

THE POWER OF PERSUASION BEFORE AND WITHIN THE SUPREME COURT: REFLECTIONS ON NEPA'S ZERO FOR SEVENTEEN RECORD AT THE HIGH COURT

*Richard J. Lazarus**

This Article reviews the remarkable string of seventeen straight losses that environmental plaintiffs have suffered in Supreme Court cases arising under the National Environmental Policy Act (NEPA) and challenges the accepted wisdom that these rulings reflect the Court's hostility toward environmental protection. A close review of the cases, including the advocacy before the Court in each case, and the deliberations within the Court during its decision-making process, reveals instead a far more nuanced and less one-sided understanding of the rulings, and underscores the significance of effective advocacy both before the Court by arguing counsel and within the Court by the Justices themselves.

Binary analysis that treats Supreme Court rulings as either "wins" or "losses" misapprehends the nature of judicial rulings and the essential role served by legal reasoning. Not all losses are created equal. Some "losses" are the product of concessions made by the prevailing party that amount to significant wins by the purported losing party. And opinions that end by reversing favorable lower court

* Howard J. and Katherine W. Aibel, Professor of Law, Harvard Law School. This Article is based on a presentation at the David C. Baum Memorial Lecture on Civil Rights and Civil Liberties held at the University of Illinois College of Law on February 24, 2010. Much of the content of this essay borrows from a lengthier treatment of the topic, forthcoming. See Richard J. Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L.J. (forthcoming May 2012). This Article, however, differs from the original Baum Lecture in one significant respect. At the time the lecture was delivered, environmentalists had lost sixteen cases before the Supreme Court. A few months after the lecture, the Court handed environmentalists their seventeenth loss in a case arising under the National Environmental Policy Act (NEPA), *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010), which was described during the lecture as then pending before the Court. The Article title and text have been modified accordingly to account for that subsequent ruling. Apart from the addition of the *Monsanto* case, however, the NEPA database has not otherwise been modified to account for the possibility of additional Supreme Court activity in NEPA cases at the jurisdictional stage, including, for instance, unsuccessful petitions for a writ of certiorari.

judgments may nonetheless include language highly favorable to environmental plaintiffs in future litigation. To be sure, NEPA plaintiffs have not fared well before the Court and have lost some significant arguments there, but their record is far less dismal or one-sided as is routinely supposed.

Finally, the NEPA cases do suggest that there is an increasing risk that the Court's docket and rulings are being skewed in favor of commercial interests because of the disproportionate ability of those interests to retain expert Supreme Court advocates. In recent years, the private Supreme Court Bar has enjoyed a significant resurgence, marked by the emergence of a significant group of highly effective lawyers specializing in Supreme Court advocacy. Although the development of such expertise is generally a positive development for the Bar and the Court, it makes it all the more important that such expertise be available to opposing viewpoints on important legal issues that the Court is deciding.

I. INTRODUCTION

It is an extraordinary privilege for me to be back in Urbana today, the town where I was born, attended elementary and high school (Uni High), and the university where I was an undergraduate and studied chemistry and economics. It is particularly meaningful for me to deliver the David C. Baum Memorial Lecture. Growing up here, my community included the families of many law faculty, such as the Stones, Framptons, and Cribbetts, just to name a few. And, of course, David and Alice Baum were close family friends. I remember well the enormous sadness the entire university community felt upon David Baum's death at such a young age. With my parents, I attended the memorial for David Baum here at the law school, in which his career and life were celebrated.

I was moved then not only by the enormous affection that David Baum's colleagues felt for him, but by the words they chose. Dean Cribbitt eloquently said, "He trod these corridors—not of power but of something infinitely more precious—of learning, with a sure tread and a clear grasp of law and justice, enriching the lives of all who had the privilege of knowing him."¹ But it is, for me, Victor Stone who described it best, using words to describe David Baum's work that can well guide all of us who teach, write, and practice law: "Conscientious and judicious in his work, he did not spare his students or himself from the heavy burden of penetrating examination of and searching reflection on the complexities of the law, its intellectual and moral challenges, its pragmatic dilemmas."²

1. John E. Cribbitt, *David C. Baum*, 1973 U. ILL. L.F. 1, 1.

2. Victor J. Stone, *David C. Baum*, 1973 U. ILL. L.F. 5, 5.

My topic today is in many respects different from those in past Baum lectures. In closer keeping with the formal title of this lecture series, prior speakers have spoken on topics more obviously related to civil liberties and civil rights, beginning with Erwin Griswold's first lecture in 1973 on the Supreme Court's caseload and civil rights,³ and extending to the 2009 Baum lecture by Professor Barbara Woodhouse on the role of children in the struggle for social justice.⁴ Like Erwin Griswold's and several other talks, my topic deals with the U.S. Supreme Court. But unlike any of the other preceding sixty Baum lectures, my talk concerns environmental protection laws.

For those unfamiliar with environmental law and its roots, the gap between civil rights and liberties law and environmental law may seem considerable. But not for those of us who work with and study the nation's pollution control and natural resource conservation laws that make up environmental law. In many respects, modern environmental law was inspired by and grew out of the civil rights movement. The civil rights model was the natural blueprint for environmentalists in the late 1960s, many of whom first became politically active working on civil rights issues in the South earlier that same decade. Environmentalists saw how a political movement could transform the nation's laws, and they strived to achieve for environmental protection what the civil rights movement appeared then to be accomplishing in ending racial discrimination.

Environmentalists also saw a direct relationship between the two. They both shared the need to ensure that interests systematically less economically and politically powerful were protected. For environmentalists, those unrepresented interests extended to future generations of humankind but began with other species and objects of natural beauty. These creatures and objects inevitably lacked voice in both the marketplace and lawmaking fora, not unlike the discrete and insular minorities in existing populations of humankind at issue in the civil rights movement.

Accordingly, environmental activists borrowed wholesale the strategies and tactics of the civil rights movement. The roots of the first celebration of "Earth Day" in April 1970 are evident in Martin Luther King's march on Washington in 1963.⁵ Environmentalists also formed the first environmental law public interest groups based on a model strikingly reminiscent of Thurgood Marshall's National Association for the Advancement of Colored People (NAACP) Legal Defense Fund.⁶ There was nothing subtle about this relationship, as the new environmental

3. See Erwin N. Griswold, *The Supreme Court's Case Load: Civil Rights and Other Problems*, 1973 U. ILL. L.F. 615.

4. See Barbara Bennett Woodhouse, *The Courage of Innocence: Children As Heroes in the Struggle for Justice*, 2009 U. ILL. L. REV. 1567.

5. See Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 788-89 (1993).

6. See *id.* at 789 n.10.

groups had names such as Natural Resources *Defense Council*, Environmental *Defense Fund*, and the Sierra Club *Legal Defense Fund*.

Like Thurgood Marshall decades beforehand, environmentalists looked to the courts as the most promising champion of their cause. Environmentalists also found their first champion in Judge Skelly Wright of the D.C. Circuit, who was himself a hero of the civil rights movement. Indeed, the civil rights movement was the reason why Judge Wright was on the D.C. Circuit and therefore positioned to issue landmark environmental rulings in the early 1970s.⁷ Previously Judge Wright had been a district court judge in New Orleans, beginning in 1949.⁸ As a judge there, he had vigorously ordered desegregation in education, even before *Brown v. Board of Education*.⁹ He then aggressively ordered the desegregation of New Orleans public schools after *Brown* was decided.¹⁰ Consequently, President John F. Kennedy placed him on the D.C. Circuit, but not as a reward for good deeds.¹¹ Rather it was at the request of southern Democratic senators who wanted him out of Louisiana and out of the South.¹²

On the D.C. Circuit, Judge Wright immediately understood the close connection between what he was trying to accomplish in civil rights and the environmental movement. Perhaps more than any other individual, Judge Wright shaped the initial emergence of modern environmental law. In 1971, Judge Wright took a brand-new statute, the National Environmental Policy Act of 1969 (NEPA),¹³ and transformed it into what commentators quickly dubbed environmental law's "Magna Carta."¹⁴

NEPA was the very first environmental law of the 1970s, signed into law by President Richard Nixon on January 1, 1970.¹⁵ NEPA's mandate seemed simple: first, federal agencies had to look before they leap, and second, before undertaking a major federal action with significant impacts on the quality of the human environment, federal agencies had to prepare a detailed statement discussing those impacts.¹⁶ There was essentially nothing, however, in either the statutory language or history of NEPA to suggest that its drafters contemplated that NEPA's requirements would be judicially enforceable.

