

MEMORANDUM

June 26, 2008

From: Akin Gump Strauss Hauer & Feld LLP and SCOTUSblog.com

Re: End of Term Statistical Analysis – October Term 2007

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

1. Docket

The Justices issued 67 merits opinions after argument this Term, the lowest number since the 1953-54 Term. The number of decisions after argument for previous Terms are 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 Justices decided 71 cases in total this Term, including two summary reversals and two affirmances by an equally divided court, also the lowest number of decisions in recent memory. The numbers for previous terms are 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 46 of 70* cases (66%) and affirmed in the remaining 24 (34%). Those figures are slightly different from the previous Term, when the Court reversed or vacated the lower court decision in 73% of cases and affirmed the lower court 25% of the time (with two affirmed in part or reversed or vacated in part).

The Court again considered more cases from the Ninth Circuit – 10 of 71 cases (14.1%) – than any other Court, but that proportion was far down from OT06, when the Ninth Circuit supplied 29% of the Court's docket. In OT07, the Court vacated or reversed the Ninth Circuit in eight of ten cases (80%), which is in line with the 86% and 83% reversal rate for the previous two Terms.

* One case decided was an original action, so there was no lower court decision to either affirm or reverse.

June 26, 2008

Page 2

The Second Circuit came next with seven of 71 cases on the docket (9.9%) but was reversed only twice, or 29% of the time. The Seventh and Eleventh Circuits each had six of 71 cases (8.5%), but fared much differently: the Seventh Circuit was reversed or vacated only once, while the Eleventh was overturned four times.

The Court again resolved four cases (5.6%) from the Federal Circuit, reversing three of its decisions, though the Justices heard only one patent case from that court this Term.

State courts accounted for 11 cases this session, up from seven in OT06. The Court also decided an original action after oral argument this Term, which they did not do in OT06.

2. Split and Unanimous Decisions

The number of 5-4 decisions this Term depends (as it often does) on how you count them. Eleven cases were clearly 5-4. A twelfth (*Stoneridge*) was 5-3, with the left of the Court in dissent and Justice Breyer recused, suggesting that it would have been 5-4 if he had participated. Two others (*Tom F.* and *Warner-Lambert*) were 4-4, almost by definition meaning that the case would have been 5-4 absent a recusal. So between 15% and 20% of the docket was 5-4. We ultimately believe that the fairest count treats *Stoneridge* and ignores the 4-4 cases in which no opinion was ultimately issued – in other words, 12 cases, or 17% of opinions.

That number falls between the previous two Terms of the Roberts Court: it is significantly lower than last year's percentage of 33%, while the 2005 Term saw only 13% of cases decided by a 5-4 margin. The numbers from previous terms are: 24 of 80 cases – 30% (OT04), 21 of 79 cases – 27% (OT03), 15 of 80 – 19% (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). More detailed breakdowns from past years are available in the statistics section of SCOTUSwiki.com (http://www.scotuswiki.com/index.php?title=Supreme_Court_Statistics).

Somewhat surprisingly, the drop in the number of 5-4 decisions did not go hand in hand with a commensurate increase in unanimous decisions. This Term, fully unanimous decisions (*i.e.*, decisions with no dissent or concurrence) decreased to only 11 of 71 cases (15%), and there was no dissenting vote in a total of 30% of the

June 26, 2008

Page 3

decisions. Last Term, which was considered very divisive, the Court issued fully unanimous decisions in 18 cases (25%), with a total of 38% of the decisions coming without a dissenting vote; in OT05, 45% of decisions were unanimous and fully 55% cases were decided without a dissenter. The number of unanimous decisions from previous Terms are 17 of 80 – 21% (OT04), 25 of 79 – 32% (OT03), 31 of 80 – 39% (OT02), 26 of 81 – 32% (OT01), 25 of 85 – 29% (OT00).

This lack of unanimity meant that, despite the drop in 5-4 decisions this Term from last, the overall number of dissenting votes remained high. An average decision by the Court this term found 1.86 Justices in dissent, exceeding last Term's 1.81 dissents per case and making decisions this term the most divided in recent history.[†]

Looking back on recent terms, the average dissenting votes per case are: 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).

3. Distribution of Justices in 5-4 Decisions

In OT07, ideology was a less accurate predictor of the distribution of Justices in 5-4 decisions than it was last Term. In eight out of the 12 (67%) cases we count as 5-4, the “left” (Justices Stevens, Souter, Breyer, and Ginsburg) and “right” (Chief Justice Roberts along with Justices Scalia, Thomas, and Alito) held and Justice Kennedy cast the decisive vote.[‡] Last Term, that happened 19 out of 24 times (79%).

After going 24-for-24 in last Term's most divisive cases, including both ideological and other configurations, this Term Justice Kennedy was in the majority in only those cases which broke along ideological lines. Nonetheless, those eight ideological splits were enough to put Justice Kennedy in the majority in as many 5-4 cases as any other justice. Among the Court's other members, Justice Thomas also voted with the majority eight times (67%), Chief Justice Roberts and Justice Stevens seven times (58%), Justices Scalia, Souter, Ginsburg, and Alito and Ginsburg six times (50%), and Justice Breyer, the fewest, with five majority votes (42%).

[†] Under this metric, the level of divisiveness produced by two 7-2 decisions is the same as that produced by one 9-0 decision and one 5-4 decision.

[‡] Though Justice Breyer was recused, we count *Stoneridge* in this group.

