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The 'Tenth Justice'

And the Limits of Influence

By Jacqueline Bell & Cristina Violante

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Noel Francisco argues before the Supreme Court in the Noel Canning case. (Courtroom sketch by Arthur Lien)

In Noel Francisco's first appearance before the Supreme Court, he made the sort of argument he likely won't be making in his new job.

Standing before the justices that morning in January 2014, he aimed to convince them to check the authority of the president to make recess appointments.

"The one thing that the president may not do is force the Senate to act against its will," he told the court.

Francisco's bid to rein in the powers of the president hit home. The justices sided with the Jones Day advocate 9-0, handing him a win against Solicitor General Donald Verrilli Jr. in National Labor Relations Board v. Noel Canning, finding that the president can make recess appointments only during congressional breaks that are longer than 10 days.

Three years later, Verrilli is in private practice, the founder of Munger Tolles & Olson LLP's Washington office, while Francisco is standing in Verrilli's shoes — the Senate, in a 50-47 vote along partisan lines, confirmed him as the next solicitor general of the United States last month.

For an appellate advocate, Francisco's new role is as good as it gets.

It's a post Justice Thurgood Marshall once called "the best job I ever had" — a comment he made even after being appointed to the U.S. Supreme Court.

Historically, the job of solicitor general — often called "the tenth justice" — has come with not only power and prestige but also another attractive benefit: winning.

But in recent years, that advantage seems to be slipping.

While the solicitor general remains the most influential lawyer at the court, a growing group of specialty Supreme Court attorneys in private practice — many of whom have worked in the solicitor general's office themselves — are testing the limits of that power and giving the office a run for its money.

For a solicitor general in the Roberts court, the influence of the post remains powerful, but success just isn't what it used to be.

"In the beginning, the solicitor general's office had all the expertise. There were some lawyers who had Supreme Court expertise in private practice, but they were relatively few and the exception to the rule," said Andrew Pincus, a partner at Mayer Brown LLP and a former assistant to the solicitor general. "Now, it's a whole different ballgame."

