1994

Advocacy in the U.S. Supreme Court: Expertise Within the Appellate Bar.

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ADVOCACY IN THE U.S. SUPREME COURT: EXPERTISE WITHIN THE APPELLATE BAR

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I. INTRODUCTION

During the early nineteenth century, there was a distinct Supreme Court bar, dominated by lawyers in and around Washington. Travel to the new capital city was difficult, and, rather than assume the onerous task of journeying to Washington to appear before the Justices, many lawyers would refer their cases to the litigators in the District of Columbia. Lawyers such as Thomas A. Emmet, Francis Scott Key, William Pinkney, Littleton W. Tazewell, Daniel Webster, and William Wirt were among the leading lights who served as the early gatekeepers of the Court. The advent of more rapid and efficient means of transportation, however, supplanted the need for a Washington-based bar, and the integrated group of appellate practitioners gave way to a more fluid and geographically diverse set of advocates.[1]

Today, countless interests turn to lawyers in Washington, D.C., for advocacy before the federal government, but much of that specialized representation is engaged for the pressure politics of the Congress and regulatory agencies. The consumers of such representation are most often pursuing the same basic objective: securing access to governmental decisionmakers.[2] Increasingly, however, those who seek access to the U.S. Supreme

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1. See, for example, John P. Frank, *Marble Palace: The Supreme Court in American Life* 93-95 (Alfred A. Knopf, 1968); Samuel Krislov, *The Supreme Court in the Political Process* 51-54 (Macmillan Company, 1965); Robert G. McCloskey, *The American Supreme Court* 72-73 (U. of Chi. Press, 1960); Charles Warren, *A History of the American Bar* (Howard Fertig, 1966); G. Edward White, *The Marshall Court and Cultural Change, 1815-35* 201-291 (Oxford U. Press, 1991); James Sterling Young, *The Washington Community 1800-1828* (Colum. U. Press, 1966).

2. Jeffrey M. Berry, *The Interest Group Society* (Little, Brown & Co., 1984); Kay Lehman Schlozman and John T. Tierney, *Organized Interests and American Democracy* (Harper & Row, 1986).

Court have once again begun to follow the same general pattern of tapping Washington-based expertise—lawyers in the capital community who emphasize appellate litigation. So pronounced is this apparent trend, one observer noted, that today "there seems to be forming, if it has not already, a new (unofficial) Supreme Court bar in which Washington lawyers once again play a starring role."[3] Has the Washington bar actually regained a dominant position in Supreme Court politics? Which among these litigators can be thought of as genuine members of the "Supreme Court bar"? And do these lawyers, like other specialists, serve the same function of gaining access to policy makers?

To answer these questions, I draw upon several sources of data. First, to assay the profile of the most active members of the Supreme Court bar, I gathered information on those lawyers who participated in multiple cases decided on the merits from the 1977 Term to the 1982 Term. For these lawyers, I collected demographic information as well as data relating to both their general practices and the nature and extent of their specific litigation activities in the Court during that time period. These data were taken from several sources, including the *United States Reports*, *Briefs and Records of the United States Supreme Court*, and various editions of the *Martindale-Hubbell Law Directory*. Second, as a means of gauging which lawyers are regarded as expert Supreme Court advocates, I conducted a mail survey of a sample of Supreme Court practitioners in which I asked respondents to nominate from among their peers those they felt were the Court's best litigators.[4] Third, to analyze the effect of these notables as modern gatekeepers of the Court, I examine their impact on the Supreme Court's selection of cases from paid petitions for the writ of certiorari during the 1982 Term. In addition, to provide some contextual foundation for this study, I interviewed, on

3. John Greenya, *Supreme Lawyers*, The Washington Lawyer 35 (May/June 1987); Arthur S. Hayes, *Supreme Court Specialty: Does It Work?*, The American Lawyer 65 (June 1989); Eleanor Kerlow, *Supreme Payoff for Clerks: $35,000 Bonus*, The Legal Times of Washington 1 (Sept. 17, 1990); Stephen Wermiel, *More Litigants Turn to Appeals Specialists*, Wall Street Journal at B3 (July 5, 1989).

4. Specifically, I drew a systematic random sample of non-federal government lawyers who represented both petitioners and respondents at the agenda stage of the Supreme Court during the 1986-87 Term. Of approximately 700 potential respondents, nearly fifty percent returned a questionnaire. These data are fairly representative, given that different types of counsel—for example, private practitioners, lawyers in state and local government, corporate in-house counsel, and so on—responded in almost the same proportions in which they were sampled. The survey asked each respondent to name up to five lawyers whom he or she regarded as distinctive by virtue of their practice in the Supreme Court.

an anonymous basis, nineteen active Supreme Court practitioners.

