

Fed. Circ. Patent Decisions In 2018: An Empirical Review

By **Dan Bagatell** (January 3, 2019, 1:34 PM EST)

In an article published by Law360 last year, I presented an empirical study of the Federal Circuit's patent decisions in calendar year 2017.[1] This article updates and expands that analysis for calendar year 2018.

Methodology and Coverage

Like last year's study, this year's analysis includes all patent cases that the Federal Circuit decided during calendar year 2018, whether by precedential opinion, nonprecedential decision or summary affirmance. The scope includes rulings on writ petitions and dismissals for unappealable subject matter or lack of standing, but it excludes denials of leave to appeal, dismissals based on settlements, stipulated dismissals or remands, and cases sent back to the Patent Trial and Appeal Board for consideration of additional claims or grounds under the U.S. Supreme Court's decision in *SAS Institute Inc. v. Iancu*.[2]

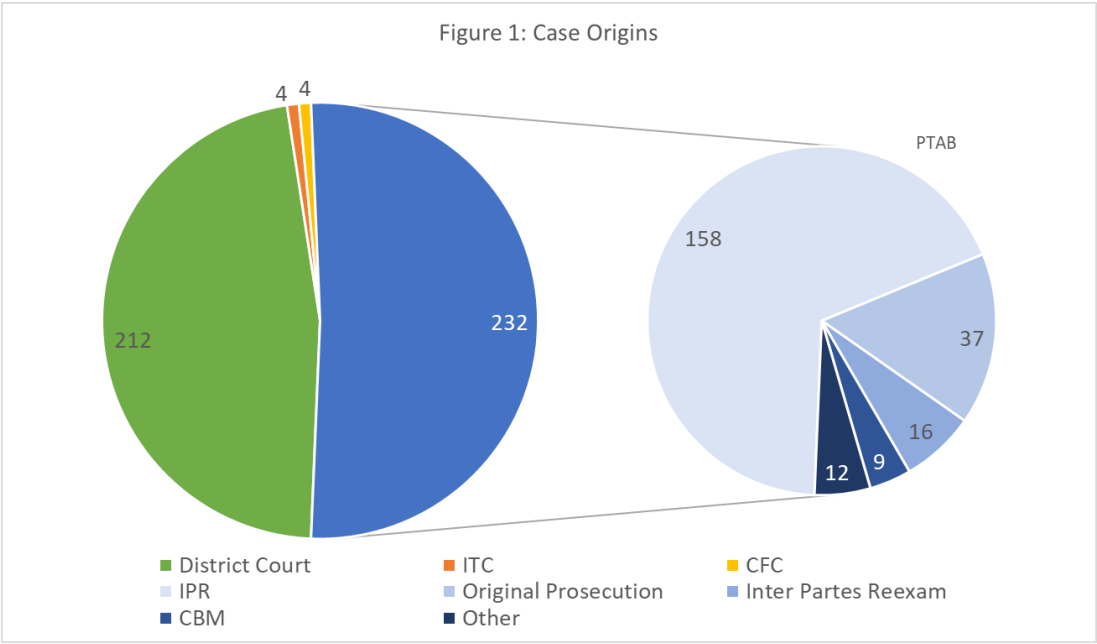


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The analysis covers appeals from district courts, the PTAB, the U.S. International Trade Commission and the Court of Federal Claims, but only cases in which the Federal Circuit decided at least one patent law issue. The study takes decisions as the Federal Circuit issues them: If the court decided three companion cases separately, they are counted as three cases, and if the court decided three cases in a single opinion, they are counted as single case regardless of whether they were formally consolidated.

