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.
The Roberts Court

An Elite Breed of Lawyers

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

Multimedia

Specializing in the Supreme Court

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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 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.