

MEMORANDUM

Saturday, June 29, 2013

From: SCOTUSblog.com

Re: End-of-Term Statistical Analysis – October Term 2012

This memo presents the blog's annual summary of relevant statistics for the Term. Detailed statistical analysis for October Term 2012 can be found in our annual Term Stat Pack (located [here](#)) and analysis for past years can be found in our Stat Pack archive (located [here](#)).

1. Docket

The Court released 73 signed merits opinions after oral argument during October Term 2012.¹ The number of decisions after argument for previous Terms are 65 (OT11), 75 (OT10), 75 (OT09), 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), and 102 (OT90).

The Court decided 78 merits cases in total. That total includes 73 signed opinions released after oral argument and 5 summary reversals. The numbers for previous Terms are 76 (OT11), 82 (OT10), 86 (OT09), 80 (OT08), 71 (OT07), 72 (OT06), 82 (OT05), 80 (OT04), 79 (OT03), 80 (OT02), 81 (OT01), 85 (OT00), and 77 (OT99). The number of signed opinions after argument is consistent with output of recent Terms. The Roberts Court² has released between 65 (OT11) and 75 (OT10) opinions after oral argument every Term. The number of total opinions is also consistent with recent practice, with the Roberts Court releasing between 71 (OT07) and 86 (OT09) opinions every Term.

The Court reversed or vacated the lower court in 56 of 78 cases (72%), and it affirmed in 22 (28%). These figures are roughly consistent with those from OT11, when the Court reversed or vacated the lower court in 63% of cases and affirmed in part or in full in 37% of cases. Notably, the Court did not hear any cases from its original docket during OT12 – the second year in a row it has not heard an original case at oral argument.

The Court once again considered more cases from the Ninth Circuit than it did from any other court: 14 (18% of all cases). That figure is a decline from recent Terms, in which the Ninth

¹ Nearly all data cited for October Term 2012 can be found in the SCOTUSblog Stat Pack for October Term 2012. Kedar S. Bhatia, *SCOTUSblog Stat Pack for October Term 2012*, SCOTUSblog (June 22, 2013), http://www.scotusblog.com/wp-content/uploads/2013/06/SB_Stat_Pack_June_22_2013.pdf. Data cited for past Terms is drawn from either past Summary Memos or past Stat Packs, all of which are available on the SCOTUSblog website. See *Stat Pack Archive*, SCOTUSBLOG, <http://www.scotusblog.com/reference/stat-pack/> (last visited June 26, 2013).

² At several points in the memorandum, we refer to the Roberts Court as a shorthand for October Terms 2006-2012.

Circuit has had as many as 26 cases before the Court (32% of the docket during OT10) and averaged 19 cases per Term (25% of the average docket of merits cases).

The various state courts provided the second-greatest source of cases – 12 cases (15%). The Court reversed the state courts in 58% of the cases during OT12, slightly less often than it reversed cases originating from other sources (75%). The U.S. Court of Appeals for the Sixth Circuit – which has fared poorly in the Supreme Court in recent years, winning only 1 case out of 23 between OT08 and OT11 – once again struck out at the Supreme Court: the Court reversed the Sixth Circuit in both cases it heard from that court during OT12. The Tenth and Seventh Circuits were the only circuits that were affirmed more than they were reversed, with the Tenth Circuit being affirmed in its 2 cases at the Court and the Seventh being affirmed in 2 out of 3 cases.

The Eleventh Circuit, which was reversed in all 6 cases that it had in the Supreme Court, had a combined total of only 5 votes in its favor during OT12. That means it lost by an average margin of 8-1. By comparison, the Fifth Circuit, which lost 5 of its 6 cases in the Supreme Court, nonetheless received a total of 22 votes (out of a possible 62) to affirm, for an average losing margin of 6-3.

2. Split and Unanimous Decisions

Of this Term's 78 merits opinions, 24 (31%) were completely unanimous – meaning there were no concurring opinions – and 38 out of 78 (49%) had at least a unanimous judgment. From OT06-OT11, the Court reached a unanimous judgment in about 40% of cases. The Court released a greater percentage of 9-0 cases during OT12 than it has during any Term since OT02, when 51% of all opinions had a unanimous judgment.

