New Study Suggests Veteran Advocates Sway Supreme Court

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For the elite of the Supreme Court Bar, this is the Gilded Age. Or call it the Age of the Guild.

The Court's docket continues to shrink. Yet dramatic new research by Georgetown University Law Center professor Richard Lazarus shows that more and more of the Court's cases are brought and argued by the seasoned veterans who have honed Supreme Court practice into a fine, and exclusive, art form. Last term, fully 44 percent of the nongovernment petitions that were granted review by the Court were filed by such veteran advocates. In 1980, that number was less than 6 percent.

The justices and their law clerks, it seems clear, pay special attention to the briefs and arguments of these virtuosos of the bar. Chief Justice John Roberts Jr., after all, was once one of them, arguing 39 cases to the Court in his days as an appellate lawyer in the private and public sector. And Lazarus cites a 2004 survey published in the Journal of Law & Politics indicating that 88 percent of law clerks openly acknowledged giving extra consideration to briefs filed by what one called the "inner circle" of the Supreme Court Bar. The clerks, who play a crucial role in screening incoming cases for their justices, often then go to work for these same firms, garnering hiring bonuses that this year have reached $250,000.

But this is not just a "rich get richer" tale about lawyers. Lazarus, founder of the university's Supreme Court Institute, goes a step further to make the claim that the increasing dominance of the veteran Supreme Court Bar is beginning to have an impact on the Court's doctrine.

The study, set for publication soon in the Georgetown University Law Journal, draws a direct and controversial connection between the growth of the Supreme Court Bar and the Court's widely noted new pro-business tilt.

Clients willing to plunk down $100,000 or more for a veteran advocate to petition the Court are elbowing aside the civil rights, civil liberties and labor groups that once helped set the Court's agenda, the study suggests. Recent breakthrough victories for business in tort, antitrust and other areas of the law can't be explained totally by the Court's overall conservative majority, Lazarus says. The elite Supreme Court Bar has played a pivotal role, he asserts.

"The re-emergence of a Supreme Court Bar of elite attorneys ... is quietly transforming the Court and the nation's laws," says Lazarus, recalling the early 1800s, when Daniel Webster, Francis Scott Key and a handful of other lawyers dominated arguments at the Court in landmark cases. Increasingly, Lazarus says, the modern-day Court is ruling in favor of "monied interests more able to pay for such expertise."

Lazarus calls on the Supreme Court Bar -- and the Court itself -- to take steps to reduce the imbalance in advocacy
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between the well-paid pro-business veterans and those representing other parties, such as criminal defendants and employment discrimination, tort and environmental plaintiffs. "The advocacy gap in the Court between those who can pay and those who cannot," says Lazarus, is "bad for the legal profession, the Court, and its rulings."

LEVELING THE FIELD

But some of the very lawyers Lazarus pinpoints say the problem, if there is one, is already being addressed by increased pro bono work by the veterans and by the recent proliferation of law school Supreme Court clinics that spread their expertise more broadly among parties that need help. Increased competition for fewer cases also means that virtually every private party has multiple offers of help from Supreme Court specialists.

The veterans also dispute the notion that the bar is steering the Court in any direction, pro-business or otherwise.

"Effective advocacy can impact the Court, but the heightened success of business has been in the works for 25 years," says Latham & Watkins' Maureen Mahoney, who argued four cases last term. "And you've got seven Republican appointees on this Court who have a high interest in these cases."

Akin Gump Strauss Hauer & Feld's Thomas Goldstein makes a similar point. "We advocates tend to think it's all about the lawyering. But the most important trend by far is the increasing conservatism and pro-business orientation of the justices themselves." All the highly polished pro-business petitions in the world, he adds, "wouldn't get anywhere on a Court with nine Bill Brennans," a reference to the late liberal lion, Justice William Brennan Jr. [Note: Goldstein is an occasional contributor to Legal Times.]

Adds O'Melveny & Myers' Walter Dellinger, "The Supreme Court has such capacity to do its own work. It's increasingly sensitive to the economic consequences of litigation and regulation. I don't think I'd attribute that to the bar."

Robert Long of Covington & Burling also points out, "We all file a lot of cases that are denied." But he agrees with Lazarus that these are salad days for the Supreme Court Bar, in part because of "the reflected luster" of having one of its own, Roberts, occupying the Court's center chair.

In response, Lazarus acknowledges that "the bar alone does not determine the docket." But he asserts the modern Supreme Court Bar is having dramatically more impact than in the past. "If we had essentially the same Court but not this kind of bar, we would not have the same number of business cases."

