

# The Voting Behavior of Clarence Thomas

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## 1. Introductory Notes

- A. The tables and figures that follow rely on the U.S. Supreme Court Database's definitions of "conservative" and "liberal."<sup>2</sup> The definitions mostly comport with conventional understandings. "Liberal" votes are those in favor of defendants in criminal cases; of women and minorities in civil rights cases; of individuals against the government in First Amendment, privacy, and due process cases; of unions and individuals over businesses; and of government over businesses in cases involving economic regulation. "Conservative" votes are the reverse.
- B. The tables and figures are based on orally argued cases only (including per curiams).
- C. The overall conclusions are:
  - (1) *Ideology*. Thomas emerges as one of the most conservative Justices to have served since 1937 (see especially Table 1), and there is some evidence that he has grown increasingly conservative over time (see Figures 1 & 2).
  - (2) *Influence*. Assessing a Justice's influence is difficult. Based on the measures we used, it's hard to make the case that Thomas has been especially influential, though there is some (limited) evidence of an uptick in the 2010 term.

## 2. Overall (Ideological) Voting Patterns

There are many ways to assess/rank the Justices on a liberal-conservative scale. Below we take two different approaches: (A) Fraction of Conservative Votes in Non-Unanimous Cases and (B) Fraction of Conservative Votes in All Cases by Justice and Term. Either way, Thomas is extremely conservative. (We also consider trends over time (C).)

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<sup>2</sup> The Database is available at: <http://supremecourtdatabase.org>. We performed all analyses using the 2011 Release 03 version of the database.

### A. Fraction of Conservative Votes in Non-Unanimous Cases

Table 1 (column 1a) ranks the Justices by the fraction of conservative votes in all non-unanimous orally argued cases;<sup>3</sup> column 1b shows the fraction. Thomas is the second most conservative Justice serving since 1937. He's reached conservative decisions in about 81% of the cases.

The table (columns 2a & 2b) also shows the fraction of conservative votes in non-unanimous civil liberties cases. Once again, only Rehnquist cast a higher fraction of conservative votes than Thomas (92% versus 87%).

Columns 1a-2b come from Epstein, Landes & Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice*. Columns 3a & 3b rank the Justices according to the average of their "Martin-Quinn" scores. These scores are derived from an analysis of the voting patterns on the Supreme Court each term—meaning they allow for changes in the Justices' ideology over time.<sup>4</sup> On this measure, Thomas is the most conservative Justice, followed by Rehnquist.

Other observations:

- (1) There is a noticeable split between the *sitting* Democratic and Republican appointees. The mean fraction conservative (column 1b) is .30 (30%) for the Democrats and .74 (74%) for the Republicans—a big and statistically significant difference.
- (2) Looking at the top 10 most conservative Justices serving since 1937, three (Thomas, Scalia, and Alito) are on the current Court. Roberts is among the top 10 in columns 1b and 3b.
- (3) Justices Kagan & Ginsburg are among the top 10 liberals in columns 1b & 2b, but not 3b.

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<sup>3</sup> Weighted by the number of cases in which they participated each term.

<sup>4</sup> The scores have been used in many scholarly studies. For a (simple) explanation of how Martin & Quinn generate them, see Lee Epstein, et al., "Ideological Drift among Supreme Court Justices," 101 *Northwestern University Law Review* 1483 (2007); Andrew D. Martin et al., "The Median Justice on the United States Supreme Court," 83 *North Carolina Law Review* 1275 (2005).

**Table 1.** Voting in Non-Unanimous Cases for 45 Supreme Court Justices Ranked from More to Less Conservative, 1937-2010 Terms

(Sitting Justices are in **Bold**)

