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Docket Capture at the High Court

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RICHARD J. LAZARUS

Docket Capture at the High Court

The declining number of cases on the Supreme Court’s plenary docket may or may not be a problem. After all, there are many good reasons that such a decline could be happening, 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 having fewer cases is not necessarily problematic, what is worrisome is the very real possibility that the Court’s plenary docket is increasingly captured by an elite group of expert Supreme Court advocates, dominated by those in the private bar. The same way that powerful economic interests can capture an agency¹ or any other entity that purports to exercise authority over those interests,² so too may the Supreme Court’s docket be “captured” by the more powerful economic interests that know best how to influence the decisionmaking of the Justices at the jurisdictional stage. It is, accordingly, not the number of cases on the plenary docket but rather their content that is the real problem.³

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1. MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* (1955); Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 *YALE L.J.* 467 (1952). See generally George J. Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3 (1971) (discussing how the state can be used by an industry or group for its own purposes).
 2. Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 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.”).
 3. This Essay builds upon ideas and statistics set forth more fully in an earlier article 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).

I. THE RISING INFLUENCE OF THE SUPREME COURT BAR AT THE JURISDICTIONAL STAGE

The statistics are striking. While the number of merits cases has roughly declined by one half during the past three decades, the influence of the expert Supreme Court bar over the plenary docket during this same time period has increased approximately tenfold; expert practitioners now represent the successful petitioner at the jurisdictional stage in more than fifty percent of the cases. What is the basis of this 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 her 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 have presented at least five oral arguments before the Court or be affiliated with a practice whose current members have argued at least ten cases. Based on this measure, expert Supreme Court advocates were responsible for 5.8% (6 of 102 cases) of the petitions granted plenary review during October Term 1980.⁴ By October Term 2000, that same percentage had increased to 25% (seventeen of sixty-eight cases) and has steadily increased since—36% in October Term 2005 and 44% in October Term 2006—to boast more than 50% of the Court’s docket during both the most recently completed October Terms 2007 (53.8%) and 2008 (55.5%).⁵ 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 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 more experienced advocates before the Court are especially successful in persuading the Court to grant their certiorari petitions. What is worrisome is the potential for an undesirable skewing in the content of the Court’s docket. The public should expect that the Court will devote its limited resources to address the legal issues that are truly the most important for the nation rather than those

4. *Id.* at 1515-16.

5. *Id.* at 1516. 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 concluded that out of a total of sixty-three non-Solicitor General cases heard on the merits, expert advocates had filed the petitions in thirty-five of those cases, or 55.5%.

legal issues important to those who can secure representation of their interests by the Supreme Court bar.

II. THE ENVIRONMENTAL LAW CASES OF OCTOBER TERM 2008

It is not 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. As described further below, the Court regularly grants cases at the urging of leading members of the private sector Supreme Court bar that are marginally certiorari worthy at best, 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 Supreme Court practice, as underscored by the extraordinary number of cases arising under the Federal Employer Liability Act in which the firm has obtained High Court review on behalf of railroad clients.⁶

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

The Court granted review in four cases that, absent the involvement of expert practitioners, would not have seemed to have had a remote chance of review. Two were Clean Water Act cases (*Entergy Corp. v. Riverkeeper, Inc.*⁹ and *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*¹⁰) 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.¹¹ Such federal opposition is almost always the death knell of a petition.

6. Lazarus, *supra* note 3, at 1537-39 (describing Phillips's successful Federal Employer Liability Act petitions for certiorari).

7. Richard Lazarus, *The Age of the Expert Advocate*, 25 ENVTL. F. 12 (2008).

8. Marcia Coyle, *High Court Losses Stun Environmentalists*, NAT'L L.J. (June 29, 2009), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202431807260>; Richard Lazarus, *Environmentalists Lose Every Case*, 26 ENVTL. F. 12 (2009).

9. 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.

10. 129 S. Ct. 2180 (2009).

11. See Brief for the Federal Respondents in Opposition, *Coeur Alaska, Inc., v. Se. Alaska Conservation Council*, 129 S. Ct. 2180 (2009) (Nos. 07-984 & 07-990); Brief for the Federal Respondents in Opposition, *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009) (Nos. 07-588, 07-589, & 07-597). Note that the federal government is a named "respondent"

If the Solicitor General is advising the Court that the federal agency that lost below is not seeking review that tends to end the matter. In one of those cases (*Entergy*), not only was there no 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 thirty-six years. The third and fourth cases, *Burlington Northern & San Francisco Railroad v. United States* and *Shell Oil v. United States*,¹² both arose under the federal Superfund law and raised legal issues of diminishing practical significance the Court declined to hear for decades.¹³ 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 resources for the law's administration have been running out ever since.¹⁴

