

# Environmental Law in the Age of the Supreme Court Bar

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## I. INTRODUCTION

The rise of the modern Supreme Court Bar has been well documented.<sup>1</sup> Thirty years ago, few private attorneys could boast expertise before the Supreme Court.<sup>2</sup> Today, an elite private sector group of attorneys, many of whom previously served in the Solicitor General’s office, dominate advocacy before the Court.<sup>3</sup> An examination of Supreme Court cases between 2004 and 2012 demonstrates that “66 of the 17,000 [private] lawyers who petitioned the Supreme Court . . . were at least six times more likely” to succeed in having their petitions granted by the Court than were all other private lawyers during that period.<sup>4</sup> Between 2004 and 2014, thirty-four private lawyers argued at least five cases, and within that group, eight argued fifteen cases or more.<sup>5</sup> These

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<sup>1</sup> See Richard Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487 (2008) (describing the rise and influence of private attorneys before the Supreme Court); see also Joan Biskupic et al., *The Echo Chamber*, REUTERS (Dec. 8, 2014, 10:30 AM), <http://www.reuters.com/investigates/special-report/scotus/> (explaining how an elite group of private sector attorneys have come to dominate Supreme Court advocacy).

<sup>2</sup> See generally Lazarus, *supra* note 1.

<sup>3</sup> See generally Lazarus, *supra* note 1; Biskupic, *supra* note 1.

<sup>4</sup> Biskupic, *supra* note 1; “private” entails non-government lawyers.

<sup>5</sup> Biskupic, *supra* note 1 (The eight lawyers, in order of number of arguments presented, were Carter Phillips (36), David Frederick (30), Seth Waxman (28), Paul Clement (23), Jeffrey Fisher

eight lawyers have “made almost one of every five arguments the court heard from private attorneys [between 2004 and 2012].”<sup>6</sup> The rise of the Supreme Court Bar has led to concern that the Court’s docket and its rulings on the merits skew disproportionately in favor of the business community.<sup>7</sup> If this is true, it bodes ill not only for non-moneyed interests in general, but for environmental interests in particular.

This article examines the role of the Supreme Court Bar, its increase in representation of industry, and its corresponding influence on environmental law before the Supreme Court. How has industry fared, and how has the environment? Because the Solicitor General’s office also plays a significant role—perhaps the most significant role—in Supreme Court advocacy, this article also looks at government’s role in environmental law: which “side” has the federal government represented, and to what effect? The results of the analysis presented in this article are clear: over time industry, represented by the rising Supreme Court Bar, has enjoyed marked success in environmental litigation. But industry has not achieved this success on its own. The Solicitor General’s office has increasingly aligned itself with industry, and the Supreme Court has increasingly held in favor of those non-environmental interests. In short: environmental interests have not fared well before the Supreme Court.

To reach these conclusions, this article presents an analysis of Supreme Court environmental law decisions in the years leading up to and during the rise of the modern Supreme Court Bar.<sup>8</sup> For purposes of analysis, this period is divided into four parts: 1980 to 1989, 1990 to 1999, 2000 to 2009, and 2010 to the close of the 2014-2015 Supreme Court term. To adjust for the fewer number of years in this latter period, I have calculated statistics in terms of percentages. For the purpose of this article, “environmental” includes pollution cases<sup>9</sup> and cases involving the protection of species and wildlife. Natural resource management cases and regulatory takings cases are not included. Not all environmental cases are easily classified into “wins” or “losses” for the environment, and for the sake of analysis, some categorizations may be oversimplified. Where a case presents

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(21), Thomas Goldstein (20), Ted Olson (19), and Gregory Garre (15). Half of those lawyers’ arguments were for business, and Fisher is the only one of the eight who does not work at a law firm).

<sup>6</sup> *The Best Lawyers Money Can Buy*, N.Y. TIMES (Dec. 25, 2014), [http://www.nytimes.com/2014/12/26/opinion/the-best-lawyers-money-can-buy.html?\\_r=0](http://www.nytimes.com/2014/12/26/opinion/the-best-lawyers-money-can-buy.html?_r=0).