Briefly, the results demonstrate that lawyers within the Washington community, comprising a substantial component of the bar of the Court, generally are viewed as the Court's premiere litigators. Moreover, the certiorari petitions brought by these lawyers enjoy a significant advantage as the Justices construct their plenary agenda. Thus, just as the lawyers in Washington are better able to gain access to members of the legislative and executive branches, so too are they more effective in gaining access to the judicial branch.

II. WASHINGTON LAWYERS AND THE SUPREME COURT BAR

Between 1977 and 1982, roughly 4,000 lawyers formally participated in the fully-argued cases that the Supreme Court decided on the merits.[5] For many it was probably their first and last appearance before the Justices. Still, even within that relatively short time period, some fifteen percent appeared in more than one case. In fact, this small percentage—which I will call the "experienced" Supreme Court bar—actually commanded a hefty portion of the representation in the Supreme Court, making half of all formal appearances by counsel. Who were these lawyers?

As one might suspect, a substantial number of the lawyers with multiple cases are governmental representatives. A quarter of them work for the federal government, while about the same percentage serve state and local governments. An additional eleven percent work for organized interests, while the ranks of academia, corporate in-house counsel, and legal aid or public defender programs each contribute roughly two percent. The lawyers making the single largest contribution to this group, however, are private practitioners, nearly one third of the experienced bar. Although these private counsel hail from regions across the country, fifty percent of them work in a single geographic location—Washington, D.C.

Table 1, which presents data on the primary urban locations of the experienced Supreme Court counsel, reinforces the view that Washington is the principal city in which active members of the Court's bar practice; the number of lawyers in the District of

5. By formal participation, I mean that they were given official recognition in the *United States Reports*, listed as having argued the cause or as having appeared on the brief with the attorney who did argue the case. Specifically, there were 3915 different lawyers, of whom 709 appeared more than once.

TABLE 1. PRINCIPAL LOCATIONS OF EXPERIENCED MEMBERS OF SUPREME COURT BAR

All lawyers	Percent	Private practice only	Percent
Washington	43.0	Washington	47.8
New York	9.4	New York	10.7
Chicago	5.4	Chicago	7.8
Los Angeles	3.2	Los Angeles	3.4
San Francisco	2.7	Phoenix	2.4
Austin	2.0	Philadelphia	2.0
Atlanta	1.7	San Francisco	2.0
Boston	1.6	Minneapolis/St. Paul	1.5
Phoenix	1.6	Houston	1.0
Minneapolis/St. Paul	1.3	Pittsburgh	1.0
N = 709		N = 205	

Columbia, some forty-three percent, towers above the proportion of counsel from virtually every other locale. This clearly is not a reflection of the bar at large, since Washington, New York, and Chicago have more or less comparable shares of the total lawyer population.[6] It is true, of course, that Washington's disproportionately large percentage is, at least in part, a function of the wealth of federal government attorneys who work in Washington and appear in the Court. The federal government's counsel, however, do not tell the whole story; a substantial segment of the Washington lawyers (32%) work in private practice.

Among the private practitioners, Washington still maintains a commanding presence. This is particularly noteworthy, given that so few lawyers in the District of Columbia practice privately: less than forty percent of all Washington lawyers are in private practice, in comparison to seventy percent of the lawyers in both New York and Chicago.[7] Overall, the private lawyers in Washington comprise nearly half of all the Court's experienced private litigators. These data illustrate quite strikingly the centrality of Washington as the nation's legal center. Moreover, many of the cases that end up in the Supreme Court are products of the Courts of Appeals for both the District of Columbia and the Federal Circuits; many litigants are likely to turn to local counsel for

6. Barbara A. Curran, Katherine J. Rosich, Clara N. Carson, and Mark C. Puccetti, *The Lawyer Statistical Report: A Statistical Profile of the U.S. Legal Profession in the 1980s* (American Bar Foundation, 1985).

7. See id.

representation in these appellate courts and retain them for any subsequent work in the Supreme Court. Finally, and perhaps most obviously, the Court itself is in Washington, and, when clients have cases before the Supreme Court, they may perceive the need to have genuine Supreme Court specialists and consequently look to the firms that work in the Court's shadow.[8]

Clearly, not all Supreme Court counsel are located in Washington. One should not, however, lose sight of the *concentration* of experienced litigators in the capital relative to that of other cities. On the one hand, fifty percent of the most experienced Supreme Court lawyers work in cities other than Washington. On the other hand, the cities making even a modest contribution to the Court's bar, when taken together, do not begin to approach the lion's share that Washington commands. Of course, this concentration by itself does not tell us anything about the relative effectiveness of these lawyers. After all, just because parties turn disproportionately to Washington counsel when litigating before the Justices does not mean that those lawyers provide qualitatively better representation. Whether certain types of lawyers can be regarded as more effective—as expert Supreme Court practitioners—is a topic to which I now turn.

