

Specialists' Help at the Supreme Court Can Come With a Catch

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Byline: By ADAM LIPTAK

Body

WASHINGTON -- Humberto Fernandez-Vargas, deported to Mexico, had run out of options. A federal appeals **court** said he could not return to the United States to live with his American wife and son. And his lawyer did not have the expertise or money to pursue the case further.

Then the cavalry arrived. Leading lawyers from around the country, sensing that the case was one of the rare ones that might reach the **Supreme Court**, called to offer free **help**. Mr. Fernandez-Vargas's immigration lawyer was delighted, and he chose a lawyer from a prominent firm here.

But there was a **catch**, and then a controversy. The **catch** was that the Washington lawyer, David M. Gossett, would take the case only if he could argue before the **Supreme Court** himself.

The controversy was that groups representing immigrants were furious, suspicious of the new lawyer's interest in the case and fearful of a **Supreme Court** ruling that would curtail the rights of immigrants nationwide.

Indeed, Mr. Gossett faced a barrage of hostile questions from the justices, and in June 2006 the **court** ruled against his client, 8 to 1. The ruling wiped out decisions in much of the nation -- notably from the federal appeals **court** in California -- that had favored immigrants.

Mr. Gossett is among an increasingly influential cadre of lawyers specializing in **Supreme Court** cases, attracted to the importance and intellectual challenge of the work. Many are willing to serve without charge to draw prestige and paying clients to their firms.

Thirty years ago, 6 percent of cases accepted by the **court** were brought by lawyers specializing in **Supreme Court** advocacy, according to data compiled by Richard J. Lazarus, a law professor at the Georgetown University Law Center and faculty director of its **Supreme Court** Institute.

In the term that ended in 2008, the number topped 50 percent for the first time. Many of the cases involved businesses that paid large fees, but a good number were for clients who could not afford a lawyer and have historically been represented, if at all, by public interest lawyers.

Overburdened public interest lawyers might be expected to welcome the high-powered **help**. But the old guard is often wary of, if not hostile toward, the new breed of skilled and ambitious advocates, fearing that they are more interested in the glory of a **Supreme Court** argument than in what is best for their clients and the development of the law.

"There's one and only one reason they're interested," Barry A. Schwartz, a criminal defense lawyer in Denver, said of many of the dozen or so lawyers who called him after he had won an appeals **court** decision on an issue that

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was likely to reach the Supreme Court. "It's not because they love your client or believe in the legal principle your case presents. They want to get the case into the Supreme Court."

A related development has only heightened the competition. Starting in 2004, leading law schools created student clinics focused solely on the court, all affiliated with prominent law firms. The result has been an intense struggle to find and press cases with Supreme Court potential.

Law firms trying to build or maintain credible Supreme Court practices must show paying clients that they have a consistent presence in the court, and law school clinics have to provide work to the students. Separately and in combination, firms and clinics offer their services free to poor clients in exchange for taking a lead role in the case. That means people with legal troubles but no money can end up with a top-tier lawyer with deep experience before the court.

The specialists respond to critics by pointing to data showing that their record in the court is quite good. They say their ethical obligations are to the individuals they represent and not to the agendas of interest groups.

But public interest lawyers say firms and clinics have sometimes pushed the wrong cases. "It's not in every client's interest to be in the Supreme Court," said John H. Blume, a law professor at Cornell and the director of its Death Penalty Project, which conducts research and allows students to work on capital cases at all levels of the court system. "If you're in the get-to-the-podium business, it could compromise your judgment."

Mr. Gossett, a partner with the Mayer Brown law firm, said his case was not an example of skewed incentives. "We devoted hundreds of hours, and maybe thousands, and I continue to believe we did so to the best of our ability," he said. Of the decisions the firm faced, he said, "I think we made every one right."

He added that his obligations were to his client. Mr. Fernandez-Vargas was deported after two decades in the United States, separated from his family. "I gave us a 30 percent chance of winning," Mr. Gossett said. "I therefore had a client who had a 30 percent chance of being reunited with his wife and child in the United States."

J. Christopher Keen, Mr. Fernandez-Vargas's original lawyer, also dismissed the widespread criticism from immigrant rights groups, saying they were not sufficiently alert to the human stakes in the case.

Mr. Keen attended the Supreme Court argument with his client's wife, Rita Fernandez, and he consoled her after she heard cutting remarks about her husband from Justice Antonin Scalia. "I was on the front steps of the Supreme Court while she cried after Scalia called him 'a two-time loser,' " Mr. Keen said.

Still, he said, "if you're thinking strategically, maybe it wasn't the best case."

