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All Over the High Court

Major corporate law firms dominate the Court's new cases.

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As the Supreme Court starts a new term this Monday, the most interesting story so far is not so much the cases before the Court, but rather the lawyers contesting them.

Outside of a few cases that will catch the public eye—such as the battle over the broadcast TV indecency standards in *Federal Communications Commission v. Fox Television Stations*—the docket reflects the Court's now-usual fare of narrow disputes over federal statutes and constitutional cases arising from criminal trials. Some of these cases are significant in particular fields, such as the four federal environmental law cases that the Court will hear. But few of the 53 cases granted have broad public import.

Even if the composition of the Court's 2008 docket is unremarkable, the number of cases that the Court has been granting did seem noteworthy, at least at first.

Supreme Court lawyers have long rued the steady dwindling of the number of cases that the Court decides. In the 1970s and early 1980s, the Court decided roughly 120 to 160 cases per term. The slide began in 1986. Over the last decade, the Court has not issued more than 80 signed merits opinions a term. Last term, the Court issued only 67 signed merits opinions, a near-record low.

The causes of this decline are unclear. Likely culprits are the repeal of the Court's mandatory jurisdiction, the retirement of justices who readily voted to grant certiorari, and the relative dearth of sweeping federal legislation during periods of a divided or Republican-controlled Congress.

The hearts of Supreme Court practitioners leapt this spring when the Court began granting petitions for certiorari at a faster clip. The Court granted 43 cases before its summer recess, compared to only 26 at the same juncture in 2007.

But optimism has recently dimmed, if only slightly. On Oct. 1, the Court announced that it had granted 10 new cases from its summer conference. That was seven fewer than the year before.

And so while grants for the 2008 term continue to outpace grants for the 2007 term by a healthy margin of 10, it's still too early to know if any significant trend toward larger dockets is under way.

RARE TO COMMON

A trend that is far more certain is the near ubiquity of advocates from corporate law firms appearing across the wide variety of cases that the Supreme Court hears.

In an article published last May in the *Georgetown Law Journal*, Georgetown law professor Richard Lazarus traced the origins of this phenomenon. There was very little specialization in Supreme Court practice in the earlier decades of the 20th century, Lazarus noted, even when Supreme Court dockets were quite large. Corporations were often represented by a single law firm that would handle all legal work and did not divide their work among specialists from different firms (including appellate advocates).

In the late 1980s, certain firms started to copy the model set by the Office of the Solicitor General—that is, they put together a group of elite lawyers who specialized in Supreme Court practice. At the same time, in-house legal departments increasingly began to rely upon more than just a single law firm, which created an opportunity for Supreme Court specialists in other firms to attract business. The rare soon became common; Lazarus' study showed an inexorable rise in filings and arguments by Supreme Court experts since 1980.

STRIKING DOMINANCE

My own examination of the nascent 2008 term shows the striking dominance not only of Supreme Court specialists, but of corporate law firms.

So far, excluding the federal and state parties represented by

government counsel, 59 merits briefs have been filed on behalf of petitioners or respondents in 42 cases. Forty-three of those parties (or 73 percent) are represented in whole or in part by major corporate law firms, and 37 of them by firms with an established Supreme Court practice or practitioner.

(This does not imply that the other parties lack quality representation. Many are represented by leading labor and public interest advocates.)

Such predominance of corporate firms might be expected in business cases. But notably it is more pronounced in criminal cases (including civil habeas corpus cases challenging criminal convictions). Fully 77 percent of criminal defendants are represented in whole or part by major corporate law firms. All of those firms have Supreme Court practices.

This pattern began with a few enterprising lawyers who broke open the Supreme Court market in the 1990s. Recognizing that the Court principally grants petitions to resolve conflicts among the courts of appeals, these lawyers began tracking such conflicts. They solicited parties whose cases were likely to be granted, especially parties unserved by the big firms, such as individual plaintiffs and criminal defendants. And it worked.

The corporate firms soon awoke to this strategy. Moreover, they knew that the number of Supreme Court cases a firm handles, and its victories, count in the marketplace. Firms realized they could burnish those numbers by representing criminal defendants without compromising the interests of their business clients. They began devoting significant resources to unearthing pro bono cases.

More recently, the firms began to team with law schools to organize Supreme Court clinics. In tandem, law students and private practitioners monitor appellate cases for the holy grail of a circuit conflict, in hopes of a chance to brief a case in the Supreme Court.

When such a case is discovered, a ferocious competition ensues. Firms or clinics that discover a circuit conflict a day late are out of luck. The target party's current lawyer is often stunned (and vexed) by the immediate onslaught of calls from eager appellate specialists. More than one prominent advocate has been known to hop a red-eye to visit a prison, hoping to sign up the inmate whose *pro se* petition the Court just granted.

PUBLIC BENEFITS

Such practices may seem uneconomical, and carried to excess they may be. But in general they are justified by a major shift in legal practice in the last decade: namely, the rise of appellate practices to serve clients in the lower courts. Corporate clients have come to recognize that skills that bring victory in the Supreme Court—such as expertise in the crafts of brief writing and oral argument—translate to regular appeals. Moreover, clients now commonly deploy appellate lawyers in high-stakes trial litigation to brief law-intensive issues and position the case for appeal.

If the market is the judge, the costs of pro bono representation in Supreme Court cases are largely offset by reputational, recruiting, and financial dividends for the practice and the firm as a whole. In essence, Supreme Court experience sells the rest of the appellate practice and elevates the entire firm.

The public, too, benefits greatly from this pattern of representation. Cases are closely vetted for the Supreme Court. The current advocacy in indigent criminal cases at the Court is superb, certainly compared to what I saw as a clerk in the 1995 term.

Some observers worry that, even if indigent criminal defendants benefit, interests opposed to business (such as tort plaintiffs or unions) may be disadvantaged by the dominance of the corporate law firms. But there seems little risk of that. Supreme Court advocates at smaller firms—that is, those facing less potential for client conflicts—have built practices serving tort plaintiffs, and Supreme Court specialists still abound outside the corporate bar.

At the end of the day, we are all served by strong advocacy in the Supreme Court, whoever provides it. Let's hope the Court gives these advocates more chances to do their work.

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