

## Docket Capture at the High Court (Draft 9/18/09)

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The declining numbers of cases on the Supreme Court's plenary docket may or may not be a problem. After all, there are lots of good reasons that could happen, including the obvious possibility that the Court was previously hearing too many cases that did not warrant plenary review and is now doing a better, not worse job, of picking cases. But while the mere fact of fewer cases is not necessarily problematic, what is worrisome is the very real possibility that the Court's plenary docket is increasingly being captured by an elite group of expert Supreme Court advocates dominated by those in the private bar. In short, the same way that powerful economic interests can capture an agency<sup>1</sup> or any other entity that purports to control them,<sup>2</sup> so too may the Supreme Court's docket be "captured." It is, accordingly, not the numbers of cases on the plenary docket, but their content that may be the real problem.<sup>3</sup>

The statistics are striking. While the number of merits cases has roughly declined by one half during the past three decades, the expert Supreme Court Bar's influence over the plenary docket during this same

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<sup>1</sup> Marver Bernstein, *Regulating Business by Independent Commission* (1955); Samuel Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 *Yale L. J.* 467 (1952); see George Stigler, *The Theory of Economic Regulation*, 2 *Bell. J. Econ. Man. Sci.* 3 (1971).

<sup>2</sup> Jon Hanson & Davis Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Culture*, 152 *U. Pa. L. Rev.* 129, 213-14 (2003) ("If administrative regulators are vulnerable to the forces of capture by certain interests, as most everyone agrees they are, then the likelihood of a deeper capture seems undeniable. There is nothing special about administrative regulators - except, perhaps, the general concern that they may be captured. Virtually every other institution in our society seems just as vulnerable").

<sup>3</sup> This essay builds upon ideas and statistics set forth more fully in a earlier article of mine that discusses the significance of the emergence of a modern Supreme Court Bar, but without a discrete focus on the Court's plenary docket and its capture. See Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 *Geo. L. J.* 1487 (2008).

time period has increased by approximately tenfold and now extends to more than fifty percent of the cases. That's troubling.

So, what's the basis of my measurement? I examined the petitions granted plenary review in several Supreme Court Terms, ranging back to October Term 1980 and extending to the most recently completed October Term 2008. I deliberately eliminated from consideration cases in which the Solicitor General was the petitioner or one of the petitioners because their influence is well-established. And, I chose a fairly tough measure of what it means to be an "expert Supreme Court advocate": an attorney either has to herself had presented at least five oral arguments before the Court or be affiliated with a practice whose members have argued at least ten cases. Based on this measure, expert Supreme Court advocates were responsible for 5.7 percent (six of 102 cases) of the successful petitions granted review during October Term 1980.<sup>4</sup> By October Term 2000, that same percentage had increased to 25 percent (17 of 68 cases) and has steadily increased ever since – 36 percent in October Term 2005 and 44 percent in October Term 2006 – to boast more than 50 percent of the Court's docket during both the most recently-completed October Terms 2007 (53.8 percent) and 2008 (55 percent).<sup>5</sup> I do not doubt that there is some inexactitude at the margins in counting cases and oral arguments and comparing Supreme Court Terms, but these trends are beyond marginal. They reflect a shift in the nature of an order of magnitude.

Why should we worry? Good advocacy is not a bad thing, of course, and it should not be especially surprising to discover that those who are expert at the Court are especially successful before the Court. That is why they are experts. What is worrisome is the potential for an undesirable skewing in the content of the Court's docket. The resources of the Supreme Court and the skill of the Supreme Court's Justices are enormously important and the public has reason to expect that the Court's resources stand ready to be applied to what are in fact the most important legal issues facing the nation and not just those legal issues most important to those who can afford to pay the (justifiably) high billing rates charged by the private sector Supreme Court Bar, persuade those counsel to petition for their cases

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<sup>4</sup> *Id.* at 1515-1516.

<sup>5</sup> *Id.* My earlier article was published at the close of October Term 2007. I recently examined all the cases heard for oral argument during the more recently completed October Term 2008. A couple of the cases, as almost always tends to happen, defied easy classification, but my review of those cases was that out of a total of 63 non-Solicitor General cases heard on the merits, expert advocates had filed the petitions in 35 of those cases, or 55 percent of the cases.

on a *pro bono basis*, or enlist the assistance of the relatively few members of the public interest bar that qualify as expert Supreme Court advocates.

