

MEMORANDUM

June 29, 2006

From: Akin, Gump, Strauss, Hauer & Feld

RE: End of Term Statistics and Analysis – October Term 2005

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

1. Docket

The Justices decided 71 cases after argument this Term. That total follows the Court's recent trend. The numbers of decisions after argument for previous Terms are 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 Justices decided 82 cases in total this Term, including eleven summary dispositions without argument. The numbers for previous terms are 80 (OT04), 79 (OT03), 80 (OT02), 81 (OT01), and 77 (OT99).

The Court reversed or vacated the lower court decision in 59 of 82 cases (72%) and affirmed the lower court in 20 of 82 cases (24%). In three cases, it reversed or vacated in part and affirmed in part.

More of the Court's caseload came from the Ninth Circuit than from any other circuit (18 of 82–22%). The Court reversed the Ninth Circuit in 15 of those 18 cases (83%). The Second and Sixth Circuits followed, each with 7 of 82 cases (9%). Only two cases came from the D.C. Circuit and one from the First Circuit. State court cases accounted for 15 of 82 cases (18%) this Term.

2. Split and Unanimous Decisions

The number of 5-4 decisions this Term, 11 of 82 (13%), was markedly lower than OT04, when 24 of 80 cases (30%) produced a 5-4 split. The deviation from OT04 may be explained in part by the fact that four decisions were 5-3 (with Justice Alito not participating in three and Chief Justice Roberts not participating in one) and one was 5-2 (with Alito and Roberts not participating). Had all nine Justices participated in those cases, it is possible that the number of 5-4 decisions would have increased to 16 of 82 (20%). The numbers from previous terms are 21 of 79–27% (OT03), 13 of 80–16% (OT02), 21 of 71–26% (OT01), 26 of 85–30% (OT00), 21 of 77–27% (OT99), 19 of 80–24% (OT98), 16 of 96–17% (OT97), 17 of 91–19% (OT96), 16 of 85–19% (OT95).

The number of unanimous opinions increased substantially over the previous term. In OT05, 37 of 82 cases (45%) were decided unanimously, and 45 of 82 (55%) were unanimous in the judgment. By contrast, only 17 of 80 decisions (21%) were unanimous in OT04. The numbers from previous years are 25 of 79–32% (OT03), 31 of 80–39% (OT02), 26 of 81–32% (OT01), 25 of 85–29% (OT00).

3. Distribution of Justices in 5-4 Decisions

In this Term's 5-4 decisions, Justice Kennedy was in the majority on 9 of 12¹ occasions. Chief Justice Roberts and Justice Scalia were in the majority in 8 of 12 instances. Justice Thomas was in the majority in 7 of 12 instances. Justice Alito, who participated in nine of the Court's eleven 5-4 cases, was in the majority 6 times. Justice Ginsburg was in the majority 6 of 12 times, while Justices Stevens and Souter were in the majority 5 times, and Justice Breyer was in the majority only 4 times. Justice O'Connor was in the majority of both of the 5-4 decisions in which she participated.

By contrast, during OT04 Justices O'Connor, Scalia, Kennedy, Souter, and Thomas were in the majority in 14 of 24 decisions. Justices Ginsburg and Breyer were each in the majority on 13 occasions. Chief Justice Rehnquist and Justice Stevens were in the majority 12 times.

Justice Scalia authored 4 of the Court's 5-4 decisions. Justices Kennedy and Ginsburg each authored 2, and Justices Roberts, Stevens, and Thomas each authored 1. Justices O'Connor, Souter, Breyer, and Alito authored none.

In addition to the two 5-4 decisions he authored, Justice Kennedy wrote controlling concurrences in two additional cases.²

The Court's conservative majority (Roberts, Scalia, Kennedy, Thomas, and Alito/O'Connor) held together in 6 of 12 (50%) of the 5-4 decisions this Term. This represents a significant increase from OT04, in which the conservative majority held in only 5 of 24 cases (21%). However, it is more in line with previous terms: 10 of 21–48% (OT03), 6 of 13–46% (OT02), 10 of 21–48% (OT01), 14 of 26–54% (OT00), 14 of 21–66% (OT99), 10 of 19–53% (OT98), 6 of 16–38% (OT97), 8 of 17–47% (OT96), 7 of 16–44% (OT95).

Two 5-4 cases this Term were decided by a majority composed of the remaining four Justices (Stevens, Souter, Ginsburg, and Breyer) plus Justice Kennedy, one case was decided by those four Justices plus Justice O'Connor, and one case was decided by those four Justices plus Justice Scalia. The other 5-4 alignments were Roberts, Kennedy, Souter, Ginsburg, Alito (once); and Roberts, Stevens, Scalia, Thomas, Ginsburg (once).

