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Supreme Court Brief

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Good morning and welcome to Supreme Court Brief. With the Trump impeachment trial expected to end today, Chief Justice John Roberts Jr. will be able more fully to join his colleagues during this break in arguments. Meanwhile, we take a look at a petition in which a Columbia law professor contends there is a "systemic breakdown" in appellate courts' handling of prisoners' "certificates of appeal." Which judges have the most former students on law faculties? We have the answer. Plus: Former deputy solicitor general Michael Dreeben shares his thoughts on making the leap to private practice.

Thanks for reading Supreme Court Brief. Contact Marcia Coyle at ***mcoyle@alm.com*** *and on Twitter* ***@MarciaCoyle****.*

Have Circuit Courts 'Closed the Gate' on Some Inmate Appeals?

For capital and non-capital prisoners, certificates of appealability are a golden key to appeal an order dismissing a habeas corpus claim. But what does it mean for due process and access to the courts if non-capital prisoners in the First Circuit, according to one recent study, were 69% more likely to get a certificate than non-capital prisoners in the Eleventh Circuit? And even within the Eleventh Circuit, if COA grant rates per judge range from 2.33% to 25.81%?

A **petition** filed on behalf of an Alabama inmate by a Columbia Law School professor contends the arbitrariness in certificate rulings by federal appellate courts, particularly the Eleventh Circuit, reflects a systemic breakdown in the certificate of appealability, or COA, review process.

"A lot of (COA) petitioners are pro se, and they're not really getting reviewed anymore," said Columbia's **Bernard Harcourt**, who filed the petition. "It's almost as if the [Antiterrorism and Effective Death Penalty Act] mechanism requiring a COA has closed the gate on federal circuit review of their habeas denials. It's really important from a larger perspective of systemic justice."

Harcourt filed the petition on behalf of Phillip Tomlin, who has been in prison for 42 years—first on death row and now, since 2004, serving a sentence of life without parole. The Eleventh Circuit in May denied Tomlin a COA on a legal question that it had explicitly left open in a 2011 decision, according to Harcourt. That court applied "an improper, too demanding, and unduly burdensome" COA standard, Harcourt told the justices.

After Tomlin's COA denial (by Judge **Charles Wilson**, a 2.68% grant rate, according to **a study posted** in January), Harcourt, other faculty and a team of law and undergraduate students started to investigate denial rates. They were able to build on a 2007 **study** by Vanderbilt Law School's **Nancy King**, who documented the widely varying grant rates among the circuits in noncapital cases.

According to Harcourt's petition, between January 1, 2018 and September 30, 2019 there were significant disparities in grant rates for capital prisoners (58%) and noncapital prisoners (8%) in the Eleventh Circuit. Also, there were disparities in grant rates among Eleventh Circuit judges, with rates as low as 2.33%, while others as high as 25.81%—more than 10 times higher. "All this is what makes it feel like a very arbitrary process," Harcourt said.

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The state of Alabama waived its right to respond to the petition, but the Supreme Court directed the state to respond by Feb. 24. —*Marcia Coyle*