

# Summary rulings spike at the high court

By Tony Mauro

The question always arises at Senate confirmation hearings on Supreme Court nominees, including Elena Kagan this week: Why is the Court issuing so few opinions these days?

The implication of the question by senators often seems to be that the justices are not working hard, enough because they aren't producing as many widgets – decisions – as their predecessors did 20-plus years ago.

But now, at the end of a term that produced 77 signed decisions in argued cases, a new wrinkle has emerged. The Court seems to be putting more and more energy into a different kind of widget: namely, summary decisions in cases that have not been argued or fully briefed. It's a trend may alter Supreme Court practice.

The Court issued 12 summary, unsigned rulings this term, more than any term in at least a decade, according to a study by Texas Solicitor General James Ho, a former clerk to Justice Clarence Thomas and a close student of the Court.

The uptick in these rulings began when Chief Justice John Roberts Jr. became chief justice in 2005, and could represent a quiet and relatively painless effort to bulk up the docket without lengthy and expensive briefing and argument.

"It's been suggested, including by some of the justices themselves, that the Court might decide more cases," said Ho. "Perhaps this is the Court's way of fulfilling that vision in a cost-effective way."

Roberts has spoken about summary dispositions positively as a method of "error correction," said Mayer Brown partner Stephen Shapiro, co-author of *Supreme Court Practice*, the leading guide for Court practitioners. "Not every



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case demands full dress briefing and argument," he added.

Shapiro used to advise practitioners that in cert petitions and opposition briefs, they should focus, not on the merits of the case, but on whether it fits the Court's criteria for granting review. "We don't give that advice any more. Practitioners need to be aware that summary treatment is a possibility."

Shapiro's Mayer Brown colleague Timothy Bishop, also a co-author of the book, agrees. "I think these days you need to be more careful than ever adequately to address the merits at the cert stage if a [summary disposition] seems like a possibility," Bishop said.

In one case this term, Ho actually suggested to the Court that summary treatment could be a way to go, even as he asked for full review. In *Thaler v. Haynes*, Ho said summary reversal would conserve "the Court's scarce resources." On Feb. 22 the justices ruled summarily in the state's favor, with the rare result that the high court reinstated a death sentence that the U.S. Court of Appeals for the 5th Circuit had set aside.

In his tally of summary decisions, Ho included two categories of under-the-radar writings by the Court: substantive rulings based on certiorari petitions without hearing arguments or receiving briefs on the merits, and substantive decisions on stay applications, which are also not fully briefed.

They are meaty decisions, not quick, one-paragraph judgments, and they tend to come in cases in which the standards and precedents involved are clear, and the petitioner claims the lower court's error is obvious.

"It definitely reflects the fact that the Court is not content to let erroneous decisions stand simply because they don't implicate a circuit split," said Vinson & Elkins partner John Elwood, who has also noted the trend.

Summary rulings occasionally include dissents, and they sometimes make news. *Sears v. Upton*, issued June 29 on a 5-4 vote, sent a murder conviction and death sentence back to the Georgia Supreme Court. On Jan. 13, *Hollingsworth v. Perry* halted plans to broadcast the Proposition 8 same-sex marriage trial in California. *Presley v. Georgia*, issued January 19 in a case where a judge closed jury voir dire to spectators, is an important reaffirmation of the public nature of criminal trials.

"An opinion of the Court is still the law of the land, even if it's a summary ruling," said Ho. "So it's no surprise that these opinions reflect a lot of care and effort."

Tony Mauro can be contacted at [tmauro@alm.com](mailto:tmauro@alm.com).