<sup>7</sup> See generally Lazarus, *supra* note 1 (explaining how the rise of the Supreme Court Bar has led to greater representation and advocacy on behalf of business interests).

<sup>8</sup> Although the role of experts at the certiorari stage is undoubtedly significant, this article has narrowed its inquiry to cases at the merits stage only.

<sup>9</sup> In this article, “pollution cases” includes only those cases dealing with pollutants traditionally regarded as harming the natural environment. For example, I have included *Industrial Union Dept., AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980) (OSHA case involving benzene), but not included *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981) (OSHA case involving cotton dust).

the risk of oversimplification, I have indicated as such.<sup>10</sup>

The first part of this article traces the increasing involvement of certain advocates and law firms in environmental law cases before the Supreme Court. The second part analyzes how industry interests have been represented, and their relative success over time. The article then considers how the government has positioned itself in environmental law cases and its corresponding success. The article concludes by addressing the concern that the government has increasingly aligned itself with business interests and presents recommendations for leveling the playing field in environmental law.

## II. PRACTITIONERS AND LAW FIRMS

Since 1980, the percentage of practitioners and law firms representing industry in more than one environmental case has steadily increased. From 1980 to 1989, for example, the Court decided thirty-three environmental law cases<sup>11</sup> where seventy different practitioners presented oral argument.<sup>12</sup> Nine

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<sup>10</sup> These complexities are indicated in footnotes and in the full list of cases attached as an appendix.

<sup>11</sup> The cases included in this time period are: (1) *Costle v. Pac. Legal Found.*, 445 U.S. 198 (1980); (2) *Harrison v. PPG Indus., Inc.*, 446 U.S. 578 (1980); (3) *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980); (4) *United States v. Ward*, 448 U.S. 242 (1980); (5) *Indus. Union Dept., AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980); (6) *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64 (1980); (7) *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); (8) *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304 (1981); (9) *Hodel v. Va. Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981); (10) *Hodel v. Indiana*, 452 U.S. 314 (1981); (11) *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981); (12) *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982); (13) *North Dakota v. United States*, 460 U.S. 300 (1983); (14) *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983); (15) *United States v. Stauffer Chemical Co.*, 464 U.S. 165 (1984); (16) *Sec'y of the Interior v. California*, 464 U.S. 312 (1984); (17) *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); (18) *Ohio v. Kovacs*, 469 U.S. 274 (1985); (19) *Chemical Mfrs. Ass'n v. Nat. Res. Def. Council, Inc.*, 470 U.S. 116 (1985); (20) *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729 (1985); (21) *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); (22) *Midatlantic Nat'l Bank v. N.J. Dept. Of Envtl. Prot.*, 474 U.S. 494 (1986); (23) *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986); (24) *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986); (25) *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987); (26) *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987); (27) *Tull v. United States*, 481 U.S. 412 (1987); (28) *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987); (29) *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987); (30) *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); (31) *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989); (32) *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989); (33) *Hallstrom v. Tillamook Cty.*, 493 U.S. 20 (1989).

<sup>12</sup> See cases cited *supra* note 11 (The practitioners were: William Alsup, Robert Best, Maryann Walsh, Charles Lettow, Telford Taylor, Peter Schiff, Edwin Kneedler, Stephen Jones, George Cohen, Edward Warren, Andrew Levander, George Freeman, Jr., Theodore Garrett, Kenneth Raschke, Jr., Harlon Dalton, Leonard Keyes, Elwin Zarwell, Joseph Karaganis, Peter Buscemi, Marshall Coleman, G. Daniel Kelley, Jr., Milton Conford, Alan Horowitz, Robert Corbin, Elinor Stillman, John Hodges, Robert Wefald, Barbara Etkind, Kathryn Oberly, Harold Tyler, Jr., Louis Claiborne, E. Edward Bruce, Rex Lee, Theodora Berger, Paul Bator, David Doniger, E. Dennis Muchnick, David Caldwell, Samuel Alito, Jr., Frances Dubrowski, Charles Rothfeld, Harold Reis,

practitioners argued more than once.<sup>13</sup> Of these nine, seven were attorneys in the Solicitor General's office, one was in the office of a state attorney general,<sup>14</sup> and only one represented industry.<sup>15</sup>