A Loss Leader

As recently as 1987, Chief Justice William H. Rehnquist remarked that the days of a few great advocates appearing regularly before the Supreme Court were gone. "There is no such Supreme Court bar at the present time," he said.

A little more than two decades later, the fanciest firms not only represent corporations for handsome fees but also fight to offer their services free to poor clients in exchange for a half-hour at the Supreme Court lectern. Handling cases pro bono has turned into a loss leader and reputation enhancer.

Lots of lawyers are members of the Supreme Court bar in a nominal way. All it takes is a check for \$200, three years as a lawyer, being a member of a state bar and securing the sponsorship of two lawyers who can already practice in the court. More than 250,000 lawyers have been members of the Supreme Court bar over the years, and almost none will ever argue before the court.

Indeed, the court has said that trumpeting the mere admission to its bar as significant "could be misleading to the general public" and is "at least bad taste."

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The specialists are another matter.

Professor Lazarus developed a definition of Supreme Court expertise that is now in general use. A Supreme Court specialist, he says, is one who has argued five cases in the court or is affiliated with a practice whose current members have argued at least 10. He concedes "some inexactitude at the margins" but says the overall trends showing the quite recent dominance of the docket by this group are undeniable.

A pioneer in this area was Thomas C. Goldstein, now with Akin Gump Strauss Hauer & Feld. A decade ago, he developed a technique to spot the cases most likely to attract the court's attention -- those in which two or more federal appeals courts had decided the same legal issue differently. Then he offered to handle such cases free, cold-calling surprised and often delighted local lawyers. In his first four years, he argued eight cases in the court, winning four.

Mr. Goldstein's competitors sneered.

"If I'm going to have heart bypass surgery, I wouldn't go to the surgeon who calls me up," Chief Justice John G. Roberts Jr., who argued 39 cases before the court before joining it in 2005, told The American Lawyer in 2000. "I'd look for the guy who's too busy for that."

Four years later, Chief Justice Roberts, by then an appeals court judge, said the rise of the specialized Supreme Court bar had "had something of a snowball effect."

"If one side hires a Supreme Court specialist to present a case," he told the Supreme Court Historical Society in 2004, "it may cause the client on the other side to think that they ought to consider doing that as well. This is just a variant on the old adage that one lawyer in town will starve, but two will prosper."

The first law school Supreme Court clinic, at Stanford, started in 2004. It has been joined by similar clinics at Harvard, Northwestern, Pennsylvania, Texas, Virginia and Yale.

Experts Versus Amateurs

The new specialists have not only prospered but have also compiled an impressive record. During the last six years, they have won much more often than relative amateurs, according to statistics compiled by Jeffrey L. Fisher, a director of the Stanford clinic, for a coming article. (He used essentially the same definition of experts as Professor Lazarus and considered the 292 cases in which one of the parties was an individual who was, or could have been, represented by the clinic. He thus excluded cases involving, say, disputes between two corporations or two states.)

As a general matter, the justices are more likely to reverse than affirm the decisions they review. Professor Fisher explored the gaps between experts and amateurs both when they represented individuals as petitioners -- the parties bringing the appeals, and so the likely winners -- and when they represented individuals on the other side, known as respondents.

Experts not affiliated with the clinic who brought appeals won 67 percent of the time, compared with 46 percent for others. When representing those responding to appeals, they won 29 percent of the time, versus 16 percent.

The Stanford clinic has generally been even more successful. In the 35 cases it has argued before the court, it, too, won 67 percent of the time when representing petitioners but did substantially better than expert counsel in representing respondents, winning 46 percent of the time.

Winning on the merits is not the only way to measure success. The Supreme Court agrees to hear about one in a hundred petitions seeking review. In the Stanford clinic's first year, the court agreed to hear its first four petitions.

"Not so long ago," Professor Lazarus wrote in The Georgetown Law Journal in 2008, "only the most accomplished private sector Supreme Court advocates could claim to have persuaded the court to grant four petitions in an entire career."

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The clinic, which includes a dozen second- and third-year students who take no other classes for three months and often work 60 to 80 hours a week, has handled more than 100 Supreme Court cases in a little over six years. Its success in persuading the court to hear cases has dropped, but only to 42 percent, which is almost certainly better than any practice in the nation except for the solicitor general's office, which represents the federal government.

Other clinics are now in the hunt, too. Indeed, the last term included the first case with lawyers affiliated with clinics on both sides. It was an international custody dispute, and the side that included the Stanford clinic prevailed over the one that included the clinic at the University of Pennsylvania.

But like the pro bono lawyers specializing in the Supreme Court, the clinics have sometimes found themselves at odds with public interest lawyers focused on the careful development of the law. Lawyers concerned with criminal defense, capital punishment, immigration and civil liberties often try to keep cases out of the Supreme Court, which they view as hostile.