The SG's Advantage

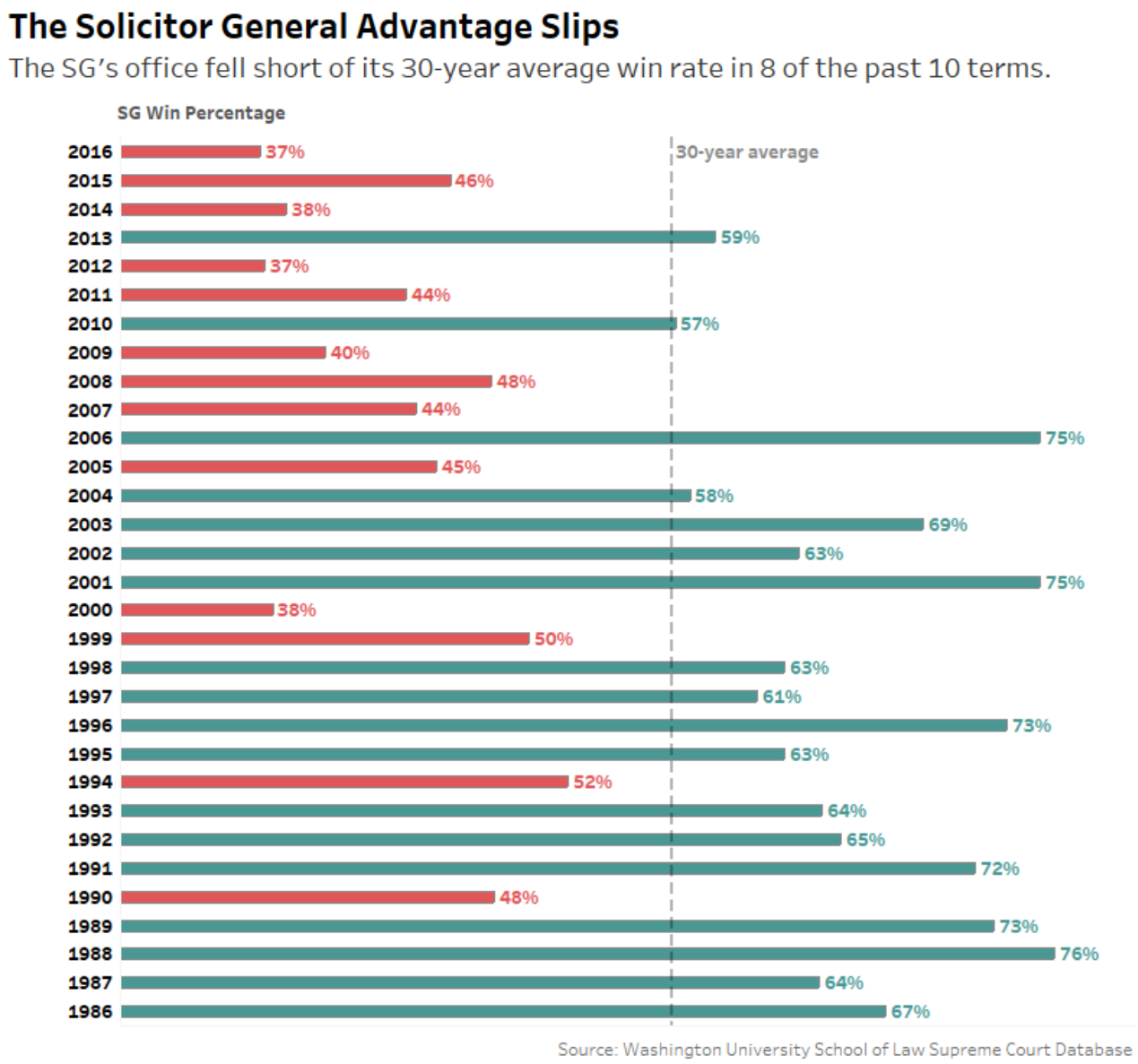
In the Rehnquist court, the solicitor general's office certainly reaped the benefits of an unrivaled advantage. Over that nearly 20-year span, the office won more than 64 percent of the time in cases where it appeared as a party.

But in the Roberts court, the solicitor general's win percentage has dropped precipitously, with the SG's office scoring a victory in just 47 percent of the cases it has argued as a party.

Since the 2009 term, the first full term under the Obama administration, the SG has on average won just over 44 percent of its cases.

Some of the recent decline, of course, can be chalked up to politics — the natural result of a liberal solicitor general representing a liberal administration tangling with a court that, by some measures, is one of the most conservative in decades.

"It's really the first time in a long time that we had an executive branch that was in a quite different place on a lot of legal issues from where at least many of the justices were," Pincus said.



The size of the court's docket each term has also shrunk dramatically. In the 1980s, the court used to hear twice as many cases. Now, each individual win — and also each loss — looms larger for the solicitor general.

Still, the overall percentage drop masks some landmark wins by the solicitor general's office in recent terms in politically divisive cases. In at least some of the administration's toughest battles, the solicitor general scored dramatic victories.

"On the biggest-ticket items, I think the Obama administration did quite well before the Supreme Court," said William Jay, a partner at Goodwin Procter LLP and co-chair of the firm's appellate litigation practice.

Those wins include 2012's National Federation of Independent Business v. Sebelius, which upheld the constitutionality of the Affordable Care Act, along with King v. Burwell, a ruling that preserved the Affordable Care Act's health insurance subsidies. The Obama administration also triumphed in a battle over the Environmental Protection Agency's power to regulate greenhouse gases in Utility Air Regulatory Group v. EPA.

There also were striking losses, though, including the campaign spending case Citizens United v. Federal Election Commission, the dispute over the Affordable Care Act's contraception mandate in Burwell v. Hobby Lobby Stores, and the Voting Rights Act tug of war in Shelby County v. Holder.