Overall Caseload and Origins of the Cases

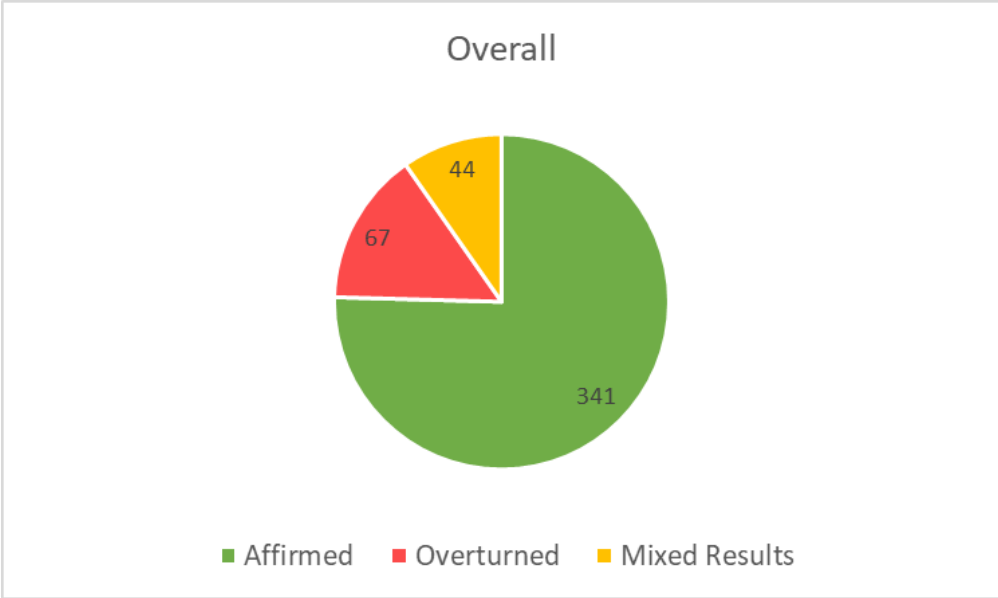
All told, the Federal Circuit decided 452 patent cases in 2018, the same as in 2017. Of those cases, 51 percent came from the PTAB, 47 percent came from district courts, and the remainder came from the ITC or CFC. 2018 marked a slight uptick in the proportion of PTAB cases (from 48 percent in 2017) and a corresponding mild decline in district court cases (from 49 percent in 2017). Appeals from inter partes reviews accounted for much of the increase in PTAB cases: IPR appeals resulted in 35 percent of the Federal Circuit's decisions in 2018, a jump from 29 percent in 2017.

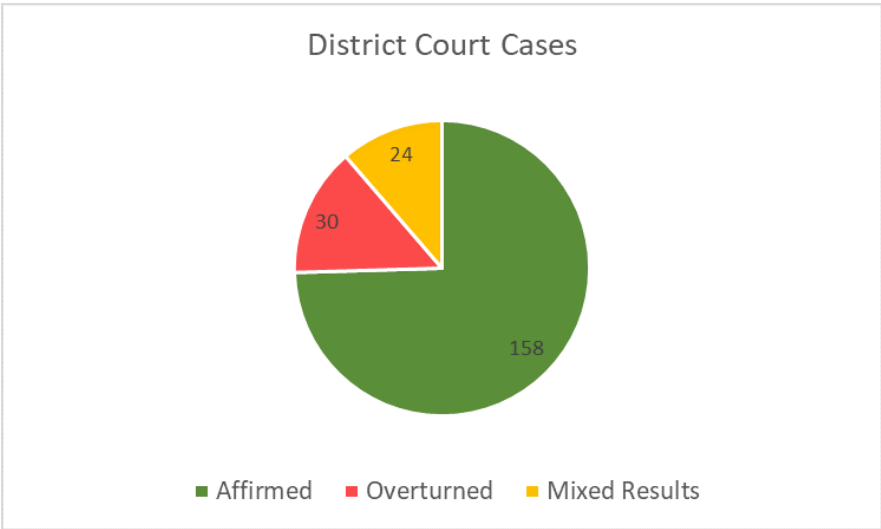
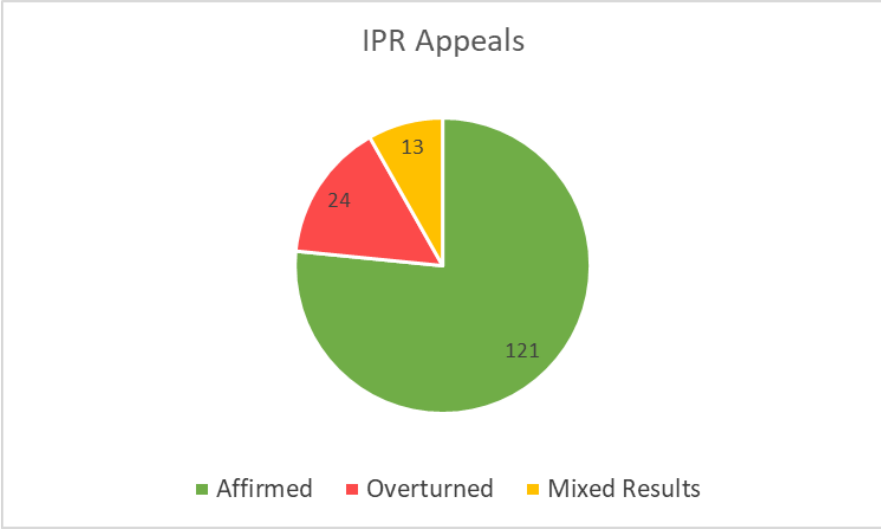
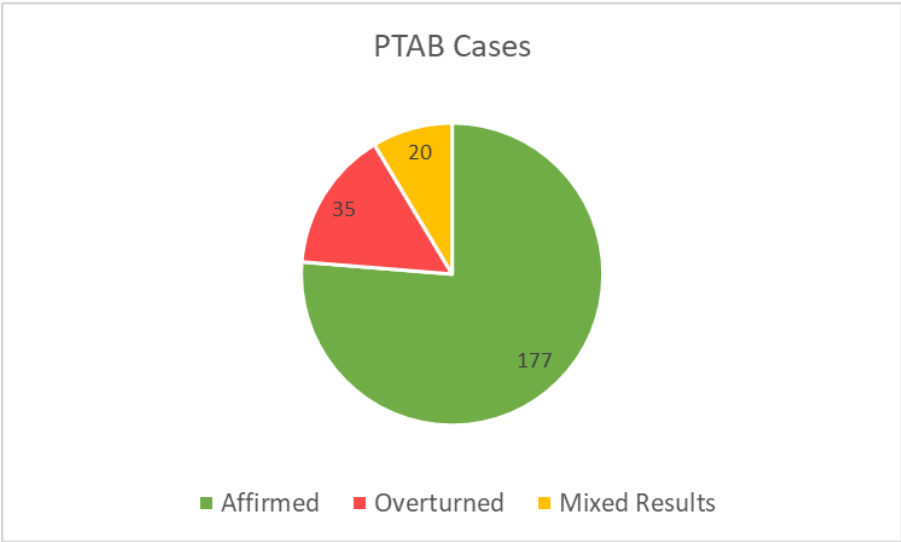


