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Going on a Diet -- Supreme Court Style

By Alan B. Morrison*

*Mr. Morrison, a lawyer with the Public Citizen Litigation Group in Washington D.C., practices regularly in the Supreme Court.

Not so long ago, there was a man who weighed about 300 pounds. Sometimes he got down to 280, and once in a while he drifted up to 320, but for the last twenty years he had always been in the 300 pound range. For a number of years, some people, including once in a while the man himself, suggested a serious diet, saying that he would be healthier if he dropped a hundred pounds or so. But despite this advice, he never went on a diet, or at least stayed on it long enough to shed any excessive weight, in part because there were others who thought he was fine just as he was.

Then, all of sudden, without talking to any of his friends, he started eating less and less, and, not surprisingly, the pounds started to come off. They came off so fast that, in a couple of years, he quickly passed the 200 pound mark. But he kept losing weight and had fallen to 168 pounds when he most recently stepped on the scales last June. He isn't scheduled to be weighed again officially until next June, but those who saw him in the fall said he was losing more weight, although it now appears he is back to where he was last year at this time.

While many applaud his slimmer self, others question it, or at least are concerned by some of the problems generated by the weight loss. Among the doubters are those who argue that the man has an important job, requiring very heavy lifting, and that many people depend on his strength to do all the work that needs to be done. Others point out that the man was perennially late in the past, claiming that his size caused him to move slowly, but now,

even though he no longer has that excuse, he is still often late. And finally, there are those who think that the man looks a little silly these days because, despite his new size, he still wears all his old clothes. Not only that, but he insists on others conforming to his old shape when they buy him new things to wear.

The story of the man is the story of the United States Supreme Court, which, in just three years, has gone from deciding 150 or more cases per year, to 84 last year and about the same this term. The important question is, does it matter?

First and most significant, is the Court, or properly, our country, healthier because the Court is now deciding fewer cases? There is surely not less "law" because the Supreme Court issues fewer opinions each year, since each of the cases it is asked to hear, but declines to accept for review, has already produced at least one opinion before then. Even at 150 rulings a year, the incremental addition to the law books from Supreme Court opinions would be negligible compared to all other judicial decisions.

Some might argue that it is a positive good that the Court makes fewer pronouncements each year because it already plays too large a role in our society. But that confuses the question of whether the Court should decide an issue, with how it should decide it a particular question. By taking a case, the Court is promising to try to resolve a legal issue, such as the extent to which states can place burdens on those who seek abortions, but it is not undertaking to decide it one way or the other.

Few people familiar with the Court's docket of filed, but unaccepted, cases would suggest that the loss results from fewer tasty morsels on which to chew, since the number of cases has been going up rapidly each year, even discounting the large number of cert petitions that are plainly not legitimate candidates for Supreme Court review. Nor is there any decrease in the cases in which the lower courts are divided, although the one member of the Court who regularly used to chide his colleagues through public dissents over their failure to take such cases -- Justice Byron White -- has retired.

Since the Supreme Court has virtually total freedom to take a case or not, and since the votes of four Justices are enough to hear a case, it is apparent that at least a majority of the Court has made a conscious decision to decide fewer cases. There has been considerable speculation about the reasons for that decision, and some debate about whether the trend is a healthy one, but the only people who know the answers, or who take part in the debate, do so behind closed doors, with no published explanation ever issued. Given the place of the Court at the head of one of the three branches of the federal government, there is a serious question as to whether that a decision of that importance should be made in that manner by men and women who hold their jobs for life. However, for those who think that something should be done, there is the difficult question of how the other branches could affect the Court's docket without intruding on its essential

independence.

Second, as with the man whose suits no longer fit him, the Court's calendar of oral arguments no longer fits it. For many years the Court has scheduled four oral arguments of exactly one hour each -- two before and two after lunch -- three days a week (except for holidays) for seven two-week sessions. That meant that the Court could hear about 160 cases, although it often heard a few less. Despite its much reduced caseload, the Court still maintains its identical schedule, but usually has argument only in the mornings, and there are some days which are set aside for oral arguments when the Court does not sit at all. No one familiar with the workload of the Court suggests that the Justices are coasting, but the question remains, does it matter that the caseload no longer fits the schedule?

When the Court heard as many as 150 or 160 cases a year, oral argument had to be kept to one hour if the schedule was to be maintained. Assuming that it was sensible for the Court to adhere quite rigidly to the one hour limit when its docket was full, there surely is much less to say for that position now that the Court hears only half as many cases as it once did. The problem is particularly acute when there are multiple parties on each side and their interests are not identical, and in some cases even antithetical, at least insofar as their legal theories are concerned.

Moreover, there are a significant number of cases each year

in which the Solicitor General asks to be heard, even though the United States is not a party to the dispute. Almost invariably, the time given to him is subtracted from the time of one or both sides, depending on what position he is taking. Moreover, there are some cases in which the questions are of such significance that it seems sensible for all concerned for oral argument to be extended by half an hour, or even an hour. The Court granted additional time in only one case this year -- the challenge to Congressional term limits -- but there are probably a number of others each year that could use some extra time so that the issues are fully ventilated before the Justices retire to decide them.

There is another way in which the Court's current calendar is ill-fitting. Because it takes so few cases before it leaves for the summer recess, it has to use cases that it accepts in October to fill the January sitting. But to do that, it has to cut the time for briefing down, and this year, it also announced the first batch of eight grants a week earlier than the term officially started, thereby throwing at least 16 lawyers (and quite a few reporters) into a mild state of panic, practice that it followed on several other Fridays this term. It also left all of the others who were waiting for the opening of the Court on the First Monday in October wondering what happened to their cases. As it turns out, most were rejected, but a few were "kept on the waiting list," and then accepted, or in some cases rejected, during the following weeks. The problem is exacerbated because the Court

takes so few cases that lawyers can almost never assume a case will be accepted, which makes shortened briefing schedules even more difficult to handle.

All of that haste and confusion could be avoided if the Court either eliminated the January sitting, or sat at the end of the month and eliminated the April session. The latter option would also have the benefit of assuring that cases argued at the end of the term would have more time for consideration, which should be possible given the Court's lighter load. It also should be possible to avoid the June crunch when half the cases are decided in the last three weeks, leaving litigants, law clerks, scholars, and the press overwhelmed. Indeed, the schedule was so imbalanced this term that 20% of the arguments, including those in some very important cases, are being heard the last two weeks in April.

None of this should be taken to suggest that the Supreme Court is in danger of losing its cherished role in our society. Nor does it mean that fewer decisions from the Court are a bad idea, since there is inevitably a tradeoff between quantity and quality, although some would contend that there has been little of that kind of correlation since the Court started on its diet. But every institution needs to rethink and adjust its mission from time to time. With a lighter caseload and six new Justices in the last eight years, this looks like a very propitious time for the Court to consider at least a little self-mending of a few of its parts that seem in need of repair.