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MEMORANDUM

Thursday, June 28, 2012

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Re: End-of-Term Statistical Analysis – October Term 2011

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

1. Docket

The Court released 65 signed merits opinions after oral argument during October Term 2011. The number of decisions after argument for previous Terms are 75 (OT10), 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), and 102 (OT90). This year's tally is the lowest in recent history.

The Court decided 75 merits cases in total. That total includes 64 signed opinions, one per curiam opinion released after oral argument, and ten summary reversals. The numbers for previous Terms are 82 (OT10), 86 (OT09), 80 (OT08), 71 (OT07), 72 (OT06), 82 (OT05), 80 (OT04), 79 (OT03), 80 (OT02), 81 (OT01), 85 (OT00), and 77 (OT99). 13% of all merits cases were summary reversals, a high percentage but not an unprecedented one. Since October Term 2000, the Court has averaged about 8% of all merits opinions as summary reversals, and it only reached double digits in two other Terms since then: OT09 (16%) and OT05 (11%). On the opposite extreme, the Court released only 3% of all merits opinions as summary reversals during OT07.

The Court reversed or vacated the lower court in 47 of 75 cases (63%), and it affirmed in 24 (37%). These figures are consistent with those from OT10, when the Court reversed or vacated the lower court in 70% of cases and affirmed in part or in full in 30% of cases. Notably, the Court did not hear any cases from its Original docket during OT11, nor did it issue any merits opinions in those cases.

The Court once again considered more cases from the Ninth Circuit than it did from any other court – 24 of 75 cases (32%). This figure is consistent with the rate from OT10 (32%), but represents a substantial increase over prior years, when the Ninth Circuit contributed 15 of 86 cases (18%) during OT09 and 16 of 79 cases (20%) during OT08. Looking towards OT12, only 4 of the 30 cases currently scheduled for oral argument during the next Term (13%) come from the Ninth Circuit.

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The various state courts provided the second-greatest source of cases – 11 out of 75 total cases (15%). The Court reversed the state courts in 64% of the cases during OT11. The U.S. Court of Appeals for the Sixth Circuit – which has fared poorly in the Supreme Court in recent years, winning only one case out of eighteen between OT08 and OT10 – continued its abysmal streak at the Court: the Court considered five cases originating in the Sixth Circuit during OT11, and it reversed the court below in each.

2. Split and Unanimous Decisions

Of this Term’s 75 merits opinions, 20 (27%) were completely unanimous – meaning there were no concurring opinions – and 33 out of 75 (44%) had at least a unanimous judgment. From OT06-OT10, the Court reached a unanimous judgment in about 39% of cases.

The Court split 5-4 in 15 out of 75 cases during OT11 (20%).¹ The number of 5-4 opinions from previous Terms are: 16 of 80 cases (14%) in OT10; 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.

The Court split 8-1 in 8 cases (11%), a number only slightly higher than the Roberts Court’s recent average of 10%. The Court seemed to be on pace to clear that rate with room to spare after the Court released five 8-1 opinions across two days in January. However, after releasing only one 8-1 decision in the last 35 decisions of the Term, the rate of eight-Justice-majority decisions receded to normal levels. Justice Ginsburg was a solo dissenter three times during OT11, far exceeding her average of 0.5 per lone dissents per Term since OT00. Justice Sotomayor dissented on her own in two cases, while Justices Scalia, Thomas, and Breyer 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, nor has Justice Kagan during her two Terms on the Court.

3. Distribution of Justices in 5-4 Decisions

There were seven different alignments of Justices in this Term’s 15 5-4 decisions. That number is consistent with past years, in which there have been about half as many unique arrangements as decisions. This year’s ratio, 0.47, is just lower than the average for the preceding ten Terms, 0.41. However, the two most prevalent alignments – Justice Kennedy with either the liberal or the conservative Justices – were found in only 10 out of 15 decisions.