7. See Richard J. Lazarus, *Judging Environmental Law*, 18 TUL. ENVTL. L.J. 201, 204 (2004).

8. Elbert P. Tuttle, *Chief Judge Skelly Wright: Some Words of Appreciation*, 7 HASTINGS CONST. L.Q. 869, 869 (1980).

9. *Id.* at 869–70.

10. See Lazarus, *supra* note 7.

11. *Id.*

12. See Tuttle, *supra* note 8, at 872.

13. 42 U.S.C. §§ 4321–4370f (2006).

14. See Richard A. Lirott, *NEPA Litigation in the 1970s: A Deluge or a Dribble?*, 21 NAT. RESOURCES J. 315, 316 (1981); Daniel R. Mandelker, *Thoughts on NEPA at 40*, 39 ENVTL L. REP. 10640, 10641 (2009).

15. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970); RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 68 (2004).

16. 42 U.S.C. § 4332(2)(C) (setting forth the environmental impact statement requirement).

There was nothing to suggest that result until Judge Wright got hold of the statute in a case decided in 1971, soon after the law had passed. The case was *Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Commission*.¹⁷ The Atomic Energy Commission (now the Nuclear Regulatory Commission) had declined to prepare a detailed statement as part of its licensing of nuclear power plants.¹⁸ Judge Wright let the Atomic Energy Commission have it with both judicial barrels blasting; he made clear NEPA's procedural requirements must be strictly followed.¹⁹ In one of the most famous judicial statements made in any environmental case, Judge Wright made his view of the essential role the courts must play in ensuring environmental protection unambiguous, writing in the opening sentence of the opinion, "These cases are only the beginning of what promises to become a flood of new litigation—litigation seeking judicial assistance in protecting our natural environment."²⁰

Strikingly, Wright converted the notion of a "flood" from a negative into a positive.²¹ The "floodgates of litigation" in the context of NEPA became, in *Calvert Cliffs*, something good that the new law "promises."²² The court's "duty" and "judicial role" is to ensure that NEPA's "important legislative purposes . . . are not lost or misdirected in the vast hallways of the federal bureaucracy."²³ These statements described the roles of judges in environmental protection law as akin to their function in civil rights litigation. They anticipated the tendency for new policies to be lost or misdirected and identified courts as essential players in guarding against that happening.

Because of Judge Wright's opinion in *Calvert Cliffs*, NEPA became one of this nation's most important federal environmental laws. Many lower federal courts followed Judge Wright's lead, strictly enforcing NEPA's procedural requirements and readily enjoining agency activities that fell short.²⁴ NEPA has led to wiser decisions and prevented hundreds, if not thousands, of actions that would have unnecessarily caused environmental degradation. These benefits have stemmed not so much from the NEPA documents themselves as from the fact that the process of their preparation can change agency decisions. As many as half of the states have, in turn, enacted their own NEPA programs modeled after

17. 449 F.2d 1109 (1971).

18. A. Dan Tarlock, *The Story of Calvert Cliffs: A Court Construes the National Environmental Policy Act to Create a Powerful Cause of Action*, in ENVIRONMENTAL LAW STORIES 77, 89–90 (Richard J. Lazarus & Oliver M. Houck eds., 2005).

19. *Calvert Cliffs*, 449 F.2d at 1112.

20. *Id.* at 1111.

21. *Id.*

22. *Id.*

23. *Id.*

24. Matthew J. Lindstrom, *Procedures Without Purpose: The Withering Away of the National Environmental Policy Act's Substantive Law*, 20 J. LAND RESOURCES & ENVTL. L. 245, 258 (2000).

the federal statute.²⁵ And approximately 160 other countries have done the same, making NEPA the nation's most successful international export in the field of environmental protection law.²⁶

Yet all that apparent success is precisely the reason NEPA is such a fascinating topic for scholarly inquiry. The NEPA story in the lower federal courts lies in sharp contrast with NEPA's story in the U.S. Supreme Court. The basic statistics are striking: in the seventeen NEPA cases the Supreme Court has decided on the merits, the federal government has won every single one.²⁷ In none of those cases were environmental groups the petitioner, for in all seventeen, the environmentalist plaintiffs had won below and therefore had everything to lose before the Court. And, that is exactly what they did: lose. Amazingly, from 1976 until the Court decided *Winter v. Natural Resources Defense Council, Inc.* in November 2008,²⁸ environmentalists lost all their cases unanimously, without obtaining a single vote of a single Justice.²⁹ Until the ruling in *Winter*, the last time the environmentalists received a vote in a NEPA case subject to plenary review was in *Kleppe v. Sierra Club*, decided in 1976, when Justices Thurgood Marshall and William Brennan both dissented.³⁰ Even before 1976, only Justice William Douglas provided a dissenting vote in favor of the environmentalist view of NEPA.³¹ A vote from Douglas in favor of the environmentalists, moreover, was virtually automatic.³²

That is quite something in terms of streaks. Of course, it is less than some streaks in sports. The Chicago Cubs began the 1997 season losing

25. See Noah D. Hall, *Interstate Environmental Impact Assessment*, 39 ENVTL. L. REP. 10667, 10668 (2009) ("A recent survey indicated that 32 states have some form of an environmental impact assessment policy modeled after NEPA.").

26. See Nicholas A. Robinson, *NEPA at 40: International Dimensions*, 39 ENVTL. L. REP. 10674, 10674 (2009).

27. *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2749 (2010); *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 12 (2008); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004); *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004); *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 336 (1989); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 385 (1989); *Balt. Gas & Electric Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 90 (1983); *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 768 (1983); *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 141 (1981); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 228 (1980); *Andrus v. Sierra Club*, 442 U.S. 347, 348-49 (1979); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 525 (1978); *Kleppe v. Sierra Club*, 427 U.S. 390, 394 (1976); *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 792-93 (1976); *Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289, 295-97 (1975); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 698-99 (1973).

28. 555 U.S. at 7.

29. *Id.* at 10-11; *Norton*, 542 U.S. at 73; *Pub. Citizen*, 541 U.S. at 773; *Seattle Audubon Soc'y*, 503 U.S. at 440-41; *Marsh*, 490 U.S. at 385; *Methow Valley*, 490 U.S. at 358-59; *Balt. Gas*, 462 U.S. at 107-08; *Metro. Edison*, 460 U.S. at 778-79; *Weinberger*, 454 U.S. at 146-47; *Strycker's Bay*, 444 U.S. at 227-28; *Andrus*, 442 U.S. at 364-65; *Vt. Yankee*, 435 U.S. at 557-58.

30. 427 U.S. at 415 (Marshall, J., concurring in part and dissenting in part).

31. *Aberdeen & Rockfish R.R. Co.*, 422 U.S. at 328 (Douglas, J., dissenting in part); *Students Challenging Regulatory Agency Procedures*, 412 U.S. at 699 (Douglas, J., dissenting in part).

32. Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 724-25 (2000).

fourteen games in a row.³³ Northwestern's football team once lost thirty-four games in a row.³⁴ None, however, bests my high school's basketball team: from February of 1974 to November of 1979, they lost all ninety-six games.³⁵ (My junior year, the average score of a Uni High basketball game was eighty-eight to thirty-three, and Uni did not have the eighty-eight; I was not even good enough to play for the team.³⁶) But at least these streaks did not, like NEPA's, last forty years, and they did not lose almost all those contests without scoring any points.