Table 1.<sup>16</sup>

Practitioner	Affiliation	Number of Appearances 1980-89
Andrew Levander	SG	2
Charles Lettow	Industry	3
William Alsup	SG	2
Alan Horowitz	SG	2
Kathryn Oberly	SG	3
Mary Jacobson	State AG	2
Lawrence Wallace	SG	2
Louis Claiborne	SG	2
Peter Buscemi	SG	2

The number of environmental cases heard during the next decade dropped precipitously.<sup>17</sup> From 1990 to 1999, thirty-two attorneys<sup>18</sup> argued in fifteen

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Martin Hodder, Edgar Washburn, A. Dennis Terrell, William McEnroe, Mary Jacobson, Robert Hermann, Daniel Gribbon, Jane Gootee, Roy Reardon, Peter Langrock, Lawrence Wallace, Linus Masouredis, Barbara Banke, Jeffrey Minear, Richard Nageotte, Jay Waldman, Donald B. Ayer, James Crawford, E. Barrett Prettyman, Jr., Andrew Pincus, Marilyn Miles, Charles Fried, David Bricklin, John F. Knorr, Robert Swift, Kim T. Buckley, I. Franklin Hunsaker, and Brian J. Martin).

<sup>13</sup> See *infra* Table 1.

<sup>14</sup> See *infra* Table 1. Mary Jacobson was a Deputy Attorney General for New Jersey. See *infra* Table 1.

<sup>15</sup> See *infra* Table 1. Another attorney representing industry, E. Barrett Prettyman, presented oral argument only once, but joined the appellant's brief in a second case. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987) (arguing); *Tull v. United States*, 481 U.S. 412 (1987) (joining appellant's brief).

<sup>16</sup> See cases cited *supra* note 11.

<sup>17</sup> See cases cited *infra* note 20. The Court's docket, however, also dropped significantly in the 1990s. See UNITED STATES CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES § 5 (129 ed. 2010), <https://www.census.gov/library/publications/2009/compendia/statab/129ed/law-enforcement-courts-prisons.html>. In 1980, for example, the Court issued 123 opinions. *Id.* By contrast, the Court issued only 112 opinions in 1990, and a mere 75 in 1995. *Id.* The drop in environmental cases thus more or less reflects the overall drop in cases.

<sup>18</sup> See cases cited *infra* note 20 (The practitioners were: Theodore Garrett, Lawrence Wallace, Michael Clapp, Richard Seamon, Barry Goldstein, Edward Warren, Robert Butkin, James Feldman, Jack Van Kley, Andrew Pincus, Edwin Kneeder, Bert Nettles, Harold Finn III, Thomas Casey, Brian O'Neill, Peter Schiff, William Collins, Betty Jo Christian, William Brashares, Howard Shapiro, Christine Gregoire, Lawrence Rosenthal, Jeffrey Minear, Richard Lazarus, Mark Schneider, John P. Zaimes, Daniel Romano, Sanford Stein, David Strauss, Irving Gornstein, Lois Schiffer, and

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environmental law cases<sup>19</sup> before the Court. Three attorneys—Lawrence Wallace, Edwin Kneedler, and Jeffrey Minear, all in the Solicitor General’s office—argued more than once.<sup>20</sup> Of the thirty-two lawyers, seven, including Wallace and Kneedler, had also argued before the Court in the 1980 to 1989 time period.<sup>21</sup>