Affirmance Rates Overall and by Venue Below

The Federal Circuit affirmed outright in a little over 75 percent of its patent decisions in 2018.[3] The affirmance rate was slightly higher in PTAB cases (76 percent) than in district court cases (a little under 75 percent), and both of those numbers were similar to levels in 2017. The affirmance rate in appeals from IPRs, however, increased by almost four percentage points in 2018, to nearly 77 percent.

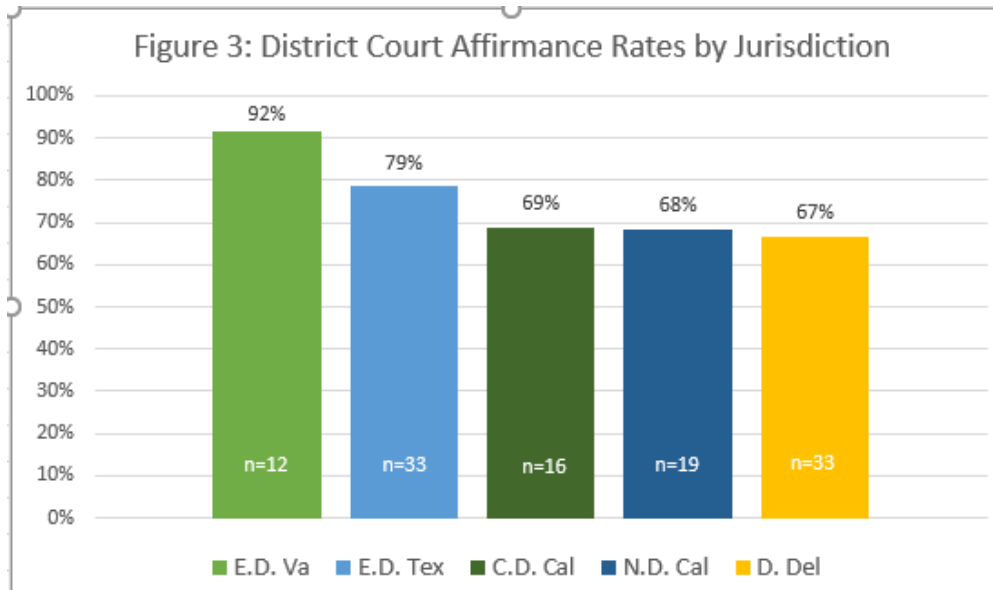
Figure 2: Affirmance Rates





The trends in district courts varied. The Eastern District of Virginia retained the top spot among districts with at least 10 decisions, enjoying a 92 percent affirmance rate. But the affirmance rate for the District