The vestigial chemist in me from my days in Noyes Lab here at the University of Illinois knows such anomalies are always the most revealing. If you want to understand how something works, do not look for the patterns or consistencies, but for the discontinuities. This notion may well be bred in my genes: my father, a retired professor of physics at the University of Illinois, is a solid-state physicist, an experimentalist, whose expertise was "defects in solids." Understanding how something works from its anomalies is true for unknowns in science and is also true in law and legal reasoning.

I decided to explore why and how this has happened with NEPA. First, I read all seventeen NEPA cases the Supreme Court decided on the merits, including the briefs and oral arguments. This was quite easy because there are not many dissents to read. My second step was harder—I decided to take a better look at the approximately 150 cases in which review was sought. To analyze why the Supreme Court denied certiorari, I looked to the lower court opinions and jurisdictional pleadings. The results were also stark. Parties, mostly environmentalists, filed more than two-thirds of those petitions, claiming that the lower court erred by not finding a NEPA violation; business interests filed twenty-three petitions on their own, asking the Court to reverse lower court rulings that NEPA had been violated; and the Solicitor General filed twenty petitions seeking to reverse a lower court ruling that the federal agency had violated NEPA and was joined by business petitions on seven of those twenty petitions.³⁷ The Court granted three-fourths of the Solicitor

33. Al Yellon, *Cavaliers Losing Streak: How Do Chicago Teams Measure Up?*, SB NATION (Feb. 10, 2011), <http://chicago.sbnation.com/2011/2/10/1986229/cleveland-cavaliers-losing-streak-chicago-teams-cubs-white-sox-bulls-bears-blackhawks>.

34. *Worst College Football Teams of All Time*, ESPN PAGE 2, <http://espn.go.com/page2/s/list/col-football/teams/worst.html> (last visited Oct. 23, 2011).

35. *Boys Basketball Season Summaries*, ILL. HIGH SCH. ASS'N, <http://www.ihsa.org/Sports/Activities/BoysBasketball/RecordsHistory.aspx?url=/data/bkb/records/index.htm> (last visited Oct. 23, 2011).

36. This statistic is based purely on my recollection.

37. Industry filed seven petitions parallel to the petition filed by the Solicitor General. See *Balt. Gas & Electric Co. v. Nat'l Res. Def. Council, Inc.*, 462 U.S. 87, 88–89 (1983); *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 767–68 (1983); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 224 (1980); *Kleppe v. Sierra Club*, 427 U.S. 390, 392–94 (1976); *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 777–78 (1976); *Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289, 294–95 (1975); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 671–72 (1973).

General petitions,³⁸ and only two of the business petitions filed without the Solicitor General's support.³⁹ The Court granted only one environmentalist petition, which it subsequently vacated and remanded on mootness grounds.⁴⁰

My final step was to go beyond the public documents and read the private papers of the individual Justices. At present these documents constitute thousands of pages, as several Justices have, in recent decades, made their personal papers available to scholars several years after their deaths. Of particular relevance to NEPA are the papers of Justices William Douglas, Thurgood Marshall, Lewis Powell, William Brennan, and Harry Blackmun.⁴¹ These papers include notes on what Justices said at their private conferences with the other members of the Court, handwritten notes by Justices, in-chambers memoranda between law clerks and their respective Justices, correspondence between chambers of different Justices, and draft opinions circulated between chambers.⁴² I read all documents for cases up to 1994 and discovered fabulous archival material. Some of the documents were amusing and quirky, such as a note apparently passed on the bench from Justice Brennan to Justice Blackmun during the February 28, 1973 oral argument in *United States v. Students Challenging Regulatory Administrative Procedures*, the first NEPA case heard by the Court, stating only "NEPA über alles,"⁴³ meaning "NEPA above everything else." Other materials present a surprisingly clear picture of the internal workings of the Court behind the curtains, which has traditionally been strictly closed from public disclosure.

From these sources, I learned three broader lessons about the nature of Supreme Court decision making, relevant to both those litigating

38. The Court denied four Solicitor General petitions. See *U.S. Forest Serv. v. Earth Island Inst.*, 549 U.S. 1278, 1278 (2007); *Clark v. S. Or. Citizens Against Toxic Sprays, Inc.*, 469 U.S. 1028, 1028 (1984); *Morton v. Wilderness Soc'y*, 411 U.S. 917, 917 (1973); *Fed. Power Comm'n v. Greene Cnty. Planning Bd.*, 409 U.S. 849, 849 (1972).

39. *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2743 (2010); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 429 U.S. 1090, 1090 (1977).

40. See *Upper Pecos Ass'n v. Peterson*, 409 U.S. 1021, 1021 (1972); Memorandum for the Respondents Suggesting Mootness, *Upper Pecos Ass'n v. Peterson*, 409 U.S. 1021 (1972) (No. 71-1133).

41. The papers of all these Justices are located in the Library of Congress, except for Justice Powell, whose papers are maintained at the William and Mary School of Law Library. The papers of the individual Justices are referred to hereinafter by the shorthand expression "The [Justice last name] Papers." The shorthand for the papers of Justice Blackmun is, accordingly, "The Blackmun Papers."

42. See CONNIE L. CARTLEDGE WITH JOSEPH K. BROOKS ET AL., *HARRY A. BLACKMUN PAPERS: A FINDING AID TO THE COLLECTION IN THE LIBRARY OF CONGRESS* (rev. ed. 2010); CONNIE L. CARTLEDGE WITH ALLYSON H. JACKSON ET AL., *THURGOOD MARSHALL: A REGISTER OF HIS PAPERS IN THE LIBRARY OF CONGRESS* (rev. ed. 2004); AUDREY A. WALKER WITH PAUL A. COLTON ET AL., *WILLIAM O. DOUGLAS: A REGISTER OF HIS PAPERS IN THE LIBRARY OF CONGRESS* (rev. ed. 2008); AUDREY WALKER & MICHAEL SPANGLER WITH ANDREW P. PASSETT & MICHAEL SPANGLER, *WILLIAM J. BRENNAN, JR.: A REGISTER OF HIS PAPERS IN THE LIBRARY OF CONGRESS* (rev. ed. 2004); WASH. & LEE UNIV., *A GUIDE TO THE LEWIS F. POWELL JR. COLLECTION 1937-1999* (2001).

43. Handwritten Note from William J. Brennan, Jr., Justice, U.S. Supreme Court, to Harry A. Blackmun, Justice, U.S. Supreme Court (Feb. 28, 1973), *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) (No. 72-535) (on file with the Library of Congress in The Blackmun Papers).

before the Court and those purporting to glean the significance of the Court's rulings for NEPA in particular and environmental law more generally. The first is what a difference a Justice can make based on the Justice's effective advocacy within the court. The second is what a difference an effective, strategic lawyer can make as an advocate before the Court. The third lesson stems from the first two and shows it is actually wrong to view all seventeen NEPA cases as just losses. It is a mistake to measure Supreme Court results by the single word that appears at the end: affirmed or reversed. But the broader significance of these lessons extends further than just how best to evaluate the Supreme Court's NEPA rulings, or even any Supreme Court ruling. By demonstrating the significance of advocacy before and within the Supreme Court, these three lessons suggest why it is important to ensure all interests are well represented at the high court by highly skilled advocates. Otherwise, there is good reason to worry the Court's rulings will be both poorer and skewed as a result.

II. THREE LESSONS ON SUPREME COURT DECISION MAKING

A. *The Difference a Justice Can Make*

The first lesson I learned is what a difference a Justice can make. To demonstrate the importance of individual Justices, I will showcase two in the context of NEPA: a surprisingly ineffective Justice and an effective Justice.

1. *A Surprisingly Ineffective Justice: Justice William Douglas*

The ineffective Justice is William Douglas, which is surprising because he is understandably the hero of modern environmentalists.⁴⁴ Douglas was a passionate environmentalist and outdoorsman; he was a celebrated environmental writer and a committed activist, even when he served on the Supreme Court.⁴⁵ Justice Douglas was not shy about his environmentalism.⁴⁶ Accordingly, Justice Douglas always voted for the environmental side in every case, no matter the issue or the merits.⁴⁷

The papers of the Justices that I reviewed suggest, however, that this is this very reason that Justice Douglas was so ineffective. Justices receive only one vote, but five are necessary for a majority, as Justice Brennan knew so well. Justice Brennan reportedly would ask his clerks on their first day what was the most important rule of constitutional

44. See, e.g., "HE SHALL NOT PASS THIS WAY AGAIN": THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS pt. 4 (Stephen L. Wasby ed., 1990).