Many recent Supreme Court terms have had more than their usual share of those high-profile cases. Verrilli, Obama's solicitor general from 2011-16, who could not be reached for comment on this story, told a group of students during a talk at the Oxford Union earlier this year that his five-year tenure came during an unusual time in the history of the solicitor general's office.

"There were so many issues of great importance that came before the Supreme Court in such quick succession," he said. "Term after term after term. Most solicitors general might have one or two landmark cases in their tenure. I was having two or three a year."

But the vast majority of Supreme Court cases aren't disputes with a strong political dimension that break down neatly along ideological lines. And the solicitor general's arguments before the Supreme Court each term as a party also include a significant number of meat-and-potatoes cases.

If the solicitor general is losing a higher percentage of cases overall, then who is winning? Increasingly, the solicitor general is facing private attorneys who specialize in Supreme Court litigation, and these adversaries are often as experienced and skilled at high court advocacy as the SGs are.

"There are more voices that are — not as powerful as the SG — but that can also be effective in speaking the language of the court. And that has an impact," Pincus said. "To me, it's a switch from being effectively dominant, both because of being the voice of the executive branch but also because to some extent it was the only experienced speaker in town. And now that latter part is no longer true."

The Rise of the Supreme Court Bar

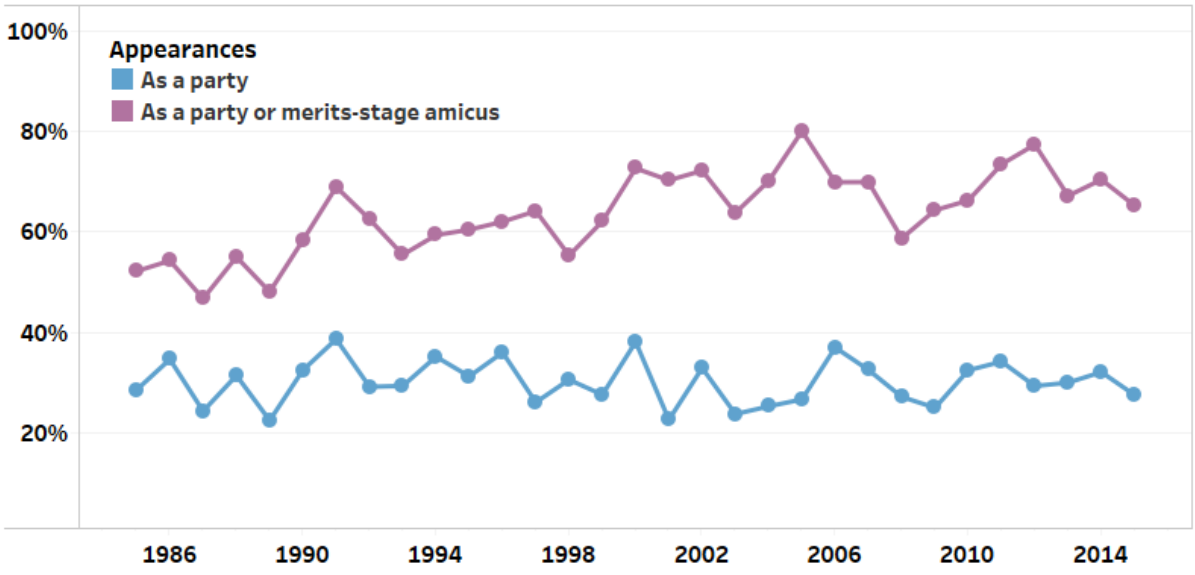
Theodore B. Olson kept a close eye on his office's win rate before the high court when he served as solicitor general under President George W. Bush.

"I wanted to see if we were falling below what my expectation was, to see if there was any reason," he told Law360. "Were we doing our job properly or weren't we? Were we making the right decisions about which cases to present to the court, or which arguments to make or which arguments not to make?"

The solicitor general in the Supreme Court serves as an advocate for the interests of the United States, but the justices have also long expected the solicitor general to be a scrupulous counselor to the court. The office is a dominant presence in most cases argued, appearing as either a litigant or as amicus curiae, or "friend of the court."

