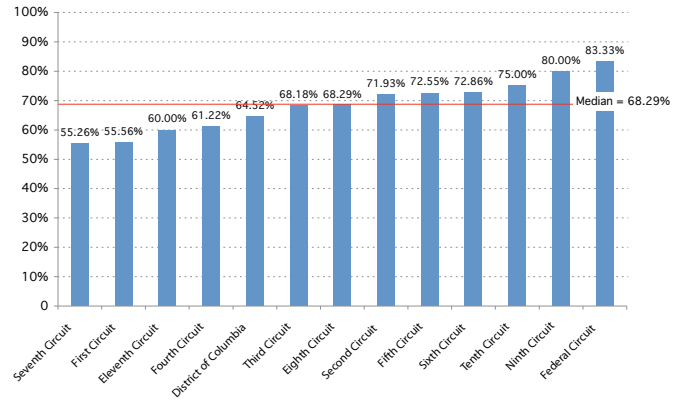


Figure 3. Supreme Court Disposition of Cases by Circuit for October Terms 1999–2008