45. See NATURE'S JUSTICE: WRITINGS OF WILLIAM O. DOUGLAS 269 (James O'Fallon ed., 2000).

46. See *id.*

47. Lazarus, *supra* note 32, at 725 (describing how Justice Douglas voted for the "pro-environmental side" in every case when he was on the Court, "no matter the legal issue").

law.⁴⁸ His answer: the “rule of five.”⁴⁹ Justice Douglas, by contrast, was not a coalition builder or a team player.⁵⁰ He had once harbored grand political ambitions, including the White House,⁵¹ but by 1970—modern environmental law’s dawning and NEPA’s first year—it was clear that those political ambitions would go unrealized.⁵² Justice Douglas wrote then for himself and in a manner that appealed to environmentalists. He was increasingly isolated from the rest of the Court, and his writing was often more polemical than persuasive. Justice Potter Stewart once reportedly said, “Bill Douglas seems positively embarrassed if anyone agrees with him.”⁵³

Justice Douglas’ uncompromising commitment to the environment undermined his persuasiveness. The internal documents demonstrate this impact dramatically. In suggesting that Justice Thurgood Marshall might wish to draft his own dissent in one NEPA case rather than rely on Douglas, Justice Marshall’s law clerk stressed that “there is some indication that [Douglas’s dissent] will be pretty much a polemic on the problems of the environment without much hard analysis of the jurisdictional issue which is at the center of the case.”⁵⁴ Also undermining his credibility were his recusal shifts. Justice Douglas would at first announce to his colleagues that he was recusing himself from a NEPA case because of his close ties to the environmentalists who brought the case⁵⁵ but would then participate anyway, loudly in dissent from the majority.⁵⁶

48. Mark Tushnet, *Themes in Warren Court Biographies*, 70 N.Y.U. L. REV. 748, 763 (1995).

49. *Id.*

50. JAMES F. SIMON, *INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS* 353 (1980) (describing Justice Douglas as a loner, happiest when working for and by himself).

51. NOAH FELDMAN, *SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR’S GREAT SUPREME COURT JUSTICES* 317–20 (2010).

52. *See id.* at 320, 323 (indicating that after 1948, Justice Douglas realized the potential for high office had passed, and he became more insular).

53. JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 49 (2001); *see also* FELDMAN, *supra* note 51, at 306 (quoting Justice Felix Frankfurter describing Justice Douglas as “one of the ‘two completely evil men I have ever met[.]’”).

54. Clerk Memorandum to Thurgood Marshall, Justice, U.S. Supreme Court (n.d.), *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) (Nos. 72-535 & 72-562) (on file with the Library of Congress in The Marshall Papers).

55. Docket Sheet, *Sierra Club v. Morton*, 405 U.S. 727 (1972) (No. 70-34) (on file with the Library of Congress in The Douglas Papers); Memorandum from William O. Douglas, Justice, U.S. Supreme Court, on WOD and the *Sierra Club*, 405 U.S. 727 (No. 70-34) (on file with the Library of Congress in The Douglas Papers); Conference Notes of Harry Blackmun, Justice, U.S. Supreme Court 1 (n.d.), *Sierra Club*, 405 U.S. 727 (No. 70-34) (on file with the Library of Congress in The Blackmun Papers).

56. Douglas’s dissent in *Sierra Club v. Morton* is among his most famous opinions. *See* 405 U.S. at 741–45 (Douglas, J., dissenting).

2. *The Most Effective Justice by Far: Justice and Chief Justice William Rehnquist*

Hands down, no one was more effective or influential in NEPA cases than Justice, later Chief Justice, William Rehnquist. Chief Justice Rehnquist was exceedingly skillful at influencing the content of the Court's opinions.

What made Chief Justice Rehnquist so effective? Three things in particular stand out. First, he was just a top-notch, intelligent lawyer with a clear vision of how the law should be shaped.⁵⁷ This made him much more effective within the Court, either in drafting an opinion for the Court or commenting on opinions drafted by others. He had an unrelenting ability to perceive which precise words would best advance his view of the merits, as well as which would frustrate his view over the longer term.

Second, he was an incredibly fast writer. Prior to reviewing the personal papers of the Justices, I had little appreciation of how important sheer writing speed could be. Chief Justice Rehnquist produced draft opinions faster than anyone else. Under his ten-day rule, his clerks had to produce draft opinions for Rehnquist's review within ten days of his assigning the case to a clerk.⁵⁸ Rehnquist would also comment on other draft opinions with remarkable speed. His speed made him that much more influential because he could build momentum for his draft opinion before dissenters had a chance to react. He could also prevent others from building momentum for their opinions.

Finally, Chief Justice Rehnquist was remarkably charming in his personal relations with the other Justices. He was polite, respectful, and never appeared to hold grudges.⁵⁹ Chief Justice Rehnquist could decide a case and walk away from it, which is why he and Justice Brennan reportedly were so fond of each other.⁶⁰ They could work well with each other and could enjoy each other's company, and each was more persuasive as a result.

The NEPA cases illustrate these skills. They show Chief Justice (and Justice) Rehnquist influencing the result in case after case with his precise edits of draft opinions of others and his quick drafts. He was an advocate within the Court. He was what former Solicitor General John W. Davis and former Solicitor General and NAACP Legal Defense Fund Advocate Thurgood Marshall were as advocates before the Court at the lectern: just great lawyers.⁶¹ Like an advocate, Rehnquist had care-

57. See Richard J. Lazarus, *Rehnquist's Court*, 47 ST. LOUIS U. L.J. 861, 863–66 (2003).

58. John G. Roberts, Jr., *Tribute to William H. Rehnquist*, 31 J. SUP. CT. HIST. 15, 15 (2006).

59. See Lazarus, *supra* note 57, at 872.

60. William E. Hellerstein, Book Review, 58 BROOK. L. REV. 913, 918 (1992) (reviewing DAVID G. SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST COURT* (1992)).

61. See WILLIAM H. HARBAUGH, *LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS* (1973) (discussing, among other things, Mr. Davis's legal career); MARK V. TUSHNET, *MAKING CIVIL RIGHTS*

ful case-by-case strategic thinking. He was patient and had what seemed prescience in understanding how best to draft language in his opinions for the Court so as to affect future issues. He was simultaneously demanding and collegial.

One of the best examples of Rehnquist's persuasive power is *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,⁶² which could be termed a real Rehnquist *tour de force*. Chief Justice Burger assigned him to write the majority opinion, and Rehnquist effectively used it to its full potential to advance his view of NEPA's limited role. His opinion does not reflect my own view of NEPA, but I still cannot help but admire his skill within the Court and wish others with differing views had been similarly skilled. Rehnquist ultimately persuaded all the Justices in *Vermont Yankee* to embrace a narrow view of NEPA's procedural requirements.⁶³ And he managed to include language in dictum⁶⁴ that he then tapped into a few years later to eliminate NEPA's substantive side.⁶⁵

Underscoring Rehnquist's skill as an advocate was how he managed to overcome efforts by Justice Brennan in *Vermont Yankee* to kill the case. Justice Brennan repeatedly tried to get the Court, after initially granting review, to dismiss the case as improvidently granted for the simple reason that the federal government had conceded away much of the case.⁶⁶ Following oral argument in the case, Justice Brennan twice circulated, once in January and a second time in February, a draft per curiam opinion that would have dismissed the writ as improvidently granted.⁶⁷

Justice Rehnquist's immediate response was a nearly forty-page, exhaustively cited document entitled "Memorandum" that was in effect a full draft opinion of the Court in all but name.⁶⁸ He was apparently careful not to call it an "opinion," perhaps to avoid formal disrespect of others. But in effect, Justice Rehnquist mooted out the mootness argument being advanced by Justice Brennan. In the immediate aftermath of Jus-

LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 (1994) (describing Justice Marshall's role as a lawyer before he became a Justice in many Supreme Court cases).