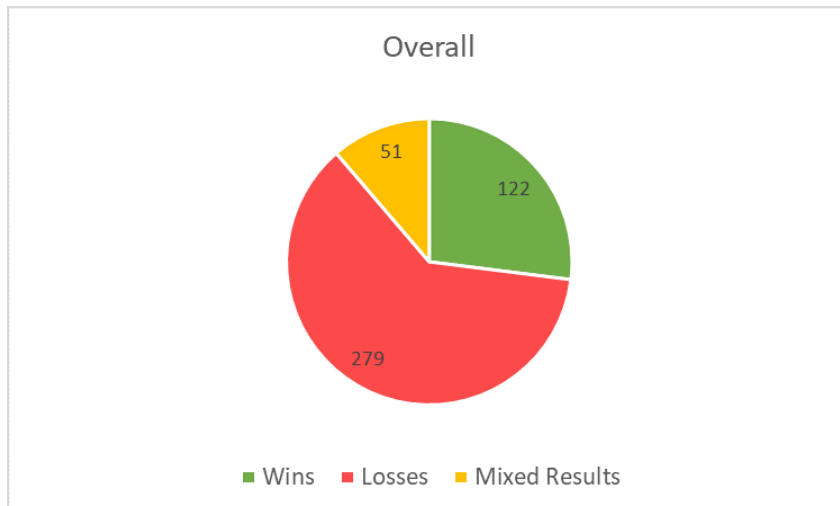
of Delaware dipped from 73 percent in 2017 to 67 percent in 2018, and the affirmance rates for the Northern and Central Districts of California dropped from 88 percent to 68 percent and 86 percent to 69 percent, respectively. By contrast, the affirmance rate in appeals from the Eastern District of Texas rose dramatically from just 54 percent in 2017 to an above-average 79 percent in 2018.



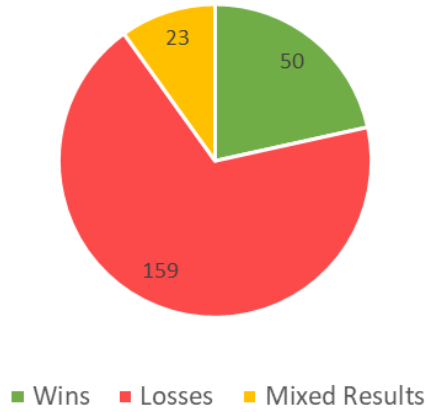
Success Rates for Patent Owners and Patent Applicants

Overall, patent owners and patent applicants prevailed outright in just 27 percent of all appeals. They lost outright 62 percent of the time, and 11 percent of decisions produced mixed results. Patent owners and applicants fared somewhat better in district court appeals, winning 33 percent of the time and achieving mixed results 12 percent of the time, and worse in appeals from the PTAB, winning less than 22 percent of the time and achieving mixed results 9 percent of the time.

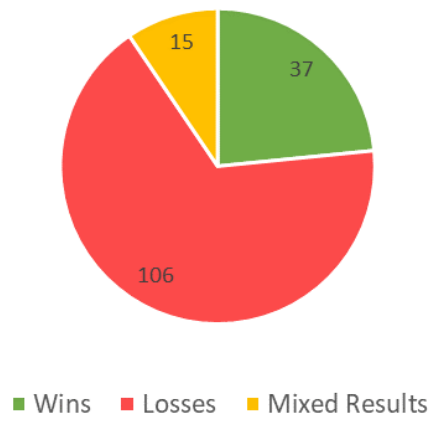
Figure 4: Patent Owner/Applicant Success Rates