<i>Ranked from Conserv.-Lib. (All Cases)</i>	<i>Fraction Conserv. (All Cases)</i>	<i>Ranked from Conserv.-Lib. (Civil Liberties)</i>	<i>Fraction Conserv. (Civil Liberties)</i>	<i>Ranked from Conserv.-Lib. (MQ Score)</i>	<i>MQ Score</i>
(1a)	(1b)	(2a)	(2b)	(3a)	(3b)
Rehnquist	0.850	Rehnquist	0.917	<b>Thomas</b>	3.815
<b>Thomas</b>	0.813	<b>Thomas</b>	0.871	Rehnquist	2.855
Burger	0.789	Burger	0.841	<b>Scalia</b>	2.764
<b>Scalia</b>	0.768	<b>Alito</b>	0.826	McReynolds	2.670
Whittaker	0.757	<b>Scalia</b>	0.814	<b>Alito</b>	2.110
<b>Alito</b>	0.758	Cardozo	0.800	Sutherland	2.050
Harlan	0.736	Minton	0.779	<b>Roberts, J</b>	2.001
Sutherland	0.733	Vinson	0.757	Butler	1.967
McReynolds	0.724	Harlan	0.756	Burger	1.850
<b>Roberts, J</b>	0.696	Whittaker	0.756	Harlan	1.633
Powell	0.695	Burton	0.746	Roberts, O	1.597
O'Connor	0.692	Clark	0.735	Whittaker	1.259
Roberts, O.	0.660	Byrnes	0.733	Minton	1.102
Burton	0.660	Reed	0.727	Burton	1.025
<b>Kennedy</b>	0.654	<b>Roberts, J</b>	0.715	Vinson	1.002
Vinson	0.641	Powell	0.711	Powell	0.936
Butler	0.637	O'Connor	0.708	O'Connor	0.897
Minton	0.627	<b>Kennedy</b>	0.685	<b>Kennedy</b>	0.885
Jackson	0.605	White	0.672	Jackson	0.725
Stewart	0.605	Sutherland	0.667	Stewart	0.564
White	0.588	Jackson	0.657	Frankfurter	0.537
Frankfurter	0.582	Roberts, O.	0.617	Clark	0.482
Clark	0.560	Stewart	0.589	White	0.440
Reed	0.542	Stone	0.546	Reed	0.361
Byrnes	0.518	Frankfurter	0.544	Hughes	0.102
Blackmun	0.487	McReynolds	0.524	<b>Kagan</b>	0.029
Stone	0.442	Blackmun	0.502	<b>Sotomayor</b>	0.019
Hughes	0.439	Brandeis	0.444	Stone	-0.081
Cardozo	0.375	Butler	0.417	Blackmun	-0.115
<b>Sotomayor</b>	0.325	Hughes	0.318	Byrnes	-0.192
Brandeis	0.347	<b>Breyer</b>	0.306	Brandeis	-0.520
Souter	0.333	Black	0.298	Goldberg	-0.790
<b>Breyer</b>	0.326	Souter	0.283	Souter	-0.812

<i>Ranked from Conserv.-Lib. (All Cases)</i> (1a)	<i>Fraction Conserv. (All Cases)</i> (1b)	<i>Ranked from Conserv.-Lib. (Civil Liberties)</i> (2a)	<i>Fraction Conserv. (Civil Liberties)</i> (2b)	<i>Ranked from Conserv.-Lib. (MQ Score)</i> (3a)	<i>MQ Score</i> (3b)
Stevens	0.313	Stevens	0.267	<b>Breyer</b>	-0.923
Fortas	0.300	<b>Sotomayor</b>	0.255	<b>Ginsburg</b>	-1.069
Goldberg	0.297	Warren	0.234	Warren	-1.175
<b>Kagan</b>	0.276	<b>Kagan</b>	0.222	Fortas	-1.196
<b>Ginsburg</b>	0.270	<b>Ginsburg</b>	0.222	Rutledge	-1.394
Black	0.251	Rutledge	0.222	Stevens	-1.506
Warren	0.247	Fortas	0.193	Murphy	-1.584
Rutledge	0.238	Brennan	0.155	Black	-1.759
Murphy	0.227	Murphy	0.152	Cardozo	-1.776
Brennan	0.217	Goldberg	0.134	Brennan	-1.949
Douglas	0.195	Douglas	0.117	Marshall	-2.836
Marshall	0.170	Marshall	0.098	Douglas	-4.164

*Sources:*

- (1) For Columns 1a-2b: Lee Epstein, William M. Landes & Richard A. Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice*.
- (2) For Columns 3a-3b: Andrew D. Martin & Kevin Quinn, at: <http://mqscores.wustl.edu/>

*Notes:*

- (1) Fraction Conservative Votes (in Columns 1b and 2b): Weighted by the number of orally argued cases in which the Justice voted each term in each category.
- (2) Civil Liberties: Includes criminal procedure, civil rights, First Amendment, due process, privacy, attorneys.