The 10th Justice

The solicitor general's office has long been involved in most high court cases.



Source: Washington University School of Law Supreme Court Database, The Supreme Court Compendium, Edition 6, and Law360 data.

Practically speaking, that means the justices have many opportunities to see the solicitor general and the attorneys from the solicitor general's office in action, developing a sharp sense of who they are as advocates.

"I had one justice, who's still alive but who retired a number of years ago, tell me in person that, he said, no matter what the issue was, we could always count on you to give us a fair and honest and forthright argument," Olson said. "And that meant a great deal to me, because it meant that that particular justice and his colleagues trusted what we were doing."

Increasingly, once their time at the solicitor general's office is done, attorneys like Olson, now a partner at Gibson Dunn & Crutcher LLP, take those years of experience and credibility with them into private practice, shifting the traditional power dynamic among attorneys at the court.

"Back in the '80s when the dockets were high and life was different, the people that were bringing the cases to the Supreme Court and litigating them in the Supreme Court were just regular lawyers," said Margaret Cordray, a professor at Capital University Law School. "It was just a mix of people. Nowadays it's much more frequently a member of this elite Supreme Court bar."

Those attorneys have an intimate knowledge of the court's processes and can use that knowledge to their client's advantage. They know what the justices are considering when they decide to take a case, what they're looking for in a brief, and how to answer the justices' toughest questions at oral arguments. Many are recognizable faces to the justices, and, since many of them are former Supreme Court clerks, many of them have direct knowledge of how the justices think.

“Not only do they have process expertise about how the court works, they have a lot of personal information," said Ryan Owens, a professor at the University of Wisconsin Law School.

The Power of the Petitioner

The power of those private-sector attorneys is particularly reflected in the solicitor general’s diminishing role as a petitioner in the cases it argues. More and more, outside attorneys are becoming remarkably successful at convincing the court to take cases against the government that it might not otherwise have considered — and that the solicitor general would prefer to keep out of court.

Since the middle of the Bush administration — and coinciding with the beginning of the Roberts court — the solicitor general has appeared more often than not as a respondent. Of the over 300 cases in which the SG has been a party since the October 2004 term, the office appeared as a respondent almost 70 percent of the time. In no term since then has the SG appeared as a petitioner in more than half its cases, which was previously the norm.

Even for the most experienced advocate, appearing before the court as a respondent trying to keep a lower court decision in place is much more difficult than the other way around.

“Generally speaking, no matter who the party is, your odds are a little better when you’re the petitioner who got the court to take the case,” said Erin Murphy, a partner at Kirkland & Ellis LLP and former clerk to Chief Justice John Roberts. “There’s always a difference between being brought before the court unwillingly versus being brought there as the petitioner who asked them to step in.”

According to the Supreme Court database, the court has sided with the petitioner in 63 percent of its cases since 1986. If the solicitor general is arguing more frequently as a respondent, that’s bound to affect the win rate.

