

MEMORANDUM

June 30, 2009

From: Akin Gump Strauss Hauer & Feld LLP and SCOTUSblog.com
Re: End of Term Statistical Analysis – October Term 2008

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

1. Docket

The Justices issued 75 merits opinions after argument this Term. The number of decisions after argument for previous Terms are 67 (OT08), 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 79 cases in total this Term, including four summary reversals. The numbers for previous terms are 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 60 of 79* cases (75.9%) and affirmed in 16 (20.3%). Those figures are significantly different from the previous Term, when the Court reversed or vacated the lower court decision in 66% of cases and affirmed the lower court in 34% of cases. But in OT06, similarly, the Court reversed or vacated the lower court decision in 73% of cases and affirmed the lower court in 25% of cases

The Court again considered more cases from the Ninth Circuit – 16 of 79 cases (20.3%) – than any other Court, an increased proportion from OT07, when the Ninth Circuit supplied 14.1% of the Court's docket. In OT08, the Court vacated or reversed the Ninth Circuit in 13 of 16 cases (81.3%), which is in line with the 80% and 86% reversal rates for the previous two Terms.

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

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State courts accounted for the second largest percentage of the docket (19%). Fifteen cases were considered this session, up from 11 in OT07 and seven in OT06. Eleven decisions from state courts of last resort were reversed, a rate of 73.3%.

The Second Circuit came next with nine cases on the docket (11.4%), up from seven the previous year. Only two Second Circuit cases were reversed in OT07, or 28.6%; this Term seven were reversed, or 77.8%.

This year, seven circuits had all of their decisions reversed: the Fourth (six cases), Sixth (five cases), Seventh (one case), Eighth (four cases), Tenth (two cases), the DC Circuit (one case), and the Federal Circuit (four cases). This is a radical change from last Term, when the Tenth Circuit was the only circuit with a 100% reversal rate (two cases). The one case to come from district court this Term—*Northwest Austin Municipal Utility District Number One v. Holder*—was reversed; in OT07, both cases that came from district court were also reversed.

The Eleventh Circuit, on the other hand, had a 100% affirmance rate, with the High Court upholding all three cases (*Herring v. United States*, *Dean v. United States*, and *Atlantic Sounding v. Townsend*).

2. Split and Unanimous Decisions

In twenty-three opinions this Term (29.1%), the Court split 5-4 on a significant issue. As with the reversal rates, the Court's patterns this Term are more analogous to OT06 than OT07. Last Term, 17% of opinions were 5-4 (including a 5-3 vote and excluding the two equally divided opinions); in OT06, 33% of cases were divided by a 5-4 margin.

The numbers of 5-4 opinions from previous terms are: 11 of 82 cases – 13% (OT05), 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).

The percentage of unanimous decisions increased slightly from last Term, but was lower than many recent terms. This Term, 15 of 79 opinions (19%) were fully

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unanimous decisions (*i.e.*, decisions with no dissent or concurrence) and 26 (32.9%) had no dissenting vote. Last Term, only 11 of 71 cases (15%) were fully unanimous and there was no dissenting vote in a total of 30% of the decisions. In OT06, 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).

With a low proportion of unanimity and an increased number of 6-3 decisions (13 cases, compared to OT07's 10 cases or OT06's three cases), the number of dissenting votes across all cases this Term is particularly high. An average decision by the Court this Term found 2.04 justices in dissent, far exceeding last term's 1.86 average. 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

Sixteen decisions (69.6%) in which voting split 5-4 were divided along ideological lines, with either the "left" (Justices Stevens, Souter, Breyer, and Ginsburg) or "right" (Chief Justice Roberts along with Justices Scalia, Thomas, and Alito) holding and Justice Kennedy casting the decisive vote. As there were twice as many 5-4 decisions this Term than last, this rate has stayed consistent: in OT07, eight of the 12 cases (67%) counted as 5-4 were divided ideologically. But this Term, the right took Justice Kennedy in 11 cases and the left prevailed in only five. This is a major difference from last Term, in which Kennedy voted with the right and the left blocs four times each.

Justice Kennedy yet again cast the most majority votes in 5-4 cases (18), but both he and Justice Scalia wrote five 5-4 opinions. Justice Scalia had 16 votes in 5-4 majorities and Justice Thomas had 15. Justices Stevens and Thomas each authored three 5-4 opinions. Justice Breyer was left out of the most sharply divided cases this Term: he cast the fewest votes in 5-4 majorities (nine) and wrote no 5-4 opinions.