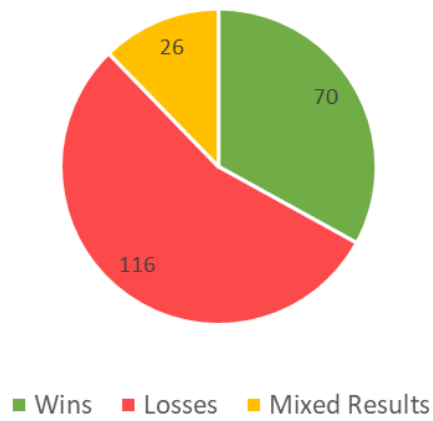
PTAB Cases



IPR Appeals



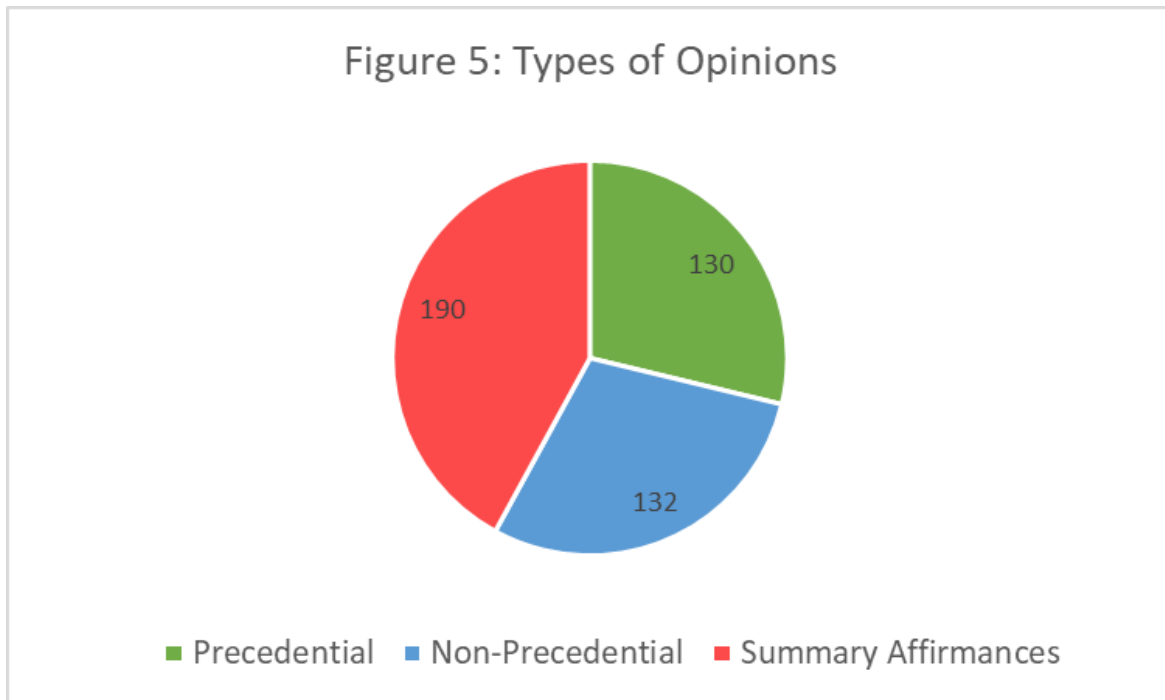
District Court Cases



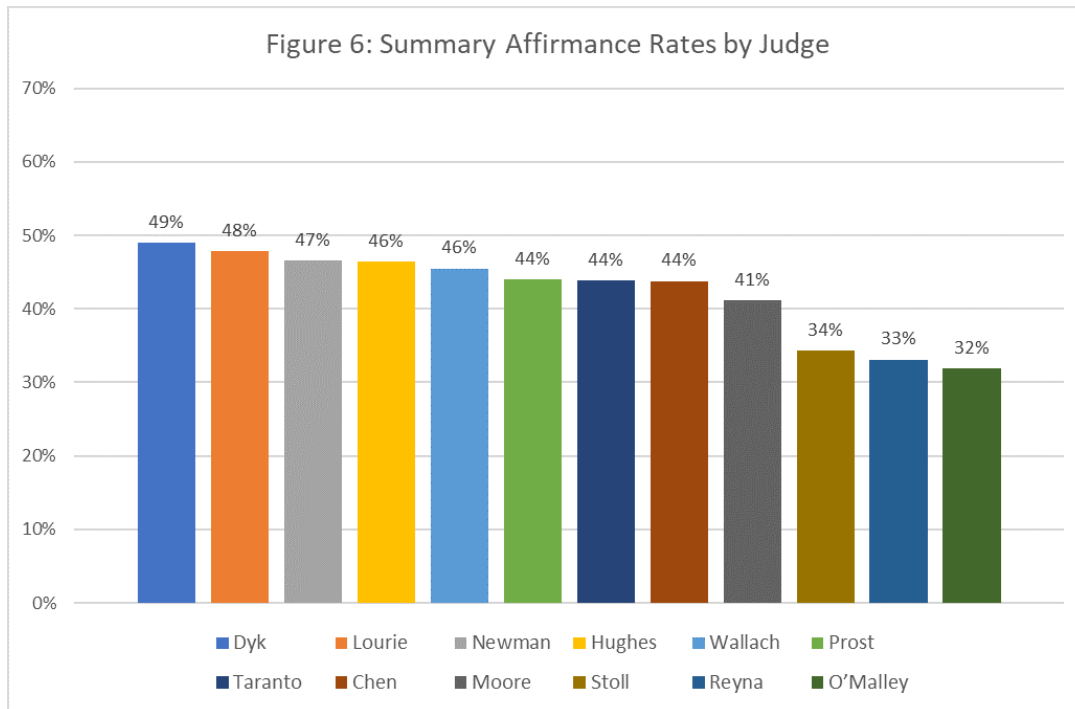
The low success rate for patent owners and applicants is due in part to the fact that they are more likely to be appellants, which prevail only 25 percent of the time. Indeed, in appeals from ex parte re-examinations and original prosecutions, patent owners and applicants are always on the appellant side. Patent owners or applicants prevailed outright in 80 cases in which they were appellees, but in just 42 cases in which they were appellants or cross-appellants. On the other hand, in cases in which appellants managed to beat the odds and win on all issues decided, patent owners or applicants were the victors 60 percent of the time (41 of 68 cases).