The Court split 5-4 in 23 out of 78 cases during OT12 (29%).³ The number of 5-4 opinions from previous Terms are: 15 of 76 cases (20%) in OT11; 16 of 80 cases (14%) in OT10; 16 of 86 cases (19%) in OT09; 24 of 80 cases (30%) in OT08; 12 of 69 cases (17%) in OT07; 24 of 72 cases (33%) in OT06; and 11 of 82 cases (13%) in OT05. The Court released a greater percentage of 9-0 and 5-4 decisions than it has in the past. On average, from OT08-OT11, 43% of its cases were decided 9-0, with 22% decided by a vote of 5-4, for a combined total of 55% of cases that were either 9-0 or 5-4. During OT12, 49% of the Court's cases were decided by a vote of 9-0, while 29% were 5-4, for a combined total of 78% of all cases.

The surge of 9-0 and 5-4 opinions naturally resulted in a decrease in 8-1, 7-2, and 6-3 opinions. Only 5% of cases were 8-1, which is 5% lower than the Roberts Court average (10%). 9% of cases were decided by a vote of 7-2, down from the average of 16% during the Roberts Court, and 8% were decided with a 6-3 vote, also down from the 11% average since OT06.

³ The Court actually split 5-3 in *Federal Trade Commission v. Actavis* and *American Express v. Italian Colors Restaurant*, but we count those case as 5-4 decisions throughout this summary memo because we concluded that it is substantially likely that, had all nine Justices participated, the votes would have been 5-4. This practice is consistent with what we have done for several years now.

3. Distribution of Justices in 5-4 Decisions

There were seven different alignments of Justices in this Term's 23 5-4 decisions. There were a relatively small number of alignments compared to the high number of total 5-4 opinions, a sign that the Justices frequently gathered in the same camps for these difficult cases. 10 of the 23 cases fell to the traditionally conservative bloc,⁴ including in *Shelby County v. Holder*. The liberal bloc prevailed in 6 cases, including *United States v. Windsor*, the landmark same-sex marriage ruling.

An interesting third alignment began to appear in 5-4 decisions. In 3 separate cases, the majority of Chief Justice Roberts and Justices Kennedy, Thomas, Breyer, and Alito fended off Justices Scalia, Ginsburg, Sotomayor, and Kagan. This alignment – which was on display in *Maryland v. King*, *Maracich v. Spears*, and *Adoptive Couple v. Baby Girl* this Term, and in *Williams v. Illinois* last Term – has Justices Scalia and Breyer switching sides to join common adversaries. Court-watchers will want to look closely to see if this alignment of Justices continues to form coalitions in close decisions in coming years.

Continuing a recent trend, Justice Kennedy remained the Justice most likely to be in the majority of a 5-4 decision. He joined the majority in 20 of 23 5-4 decisions (87%) during OT12, reflecting a rate similar to OT11 (80%), OT10 (88%), OT09 (69%), OT08 (78%), OT07 (67%), and OT06 (100%). Justice Kennedy was once again the Justice most frequently in the majority of 5-4 decisions. He has been either the most frequent Justice in the majority of 5-4 decisions, or tied for that title, in every Term since OT03 and 13 times since OT95. Justice Kennedy also authored 4 majority opinions in 5-4 cases, the second-highest tally among the Justices.

The author of the greatest number of 5-4 majority opinions was Justice Alito. Justice Alito took a star turn during OT12, authoring a staggering 6 5-4 opinions. That number is particularly remarkable because he was only in the majority in 13 5-4 opinions (the fourth-highest total). It is also the greatest number of 5-4 decisions in a single Term since OT06, when Justice Kennedy – who was in the majority of all 24 of that Term's 5-4 decisions – wrote six majority opinions in 5-4 cases. Before that, no Justice had issued six majority opinions in 5-4 cases since we began tracking that statistic in OT95.

Aside of Justices Kennedy and Alito, authorship of majority opinions in 5-4 cases was scattered fairly evenly among several Justices. Justice Scalia authored 3 majority opinions, the Chief Justice and Justices Thomas, Breyer, and Sotomayor authored two opinions, and Justices Ginsburg and Kagan each issued one majority opinion. This is the first time during the Roberts Court each Justice has authored at least one majority opinion in a 5-4 case during a single Term.

