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The Incredible Shrinking Court; If Their Productivity Were Measured By Private Sector Standards, The Supremes Might Receive Pink Slips

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In the corporate world, budget-conscious managers strive to improve their organization's productivity, generating more product, more efficiently, with fewer resources. In government, productivity is virtually irrelevant. Government agencies are spared the rigors of the market and survive forever regardless of their efficiency. In this respect, unfortunately, the U.S. Supreme Court is just like any other government agency.

I yield to no one in my admiration of the Court as an institution. It is, after all, the apex of the legal system that now features more than a million law school graduates. A major part of my professional career has been wrapped up with the Supreme Court. But that experience just raises a nagging question: Why don't the justices produce more justice?

I am not questioning the soundness of their decisions on any particular topic of controversy. I just wish the justices would do more. The Court's business is to decide important cases. Despite growing resources and an expanding market for dispositive decisions, the Court's market share is shrinking-as a matter of deliberate but ill-conceived choice. The justices inexplicably have decided not to do as much as the taxpayers pay them to do.

Every term the Court generates a handful of blockbuster decisions-perhaps half a dozen, rarely as many as ten-that make the evening news. Sometimes those blockbuster cases actually have broad impact, such as last term's affirmative action decisions, which directly affect thousands of enterprises and institutions and hundreds of thousands of employees, job applicants, and students. Others are largely symbolic, such as its gay rights decision, which struck down statutes that the Court itself emphasized already had become inoperative in the face of a "pattern of nonenforcement with respect to consenting adults acting in private."

The tiny handful of blockbusters tend to obscure the real work of the Court. They may lead even lawyers to assume that a large iceberg of less notorious cases is being resolved, even though the public notices only the prominent tip that generates the fuss. Unfortunately, the iceberg is really just an ice cube. The Court is not doing much to resolve the important, workaday disputes of federal commercial law that it should be addressing. The numbers tell a compelling story. In the term that ended in June, the Court decided just 73 cases after hearing oral argument. There were 72 signed opinions and one per curiam. Although the average justice also wrote several concurring or dissenting opinions, each wrote only eight dispositive opinions all year. There were seven other cases decided summarily on the briefs without even hearing argument. Thus, measuring the Court's actual output in performing its constitutional function of deciding "cases and controversies," the Court produced a total of only 80 decisions.

By any measure, this is a shockingly low performance record. Look at the Court's productivity as measured either by the trend of its decision making or by the percentage of cases decided by the lower federal and state courts and subjected to Supreme Court review. By either

comparison, taxpayers, lawyers, and litigants may fairly ask: "What are the justices doing with all the resources given to them?"

Consider first the Court's total number of cases decided. During the past few terms, the number of cases decided after oral argument has steadily declined from 107 in the 1992-93 term, to 92 in the 1997-98 term, to 70-plus cases in each of the past five terms. A 30 percent reduction in productivity may not seem very dramatic, but a commercial enterprise posting such numbers would be viewed as poorly managed and in crisis.

The numbers are far more dramatic and revealing if one looks at what the Court used to accomplish as recently as a generation ago. For example, the 1976-77 term was typical of its productivity for decades. In that year, the Court heard oral argument in 176 cases and decided those cases in 154 signed opinions and 22 per curiam decisions. Thus, within the lifetime of even the newest members of the bar, the Supreme Court has settled into a pattern of resolving barely half as many cases as it once did.

Indeed, these figures do not tell the full story of the Court's dramatic decline in disposing of the nation's judicial business. Before Congress acceded to the Court's request in the late 1980s to remove virtually all of its "mandatory" jurisdiction, federal statutes required the Court to address the merits of hundreds of additional cases, such as appeals from state supreme courts that rejected certain federal constitutional claims and appeals from three-judge district courts convened to resolve important federal issues.