In all four cases, a high-profile member of the private Supreme Court bar served as lead counsel for industry petitioners: Maureen Mahoney in *Entergy* and *Burlington Northern*, Ted Olson in *Coeur Alaska, Inc.*, and Kathleen Sullivan in *Shell Oil*. The bar's *coup de grâce* last Term, however, was the Court's denial of the Solicitor General's petition in yet another Clean Water Act case, *McWane, Inc. v. United States*. *McWane* presented all the traditional criteria of a case warranting review – an express, deep, and wide conflict in the circuits regarding a legal issue of national importance; yet, the Court denied review after Ted Olson's partner at Gibson Dunn, Miguel Estrada, filed an

in both cases only because it declined to petition and opposed the petition. On the merits in both cases, the government was aligned with the industry petitioner both in the lower courts and in the Supreme Court.

12. The Court consolidated these two cases for purposes of oral argument and the Court's opinion. See *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870 (2009).
13. 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 (5th Cir. 1993). See Petition for Writ of Certiorari at 26-28, *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870 (2009) (No. 07-1601). *Bell Petroleum* was long an outlier in the lower federal courts and created the potential for an argument of a circuit conflict, yet no one before *Burlington Northern* effectively used that precedent as an effective basis for securing Supreme Court review of the joint and several liability issue ultimately reviewed in *Burlington Northern*. See, e.g., *United States v. Alcan Aluminum Corp.*, 315 F.3d 179 (2d Cir. 2003), *cert. denied*, 540 U.S. 1103 (2004).
14. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 394 (6th ed. 2009). Congress enacted the Superfund law, formally known as the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), in December 1980. Pub. L. No. 96-510, 94 Stat. 2767 (1980). CERCLA primarily aims to clean up abandoned and inactive hazardous waste sites by imposing liability for such cleanup on a series of statutorily designated potentially responsible parties. See *Cooper Indus., Inc. v. Aviall Servs.*, 543 U.S. 157, 161 (2004) (citing 42 U.S.C. § 9607 (2006)); PERCIVAL ET AL., *supra*, at 393-98. As many of those sites have been cleaned up during the past several decades, CERCLA's exigency has necessarily lessened.

especially skillful brief in opposition to the government's petition.¹⁵ There is hardly anything in Supreme Court advocacy as difficult as obtaining plenary review, but defeating a Solicitor General's petition runs a close second. The Court grants the Solicitor General's petitions for writ of certiorari about seventy percent of the time compared to between three and four percent for others.¹⁶

III. THE SUSCEPTIBILITY TO CAPTURE OF THE COURT'S JURISDICTIONAL DECISIONMAKING

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 play 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 their clerks can in fact spend significant time evaluating the certiorari worthiness 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 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 only a few minutes to review a petition and may in fact never read the petitions themselves.¹⁷ The Justices instead delegate the task to their law clerks—inexperienced recent law school graduates 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.¹⁸

15. See *McWane, Inc. v. United States*, 129 S. Ct. 630 (2008); Petition for Writ of Certiorari, *McWane*, 129 S. Ct. 630 (No. 08-223); Brief for the Respondents in Opposition, *McWane*, 129 S. Ct. 630 (No. 08-223).

16. Lazarus, *supra* note 3, at 1493.

17. Carter Phillips, Remarks at the Yale Law School Supreme Court Advocacy Conference: Important Questions of Federal Law—Assessing the Supreme Court's Case Selection Process (Sept. 18, 2009).

18. See Lazarus, *supra* note 3, at 1524-25.

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 the trends in the Court's recent precedent and the predilections of each individual Justice as evidenced in recent oral argument transcripts, speeches, and writings. Having once served as Supreme Court clerks themselves, the experts are also well versed in the generic limitations, susceptibilities, and tendencies of the clerks.

Their expertise extends to the securing of multiple amicus briefs at the jurisdictional stage in support of their request for the Court's plenary review. They appreciate how amicus support substantiates their assertions regarding the importance of the legal issues proffered for review. And they have the professional connections with other members of the Supreme Court bar and the economic clout to generate the necessary amicus submissions.¹⁹ If news article and op-ed columns contemporaneous to the Court's jurisdictional determination might be helpful, they can and will obtain them.²⁰

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 and do in fact work for these experts' law firms immediately or soon after their clerkships.²¹ And, for no reason more than the appearance of the name of the advocate on the cover of the brief, their petitions will receive more attention and respect.²² This is not an incidental advantage. In the barrage of petitions under review,

19. *Id.* at 1528-29.

20. *Id.* at 1525.