62. 435 U.S. 519 (1978).

63. *Id.* at 548.

64. While acknowledging that "NEPA does set forth significant substantive goals for the [n]ation," the Court's opinion went on to provide that "its mandate . . . is essentially procedural." *Id.* at 558.

65. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980) (stating that NEPA's mandate is "only" procedural).

66. See Memorandum from William J. Brennan, Jr., Justice, U.S. Supreme Court, to the Conference (Feb. 10, 1978), *Vt. Yankee*, 435 U.S. 519 (No. 76-419) (on file with the Library of Congress in The Brennan Papers) (circulating second draft per curiam opinion); Memorandum from William J. Brennan, Jr., Justice, U.S. Supreme Court, to the Conference (Jan. 12, 1978), *Vt. Yankee*, 435 U.S. 519 (No. 76-419) (on file with the Library of Congress in The Brennan Papers) (attaching first draft per curiam opinion).

67. See *supra* note 66 and accompanying text.

68. Memorandum from William H. Rehnquist, Justice, U.S. Supreme Court (Feb. 24, 1978), *Vt. Yankee*, 435 U.S. 519 (No. 76-419) (on file with the Library of Congress in The Blackmun Papers).

tice Rehnquist's circulation of his "Memorandum," Justice Brennan ended his effort to kill the case—"now that all this effort has been spent."⁶⁹

Justice Rehnquist did all this with charm and grace, as suggested by the tenor of the subsequent correspondence between Justices Brennan and Rehnquist about *Vermont Yankee*.⁷⁰ Justice Brennan was one of the best on the Court in persuading others, and he could not help but admire Justice Rehnquist's handiwork. In one letter to Justice Rehnquist, Justice Brennan, referring to a recent conversation with Justice Byron White, told Justice Rehnquist he was "a damned good fisherman" and "[i]ndeed, so good that I now give up the sporting fight and, again like Byron, 'acquiesce' in your catch in these cases."⁷¹ And in a subsequent letter dated one week later to Justice Rehnquist, Justice Brennan added: "Just to complete the meal of crow, I also acquiesce in your opinion for the Court."⁷² The Court's final opinion was unanimous.⁷³

B. *The Difference a Supreme Court Advocate Can Make*

The second lesson I learned is what a difference an effective, strategic Supreme Court advocate can make at the lectern before the Court. NEPA plaintiffs have been at a strategic disadvantage in the Supreme Court. Their principal opponent is always the Solicitor General because a federal agency is always the defendant. NEPA plaintiffs therefore invariably face the best advocate there is before the Court—the Solicitor General and the attorneys within the Solicitor General's office. They know the Court, the Justices, and how best to persuade them. Solicitor General petitions are granted at a much higher rate (approximately seventy percent of the time), which is "orders of magnitude higher" than for advocates in general (three to four percent of the time).⁷⁴

69. Memorandum from William J. Brennan, Jr., Justice, U.S. Supreme Court, to William H. Rehnquist, Justice, U.S. Supreme Court 1 (Feb. 27, 1978), *Vt. Yankee*, 435 U.S. 519 (No. 76-419) (on file with the Library of Congress in The Blackmun Papers).

70. See Letter from William H. Rehnquist, Justice, U.S. Supreme Court, to William J. Brennan, Jr., Justice, U.S. Supreme Court 1 (Feb. 27, 1978), *Vt. Yankee*, 435 U.S. 519 (No. 76-419) (on file with the Library of Congress in The Blackmun Papers) ("I think I can make some of the accommodations which you specify in your letter, but am more doubtful about some of the others."); Letter from William H. Rehnquist, Justice, U.S. Supreme Court, to Thurgood Marshall, Justice, U.S. Supreme Court 1 (Mar. 6, 1978), *Vt. Yankee*, 435 U.S. 519 (No. 76-419) (on file with the Library of Congress in The Blackmun Papers) ("I do not think we are far apart in substance . . . Since I am dictating this in the office on Saturday, and I really do not know how our filing system works, I cannot locate the earlier draft.").

71. Letter from William J. Brennan, Jr., Justice, U.S. Supreme Court, to William H. Rehnquist, Justice, U.S. Supreme Court (Mar. 20, 1978), *Vt. Yankee*, 435 U.S. 519 (No. 76-419) (on file with the Library of Congress in The Blackmun Papers).

72. Letter from William J. Brennan, Jr., Justice, U.S. Supreme Court, to William H. Rehnquist, Justice, U.S. Supreme Court (Mar. 27, 1978), *Vt. Yankee*, 435 U.S. 519 (No. 76-419) (on file with the Library of Congress in The Blackmun Papers).

73. *Vt. Yankee*, 435 U.S. at 521.

74. Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1493–94 (2008).

The Supreme Court's NEPA cases reflect the effectiveness of the Solicitor General's advocacy and the personal papers of the Justices reveal a more nuanced story than just the Solicitor General "winning" seventeen NEPA cases on the merits. In particular, the Solicitor General frequently wins by knowing when *not* to seek Supreme Court review of potential losing arguments before the Court. The Solicitor General will accordingly reject a federal agency's request that the government seek Supreme Court review of a NEPA loss in a federal court of appeals because the risk of a loss is too great. Of course, a decision by the Solicitor General not to seek review on behalf of a federal agency defendant does not preclude an industry defendant from seeking Supreme Court review, but the absence of a federal government petition in such circumstances is well nigh preclusive. After all, if the Solicitor General does not support granting certiorari, why should the Court bother? NEPA's requirements apply directly only to federal agency action, and if the federal agency is willing to live with the adverse court ruling, that would seem to be the end of the matter.⁷⁵

Rather than abandon a case completely, the Solicitor General can also maintain the federal government's perfect record by abandoning weaker legal arguments within a case. As described below,⁷⁶ the Solicitor General has done just that in NEPA cases—strategically abandoning potentially losing arguments made below and conceding away significant points in order to narrow the issue on appeal. Sometimes the Solicitor General has even conceded away much of the case in order to keep it "winnable." Knowing precisely how, when, and where to shed parts of a case requires enormous expertise about the Court.

Additionally, the papers show how effective the Solicitor General has been in thwarting environmentalists' efforts to obtain Supreme Court review of a lower court ruling rejecting their NEPA arguments. The Solicitor General has used several techniques in successfully opposing certiorari, but one particularly effective technique has been to use the mere fact that the environmentalists lost in the lower courts as rendering the case too unimportant to warrant Supreme Court review. The Solicitor General's reasoning is straightforward: first, because the environmentalists lost below, there is no injunction; second, in the absence of an injunction, the government action has been proceeding; and third, as a practical matter, the NEPA issue is therefore quickly becoming moot given that the purpose of NEPA review is to ensure consideration of environmental consequences *before* and not *after* governmental action. The Solicitor General has used this formulaic response over and over, and with suc-

75. See, e.g., Preliminary Memorandum from the Cert Pool 11, 15–16 (Feb. 17, 1989), *Sun Exploration & Prod. Co. v. Lujan*, 489 U.S. 1012 (1989) (No. 88-865) (on file with the Library of Congress in The Blackmun Papers).

76. See *infra* notes 77–82 and accompanying text.

cess, even in instances when the Justices seemed inclined to think the legal issues presented were otherwise potentially important.⁷⁷

But even more impressive was what the federal government did in the Supreme Court to avoid what likely otherwise would have been a significant loss. The case is one that I have never seen cited in any law review: *Upper Pecos Ass'n v. Peterson*.⁷⁸ The Court granted certiorari in *Upper Pecos* in 1972, immediately after NEPA was passed. It was the first NEPA petition ever granted and the only time the Court has ever granted a NEPA petition filed by environmentalists.⁷⁹

So what happened in *Upper Pecos*? After the Supreme Court granted certiorari, the petitioner filed its merits brief, but then the government killed the case by effectively conceding away the merits, now advising that the federal agency would, after all, prepare the environmental impact statement (EIS) the environmental petitioners had been seeking.⁸⁰ The Solicitor General, accordingly, advised the Court to dismiss the case for mootness.⁸¹ The Court agreed, issuing no opinion, but instead vacating the case and sending it back to the lower court.⁸² In short, had the Solicitor General not, in effect, conceded the case away, the Supreme Court's very first NEPA opinion might well have been a major win for the environmentalists.