For example, in the 1976-77 term, in addition to the 176 cases the Court resolved after oral argument, it also "reviewed and decided" [according to the Court's official statistics] an additional 207 cases by summary decision. Those summary dispositions were treated as decisions "on the merits" and had precedential force. Thus, a generation ago the Court actually was deciding the merits of almost 400 cases in a typical term. It is not an oversimplification to say, therefore, that the Court today is deciding barely 20 percent of the cases it resolved in the relatively recent past.

Of course, it is not as if the lower courts have experienced a dramatic decline in their caseloads, so that fewer cases are available for Supreme Court reexamination. Quite the contrary; the dockets of the federal and state appellate courts have exploded over this period. Those courts are resolving several times as many cases as they did a generation ago, and the caseloads per individual judge have escalated dramatically. In 2002 federal circuit courts of appeals decided more than 27,000 cases on the merits. A generation ago, federal appellate decisions were a fraction of that number.

Someone looking for a benign explanation of the Supreme Court's incredibly shrinking docket will point out that the Court is disposing of more certiorari petitions than ever before. That is true, but it is also misleading and irrelevant. Using my benchmark term of 1976-77 and comparing it to the most recent terms, the total number of certiorari petitions presented to the Court doubled, from about 4,700 to about 9,400. One could speculate that the Court is distracted by these additional cert petitions and cannot get around to deciding many cases on the merits.

I do not think that this is a fair explanation, for two reasons. First, virtually the total growth in the number of cases presented to the Court has come in the swelling of the in forma pauperis docket. With few exceptions, these are applications by indigent criminal defendants and

prisoners [reflecting our nation's burgeoning criminal justice machinery and bulging prisons]. Almost all of these petitions are frivolous on their face, and very few are ever granted.

By contrast, the number of cases on the "paid" docket has remained remarkably stable over the years. In 1976-77, 2,300 cases of this sort were presented to the Supreme Court. Last term there were about 2,200. While some criminal cases wind up in this category, it is the paid docket that features the litigations among government agencies and regulated enterprises as well as securities, antitrust, employment discrimination, and other private commercial cases. These are the cases in which the party who lost below believes there is enough at stake to justify the substantial expense of paying the fees and legal expenses involved in asking the Supreme Court to review the case. While the number of paid cases has remained in the same range [2,100-2,500] for more than a generation, the Supreme Court has reduced by half its willingness to decide these cases.

The other reason the "escalating workload" argument does not wash can be summed up in two words: law clerks. In earlier times [within the lifetime of lawyers practicing today], each justice had one or perhaps two law clerks. Now each has four. So their resources have doubled or quadrupled. This doesn't count the addition of deputy clerks who handle applications for bail and stays [including stays of death sentences], nor does it adjust for the vastly improved technologies that make processing cases, including the doomed certiorari petitions, much more efficient.

Moreover, in that same era not so long ago, each justice read [or at least glanced at] most of the petitions before deciding whether to vote to grant review. Often that consideration was informed by a short memorandum written by the justice's own law clerk, but many cert petitions actually received personal attention from the justices.

During the past 20 years, however, that process has become bureaucratized through the mechanism of the "cert pool." Now a single law clerk from one justice's chambers is randomly assigned to prepare a "pool memorandum" for a particular case. Eight of the justices rely primarily on that single pool memorandum in deciding whether to vote to grant review. [Only Justice Stevens keeps the entire process in-house.] Many justices never touch the actual petition, much less read it.

This is, of course, quite efficient. Only one person [a very recent law school graduate] does the work that used to be done by nine justices and perhaps nine law clerks reviewing a particular cert petition. And three or four times as many law clerks are available to perform this potentially decisive screening.

Two simple but disquieting facts emerge from this: First, the Court has dealt with the increase in the total number of requests for its attention by instituting procedures that dramatically reduce the consideration actually given to each request, whether frivolous or substantial. Second, the Court's productivity in achieving what it was created to do—decide important cases and controversies—has slipped substantially both in absolute terms and by every relative measure.