¹ This figure is 12 rather than 11 because *LULAC v. Perry* produced two different 5-4 splits.

² Those cases were *Hudson v. Michigan* and *Rapanos v. United States*. Justice Kennedy also wrote what is effectively a controlling opinion in *Hamdan v. Rumsfeld*.

4. Levels of Agreement Between Pairs of Justices

In the 24 cases in which she was involved, Justice O'Connor displayed significant agreement with her colleagues. Justices O'Connor and Souter agreed in full in 96% of those cases. Justice O'Connor agreed in full with Justices Scalia and Breyer 92% of the time, with Chief Justice Roberts 91% of the time, with Justices Kennedy and Ginsburg 88% of the time, with Justice Thomas 87% of the time, and with Justice Stevens 83% of the time.

Excluding Justice O'Connor, the greatest affinity between Justices was shown by Chief Justice Roberts and Justice Alito, who agreed in full in 89% of the cases they both heard. They were followed closely by Justices Scalia and Thomas, who agreed in full 88% of the time. Other pairs of Justices who agreed in full in more than 80% of cases were Roberts-Scalia (85%), Souter-Breyer (85%), Souter-Ginsburg (84%), Roberts-Thomas (83%), Stevens-Souter (83%), Roberts-Kennedy (81%), and Ginsburg-Breyer (80%).

Justice Alito agreed in full with Justices Thomas and Kennedy 76% of the time and with Justice Scalia 74% of the time. By contrast, he and Justice Stevens agreed in full only 42% of the time, and he and Justice Breyer agreed in full only 53% of the time.

Overall, the affinity levels this Term were higher than the previous term. In OT04, only four pairs of Justices agreed with each other in full more than 70% of the time: Rehnquist-Kennedy (77%), Rehnquist-O'Connor (77%), Souter-Ginsburg (71%), and Stevens-Ginsburg (70%).

Justices Scalia and Thomas, who have historically had among the highest degrees of affinity, agreed in full or in part 94% of the time and agreed in full, in part, or in the judgment 95% of the time. They disagreed only 5% of the time.³ That represents a decline from OT04, when they disagreed 13% of the time. In previous terms, Justice Scalia and Justice Thomas's percentages of agreement in full, in part, and in the judgment were 73/79/91 (OT03), 89/92/95 (OT02), 82/87/92 (OT01), 76/92/99 (OT00), 81/91/93 (OT99), 76/92/95 (OT98), 82/88/93 (OT97), 88/98/99 (OT96), 83/unavail./93 (OT95).

Other pairs with particularly low rates of disagreement this Term were Roberts-Scalia (5%), Roberts-Alito (5%), Roberts-Thomas (8%), Kennedy-Alito (8%), Souter-Breyer (9%), and Stevens-Souter (10%). In OT04, the pair of Justices with the lowest level of disagreement was Chief Justice Rehnquist and Justice Thomas (9%).

Justice Alito had among the highest rates of disagreement with his colleagues, probably in part because he participated only in the latter part of the Term, when the Court's decisions were generally more contentious. He disagreed most often with Justice Stevens (45% of the time), followed by Alito-Ginsburg (34%), Alito-Breyer (34%), and Alito-

³ Disagreement means that the Justices did not agree in full, in part, or in the judgment.

Souter (32%). Other pairings of Justices with high rates of disagreement were Stevens-Thomas (32%), Thomas-Souter (30%), Thomas-Ginsburg (30%), Stevens-Scalia (29%), Roberts-Stevens (28%), Thomas-Breyer (27%), Scalia-Ginsburg (26%).

5. Dissents

Justice Stevens dissented 19 times during the Term, more frequently than any other Justice. The next most frequent dissenters were Justice Breyer, who dissented 15 times, and Justices Souter, Thomas, and Ginsburg, who each dissented 14 times. Justices Scalia and Kennedy each dissented 9 times. Chief Justice Roberts dissented only 6 times. Justice Alito, who participated in 39 of the Court's decisions, dissented 5 times. Justice O'Connor, who participated in 24 decisions, was never in dissent.

Justices Stevens and Thomas each dissented alone in 2 cases. The remaining Justices had no solo dissents during the Term. In OT04, Justice Stevens dissented alone in 3 cases, while Justices Scalia, Kennedy, and Thomas each dissented alone once.