Table 2.<sup>22</sup>

<b>Practitioner</b>	<b>Affiliation</b>	<b>Number of appearances 1980-89</b>	<b>Number of appearances 1990-99</b>	<b>Cumulative appearances</b>
Lawrence Wallace	SG	2	5	7
Theodore Garrett	Industry	1	1	2
Peter Schiff	State SG	1	1	2
Andrew Pincus	SG and industry	1	1	2
Edward Warren	Industry	1	1	2
Edwin Kneedler	SG	1	2	3
Jeffrey Minear	SG	1	2	3

The number of environmental law cases decided between 2000 and 2009 rose to twenty-one cases<sup>23</sup> with forty-one attorneys<sup>24</sup> arguing before the Court.

Kenneth Geller.)

<sup>19</sup> (1) *General Motors Corp. v. United States*, 496 U.S. 530 (1990); (2) *City of Burlington v. Dague*, 505 U.S. 557 (1992); (3) *Arkansas v. Oklahoma*, 503 U.S. 91 (1992); (4) *U.S. Dept. of Energy v. Ohio*, 503 U.S. 607 (1992); (5) *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992); (6) *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dept. of Nat. Res.*, 504 U.S. 353 (1992); (7) *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); (8) *New York v. United States*, 505 U.S. 144 (1992); (9) *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994); (10) *PUD No. 1 of Jefferson Cty. v. Wash. Dept. of Ecology*, 511 U.S. 700 (1994); (11) *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328 (1994); (12) *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994); (13) *Meghrig v. KFC W., Inc.*, 516 U.S. 479 (1996); (14) *Steel Co. v. Citizens for Better Env’t*, 523 U.S. 83 (1998); (15) *United States v. Bestfoods*, 524 U.S. 51 (1998).

<sup>20</sup> See *infra* Table 2.

<sup>21</sup> See *infra* Table 2.

<sup>22</sup> See cases cited *supra* notes 11, 20.

<sup>23</sup> (1) *Friends of Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167 (2000); (2) *United States v. Locke*, 529 U.S. 89 (2000); (3) *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); (4) *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001); (5) *Alaska Dept. of Envtl. Conservation v. EPA*, 540 U.S. 461 (2004); (6) *S. Fla. Water*

Despite the increase in environmental cases heard during this time period, the Court's docket remained as low, if not lower, than it had in the period from 1990 to 1999.<sup>25</sup> Of the forty-one attorneys who appeared before the Court, nine made more than one appearance.<sup>26</sup> Four of these were attorneys in the Solicitor General's office for all of their appearances, and two attorneys represented only industry.<sup>27</sup> Theodore Olson made one argument in the Solicitor General's Office and one argument as a private sector attorney for an industry client,<sup>28</sup> Timothy Bishop made two arguments on behalf of local government,<sup>29</sup> and Seth Waxman made one argument in the Solicitor General's office and one argument as a private sector attorney for a non-industry client.<sup>30</sup> An additional four lawyers also appeared before the Court in the previous decade, for a total of 13 attorneys who made multiple appearances when including two periods of time.<sup>31</sup>

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Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004); (7) Engine Mfrs. Ass'n v. S. Coast Air Quality Management Dist., 541 U.S. 246 (2004); (8) Dep't of Transp. v. Pub. Citizen, 541 U.S. 752 (2004); (9) Norton v. S. Utah Wilderness All., 542 U.S. 55 (2004); (10) Cooper Indus., Inc. v. Aviall Services, Inc., 543 U.S. 157 (2004); (11) S.D. Warren Co. v. Me. Bd. of Env'tl. Prot., 547 U.S. 370 (2006); (12) Rapanos v. United States, 547 U.S. 715 (2006); (13) Massachusetts v. EPA, 549 U.S. 497 (2007); (14) Env'tl. Def. v. Duke Energy Corp., 549 U.S. 561 (2007); (15) United States v. Atl. Research Corp., 551 U.S. 128 (2007); (16) Nat'l Ass'n of Homebuilders v. Def. of Wildlife, 551 U.S. 644 (2007); (17) Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008); (18) Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008); (19) Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009); (20) Burlington N. & Santa Fe Ry. Co. v. United States, 556 US 599 (2009); (21) Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261 (2009).