Normally, one might not think confessing error is good advocacy. But in fact, it can sometimes be the best advocacy because it will kill a case you are otherwise worried you are about to lose. The real trick here was confessing error *after* certiorari was granted. But that is what the Solicitor General did, and it was a smart move. Had the federal government not confessed error and stubbornly fought, as many lawyers tend to do, the government likely would have lost. And, if someone like Justice Douglas or another sympathetic Justice had received that opinion, who knows what wonderful language (for environmentalists) the opinion might have had. The federal government might have absorbed a huge loss that literally could have changed the history of NEPA. But effective Supreme Court advocacy instead made *Upper Pecos* into a case no one has ever heard of. This is also why it is still true to this day that environ-

77. See, e.g., Preliminary Memorandum from the Cert Pool 4 (Nov. 10, 1978), Tx. Comm. on Natural Res., 439 U.S. 966 (1978) (No. 78-485) (on file with the Library of Congress in The Blackmun Papers) ("With regard to whether an EIS should have been issued for clear-cutting prior to the development of the land management plans, that issue is timebound since those plans must be developed as of this month."); Preliminary Memorandum from the Cert Pool 6 (Apr. 12, 1974), Citizens Envtl. Council v. Brinegar, 416 U.S. 936 (1974) (No. 73-943) (on file with the Library of Congress in The Blackmun Papers) (acknowledging that the case presents a potentially cert-worthy issue but this "hardly seems like an appropriate vehicle" because the Court is presented "with a fait accompli").

78. 406 U.S. 944 (1972).

79. See *Upper Pecos Ass'n v. Stans*, 452 F.2d 1233 (10th Cir. 1971), petition for cert filed, U.S.L.W. 3434 (U.S. Mar. 6, 1972) (No. 71-1133).

80. See Memorandum for the Respondents Suggesting Mootness 4-5, *Upper Pecos*, 406 U.S. 944 (No. 71-1133).

81. *Id.* at 5.

82. *Upper Pecos*, 409 U.S. at 1021.

mentalists have never had a NEPA certiorari petition granted and decided on the merits. This is an extreme move, but the best of advocates know when to make it.

C. It Is a Mistake to View All Seventeen Cases As Just Losses

The third lesson I learned from in-depth review of the records in the High Court's NEPA cases is that the NEPA litigation results are not, at the end of the day, truly susceptible to binary analysis as simply wins or losses. It makes a difference who wrote the Court's opinion and what concessions the Supreme Court advocate made to win. Indeed, a close re-examination of the seventeen NEPA cases shows just that.

As described above, in many of the cases, the government achieved "victory" but only after first conceding away or abandoning what it had vigorously contested in the lower court. This is what happened in *Kleppe v. Sierra Club* in 1976.⁸³ The Solicitor General abandoned most of the government's lower court arguments,⁸⁴ conceding that the agency would have to do a national EIS for coal leasing, another EIS for local mining, and in some circumstances, a regional EIS too.⁸⁵ The Solicitor General adopted only a narrow, as applied argument in the Supreme Court and won.⁸⁶

That is also what happened in *Weinberger v. Catholic Action of Hawaii/Peace Education Project* in 1981.⁸⁷ The government gave up much of the case, conceding many of the claims it made in the lower court. It conceded NEPA applied to the Navy's classified actions⁸⁸ and conceded in a reply brief that the Navy had prepared an EIS as required by NEPA and Department of Defense regulations.⁸⁹ This narrowed the argument

83. See 427 U.S. 390 (1976).

84. *Sierra Club v. Morton*, 514 F.2d 856, 873 (D.C. Cir. 1975); see also Clerk Memorandum to Harry A. Blackmun, Justice, U.S. Supreme Court 4 (Apr. 23, 1976), *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) (No. 75-552) (on file with the Library of Congress in The Blackmun Papers) ("The SG's basic argument is that . . . there is only 'federal action' when the Government choses [sic] to call a set of actions one 'action' or 'proposal.'").

85. *Kleppe*, 427 U.S. at 399-400. Justice Blackmun summarized the Solicitor General's concession on the national plan at oral argument. See Oral Argument Notes of Harry A. Blackmun, Justice, U.S. Supreme Court (Apr. 28, 1976), *Kleppe*, 427 U.S. 390 (No. 75-552) (on file with the Library of Congress in The Blackmun Papers) ("St hs [sic] prepared a *natl* EIS. We concede we must."); Oral Argument Notes of Lewis F. Powell, Justice, U.S. Supreme Court (Apr. 28, 1976), *Kleppe*, 427 U.S. 390 (No. 75-552) (on file with William and Mary School of Law in The Powell Papers) ("Gov't has completed an I/S nation-wide. There is a national program and thus I/S was required. Also I/Ss have been filed for each individual mining operation.").

86. *Kleppe*, 427 U.S. at 409, 414-15.

87. See 454 U.S. 139 (1981).

88. Clerk Memorandum to Harry A. Blackmun, Justice, U.S. Supreme Court 7 (Aug. 10, 1981), *Weinberger*, 454 U.S. 129 (No. 80-1377) (on file with the Library of Congress in The Blackmun Papers) ("The SG readily acknowledges that NEPA applies to all of the Navy's activities, classified as well as unclassified.").

89. Clerk Supplemental Memorandum to Harry A. Blackmun, Justice, U.S. Supreme Court 1 (n.d.), *Weinberger*, 454 U.S. 139 (No. 80-1377) (on file with the Library of Congress in The Blackmun Papers) ("The SG has filed a reply brief, which makes the hypothetical concession that, if nuclear

before the Court, and consequently, the Government won on the disclosure issue.⁹⁰

Once again, that is what happened in *Metropolitan Edison Co. v. People Against Nuclear Energy* in 1983.⁹¹ The government's principal argument in the D.C. Circuit Court was that mental health effects were not legally cognizable.⁹² The government jettisoned this argument in the Supreme Court, instead acknowledging they were cognizable and proposed a different theory,⁹³ on which the government then won.⁹⁴

In many other cases, the government has won only after the Court rejected the government's most sweeping arguments that would have cut back on NEPA's reach and instead included language that bolstered NEPA's application in future cases. This is what happened in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)* in 1973.⁹⁵ The Court rejected all of the government's broad theories in favor of a theory with little applicability beyond the facts of the case.⁹⁶ It was only after the Court narrowed the scope of the opinion that the decision became unanimous.⁹⁷ The case also endorsed a generous view of environmental plaintiff's Article III standing.⁹⁸ On balance, the case was actually a huge victory for environmentalists. This was not happenstance, as the papers show much negotiation among the Justices. Justice Stewart's original opinion was more skeptical on standing.⁹⁹ Only after Justice Blackmun threatened to deny Justice Stewart his majority by dissenting was the language changed right before the Term ended.¹⁰⁰

Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma evidenced the same pattern in 1976.¹⁰¹ The papers of the Justices show

weapons are stored at West Loch, "an appropriate environmental impact document has been prepared, as required by NEPA and Department of Defense regulations."').

90. *Weinberger*, 454 U.S. at 146 (citation omitted).

91. See 460 U.S. 766 (1983).

92. *People Against Nuclear Energy v. U.S. Nuclear Regulatory Comm'n*, 678 F.2d 222, 228 (D.C. Cir. 1982) ("[T]he Commission's brief contends that psychological distress is beyond the scope of NEPA because it is not readily quantifiable.").

93. Brief for the United States and the Nuclear Regulatory Commission 27, *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983) (No. 81-2399) ("Thus health effects, like any other class of effects of a federal action that may be cognizable under NEPA, are so only to the extent that they are proximately traceable to the impact of the federal action upon the natural or physical environment . . .").

