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Re: End of Term Statistics and Analysis – October Term 2004

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

1. The Justices decided 76 cases after argument this Term (one of which was an opinion accompanying a dismissal), keeping with their recent trend. The numbers of decisions after argument for previous Terms are 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 80 cases in total this Term, including four summary reversals without argument. The numbers for previous terms are 79 (OT03), 80 (OT02), 81 (OT01), and 77 (OT99).

2. This Term's level of 5-4 decisions, 24 of 80 (30%), was slightly higher than the number of 5-4 decisions in OT03: 21 of 79 (27%). The numbers from previous terms are 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 continued to drop further, 17 of 80 (21%), down from 25 of 79 (32%) in OT03 and 31 of 80–39% in OT02. The numbers from previous years are 26 of 81–32% (OT01), 25 of 85–29% (OT00).

3. In this Term's 5-4 decisions, 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 13 times. Chief Justice Rehnquist and Justice Stevens were in the majority 12 times. This relatively even distribution represents a departure from OT03, when Justice O'Connor was in the majority in 16 of 21 cases, followed by Justices Kennedy (15), Thomas (14), and Scalia (11).

Justice Kennedy authored 5 of the Court's 5-4 decisions and Justice Souter authored 4. Chief Justice Rehnquist, and Justices Stevens and Scalia authored three each. Justices O'Connor and Breyer authored only two of the 5-4 decisions. Justice Thomas authored one and Justice Ginsburg authored none. One of the decisions was per curiam.

The Court's conservative majority (WHR, SOC, AS, AMK, CT) held together in only 5 of 24 (21%) of the 5-4 cases this Term. This represents a notable drop from the previous two terms, when the conservative majority held together in nearly half of the 5-4 cases, and a departure from the relatively higher levels of coherence observed in previous years of the Rehnquist Court. The numbers for 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).

Another four 5-4 cases this Term were decided by a majority composed of the remaining four Justices (JPS, DS, RBG, and SGB) plus Justice O'Connor. Justice Kennedy defected from the conservative majority to join the remaining four Justices in three of the 5-4 majorities. Justice Scalia defected once. Justice Thomas, who defected once last year, did not defect at all this year. In OT01, Justice O'Connor defected four times and Justices Rehnquist and Thomas defected once each. In OT00, seven 5-4 cases were decided by these four Justices and a defector, with Justice O'Connor providing the fifth vote four times and Justice Kennedy three.

4. Chief Justice Rehnquist and Justice Kennedy agreed in full in 77% of the cases that they both heard (53/69). Three other pairs of justices also agreed in full 70% or more of the time: Rehnquist-O'Connor (77%), Souter-Ginsburg (71%), and Stevens-Ginsburg (70%).

Justices Ginsburg and Souter agreed in full or in part 88% of the time. Only one other pair of Justices agreed in full or in part more than 85% of the time: Chief Justice Rehnquist and Justice Thomas (87%).

Justices Scalia and Thomas, who have historically had among the highest degrees of affinity, disagreed only 13% of the time. This represents a difference from last Term, when Justices Scalia and Thomas agreed less often than did six other pairs of justices. This Term, only Chief Justice Rehnquist and Justice Thomas had a lower rate of disagreement: 9% (6/69). 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).

Justice Ginsburg continued to exhibit a high degree of agreement with Justice Souter, with the two justices disagreeing only 13% of the time. In previous terms, their percentages of agreement in full, in part, and in the judgment were 85/92/94 (OT03), 88/91/91 (OT02), 86/90/94 (OT01), 79/94/94 (OT00), 81/88/91 (OT99), 82/91/91 (OT98), 82/87/88 (OT97), 75/87/91 (OT96), 78/unavail./90 (OT95).

Chief Justice Rehnquist and Justice Kennedy agreed less frequently this Term than last Term: 77% (in full), 83% (in full or part), 83% (in full, in part, or in the judgment). In OT03, the numbers were 77% (in full), 86% (in full or part), 91% (in full, in part, or in the judgment). During OT02, the numbers were 86/91/93.

Chief Justice Rehnquist and Justice O'Connor also agreed far less frequently this Term than last Term: 72% (in full), 83% (in full or part), 84% (in full, in part, or in the judgment). During OT03, their percentages of agreement were 79% (in full), 90% (in full or part), 91% (in full, in part, or in the judgment), similar to 82/87/87 from OT02. Their numbers for previous Terms were 71/75/79 (OT01), 73/86/86 (OT00), 87/94/95 (OT99), 79/86/87 (OT98), 80/86/88 (OT97), 73/82/84 (OT96), 78/unavail./87 (OT95).

Measured by agreement in full or in part, the pairing with the lowest affinity this Term was

Justices Stevens and Thomas. Their percentages of agreement were 33% (in full), 50% (in full or part), 60% (in full, in part, or in the judgment). Two other pairings had an affinity almost as low. The first is Chief Justice Rehnquist and Justice Stevens, whose percentages of agreement were 38% (in full), 51% (in full or part), 55% (in full, in part, or in the judgment). The second was Justices Thomas and Ginsburg (31/51/60).

The pairing with the lowest affinity last Term was Justices Stevens and Scalia (38/51/60). Their percentage of agreement in full or in part increased slightly this Term but remained low overall (31/53/60).

5. Justices O'Connor, Kennedy, and Breyer each dissented 11 times. This represents a striking difference from last Term, when Justice O'Connor dissented in just 5 of the Court's 79 cases while Justice Kennedy, the next-least-dissenting justice, cast 10 dissenting votes. In previous terms, Justice O'Connor has cast the following number of dissenting votes: 5 (OT02), 10 (OT01), 8 (OT00), 4 (OT99), 7 (OT98), 11 (OT97), 10 (OT96), 8 (OT95).

Justice Stevens dissented alone in 3 cases. Justices Scalia, Kennedy, and Thomas dissented alone only once. The remaining justices had no solo dissents during the Term.