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How the Sausage Is Made

Supreme Court decisions aren't just dashed off, even when the justices know how they'll vote. It takes time—a lot of it.

by [Margot Sanger-Katz](#)



Members of the public line up outside the Supreme Court. (AP Photo/Charles Dharapak)

Two days after the marathon health care arguments ended at the Supreme Court in March, the nine justices met alone in a room and cast their votes in the historic case. It would be easy to think that all the hard work was done—the justices had read the briefs, questioned the lawyers, and made up their minds about the case. Which might explain why Washington was abuzz about a rumor that the Court would issue its judgment before Memorial Day.

It didn't. And it probably won't issue one until the term ends in late June.

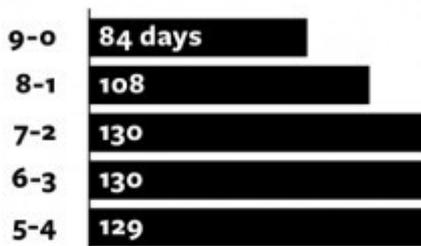
For the justices, everything is in the writing, and judicial writing takes time. Policy wonks care about the bottom line, but the Court cares about the future. Choosing one line of legal reasoning instead of another can influence a spate of future cases. And the case challenging the Affordable Care Act contains three core issues that, depending on the decision, could have big effects beyond health care. “The justices are attuned to the fact that these decisions will be quoted for years to come, if not decades to come,” said Steven Engel, a partner at the Dechert law firm and a former law clerk for Justice Anthony Kennedy.

In the post-argument conference, justices are assigned to write the majority and dissenting opinions. But even a justice who chooses her words carefully must win over four colleagues if she wants her written opinion to carry the day. The Court's traditional deadline for the circulation of first drafts is June 1, which means that the justices may just be reading the first version of the majority opinion in the case this week. If they don't like what they read, they'll make their views known, also in writing. Draft opinions and memoranda are still circulated on paper, hand delivered in manila envelopes. The memos are typically addressed to the justices using their first names, except for the chief justice, who is called Chief, former clerks say.

In cases where most members of the Court agree, this process can be fairly streamlined. But close cases often require more back and forth. Because there's little wiggle room in the event of a five-justice coalition, each justice's comments will require detailed attention, lest they stray from the majority position. (It's not clear whether all or part of the decision in the health care case will turn out to be 5-4 splits, but many legal analysts believe that Kennedy's vote will be critical in determining key issues.)

Supreme Court Decision Time

Average days between oral argument and opinion, by vote breakdown, 2010-11



Average days between argument and majority opinion, by author, 2010-11



Source: Tom Goldstein/SCOTUSblog

It also means the opinion must be carefully constructed to please the least convinced party in the coalition, which can be tricky. In *Miranda v. Arizona*, the 1966 case that forced police to read criminal suspects their rights, Justice William Brennan submitted 21 pages of revisions to Chief Justice Earl Warren's original majority draft. "This will be one of the most important opinions of our time, and I know that you will want the fullest expression of my views," he wrote, according to *Storm Center*, a book on the workings of the Court by University of Virginia political scientist David O'Brien. Brennan's changes were incorporated.

Tom Goldstein, a lawyer who frequently argues before the Court and who publishes the Supreme Court news site *SCOTUSblog*, said that it's helpful to think of the justices as nine separate law firms, each with its own staff and process. "They have the right to review everything and make their own comments," he said.

Decisions in high-profile cases like this one care frequently contain dissents written for posterity. Justices are more likely to write in dissent, use rhetorical flourishes, or provide a detailed parade of horrors that will result from the majority's view. (Sometimes, such dissents are written with an eye to attracting an uncertain justice to switch sides.) Dissent writing typically doesn't begin until the majority draft has circulated, but the majority author may want to address key points in the dissents through additional revisions. Rinse,

repeat. "It's an iterative process," said Kevin Walsh, an associate professor at the University of Richmond School of Law who clerked for Justice Antonin Scalia. "The bigger the case, the harder the issues, the more iterations."

The health care case is more complicated than even the typical blockbuster. The justices asked to consider more questions than they normally do; more lower courts than usual have weighed in; and the briefing pile (thanks to the litigants, outside lawyers hired by the Court, and a record number of friend-of-the-Court submissions) is enormous. Law clerks working on the case may have to read thousands of pages before they're up to speed—far more than in a typical case. Meanwhile, the justices and their clerks are also managing the Court's other cases; more than 15 decisions are expected before the end of the term, according to *SCOTUSblog*.

And even when the sides seem settled, sometimes they're not. About once per term, according to former clerks, a justice changes his mind during the process of writing, reading, and revising. That's what happened in *Planned Parenthood v. Casey*, the 1992 abortion decision for which Justice Anthony Kennedy switched sides midstream, ultimately writing to preserve key parts of *Roe v. Wade*. Sometimes, a justice in the majority will be moved by a persuasive dissent. Other times, the justice writing the majority opinion will realize, once she sits down, that an argument that sounded superficially appealing just doesn't hold together, said Carrie Severino, who clerked for Justice Clarence Thomas and is now the chief counsel and policy director of Judicial Crisis Network.

All of which is to say: These things take time. The health care case is likely to stretch into the very last week of the Court's term. If the justices' current schedule holds, smart gamblers would bet on a June 25 decision.

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