

# Problems of a philosopher king court

U.S. Supreme Court issues longer opinions in fewer cases.

**By Brian J. Paul**

During the U.S. Supreme Court's October 1986 term - the term in which William Rehnquist became chief justice - the court granted a writ of certiorari in 11.7 percent of paid cases (cases in which a filing fee had been tendered) and issued 152 opinions. Over the course of the ensuing 17 terms, these numbers plummeted. During the October 2003 term, the latest term for which statistics have been compiled, the court granted review in just 4.2 percent of all paid cases and issued only 76 opinions. The data available thus far for the October 2004 term suggests this trend, toward accepting fewer cases and issuing fewer opinions, has continued unabated.

What explains this apparent reduction in productivity? With the chief justice nearing retirement, a reappraisal of the Rehnquist court's caseload - consisting almost entirely of cases within the court's discretionary purview - is in order.

Court watchers have floated various theories. Some speculate 12 consecutive years of Republican judicial nominations homogenized the federal Courts of Appeal, leading to fewer circuit splits for the court to resolve. But if Justices O'Connor, Scalia, Kennedy, Souter, and Thomas are any gauge for philosophical uniformity among Reagan-Bush nominees, that hypothesis falls flat. Souter (a Bush nominee) has agreed with Ginsburg (a Clinton nominee) 85.6 percent of the time, which is nearly as much as Scalia and Thomas have agreed (86.7 percent of the time). As for O'Connor, she has more consistently voted with Breyer (another Clinton nominee) than with fellow Reagan nominee, Scalia.

Others have pointed to changes in the way the Supreme Court handles its initial disposition of cases. Chief Justice Warren Burger (1969-1986) practiced a "join-3" version of the Rule of Four: if three Justices voted to grant certiorari, and Burger was not among them, he would join the three, generating the fourth vote necessary to review the case. Upon taking the helm, Rehnquist curtailed this practice. While this procedural adjustment may well account for some of the shrinkage in the court's docket, it hardly bears the weight of such a spectacular decline in decisional output.

Not even the sharp increase in certiorari petitions can explain the falloff. Although the gross caseload has risen precipitously since 1986, the upsurge is almost exclusively attributable to a rise in IFP (in forma pauperis) petitions. According to Supreme Court Practice, 90 percent of IFP petitions are "wholly without merit" and can be dispatched with minimal effort. The statistics tend to confirm this assessment: the court granted just 0.2 percent of all IFP petitions in the October 2003 term. In comparison, the number of paid petitions, a higher percentage of which command close scrutiny, has remained fairly constant over the same period (about 2,500 in any given term). Still, the percentage of certiorari grants in paid cases has declined by 64 percent.

So while these theories might explain part of the decline in the court's workload, they cannot explain the bulk of it. There is a more fundamental explanation: The court's view of its role has subtly shifted since 1986, from being primarily an arbiter of disputes (albeit select and important disputes) to an expositor of law. Though resolving conflicts, ambiguities, disagreements - the marrow of litigation - has remained very much the work of the court, dispute resolution is but a byproduct of the court's self-defined role as lawgiver. To be sure, this view was not totally alien to courts of previous eras; it traces back at least to *Marbury v. Madison*. But no court has taken this role more literally than the Rehnquist court.

As a result, the court has become exceptionally selective about the cases it accepts for plenary review. The statistics bear this out, but they are not the only evidence. In 1995 the court amended the criteria governing review of certiorari petitions. In so doing the court documented its narrowed mission: The court would no longer grant certiorari when there existed "special and important reasons," but "only for compelling reasons"; instead of accepting cases involving a conflict over a "federal question," the court now would only accept cases involving an "important federal question"; and instead of leaving ample room on the docket for the court to exercise its supervisory power, the court made clear that review would be "rarely granted" when the error entailed an "erroneous factual finding or the misapplication of a properly stated rule of law."

Meanwhile, as the number of opinions has declined, the number of pages the court churns out has ballooned; 50-plus page opinions in key cases are becoming de rigueur. *Bush v. Gore*, *Alden v. Maine*, *Hamdi v. Rumsfeld*, *Gruter v. Bollinger*, *McConnell v. FEC*, and *U.S. v. Booker*, for example, all exceed 60 pages in the U.S. Reports. Most of the landmark cases aren't as long: *Wickard v. Filburn* (23 pages), *Brown v. Board* (14 pages), *Gideon v. Wainwright* (18 pages), *New York Times v. Sullivan* (52 pages), *Griswold v. Connecticut* (53 pages). There certainly are exceptions - Rehnquist's own opinions are usually concise - but they seem to be just that: Outliers. On the whole, the court is producing scholarly tomes, not narrowly tailored decisions.

The justices of the Rehnquist court have, to one degree or another, moved away from the common-law approach of, in Justice Scalia's words, "gradually closing in on a fully articulated rule of law by deciding one discrete fact situation after another until ... the truly operative facts become apparent ... ." Court decisions now "tend to be singular events," according to Professor Arthur Hellman. Scalia has said quite openly that he is willing to extend "the Rule of Law ... as far as the nature of the question allows."

The question for the court upon Rehnquist's retirement will be whether this practice ought to continue or whether, as Justice Ginsburg has suggested, it would be good for the court "to turn its attention away from philosopher-king problems and toward the pedestrian statutory staples of the lawyer's craft."

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