

Covington's Beth Brinkmann on Returning to Argue at SCOTUS

Brinkmann made her 25th appearance before the U.S. Supreme Court this year after a 10-year hiatus.

BY TONY MAURO

After eight years as deputy assistant attorney general heading appellate litigation in the Justice Department's civil division, Beth Brinkmann returned to private practice in 2017, co-chairing Covington & Burling's appellate and U.S. Supreme Court practice.

With her previous experience in the Solicitor General's Office and at Morrison & Foerster, Brinkmann argued in 24 Supreme Court cases up until 2008. So it was something of a homecoming when she argued and won her 25th case, *Return Mail v. United States Postal Service*, before the high court this year.

The win also keeps Brinkmann near the top of what is still a fairly short list of female Supreme Court advocates in private practice. We caught up with Brinkmann to discuss her return to Supreme Court advocacy, the small number of women in private practice arguing there, and the upcoming term of the court.

Answers have been edited for length and clarity.

How did it feel to return to the Supreme Court lectern for the first time since 2008? How was it different from what you remember?

Arguing from the Supreme Court lectern again was wonderful. The justices asked the most challenging questions and got to the heart of the case quickly. It was the first time I had argued before the newer justices, but it still was familiar because I had worked with Justice Elena Kagan at DOJ and argued before Justice Brett Kavanaugh when he was on the D.C. Circuit. It also was familiar



Beth Brinkmann of Covington & Burling in Washington, D.C.

preparation because I had been arguing high-profile cases regularly at the D.C. Circuit for several years for DOJ, including wins on the Affordable Care Act, stem cell funding, and an en banc political question case. In fact, I won a case on behalf of the Supreme Court, itself—successfully defending the constitutionality of the statute that regulates activity on the Supreme Court plaza.

Some might think that you were away from Supreme Court litigation during your time as head of the appellate team in the Justice Department's civil division from 2009 to 2017, but that's not the case, is it?

Correct. As deputy for the civil appellate docket, my responsibilities included the most significant government cases in the courts of appeals and then also initial drafts of briefs for those cases

when they went to the Supreme Court. I was involved in strategy and argument preparation meetings with the Solicitor General's Office for those Supreme Court cases as well. As an alum of the SG's Office, I appreciated the importance of that collaboration.

Now that you are back at a law firm, you rejoin the fairly short cohort of female Supreme Court advocates in private practice. Why are you still a rarity, and do you see any changes in the near future?

The women who argue at the Supreme Court are stars at the top of the profession, regardless of gender. They are sure bets for private clients who are becoming increasingly aware of that. The attrition rate for women Supreme Court advocates is challenging because there are so many opportunities for such outstanding attorneys.

Justice Kagan, the best woman advocate that I have seen, of course now sits on the Supreme Court; Judges Nina Pillard and Patricia Millett left the ranks of Supreme Court advocates to sit on the D.C. Circuit, and Justice Leandra Kruger, former deputy SG, now sits on the California Supreme Court. Barbara Underwood, another former deputy SG, is New York's solicitor general, and is still arguing before the court but in the public sector.

And other women who

would be likely advocates as former Supreme Court clerks have reached other top leadership positions in the profession, including as general counsel or chief legal officer at some of the country's major corporations—Home Depot, Apple and Walmart.

What is happening at Covington in terms of female appellate litigators?

At Covington, my partner Emily Henn clerked for Justice Sandra Day O'Connor, and there is no better litigator than Emily. She chaired our class action practice for years and now is on the firm management committee. Also my partner Trisha Anderson clerked for Justice Kagan, and she just returned to Covington after serving as deputy general counsel for the FBI, and in senior positions at Treasury and DOJ, to focus on national security matters. And there is Carolyn Corwin, who has been an outstanding leader at Covington for decades. Carolyn served in the Solicitor General's Office and argued nine cases before the Supreme Court in the 1980s.

There are many amazing women filling out the ranks in private practice, at both large firms and boutiques, including alums from the Solicitor General's Office, individual entrepreneurs, and others. I am sure we will see them with expanding arguments

and hope not all of them want to move on to the bench!

How do you think the upcoming Supreme Court term is shaping up?

One business case of particular interest to me is the copyright case, *Allen v. Cooper*, on whether Congress validly abrogated sovereign immunity of states. We just filed an amicus brief for the Copyright Alliance and U.S. Chamber in support of petitioner in that case.

And the [Deferred Action for Childhood Arrivals] case, of course, is of great significance. Covington represents the University of California in one of the cases under review.

Generally, the Supreme Court term is shaping up to include a typical number of significant criminal cases, and some additional high-profile cases of public interest on the scope of Title VII's prohibition on sex discrimination and health care, for example. But the September cert grants will no doubt also bring some of the most interesting cases of the term as they always do. So stay tuned.

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