Summary Affirmances vs. Full Opinions

The Federal Circuit summarily affirmed in 42 percent of its patent decisions in 2018, up from 37 percent in 2017.[4] The remaining decisions were nearly evenly split between precedential and nonprecedential opinions — unlike in 2017, when nonprecedential opinions outpaced precedential decisions by a large margin (37 percent to 26 percent).



Federal Circuit judges seem to have different tastes for summary affirmances. Panels may summarily affirm under Federal Circuit Rule 36 only if all three panel members agree to do so,[5] yet some judges summarily affirm in nearly half their patent cases while others summarily affirm in less than a third. In particular, the judges with the highest summary affirmation rates in patent cases in 2018 were Judges Timothy Dyk (49 percent), Alan Lourie (48 percent), Todd Hughes (47 percent) and Pauline Newman (47 percent), while the judges with the lowest rates of summary affirmances were Judges Kathleen O'Malley (32 percent), Jimmie Reyna (33 percent) and Kara Farnandez Stoll (34 percent). Perhaps as a result, the judges less inclined to summarily affirm took on additional work: Judge Stoll authored 17 nonprecedential opinions in patent cases in 2018, the most of any judge on the court, while Judge Reyna authored the most precedential opinions (15), closely followed by Judge O'Malley (14).



Disposition Speed

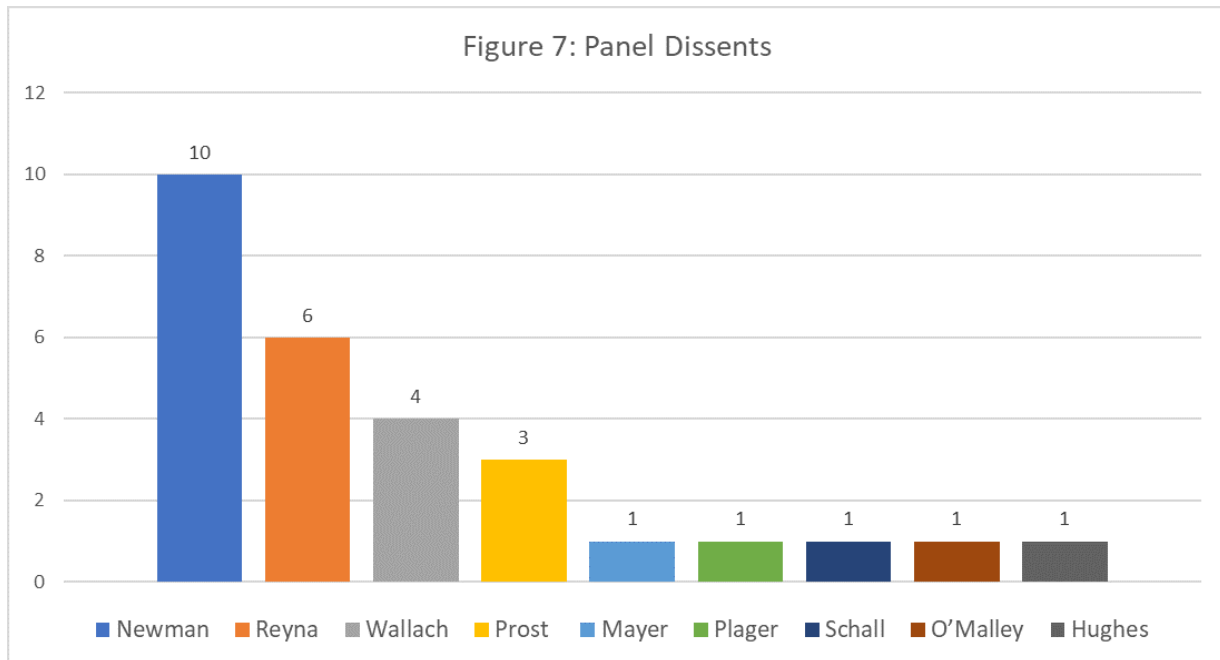
The Federal Circuit’s median time for disposing of patent cases (measured by the time from docketing to a decision after argument or submission on the briefs) was 14 months in 2018, up slightly from past years. The median lag from filing of the joint appendix to oral argument or submission on the papers also grew to over five and a half months. But that rising “frontlog” before argument was not matched by a rising backlog after argument or submission. On average, the court still took three to four months to issue precedential decisions, a little over one month to issue nonprecedential decisions, and a few days to issue summary affirmances.[6]