It is not, moreover, numbers alone that strongly suggest that the private Supreme Court Bar is increasingly capturing the Court's docket. A look at the cases themselves reinforces that suggestion. The Court regularly grants cases at the urging of leading members of the private sector Supreme Court Bar that are marginally certworthy at best and at a time when the rates of granting certiorari are otherwise rapidly declining. No one may be more skilled in this respect right now than Sidley & Austin's Carter Phillips, as underscored by the extraordinary number of cases arising under the Federal Employer Liability Act in which Phillips has obtained High Court review on behalf of railroad clients.<sup>6</sup>

Especially illustrative are the environmental cases from October Term 2008. For the first time, a series of industry clients last Term turned systematically to the expert Supreme Court Bar for assistance in a host of cases arising under federal pollution control laws.<sup>7</sup> The result was palpable and formed the basis of the best Term that industry has ever enjoyed before the Court in environmental cases.<sup>8</sup>

The Court granted review in four cases that would not have seemed, absent the involvement of Supreme Court experts, to have had a remote chance of being reviewed. Two were Clean Water Act cases (*Entergy v. Riverkeeper*<sup>9</sup> and *Coeur d'Alaska Inc. v. Southeast Alaska Conservation Council*<sup>10</sup>) in which industry parties were merely intervenors in the lower courts and the federal agency that had lost the case declined to petition on its own and opposed Supreme Court review.<sup>11</sup> Such federal opposition is

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<sup>6</sup> Lazarus, *Advocacy Matters*, *supra*, at 1537-39.

<sup>7</sup> Richard Lazarus, *The Age of the Expert Advocate*, 25 *Env'tl L. Forum* 12 (November/December 2008).

<sup>8</sup> Richard Lazarus, *Environmentalists Lose Every Case*, 25 *Env'tl L. Forum* 12 (September/October 2009).

<sup>9</sup> 129 S. Ct. 1498 (2009). I should disclose that I served as counsel of record for the environmental respondents in this case at the merits stage.

<sup>10</sup> 129 S. Ct. 2180 (2009).

<sup>11</sup> *Entergy*, Nos. 07-588, 07-589 and 07-597 (filed March 3, 2008); Brief for the Federal Respondents in Opposition; *Coeur Alaska*, Nos. 07-984 and 07-990 (May 14, 2008). Note that although the federal government is a named "respondent" in both cases, that is only because they declined to petition and opposed the petition. On the merits in both cases, they were aligned with the industry petitioner both in the lower courts and in the Supreme Court.

almost always the death knell of a petition. If the Solicitor General is advising the Court that the federal agency that lost below is not seeking review and can live with the case, that tends, understandably, to be the end of the matter. And, in one of those cases (*Entergy*), not only was there an absence of a circuit court conflict, but the lower court ruling was the first court of appeals ever to construe statutory language that has been on the books for more than 36 years. The third and fourth cases, *Burlington Northern & San Francisco Railroad v. United States* and *Shell Oil v. United States*,<sup>12</sup> both arose under the federal Superfund law and raised legal issues that the Court had routinely denied to hear for decades and of diminishing practical significance.<sup>13</sup> Not only is Superfund a retrospective liability law that has naturally dissipated in its application over time, but Congress has declined since 1995 to reauthorize the federal tax that funds the Act, so monies for the law's administration has been running out ever since.<sup>14</sup>

The one thing all four cases had in common (other than that industry won all three) is a high profile member of the private Supreme Court Bar as lead counsel for industry petitioners: Maureen Mahoney in *Entergy*, Ted Olson in *Coeur d'Alaska Inc.*, and Maureen Mahoney and Kathleen Sullivan, respectively in *Burlington Northern* and *Shell Oil*. The Bar's *coup de grace* last Term, however, was the Court's denial of the Solicitor General's petition in yet another Clean Water Act case, which in fact presented all the traditional criteria of a case warranting review, based on the skilled advocacy of Ted Olson's partner, Miguel Estrada, who filed an opposition to the government's petition.<sup>15</sup> There is hardly anything in Supreme Court advocacy as difficult as obtaining plenary review. But, defeating a Solicitor General petition runs a close second.