III. SOURCES OF THE BAR'S REPUTATION

When the American Truckers Association needed representation in the Supreme Court, to whom did they turn? The Chicago-based firm of Mayer, Brown & Platt. Why? "We wanted the best," said their chief counsel.[9] What would make such a firm "the best" when it comes to litigating in the Court? Why is it, precisely, that some lawyers are regarded as true Supreme Court counsel while others garner no similar favorable reputations? In short, why are some lawyers viewed as Supreme Court practitioners? There is probably no formula for acquiring the status of a true Supreme Court lawyer, but we can probably account for some of the considerations that contribute to it.

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8. Elsewhere, I reported that this representation of private Washington counsel has evinced steady growth in recent decades: at the case selection stage, for example, only one percent of all petitions for review in the Court in 1940 were filed by Washington law firms; some twenty-five years later, however, Washington's share of the Supreme Court bar had increased ten-fold. Indeed, the number of cases brought to the Court by the Washington firms in 1985 was more than the combined number filed by law firms in New York and Chicago, cities that together have four times as many private practitioners than Washington. See Kevin T. McGuire, *Lawyers and the U.S. Supreme Court: The Washington Community and Legal Elites*, 37 Am. J. of Pol. Sci. 365 (1993).

9. Hayes, The American Lawyer at 65 (cited in note 3).

Scholars of the legal profession have investigated similar issues. In one important work, for example, Heinz and Laumann examined the social hierarchy of the Chicago bar.[10] In their study, they asked the respondents whether they knew several of Chicago's most notable practitioners. This proved to be very effective in characterizing the stratification within the bar. Drawing upon their analysis, I employed a similar strategy in my investigation of effectiveness within the Supreme Court bar: I asked the Supreme Court practitioners themselves to nominate litigators whom they regarded as the Court's expert advocates, and they responded by nominating 166 different litigators as skilled Supreme Court counsel.

Why were these lawyers selected? What factors motivated the respondents to name these particular litigators as genuine Supreme Court practitioners? A good way to answer this question is to see if those who were selected appeared in the 1977-82 data and, if so, what distinguished them from other experienced lawyers. Of those who were nominated, some 57 were present in the 1977-82 data set on experienced lawyers. By confining the data set to lawyers with multiple participation on the merits during those years, I set a fairly rigorous threshold for lawyers to meet. Nevertheless, over a third were able to do so. Lawyers who were named as experts but who had less than two cases during that period were eliminated.[11] Of those lawyers who were named as Supreme Court experts, some were nominated only once; others were mentioned several times. Among the roughly one dozen lawyers who were nominated most frequently were William T. Coleman, Jr., Archibald Cox, Laurence Gold, Erwin Griswold, Rex Lee, E. Barrett Prettyman, Jr., and Laurence Tribe—by virtually any standard, luminaries within the bar nationally. What is striking about those named most often is the degree of professional continuity between them: four are alumni of the Solicitor General's office; six served as clerks to Supreme Court Justices; six are affiliated with large law firms, all of them in Washington. In sum, Washington is or was home to eight of them. Supreme Court lawyers are well aware of their profes-

10. See John P. Heinz and Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* 274-315 (Russell Sage Foundation and American Bar Foundation, 1982).

11. Note the time span between the 1977-82 data and this survey, which was conducted in 1990. When looking for the presence of skilled lawyers among the 1977-82 data, one may not find some of them, since a fair number of notables may have developed their reputations subsequent to 1982. Furthermore, even those who were active during that six year period may have been involved in even more cases in the intervening years. Thus, the analysis may be underestimating the relationship between experience and skill.

sional integration. As one alumnus of the Solicitor General's office told me, "I think if you look at the folks who have a practice in front of the Supreme Court, they have fairly common backgrounds."

The similarities shared by these lawyers provide some clues as to which litigators are apt to be seen as the bar's most effective members. Across the full range of experienced advocates, for example, Supreme Court clerks and alumni of the Solicitor General's office might be seen by their peers as more effective Supreme Court counsel. Likewise, lawyers in the law firms in Washington might be viewed as more closely connected to the Court—and thus more effective—than the private practitioners in other cities. Since the Washington legal community is apparently so central for Supreme Court counsel, it may be worthwhile to examine the professional reputations of lawyers both in and out of Washington, D.C. These potential influences can be utilized to provide a more systematic account of why lawyers acquire expert status.

