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MEMORANDUM

July 7, 2010

From: SCOTUSblog.com

Re: End of Term Statistical Analysis – October Term 2009

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

**1. Docket**

The Court issued 72<sup>1</sup> merits opinions after argument this Term. The number of decisions after argument for previous Terms are 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), 102 (OT90).

The Court decided 86 merits cases in total this Term, including – in addition to the 72 argued cases mentioned above – 11 summary reversals, two cases decided before oral argument, and one certified question. The numbers for previous terms are 80 (OT08), 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 59 of 83<sup>2</sup> cases (71%), affirmed in 17 (20%), and reversed in part and affirmed in part in seven (8%). Those figures are similar to those in OT08, when the Court reversed or vacated the lower court in 77% of cases and affirmed in 20% of cases.

The Court again considered more cases from the Ninth Circuit – 15 of 86 cases (18%) – than any other court. However, this number represents a lower proportion than in OT08, when the Ninth Circuit supplied 20% of the Court’s docket. In OT09, the Court vacated or reversed the Ninth Circuit in 9 of 15 cases (60%), which is significantly less than the 81% and 80% reversal rates for the previous two Terms (OT08 and OT07), and in fact lower than the average reversal rate across circuits this Term. For OT10, the Court has already granted 16 cases from the Ninth Circuit out of a preliminary total of 37 cases (43%).

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<sup>1</sup> This total, and all OT09 totals throughout this memorandum, excludes *Citizens United v. Federal Election Commission*, which was decided during OT09 but which we classify as an OT08 case because the Court agreed to hear it that Term and it was argued and reargued prior to the regular October Term 2009.

<sup>2</sup> Two cases decided this Term were original actions between states, and one case certified a question to a lower court, so there were no lower-court decisions to either affirm or reverse.

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The Seventh Circuit accounted for the second-largest percentage of the docket (13%). Eleven cases were considered this Term, up from just one case in OT08 and six in OT07. Ten decisions were reversed, a rate of 91%. The Eleventh Circuit came next with ten cases on the docket (12%), up from three the previous Term. No Eleventh Circuit cases were reversed in OT08; this Term eight were reversed, or 80%.

This year, only one circuit had all of its decisions (seven) reversed: the Sixth Circuit. This is a radical change from last Term, when seven circuits had all of their decisions reversed: the Fourth (five cases), Sixth (five cases), Seventh (one case), Eighth (four cases), Tenth (two cases), the D.C. Circuit (two cases), and the Federal Circuit (four cases). It is more in line with OT07, when the Tenth Circuit was the only circuit with a 100% reversal rate (with two cases).

The Tenth and Federal Circuits, on the other hand, had 100% affirmance rates, with the Supreme Court upholding two decisions from the former (*Dolan v. United States* and *Hamilton v. Lanning*) and one from the latter (*Bilski v. Kappos*).

## 2. Split and Unanimous Decisions

The number of 5-4 decisions this Term depends (as it often does) on how you count them. In 14 cases, the Court clearly split 5-4 on a significant issue. In two additional cases with five-Justice majorities, *Conkright v. Frommert* and *Stolt-Nielsen, S.A. v. AnimalFeeds International*, only eight Justices participated. We regard these two cases as 5-4 decisions because it seems very likely that, had all nine Justices participated, the vote would have split that way. Altogether, therefore, we conclude that 16 (19%) of the total 86 merits cases decided this Term were effectively 5-4 splits. The Court's percentage of 5-4 splits this Term is more reminiscent of OT07 than OT08. Last Term, 30% of decisions (24 of 80 total) were divided by a 5-4 margin; in OT07, 17% of decisions (12 of 71 total) were 5-4.

The numbers of 5-4 opinions from previous terms are: 24 of 72 cases – 33% (OT06), 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.

This Term, 12 of 86 opinions (14%) were fully unanimous decisions (*i.e.*, decisions with no dissent or concurrence) and 40 (47%), including the 11 summary reversals, had no dissenting vote.

The trend toward unanimity has increased dramatically over the last four Terms, and this

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Term surpassed the level of OT05, the Chief Justice's first Term on the Court. In OT08, a particularly divisive Term, a similar proportion of cases – 16 of 79 total (15%) – were fully unanimous (i.e., without even a concurrence) but a much smaller proportion were unanimous with some number of separate opinions – 26 (33%). In OT07, there was no dissenting vote in 30% of the 71 decisions. In OT06, which was considered very divisive, 38% of the decisions had no dissenting vote; in OT05, 55% had no dissent. The number of decisions that were unanimous in the judgment 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).