<sup>24</sup> See cases cited *supra* note 25 (The practitioners were: Bruce Terris, Jeffrey Minear, Donald Cockrill, C. Jonathan Benner, David Frederick, Timothy Bishop, William Collins, Lawrence Wallace, Seth Waxman, Judith French, Edward Warren, Jonathan Franklin, Thomas Hungar, Dexter Lehtinen, Carter Phillips, Ted Olson, Edwin Kneedler, Jonathan Weissglass, Paul Smith, William Reynolds, Richard Faulk, William Kayatta, Jr., G. Steven Rowe, Timothy Stoecker, M. Reed Hopper, Paul Clement, James Milkey, Gregory Garre, Sean Donahue, Owen Armstrong, Jr., Jay Geck, Eric Glitzenstein, Walter Dellinger, Jeffrey Fisher, Richard Kendall, Maureen Mahoney, Daryl Joseffer, Richard Lazarus, Kathleen Sullivan, Malcolm Stewart, and Thomas Waldo).

<sup>25</sup> See *infra* Table 8. For example, the Court issued 77 opinions in 2000 and 69 in 2005. See *id.*

<sup>26</sup> See *infra* Table 3.

<sup>27</sup> See *infra* Table 3.

<sup>28</sup> See Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246 (2004) (representing the government); Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261 (2009) (representing petitioner mining company, i.e., industry).

<sup>29</sup> See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001); S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004).

<sup>30</sup> See Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 459–60 (2001) (representing the government); Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246 (2004) (representing non-industry client).

<sup>31</sup> See *infra* Table 3.

Table 3.<sup>32</sup>

Practitioner	Affiliation	No. of appearances 1980-89	No. of Appearances 1990-99	No. of appearances 2000-09	Cumulative appearances
Lawrence Wallace	SG	2	5	1	8
Edward Warren	Industry	1	1	1	3
Edwin Kneedler	SG	1	2	3	6
Jeffrey Minear	SG	1	2	4	7
William Collins	State SG	-	1	1	2
Richard Lazarus	Environmental nonprofits	-	1	1	2
Thomas Hungar	SG	-	-	3	3
Theodore Olson	SG and Industry	-	-	2	2
Gregory Garre	SG	-	-	3	3
Carter Phillips	Industry	-	-	2	2
Timothy Bishop	Local government	-	-	2	2
Maureen Mahoney	Industry	-	-	2	2
Seth Waxman	SG once, as a WilmerHale attorney for Local Government once	-	-	2	2

Although a shorter period, twenty-five lawyers appeared before the Court<sup>33</sup> in eleven cases<sup>34</sup> from 2010 to the close of the 2014-2015 term. Four attorneys

<sup>32</sup> See cases cited *supra* notes 11, 20, 25.

<sup>33</sup> See cases cited *infra* note 35 (The practitioners were: Gregory Garre, Malcolm Stewart, Lawrence Robbins, Peter Keisler, Neal Katyal, Barbara Underwood, Damien Schiff, Carter Phillips, Michael Dreeben, Timothy Coates, Pratik Shah, Aaron Colangelo, Timothy Bishop, Jeffrey Fisher, Daniel Lerman, John Bash, Steven Rosenthal, Jonathan Mitchell, Brian Murray, Joseph Palmore, John Korzen, Donald Verrilli, Jr., Aaron Lindstrom, Paul Smith, and William Brownell).