An overview of the lawyers with reputations as expert Supreme Court counsel is presented in Table 2. I have divided the data on experienced lawyers into Washington and non-Washington categories. Within those two groups, I examine the most common types of practitioners—academic lawyers, counsel to

TABLE 2. REPUTATIONS AS NOTABLE SUPREME COURT COUNSEL FOR SELECTED CATEGORIES OF LAWYERS

Experienced Non-Washington counsel	Percent	N
Academic lawyers	23.1	13
Interest group lawyers	12.7	55
Corporate counsel	7.7	13
Firm lawyers	6.5	107
State and local government	4.0	200
All lawyers	7.0	388
Experienced Washington counsel		
Alumni of Solicitor General's office	50.0	10
Former Supreme Court clerks	30.4	46
Interest group lawyers	20.0	20
Lawyers in Solicitor General's office	18.2	44
Firm lawyers	16.3	98
All lawyers	17.9	179

state and local government, interest group litigators, and law firm counsel. I also distinguish those who have been previously linked to the Court in an immediate way—alumni of the Solicitor General's office and former Supreme Court clerks. Within each group I report the proportion of lawyers who were named as Supreme Court experts. Finally, I calculate the overall percentage of notables in and out of Washington. These data show stark contrasts in the distribution of Supreme Court experts. This stands to reason; not everyone can be seen as influential. Still, some kinds of lawyers have considerably greater degrees of reputational status as members of the Supreme Court bar. Why?

Among the lawyers who work outside of Washington, only seven percent are thought of as expert counsel. In general, their distribution of notable Supreme Court lawyers is fairly constrained: in three categories of non-Washington counsel, less than ten percent of their membership are noted as influential in the Court. Of those three, one group has less than five percent of its peers elevated to expert status. Clearly, there are leaders within the Supreme Court bar who do not practice in the capital; in large measure, however, they are concentrated among two groups, law professors and attorneys for organized interests.[12]

Among academic lawyers, there are a number of distinguished members of the legal professoriate who are nominated for influential status: Alan Dershowitz, Eugene Gressman, Laurence Tribe, and Charles Alan Wright are among the law professors named. In the interview setting, lawyers frequently volunteered admiration for their work. For example, one law professor, also a Supreme Court practitioner, said, "In my course on the Supreme Court, I always play the tape of Charles Alan Wright's argument in *San Antonio v. Rodriguez* to my students. I think it's one of the best arguments I've ever heard." Counsel to organized interests are held in similar high regard. Names like Laurence Gold of the AFL-CIO, Jack Greenberg and Julius Chambers of the NAACP Legal Defense Fund, and Burt Neuborne of the ACLU are among the more common nominees for notable Supreme Court practitioners.[13] Again, the

12. The reader might note that there are academic lawyers in Washington, some of whom litigate in the Court. In this sample, however, only one was in Washington. The same can also be said of corporate counsel; not a single corporate lawyer with extensive Supreme Court experience practices in Washington. Accordingly, I have classified them as non-Washington attorneys.

13. Since there are experienced interest group lawyers both in and out of Washington, I have computed the proportions with Supreme Court reputations accordingly. Although the organized interest counsel in Washington have slightly more Supreme

reputations of interest group advocates in the Court are well-known.[14]

In contrast, the lawyers who represent state governments and corporations are among the lawyers least likely to be considered as notables. For lawyers in either of these two groups to be named as leaders of the Supreme Court bar is a rarity; only four percent and eight percent of their respective members were singled out as influential counsel. Neither finding is scarcely surprising, since both types of counsel have traditionally not fared well in the high court.[15] Thus, when it comes to Supreme Court practice, they garner less notice from their colleagues.

Are the lawyers in Washington viewed as any more influential in the Supreme Court than those who work elsewhere? Again, Table 2 provides us with the clear answer. Even the most conservative assessment of these data would lead one to conclude that Washington lawyers are far more likely to be tapped for their Supreme Court expertise.[16] The proportion of private practitioners in Washington who have reputations as effective counsel, for example, is twice as large as the percentage of the private bar in other cities. Specifically, sixteen percent of the experienced Supreme Court litigators in Washington are notables; only seven percent of the non-Washington lawyers have earned reputations. Obviously, many litigants respond to this perception by seeking out the Washington bar's expertise, as one lawyer's comments illustrate. "In the cases that I've been involved in, the sense was that the local attorneys didn't really have—or at least perceived that they didn't have—the skills to handle the case, and therefore they sought out Washington counsel." This is not to suggest, of course, that merely practicing in Washington will

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Court notables, the difference suggests that any value that interest group lawyers receive from working in Washington is incremental in nature.

14. See, for example, Lee Epstein, *Conservatives in Court* (U. Tennessee Press, 1985); Richard Kluger, *Simple Justice: The History of* Brown v. Board of Education *and Black America's Struggle for Equality* (Alfred A. Knopf, 1976); Susan E. Lawrence, *The Poor in Court: The Legal Services Program and Supreme Court Decision Making* (Princeton U. Press, 1990); Doris Marie Provine, *Case Selection in the United States Supreme Court* (U. of Chi. Press, 1980); Frank J. Sorauf, *The Wall of Separation: The Constitutional Politics of Church and State* (Princeton U. Press, 1976).

