A SNAPSHOT OF BRIEFS, OPINIONS, AND CITATIONS IN FEDERAL APPEALS

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To assist the federal courts in deciding whether to require the courts of appeals to accept citations to their unpublished opinions, the Federal Judicial Center assessed the frequency of citations to unpublished opinions in a sample of federal appeals.[1] This article grew out of that citation study, because my colleagues and I noticed while collecting the necessary data that they contained information about a number of other interesting topics, all of which seemed to us to be of interest to the appellate community. We learned about case disposition times; the frequency with which both published and unpublished opinions are issued; the average length of counseled briefs and the frequency with which they are filed; the average length of both published and unpublished opinions; and the frequency with which various types of authorities are cited in both briefs and

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1. This article presents data collected for a project conducted for the federal Appellate Rules Advisory Committee, resulting in a published report: Robert Timothy Reagan, et al., *Citing Unpublished Opinions in Federal Appeals* (Fed. Jud. Ctr. 2005) [hereinafter *FJC Study*]. New Federal Rule of Appellate Procedure 32.1 requires federal courts of appeals to accept citations to their unpublished opinions issued in 2007 or later, but it is not intended to affect the precedential effect of the opinions.

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opinions. This article presents some of that additional information.

I. THE SAMPLE

We examined the case files of a random sample of fifty cases in each of the thirteen federal courts of appeals selected from among all cases filed in 2002.[2] Because the data were collected for a study of citation practices, we examined counseled briefs filed in each of these cases.[3] We did not examine pro se briefs, because although citation rules apply to pro se litigants, citation behavior by lawyers would be much more relevant to the development of court rules.[4] We did not examine memoranda supporting motions, because these are often short documents with few citations.[5]

This article presents data for circuits individually and estimates for all courts of appeals together. In computing nationwide estimates I weight more heavily the data for courts with more cases.[6] For example, because twenty percent of the cases filed in federal courts of appeals in 2002 were filed in the Ninth Circuit, I weight its data twenty percent in computing averages, while weighting data for the D.C. Circuit two percent, because only two percent of the cases filed in 2002 were filed there.

II. FILING BRIEFS AND PUBLISHING OPINIONS

Most appeals are resolved without counseled briefs. In our sample, only cases with counseled briefs were resolved by published opinions. Cases with counseled briefs filed on both sides were more likely to be resolved by published opinions than were cases with counseled briefs filed on one side only. Our data suggest that approximately thirty-nine percent of cases with

2. *FJC Study*, *supra* n. 1, at 22.

3. *Id.* at 26.

4. *See id.*

5. *See id.*

6. Figure 1 provides the number of filings in 2002 for each of the federal courts of appeals. (All figures and tables referenced this article can be found in Appendices A and B, which follow the text.)

counseled briefs on both sides are resolved by published opinions.

We found counseled briefs filed in forty-one percent of the cases in our sample.[7] Taking into account the number of cases filed in each court, this suggests that approximately thirty-nine percent of the cases filed in 2002 had counseled briefs filed. As Table 1 demonstrates, the percentage of cases with counseled briefs ranged from twenty-two percent in the Fourth Circuit to fifty-four percent in the Eighth Circuit.[8]

Not all cases with counseled briefs had counseled briefs filed on both sides. Pro se cases accounted for approximately three-quarters of the cases with counseled briefs on one side only.[9] Some cases were dismissed before appellee briefs were filed—either because of settlement or resolution on motion.[10]

The data shown in Table 1 indicate that from a large minority to a substantial majority of cases filed in each court had no counseled briefs filed. But as figure 3 demonstrates, nearly one-third of these cases are denials of pro se applications for certificates of appealability or for successive habeas corpus petitions. Almost another third of these cases were dismissed as improper for some reason, such as failure to prosecute or lack of jurisdiction. More than a quarter were voluntarily dismissed. Other reasons for no counseled brief filed included pro se appeals dismissed on motion and mandamus actions decided without formal briefing.[11]

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7. *FJC Study*, *supra* n. 1, at 26.

8. *Id.* at 26 & n. 48.

9. *See* Figure 2.

10. We observed two cases with counseled briefs filed on one side only for other reasons. In one, the appellant filed a counseled application for a certificate of appealability, which was denied. (It is much more common for such applications to be filed pro se.) The other case was part of a complex consolidation including a successful appeal of the denial of qualified immunity. One plaintiff decided not to respond to the defendant's brief as appellant because a motion to dismiss for lack of jurisdiction was pending.

11. We observed twenty-two cases in which there were other reasons why no counseled brief was filed. Five cases were transferred before briefing, five were dismissed or remanded summarily because of new law, three were in abeyance and might still have been briefed, two were immigration appeals resolved on motion, one was remanded on a joint motion, and one was dismissed for administrative error. Another case was a pro se appeal in which the court vacated the district court's dismissal of the complaint for the limited purpose of permitting the plaintiff to properly identify the defendants. The remaining case was part of a complex consolidation: The selected appeal concerned an award of attorney fees; the main appeal was unsuccessful, and the attorney fee issue was not briefed.

The percentage of cases with counseled briefs on both sides—cases we designated as "fully briefed"—ranged from twelve percent in the Fourth Circuit to forty percent in the Third and the Eighth Circuits. From these data, we estimate an average of twenty-seven percent in all circuits combined.[12]

In our sample of cases, ninety-nine percent were resolved during the study period.[13] Of these, fourteen percent were resolved by published opinions, thirty-one percent were resolved by unpublished opinions, and fifty-five percent were resolved without opinions.[14] If we take into account the number of cases filed in each circuit, this implies that among all cases an estimated ten percent were resolved by published opinions, approximately thirty-one percent were resolved by unpublished opinions, and about fifty-nine percent were resolved without opinions.[15]

From our sample of case files we can estimate how many counseled briefs were filed in 2002 cases, but to do that we have to take into account consolidations. It is not uncommon for both sides of a case concluded in the trial court to file an appeal, with one of the filings designated the appeal and given one case number, and the other filing designated a cross-appeal and given another case number. The appeal and cross-appeal usually are consolidated, with one set of briefs filed to cover both cases. If we want to estimate from our sample the average number of briefs per case, then we should count each brief filed in a two-case consolidation as half a brief. Similar principles would apply to more complicated consolidations. For example, if three losing defendants each filed an appeal and the three appeals were consolidated, and if each appellant filed a separate brief, but the appellee filed one brief to cover all three appeals, then each appellant brief would count as one brief, but the appellee brief would count as one-third of a brief. Our data suggest that in 2002, an average of 0.80 counseled briefs per case were filed in

12. *See* Table 1.

13. Of the 650 cases in our sample, 644 were resolved. *FJC Study, supra* n. 1, at 22. The unresolved cases include two in the D.C. Circuit and one each in the Second, Third, Ninth, and Tenth Circuits. *Id*. at 22, n. 37.

14. *See id*. at 23, 25 (reporting percentages of all 650 cases instead of percentages of the 644 resolved cases).

15. *See* Table 2.

federal appeals, ranging from an average of 0.31 briefs per case in the Fourth Circuit to an average of 1.28 briefs per case in the Eighth Circuit.[16]

We determined that fully briefed cases are much more likely to be resolved by published opinions than are cases with counseled briefs filed on only one side. And we also observed that no case without any counseled brief filed was resolved by a published opinion in our sample.

Among cases without any counseled brief filed, all were resolved without opinion in five circuits—the Second, Seventh, Eighth, Ninth, and Eleventh Circuits.[17] The percentage of cases without counseled briefs that were resolved without opinion in the other circuits ranged from forty-six percent in the Fourth Circuit to ninety-six percent in the First and Third Circuits. Our data suggest that overall, eighty-nine percent of cases filed in 2002 without counseled briefs were resolved without opinions, and eleven percent were resolved with unpublished opinions.

The Fourth Circuit issued the highest percentage of opinions in cases without counseled briefs—fifty-four percent. Of the thirty-nine Fourth Circuit cases in our sample without counseled briefs, the court resolved twenty-one with opinions. Approximately half of these opinions—ten—deny certificates of appealability. Other circuits generally deny certificates of appealability without opinion, but the Fourth Circuit appears to deny them with form unpublished opinions.[18]

Cases with counseled briefs filed on one side only—"partially briefed" cases—were resolved mostly by unpublished opinions. Our data suggest that overall eighty-one percent of the cases filed in 2002 with counseled briefs on one side only were resolved with unpublished opinions, ranging from just fourteen percent in the First Circuit to one hundred percent in the courts of appeals for the Eighth, Ninth, Tenth, and D.C. Circuits.[19] Our data suggest that overall seventeen percent were resolved without opinions, and two percent were resolved with published

16. *FJC Study, supra* n. 1, at 26 n. 48. *See also* Table 1.