Once again, the averages mask significant variation across judges—especially in the time to author a precedential decision. Judges Evan Wallach, Kimberly Moore, Alan Lourie, Kathleen O’Malley and Richard Taranto were the speediest active judges, with median times from argument to published opinion of between two and three months, while Judge Newman’s median time from argument to published opinion was over 11 months. Bear in mind, however, that, many factors may affect the gestation period of a precedential opinion, including the complexity of the case, dissents or other disagreements within the court, delays pending decisions in other cases raising related issues, and so forth. Moreover, the number of precedential patent opinions each judge authors per year is small (ranging from seven to 15 in 2018), so anomalies are common.

Dissents and En Banc Cases

Dissents remained relatively rare in 2018. At the panel level, there were only 28 dissents in 450 panel decisions (6 percent), and a substantial portion of those opinions were dissents only in part. Judge Newman authored the most panel-level dissents (10), followed by Judge Reyna (six), Judge Wallach (four) and Chief Judge Sharon Prost (three).[7] No other judge authored more than one panel dissent. Although lawyers and judges often complain that Federal Circuit decisions are unpredictable because results are panel-dependent, little evidence supports that theory. Even in the area of patent eligibility,

which has sharply divided the court in the last decade, there were only five dissents in dozens of cases, and many patent-eligibility cases resulted in summary affirmances.