June 26, 2008

Page 4

Of the eight decisions in which the voting blocs “held,” the left and right split the outcomes four to four. This is a shift from last Term, when 68% of the ideological 5-4s were won by the conservative-plus-Kennedy quintet. For the second straight Term, the left of the court did not prevail in a 5-4 case by getting the vote of a member of the Court other than Justice Kennedy. Interestingly, this Term the majority opinions in *Irizarry* and *Ali* were made up of the conservative bloc but did not include Justice Kennedy; instead Justices Stevens and Ginsburg respectively, made up the fifth votes.

Among the 5-4 cases not decided along liberal-conservative lines in OT07, one featured a majority comprised of the Chief Justice and Justices Stevens, Souter, Thomas, and Breyer in the majority (*Kentucky Retirement*); one featured the Chief Justice and Justices Stevens, Scalia, Thomas, and Alito (*Irizarry*); one featured the Chief Justice and Justices Scalia, Thomas, Ginsburg, and Alito (*Ali v. BoP*); and one featured Justices Stevens, Scalia, Souter, Thomas, and Ginsburg (*Santos*).

Though Justice Kennedy was not “perfect” in 5-4s as he was last Term, he still exerted more than considerable influence. He wrote the opinion for the Court in four of the 12 5-4 merits opinions—all four of those opinions coming in ideologically divided cases. Justice Stevens assigned him the opinion in three of the four 5-4s in which the left prevailed by getting Justice Kennedy’s vote: *Boumediene*, *Dada*, and *Kennedy v. Louisiana*, while the Chief Justice assigned him the opinion in *Stoneridge*.

No other Justice wrote more than half as many 5-4 opinions: Justices Scalia and Breyer wrote two each, and Chief Justice Roberts and Justices Stevens, Thomas, and Alito each wrote one. Justices Souter and Ginsburg did not author a 5-4 opinion this Term.

4. Levels of Agreement Between Pairs of Justices

By a nose, the Chief Justice and Scalia were the two justices whose agreement rates were the highest this Term. They agreed in whole, part, or in the judgment in 60 of 68 (88%) of cases in which they both participated, outpacing the Chief Justice and Justice Alito, who agreed in one fewer case overall (because of recusals). The Chief and Justice Scalia agreed in full only 68% of the time, however, giving Roberts and Alito the most similar voting patterns; they found themselves in full agreement in 81% of the cases they participated in together. On the other side of the ideological

June 26, 2008

Page 5

spectrum, Justices Souter and Ginsburg were the most aligned justices this Term, agreeing in at least one aspect of 87% of the cases, and agreeing in full in 80% of cases.

Overall, the most notable difference from last Term is that Justice Kennedy agreed more frequently with some of the liberal members of the Court and less frequently with the conservatives. His agreement rate (in full, part, or judgment) was 77% this Term with Justice Stevens and 85% with Justice Breyer; those are noticeably up from last Term's agreement rates of 66% and 74% respectively. On the opposite side of the judicial spectrum, Justice Kennedy and Justice Thomas agreed 62% of the time as opposed to 79% last Term, while Justice Kennedy and Justice Alito agreed 82% of the time in OT07, down from 90% in OT06.

Justice Thomas may win the "iconoclast" award this Term, as he enjoyed the lowest rates of agreement with other members of the Court; he was a solo dissenter in four cases, the most of any Justice. Justice Thomas agreed in at least the judgment with each of the four most liberal members of the Court less than 60% of the time, and as previously mentioned, with Justice Kennedy in only 62% of the cases. Nor did his votes fall in lockstep with any of the more conservative members: he agreed with Justice Scalia 87% of the time (as opposed to 93% last Term) and the Chief Justice 79% of the time, as opposed to 88% last Term.

5. Frequency in the Majority

At the beginning of OT07, conventional wisdom held that the Court would pick up where it left off the previous term: with Justice Anthony Kennedy in the driver's seat. As Court watchers will recall, Justice Kennedy ended OT06 having joined the majority in a remarkable 97% of cases, and even more astonishingly, voted with the majority in all 24 cases decided by five-vote majorities. On the heels of a term in which he dissented only twice, it was possible to imagine that Justice Kennedy would finish OT07 with a perfect record. But it would not be. Justice Kennedy cast his third dissenting vote before the start of spring and by Term's end had joined the minority 10 times.

Into Justice Kennedy's place atop the standings slipped, quietly, Chief Justice Roberts. He ended the winter with only one dissenting vote, and was not again in the minority until late May. The Chief ended the term, impressively, having dissented in only seven cases, for a frequency-in-the-majority percentage of 90%.

June 26, 2008

Page 6

He was followed in the standings by Justices Kennedy (86%), Alito (82%), Scalia (81%), Breyer (79%) and Souter (77%). Justices Stevens, Ginsburg and Thomas were least in the majority, all at only 75%. After factoring out cases in which all Justices agreed on the judgment, Chief Justice Roberts voted with the majority in a similarly impressive 84% of cases, followed by Justices Kennedy (79%), Alito (74%), Scalia (73%), Breyer (68%) and Souter (67%). The the trio of Justices Stevens, Ginsburg, and Thomas were tied at 65%.

If the Court bestowed a “most improved” award on the Justice joining the highest share of majority opinions over the previous term, Justice Stevens would be the clear winner. In OT06, Justice Stevens joined the smallest share of majority opinions in divided cases (37%). This term, by contrast, the longest-serving sitting Justice joined the majority 65% of the time in divided cases – jumping 28 percentage points.

Though he voted with the majority more often than anyone but the Chief, Justice Kennedy ended the term, by contrast, with the biggest declines. After concluding OT06 with a majority rate of 95% for divided cases, Justice Kennedy’s comparable rate for this term declined 16 percentage points to 79%.