17. *See* Table 3.

18. *See e.g. Jenkins v. Bell*, 30 Fed. Appx. 115 (4th Cir. 2002) (denying certificate and dismissing appeal "on the reasoning of the district court")

19. *See* Table 4.

opinions. There were only three partially briefed cases in our sample resolved by published opinions.[20]

Our data—reported in Table 5—suggest that a bare majority of fully briefed cases filed in 2002 were resolved by unpublished opinions and that over a third were resolved by published opinions. In six circuits (the First, Second, Seventh, Eighth, Tenth, and D.C. Circuits), however, most fully briefed cases were resolved by published opinions.

The court resolving the largest percentage of fully briefed cases without opinion was the Federal Circuit, which resolved seven (or fifty-eight percent) of its twelve fully briefed cases without opinion. Two of these cases were voluntarily dismissed, and one was dismissed as moot. The other four were unsuccessful appeals resolved by per curiam judgments without opinion.[21]

The First Circuit resolved five (or thirty-one percent) of its sixteen fully briefed cases without opinion. But this court often explains its holdings without opinion in textually rich docket entries.[22]

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20. *Santana v. Calderón*, 342 F.3d 18 (1st Cir. 2003) (successful appeal of the denial of qualified immunity in a complex consolidation in which the plaintiff elected not to brief the selected appeal because a motion to dismiss for lack of jurisdiction was pending); *Miniat v. Ed Miniat, Inc.*, 315 F.3d 712 (7th Cir. 2002) (unsuccessful civil appeal in a corporate governance case, in which the plaintiff-appellant, an attorney, appeared pro se); *Campion v. Merit Sys. Protection Bd.*, 326 F.3d 1210 (Fed. Cir. 2003) (unsuccessful pro se appeal of a decision by the Merit Systems Protection Board that it did not have jurisdiction over the case because the petitioner was not a preference-eligible veteran).

21. *See e.g. Watts v. XL Systems, Inc.*, 56 Fed. Appx. 922, 2003 WL 932439 (Fed. Cir. 2003) ("This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: AFFIRMED. See Fed. Cir. R. 36."). The rule cited in *Watts* provides that

> [t]he court may enter a judgment of affirmance without opinion, citing this rule, when it determines that any of the following conditions exist and an opinion would have no precedential value:
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> (a) the judgment, decision, or order of the trial court appealed from is based on findings that are not clearly erroneous;
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> (b) the evidence supporting the jury's verdict is sufficient;
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> (c) the record supports summary judgment, directed verdict, or judgment on the pleadings;
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> (d) the decision of an administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review; or
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> (e) a judgment or decision has been entered without an error of law.

Fed. Cir. R. 36.

22. *See e.g. U.S. v. Santiago*, No. 02-1610 (1st Cir. Mar. 6, 2003). This is the docket sheet entry resolving the case:

III. VOLUME PER JUDGESHIP

It is clear that not all cases require the same amount of work by the court. A case without briefs that is resolved without opinion will generally require considerably less work than a fully briefed case resolved by a published opinion. And not all briefs and opinions require the same amount of work. A 10,000-word brief will generally require substantially more time to read and review than a 1,000-word brief.

We computed the length of all of the briefs and opinions filed in our sample of cases. These computations were somewhat crude, because although some documents were available electronically, some had to be scanned and passed through character-recognition software. Such software often results in errors, but the data appear to be sufficiently accurate for general conclusions.

Our data suggest that there were 340 cases filed per court of appeals judgeship in 2002.[23] This ranged from ninety-two cases per judgeship in the D. C. Circuit to 614 cases per judgeship in the Eleventh Circuit.

There was fairly close agreement between cases per judgeship and counseled briefs per judgeship, keeping in mind that there was an average of 0.80 counseled briefs filed per case. The Fourth Circuit had noticeably fewer briefs per judgeship than other courts compared with its number of cases per judgeship, and the Eighth Circuit had noticeably more briefs per

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JUDGMENT filed Judge Selya, Judge Stahl, and Judge Lynch closing case. Challenges the sufficiency of the evidence to support his conviction for unlawful possession of ammunition. 18 U.S.C. § 922(g)(1). We review sufficiency of the evidence claims viewing the evidence "in the light most amiable to the government and taking all reasonable inferences in its favor." *United States v. Moran*, 312 F. 3d 480, 487 (1st Cir. 2002). The transcript of the trial shows, however, that there was evidence, which a rational jury could credit, that appellant admitted possession of the ammunition to the agents searching his apartment pursuant to a warrant and then shortly thereafter contradicted himself, denying ever having seen it before. The jury was entitled to consider, in addition to the testimony that appellant made inculpatory statements, the circumstantial evidence of constructive possession, for example, the fact that the ammunition was kept in a closet which held appellant's possessions. *Cf. United States v. Echeverri*, 982 F. 2d 675 (1st Cir. 1993); *United States v. Ortiz*, 966 F. 2d 707 (1st Cir. 1992). The judgment of conviction is affirmed. 1st Cir. R. 27(c).

23. *See* Figure 4.

judgeship than other courts compared with its number of cases per judgeship.

Summing the words in the counseled briefs and the published and unpublished opinions, the data suggest an average of 5,012 words per case and 1.7 million words per judgeship in 2002. The data for individual circuits ranged from an estimated 0.6 million words per judgeship in the Fourth Circuit to an estimated 2.9 million words per judgeship in the Eleventh Circuit.

IV. CITATIONS TO AUTHORITY

Citations to published opinions greatly outnumber citations to unpublished opinions or secondary sources.

We counted all citations to opinions and certain other authorities in all of the counseled briefs and opinions in our sample of cases.[24] We did not count citations to statutory and similar authorities, because they are difficult to enumerate.[25] For example, should two sections of the same statute count as one or two citations?[26] How about two paragraphs of the same section? How about a citation to a statute that includes twelve sections?

Among citations to non-statutory authorities, an estimated ninety percent were to published court opinions, ranging from eighty-one percent in the D.C. Circuit to ninety-nine percent in the Fifth Circuit.[27] An estimated one percent were citations to unpublished court opinions, ranging from 0.4% in the D.C. Circuit to five percent in the Sixth Circuit. An estimated six percent of citations to non-statutory authorities were citations to agency or arbitrator decisions, which are represented in Table 6 as "other opinions," ranging from a low of zero in the Fifth Circuit to a high of fourteen percent in the D.C. Circuit. The remaining estimated three percent of citations to non-statutory authorities were to "other authorities," which include

24. *FJC Study, supra* n. 1, at 26. This included 213 appellant briefs, 260 appellee briefs, 145 reply briefs, 15 amicus curiae and intervenor briefs, and 296 opinions.

25. *Id.*

26. *Id.* at 26 n. 49.

27. *See* Table 6.

restatements, treatises, law review articles, dictionaries, and the like.[28]

A. Published Court Opinions

We observed 16,789 citations to published court opinions in the opinions and counseled briefs in our sample of cases. As can be seen in Figure 5, approximately one quarter of these were citations to Supreme Court opinions, nearly half were citations to published opinions by the court hearing the case, and approximately one-fifth were citations to other federal courts of appeals. An estimated seven percent were citations to published opinions by other federal courts, including district courts,[29] and an estimated six percent were citations to published opinions by state courts.[30] The pattern is very similar in all circuits, although citations to state court opinions are noticeably most frequent in Fifth Circuit cases.

We observed twenty-three citations to opinions by foreign courts. These occurred in three cases in two circuits.

In a case before the D.C. Circuit,[31] initially an unsuccessful appeal of the district court's judgment that federal courts do not have jurisdiction over alien prisoners held at the Guantanamo Bay Naval Base in Cuba, but subsequently remanded to the district court after reversal by the Supreme Court,[32] the appellant cited five foreign court opinions[33] and amici curiae cited

28. These data do not include citations to opinions in related cases, such as an opinion in the case reviewed, or an opinion in an earlier phase of the case; briefs in other cases; or unreported judgments.

29. In addition to published opinions by district courts, we observed citations to published opinions by bankruptcy courts, the Tax Court, the Court of Federal Claims, the Court of Appeals for Veterans Claims, the Court of Military Appeals, the Court of Military Justice, and the United States Court of Berlin.