*B. Fraction of Conservative Votes in All Cases (Unanimous and Non-Unanimous) by Justice and Term*

Next we rank the Justices based on the fraction of conservative votes cast by each Justice in each term between 1980-2010 (last three decades). Table 2 shows the top ten most liberal Justice-term combinations and the top 10 most conservative.

The most liberal Justice-term is Marshall-1989. In 1989, only about 19% of his votes were conservative; 81% were liberal. Thurgood Marshall appears four times in the top ten most liberal Justice-term combinations: 1989 (rank #1), 1986 (rank #3), 1990 (rank #6), and 1988 (rank #7).

The most conservative Justice-term combination is Scalia in 2001: about 78% of his votes were conservative. Rehnquist appears 4 times in the top ten most conservative Justice-terms. Thomas also appears 4 times: in 1998, 2002, 2003, and, most recently in 2008. In 2008, about 75% of his votes were conservative.

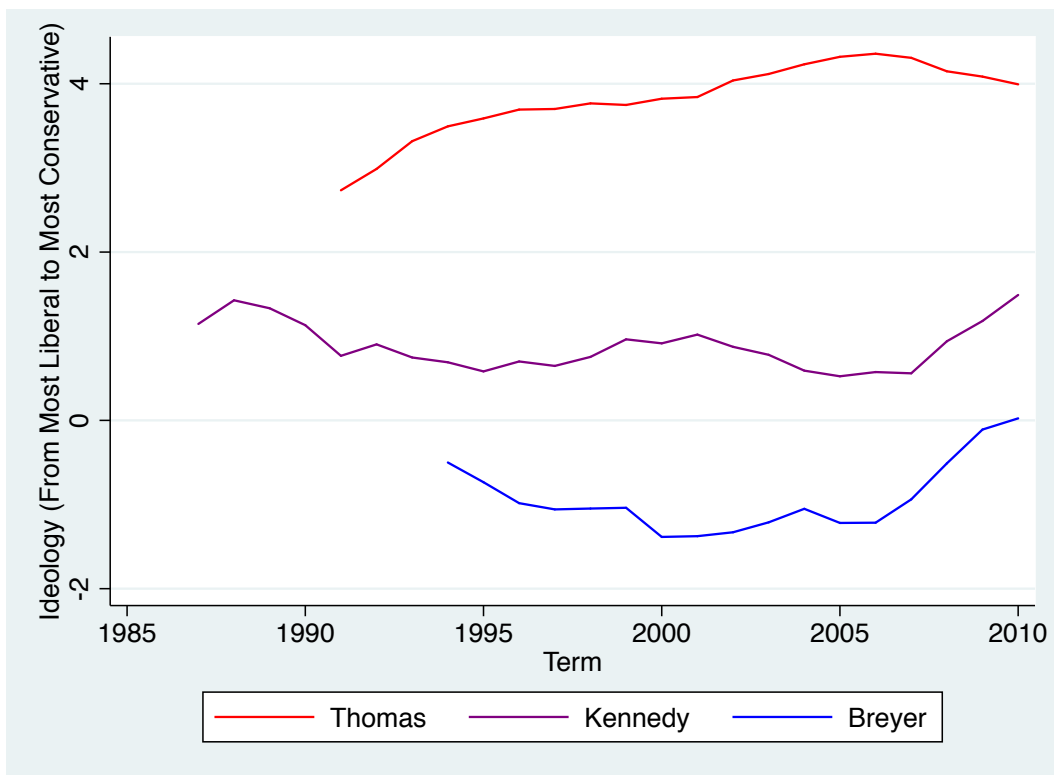
**Table 2.** Fraction of Conservative Votes in All Cases (Unanimous and Non-Unanimous) by Justice and Term: Top 10 Most Liberal and Top 10 Most Conservative Justice-Terms, 1980-2010