⁴ The traditionally conservative bloc is composed of the Chief Justice and Justices Scalia, Thomas, and Alito. The traditionally liberal bloc is composed of Justices Ginsburg, Breyer, Sotomayor, and Kagan.

4. Levels of Agreement Between Pairs of Justices

The pair of Justices with the highest rate of agreement⁵ during OT12 is the pair of Justices Ginsburg and Kagan, who agreed in 72 out of 75 cases (96%) in which they both voted. The same pair had the highest agreement in all divided cases (92%), and in 5-4 cases (100%). The pair of Justices with the highest rate of agreement last Term, Justices Scalia and Thomas, had the ninth-highest agreement rate for OT12, agreeing in 67 of 78 cases (86%).

The pair of Justices with the lowest agreement in all cases was Justices Ginsburg and Alito, who agreed in only 45 out of 77 cases. Three pairs of Justices did not agree in a single 5-4 decision: Chief Justice Roberts and Justice Sotomayor, Justices Ginsburg and Alito, and Justices Alito and Kagan.

5. Opinion Authorship

The Court released 169 total opinions in 78 merits cases. The total number of opinions is only 8 more than the Court's tally from last year, which was the lowest output in at least 50 years. Between OT00 and OT11, the Court released an average of 186 opinions per year, fluctuating during that period between 161 opinions (OT11) and 205 opinions (OT04).

Justice Clarence Thomas issued more opinions this Term than any of his colleagues, 25. He authored 8 majority opinions, including 5 in cases that were decided 9-0, 11 concurring opinions, and 6 dissents. This is the third time that Justice Thomas has led his colleagues in this category since we began collecting opinion statistics for the Court; he also had the highest total number of opinions in OT04 and OT07. Last Term, Justice Thomas had the sixth-highest number of total opinions, 16. Justice Elena Kagan issued the fewest opinions this Term – 8 majority opinions, 2 concurring opinions, and 3 dissenting opinions; last Term she tied with Justice Anthony Kennedy in that category.

Across the Term, majority opinion assignments were evenly distributed to Justices. With the exception of Justice Ginsburg, who authored 9 majority opinions, every Justice authored a uniform 8 majority opinions. While the Court typically strives to distribute majority opinions evenly, it rarely achieves this level of success. During OT11, two Justices authored 6 majority opinions while another, Justice Kennedy, authored 9. During OT10, 4 Justices authored 7 majority opinions while another, again, Justice Kennedy, authored 11. Within sittings during OT12, the Justices were less successful in distributing opinions evenly. For the November sitting, Justice Scalia authored 3 majority opinions, even though many of his colleagues authored only one opinion. During the December sitting, Justice Kagan authored two majority opinions against Justice Scalia's zero – although his heavy load for the November sitting likely explains why he did not author any opinions the next month.

⁵ For the sake of picking a consistent measurement, this memorandum will use agreement in full, in part, or in the judgment unless otherwise noted. That metric measures whether a pair of Justices agree on any aspect of the opinion, which typically translates into whether the pair agree on the judgment – affirm, reverse, or vacate.

6. Frequency in the Majority

Justice Kennedy is, for the fifth consecutive Term, the Justice most likely to appear in the majority. This Term he voted with the majority in 71 out of the 78 cases in which he voted (91%). Chief Justice Roberts, who himself has become a mainstay of recent majority opinions, had the second-highest frequency in the majority (86%). For the last four Terms, the Chief Justice has been either the most likely or second-most-likely Justice to appear in the majority. Justice Scalia, meanwhile, has seen a steady slide down the list of Justices most frequently in the majority. During OT08, he was the second-most-likely Justice to appear in the majority, but that rank declined in subsequent years; he was third-most likely during OT09, fourth-most likely during OT10, and fifth-most likely during OT11. During OT12, he was the least likely Justice to appear in the majority, voting with the majority in only 61 out of 78 cases (78%). This is the first time he has been in this position during the Roberts Court. Three other Justices voted with the majority in only 61 cases, but each voted in fewer total cases: Justices Alito and Sotomayor voted in 77 cases, while Justice Kagan voted in only 75.