30. The pattern is very much the same for citations in briefs and citations in opinions.

31. *Habib v. Bush* (D.C. Cir. 02–5284, filed 09/11/2002, judgment 07/19/2004), initially resolved by *Al Odah v. U.S.*, 321 F. 3d 1134 (D.C. Cir. 2003), *rev'd*, *sub nom. Rasul v. Bush*, 542 U.S. 466 (2004).

32. *Rasul v. Bush*, 542 U.S. 466 (2004).

33. The appellant cited three opinions by the European Court of Human Rights, one opinion by the International Court of Justice, and one opinion by the Organization of American States' Inter-American Commission on Human Rights.

sixteen.[34] The court did not cite any foreign court opinions in its opinion initially resolving the case.[35]

The two other cases were in the Second Circuit, where the government cited an opinion by Great Britain's privy council in an immigration appeal[36] and the appellant cited an opinion by the court of appeal for England and Wales in an arbitration appeal.[37]

B. Unpublished Court Opinions

We observed 247 citations to unpublished court opinions; 229 of these citations were in briefs and eighteen were in opinions. The citations to unpublished opinions by the courts occurred in thirteen cases in six circuits—in eight published opinions and five unpublished opinions.

A third of the citations to unpublished opinions were in Tenth Circuit cases. In the Tenth Circuit, as in most circuits, unpublished opinions are not binding precedents in unrelated cases, and their citation was disfavored at the time of this

34. Human rights organizations and legal scholars cited two nineteenth century opinions by English courts (one by the court of common pleas and one by the admiralty court), six opinions by the European Court of Human Rights, four opinions by the United Nations Human Rights Committee, one opinion by the United Nations Working Group on Arbitrary Detention, two opinions by the Organization of American States's Inter-American Commission on Human Rights, and one opinion by the International Court of Justice.

35. *See Al Odah*, 321 F. 3d 1134. The Supreme Court, however, did cite twelve English opinions in its discussion of the history of the writ of habeas corpus. *Rasul*, 542 U.S. at 481-83, 481 n. 11, 482 n. 12-14.

36. *Ni v. U.S. Dept. of Justice* (2d Cir. 02–4764, filed 11/18/2002, judgment 09/13/2005) (unsuccessful appeal of the denial of asylum by a Chinese citizen, because, in part, his claims that his wife was sterilized after having a second child contradicted his wife's statement that she fled China to avoid sterilization).

37. *Duferco Intl. Steel Trading v. T. Klaveness Shipping A/S* (2d Cir. 02–7238, filed 03/07/2002, judgment 06/24/2003) (unsuccessful appeal of the district court's refusal to set aside an arbitration decision concerning the shipping of steel slabs).

study.[38] But in an unpublished opinion, the court cited one of its unpublished opinions as a precedent.[39]

In another published opinion,[40] the court cited both one of its own unpublished opinions[41] and an unpublished opinion by the Ninth Circuit.[42] This is ironic, because the Ninth Circuit's rules do not permit parties or the court itself to cite its unpublished opinions in unrelated cases.[43] In another published opinion, [44] the court cited one of its own unpublished opinions

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38. Tenth Circuit Rule 36.3(A) formerly provided that "[u]npublished orders and judgments of this court are not binding precedents, except under the doctrines of law of the case, res judicata, and collateral estoppel." Tenth Circuit Rule 36.3(B) formerly provided that "[c]itation of an unpublished decision is disfavored. But an unpublished decision may be cited if (1) it has persuasive value with respect to a material issue that has not been addressed in a published opinion; and (2) it would assist the court in its disposition."

39. *Jackson v. Barnhart*, 60 Fed. Appx. 255, 256 n. 1 (10th Cir. 2003) (citing *Bellamy v. Massanari*, 29 Fed. Appx. 567 (10th Cir. 2002)). *Jackson* concerned Social Security disability benefits, and the citation to a previous unpublished opinion supported the statement that the court was continuing to apply a regulation concerning disability coverage for alcoholism even after other related regulations had been amended. *Id.* at 256 n. 1.

40. *U.S. v. Cruz-Alcala*, 338 F. 3d 1194 (10th Cir. 2003).

41. *Id.* at 1197 (citing *U.S. v. Molina-Barajas*, 47 Fed. Appx. 552 (10th Cir. 2002)). The issue was whether a previous misdemeanor conviction received in a proceeding in which the defendant was without counsel could be used as a factor in connection with sentence enhancement. The court stated that it had established no precedential authority on whether an involuntary or unknowing waiver of counsel amounted to a complete denial of counsel, but acknowledged the existence of its unpublished opinion finding that the appellant had offered no evidence to rebut the state's evidence that the waiver was voluntary and knowing. *Molina-Barajas*, 47 Fed. Appx. at 555.

42. *Cruz-Alcala*, 338 F. 3d at 1199 (citing *U.S. v. Viveros-Castro*, 1998 WL 225053 (9th Cir. 1998)). The *Cruz-Alcala* court cited published opinions by the Fourth Circuit and the Eighth Circuit, and an unpublished opinion by the Ninth Circuit, to support a principle that for sentence enhancement purposes what matters is the sentence pronounced, not the actual amount of time served.

43. Unpublished dispositions and orders of this Court issued before January 1, 2007 may not be cited to or by the courts of this circuit, except in the following circumstances.

> (i) They may be cited to this Court or to or by any other court in this circuit when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.
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> (ii) They may be cited to this Court or by any other courts in this circuit for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case.
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> (iii) They may be cited to this Court in a request to publish a disposition or order made pursuant to Circuit Rule 36–4, or in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders.

9th Cir. R. 36–3(b) (as amended eff. Jan. 1, 2007).

44. *Wiransane v. Ashcroft*, 366 F.3d 889 (10th Cir. 2004).

and an unpublished opinion by the Third Circuit,[45] even though that circuit permits parties, but not the court itself, to cite its unpublished opinions.[46]

In a high-profile case concerning application of the Religious Freedom Restoration Act to prosecutions for religious use of a hallucinogenic tea-like mixture called hoasca, ultimately affirmed by the Supreme Court,[47] the Tenth Circuit issued three published opinions. First, the court stayed the district court's preliminary injunction against hoasca prosecutions pending resolution of an appeal,[48] then the court affirmed the injunction in a panel decision,[49] and then in an en banc decision.[50] Both the stay opinion and some of the opinions concurring in part and dissenting in part with respect to the en banc opinion cite an unpublished opinion by the Eighth Circuit upholding application of the Controlled Substances Act to arguably religious uses of marijuana.[51]

The only other court to cite in our sample its own unpublished opinions in unrelated cases was the Sixth Circuit, which ostensibly disfavored citation to its unpublished

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45. *Id*. at 898 (citing *Limerta v. Ashcroft*, 88 Fed. Appx. 363 (10th Cir. 2004); *Lauw v. Ashcroft*, 85 Fed. Appx. 871 (3d Cir. 2003)).

46. "The court by tradition does not cite to its not precedential opinions as authority. Such opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing." 3rd Cir. I.O.P. 5.7 (eff. 2002). *See also EEOC v. Watson Standard Co*., 119 F.R.D. 632, 632 (W.D. Pa. 1988) (declining to reconsider earlier decision to take account of unpublished decision when counsel who brought that decision to the court's attention later challenged its precedential value); *In re Mays*, 256 B.R. 555, 558 (Bankr. D.N.J. 2000) (indicating that attorneys appearing before the court may rely on unpublished opinions in the absence of Circuit or local rules prohibiting that reliance); *Citation of Unpublished Opinions: Panel Discussion: The Appellate Judges Speak*, 74 Fordham L. Rev. 1, 10 (2005) (remarks of Edward R. Becker, J., senior circuit judge and former chief judge of the Third Circuit (noting that "we do not cite our own non-precedential opinions in our opinions").

47. *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418 (2006).

48. *O Centro Espirita Beneficiente Uniao de Vegetal v. Ashcroft*, 314 F.3d 463 (10th Cir. 2002) (*OCEBUV I*).

49. *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 342 F.3d 1170 (10th Cir. 2003).

50. *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973 (10th Cir. 2004) (*OCEBUV III*).

