

— SCOTUSBLOG —

**MEMORANDUM**

July 1, 2011

From: SCOTUSblog.com

Re: End-of-Term Statistical Analysis – October Term 2010

This memo presents the blog's annual summary of relevant statistics for the Term:

**1. Docket**

The Court released 75 signed merits opinions after oral argument during October Term 2010. The number of decisions after argument for previous terms are 75 (OT09), 76 (OT08), 67 (OT07), 68 (OT06), 71 (OT05), 76 (OT04), 74 (OT03), 73 (OT02), 76 (OT01), 79 (OT00), 74 (OT99), 78 (OT98), 92 (OT97), 81 (OT96), 77 (OT95), 84 (OT94), 84 (OT93), 107 (OT92), 107 (OT91), 102 (OT90).

The Court decided 82 merits cases in total. That total includes 75 signed opinions, five summary reversals, and two cases that were affirmed by an evenly divided Court. The numbers for previous terms are 86 (OT09), 80 (OT08), 71 (OT07), 72 (OT06), 82 (OT05), 80 (OT04), 79 (OT03), 80 (OT02), 81 (OT01), 85 (OT00), and 77 (OT99).

The Court reversed or vacated the lower court in 57 of 81<sup>1</sup> cases (70%), and it affirmed in 24 (30%). These figures are similar to those for OT09, when the Court reversed or vacated the lower court in 71% of cases and affirmed in part or in full in 29% of cases.

The Court once again considered more cases from the Ninth Circuit than it did from any other court – 26 of 82 cases (32%). This total represents a significant increase from years past, when the Ninth Circuit contributed 15 of 86 cases (18%) during OT09 and 16 of 79 cases (20%) during OT08. As the Court breaks for its annual summer recess, 16 of the 41 cases scheduled for oral argument during OT11 (39%) come from the Ninth Circuit.

Although the Ninth Circuit contributes far more cases to the Court's docket than any other circuit, its reversal rate is only marginally higher than those of other courts: during OT10, the Court voted to reverse or vacate the judgment below in 70% of all cases but voted to reverse the Ninth Circuit in 73% of its cases. The Ninth Circuit's unremarkable reversal rate during OT10 reflects the recent norm. During OT09, the Court voted to reverse in 71% of all cases but reversed the Ninth Circuit in only 60% of cases, while during OT08, it voted to reverse in 76% of all cases but reversed the Ninth Circuit in 81% of cases.

---

<sup>1</sup> One case was an original action between states, so there was no decision below to affirm or reverse.

## — SCOTUSBLOG —

The various state courts provided the second greatest source of cases – 9 out of 82 total cases (11%). The Court reversed the state courts in 100% of the cases during OT10. The U.S. Court of Appeals for the Federal Circuit contributed seven cases to the total (9%) – a dramatic increase from OT09, in which the Federal Circuit contributed only one case to the Term. The Federal Circuit contributed four cases to the Term during both OT08 and OT07.

### 2. Split and Unanimous Decisions

The Court split 5-4 in 16 out of 80<sup>2</sup> cases during OT10 (20%).<sup>3</sup> Going into OT10, the Roberts Court, OT05-present, has split 5-4 in 22% of cases. The number of 5-4 opinions from previous Terms are: 16 of 86 cases (19%) in OT09; 24 of 80 cases (30%) in OT08; 12 of 69 cases (17%) in OT07; 24 of 72 cases (33%) in OT06; and 11 of 82 cases (13%) in OT05.

Of this Term's 75 signed opinions and 5 summary reversals, 18 (23%) were completely unanimous – meaning there were no concurring opinions – and 38 out of 80 (48%) had at least a unanimous judgment. From OT05-OT09, the Court reached a unanimous judgment in about 41% of cases.

There were, on average, 1.34 dissenters per decision. That number is on the low end of averages over the past fifteen years: 1.33 (OT09), 2.04 (OT08), 1.86 (OT07), 1.81 (OT06), 1.23 (OT05), 1.68 (OT04), 1.56 (OT03), 1.45 (OT02), 1.79 (OT01), 1.80 (OT00), 1.77 (OT99), 1.61 (OT98), 1.36 (OT97), 1.45 (OT96) and 1.43 (OT95).