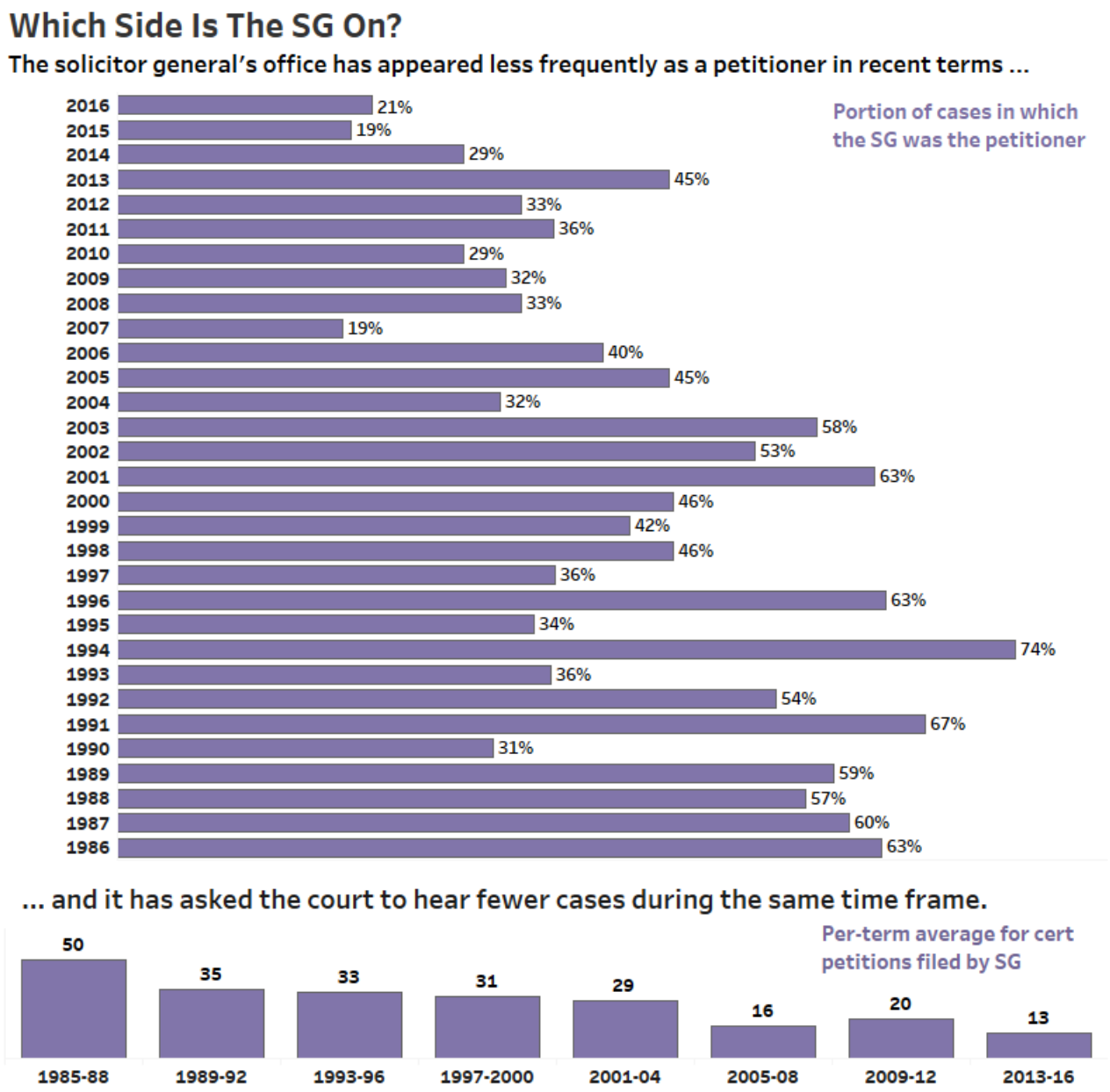
“Realistically, if you're going into the Supreme Court as a respondent, you’re going to lose more often than not, because the court doesn’t grant to affirm typically. It typically grants to reverse,” said Carter Phillips of Sidley Austin LLP, who has argued 75 cases before the Supreme Court while in private practice.

The solicitor general’s increasing role as a respondent is likely due to a combination of factors.

One is the emergence of an expert Supreme Court bar that knows when and how to seek certiorari — and what kinds of cases are going to attract the attention of the justices and their clerks. Expert practitioners are becoming better at identifying promising cert petitions, and the government is often on the receiving end of those appeals.

The SG’s office itself is also filing fewer appeals. The average number of petitions for certiorari filed by the office has dropped from 50 per term in the mid-’80s to 13 per term from the October 2013 to October 2016 terms.

Here, too, politics may have played a minor role, at least in recent terms.



"If you're the Obama SG and you're looking at a conservative-leaning court, why would you want to take a lot of cases there unless you thought you had a pretty good chance of winning them?" said Roman Martinez, a partner at Latham & Watkins LLP and former assistant to the solicitor general.