21. For instance, a cursory review of the firms at which those who clerked for the Court during the 2007-2008 Term currently work shows a remarkable number at law firms with leading Supreme Court practices, even though those clerks cannot under Court rules work on Supreme Court cases until two years after the clerkship has ended. *See* SUP. CT. R. 7. Three law clerks from that single Term are working for Sidley Austin (Carter Phillips), three for Kirkland & Ellis (Ken Starr), two for O'Melveny & Myers (Walter Dellinger), two for King & Spalding (Paul Clement), two for WilmerHale (Seth Waxman), and one each for Jones Day, Arnold & Porter, and Robbins Russell. Nor is this trend an aberration. There are currently nine attorneys at WilmerHale and seven attorneys at Sidley Austin who clerked for the Court dating back to October Term 2003, which understates the trend because several former clerks who worked for those firms have undoubtedly since left, including to work for the Obama Administration. Three clerks from the most recently completed October Term 2008 now work for Kellogg Huber, whose Supreme Court practice is headed by David Frederick and who won several significant cases that Term, including *Wyeth v. Levine*, 129 S. Ct. 1187 (2009). *See* Tony Mauro, *A Low-Profile Ride to Top of High Court Bar*, NAT'L L.J., Mar. 16, 2009, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202428981439>.

22. *Lazarus*, *supra* note 3, at 1526.

visibility alone can make all the difference at the jurisdictional stage, especially when buttressed by multiple amicus briefs supporting plenary review.

The effect is twofold. Not only are the expert Supreme Court counsel able to make their petitions seem more compelling, but they are simultaneously able to make petitions filed by others less expert seem relatively weaker by comparison. The experts have, in practical effect, raised the bar for Supreme Court review through their outstanding presentations and significant amicus support.

IV. REFORMING THE COURT'S DECISIONMAKING PROCESS AT THE JURISDICTIONAL STAGE

The question is what, if anything, to do about the disproportionate influence the high Court bar increasingly has on the Court's plenary docket. A full answer to that question, however, lies far beyond the purpose of this Essay, which seeks to initiate, and not end, the conversation.²³ Nonetheless, I offer 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. Mitigation already occurs to an extent as reflected in the private bar's willingness to offer pro bono services, the development of expert solicitors general in many states, and the recent emergence of Supreme Court clinics in several of the nation's leading law schools.²⁴

But, such mitigating efforts fall far short of filling the gap between those who have access to the resources of the expert Supreme Court bar and those who do not. Much of the private law firm pro bono effort occurs 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, will not take up, including when they oversee the law school Supreme Court clinics.²⁵ It is undeniably a positive development to have the states represented more effectively than in the past, but they too are

23. My remarks at the Yale Supreme Court Advocacy Clinic Conference where this paper was first presented were directed to the threshold question of what problem exists with the Court's current plenary docket. Subsequent panels and papers were directed to the antecedent question of how, if at all, the Court's case selection process should be reformed.

24. Lazarus, *supra* note 3, at 1557-60. For instance, the Stanford Supreme Court Litigation Clinic was co-counsel for the successful petitioner at the jurisdictional stage in at least four cases heard during October Term 2008. See, e.g., *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009); *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009); *Cone v. Bell*, 129 S. Ct. 1769 (2009); *Herring v. United States*, 129 S. Ct. 695 (2009).

25. Lazarus, *supra* note 3, at 1560.

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 Harvard, Northwestern, Stanford, Texas, Virginia, and Yale are still just that: students.

The disproportionate influence that the expert Supreme Court bar exerts on the content of the Court's plenary docket is the problem, not solved by which cases the bar takes—business or public interest—but by the Court itself asserting more control. For this reason, I expect the fuller solution to the docket capture problem 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, such reforms would require changes in the Court's internal decisionmaking process at the cert stage. The place to start is questioning 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 of below-par counsel.

At the Yale Law School Supreme Court Advocacy Clinic Conference on the Court's case selection process, speakers and audience participants suggested several preliminary ideas. One modest recommendation would be to replace the existing single cert pool with two competing cert pools, thereby increasing the number of clerks who provide a petition with a close review. Another would be the introduction of a two-step process to jurisdictional review in which the clerks would first identify potentially cert-worthy cases and then next examine that smaller subset of petitions more closely prior to recommending in favor of certiorari.

A more ambitious reform would be for the Justices to be more willing at the jurisdictional stage to seek input from those outside the Court who are knowledgeable about the issues raised by a pending petition. The Court currently seeks such input several times a year on pending petitions, but exclusively from the Solicitor General by way of formal orders inviting the Solicitor General to express the views of the United States on a pending petition.²⁶ The Court could make similar requests from other knowledgeable organizations as a method of ensuring the wisdom of the Court's jurisdictional determinations.

26. David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 242 (2009).

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An even more dramatic structural reform would be the addition to the Court of an office of seasoned, career lawyers akin in skills to assistants to the Solicitor General; the attorneys in such an office would assist the Court at the jurisdictional stage in assessing the worthiness of cases for judicial review, by both questioning the exaggerated claims of some advocates and making up for the deficiencies of other advocates. Whatever the best approach, it is 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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