51. *OCEBUV I*, 314 F.3d at 467 (citing *U.S. v. Brown*, 72 F.3d 134 (8th Cir. 1995) (unpublished opinion reported in table); *OCEBUV III*, 389 F.3d at 984 (Murphy, J., concurring in part and dissenting in part) (citing *U.S. v. Brown*, No. 95-1616 (Dec. 12, 1995)), 1020 (Seymour, J., concurring in part and dissenting in part) (same).

opinions.[52] Three of the court's opinions in our sample—one published and two unpublished—cited an unpublished opinion by the court.[53] In another unpublished opinion, the court cited an unpublished district court opinion.[54]

The other citations to unpublished opinions in our sample were citations to opinions by other courts. In an unpublished opinion, the First Circuit distinguished two unpublished Eleventh Circuit opinions that the appellant apparently cited in his pro se brief.[55] And the Third Circuit cited unpublished district court opinions in two of its published opinions.[56]

In a published opinion, the Seventh Circuit cited a depublished opinion by a district court in another circuit.[57] The appellant relied heavily on the depublished opinion and also cited the district court's published opinion, while the Seventh Circuit cited both opinions to answer the appellant's argument.

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52. Sixth Circuit Rule 28(g) used to discourage citations to unpublished opinions:

> Citation of unpublished decisions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case. If a party believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case, and that there is no published opinion that would serve as well, such decision may be cited if that party serves a copy thereof on all other parties in the case and on this Court. Such service shall be accomplished by including a copy of the decision in an addendum to the brief.

The rule now permits such citations: "Citation of unpublished opinions is permitted." 6th Cir. R. 28(g).

53. *Smith v. Henderson*, 376 F.3d 529, 536 (6th Cir. 2004) (citing *Brown v. Chase Brass & Copper Co.*, 14 Fed. Appx. 482 (6th Cir. 2001)); *Klimik v. Kent County Sheriff's Dept.*, 91 Fed. Appx. 396, 400 (6th Cir. 2004) (citing *Bower v. Vill. of Mount Sterling*, 44 Fed. Appx. 670, 677 (6th Cir. 2002)); *Moore v. Potter*, 47 Fed. Appx. 318, 320 (6th Cir. 2002) (citing *Savage v. Unknown FBI Agents*, No. 97-3311 (6th Cir. Feb. 10, 1998)).

54. *Hauck v. Commr. of Internal Revenue*, 64 Fed. Appx. 492, 493 (6th Cir. 2003) (citing *Perez v. U.S.*, No. 3:00CCV00302 (W.D. Tex. Oct. 11, 2001)).

55. *U.S. v. Quiñones-Rodríguez*, 70 Fed. Appx. 591, 591 n. 1 (1st Cir. 2003).

56. *See W.V. Realty Inc. v. N. Ins. Co. of N.Y.*, 334 F. 3d 306, 313-14 (3d Cir. 2003) (citing three unpublished opinions by the United States District court for the Eastern District of Pennsylvania); *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation*, 401 F. 3d 143, 168 (3d Cir. 2005) (Ambro, J., concurring) (citing an unpublished decision of the United States District court for the Eastern District of Pennsylvania).

57. *U.S. v. George*, 363 F. 3d 666, 672 (7th Cir. 2004) (citing *U.S. v. Llera Plaza*, 179 F. Supp. 2d 492 (E.D. Pa. 2002), *vacated*, *U.S. v. Llera Plaza*, 188 F. Supp. 2d 549 (E.D. Pa. 2002)). The cited opinion famously ruled that fingerprint evidence lacked sufficient scientific validity to be admissible as evidence, but the district court vacated its own ruling and depublished its opinion on reconsideration.

The remaining citation by a court of appeals to an unpublished opinion was a citation in a published opinion by the D.C. Circuit to an unpublished consent decree entered in an EPA case by the United States District Court for the District of Columbia.[58]

The Second, Seventh, Ninth, and Federal Circuits forbade citation to their unpublished opinions in unrelated cases during the time of this study.[59] In our sample of cases before the Seventh Circuit, we did not find any citations to unpublished opinions.[60] But in the other three courts, we found citations to unpublished opinions issued by the forum court.

In the cases we examined in the Ninth and Federal Circuits, citations in briefs to the court's unpublished opinions may be regarded as innocent, merely informational, violations of the courts' proscriptions against the practice. In one case before the Ninth Circuit, an immigration petitioner cited a depublished Ninth Circuit opinion and a published opinion that superseded it, and it may be that only citation to the superseding opinion was intended as authority.[61] In a Ninth Circuit sentencing appeal, the government noted that a cited published opinion by the court was amended on denial of rehearing by both a published opinion concerning the sentence and an unpublished opinion concerning the conviction.[62] And in an appeal in the Federal Circuit, the government cited an unpublished opinion by the court to point out that the pro se petitioner should not have cited it.[63]

We observed four citations to the Second Circuit's unpublished opinions in three Second Circuit appeals, and these citations appear to violate the court's rule proscribing them.[64]

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58. *N.E. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 941 n. 5 (D.C. Cir. 2004) (citing consent decree entered in *Sierra Club v. Whitman*, No. 01-1537 (D.D.C. July 16, 2001)).

59. The Second, Seventh, and Ninth Circuits still forbid citations to unpublished opinions issued before 2007 in unrelated cases. 2d Cir. R. § 0.23(c)(2); 7th Cir. R. 32.1(d); 9th Cir. L.R. 36–3(c). The Federal circuit no longer forbids citation to its unpublished opinions. Fed. Cir. R. 32.1.

60. *See* Figure 6.

61. *See FJC Study*, *supra* n. 1, at 234, 242.

62. *Id.* at 234, 238.

63. *Id.* at 293, 299.

64. *Id.* at 141, 144, 147, 151.

The Fifth Circuit permits citations to its unpublished opinions,[65] but we did not observe any in our sample of cases.[66] In fact, we observed only four citations to unpublished court opinions of any kind among the Fifth Circuit cases in our study.[67]

Overall, approximately one quarter of citations to unpublished court opinions were citations to federal appellate opinions, half of these issued by the court hearing the case and half issued by another circuit.

C. Other Authorities

One of the ironies often articulated to support a rule requiring courts to accept citations to their unpublished opinions was well expressed in the *Daily Journal*: "Lawyers may cite sonnets by Shakespeare or scenes from Spielberg for their persuasive value, but they can't cite unpublished decisions by the very appellate courts they wish to persuade."[68]

We did not actually observe any citations to Shakespeare or Spielberg, but we did observe citations to Scott, Fleming, and Scorsese. Chief Judge Douglas Ginsburg of the D.C. Circuit offered a charming musing on remedies: "'O what a tangled web we weave, when first we practice to . . .' relieve. With apology to Sir Walter Scott, Marmion, Canto vi, Stanza 17 (1808)."[69] Judge Michael McConnell of the Tenth Circuit cleverly alluded to the story of Dorothy: "This case is reminiscent of the coroner's verdict in *The Wizard of Oz*: It's not only merely moot, it's really most sincerely moot."[70] Judge McConnell also

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65. 5th Cir. R. 47.5.4.

66. *See FJC Study*, *supra* n. 1, at 181.

67. *Id*. One case included a citation to a district court opinion and a state appellate opinion, *id*. at 181–82, 187, another case included a citation to a district court opinion, *id*. at 181, 184, and a third case included a citation to a state appellate opinion, *id*. at 182, 183.

68. Pamela A. MacLean, *The Fight to Cite: The 9th Circuit is a Vocal and Formidable Opponent of the Move to Let Lawyers Cite Unpublished Opinions*, Daily J. (Feb. 6, 2004), http://www.nonpublication.com/macleanarticle.pdf (accessed Sept. 21, 2006; copy on file with Journal of Appellate Practice and Process).

69. *Natl. Assn. of St. Utility Consumer Advocates v. FCC*, 372 F. 3d 454, 457 n. * (D.C. Cir. 2004).

70. *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1262 (10th Cir. 2004) (McConnell, J., concurring).

mentioned *The Last Temptation of Christ*, but only because it was involved in a cited case.[71]

Table 7 shows our count of citations to authorities that were not constitutions, statutes, rules, or opinions. Citations to these "other authorities"—most of which were either treatises or articles, but approximately ten percent of which were dictionaries, and somewhat fewer of which were Restatements—outnumbered citations to unpublished court opinions 412 to 247.

Table 8 shows that among citations to Restatements, nearly half were citations to the *Restatement (Second) of Torts*. If we add the single citation to the *Restatement (First) of Torts* and the single citation to the *Restatement (Third) of Torts*, we get a bare majority of Restatement citations. The second most common Restatement citation was to the *Restatement (Second) of Contracts*, with four citations, and we observed citations to seven other Restatements.