15. Larry Lempert, *DOJ Loans Lawyer to NAAG to Follow High Court*, The Legal Times of Washington 2 (Aug. 30, 1982); Tony Mauro, *Corporate Lawyer "Quayles" Before Court*, The Legal Times of Washington 8 (Oct. 24, 1988); H.W. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* 127 (Harv. U. Press, 1991); Cf. Lee Epstein and Karen O'Connor, *States and the U.S. Supreme Court: An Examination of Litigation Outcomes*, 69 Soc. Sci. Q. 660 (1988).

16. Note that the total number of all experienced Washington counsel is less than the sum of the individual categories because some lawyers may fall into more than one group. Many former clerks, for instance, are also in Washington law firms.

earn one a reputation as an effective Court litigator. At the very least, however, a private practitioner in Washington, with a few Supreme Court cases to his credit, has a greater chance of being perceived as more closely connected to the daily workings of the Court.

Another set of Washington practitioners, members of the Solicitor General's staff, have reputations in roughly the same proportion as the attorneys in Washington law firms. The influence of the Solicitor General is, of course, well-documented,[17] and it is not necessary to justify either the Solicitor General's successes or his reputation. Still, the percentage of lawyers on the Solicitor General's staff who have earned the status of expert Supreme Court counsel may strike one as low. Consider, however, that the reputation carried by that office is largely institutional in nature. Lawyers hold the office itself in very high esteem, yet they are hard pressed to name individual members whom they consider to be distinctive practitioners. This is certainly not to suggest that the lawyers who comprise that office are not among the brightest legal minds who practice before the Court; quite the contrary. Most lawyers, however, apparently do not know who they are.[18]

The most effective advocates, in the eyes of the bar, are those lawyers who have left the Solicitor General's office and have used their extensive experience with the Court as a means of attracting potential Supreme Court clients. One lawyer explained:

> The most common reason lawyers develop a Supreme Court practice is my reason, which is that they've served in the solicitor general's office. They've acquired a lot of experience with the Court. They know how the Court works. They know what kind of arguments they make. They know how to write things that are likely to be persuasive to the Court. It therefore makes a lot of sense for clients with cases they care about to retain people like that. Unlike a lot of other areas, it's not as easy to become an experienced Supreme Court practitioner.

17. See, for example, Gregory A. Caldeira and John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 Am. Pol. Sci. Rev. 1109 (1988); Lincoln Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* (Alfred A. Knopf, 1987); Provine, *Case Selection in the United States Supreme Court* (cited in note 14); Jeffrey A. Segal and Cheryl D. Reedy, *The Supreme Court and Sex Discrimination: The Role of the Solicitor General*, 41 Western Pol. Q. 553 (1988).

18. Among the survey respondents, for example, a fair number of lawyers listed "Lawyers in the solicitor general's office" as expert Supreme Court counsel. Frequently, they volunteered that they did not know them by name.

> There's sort of one place where you can really do it, and that's the solicitor general's office.

It is important to consider these former associates of the Solicitor General's staff in the context of Washington counsel, because, as the 1977-82 data vividly convey, Washington is where most of them are to be found: in only one instance in this sample did a former associate of the Solicitor General practice law in a city other than Washington.[19]

Like the alumni of the Solicitor General's office, many of former clerks to the Justices end up practicing law in Washington following their tenure with the Court.[20] Not surprisingly, nearly eighty percent of the Supreme Court clerks who later appear before the Justices are Washington attorneys. Why consider Supreme Court clerks in the context of the specialized Supreme Court bar? The answer is that a Supreme Court clerkship affords the young lawyer an insider's view of the machinations of the Court. This in turn has implications for a lawyer's ability to provide knowledgeable representation once he or she moves on to practice law. Clerks, having screened petitions for review and acquired a taste for plausible arguments the Court will likely find appealing, can likely lend a critical eye to petitions they encounter in private practice. The interviews are chock full of statements about the importance of having served as Supreme Court clerks in precisely this context. As one former clerk told me:

> Being a clerk is most helpful, I think, in the certiorari process—knowing how petitions are reviewed, what role law clerks play versus the justices, or knowing who's your audience and what are the constraints on your audience. I think that's a terribly important piece of knowledge to have. If you know what it's like to try to go through a hundred cert petitions a week and make sense of them, if you understand that and think about what the reader is doing, it ought to significantly alter what you're trying to say to them. . . . It's kind of like the electronic sound bite. To a certain extent, what you do has to be designed in the same way, because the person you're writing for does not have the time to sit there and think great thoughts about what you're writing. He or she has to

19. As I noted earlier, several of the alumni of the Solicitor General's office currently work in the Chicago office of Mayer, Brown. The reason they do not show up in the 1977-82 data set is that many were still in the Solicitor General's office during this period. That some practice in Chicago does not detract from the larger point. Alumni of the Solicitor General's office clearly prefer Washington.

20. Susan E. Grogan, *Judicial Apprentices? Law Clerks in the United States*, paper presented at the annual meeting of the American Political Science Association, Washington, DC (1991).