<b>Term</b>	<b>Justice</b>	<b>Fraction Conservative</b>
<i>Top 10 Most Liberal Justice-Term Combinations</i>		
1989	Marshall	0.185
1999	Stevens	0.213
1986	Marshall	0.215
1989	Brennan	0.215
1986	Brennan	0.227
1990	Marshall	0.236
1988	Marshall	0.241
2007	Stevens	0.242
1999	Souter	0.257
1988	Brennan	0.257
<i>Top 10 Most Conservative Justice-Term Combinations</i>		
2001	Scalia	0.776
2002	Scalia	0.770
2002	Thomas	0.767
2003	Thomas	0.753
1985	Rehnquist	0.748
2008	Thomas	0.747
1980	Rehnquist	0.746
1998	Thomas	0.740
2001	Rehnquist	0.740
1998	Rehnquist	0.740

### C. Trends Over Time

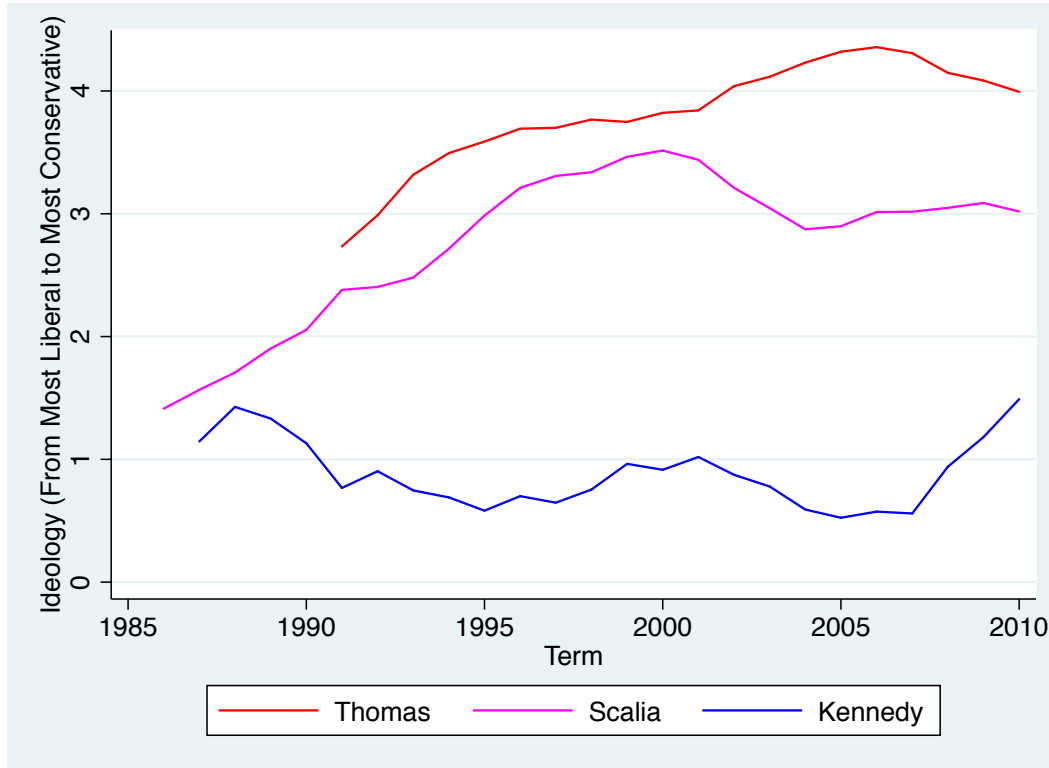
Using the Martin-Quinn scores, it is possible to examine the Justices' ideology over time. These scores correct for the different types of cases that arise each term, thus facilitating comparisons over time. In Figure 1, we show Thomas's, Kennedy's, and Breyer's. Justice Kennedy's line appears relatively flat, and statistics confirm that he has not moved significantly over time. Justice Breyer has drifted slightly but not significantly to the right. Justice Thomas, on the other hand, has grown increasingly and significantly more conservative since his appointment in 1991.

**Figure 1.** Estimated Ideology Over Time of Justices Thomas, Kennedy, and Breyer



Justice Scalia too has drifted (significantly to the right). But as Figure 2 shows, in no term has Scalia's estimated conservatism exceeded Thomas's; and there appears to be a growing disjuncture between the two in the last few terms.