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<sup>12</sup> The Court consolidated these two cases for purposes of oral argument and the Court's opinion. See 129 S. Ct. 1870 (2009).

<sup>13</sup> For instance, the primary case upon which petitioners relied upon for their assertion of a circuit conflict in *Burlington Northern* was the Fifth Circuit's 1993 ruling in *In re Bell Petroleum Services, Inc.*, 3 F.3d 889 (5<sup>th</sup> Cir. 1993). See *Burlington Northern*, Petition for a Writ of Certiorari, 26-28 (filed June 23, 2008). *Bell Petroleum* was long an outlier in the lower federal courts, yet the Supreme Court declined all prior entreaties for plenary review.

<sup>14</sup> Robert V. Percival, Christopher H. Schroeder, Allan S. Miller, and James P. Leape, *Environmental Regulation: Law, Science, and Policy*, 394 (6<sup>th</sup> ed., 2009).

<sup>15</sup> See *United States v. McWane*, 129 S. Ct. 630 (2008); Petition for Writ of Certiorari, *United States v. McWane*, No. 08-223 (filed August 21, 2008); Brief of Respondents *McWane et al* in opposition, *United States v. McWane*, No. 08-223 (filed September 22, 2008).

No doubt some might respond that even if the Court's plenary docket has been captured, this is not the result of a hostile takeover. Any such development, it could be contended, results from the predilections of business-friendly members of the Court rather than the heightened skills of the advocates. Such an assessment, however, would both overestimate the role Justices at the jurisdictional stage and underestimate the influence of the advocates. To be sure, the Justices, and not the advocates, are the ones with the votes necessary to grant certiorari. But the Justices are far more dependent on the skills of the advocates than is routinely appreciated.

Even with the introduction of the cert pool, neither the Justices nor the law clerks can in fact spend significant time evaluating the certworthiness of the literally thousands of petitions that must be reviewed. Once one subtracts the significant time necessary to decide increasingly complex merits cases and the other activities of a Justice these days, the clerks typically can spend on average only minutes for each cert pool memo, or at most a few hours for a handful. The Justices have in theory at most few minutes to review a petition and, it has been reported, may in fact never read the petitions themselves.<sup>16</sup> The Justices instead delegate the task to their law clerks – inexperienced lawyers typically in their mid-20s who lack both the requisite background and time necessary to consider the competing legal arguments on the merits, and to evaluate in a truly informed and independent manner the petitioner's claims of circuit conflict and practical importance.<sup>17</sup>

The upshot is a huge tactical advantage for those attorneys who know best how to pitch their cases to the law clerks. The expert attorneys know far better than others the latest trends in the Court's recent precedent, the predilections of the individual Justice as evidenced in recent oral argument transcripts, speeches, and writings. They are also well versed in the generic weaknesses and susceptibilities of the law clerks, which many of these same advocates once were.

Their expertise extends to the securing of multiple amicus briefs in support of plenary review. They appreciate how much amicus support provides ready and influential substantiation of their assertions of the importance of the legal issues proffered for review. And, they have the professional connections with other members of the Supreme Court Bar and

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<sup>16</sup> Comments of Carter Phillips, The Yale Law School Supreme Court Advocacy Conference on "Important Questions of Federal Law – Assessing the Supreme Court's Case Selection Process," September 18, 2009, Washington, D.C.

<sup>17</sup> Lazarus, *Advocacy Matters*, *supra*, at 1533-25.

the economic clout to generate the necessary amicus submissions.<sup>18</sup> If news article and op-ed columns contemporaneous to the Court's jurisdictional determination might be helpful, they can and will obtain them.<sup>19</sup>

The expert advocates also invariably enjoy an advantage by dint of their sheer celebrity, at least within the confines of "One First Street, N.E." The clerks know of the outstanding reputation of these expert advocates for working on important Supreme Court cases. Many of the clerks hope to work for these experts immediately or at least soon after their clerkship. And, for no reason more than the appearance the name of the advocate on the cover of the brief, their petitions will receive more attention and respect.<sup>20</sup> This is not an incidental advantage. In the barrage of petitions being reviewed, visibility alone can make all the difference at the jurisdictional stage, especially when buttressed by multiple amicus briefs supporting plenary review.