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The Chief Justice was the only member of the right to never break ideological lines in 5-4 cases; this stands in contrast to OT07, during which he three times voted with mixed majorities.

The *Apprendi* and *Blakely* Five (Justices Scalia, Thomas, Ginsburg, Stevens and Souter) made up the majority in two 5-4 criminal justice cases this Term, voting together in *Melendez-Diaz* and *Arizona v. Gant*.

Perhaps the two most unique 5-4 splits, with resonance for Justice Souter's retirement, were *Vaden v. Discover Bank* and *Oregon v. Ice*, both written by Justice Ginsburg. In *Vaden*, on federal courts' jurisdiction to compel arbitration, Justice Ginsburg's majority opinion was joined by Justices Souter, Kennedy, Scalia, and Thomas, with Chief Justice Roberts filing a partial dissent joined by Justices Stevens, Breyer, and Alito. In *Oregon*, Justices Ginsburg, Stevens, Breyer, Kennedy, and Alito voted to reverse and remand the lower court's ruling for the defendant, and Justice Scalia filed a dissenting opinion joined by Chief Justice Roberts and Justices Souter and Thomas.

4. Levels of Agreement Between Pairs of Justices

Chief Justice Roberts and Justice Alito had a remarkable rate of agreement, voting together in whole, in part, or in the judgment in 73 of 79 cases, or 92%. Last Term, the Chief Justice and Justice Alito had an 88% agreement rate.

In contrast, the greatest level of agreement between any two Justices on the left was 87% (Justices Stevens and Souter). In 86% of all cases, Justices Stevens and Ginsburg voted together, as did Justices Souter and Ginsburg. Looking at divided cases throws this difference in voting patterns between the right and left more into relief: of the 53 opinions with at least one dissenting vote, Justice Stevens and Souter voted together 81% of the time, but the Chief Justice and Justice Alito voted together 89% of the time.

This Term, the Chief Justice and Justice Scalia voted together 87% of the time, as did Justices Scalia and Thomas, Justices Scalia and Alito, and Justices Kennedy and Alito.

Justice Kennedy hewed much closer to the right than the left this Term, as he also did last Term. With an 86% agreement rate, Justice Kennedy and the Chief Justice

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voted together in only one fewer case (68) than Justice Scalia and the Chief Justice. In contrast, Justice Kennedy's greatest rate of agreement with any Justice on the left was 77% with Justice Breyer. He agreed with Justice Stevens in only 59% of all cases (and with Justice Souter in 66% and Justice Ginsburg in 67%).

Both this Term and last, Justice Kennedy voted more frequently with Justice Alito and the Chief Justice than Justice Thomas did. In OT09, Justice Thomas agreed with Justice Alito in 85% of cases and the Chief Justice in 82%. Last Term, Justice Thomas agreed with both Justice Alito and the Chief Justice in 79% of all cases, while Justice Kennedy agreed 88% and 84%, respectively.

Justice Stevens disagreed more than he agreed with Justice Thomas (agreeing in 46% in all cases and only 19% of divided cases), with Justice Alito (48% in all cases and only 23% in divided cases) and with Justice Scalia (the same). Justices Souter and Alito (51%) and the Chief Justice and Justice Stevens (51%) came close to that record. Justice Ginsburg voted with each the Chief Justice and Justices Thomas and Alito in 53% of cases.

Justice Breyer agreed with almost every Justice less frequently this Term than he did last, except for a 1% increase with Justice Thomas (58%) and Justice Ginsburg (81%).

5. Frequency in the Majority

With 73 out of 79 votes cast in the majority (92.4%), Justice Kennedy was the significant leader of this Term and significantly outpaced his voting record from last Term (85.%%).

Following Justice Kennedy's lead was Justice Scalia (83.5%) and then Justices Thomas and Alito and Chief Justice Roberts, who each voted 81% with the majority. With Justice Ginsburg at 69.6%, Souter at 68.4%, and Stevens at 64.6%, the far left of the bench slipped even further out of the majority than last Term, in which Justice Souter cast 76.8% votes in the majority and Justices Stevens and Ginsburg each cast 75.4%. But this percentage is still far greater than Justice Stevens' 37% share of majority votes in OT06.