I was particularly eager to review the statistical information about dictionaries, because I have long been a fan of *The American Heritage Dictionary*, now in its fourth edition. Its definitions strike me as clearly written and well-researched, so I was disappointed to learn that at least one analysis of citations to dictionaries by the United States Supreme Court[72] revealed that citations to *Webster's* outnumbered citations to *American Heritage* by 174 to twenty-one in cases decided since the second edition of *American Heritage* came out in 1981.[73] I am happy to report, however, that *American Heritage* fared a bit better in our sample. The data reported in Table 9 show that, in our survey at least, *American Heritage* was outnumbered only fourteen to seven when compared with *Webster's*. I note too that our data have *Black's* beating *Webster's*, seventeen to fourteen.

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71. *Id.* at 1267 ("In *Committee for the First Amendment v. Campbell*, 962 F. 2d 1517 (10th Cir. 1992), a university student group challenged the decision of university officials to bar exhibition of a controversial film—*The Last Temptation of Christ*—but before the district court rendered a decision, the officials rescinded the order and the film was shown; subsequently the University adopted a new policy that comported with the First Amendment.").

72. Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 Buff. L. Rev. 227 (1999).

73. *Id.* at 472-74, 526-58, app. C (showing all citations to any version of either *American Heritage* or *Webster's*).

V. DISPOSITION TIME

The federal courts of appeals resolve more than half of their cases within seven months and nearly three-quarters of them within one year. Slightly more than one-twentieth of their cases appear to remain unresolved after two years.

We were able to compute disposition times for the 644 cases that were resolved during our study period in our sample of 650 cases filed in 2002. I also examined a sample of cases filed in 2003 to test the reliability of our disposition estimates.[74] All but eighteen of the 2003 cases were resolved during our study period, so I could compute disposition times for 632 cases filed in 2003.

These disposition data suggest that the courts of appeals resolved approximately seventy-four percent of the cases filed in 2002 and 2003 within one year of filing, with their totals ranging from fifty-three percent in the Second Circuit to ninety-two percent in the Fourth Circuit, and that the courts resolved approximately ninety-four percent of the cases within two years of filing, their two-year resolution rates ranging from seventy-seven percent in the Second Circuit to one hundred percent in the Eighth and Eleventh Circuits.

The data suggest a median disposition time of 208 days, ranging from 118 days in the Fourth Circuit to 318 days in the Second Circuit. And our plot of cumulative disposition times, shown in Figure 7, conveys additional information. Each point on the plot represents how many cases (y) have been resolved within how many days (x). The point at which a line connecting the points crosses 365 days shows how many cases have been resolved within one year. The line shows the median disposition time where it crosses the indicator for fifty cases, because the combined sample for each circuit is 100 cases.

The farther to the left a particular circuit's cumulative disposition line, the more quickly that circuit resolves its cases. The Fourth Circuit appears to resolve its cases most quickly, although by only a very few days compared with the Eleventh

74. *FJC Study*, *supra* n. 1, at 24 & n. 41 (reporting very high agreement in the two samples with respect to the percentage of cases resolved by opinion among closed cases, $r = .79$, $p = .001$, and very high agreement comparing the percentage of opinions that are published, $r = .86$, $p < .001$).

Circuit. The Eighth Circuit, however, was the court that resolved all of the cases in our combined sample most quickly.

The Ninth Circuit, which gets a lot of attention because of efforts to split the circuit, appears to be relatively close to the average in the rate at which it resolves its cases, while the Second Circuit appears to resolve its cases most slowly, perhaps because its caseload includes a large number of immigration cases. Six of its nine unresolved cases and eleven of the thirteen other cases it took more than two years to resolve are reviews of decisions by the Board of Immigration Appeals.[75]

VI. CONCLUSION

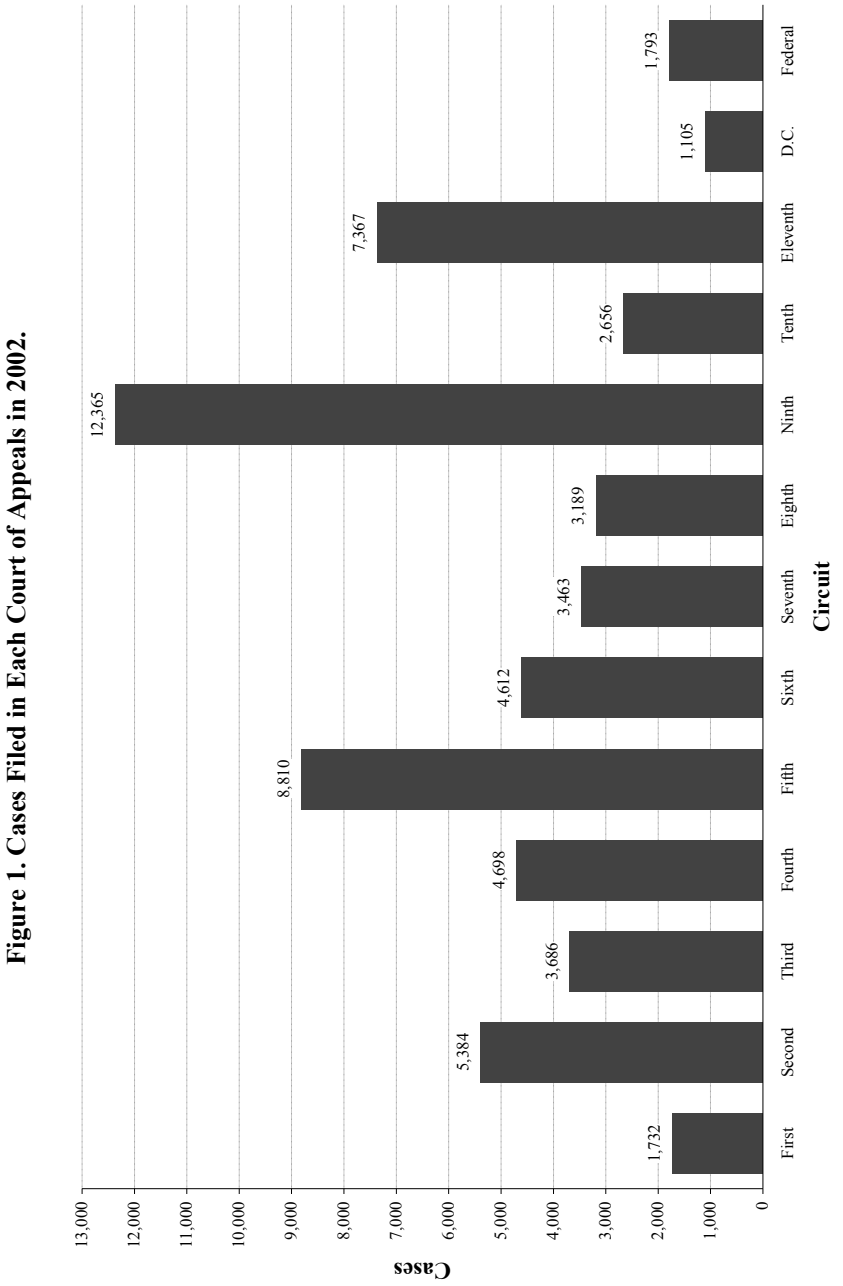
Our data show, then, that the federal courts of appeals resolve a large fraction of their fully briefed cases by published opinions, and the courts in some circuits resolve most of their fully briefed cases by published opinions. Just considering opinions and counseled briefs, the courts are processing 1.7 million words per judgeship per year and resolving approximately ninety-four percent of their cases within two years of filing.

Our data also show that citations to published opinions far outnumber citations to other non-statutory authorities in briefs and opinions. Parties and courts cite secondary sources only occasionally, and unpublished opinions somewhat less often. Some citations to unpublished opinions appear to violate the courts' proscriptions against such citations.

I hope that these data and statistics culled from a random sample of federal appeals will help judges and lawyers better understand the work of the federal appellate courts.

75. Our data suggest that approximately thirteen percent of cases filed in the federal courts of appeals in 2002 and 2003 were reviews of decisions by the Board of Immigration Appeals. Reviews of decisions by the Board of Immigration Appeals accounted for thirty-one percent of cases filed in the Second and the Ninth Circuits, and less than ten percent of cases filed in each of the other courts of appeals.