> make a judgment almost immediately, and you're writing for that purpose. So I think that part helps. Having seen the other side of it and knowing which kinds of submissions were not helpful to me, I think, is a plus—a big plus.

There can be little doubt that these lawyers are a highly valued asset, particularly to those that aspire to Supreme Court practice, as evidenced by the willingness of many firms to offer clerks lucrative signing bonuses.[21]

Experiences such as these, when taken together, ought to provide the makings of the prototypical Supreme Court practitioner. Thus, for example, the Washington lawyer with the perspective of a former clerk and experience in the Solicitor General's office arguably should know, as well as or better than anyone, how to provide effective representation before the Court, as this litigator explains:

> To my mind, the ideal Supreme Court lawyer is somebody who clerked on the Supreme Court, was in private practice for a time, and then went to the solicitor general's office where he rose to become a deputy solicitor general and has since been out for a relatively short period of time. All things being equal, that person ought to be a very good Supreme Court lawyer.

Of course, these attributes are only imperfect indicators of genuine skill in advocacy. Clearly, there is no guarantee that such lawyers would be any more effective than those who come from different backgrounds. Any lawyer who litigates in the Supreme Court has a reasonable chance of earning a reputation for excellence in advocacy; what these results reflect, though, is that, among the lawyers who practice there, those who are tethered most closely to the Court—clerks, the Solicitor General's alumni, and those who work in immediate proximity to the Court—obviously have a much greater advantage when it comes to developing reputations for skillful representation.

That such a large proportion of Supreme Court practitioners locate themselves in Washington and that so many of those who do have substantial reputations for advocacy are findings well worth reporting. Still, whether these counsel have any effect on the decision making of the Court remains an open matter. Are those who are regarded as "insiders" any more effective than those who are not?

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21. See Kerlow, The Legal Times of Washington at 1 (cited in note 3); see also Hayes, The American Lawyer at 65 (cited in note 3); Wermiel, Wall Street Journal at B3 (cited in note 3).

IV. THE SUPREME COURT BAR AS GATEKEEPERS

Quite often, the individuals in Washington who advocate causes before decision makers are sought because they can more effectively give voice to the interests they represent. The principal reason why these specialists are sought "is to gain *access* to those members of Congress or executive branch officials to whom the client does not have easy entree."[22] In the Supreme Court, precious few, aside from the Solicitor General, enjoy easy entree: the Supreme Court guards its gates rather closely, granting review to but a handful of the thousands of petitions it receives annually. Can we generalize about what is known regarding the reliance upon specialists in legislative and executive politics to the federal judiciary? Are the expert Supreme Court counsel any more effective at gaining access (i.e., securing plenary review from the Justices) than other lawyers, and, if so, why?

To begin with, there is a theoretical nexus between the quality of a certiorari petition and its likelihood of persuading the Justices to grant review. Many petitions that are brought to the Court are disadvantaged because their authors lack a sense of how to construct compelling petitions. Many lawyers who are new to the Court hammer out briefs that are simply not up to the task of demonstrating cert-worthiness.

> In hundreds of cases each year the private litigant is represented by a lawyer whose brief reveals that he has no notion at all of the requisites of Supreme Court litigation or of what is and what is not persuasive to the Court to which the brief is addressed. These are the cases that never get to argument because by its preliminary order, the Court disposes of them.[23]

Hence, logical briefs have a greater chance of persuading the Court than disorganized, implausible ones, and it is here where veteran counsel could have an edge. One lawyer, formerly of the Solicitor General's office and now in private practice, provides the following illustration:

> Say you have a party that has a case that's litigated in the lower courts—the party could be a big company, a wealthy individual, or some organization—and somebody with influence on the party comes along and says, "This case is impor-

22. Schlozman and Tierney, *Organized Interests and American Democracy* at 100 (cited in note 2) (emphasis in original).

23. Frank, *Marble Palace: The Supreme Court in American Life* at 95 (cited in note 1).

> tant to you; you ought to have a Supreme Court specialist handle it." And the art of getting the Supreme Court to review a case is a somewhat special artist thing. So they bring in Supreme Court counsel. Now, that may be true even though very competent counsel has handled the case in the lower courts. But when they get to the Supreme Court, some clients feel that there are lawyers who have a lot of experience with the Supreme Court and that they ought to use them.

This is not to suggest, of course, that inexperienced counsel will, of necessity, have every petition denied or that expert litigators can guarantee success. On balance, however, the inexperienced lawyer must overcome the burdens of the unfamiliar, and thus the odds are against him.