<sup>34</sup> (1) *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010); (2) *Am. Elec. Power Co. v. Connecticut*, 131 S.Ct. 2527 (2011); (3) *Sackett v. EPA*, 132 S.Ct. 1367 (2012); (4) *S. Union Co. v.*

representing industry made multiple appearances between 2000 and 2015.<sup>35</sup>

Table 4.<sup>36</sup>

Practitioner	Affiliation	Number of Appearances 2000-09	Number of Appearances 2010-15	Cumulative Appearances
Gregory Garre	SG	3	1	4
Carter Phillips	Industry	2	1	3
Timothy Bishop	Industry	2	1	3
Malcolm Stewart	SG	1	4	5
Jonathan Mitchell	State SG	-	2	2
Donald Verrilli	SG	-	2	2
Peter Keisler	Industry	-	3	3
Paul Smith <sup>37</sup>	Industry and environment	1	1	2

Since 1980, an increasing percentage of attorneys have made more than one appearance in environmental cases, and an increasing percentage of attorneys have made more than one appearance on behalf of industry.<sup>38</sup>

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United States, 132 S.Ct. 2344 (2012); (5) L.A. Cty. Flood Control Dist. v. Nat. Res. Def. Council, Inc., 133 S.Ct. 710 (2013); (6) Decker v. Nw. Env'tl. Def. Ctr., 133 S.Ct. 1326 (2013); (7) Am. Trucking Ass'ns, Inc. v. Los Angeles, 133 S.Ct. 2096 (2013); (8) EPA v. EME Homer City Generation, 134 S.Ct. 1584 (2014); (9) CTS Corp. v. Waldburger, 134 S.Ct. 2175 (2014); (10) Utility Air Regulatory Group v. EPA, 134 S.Ct. 2427 (2014); (11) Michigan v. EPA, 135 S.Ct. 2699 (2015).

<sup>35</sup> See *infra* Table 4.

<sup>36</sup> See cases cited *supra* notes 11, 20, 25, 35.

<sup>37</sup> Although Smith represented industry in both appearances, in one of those cases he represented the same side as the EPA, which took a pro-environmental stance. See *Michigan v. EPA*, 135 S.Ct. 2699 (2015).

<sup>38</sup> See *infra* Figures 1, 2. See also *infra* Table 9 (full chart of all attorneys making multiple appearances).



Figure 1. Percentage of attorneys who made more than one appearance in environmental cases (as compared to total attorneys)<sup>39</sup>

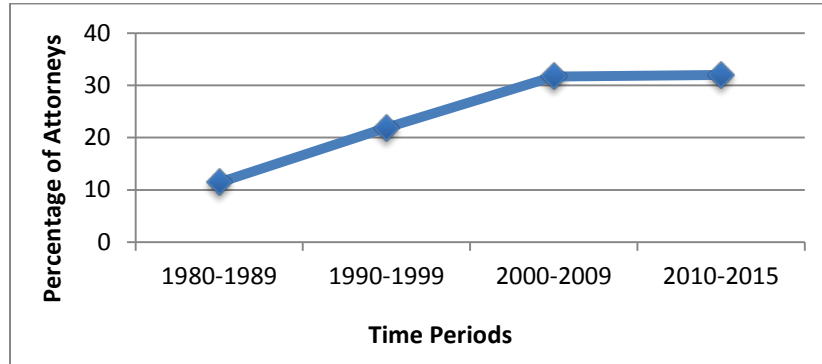
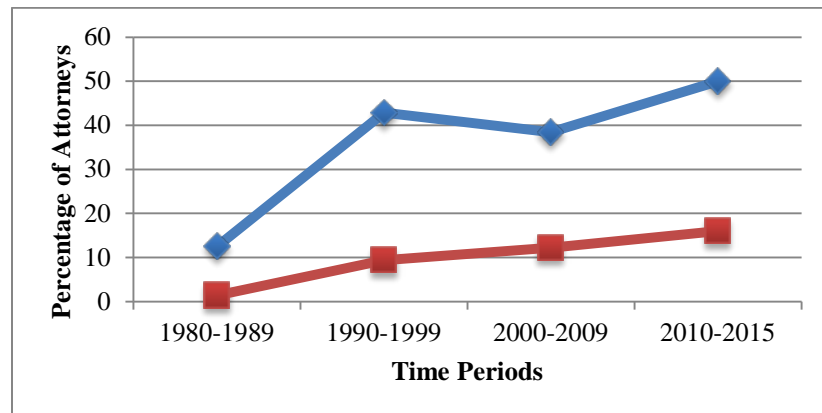