As for leveling the playing field, Dellinger's own portfolio of cases this term indicates that the high priests of the high court bar can mix business with pro bono clients. Dellinger represents ExxonMobil in its challenge to the multibillion-dollar damage verdict in the Exxon Valdez oil spill case. But his name is also on a petition filed for Humberto Cuellar, a drug smuggler who is challenging the federal money-laundering statute. The Court granted review in the case Oct. 15. Dellinger won't argue the case himself, deferring to a federal defender in Texas, but he says it represents an effort by his firm -- and the Harvard Law School clinic he helps run -- to assist first-time advocates even before the Court grants review.

Lazarus acknowledges the role of the clinics and law firms such as O'Melveny, Sidley Austin, WilmerHale, Jenner & Block, and Mayer Brown, among others, which have worked for years -- mostly unheralded -- to improve advocacy before the high court for criminal defendants and death row inmates. But more needs to be done, he says, including the Court itself granting argument time to established groups such as the National Association of Criminal Defense Lawyers when a defendant's advocate is a first-timer or needs help.

Lazarus' concern has been growing in recent years. Last term, his institute ran moot courts for more than 90 percent of the cases argued before the high court. And in his own field of environmental law, Lazarus has researched the record of near-total defeat for environmental plaintiffs challenging government action or inaction.

From both experiences, Lazarus concludes, "Good advocacy really matters." To a degree that surprised him, Lazarus found that the quality of the briefing and of the oral advocacy -- the way that cases are framed, the arguments that are stressed, and the ones that are omitted -- have a powerful impact on the justices, as independent as they may be.

As an example, Lazarus charts the history of the business community's efforts to convince the Supreme Court that there is a constitutional limit to punitive damages in tort cases. By placing seven of the eight cases in the hands of veterans such as Mayer Brown's Andrew Frey, Theodore Olson of Gibson, Dunn & Crutchler, and Sidley Austin's Carter Phillips, business groups were able to make slow but steady progress -- culminating in last term's Philip Morris v. Williams. In some ways, Lazarus says, the long march toward a favorable outcome on punitive damages mirrored the late Thurgood Marshall's strategic litigation campaign before he became a justice, leading to a civil rights victory in Brown v. Board of Education.
The Court's renewed interest in antitrust issues also illustrates the elite bar's power to achieve success, says Lazarus, "not simply by discerning the priorities and interests of the justices but by changing them." The Court heard only two antitrust cases between 1992 and 2002, but since then it has decided 10. All 10 were brought by antitrust defendants appealing unfavorable decisions below, and all 10 were represented by seasoned veterans.

But the dominance of the Supreme Court Bar begins at the petition stage. The Court accepts fewer than 100 of the nearly 10,000 petitions it receives yearly. Yet the veterans, who know how to make a petition attractive to the justices and their clerks, sometimes achieve a 20 percent success rate or higher, Lazarus says -- something that would have been unheard of 20 years ago. In its first year of existence, for example, Goldstein's Stanford Law School clinic worked on four petitions -- and all four were granted.

Given the Court's shrunken docket, the veteran advocates are also busy writing amicus briefs, which, Lazarus documents, have grown in importance at both the petition stage and the merits stage. The number of amicus briefs supporting a petition for review have increased 40 percent in the last 25 years, and petitions that are accompanied by these briefs have a significantly higher chance of being accepted. Once the case is granted, Lazarus calculates, an average of nine amicus briefs are filed in advance of oral argument, triple the number 20 years earlier.

**TAKING NO PRISONERS**

The apex of amicus brief influence came in the arguments in *Grutter v. Bollinger*, the landmark 2003 affirmative action case. Justices posed 19 questions about the brief filed by retired military officials supporting affirmative action. Several referred to it as the "Carter Phillips brief," even though the counsel of record was his Sidley Austin partner Virginia Seitz, herself a veteran of the Supreme Court Bar.

The dominance of the specialists is especially visible at oral argument, Lazarus' study indicates. Last term, 26 percent of the advocates who argued before the Court were veterans -- defined as having argued five cases themselves or coming from an organization that has argued 10 cases.

But it is also at oral argument where the veterans say they earn their fees. The intense barrage of high-level questions from justices is not for the faint of heart, Dellinger says. "You can't evade answering their questions," he says. "If you do, they will hunt you down. They take no prisoners."

David Frederick of Kellogg, Huber, Hansen, Todd, Evans & Figel says, "The specialization has arisen at least in part in response to the Court's uniquely vigorous questioning style, which makes a Supreme Court argument quite unlike an argument in any other court."

Lazarus' article recalls oral arguments on April 25, when Frederick and five other advocates stood before the Court to argue in three cases. Two of the lawyers had argued more than 45 cases each before the justices, and all but one had argued more than 20. The "rookie" had five under his belt. Frederick, arguing his 21st case, had also appeared the week before. Lazarus writes of that day, "The modern Supreme Court Bar had arrived."