**Figure 2.** Estimated Ideology of Justices Thomas, Scalia, and Kennedy



### 3. Influence

Measuring a Justice's influence is difficult for us to do. For example, only through linguistic analysis (and not the kind of data we possess) would we be able to assess directly the claim that Justice Thomas's early opinions ultimately gained traction in the Court's subsequent decisions. Then there's the counterfactual problem: Would the Court have moved in a different direction (e.g., accepted different cases, reached different outcomes, used different rationales) had George H.W. Bush nominated someone other than Thomas? Unfortunately, we cannot reverse time (and ask the President to appoint another Justice) to find out.

Instead, we look at four other possible indicators of power: (A) the median Justice, (B) Majority Opinion Writing, (C) Dissents, and (D) Interagreements. These measures suggest that Thomas is not an especially influential Justice, though there is some (limited) evidence of an uptick in the 2010 term.



### A. The Median Justice

For obvious reasons, the median (middle) Justice tends to wield a great deal of power on the Court. Ever since Justice Thomas's appointment to the Court, Justices O'Connor and Kennedy have held this position (see Table 3). Never has Justice Thomas been the median, nor has even come close to the center of power. For example, for the most recent term there is a .98 probability that Justice Kennedy was the median Justice. For Justice Thomas, the probability is virtually 0, as it was in all his previous terms. (N.B. Our data suggest that Kennedy's vote will continue to be pivotal in the 2011 term.)

**Table 3.** Median Justice on the Supreme Court, 1991-2010 Terms

Term	Justice Most Likely to be the Court's Median	Probability that Justice Thomas is the Court's Median
1991	O'Connor	0
1992	O'Connor	0
1993	Kennedy	0
1994	O'Connor	0
1995	Kennedy	0
1996	Kennedy	0
1997	Kennedy	0
1998	Kennedy	0
1999	O'Connor	0
2000	O'Connor	0
2001	O'Connor	0
2002	O'Connor	0
2003	O'Connor	0
2004	O'Connor	0
2005a	O'Connor	0
2005b	Kennedy	0
2006	Kennedy	0
2007	Kennedy	0
2008	Kennedy	0
2009	Kennedy	0
2010	Kennedy	.0004

Source: The Martin-Quinn Scores.

Note: 2005a is before Alito's appointment; 2005b is after Alito's appointment.

## B. Opinion Writing

Here we consider two indicators of influence through majority opinions: (1) writing in 5-4 cases and (2) writing in important cases.

### (1) 5-4 Cases

Some social science work suggests that in closely divided cases (mostly 5-4s or 5-3s), the majority opinion author wields a great deal of influence. If this is so, Thomas has not fared especially well (see Table 4). If we believe that a justice in the majority in a 5-4 (or 5-3) case has a 1 in 5 chance (20%) of writing the opinion of the Court, then in only three terms since 2000 has Thomas's percentage been above 20. For the median Justice, Kennedy, in all but one term has his percentage fallen below 20.

On the other hand, in the 2010 term, Thomas wrote for the 5-person majority in 5 of the 13 closely divided cases in which he voted with the majority—the highest percentage in his career. (His previous record, which is not shown in Table 4, was 27.3% in 1997).

**Table 4.** Percentage of Closely Divided Cases in which the Justice Was in the Majority and Wrote the Majority Opinion (Limited to the Five Sitting Conservative Justices), 2000-10 Terms

	Scalia	Kennedy	Thomas	Roberts	Alito
2000	18.8%	21.1%	6.2%		
2001	21.4%	21.4%	21.4%		
2002	14.3%	0.0%	0.0%		
2003	44.4%	40.0%	9.1%		
2004	16.7%	38.5%	8.3%		
2005	44.4%	30.0%	12.5%	12.5%	0.0%
2006	6.7%	24.0%	26.7%	17.6%	22.2%
2007	25.0%	40.0%	10.0%	11.1%	16.7%
2008	35.3%	25.0%	17.6%	23.1%	7.1%
2009	14.3%	27.3%	6.7%	25.0%	28.6%
2010	16.7%	20.0%	38.5%	27.3%	0.0%

## (2) Important Cases

A sure sign of influence would be writing for the majority in important cases. Unfortunately, there's little agreement on the definition of "important," though many political scientists use the so-called "New York Times" measure. The idea is that a story about the case (on the day after the Court decided it) on the front page of the *New York Times* suggests that it is an important case. Despite its problems, it's a highly reliable and reasonably valid measure of importance.