When the court agreed to hear a case on the exclusionary rule at the urging of the Stanford clinic in 2008, for instance, criminal defense lawyers groaned, saying nothing good would come of it. When a 5-to-4 decision was handed down last year, it cut back significantly on the rule, which requires the suppression of some evidence obtained through police misconduct.

In an article to be published next year in The New York University Law Review, Nancy Morawetz, a clinical law professor at N.Y.U., explored what she calls the "distorted incentives in Supreme Court pro bono practice."

"The competition for cases that may be heard by the Supreme Court on the merits," she wrote, "creates a disincentive to the new Supreme Court bar to engage in full case analysis prior to accepting a case for representation."

There is nothing new or exceptional about tension between lawyers seeking to move the law in a particular direction and those focused on representing a particular client.

Not everyone agreed with Thurgood Marshall's incremental litigation strategy in the battle to desegregate public education. Many gay rights advocates opposed the lawsuit brought by David Boies and Theodore B. Olson challenging California's ban on same-sex marriage, fearing that it would result in a negative decision if the issue reached the Supreme Court too soon.

Nor is there anything unusual about conflicts between the interests of lawyers and their clients. But all of these tensions are heightened in Supreme Court practice.

"It's more pointed and more obvious," said Pamela S. Karlan, who directs the Stanford clinic with Professor Fisher, "because there are so few opportunities and the competition is so fierce."

A Frustrating Lesson

Distorted incentives were in play in the case of Mr. Fernandez-Vargas, Professor Morawetz wrote, calling the case "a model of what not to do."

Mr. Fernandez-Vargas was a Mexican citizen who re-entered the country illegally in 1982 after being deported. When he applied for permanent resident status more than two decades later, he was arrested and deported again.

The question in the case was whether a 1996 law denying relief to immigrants who had re-entered the country illegally applied to him even though he had come back before the law was enacted.

In 2005, the United States Court of Appeals for the 10th Circuit, in Denver, ruled against Mr. Fernandez-Vargas, saying he was covered by the 1996 law. That decision was at odds with ones from the United States Court of Appeals for the Ninth Circuit, which hears cases from much of the West and so has a heavy immigration docket.

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The **Supreme Court** sided with the 10th Circuit, effectively overturning the Ninth Circuit's rulings. Only Justice John Paul Stevens dissented.

Justice Stevens's opinion was notable, said Mr. Gossett, who had argued the case for Mr. Fernandez-Vargas. "The fact that Justice Stevens's dissent tracked our argument has always reassured me that we framed the case correctly," he said. "Unfortunately, the rest of the **court** disagreed not only with us but also with Justice Stevens."

Immigration lawyers say they learned a lesson from the experience. "Fernandez-Vargas was a turning point," said Trina Realmuto of the National Immigration Project of the National Lawyers Guild. "Immigration advocates realized we needed to be proactive about working together with the pro bono bar."

She added, "Noncitizens with even more compelling cases are still living with the consequences of the Fernandez-Vargas decision."

Mr. Gossett said Professor Morawetz had chosen the wrong example in focusing on his case. "But there is some truth," he said, "to her point that the specialized **Supreme Court** bar is in it for the **Supreme Court** work."

The Roberts **Court**. Articles in this series are exploring the workings of this **Supreme Court** and the little-understood forces that influence it.

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Graphic

PHOTOS: Jeffrey L. Fisher with students in the Stanford law clinic that focuses on **Supreme Court** litigation, which has generally done better than others in its cases. (PHOTOGRAPH BY JIM WILSON/THE NEW YORK TIMES)

J. Christopher Keen, left, represented Humberto Fernandez-Vargas, who had been deported. David M. Gossett, center, offered to argue the case in the **Supreme Court**. He lost, and Mr. Fernandez-Vargas left behind a wife, Rita Fernandez, right, and a son. The ruling erased decisions favorable to immigrants. (PHOTOGRAPHS BY NICOLE MORGENTHAU FOR THE NEW YORK TIMES)

STEPHEN CROWLEY/THE NEW YORK TIMES

KEITH JOHNSON/DESERET MORNING NEWS) (A22) CHARTS: Specializing in the **Supreme Court**. Expert **Supreme Court** advocates are responsible for an increasing percentage of the cases the **court** agrees to hear

and firms and law school clinics specializing in the **Supreme Court** win at the merits stage more often than lawyers without as much experience. (Sources: Richard J. Lazarus, Georgetown University (petitions)

Jeffrey L. Fisher, Stanford (success rates)) (A22)

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