Perhaps even more significant to the process of case selection are the reputations that the Court's notable advocates possess. When a lawyer who is known to the Justices lends his or her name to a petition, the attorney conveys an implicit message to the Court: these arguments can be taken seriously and the issues raised are worthy of the your attention. Scholars of the Court have demonstrated, over and over again, that the Justices give great weight to the arguments made by the institutional litigants who come before them. By extension, as the Justices come to know the experienced lawyers who practice before them, the seasoned advocates develop comparable credibility. Lawyers themselves, then, become repeat players.[24] Thus, the relationship of lawyer credibility to the process of case selection should be obvious: the petition bearing the name of an experienced member of the Supreme Court bar may be a harbinger of a potentially certworthy case. As the lawyers who litigate in the Court with frequency admit, they place great weight on their credibility in the Court and, consequently, are reluctant to advance unreasonable claims. Here is how one practitioner in a large firm speaks to this issue, as he discusses how one of his partners—a former member of the Solicitor General's office—works to protect his and his firm's reputation with the Court.

> He doesn't put his name on a case to take an otherwise uncertworthy issue and create a Supreme Court case out of it. In fact, I've seen him tell clients he won't put his name on a petition because it's not a case that's worth going up there. Since

24. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Society Rev. 96 (1974). Galanter considers lawyers as potential repeat players, and, like all repeat players, credibility is one of the advantages that they enjoy.

> he thinks it has no realistic prospect of being granted, he just won't put his name on the pleading.

Any lawyer who submits a petition for review obviously wants the Court to take his case seriously, but the notable Supreme Court advocates also have long-term interests at stake. They want to maintain their practice in the Court, remain visible, attract future Supreme Court clients, and so on. None of these goals are well-served by alienating the Justices and losing their trust. Spending all of one's political capital on any given case simply does not outweigh the broader interests associated with the reputation for effective appellate advocacy. These lawyers see themselves in long-term relationships with the Court. As one notable lawyer puts it:

> I would say that people like [Erwin] Griswold, Larry Tribe, I hope myself, and certainly Rex Lee bring something special to the Court. I guess the one thing is—particularly if you come out of the solicitor general's practice—that the Court has confidence that you will never overstate the case. And that is something important.

Are the lawyers who have reputations for effective advocacy in the Court truly gatekeepers? Does retaining a notable practitioner increase the likelihood that the Court will grant review? And do the veteran members of the bar in the Washington community enjoy any particular advantages? One way to address these issues is to examine which lawyers petition the Court, as well as how much experience they have had practicing before it, to see if the petitions of the notable litigators in Washington receive differential treatment. If lawyers have the effect that they themselves claim, then the participation of lawyers who are regarded as the most credible—especially those in the District of Columbia—should have an impact on the selection of subsequent cases for plenary review. To test these assumptions, I have, for the 1982 Term, determined: 1) which of those petitions for certiorari were brought by active notable lawyers, and 2) the average number of cases on the merits in which the petitioners' counsel were active during the previous five terms.[25] Data on their effect on the Supreme Court's selection of cases are presented in Table 3.

Deciding to give full review in the Court is a complex process, and many influences doubtless evade this general overview.

25. If, for example, a petition was filed by three lawyers, of whom two had earlier cases from 1977 to 1981, I simply took the average of the two lawyers' previous cases.

TABLE 3. EFFECT OF SUPREME COURT BAR ON CASE SELECTION

Type of experienced lawyers	Granted	Denied	N
No Washington lawyer	7.5	92.5	1665
Washington lawyer	16.3	83.7	92
No notable lawyer	7.6	92.4	1772
Notable lawyer	25.7	74.3	35
No notable Washington lawyer	7.6	92.4	1726
Notable Washington lawyer	29.0	71.0	31

Still, it is well worth noting that the experienced counsel in Washington have their petitions granted at twice the rate of other petitions. This is not a manifestation of the Solicitor General's sponsorship of litigation, since his participation has been excluded from these measures of reputation and experience. So, quite apart from the Court's preeminent practitioner, other experienced lawyers in Washington are better able to gain access to the Court's docket. The importance of propinquity to the Court is reflected by a member of the Solicitor General's staff:

> As I have practiced before the Court over the years, I find that I am better able to anticipate what the justices are likely to be interested in about the case, what they may question me about, and so forth. I'm just a closer student of the Court in that way, because I have constant exposure. To a lesser extent, that's true of lawyers who practice more regularly before the Court but may work out of Chicago or Los Angeles or wherever they are. They don't really see the Court in action, but on rare occasions.

Thus, the seasoned members of the appellate bar in Washington are more apt to be integrated into the environment of the Court. Not surprisingly, their pleadings secure favorable attention. In addition, the lawyers who have garnered reputations among their peers for effective advocacy in the Court would appear to have earned them; roughly twenty-six percent of their petitions were granted. These lawyers attribute their success to the members of the Court placing special trust in the reliability in their judgment. If, for example, the Justices had two cases raising similar legal issues, they might give greater weight to the expert's petition. As one frequent practitioner in the Court explained:

> From what I can tell—and this is anecdotal, what you hear from people—when the Court is deciding whether to exercise its discretion, the idea that they will have a known quantity in front of them, whom they can count on to make not necessarily winning arguments but to make good arguments, to do thorough research, and to help the Court as much as possible, consistent with their client's position, that's a plus in deciding whether to take a particular case or to take one case when there are two or three that present the same issue.