Bucking a recent trend, the conservative bloc did not dominate 5-4 decisions. In fact, there were as many cases with a traditionally conservative lineup – 5 – as there were cases with a

¹ The Court actually split 5-3 in *Federal Aviation Administration v. Cooper*, but we count that case as a 5-4 decision throughout this summary memo because we concluded that it is substantially likely that, had all nine Justices participated, the vote would have been 5-4.

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traditionally liberal lineup. The conservative bloc has had more 5-4 victories than the liberal bloc in every Term since OT95 with only one exception: OT07, where the two groups had the same number of victories.

Although the traditionally conservative bloc and the traditionally liberal bloc tied for wins this Term, the traditionally conservative Justices appeared more frequently in the majority of 5-4 decisions. Behind Justice Kennedy, who set the pace with 12 appearances in 15 cases, are the Chief Justice and Justice Thomas, who both had ten appearances, and Justices Scalia and Alito, who each had nine appearances. The liberal Justices had notably fewer appearances in 5-4 decisions: Justices Breyer and Sotomayor had seven each, Justice Kagan was in the majority of 6 cases out of the 14 cases in which she voted, and Justice Ginsburg was in the majority of only 5 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 12 out of 15 5-4 decisions (80%) during OT11, reflecting a rate similar to OT10 (88%), OT09 (69%), OT08 (78%), OT07 (67%), and OT06 (100%). Justice Kennedy also authored the greatest number of 5-4 majority opinions: 4. Perhaps reflecting his outsized influence in close decisions, he authored or partially authored the principal dissenting opinion in 2 of the 3 5-4 cases in which he dissented.

Authorship of 5-4 majority opinions was scattered. Justice Kennedy authored the greatest number of majority opinions – 4 – but also appeared in the majority more frequently than any other Justice. Justices Breyer and Alito both authored 3 majority opinions and appeared in the majority 7 and 9 times, respectfully, while Justice Sotomayor authored a pair of 5-4 majority opinions. Justice Kagan and the Chief Justice both authored only 1 5-4 majority opinion, although theirs were among the biggest of the Term: *Miller v. Alabama* (Kagan) and *National Federation of Independent Businesses v. Sebelius* (Roberts). Justice Kagan’s majority opinion in *Miller v. Alabama* was her first 5-4 majority opinion.

Justices Scalia and Thomas did not author any 5-4 majority opinions despite appearing in 10 and 9 majorities, respectively. They authored the same number as Justice Ginsburg, who appeared in half as many majorities: 5. This is only the second Term during the Roberts Court that Justices Scalia and Ginsburg have not authored a single 5-4 majority opinion, and the first Term in which Justice Thomas has not authored a single 5-4 majority opinion.

4. Levels of Agreement Between Pairs of Justices

The pair of Justices with the highest rate of agreement² during OT11 is the pair of Justices Scalia and Thomas (93.3%). Those two agree on the judgment in 70 out of 75 decisions

² For the sake of picking a consistent measurement, this memorandum will use agreement in full, in part, or in the judgment unless otherwise noted. That metric measures when a pair of Justices agree on any aspect of the opinion, which typically translates into whether the pair agree on the judgment – affirm, reverse, or vacate.

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on the merits. Chief Justice Roberts and Justice Alito – the pair of Justices that agreed most frequently last year (96.2%) – had the second-highest agreement rate for the current term (90.5%). The conservative bloc’s solidarity during OT11 is evidenced by the fact that the next 4 highest agreement rates also belong to traditionally conservative members of the Court: Justices Scalia and Alito (88.0%), Justices Thomas and Alito (88.0%), Chief Justice Roberts and Justice Thomas (87.8%), and Chief Justice Roberts and Justice Scalia (86.5%). The last 4 positions in the top 10 belong to pairs of traditionally liberal members of the Court.