APPENDIX A—FIGURES



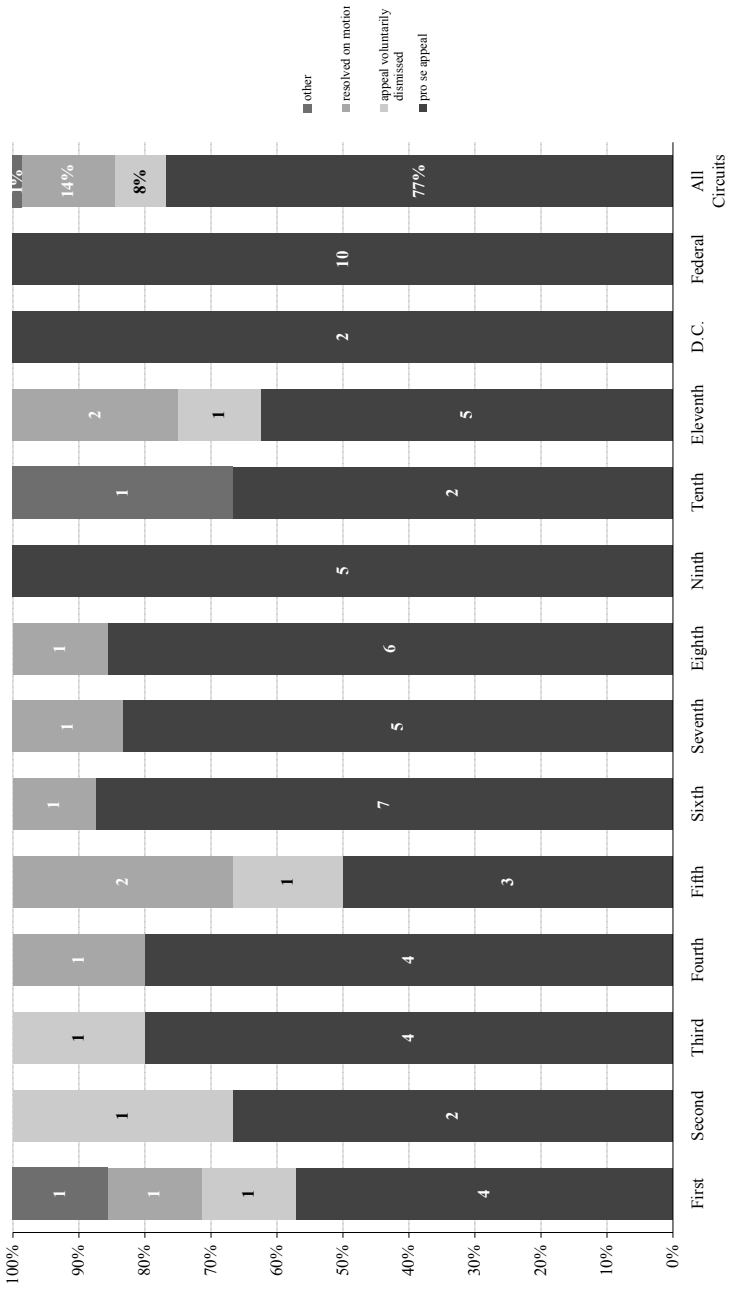


Figure 2. Cases With Counseled Briefs on One Side Only.

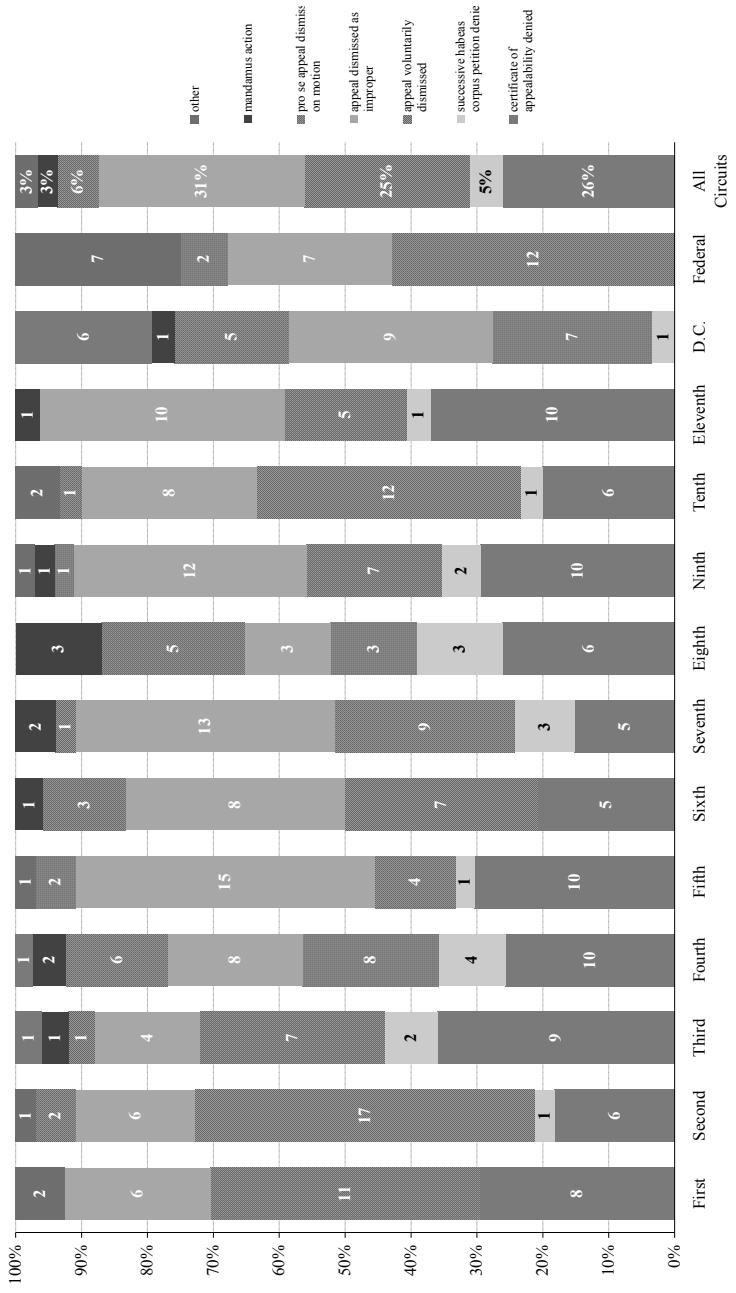


Figure 3. Cases Without Counseled Briefs.