The aberrant number of summary reversals this Term may explain in part the dramatically higher rate of unanimity. This Term the Court summarily reversed 11 cases, with a unanimous vote in six of them. In OT08, the total number of summary reversals was four.

With a high proportion of unanimity, the number of dissenting votes across all cases this Term is low. An average Justice voted with the majority 84% of the time this Term; last Term, that average was 77%, and in OT07 it was 80%. Put another way, in the average decision this Term, 1.33 Justices dissented. Looking back on recent Terms, the average dissenting votes per case are: 1.86 (OT07), 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 OT09, ideology was a good predictor of the distribution of Justices in 5-4 decisions. Eleven of 16 5-4 decisions (69%) 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) voting together and Justice Kennedy casting the decisive vote. Because there were roughly half as many 5-4 decisions this Term compared to OT08, this rate has stayed consistent since last Term: in OT08, 17 of the 24 decisions counted as 5-4 (71%) were divided ideologically.<sup>3</sup> This Term Justice Kennedy voted with the right in eight cases, while voting with the left in only three. In OT08, Justice Kennedy voted with the right in 12 cases, compared with only five with the left. In OT07, eight of 12 5-4 cases (67%) were ideologically divided, but Kennedy voted with the right and the left blocs four times each. In OT06, 19 of 24 5-4 decisions were ideologically divided, and Kennedy joined the conservatives in 13 of them, while joining the liberals in six.

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<sup>3</sup> This includes *Citizens United v. Federal Election Commission*, which was reargued and decided in OT09.

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This Term, Justices Scalia and Thomas cast the same number of majority votes in 5-4 cases (11) as Justice Kennedy. Since the beginning of the Roberts Court in OT05, Justice Kennedy's majority votes in 5-4 cases have surpassed those of all other Justices (19 out of 24 cases in OT08, eight out of 12 cases in OT07, 24 out of 24 cases in OT06, and nine out of 12 cases in OT05).

This Term every member of the Court crossed ideological lines to create a 5-4 split in at least one case. Justice Ginsburg did so just once, in *Dolan v. United States*. Every other Justice did so more than once. Justice Stevens did so the most often: four times. Last Term Chief Justice Roberts never crossed ideological lines, while every member of the Court in OT07 crossed ideological lines in at least two cases, except for Justice Breyer (who broke with the left in one case).

Three of the most remarkable alignments in 5-4 decisions were in *Shady Grove Orthopedics Associates v. Allstate Insurance Company*, *Dolan v. United States*, and *Magwood v. Patterson*. In *Shady Grove*, the liberal Justices Stevens and Sotomayor joined three conservatives – Chief Justice Roberts and Justices Scalia and Thomas – in ruling that states cannot limit the right to file a class action lawsuit in federal court. In *Dolan*, the conservative Justices Thomas and Alito joined liberal Justices Ginsburg, Breyer, and Sotomayor in allowing a sentencing court to order a convicted defendant to pay restitution even after the court misses a statutory deadline. In *Magwood*, the conservative Justices Scalia and Thomas joined the liberal Justices Stevens, Breyer, and Sotomayor in holding that a prisoner may petition for a writ of habeas corpus, even if he has previously petitioned, so long as he is challenging a new judgment for the first time. In all of these cases, Justice Sotomayor voted with the majority.

Justice Alito wrote more 5-4 opinions this Term than any other Justice (four). Both Justices Scalia and Kennedy wrote two 5-4 opinions each, as did Chief Justice Roberts. Every other Justice except Sotomayor wrote one opinion in a 5-4. Justice Sotomayor did not write a single opinion in a 5-4 split case.

#### **4. Levels of Agreement Between Pairs of Justices**

Agreement between Justices in a case can be usefully measured by their full agreement (usually, joining the same opinion), or simply their agreement in the judgment (*i.e.*, the outcome). Measuring by agreement in the judgment produces much higher rates. Counting agreement in all forms (even just the judgment),<sup>4</sup> the Justices with the highest degree of affinity this Term were Justices Scalia and Thomas, who agreed at least in the judgment in 79 of 86 merits cases (92%). Nor is this Term an anomaly for the Scalia-Thomas alignment: the pair agreed 88% in OT08 and 87% in OT07.

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<sup>4</sup> Throughout this memo, agreement refers to agreement in full, in part, or in the judgment, except as specified in the single paragraph addressing full agreement alone.