But there are larger forces at work. The court's docket has halved over the past three decades, from 150 to 160 cases per term in the 1980s to around 80 in recent years. According to Phillips, the court sent a strong message that it wanted to hear fewer cases.

“I think the solicitor general just took that to heart and became much more stingy in his or her willingness to seek certiorari, thinking that the court might be annoyed or put off by the government filing borderline cert petitions,” Phillips said.

Knowing that the court will hear fewer cases incentivizes the solicitor general to only seek certiorari in the cases it really wants the court to hear. Often, the solicitor general will pass on appealing a lower court decision, deciding instead to wait for a case that offers the court a better opportunity to resolve a given legal issue.

The federal government loses countless cases in the lower courts every year — and part of the job of the solicitor general is to pick and choose the strongest, most important cases that are worth the time and effort of appeal.

The office tends to be “more cautious” than private litigants are in seeking cert, Jay said.

“It is very conscious of having the luxury of time and the luxury of being a repeat player,” he said. “The government often has the ability to bide its time.”

Making Your Case Appealing

But if you’re the criminal defendant with an adverse judgment against you in the court of appeals, you do not have the same luxury of time that the government does to wait for the perfect case and the perfect set of facts to make your point. You need the decision against you overturned, and you need to file for writ of certiorari now.

The typical trial attorney, or even appeals court specialist, has no experience with the unique criteria the court uses when deciding whether to grant cert. But thanks to the growing Supreme Court bar, there is now a pool of skilled lawyers willing to take on these criminal cases — often on a pro bono basis.

The Other Side Of Influence

The solicitor general’s office is ever-present on the Supreme Court’s docket. Aside from appearing as a party on almost one-third of the court’s cases, the justices also frequently ask the SG to help them decide whether to hear a case.

Since 2000, the court has filed an average of 19 CVSGs, or calls for the views of the solicitor general, per term, and the court followed three out of every four of the solicitor general’s recommendations over that time frame.

The court has agreed less with recent solicitors general, such as Donald Verrilli and Elena Kagan, on when to grant certiorari, but Verrilli and Kagan were also less willing to recommend granting certiorari.

When The Solicitor General Weighs In

The justices are siding with SGs less often on whether the court should take up a case.

	Solicitor General	Number of CVSG briefs	Rate of Supreme Court agreement with SG recommendation
	Donald Verrilli 2011-16	89	66%
	Neal Katyal* 2010-11 * Acting solicitor general	38	74%
	Elena Kagan 2009-10	23	65%
	Paul Clement 2005-08	72	85%
	Ted Olson 2001-04	38	89%

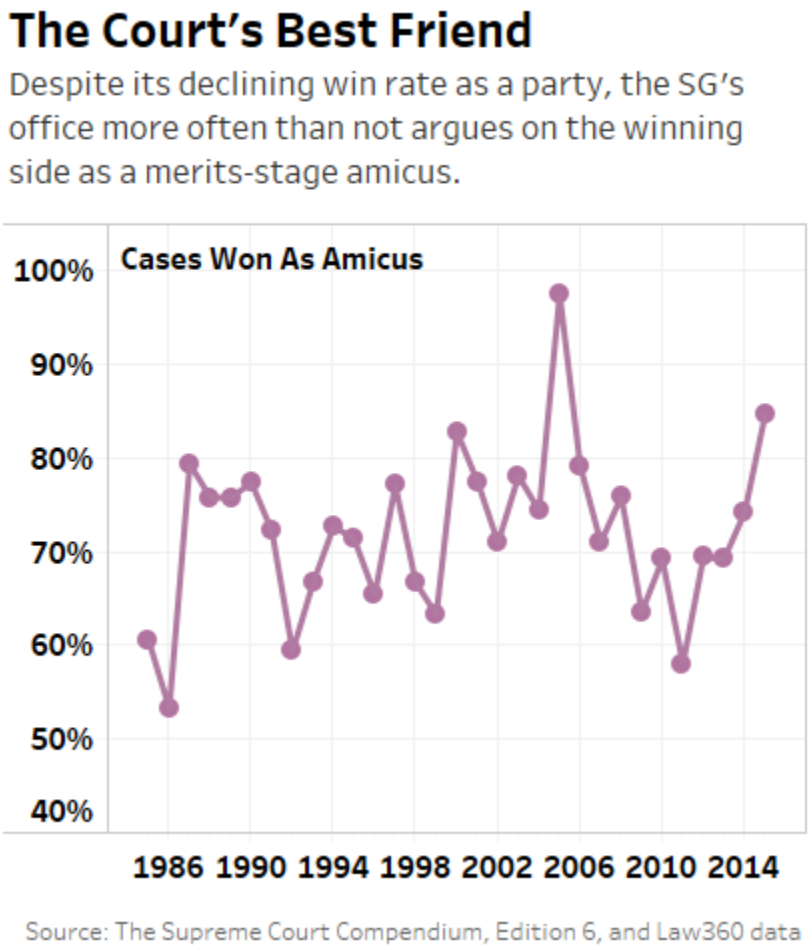
Methodology: Law360 tracked calls for the views of the solicitor general, or CVSGs, which are Supreme Court orders inviting the SG to weigh in on whether the court should grant certiorari in a given case, and compared the recommendation of the SG with the court's ultimate decision to grant or deny the petition. Data is based on all CVSGs since October Term 2000 from solicitors general who submitted at least 15.