The unique effectiveness of the experienced notables within the Washington community is particularly apparent; their success rate of thirty percent is even more impressive. In short, reputations for performing sound and solid work in the Court loom large in identifying potentially important cases. One of the Washington experts illustrates these findings:

> I think that if you are known to the Court as a Supreme Court practitioner—if you're thought of as competent and if they've learned over time that when you say, for instance, "It's a direct conflict," it *is* a direct conflict, that it's not strained—whether they agree with you or not, they know that what you say is going to be credible and supported by the record. They're not going to get embarrassed down the line and have to dismiss cert as improvidently granted because you were stretching on whether an issue was properly briefed and presented. I think that helps enormously at the cert stage in getting careful review. Enormously. I'm not trying to get you to retain me, so I can say this without sounding immodest about it: Hiring a lawyer at the cert stage who has a reputation at the Supreme Court for playing by the Court's rules is one of the most important things a client can do in terms of getting attention paid to his cert petition.

Another way to reinforce the argument that the litigation experience of the Washington notables breeds a special credibility with the members of the Court is to look at how their ability to secure review varies depending on the amount of their prior experience in the Court. The substantial variation in the fortunes of the reputation lawyers in Washington can be seen in Table 4. The likelihood of certiorari being granted increases substantially with each successive case. Thus, within the Washington bar, the notables who served as counsel on a single case on the merits during the preceding five terms successfully sought certiorari in thirteen percent of their cases. This figure doubles for those with two cases, and, for those with more than three cases, the rate is nearly forty percent. Naturally, the ultimate success or failure of

TABLE 4. EFFECT OF SUPREME COURT EXPERIENCE ON CASE SELECTION FOR NOTABLE WASHINGTON LAWYERS

Prior experience of notable Washington lawyer	Granted	Denied	N
No notable Washington lawyer	7.6	92.4	1726
One previous case	12.5	87.5	8
Two previous cases	28.6	71.4	7
Three previous cases	33.3	66.7	3
More than three previous cases	38.5	61.5	13

any petition turns on the importance of the questions it raises. In a fair number of cases, however, the petitioner's lawyer is simply better at articulating these issues, as a former associate of the Solicitor General explains:

> When they open the brief and start reading it, I think it's more what's written on the page than who wrote it that's important. Although, lawyers acquire reputations; there is an element of credibility, and if the Court feels from knowing you that you don't make arguments you don't believe in, they may give it a little more weight. In general, I think the most important thing is how to get the Justices to pay attention to your brief. And my guess is that credibility does matter. Once they start to read the brief, it's the quality of the brief that largely is going to matter to them.

Naturally, the data do not begin to capture the other important forces—conflict, the significance of the issue, the ideological direction of the lower court, to name but a few—that guide the agenda-building process.[26] What can be said, however, is that among the thousands of lawyers who petition the Court for review, the experts in Washington with whom the Court interacts most frequently are those who carry the greatest weight. There are, of course, alternative interpretations that could be brought to these findings. Nonetheless, to the extent that they do reasonably reflect reality, these results fit nicely with the theoretical assumptions regarding the consequences of relying upon specialists in Washington for governmental advocacy: experienced Supreme

26. Caldeira and Wright, 82 Am. Pol. Sci. Rev. at 1109 (cited in note 17); Perry, *Deciding to Decide: Agenda Setting in the United States Supreme Court* (cited in note 15); S. Sidney Ulmer, *The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable*, 78 Am. Pol. Sci. Rev. 901 (1984).

Court counsel are effective at gaining access for the interests that they represent.

V. CONCLUSION

The days of a dominant and discrete Supreme Court bar are long gone. Its absence, however, does not necessarily imply that there are no Supreme Court practitioners; the evidence suggests that there is a modern analogue. Within the Washington community can be found a wealth of experienced Supreme Court talent. To be sure, much of that talent is drawn from the ranks of the federal government, but Washington's contribution to the bar of the Court goes substantially beyond that. The capital's bar is also rich with valuable experience: clerkships at the Court, tenure in the Solicitor General's office, and practice in the established law firms, all combined with active involvement in the Court's docket. It is these lawyers who are regarded by their brethren as members of the Supreme Court bar.

Like many within the Washington community, these practitioners value their credibility and thus help to provide access to governmental decision makers. Indeed, those with noted expertise who work in close proximity to the Court serve as gatekeepers, substantially improving the odds of the Justices granting plenary review to petitions. Even if the changes in the likelihood of review were only partly attributable to experienced Supreme Court lawyers, that by itself would still be important. Indeed, the mere association between experienced counsel and the likelihood of the Court granting certiorari is a significant finding. At minimum, this analysis is an initial step in the direction of assessing the role of lawyers in policy making in the modern Supreme Court.