The Court split 8-1 in 10 cases (13%), a number only slightly higher than the recent average during the Roberts Court, 8%. Justice Scalia was a solo dissenter three times during OT10 even though his average over the preceding ten Terms was only 0.6 solo dissents per term. Justice Ginsburg dissented on her own in two cases, while Justices Kennedy, Thomas, Breyer, Alito, and Sotomayor each dissented once on their own. After six full Terms on the Court, Chief Justice Roberts still has never been a solo dissenter in a merits decision.

### 3. Distribution of Justices in 5-4 Decisions

This Term featured remarkably consistent line-ups in 5-4 decisions. In fact, there were only four different line-ups, and the two primary line-ups – Justice Kennedy with either the liberal (Justices Ginsburg, Breyer, Sotomayor, and Kagan) or conservative (the Chief Justice plus Justices Scalia, Thomas, and Alito) blocs – made up the majority in 88% of all 5-4 decisions. The ratio of different alignments to total opinions was tied for the lowest in the past decade – .25 (4

<sup>2</sup> In this section, we have excluded both 4-4 cases from consideration. We therefore use a total of 80 cases and divide the vote splits accordingly.

<sup>3</sup> In three of those cases – *Schindler v. Kirk*, *Chamber of Commerce v. Whiting*, and *U.S. v. Juvenile Male* – the Court actually split 5-3. We concluded that it is substantially likely that, had all nine Justices participated, the vote would have been 5-4.

## — SCOTUSBLOG —

alignments and 16 5-4 decisions). The Court saw the same ratio during OT06 (6 different alignments and 24 5-4 decisions), but – by comparison – the Court produced a .58 ratio during OT04 (14 different alignments and 24 5-4 decisions). Recently, the Court has produced more moderate ratios: .44 during OT09, .30 during OT08, and .50 during OT07.

In two cases, the vote line-up departed from the usual line-up of Justice Kennedy with either the conservative or liberal blocs. In *CSX Transportation v. McBride*, Justice Thomas joined the traditionally ‘liberal’ bloc. And in *Bullcoming v. New Mexico*, the Confrontation Clause once again divided the Court in an unusual way. Justice Ginsburg wrote the majority opinion for herself and Justices Scalia, Thomas, Sotomayor, and Kagan, while the Chief Justice authored a dissenting opinion for himself and Justices Kennedy, Breyer, and Alito.

Justice Kennedy continues to vote with the conservative Justices in the vast majority of 5-4 decisions. During OT10, he voted with the conservative bloc in ten cases (63% of all 5-4 decisions) and sided with the liberal bloc in only four cases (25%). The conservative bloc’s victorious Term represents a high-water mark over the past few years: during OT09, that group was victorious in 50% of 5-4 decisions, compared to the liberal bloc’s victory in 19% of cases, while during OT08 they created the majority in 48% of cases while the liberal bloc did the same in only 22% of cases. The last time the conservative bloc created the majority in more than 60% of 5-4 decisions was during OT99, when they prevailed in 67% of cases.

Continuing a recent trend, Justice Kennedy remained the Justice most likely to be in the majority of a 5-4 decision. He joined the majority in 14 out of 16 5-4 decisions (88%) during OT10, reflecting a rate similar to OT09 (69%), OT08 (78%), OT07 (67%), and OT06 (100%).

The liberal bloc of the Court was considerably less successful than its counterpart in securing 5-4 victories during OT10, and its frequency in the majority rate reflects that disparity. Justices Ginsburg, Sotomayor, and Kagan<sup>4</sup> joined the majority in 6 of 16 cases (38%), while Justice Breyer joined the majority in only 5 of 16 cases (31%). By comparison, the conservative Justices fared considerably better: Justice Thomas joined the majority in 12 cases (75%), Justice Scalia joined the majority in 11 cases (69%), and the Chief Justice and Justice Alito joined the majority in 10 cases each (63%).