What explains this precipitous drop in judicial output by the nation's highest court? Structurally, Congress helped make it possible by removing almost all types of cases that the Court once had a duty to decide. Everything now falls in the discretionary category. A case will not be decided unless four justices can agree to grant review and set the matter for full briefing and oral argument. This is the so-called rule of four.

There are a couple of problems with this policy of giving the justices absolute discretion over whether to review a case. One is that the number of fractious cases actually decided illustrates that it is often hard to get several justices to agree on anything. In recent years the number of separate opinions filed has risen substantially. It is not uncommon for a single case to spark three or four or five opinions reflecting highly individualized commentary that necessarily dilutes the force of a collegial body's decisions. Sometimes the quibbles get as minuscule as one justice's refusal to concur in a single footnote of another justice's opinion, although it is more common to disavow some subsection of another opinion. With this growing discord, it is harder and harder to get four justices to agree on so basic a question as whether a case should be reviewed in the first place.

Another factor that contributes to the refusal to cast a vote in favor of review is defensive strategizing: A justice is less likely to vote for review in an important case if the justice fears that a majority may come out the "wrong way."

Another contributing factor is more delicate to address. All of the justices are hardworking. They put in full days during most of the period when the Court is in session, from the first Monday in October until the end of the following June. A couple even show up in chambers on weekends from time to time. But human nature builds in a certain inertia that cannot be gainsaid. If there is a choice whether to take on a difficult task and the question is a close one, it is reasonable to surmise that the "default" position is "vote to deny."

A change in the way the justices see their role also accounts for some of the decline. Throughout most of its history, the Court addressed important issues of federal commercial law, especially those arising under the regulatory statutes that began to proliferate in the late nineteenth century. Now, with the bizarre exception of cases involving the Employee Retirement Income Security Act, the Court disdains ordinary commercial law issues as unworthy of the justices' time. Instead, if a case is not one of the relatively few that pose intriguing questions of social policy, the chance of interesting four justices approaches zero.

One other institutional innovation compounds the problem. This is the phenomenon of the cert pool, which I already have mentioned. This process inevitably builds into the memorandum on which eight of the justices heavily rely a strong bias to recommend turning down cases. Law clerks fresh from policy-laden Socratic classroom discussions are far more likely to be interested in the relatively few abortion, gay rights, and free speech cases than the host of commercial disputes.

Moreover, a new law clerk starts with the knowledge that the Court always turns down at least 98 percent of the cases presented for review. There are even shorthand ways to summarize the various grounds for recommending a denial. Any decision to review a case is extraordinary and so is a law clerk's recommendation to do so. It takes a good deal of self-confidence for a recent law school graduate, even the kind of high achiever who makes it to clerking for a Supreme Court justice, to go out on a limb and say: "Take this one."

Sometimes the mistakes in making such a recommendation become embarrassingly public. A couple of times a year, after getting full briefs and hearing oral argument, the Court "DIGS" a case that it had been persuaded to review. That is the acronym for "dismissed as improvidently granted." No law clerk wants to be on the line having recommended certiorari to the Court, including seven justices in other chambers, only to have the Court later decide, after investing a lot of time and effort, that it was "improvident" to do. Even if the clerk's judgment was innocent and reasonable, the embarrassment is palpable.

The safer course is to recommend against review except in the most compelling case. Since the Court itself regularly reminds the bar that review is a matter of discretionary privilege, disappointed litigants and their counsel may grumble, but the Court feels no sense of having deprived them of a right. There is no public record of an improvident denial of review. There is no second-guessing a denial, only a grant. So, apart from the sheer weight of other cases competing for the Court's attention, litigants must recognize that the deck is stacked against them when they seek Supreme Court review.

