High Court Not In A State Of Denial

On January 12, the Supreme Court is scheduled to announce whether it is granting review in U.S. Environmental Protection Agency v. Sierra Club, which raises the question whether the Sierra Club may recover attorney's fees in a Clean Air Act case where the club obtained a favorable settlement with EPA but in the absence of a formal court order such as a consent decree. Because the Court agrees to hear fewer than 80 cases a year out of the thousands of requests that it receives, a grant of certiorari in an environmental law case is normally beyond the Court's immediate attention.

For example, in Alaska v. EPA, argued in October, the Court is considering whether EPA or Alaska has the penultimate authority under the Clean Air Act to determine best available control technology in the act's Prevention of Significant Deterioration program. The most exhaustive search of lower court precedent will not yield any authority in direct conflict with the Ninth Circuit ruling under review, or even substantial litigation on the question presented.

So too, the Court on January 20 will be hearing oral argument in Bed Roc Limited v. U.S., which raises the show-stopping issue whether a reservation of "valuable minerals" in a governmental conveyance of public lands under the Pittman Underwood Water Act extends to sand and gravel. The Pittman Act, which applies only to Nevada, would be unlikely to make the top 500 federal environmental laws.

Finally, although the solicitor general raised in his successful petitions in Cheney and Public Citizen the specter of massive judicial interference with the prerogatives of the president and vice president, both those lower court rulings were easily susceptible to being narrowly cabined. At most, unlike some of the other cases now before the Court, these cases offered credible cert petitions, but hardly compelling ones.

Examination of the seven cases currently pending before the Court reveals, moreover, an unsettling asymmetry. In each case, the lower court ruled in favor of the legal position supported by environmentalists and against the position favored by those subject to federal environmental regulation. Hence, to the extent that the Court seems especially willing to term to grant review in environmental cases, it appears to be doing so only when those seeking review are complaining that the lower courts have gone too far in extending environmental protections rather than the converse. No similar complete asymmetry is present in other substantive areas, such as federal criminal procedure law, where one regularly sees successful petitions for review filed by parties on either side of a legal issue.

Of course, a grant of Supreme Court review does not automatically lead to reversal. After detailed review, it is not unusual for the Court to affirm judgments in cases in which it had not anticipated at the time certiorari was granted. But, whatever the ultimate outcome in the seven pending environmental cases, the skewing of the Court's docket is still troubling. It suggests either an unfortunate apprehension about the Court — which prompts environmentalists who have lost below not to seek High Court review — or the even worse possibility that any such possible apprehension is reasonable because a majority of the Court is in fact more skeptical of lower court rulings favorable to environmentalists. In either event, the Court appears to stand ready only to reverse rulings that extend environmental protections too far rather than similarly to correct those that err by not going far enough.

We may know by the time you read this whether the Court in EPA v. Sierra Club decides to make it eight for the term, making it one of the most significant for environmental law in years. Whether certiorari was warranted in the first instance, a Supreme Court decision is almost always significant. Hopefully, the final opinions will not be as one-sided as the grants of review and, even more fundamentally, the Court can strive to maintain a more balanced docket in future years.

Richard Lazarus is on the law faculty of Georgetown University. He can be reached at lazarusr@law.georgetown.edu.

By Richard Lazarus