94. *Metro*, 460 U.S. at 774.

95. See 412 U.S. 669 (1973).

96. *Id.* at 696-99.

97. *Id.* at 671.

98. *Id.* at 686-90.

99. Clerk Memorandum to Harry A. Blackmun, Justice, U.S. Supreme Court 2 (May 17, 1973), *SCRAP*, 412 U.S. 669 (No. 72-535) (on file with the Library of Congress in The Blackmun Papers).

100. Letter from Harry A. Blackmun, Justice, U.S. Supreme Court, to William J. Brennan, Jr., Justice, U.S. Supreme Court (June 6, 1973), *SCRAP*, 412 U.S. 669 (No. 72-535) (on file with the Library of Congress in The Blackmun Papers); Letter from Potter Stewart, Justice, U.S. Supreme Court, to Harry A. Blackmun, Justice, U.S. Supreme Court (June 6, 1973), *SCRAP*, 412 U.S. 669 (No. 72-535) (on file with the Library of Congress in The Blackmun Papers).

101. See 426 U.S. 776 (1976).

the Court took the case to issue a broad opinion cutting back on NEPA. This was evident at the initial certiorari stage during the vote and discussion in December 1975, where Justices Stewart, Brennan, White, and Rehnquist all favored granting certiorari and expressed concern about the reach of the ruling of the court of appeals.¹⁰² After oral argument, the conference vote was unanimous to reverse.¹⁰³ Chief Justice Burger assigned the opinion to Justice Thurgood Marshall. But Justice Marshall drafted an opinion bearing little resemblance to what was apparently the original rationale of the Justices during the conference vote, which had been to reject the environmentalist position on broad and sweeping grounds.¹⁰⁴ Justice Marshall instead grounded the Court's opinion in an extremely narrow view with little adverse precedential effect to environmentalists.¹⁰⁵ He also filled the opinion with language favorable to NEPA, much of it borrowed from D.C. Circuit Judge Skelly Wright's opinion in *Calvert Cliffs*.¹⁰⁶ Other chambers were apparently surprised, and although some of the language in Justice Marshall's initial draft opinion was taken out prior to publication of the final "Opinion of the Court," Justice Marshall's approach generally prevailed.¹⁰⁷

So while the environmentalists' losses were almost all unanimous, that unanimity was achieved at a price. There were frequent rejections of the government's broad arguments and inclusion of language favorable to environmentalists' more expansive views of NEPA in other contexts. So rather than reflect antipathy or apathy toward NEPA, unanimity was sometimes the result of active and sustained engagement by the Justices, or good faith efforts by executive branch lawyers within the Department of Justice's Environmental and Natural Resources Division and the Office of the Solicitor General to craft a more reasonable legal position.

102. Docket Sheet, *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776 (1976) (No. 75-510) (on file with the Washington and Lee School of Law in The Powell Papers) (recording the vote and comments of individual Justices at conference on that date concerning whether certiorari should be granted).

103. Notes on Conference Vote from Harry A. Blackmun, Justice, U.S. Supreme Court (Apr. 30, 1976), *Flint Ridge*, 426 U.S. 776 (No. 75-510) (on file with the Library of Congress in The Blackmun Papers).

104. Preliminary Memorandum from the Cert Pool 6 (Dec. 1, 1975), *Flint Ridge*, 426 U.S. 776 (No. 75-510) (on file with the Library of Congress in The Blackmun Papers) (summarizing the Solicitor General's argument that "[t]he purpose of NEPA, to make agencies consider environmental factors in their decision-making, does not apply in the case of the Disclosure Act, since HUD has no substantive authority over the developer and does not even pass on the 'merits' of his project[.]").

105. Clerk Memorandum to Harry A. Blackmun, Justice, U.S. Supreme Court (June 3, 1976), *Flint Ridge*, 426 U.S. 776 (No. 75-510) (on file with the Library of Congress in The Blackmun Papers) ("This one has a surprise in it. I had thought that CA10's holding that an impact statement was required in connection with a real estate development's 'statement of record' was going to be reversed on the broad ground that no EIS is required because the HUD Secretary has absolutely no discretion bearing on environmental issues. Instead, Justice Marshall has chosen the narrow ground . . .").

106. *Flint Ridge*, 426 U.S. at 787; see also Draft Opinion of Thurgood Marshall, Justice, U.S. Supreme Court 6 (June 1, 1976), *Flint Ridge*, 426 U.S. 776 (No. 75-510) (on file with the Library of Congress in The Blackmun Papers) (quoting from Judge Wright's *Calvert Cliffs* opinion).

107. *Flint Ridge*, 426 U.S. at 792-93.

III. BROADER IMPLICATIONS OF THE THREE LESSONS

By highlighting what a difference Supreme Court advocacy makes, the NEPA cases underscore how important it is to ensure that such advocacy skills are not disproportionately and systematically enlisted on behalf of some interests to the detriment of others. Otherwise, there is a real danger that the Court's docket and rulings will be skewed. Indeed, my study of the NEPA cases is what prompted me both to undertake a broader examination of the impact of advocacy before the Court beyond NEPA and to conclude that we currently have a problem, especially at the jurisdictional stage when the Court grants review.¹⁰⁸

Through most of the twentieth century, the only entity with that kind of sustained edge in Supreme Court advocacy skills was the Solicitor General. Outside of the Solicitor General's office, there was no expert private Supreme Court Bar.¹⁰⁹ There were no repeat players of the kind seen in the Bar's heyday in the early nineteenth century when a few remarkable attorneys, such as Daniel Webster, William Pinkney, William Wirt, and Francis Scott Key, dominated the field.¹¹⁰ This is why Chief Justice Rehnquist was correct in 1986 when he said there was no Supreme Court Bar today.¹¹¹

But what Chief Justice Rehnquist did not then appreciate is how at that very moment one was being recreated. The catalyst was the work of two people: former Solicitor General Rex Lee and a young partner, former University of Illinois College of Law Professor, Carter Phillips.¹¹² In the late 1980s, the two together demonstrated that a private law firm could maintain a profitable Supreme Court practice by knowing how to get cases granted.¹¹³ At the law firm of Sidley Austin, Lee and Phillips repeatedly succeeded in securing grants of certiorari for their private sector clients during the Supreme Court's 1985 and 1986 October Terms.¹¹⁴ In the wake of such success, firms in other cities sought to replicate these results by establishing their own Supreme Court practices. First, several Chicago law firms—competitors of Sidley Austin—created competing Supreme Court practices, followed by some D.C. firms.¹¹⁵ Then more D.C. law firms joined, then California firms, and then a wave of Texas firms.¹¹⁶ Many states have also taken notice by creating or rejuvenating state Solicitor General positions, and these state advocates are quickly

108. See Richard J. Lazarus, *Docket Capture at the High Court*, 199 YALE L.J. ONLINE 89, 89–90 (2009); Lazarus, *supra* note 74, at 1490–91.

109. Lazarus, *supra* note 74, at 1497.

110. *Id.* at 1489.

111. *Id.* at 1497.

112. See *id.* at 1498; Carter G. Phillips, *Tribute to the Honorable Rex E. Lee, Solicitor General of the United States 1981–85*, 3 J. APP. PRAC. & PROCESS 557, 564–68 (2001).

113. Lazarus, *supra* note 74, at 1498–99.

114. *Id.* at 1498.

115. *Id.* at 1499–1500.

116. *Id.* at 1500.

developing expertise with the Supreme Court as well.¹¹⁷ Further, there has been a recent trend for leading law schools to create Supreme Court clinics that then take on cases pro bono for individuals or organizations.¹¹⁸

The hardest thing a Supreme Court advocate can do is to get certiorari granted. There are thousands of petitions, and only a few are granted. But that is exactly what these private Supreme Court advocates are now doing so well on behalf of their clients.