Justices Scalia and Ginsburg – close friends outside of the Court – disagreed more often with one another than any other pair of Justices except for the pair of Justices Thomas and Ginsburg, who disagreed at the same rate (56.0%). The other pairs with the lowest agreement rate were predictably pairings of traditionally liberal and traditionally conservative Justices: Justices Scalia and Breyer (57.3%), Justices Ginsburg and Alito (57.3%), and Justices Thomas and Breyer (62.7%).

Notably, a pair featuring Justice Kennedy did not appear at all on lists of the 10 highest agreement rates or the 10 lowest rates, meaning his agreement rates with each of his peers comprised 8 of the middle 16 pairings. He agreed with each of his peers in between 72.9% and 83.6% of all cases. Justice Kennedy has shown stronger agreement rates with some of his colleagues in the past; just last year he formed two of the strongest agreement rates of the Term with Chief Justice Roberts (89.9% OT10, 83.6% OT11) and Justice Alito (87.5% OT10; 78.4% OT11).

5. Opinion Authorship

The Court delivered 160 total opinions in 75 merits decisions. The total number of opinions authored during OT11 is not only the lowest in recent memory, but perusal of the *Harvard Law Review*’s annual Supreme Court issues suggests that this may be one of the lowest tallies in more than a half-century. Regardless of this Term’s historical significance in that respect, the total number of opinions is only fractionally lower than it has been in recent years. Between OT00 and OT10, the Court released an average of 188 opinions per year, fluctuating during that period between 171 opinions (OT07) and 205 opinions (OT04). That this year’s total is lower than most is undoubtedly also a function of the fact that the Court decided only 65 merits cases after oral argument. The ratio of 2.13 opinions per case is only slightly lower than last year’s ratio (2.17), but is still the lowest ratio of any Term since at least October Term 2000.

Justice Scalia once again authored more opinions than any other Justice. During OT10 he led the pack with 28 total opinions, but this year he led with only 22 total opinions. He has to share his award this year, however, because Justice Breyer authored 22 total opinions as well, one more than last year. The two Justices reached their total in nearly identical ways: Justice Scalia authored 8 majority opinions, 4 concurring opinions, and 10 dissenting opinions, while Justice Breyer authored 7 majority opinions, 5 concurring opinions, and 10 dissenting opinions. Justice Ginsburg was their closest competition with 20 total opinions. The three Justices with the

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lowest tally from last year again authored the fewest opinions this year: Chief Justice Roberts (11 OT10; 12 OT11), Justice Kennedy (17 OT10; 11 OT11), and Justice Kagan (10 OT10; 11 OT11).

The low number of merits cases decided during OT11 affected not only the total number of cases, but the individual Justices' loads of majority opinions. Justices Thomas and Sotomayor both authored only 6 majority opinions, a low matched in this century only by Justice Breyer during OT03. Both Justices are the victims of skewed distributions: Justice Sotomayor did not author any majority opinions during the October sitting, while four Justices each authored two opinions; Justice Thomas did not author any majority opinions during the December sitting, in which three of his colleagues drafted 2 opinions each. The number of majority opinions drafted by Justices Thomas and Sotomayor is dwarfed by the work product produced by Justices in recent years; last year alone Justice Scalia authored 11 majority opinions and Justice Kennedy authored 10 of his own. Incidentally, those two Justices once again lead their colleagues with 8 and 9 majority opinions, respectively.

6. Frequency in the Majority

Justice Kennedy is, for the fourth consecutive Term, the Justice most likely to appear in the majority. This Term he voted with the majority in 69 out of the 74 cases he voted in, marking the second-highest percentage of the past five Terms (93.2%) and falling only to his frequency in the majority from last Term (93.8%). Chief Justice Roberts, who himself has become a mainstay of recent majority opinions, had the second-highest frequency in the majority (91.9%). In 3 of the last 4 Terms, the Chief Justice has been either the most likely or second-most likely Justice to appear in the majority of a decision. Just as she was last Term, Justice Ginsburg is the Justice least likely to vote with the majority; she votes with the majority in 69.3% of all cases.