The problem is not a lack of resources. In 2002, Congress appropriated \$40 million to pay the salaries and expenses of the nine justices and other employees of the Supreme Court. The president's budget projects the number to grow to \$46 million for 2003 and rise to \$57 million next year. This covers 396 Court employees [including justices] in 2002 and projected expansions to 421 in 2003 and 461 next year. I emphasize that this figure does not include the other federal courts, just the Supreme Court itself. One cannot say that tight purse strings are preventing the justices from deciding more cases. Congress also has committed to spend \$120 million to refurbish the Court's magnificent building. Part of the expense will go toward constructing an underground police station for the 140 members of the Supreme Court's private police force who provide security for the Court's one-square-block facility. In 2003 alone, the total federal budgetary allocation for the Supreme Court's salaries and facilities is \$86 million. All of this public money buys about 75 decisions. These figures give new meaning to the term "the high cost of justice."

Another possible view of the "limited resources" thesis looks not to money but to time. The premise of this argument is that the Court does not have the time to decide more cases "judiciously." The circular reasoning goes like this: The Court takes a full term to rule on the number of cases it currently decides; therefore, it would have to give slipshod attention to its caseload if it tried to decide more cases.

Both history and common sense belie such a contention. With far fewer resources, the Court used to decide more than twice as many cases as it now does. I know of no empirical or scholarly basis to conclude that those decisions were less well reasoned than contemporary decisions. It is true that today's opinions tend to be longer and that the multiplication of separate concurrences, dissents, and combination partial concurrences and dissents consume a huge amount of the justices' time. But any editor will affirm that shorter is clearer. The prolixity of the contemporary opinions is hardly a compelling reason for not deciding more cases.

Instead, this is a self-inflicted constraint. With more self-discipline, opinions could be shorter. One easy way to impose that self-discipline is, paradoxically, to decide to review more cases. Opinions are like gas in a closed container. They will expand to fill the volume of time available to write them. If the Court undertakes to decide only 75 cases a year, then one can predict with absolute certainty that those 75 opinions will take up all of the time of the justices and their clerks until the Court recesses for its three-month vacation in June.

But history and common experience demonstrate that if the Court undertook to decide 100 cases or 150, the justices and their clerks once again could decide that number within the same nine-month term. They would produce twice as many opinions, but probably no more total pages. Everyone would be better for the change.

The final question one may ask is whether the declining productivity of the Supreme Court matters. Are there cases that should be reviewed and decided by the Court that are lost in the morass of the 9,000 denials? Put another way, are there only 75 or 80 cases a year coming out of the 12 federal circuits and the highest courts of 50 states and the District of Columbia that merit the Supreme Court's attention?

To believe that the Court is actually deciding all-or even most-of the cases it should be addressing, one would also have to believe one of several very dubious propositions. One is that there are fewer difficult legal issues than there were a generation or more ago. Dramatic growth in the caseloads of the lower federal and state appellate courts suggests that this proposition is unsound. Indeed, the number of parties asking the Supreme Court to intervene has not declined. That the number of "paid" petitions has remained relatively constant also illustrates that serious litigants believe the Court should be resolving at least as many cases as it once did, not 50 percent or even 20 percent of its former productivity.

Moreover, commentators regularly publish lists of "circuit conflicts" on issues of federal law. Scores of those conflicts are left unresolved, even though one of the Court's principal responsibilities under the Constitution is to assure that the law is the same for all persons, regardless of the circuit in which they happen to live or litigate.

At the very least, the current Court should try an experiment: Consciously undertake to grant review in a larger number of cases. If necessary, modify the rule of four into a rule of three, so that any three justices could conclude that a case justifies the full Court's attention. See whether there is some inherent reason why these high achievers with life tenure cannot be as productive as their predecessors. If the justices do not manifest the self-discipline to exercise their discretion to decide more cases, then Congress should restore some categories of case the Court must address.

The justices might find that the job is even more fun, if they are resolving more interesting disputes. Although courts do not share a commercial enterprise's duty to be customer [or client] focused, it certainly would be nice for twice as many parties to be getting justice from the justices.

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