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The pair of Justices with the next-highest rate of agreement in the judgment is a tie. Justice Sotomayor voted the same as Justices Ginsburg and Breyer in 90% of cases, or 72 and 71 cases respectively.

The Chief Justice has the next highest rates of agreement – with Justices Scalia and Alito (88% for both) and with Justice Kennedy (87%). Justices Ginsburg and Breyer also agreed in 87% of cases.

Counting only full agreement (*i.e.*, agreement in essentially every word of the ruling), the pair of Justices who agreed most often were Justices Ginsburg and Sotomayor (85%), followed closely by Justices Breyer and Sotomayor (81%). Justices Breyer and Ginsburg were in third place (80%).

All eyes were on Justice Sotomayor during her first Term on the Court. In addition to voting 90% of the time with Justices Ginsburg and Breyer, she voted in agreement with Justice Stevens 84% of the time. With the conservatives, she voted in agreement with Chief Justice Roberts and Justice Kennedy 78% of the time and 69% of the time with each of Justices Scalia, Thomas, and Alito.

Justice Stevens may win the “iconoclast” award this year, for he dissented in 22 cases – more than any other Justice – and did not agree with any Justice more than 84% of the time (with Justice Sotomayor).

Over the last two Terms, Justice Stevens agreed most consistently with Justice Breyer, followed by Justice Ginsburg. With Justice Ginsburg, he agreed 78% this Term, compared to 86% in OT08 and 84% in OT07. With Justice Breyer, he agreed 82%, compared to 81% in OT08 and 86% in OT07. While we only have one Term to use to compare his votes with those of Justice Sotomayor, Stevens agreed with Sotomayor 84% this Term – even more than he did with Justice Breyer.

Over all, Stevens’ average rates of agreement with both conservatives and liberals are lower than the averages other liberal Justices display. This Term, Justice Stevens’ average rate of agreement with the five conservative Justices was 65%. With the other three liberal Justices, his average agreement was 81%. Justice Ginsburg’s rates of agreement are 74% with the conservatives, and 85% with the other liberals; Justice Breyer’s are 70% with the conservatives, and 86% with the other liberals; Justice Sotomayor’s are 73% with conservatives, and 88% with the other liberals.

Rates of agreement between pairs of Justices are generally constant over the past two Terms, fluctuating within a range of 5%. Two notable changes over time stand out. First, Chief Justice Roberts agreed more often this Term with two of the liberal Justices, Ginsburg and Breyer, than he has in the past.<sup>5</sup> Chief Justice Roberts agreed with Justice

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<sup>5</sup> He agreed at a similar rate with Justice Sotomayor, but her single Term on the Court of course makes this comparison over time impossible.

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Ginsburg 79% this Term, compared to 53% in OT08 and 69% in OT07. He agreed with Justice Breyer 73% this Term, compared to 65% in OT08 and 75% in OT07.

Second, Justice Ginsburg's rate of agreement with all five of the conservatives – not just Chief Justice Roberts – has climbed over the last couple of Terms. This Term, in addition to her 79% agreement with the Chief Justice, she agreed with Justice Scalia 67%, Justice Kennedy 80%, Justice Thomas 69%, and Justice Alito 74%. For the past two Terms, listed with OT08 first, OT07 second, her rates of agreement with the conservatives are: Roberts (53%, 69%), Scalia (55%, 65%), Kennedy (66%, 72%), Thomas (53%, 55%), and Alito (53%, 68%).

### **5. Frequency in the Majority**

Chief Justice Roberts was the majority star this Term, with no dissents in any merits cases until the end of January; between the end of January and June 14, he dissented in only two merits cases. By the end of the Term, he dissented in eight cases, including six times in 5-4 decisions. He joined the majority in a remarkable 78 cases (91% of those decided on the merits).

He shares the top spot for majority voter with Justice Kennedy. While Justice Kennedy dissented earlier in the Term than did Chief Justice Roberts, he ended the Term voting with the liberals twice in 5-4 cases. In the end, he also voted with the majority in 78 cases (91%).

The rest of the rankings for majority voters are as follows: Justice Scalia (75 cases, or 87% of those in which he voted); Justice Alito (73 cases, or 87%); Justice Sotomayor (67 cases, or 84%); Justice Thomas (71 cases, or 83%); Justice Ginsburg (69 cases, or 80%); Justice Breyer (66 cases, or 78%); and Justice Stevens (63 cases, or 74%).