As Table 5 shows, Justice Thomas fares poorly on this indicator. In not one important case since the 2004 term did he write the opinion of the Court. In contrast, the median justice, Kennedy, generally fares quite well, as does Chief Justice Roberts.

**Table 5.** Percentage of Important Cases in which the Justice Wrote the Majority/Plurality Opinion When in the Majority (Limited to the Five Sitting Conservative Justices), 2000-10 Terms

	Scalia	Kennedy	Thomas	Roberts	Alito
2000	22.2%	7.1%	22.2%		
2001	0.0%	11.1%	33.3%		
2002	0.0%	22.2%	0.0%		
2003	33.3%	20.0%	25.0%		
2004	0.0%	22.2%	0.0%		
2005	20.0%	37.5%	0.0%	20.0%	0.0%
2006	0.0%	16.7%	0.0%	40.0%	20.0%
2007	40.0%	22.2%	0.0%	16.7%	20.0%
2008	20.0%	50.0%	0.0%	50.0%	0.0%
2009	0.0%	28.6%	0.0%	28.6%	20.0%
2010	66.7%	25.0%	0.0%	33.3%	0.0%

### C. Dissents

Writing in closely divided or important cases may lead to influence; writing solo dissents may be a sign of weakness. Despite examples to the contrary, Epstein, Landes & Posner show that dissents are rarely cited either in the Supreme Court or lower courts.<sup>5</sup>

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<sup>5</sup> Lee Epstein, William M. Landes, & Richard A. Posner, "Why (and When) Judges Dissent: A Theoretical and Empirical Analysis," 3 *Journal of Legal Analysis* 101 (2011).

Solo dissents may be a special case of weakness because the Justice couldn't entice even one member of the Court to join him or her. Kennedy almost never writes them; Scalia does so rarely (see Table 6). Except for two terms since 2000, Thomas has dissented alone at least once a term, and in three terms, 3 times (2006, 2007, 2008). Once again, though, note that in 2010 he wrote no solo dissents.

**Table 6.** Percentage of Cases in which the Justice Wrote a Solo Dissent (Limited to the Five Sitting Conservative Justices), 2000-10 Terms

	Scalia	Kennedy	Thomas	Roberts	Alito
2000	1.2%	0.0%	0.0%		
2001	1.3%	0.0%	2.7%		
2002	0.0%	0.0%	2.7%		
2003	0.0%	0.0%	1.3%		
2004	1.3%	1.3%	2.7%		
2005	0.0%	0.0%	2.7%	0.0%	0.0%
2006	1.4%	0.0%	4.2%	0.0%	0.0%
2007	0.0%	0.0%	4.5%	0.0%	0.0%
2008	0.0%	0.0%	3.9%	0.0%	0.0%
2009	1.3%	0.0%	1.3%	0.0%	1.3%
2010	2.6%	1.3%	0.0%	0.0%	1.3%

#### *D. Interagreement*

To what extent do the other conservatives agree with Justice Thomas? Have those percentages changed over time? If Justice Thomas's influence among the conservatives is on the upswing, we might expect to see increasing agreement percentages, though increases could also mean that other Justices are having more influence on Thomas than he is on them. (By agreement, we mean cases in which the justices were in the majority or in dissent together.)

Table 7 shows a relatively high agreement rate between Thomas and the other conservatives. The only potential trends of note are (1) the slightly declining agreement (hinted at in Figure 2) between Scalia and Kennedy and (2) the slight increase in the Thomas-Kennedy percentage, from a low of 63.6 in 2007 to 85.5 in 2010 (their highest was 87 in 2001). This may be another sign of Thomas's increasing influence but it's too soon to say.

**Table 7.** Agreement with Justice Thomas

	Scalia	Kennedy	Roberts	Alito
2000	98.8%	82.7%		
2001	89.5%	87.0%		
2002	91.9%	75.7%		
2003	90.4%	82.4%		
2004	85.5%	72.4%		
2005	94.5%	80.8%	92.8%	91.7%
2006	94.3%	75.4%	86.6%	82.9%
2007	86.4%	63.6%	80.0%	78.5%
2008	88.3%	77.9%	81.8%	84.4%
2009	88.2%	73.7%	84.2%	83.8%
2010	86.8%	85.5%	88.0%	88.2%