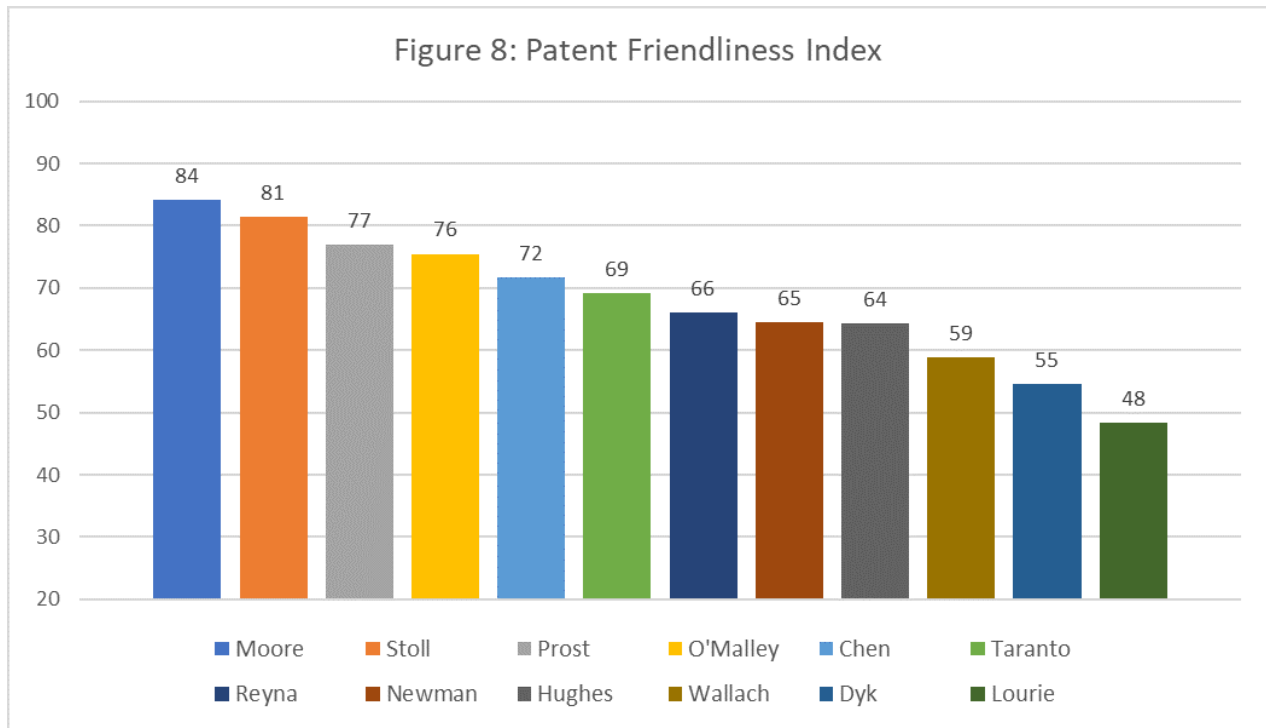


The court decided three patent cases en banc in 2018. All three resulted in victories for the patentee, and all three votes were lopsided (9-4, 7-4 and 10-2). Notably, Judge Dyk dissented in all three en banc cases and Judges Lourie and Hughes dissented in two each, yet Judges Lourie and Dyk had no panel-level dissents and Judge Hughes had only one. Senior Judge William Curtis Bryson also dissented in his only en banc vote, and he had no panel-level dissents.

Patent Friendliness

To test the accuracy of common stereotypes that certain Federal Circuit judges are pro- or anti-patent, this year's study calculated an index of patent friendliness: 100 plus the percentage of votes that the judge cast for patent owners or applicants, minus the percentage of votes that each judge cast against patent owners or applicants. Of course, the index is only a rough measuring stick — the random draw of cases plays a large role, the index weights each case the same regardless of whether it is a major case or a routine IPR or attorneys' fees appeal, and mixed results are ignored.[8] Nevertheless, those prone to stereotyping may find the results somewhat surprising.

As a baseline, the friendliness index for the court for the year as a whole was just under 65 because patent owners and applicants lost outright 62 percent of the time and won outright only 27 percent of the time ($100 + 27 - 62 = 65$). But that average hides considerable underlying variation across judges. Only four of the 12 active judges (Judges Taranto, Reyna, Newman and Hughes) had mid-range index numbers of 60 to 69. Five judges had higher index numbers, indicating greater patent friendliness: Judge Moore at 84, Judge Stoll at 81, Chief Judge Prost at 77, Judge O'Malley at 76, and Judge Raymond Chen at 72. Three judges had lower index numbers, indicating less patent friendliness: Judge Lourie at 48, Judge Dyk at 66, and Judge Wallach at 59.[9] I suspect that few would peg Judge Newman as a centrist and Chief Judge Prost as the third-most patent-friendly judge on the court, but so it was in 2018.



Of course, your mileage in a given case may vary, and the next year's results may differ. We shall see.

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[1] Dan Bagatell, Fed. Circ.'s 2017 Patent Decisions: A Statistical Analysis, Law360 (Jan. 5, 2018).

[2] 138 S. Ct. 1348 (2018).

[3] For purposes of this analysis, affirmances include dismissals of appeals and denials of writ relief. Non-affirmances include reversals, vacatur, and mixed results.

[4] This study defines summary affirmances to include both one-line affirmances under Federal Circuit Rule 36 and single-page decisions with little or no analysis. The latter include, for example, brief decisions stating that the court affirms based on the disposition in a companion appeal or on ground X without reaching ground Y.

[5] See Fed. Cir. Internal Operating Procedure 10.6.

[6] All averages discussed in this and the following paragraph are medians rather than means because outliers may distort mean values. The time periods to decision do not include time that elapses between the initial decision and issuance of the mandate, for example, delays for filing and consideration of a

petition for panel rehearing or rehearing en banc. But when a panel substantively amends an opinion on rehearing, the analysis treats the date of the amended decision as the date of decision.

[7] Judge Reyna's number of dissents is exaggerated because he authored a single dissenting opinion regarding the IPR time-bar that applied to three panel decisions.

[8] Overall, mixed results occurred in a little over 11% of decisions. Of the active judges, Judge O'Malley had the highest percentage of mixed pro- and anti-patent votes in the same case (16%), followed by Judge Dyk (at 15%), while Judge Newman was least likely to split her vote (just 4% of the time), followed by Judge Lourie (at 6%).

[9] The index numbers for individual judges do not average to 65 for several reasons. To begin with, the judges participated in different numbers of patent decisions over the course of the year: Judge Reyna and Wallach in 124, for example, but Judge Newman in just 76 and Judge Moore in 88. Moreover, a 10–2 en banc decision for a patentee counts as ten individual votes for the patentee but only one pro-patentee decision for the court. The numbers for the entire court also include decisions authored and joined by senior judges, who on average were less friendly to patentees than the active judges.