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## What We Can Learn From Ill.'s Kilbride Court

On Friday, Oct. 25, Chief Justice Thomas L. Kilbride ended a three-year term as chief justice of the Illinois Supreme Court, resuming his seat as an associate justice. The following Monday marked the installation of new Chief Justice Rita B. Garman, the 119th chief justice in the state's history and the second woman to hold the post.



Kirk Jenkins

Chief Justice Kilbride amassed a record of important achievements outside the courtroom during his tenure. Early in his term, the court announced the end of printed official reporters in Illinois, eliminating an enormous expense for bound volumes and substituting a public domain citation system.

In early 2012, the chief justice spearheaded a pilot program for electronic filing of documents in the Illinois Supreme Court. Later that year, the chief announced new statewide standards for e-filing in civil cases in the state's trial courts. When fully phased in, electronic filing promises to save Illinois taxpayers millions — Cook County spent nearly \$16 million on storage of paper documents in 2011 alone.

When the chief justice took office, Illinois was one of only 14 states where cameras in courtrooms were either barred outright or allowed under such restrictive terms that they were hardly used. In January 2012, Chief Justice Kilbride announced a pilot program allowing circuit courts to apply for permission to allow news cameras and electronic news recording.

The court also pioneered additional steps to help the disadvantaged navigate the justice system, amending the Code of Judicial Conduct to permit judges to assist self-represented litigants in being fairly heard and creating a model-language access plan for courts across the state designed to allow litigants and witnesses with limited English proficiency to be fully engaged in the judicial process.

The Kilbride court began in October 2010, when Chief Justice Kilbride succeeded Chief Justice Thomas R. Fitzgerald, and Justice Mary Jane Theis joined the court, taking the retiring chief justice's seat. The court decided 104 civil cases (disregarding attorney discipline, juvenile and commitment matters). Eighty-five of these cases were appeals from final judgments and orders fully resolving an entire suit or a discrete claim within a larger suit.

The court decided 26 tort cases, 15 cases predominantly involving civil-procedure issues, nine in domestic relations, eight in employment law, seven in constitutional law and six each in government and tax law. Interestingly, given the amount of attention arbitration has gotten in recent years in state supreme courts around the country implementing the United States Supreme Court's *AT&T Mobility v. Concepcion* decision, the Illinois Supreme Court has decided only two arbitration cases since October 2010.

Not surprisingly, a dissent before the appellate court helps in getting review; 30.6 percent of the court's cases during the Kilbride era had a dissenter at the appellate court. A divided appellate court will often mean a divided supreme court — 40.5 percent of the Kilbride court's nonunanimous decisions had drawn a dissent at the appellate court.

This court has been somewhat more contentious than other recent Illinois Supreme Courts, particularly over the past two years. After deciding 76.3 percent of its cases unanimously in 2011, the court has decided just over half that way in 2012 (53.8 percent) and 2013 (54.2 percent). During

its three-year term, the Kilbride court decided 62.5 percent of its civil cases unanimously. It would be easy to write off the year-to-year changes as being explained by accidents of the court's docket, but that explanation only goes so far; after all, unlike the appellate courts, the Supreme Court chooses its own cases.

Unanimity rates have typically been higher earlier in the past decade than they were under the Kilbride court. With the exception of 2006 under Chief Justice Robert R. Thomas, the court has decided more than 70 percent of its civil cases unanimously in most years. Overall, 75.3 percent of civil cases were decided unanimously under Chief Justice Fitzgerald (2008-2010), 72.3 percent under Chief Justice Thomas (2005-2008) and 72.1 percent under Chief Justice McMorro (2002-2005).

To give a bit of context, only 37.5 percent of the 7,183 cases resolved by the United States Supreme Court between 1946 and 2009 were decided unanimously. Just over 22 percent of civil cases drew either two or three dissenters during the Kilbride era — comparable to the Fitzgerald court (19.4 percent) but somewhat more than the Thomas (13.4 percent) or McMorro courts (14.7 percent).

Reversal rates are perhaps the most frequently cited statistic for appellate courts of last resort. During the past decade, the reversal rate at the United States Supreme Court for decisions of the Ninth Circuit has become something of a political football. So how have the appellate courts fared before the Kilbride court?

The Kilbride court reversed 61.8 percent of the civil judgments it reviewed — slightly lower than the Fitzgerald Court (67.5 percent) but more than either the Thomas (50.7 percent) or the McMorro Courts (56.5 percent). Nearly half of the Kilbride court's civil docket — 48.1 percent — came from Chicago's First District Appellate Court. Four of the six divisions of the First District were reversed more than 60 percent of the time.

Reversal rates elsewhere in the state are, for the most part, similar. Sixty-three percent of civil cases from the Second District, the northernmost district in the state, have been reversed. Moving southwards, 60 percent of the Third District's decisions have been reversed. Eighty percent of civil decisions from the Fifth District — the southernmost district in the state and considered by some to be inclined to pro-plaintiff decisions — have been reversed.

The one exception to this trend is the Fourth District, which is centered in the state capital Springfield and produces many cases involving the government. Only 41.7 percent of the Fourth District's decisions have been reversed.

To better understand each district's standing with the court, let's take a look at the average number of votes to affirm the decisions of each district. Five of the six divisions of the First District have fared relatively poorly; decisions from Divisions Four, Five and Six have earned an average of fewer than three votes before the Supreme Court, and decisions from Divisions One and Two have averaged fewer than two. Other districts have done better; decisions from the Third District receive an average of 3.1 votes and those from the Fourth District 3.67.