The effect is two-fold. First, an attorney lacking such expertise and stature is that much more likely to fail to make an adequate demonstration of certworthiness even in a case that in fact potentially presents all the necessary criteria. Their presentations also suffer by contrast to those being offered by the expert counsel, who have effectively raised the bar by the outstanding quality of their presentations and significant amicus support. Second, those with such expertise are able to take cases and, by creative transformation of the nature of the claims and legal arguments advanced bolstered by the creation of a chorus of supporting amici, literally convert what would otherwise be a ready cert denial into a grant of plenary review.

The question is what, if anything, to do about it. A full answer to that question, however, lies far beyond the purpose of essay, which seeks to initiate and not end the conversation.<sup>21</sup> Here nonetheless are a few preliminary thoughts. First, part of the answer could, of course, be to improve the Supreme Court advocacy available to a wide range of interests beyond those who can afford to pay its market value. To some extent, some mitigation is clearly already occurring as reflected both in the private Bar's

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<sup>18</sup> *Id.* at 1528-29.

<sup>19</sup> *Id.* at 1525.

<sup>20</sup> *Id.* at 1526.

<sup>21</sup> At the Yale Supreme Court Clinic at which this paper was first presented (see note \*, *supra*), my talk was directed to the threshold question of what problem exists with the Court's current plenary docket and subsequent panels and papers were directed to the antecedent question of how, if at all, the Court's case selection process should be reformed.

willingness to offer significant services *pro bono*, the development of expert Solicitor General's Office in many States, and the recent emergence of Supreme Court clinics in several of the nation's leading law schools.<sup>22</sup>

But, my own sense is that such mitigating efforts fall far short of filling the gap. Much of that private law firm *pro bono* effort is at the merits stage rather than at the certiorari stage and there are many subject matters (*e.g.*, environmental, employment discrimination) that the private Bar, because of conflicts with paying clients, won't touch, including when (as they do) are running the law school Supreme Court clinics.<sup>23</sup> It is undeniably a positive development to have the States represented more effectively than in the past, but they too are limited in their perspective and, for instance, may deepen rather than reduce the advocacy gap existing in criminal cases. Finally, the Supreme Court clinics offer some promise, but law students even at schools like *Stanford, Yale, Harvard, Virginia, Texas*, and *Northwestern* are still just that: *students*. They are not in fact expert Supreme Court advocates.

In all events, what is problematic is the disproportionate influence that the expert Supreme Court Bar has on the content of the Court's plenary docket. That is a problem ultimately not solved by which cases the Bar takes – business or public interest cases – but by the Court itself asserting more control. For this reason, the fuller answer to the question regarding how to address the docket capture problem, I expect will be found, by analogy, to the kinds of structural reforms that have been made in administrative agencies to reduce the risk of agency capture.

As applied to the Court, this should likely mean changes in the Court's internal decisionmaking process at the cert stage. The place to start is likely to question the efficacy of the existing cert pool as the primary basis for evaluating which cases warrant plenary review. As currently structured, the law clerks lack the time, experience, and resources at the jurisdictional stage to evaluate in a meaningful way the claims made by expert counsel or to make up for the deficits existing in below-par counsel.

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<sup>22</sup> Lazarus, *Advocacy Matters*, *supra*, at 1557-60.

<sup>23</sup> *Id.* at 1560.

At the Yale Law School Supreme Court Advocacy Clinic Conference on the Court's case selection process, speakers suggested several preliminary ideas, including:

- The creation of two cert pools
- Greater resort by the Justices of the technique now used exclusively with the Solicitor General<sup>24</sup> to solicit the advice of those outside the Court especially knowledgeable about the issues raised by a pending petition
- The development of a two-step process in which the clerks give especially close attention to a smaller subset of petitions identified possibly certworthy in step 1
- The addition to the Court of a office of seasoned, career lawyers akin to Assistants to the Solicitor General, who would assist the Court at the jurisdictional stage in assessing the worthiness of cases for judicial review, by being capable both of questioning the exaggerated claims of some advocates and making up for the deficiencies of other advocates

But, whatever the right answer, it seems increasingly likely that the current potential for capture of the Court's docket is a significant problem that warrants the Court's attention.

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<sup>24</sup> David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Petition Procedures: The Call for Response and Call for the Views of the Solicitor General*, 16 Geo. Mason L. Rev. 237, 242 (2009).