"There's a pretty acknowledged trend over the past solicitor general's term that the office was recommending to deny more frequently," said Erin Murphy, a partner at Kirkland & Ellis LLP. "It poses an interesting question because obviously there's no kind of right answer as to whether the court should or shouldn't grant a case."

A CVSG is not the end of the solicitor general's involvement as a "friend of the court." In these cases and others, the SG appears as an amicus as the case is argued. Over the past three decades, the SG has argued as an amicus at oral arguments in an average of 31 cases a term — meaning that it actually

participates, on average, in over 60 percent of the overall docket.

And for the cases where it argues as amicus, the solicitor general's odds of supporting the winning side have remained strong, even as its win rate when arguing as a party has dropped.



Because the solicitor general chooses when to participate as an amicus, it is often much less constrained in the arguments it can make than when it participates as a litigant.

"As an amicus, the solicitor general's office is the one looking at the case and making the decision about how to frame the arguments, and so … the justices might view them as higher-quality arguments," said Paul Collins, a professor of legal studies at University of Massachusetts Amherst.

In cases in which the SG supported a clear side, the office aligned with the winning party on average 72 percent of the time over the past three decades.

"The SG continues to have a special relationship with the court and be quite influential," said Lincoln Caplan, author of "The Tenth Justice: The Solicitor General and the Rule of Law." "In some ways it's as influential, maybe more influential than it was a generation ago."

Criminal cases that may not have made their way up to the court in the 1980s are now being heard, and such cases tend to be ones “the SG has had a very hard time” defending, Pincus said. They often involve “the extreme uses of prosecutorial discretion by [assistant U.S. attorneys] that really stretch statutes, often beyond the breaking point,” he said.

The government frequently wins such criminal suits or immigration suits in the courts of appeals, but the cases often pose conflicts with other circuits. Skilled appellate lawyers are getting better at identifying those cases, spotting the circuit conflicts and bringing them to the attention of the court.

“The increasing sensitivity of the criminal defense bar and the immigration bar and the lawyers who represent those parties pro bono about the need to show circuit splits and convince the court to take these cases has resulted in more cases getting granted over the government's opposition,” Jay said.

And it’s not just the private Supreme Court bar bringing these cases. Supreme Court litigation clinics at elite law schools — many of which partner with expert high court litigators — also pick up the work.

“They’re helping to bring cases that otherwise firms might not necessarily come across or take on,” Martinez said.

Take, for example, Honeycutt v. U.S. — an unassuming case during the October 2016 term about seizing assets from a man accused of co-conspiring to distribute an ingredient used to make methamphetamine. Georgia-based Townley & Lindsay LLC argued the case before the Sixth Circuit, where it lost to the government, but the case was then appealed to the Supreme Court by Jenner & Block and argued by partner Adam Unikowsky.