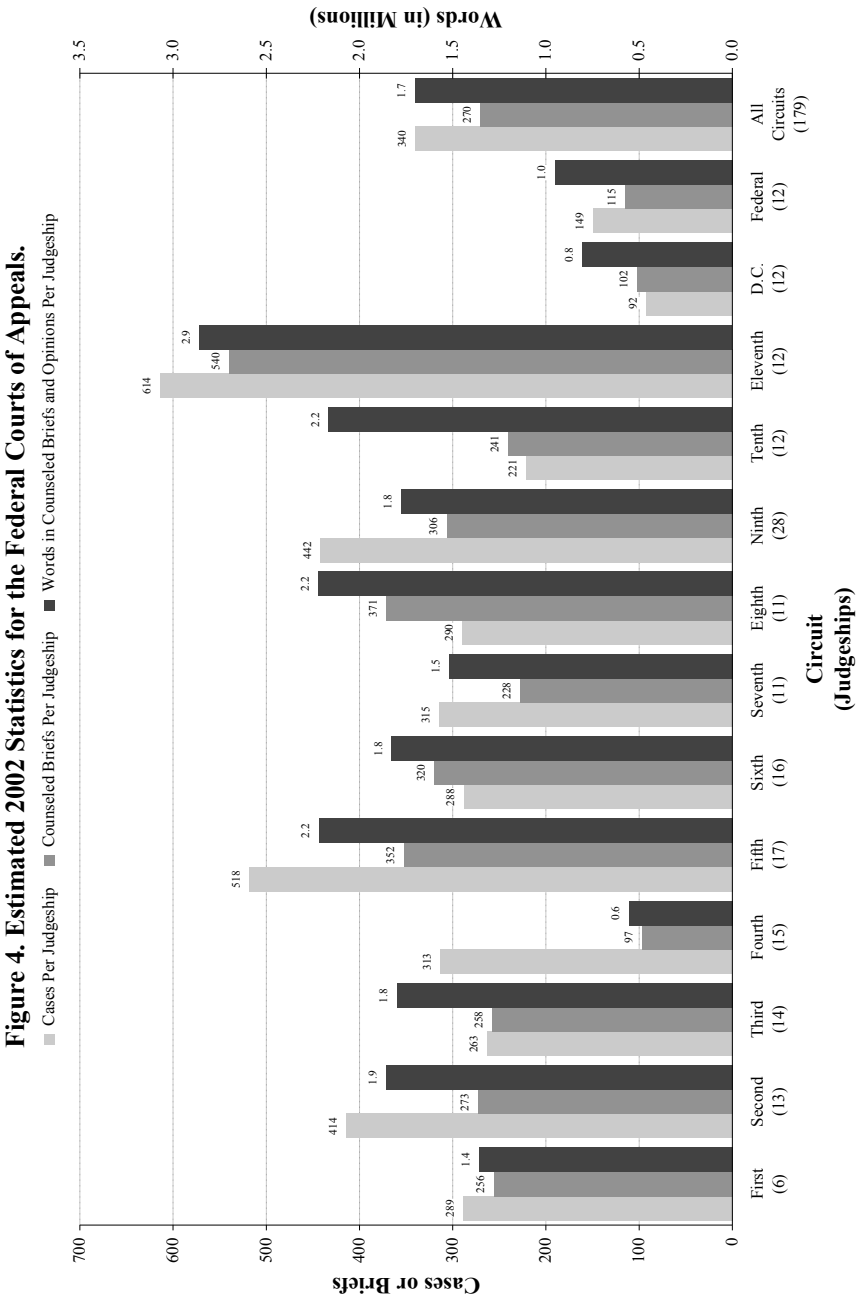


Figure 4. Estimated 2002 Statistics for the Federal Courts of Appeals.
Cases Per Judgeship
Counseled Briefs Per Judgeship
Words in Counseled Briefs and Opinions Per Judgeship
Cases or Briefs
Words (in Millions)
Circuit (Judgeships)
First (6)
Second (13)
Third (14)
Fourth (15)
Fifth (17)
Sixth (16)
Seventh (11)
Eighth (11)
Ninth (28)
Tenth (12)
Eleventh (12)
D.C. (12)
Federal (12)
All Circuits (179)

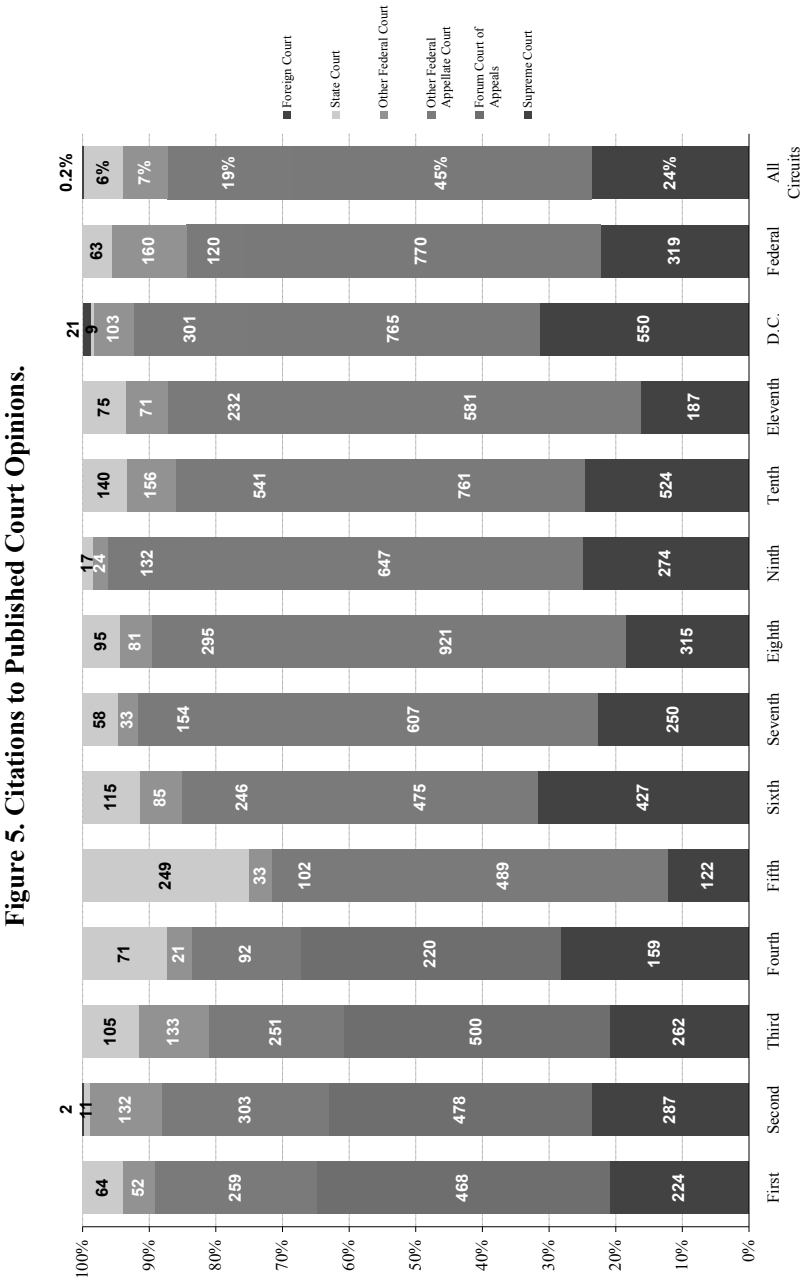
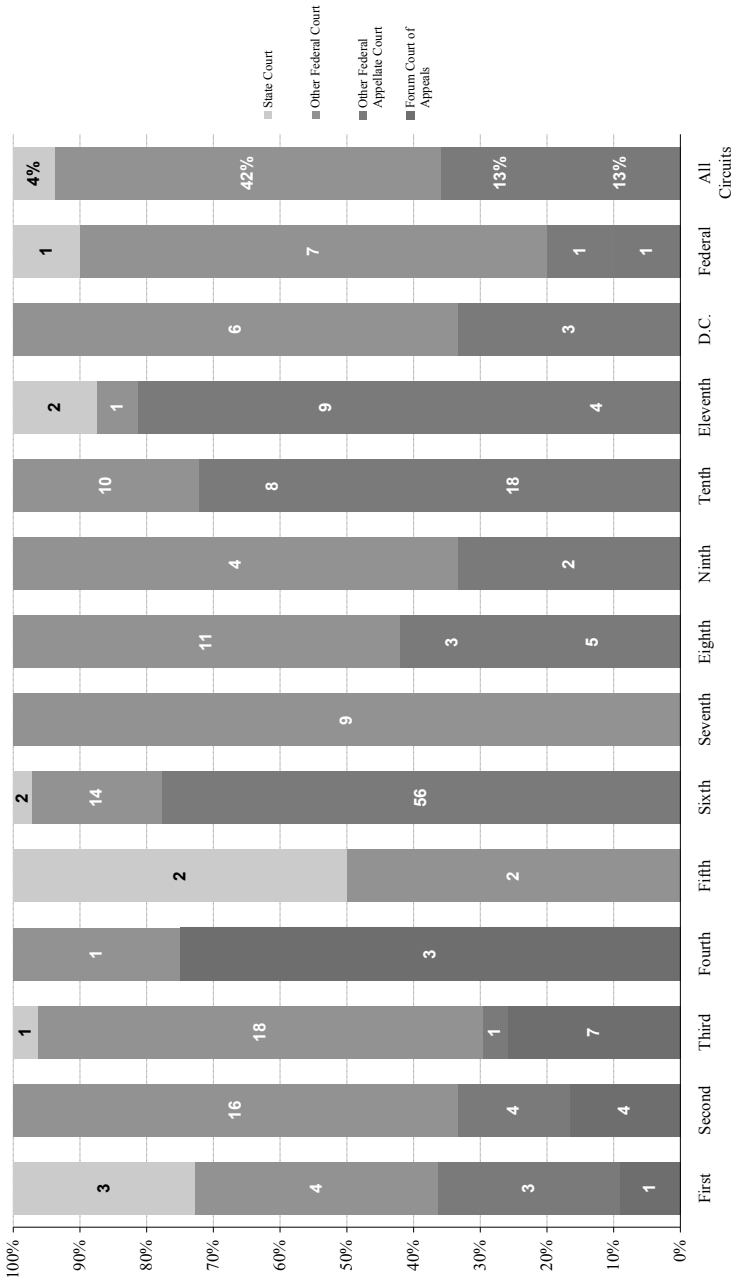


Figure 5. Citations to Published Court Opinions.

Figure 6. Citations to Unpublished Court Opinions.