If majority opinions were distributed randomly, each Justice would write around 20% of the majority opinions when he or she was in the majority of a 5-4 decision. Justice Thomas and Justice Ginsburg both authored the majority opinion in 33% of 5-4 decisions in which they were in the majority. Justice Thomas’s high rate of authorship is especially notable considering his record recently: 9% during OT09, 13% during OT08, 13% during OT07, and 29% during OT06. Chief Justice Roberts wrote the majority opinion in 30% of cases when he was in a similar situation. Justice Sotomayor authored her first 5-4 majority opinion during OT10.

---

<sup>4</sup> Justice Kagan was recused in two 5-4 cases; if those two are excluded from her total, she joined the majority in 6 of 14 cases (43%).

## — SCOTUSBLOG —

### **4. Levels of Agreement Between Pairs of Justices**

Agreement between a pair of Justices can be measured by two measures: the pair's agreement in full – meaning that the pair agreed on every part of the same opinions – or the pair's agreement in full, in part, or in the judgment – meaning that the pair simply agreed on the same judgment. For the sake of picking a consistent measurement, this memorandum will use agreement in full, in part, or in the judgment, unless otherwise noted.

Oddly enough, the two pairs of Justices with the highest agreement this Term are the two pairs of recent appointees. The Chief Justice and Justice Alito agreed in a remarkable 96.2% of cases this year, while Justices Sotomayor and Kagan agreed in 94% of cases. Trailing nearly four percentage points behind either of those rates was the pair of Justices Ginsburg and Kagan at 90.4%. The high agreement rate of the Chief Justice and Justice Alito should be expected; the pair recorded the highest agreement rate of any two Justices during OT09 (92%), and a relatively high agreement during OT08 (88%).

The lowest agreement between any two Justices was the pair of Justices Ginsburg and Alito with agreement in only 62.5% of cases. That rate is hardly surprising because Justice Ginsburg dissented in 26% of cases, more than any liberal Justice, while Justice Alito dissented in 14% of cases, more than any other conservative Justice. Trailing behind that pair was Chief Justice Roberts and Justice Ginsburg with 64.6% agreement, and a three-way tie of Justices Scalia and Ginsburg, Scalia and Breyer, and Thomas and Ginsburg with 65.0% agreement.

Predictably, the top-ten list of agreement rates is comprised primarily of pairs with similar ideological bents. Justice Kennedy makes only two appearances on the list: tied for the fourth-highest rate with Chief Justice Roberts at 89.9% agreement and with Justice Alito for the ninth-highest rate at 87.5%. The list of the ten lowest agreement rates is also predictably composed of Justices who are traditionally on opposite sides of the ideological spectrum, and Justice Kennedy appears only once: creating the seventh-lowest agreement rate with Justice Ginsburg, 66.3%. Pairs featuring Justice Ginsburg – the Justice who dissented most often in OT10 – created five of the ten lowest agreement rates.

Measured by the harsh test of full agreement – agreement in every word of the same opinions – Justices Ginsburg and Kagan recorded the highest level of agreement, 84.6%, followed by the Chief Justice and Justice Alito with 83.5% agreement in full. The lowest rates of agreement in full were recorded by the duos of Justices Thomas and Ginsburg, 36.3%, and Justices Thomas and Breyer, 37.5%.

### **5. Opinion Authorship**

## — SCOTUSBLOG —

The Court authored 176 opinions in 82 merits opinions.<sup>5</sup> That total is only slightly below the Roberts Court average of 184 opinions per term. Justice Ginsburg outperformed her Roberts Court average of 16 total opinions by releasing 22 during OT10; similarly, Justice Scalia outperformed his average of 23 opinions during the same period by authoring 28 during OT10. Justice Sotomayor authored eight more opinions this year than she did last year for a total of 22 during OT10. Chief Justice Roberts authored slightly fewer opinions this year, eleven, than his Roberts Court average coming into the year would predict, 14.