By getting the case heard and the lower court decision reversed, Jenner succeeded in rewriting an important component of white collar law, restricting the government’s ability to seize property from those indicted for co-conspiracy.

“Once those cases get to the Supreme Court, the government does not have a great track record of prevailing compared to its track record in run of the mill criminal procedure and civil cases,” Jay said. “But in criminal cases like this, the court often takes the case essentially intending to reverse.”

Scoring the New Solicitor General

Francisco, the 48th person to hold the solicitor general post, is certainly no stranger to the court or the ranks of the elite Supreme Court bar.

Francisco clerked for the late Justice Antonin Scalia and, after a stint in the Bush administration, joined Jones Day, where he recently argued before the Supreme Court on behalf of the Little Sisters of the Poor in a contentious fight over the Affordable Care Act’s contraception mandate and successfully defended former Virginia Gov. Robert McDonnell in a corruption case.

With a resume packed with conservative bona fides, Francisco’s political leanings — and those of the administration he represents — are clear. In the Roberts court, that may work in his favor.

A solicitor general's office under a conservative-leaning administration is likely to find itself more closely aligned with a court that leans conservative, experts say, which may inspire a shift in tactics and result in a few more wins for the solicitor general's office.

"I think the current administration will do better," said Richard Pacelle, a professor at the University of Tennessee. "Their percentage will be higher."

The solicitor general retains significant power to affect the court's agenda and decision-making process, and Francisco could decide to strike out in a new direction. A new solicitor general could change the dynamic, for example, by more actively and aggressively seeking cert.

Obama administration judicial appointees in federal appeals courts around the country are also generating decisions that the current SG is more likely to take issue with, creating a new wealth of cases that could be appealed to the Supreme Court.

"Those dynamics, I think, will lead the Trump SG's office to be more willing to file cert petitions than its predecessor," Martinez said.

But despite being more closely matched with the court in terms of political leanings, aggressive political advocacy from the new SG's office in support of a conservative wish list may fail to find footing in the Roberts court.

Chief Justice Roberts has publicly bristled at suggestions that the court is inherently a political body and that rulings are politically driven.

"The chief justice is really an institutionalist," said Lincoln Caplan, author of "The Tenth Justice: The Solicitor General and the Rule of Law." "It would not be impossible for the Trump Justice Department to get ahead of the court or to push the court farther than the court wanted to go."

The newly confirmed SG, as his predecessor did, also faces an ever-more sophisticated Supreme Court bar ready to challenge the government's position in any number of cases, from the most mundane to the most high-profile.

To take just one example, in the lawsuits over President Donald Trump's travel ban — currently on hold pending additional briefing at the Supreme Court — the solicitor general is pitted against Hogan Lovells partner Neal Katyal, a former acting solicitor general who has made dozens of arguments before the high court.

But Francisco has himself recently been one of those BigLaw attorneys going punch for punch with a solicitor general, and he appears ready to give as good as he gets.

"From what I've seen of his lawyering, Noel Francisco is not going to be a shrinking violet," Caplan said.

Jacqueline Bell and Cristina Violante are data reporters for Law360. Editing by Jocelyn Allison, Jeremy Barker and Philip Shea. Graphics by Jonathan Hayter and Chris Yates.

Methodology: Law360 aggregated and analyzed data from Washington University School of Law's Supreme Court Database, the Office of the Solicitor General website, the Supreme Court Journals, "Important Questions of Federal Law: An Empirical Survey of Possible Explanations for the Supreme Court's Declining Docket" by Adam Chandler and Jennifer Harris, and The Supreme Court Compendium, Edition 6. The data source has been noted in the correlating graphics.

*The Washington University School of Law's Supreme Court Database is maintained by Harold J. Spaeth, Lee Epstein and others, and is available **here**. Adam Chandler and Jennifer Harris' article is available **here**.*