Second only to reversal rates in most analysis of appellate courts comes speculation about voting blocs and "swing votes." Given the number of unanimous opinions, merely calculating the percentage of cases in which each justice votes with the majority tells us relatively little; six of the seven justices have voted with the court in 90 percent or more of civil cases (Chief Justice Kilbride is the lone exception, voting with the majority in "only" 78.8 percent of civil cases).

But when we limit our sample to nonunanimous decisions, interesting patterns begin to emerge. New Chief Justice Garman and Justices Burke, Thomas and Theis have each voted with the majority in at least 80 percent of nonunanimous cases. Excluding cases involving only one dissenter reveals that Chief Justice Garman and Justice Theis have been in the majority in at least three-quarters of the 23 cases in which either two or three justices have dissented (78.3 percent and 77.3 percent, respectively).

Most often in the minority of closely divided courts are Justice Charles E. Freeman, who votes with the majority in such cases 65.2 percent of the time, and Chief Justice Kilbride, who does so in exactly half of all two- and three-dissenter civil cases. Not surprisingly, these two justices are also the court's most frequent dissenters in civil cases, with Justice Freeman filing 10 complete or partial dissents

and Chief Justice Kilbride filing 14.

The other justices dissent much less often, with Justice Thomas filing six, Chief Justice Garman five, Justice Burke four and Justices Karmeier and Theis three apiece. Justices Thomas and Burke spoke for the court most frequently during the Kilbride era, with Justice Thomas filing 18 majority opinions and Justice Burke 17.

To further study the Kilbride court's dynamics, we turn to the justice-by-justice agreement rates: In what percentage of civil cases did each possible pair of justices vote the same way? The data reveals a central group consisting of Chief Justice Garman and Justices Thomas and Karmeier — not coincidentally, the three Republicans on the court — with Justices Burke and Theis serving as swing votes.

Across the entire database of civil decisions, Chief Justice Garman agreed with Justice Thomas in 94.1 percent of all cases and Justice Karmeier in 88.2 percent. Justices Thomas and Karmeier agreed in 91.9 percent of all civil cases.

Turning to our proposed swing voters, Justice Burke agreed with Chief Justice Garman, Justice Thomas and Justice Karmeier 86.4 percent, 86.0 percent and 87.1 percent of the time, respectively. Justice Theis agreed with the three justices in 90.9 percent (Chief Justice Garman), 88.5 percent (Justice Thomas) and 87.6 percent (Justice Karmeier) of all civil cases.

We turn next to agreement rates in nonunanimous decisions. The new chief justice voted with Justice Thomas in 83.8 percent of all nonunanimous cases and with Justice Karmeier 70 percent of the time. Justices Thomas and Karmeier vote together in 78.4 percent of all nonunanimous civil cases.

Justice Burke voted with Chief Justice Garman in 65 percent of all nonunanimous civil cases, with Justice Thomas in 62.2 percent and with Justice Karmeier in 67.5 percent of nonunanimous civil cases. As for Justice Theis, she voted with Chief Justice Garman in 74.4 percent of nonunanimous civil cases, with Justice Thomas in 68.6 percent and with Justice Karmeier in 68.4 percent.

The court's more liberal wing is somewhat less cohesive. Justice Burke agrees with Justice Freeman in 85 percent of all nonunanimous cases, but has voted with outgoing Chief Justice Kilbride in only 28.2 percent of such cases. Justice Freeman and Chief Justice Kilbride agreed in only 30.8 percent of all nonunanimous civil cases. Although other pairings score closer to the more conservative members — Justices Burke and Theis agreed in 65.8 percent of all civil nonunanimous decisions, and Justices Freeman and Theis agreed at exactly the same rate, 65.8 percent — in a court divided 4-3 between a moderate and a more liberal wing, a switch of even one vote from one wing to the other can change the result.

The Kilbride court's 26 six tort cases — the single biggest block of cases on its civil docket — tend to confirm our conclusions. The reversal rate for these cases is almost the same as for the docket as a whole — 61.5 percent.

However, when one divides the data into plaintiff- and defense-oriented appellate court decisions, we learn that the court reversed 72.2 percent of all plaintiff-oriented tort decisions and only 28.6 percent of all defense-oriented ones. The unanimity rate was somewhat less for the tort docket than for the remainder of the court's caseload — 53.8 percent of the Kilbride court's tort cases were decided unanimously.

Agreement rates in tort cases are consistent with our results for the rest of the court's docket. Although the sample of nonunanimous tort decisions is quite small — 12 cases in three years — Chief Justice Garman and Justice Thomas agreed 81.8 percent of the time. The new Chief Justice voted with Justice Karmeier 83.3 percent of the time. Justices Thomas and Karmeier voted together 90.9 percent of the time. Justice Burke agreed with Chief Justice Garman in 75 percent of the nonunanimous tort cases, with Justice Thomas in 100 percent and with Justice Karmeier 83.3 percent of the time. Justice Theis' agreement rates with Chief Justice Garman, Justice Thomas and Justice Karmeier were similar (75 percent, 81.8 percent and 91.7 percent, respectively).

On the other hand, Justice Burke agreed with Chief Justice Kilbride in only 25 percent of nonunanimous tort cases. Justice Freeman and Chief Justice Kilbride agreed in only 16.7 percent of

such cases. Justices Freeman and Theis agreed 50 percent of the time.

With a working moderate majority and no change in the court's personnel, it seems unlikely that the installation of Chief Justice Garman will have a significant impact on the ideological leanings of the court's decisions. For now, the lesson remains the same: In difficult cases, defense counsel wishing to assemble a majority should begin with the chief justice and Justices Thomas and Karmeier, with either Justice Burke or Justice Theis as a deciding fourth vote.

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