Justice Scalia authored the greatest number of total opinions with 28, comprised of ten majority opinions, eleven concurring opinions, and seven dissenting opinions. Justices Thomas, Ginsburg, and Sotomayor followed, with each authoring 22 total opinions. Chief Justice Roberts authored the fewest opinions, eleven, with only eight majority opinions and three dissenting opinions.

Justice Kennedy wrote a remarkably high number of majority opinions, eleven. Prior to this year, the last time a Justice had written ten or more majority opinions in a given Term was when Justice Scalia authored eleven majority opinions during OT08, a feat that had not been achieved since Chief Justice Rehnquist authored ten opinions for the Court during OT98.

The high number of majority opinions authored by Justices Kennedy and Scalia – eleven and ten, respectively – is all the more remarkable due to the skewed distribution of opinions. Four Justices – three liberal and one conservative – authored only seven majority opinions: Justices Breyer, Alito, Sotomayor, and Kagan. The distribution of opinions by sitting was also highly unusual. During the November sitting, Justice Scalia authored three opinions, *Staub v. Proctor Hospital*, *Brown v. Entertainment Merchants Association*, and *AT&T v. Concepcion*, while two Justices, Justices Alito and Sotomayor, did not author any majority opinions for the sitting. It is very likely that both of those Justices were initially assigned an opinion but lost their majority to either Justice Scalia or Justice Kennedy. During the January sitting, Chief Justice Roberts and Justices Kennedy and Ginsburg each wrote two opinions while Justice Breyer did not release any majority opinions. Again, the most likely explanation is that Justice Breyer was assigned to an opinion for the sitting but lost the majority.

The Justices also released an unusually low number of dissenting opinions. From OT95-OT09, the Court averaged 60 dissenting opinions per Term, but this year it released only 47. As such, for only the third time since 1995, and the second consecutive year, the Court released a greater number of concurring opinions than dissenting opinions (it also did so in OT02).

The disparity in the number of concurring and dissenting opinions is largely attributable to the low number of dissenting opinions, rather than to a high number of concurring opinions. From OT95-OT09, the Court averaged 49.33 concurring opinions per Term, and it released 49 concurring opinions during OT10. Neither the Chief Justice nor Justice Kagan authored any

---

<sup>5</sup> Of course, a *per curiam* decision will not have a signed majority opinion, but it can – and often will – have signed concurring or dissenting opinions.

— SCOTUSBLOG —

concurring opinions during OT10; the last time a Justice sat for an entire Term but did not issue any concurring opinions was Chief Justice Rehnquist during OT02.<sup>6</sup>

## 6. Frequency in the Majority

Continuing a strong recent trend, Justice Kennedy and Chief Justice Roberts registered the highest frequencies in the majority, 94% and 91%, respectively. The pair registered the highest rates last year, 91% each. Justice Kennedy had the highest frequency during OT08, 92%, the Chief Justice registered the highest frequency during OT07, 90%, and Justice Kennedy registered the highest frequency during OT06, 97%.

A sorted list of the Justices most frequently in the majority reveals a clear division by ideology. Justice Kennedy sits at the top of the list with 94% frequency in the majority, and the conservative Justices – the Chief Justice and Justices Thomas, Scalia, and Alito (in that order) – follow with 91%, 88%, 86%, and 86%. The liberal Justices round out the list with Justices Kagan, Sotomayor, Breyer, and Ginsburg joining the majority in 81%, 81%, 79, and 74% of cases, respectively. Recent Terms have divided along the same lines, but not always so cleanly. During OT09, the conservative Justices generally joined the majority more often than their liberal counterparts, but Justice Sotomayor beat Justice Thomas by one percentage point, while during OT08, the Justices were sorted by ideology (swing vote, conservative, and then liberal) without exception.

---

<sup>6</sup> Although Justice O'Connor did not author any concurring opinions during OT05, she sat for only slightly more than half of the full Term.