Putting aside the office of the Solicitor General, the expert Supreme Court Bar was responsible for 5.7% of the successful certiorari grants in October Term 1980.¹¹⁹ By October Term 2000, that number had jumped to 25%.¹²⁰ By October Term 2005 it was 36%, then 44% by the 2006 October Term.¹²¹ In October Term 2007, it topped 50% for first time, going up to 53.8%.¹²² I recently crunched the numbers for the October Term 2008 and the percentage was higher still—55.5%.¹²³

Why do I think this is a problem?¹²⁴ The Supreme Court of the United States is an extremely important governmental institution with limited time and resources. The public has every reason to expect the Justices will expend the Court's limited resources on the legal issues most important to the nation and not merely to those who can afford to pay the top dollar the private sector Supreme Court Bar understandably charges or to those who represent interests that do not create conflicts with the Bar's business clients.

Of particular concern to me is how this imbalance has affected the Court's environmental docket. During the past several terms, the private Supreme Court Bar has moved into representing business clients in environmental cases.¹²⁵ Businesses have appreciated advocacy by such experts. This has had a palpable effect. The Court has not only taken more cases, but it has also taken cases that otherwise seemed to lack bare indicia of being worthy of certiorari.¹²⁶ For example, in October Term 2008, the private Supreme Court Bar succeeded in getting certiorari granted on four environmental cases: *Entergy Corp. v. Riverkeeper, Inc.*,¹²⁷ *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*,¹²⁸

117. *Id.* at 1501.

118. *Id.* at 1502.

119. *Id.* at 1516.

120. *Id.* at 1516–17.

121. *Id.* at 1517.

122. *Id.*

123. Lazarus, *supra* note 108, at 90.

124. Some of the ideas expressed in this portion of the Article concerning the adverse institutional impact of the rise of an expert private sector Supreme Court Bar were first expressed in an article appearing in the *Yale Law Journal Online*. *See id.*

125. *Id.*

126. *Id.* at 91–92.

127. 129 S. Ct. 1498, 1501–02 (2009). I served as counsel of record for respondent Riverkeeper in this case, after the Court granted plenary review.

128. 129 S. Ct. 2458, 2462–63 (2009).

Shell Oil v. United States,¹²⁹ and *Burlington Northern and Santa Fe Railway Co. v. United States*.¹³⁰ And they have won in case after case.

There were not as many environmental cases before the Court in October Term 2009, but the Court's docket did include the seventeenth NEPA case, *Monsanto v. Geertson Seed Farms, Inc.*¹³¹ The case is significant in several respects. First, fitting the historical pattern, the environmentalists were the winning party in the lower courts.¹³² In a second respect, however, the *Monsanto* case differs from the prior sixteen NEPA cases decided on the merits: neither the Solicitor General nor the government agency that lost below sought Supreme Court review.¹³³ Instead, it was the industry intervenor, alone, who sought certiorari.¹³⁴ Unlike in the past, the Court granted review, which may be explained in part by the additional factor that the industry was represented by one of the nation's best private-sector Supreme Court counsel—Maureen Mahoney of Latham & Watkins LLP—in other words, the kind of expert counsel that has proven so successful in recent years in persuading the Court to grant certiorari to cases that in the past would have been readily denied further review.¹³⁵ Finally, although the Court did reverse the court of appeals judgment, which had been favorable to the environmental plaintiffs, the practical effect of the Court's ruling is far more nuanced than the mere fact of “reversal” suggests.¹³⁶ In particular, the opinion includes favorable language endorsing the environmental plaintiffs' view of Article III standing.¹³⁷ Also, the industry petitioner did not seek review of the trial court's ruling that the federal agency had violated NEPA,¹³⁸ and the Court reversed primarily on the ground that the court of appeals erred in issuing an injunction because an injunction was largely unnecessary to

129. Case consolidated with *Burlington Northern & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870 (2009). See *Burlington Northern v. United States*, 556 U.S. ___ (2009) (No. 07-1601), available at http://www.oyez.org/cases/2000-2009/2008/2008_07_1601.

130. 129 S. Ct. 1870, 1877 (2009).

131. As described in this Article's opening footnote, the Court decided a seventeenth NEPA case on the merits a few months after I delivered the Baum lecture in February 2010. See *supra* note † and accompanying text. As originally noted in that lecture, the Court granted review in *Monsanto* on January 15, 2010, just a few weeks before the Baum lecture. See SUPREME COURT OF THE UNITED STATES, *Granted and Noted List October Term 2009*, <http://www.supremecourt.gov/orders/09grantednotedlist.aspx> (last visited Oct. 23, 2011).

132. *Monsanto*, 130 S. Ct. 2743, 2749 (2010).

133. See Petition for Writ of Certiorari, *Monsanto*, 130 S. Ct. 2743 (No. 09-475). I served as cocounsel for the respondents in this case after the Court granted review.

134. *Id.*

135. See *Maureen E. Mahoney*, LATHAM & WATKINS LLP, <http://www.lw.com/attorneys.aspx?page=attorneybio&attno=00571> (last visited Oct. 23, 2011) (biography of Maureen Mahoney). Maureen Mahoney served as counsel of record at the jurisdictional stage but former Solicitor General Greg Garre, who joined the firm after the petition was granted, became counsel of record for petition for the briefing on the merits and oral argument in the case. Compare Petition for a Writ of Certiorari, *supra* note 133, with Brief for Petitioners, *Monsanto*, 130 S. Ct. 2743 (No. 09-475), and Oral Argument Transcript, *Monsanto*, 130 S. Ct. 2743 (No. 09-475).

136. See *Monsanto*, 130 S. Ct. at 2760–62.

137. *Id.* at 2754–56.

138. *Id.* at 2752.

preserve their victory on the merits.¹³⁹ As a practical matter, the environmental plaintiffs lost very little in the Court.

IV. CONCLUSION

My claim today is not that zero for seventeen is really seventeen for zero. It is certainly much more satisfying to have the last word in the opinion be “affirmed” when you are the respondent before the Supreme Court. It is likewise far more satisfying not to have all of your certiorari petitions denied. There is no question that NEPA has not been a big winner in the Supreme Court. But neither has it been the overwhelming loser that most legal scholars, including myself, have too quickly assumed NEPA to be without qualification. In fact, there have been significant victories for environmental NEPA plaintiffs in those “lost” cases.

More broadly, a closer look at the NEPA cases makes clear what a difference the advocacy skills of Supreme Court litigators and Justices can make. An effective Supreme Court advocate can play a significant role in how a case is pitched to the Court and, by so doing, can have a profound influence on both whether the Supreme Court grants plenary review and the content of the Court’s opinion in those cases the Court decides on the merits. The content of the Court’s opinion is almost always far more important than the formal judgment. For that same reason, however, it is all the more important to improve advocacy skills on behalf of those unable to afford the high fees charged by the expert Supreme Court Bar or to restructure the Court’s procedures in an effort to even the playing field between expert and nonexpert members of the Court’s Bar.

Further, the significance of advocacy is not limited to one side of the lectern. Advocacy continues after arguments close and the Chief Justice declares, “The case is submitted.” That is when the Justices take over advocacy in their deliberations and writing. An effective Justice does far more than just vote. The full measure of a Justice extends to his or her participation in the internal Court deliberations and the production of the “Opinion of the Court.” It therefore takes a good lawyer to be a good Justice. This is something a President and Senate should always have foremost in mind when considering appointments to the Supreme Court. The courts, including the Supreme Court, are best served when those standing before them and those sitting within them possess all the skills of an excellent lawyer.

Of course, that is what Victor Stone so well captured about David Baum in his comments on Professor Baum at his memorial here at the University of Illinois College of Law, now decades ago: Professor Baum’s understanding of the importance of law and the essentials of legal educa-

139. *Id.* at 2759–60.

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tion. That is why, in Victor Stone's words more than thirty-six years ago, "Conscientious and judicial in his work, [David Baum] did not spare his students or himself from the heavy burden of penetrating examination of and searching reflection on the complexities of the law, its intellectual and moral challenges, its pragmatic dilemmas."¹⁴⁰ That is what truly excellent lawyers must do. And that is also why I am so pleased and honored to have had this opportunity to return home to deliver this talk in honor of David Baum.

140. Stone, *supra* note 2, at 5.