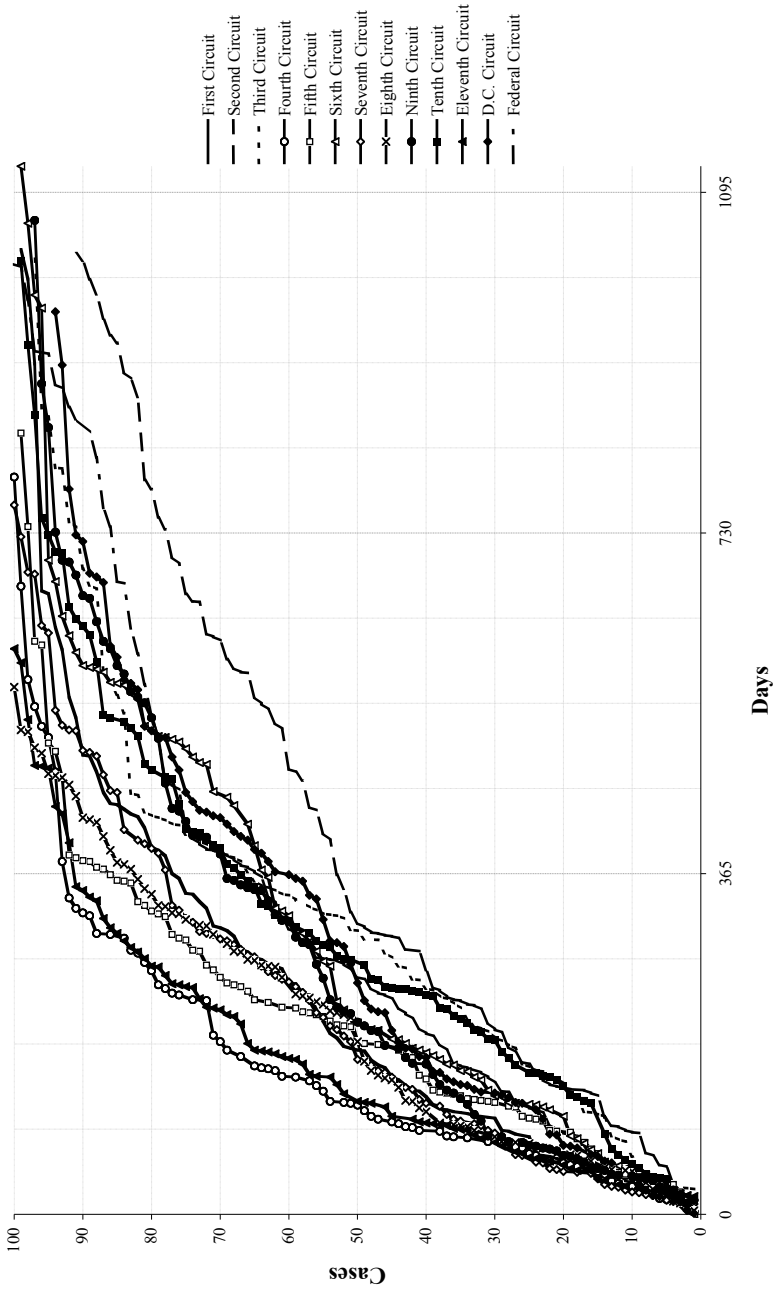


Figure 7. Cumulative Disposition Times.

APPENDIX B — TABLES

Table 1. Counseled Briefs Filed in Cases Filed in 2002.

Circuit	Percentage of Cases in Sample With Counseled Briefs	Percentage of Cases in Sample That Were Fully Briefed	Estimated Average Counseled Briefs Per Case
First	46%	32%	0.89
Second	34%	28%	0.66
Third	50%	40%	0.98
Fourth	22%	12%	0.31
Fifth	34%	22%	0.68
Sixth	52%	36%	1.11
Seventh	34%	22%	0.72
Eighth	54%	40%	1.28
Ninth	32%	22%	0.69
Tenth	40%	34%	1.09
Eleventh	46%	30%	0.88
D.C.	42%	38%	1.11
Federal	41%	24%	0.77
All Circuits (weighted averages)	39%	27%	0.80

Table 2. Estimated Percentages of How Cases Filed in 2002 Were Resolved.

Circuit	Published Opinion	Unpublished Opinion	No Opinion
First	24%	4%	72%
Second	16%	14%	69%
Third	10%	39%	51%
Fourth	2%	60%	38%
Fifth	6%	32%	62%
Sixth	12%	38%	50%
Seventh	16%	14%	70%
Eighth	34%	20%	46%
Ninth	6%	24%	69%
Tenth	18%	33%	49%
Eleventh	2%	38%	60%
D.C.	27%	44%	29%
Federal	10%	42%	48%
All Circuits (weighted averages)	10%	31%	59%

Table 3. Estimated Percentages of How Cases Without Counseled Briefs Were Resolved.

Circuit	Published Opinion	Unpublished Opinion	No Opinion
First	0%	4%	96%
Second	0%	0%	100%
Third	0%	4%	96%
Fourth	0%	54%	46%
Fifth	0%	12%	88%
Sixth	0%	13%	88%
Seventh	0%	0%	100%
Eighth	0%	0%	100%
Ninth	0%	0%	100%
Tenth	0%	27%	73%
Eleventh	0%	0%	100%
D.C.	0%	48%	52%
Federal	0%	39%	61%
All Circuits (weighted averages)	0%	11%	89%

Table 4. Estimated Percentages of How Partially Briefed Cases Were Resolved.

Circuit	Published Opinion	Unpublished Opinion	No Opinion
First	14%	14%	71%
Second	0%	67%	33%
Third	0%	80%	20%
Fourth	0%	80%	20%
Fifth	0%	83%	17%
Sixth	0%	75%	25%
Seventh	17%	67%	17%
Eighth	0%	100%	0%
Ninth	0%	100%	0%
Tenth	0%	100%	0%
Eleventh	0%	75%	25%
D.C.	0%	100%	0%
Federal	10%	90%	0%
All Circuits (weighted averages)	2%	81%	17%

Table 5. Estimated Percentages of How Fully Briefed Cases Were Resolved.

Circuit	Published Opinion	Unpublished Opinion	No Opinion
First	69%	0%	31%
Second	62%	38%	0%
Third	25%	70%	5%
Fourth	17%	83%	0%
Fifth	27%	64%	9%
Sixth	33%	56%	11%
Seventh	64%	27%	9%
Eighth	85%	15%	0%
Ninth	30%	70%	0%
Tenth	56%	31%	13%
Eleventh	7%	87%	7%
District of Columbia	68%	32%	0%
Federal	33%	8%	58%
All Circuits (weighted averages)	39%	54%	7%

Table 6. Citations to Non-Statutory Authorities.

Circuit	Unpublished Court Opinions	Published Court Opinions	Other Opinions	Other Authorities
First	1.0%	92.5%	4.7%	1.8%
Second	1.9%	94.0%	2.6%	1.6%
Third	2.1%	92.4%	2.7%	2.9%
Fourth	0.7%	97.1%	1.7%	0.5%
Fifth	0.4%	99.1%	0.0%	0.5%
Sixth	5.0%	92.0%	0.5%	2.5%
Seventh	0.8%	97.9%	0.6%	0.7%
Eighth	1.0%	91.4%	6.2%	1.3%
Ninth	0.5%	95.6%	2.5%	1.3%
Tenth	1.6%	93.5%	1.4%	3.5%
Eleventh	1.4%	97.1%	0.5%	1.0%
D.C.	0.4%	81.3%	13.8%	4.5%
Federal	0.7%	94.0%	2.0%	3.3%
All Circuits (weighted averages)	1.1%	90.1%	5.9%	2.9%

Table 7. Citations to "Other Authorities."

Authority	Number of Citations	Percentage of Citations to "Other Authorities"
Restatements	29	7%
Dictionaries	43	10%
Treatises	113	28%
Articles	108	26%
Other Books	58	14%
Reports, Manuals, and Websites	58	14%
Movies and Poems	3	1%
All "Other Authorities"	412	100%

Table 8. Citations to Restatements.

Authority	Number of Citations	Percentage of Citations to Restatements
Restatement (3d) of Torts	1	3%
Restatement (2d) of Torts	13	46%
Restatement (1st) of Torts	1	3%
Restatement (2d) of Contracts	4	15%
Restatement (3d) of Property	1	3%
Restatement of Restitution	2	7%
Restatement (2d) of Judgments	1	3%
Restatement (2d) of Agency	2	7%
Restatement (2d) of Trusts	1	3%
Restatement (3d) of the Foreign Relations Law of the United States	2	7%
Restatement (2d) of Foreign Relations Law of the United States	1	3%
All Restatements	29	100%

Table 9. Citations to Dictionaries.

Dictionary	Number of Citations	Percentage of Citations to Dictionaries
Black's	17	40%
American Heritage	7	16%
Webster's	14	33%
Oxford	1	2%
Spanish-English	4	9%
All Dictionaries	43	100%