Figure 2. Number of attorneys making multiple appearances on behalf of industry (compared to total number of attorneys making multiple appearances) [Upper line]. Number of attorneys making multiple appearances on behalf of industry (compared to the total number of attorneys) [Lower line].<sup>40</sup>



<sup>39</sup> See *supra* Tables 1-4 (calculations for this figure derived from the information in these tables); Formula (for y-axis): # of attorneys who made more than one appearance in environmental cases in that time period / total # of attorneys who argued in these cases in that time period + preceding decade, if applicable).

<sup>40</sup> See *supra* Tables 1-4 (calculations for this figure derived from the information in these tables); see also cases cited *supra* notes 11, 20, 25 (calculations also based on a review of the dockets in all of the above-mentioned cases); Formula (for y-axis): Blue line = # of attorneys who made more than one appearance when advocating for the industry side / # of attorneys who made more than one appearance (regardless of which side they were advocating for); Red line = # of attorneys who made more than one appearance when advocating for the industry side / # of attorneys (regardless of how many times they appeared or what side they represented).

One witnesses similar trends in the representation of industry by law firms. In the period from 1980 to 1989, twenty-three different law firms represented industry.<sup>41</sup> Only three firms represented industry more than once: Cleary Gottlieb, Covington & Burling, and Hogan & Hartson.<sup>42</sup> The Pacific Legal Foundation also represented industry in one case.<sup>43</sup> From 1990 to 1999, eight law firms represented industry<sup>44</sup> and only one firm—Mayer Brown—appeared more than once.<sup>45</sup> Two additional firms—Covington & Burling and Kirkland & Ellis—had also presented oral argument in the preceding decade(i.e. from 1980 to 1989).<sup>46</sup> In the next decade, fourteen law firms represented industry.<sup>47</sup> Four of them presented argument more than once: Mayer Brown, O’Melveny & Myers, Sidley Austin, and Latham & Watkins.<sup>48</sup> An additional three—Kirkland & Ellis, Hogan & Hartson, and Covington & Burling—had also presented argument in previous decades.<sup>49</sup> The Pacific Legal Foundation also made an appearance on behalf of industry.<sup>50</sup> In the most recent period from 2010 to 2015, nine different firms have represented industry.<sup>51</sup> Two of the nine have presented oral argument on behalf of industry more than once: Sidley Austin and Hunton & Williams.<sup>52</sup>

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<sup>41</sup> See cases cited *supra* note 11 (The firms representing industry included the following: Cleary Gottlieb; James Sears Bryant; Kirkland & Ellis; Scott Slaughter, Hunton & Williams; Covington & Burling; Taylor, Ferencz & Simon; Briggs & Morgan; Quarles & Brady; Ice Miller Donadio & Ryan; Kilcullen, Smith & Heenan; Wilentz, Goldman & Spitzer; Pillsbury; Reed Smith Shaw & McClay; Fuller & Henry; Washburn & Kemp; Newman & Holtzinger; Shanley & Fisher; Nolan, O’Neill & Moore; The Dow Chemical Company; Hogan & Hartson; Nageotte, Borinsky & Zelnick; Simpson Thacher; Goldstein, Barceloux & Goldstein; Kohn, Savett, Klein & Graf).

<sup>42</sup> See *infra* Table 5. In *Tull v. United States*, 481 U.S. 412 (1987), Hogan & Hartson did not present oral argument, but did join in the brief.

<sup>43</sup> *Costle v. Pac. Legal Found.*, 445 U.S. 198 (1980); see *infra* Table 5.

<sup>44</sup> See cases cited *supra* note 20 (The firms included: Covington & Burling; Kirkland & Ellis; Mayer Brown & Platt; Finn Dixon & Herling; Steptoe & Johnson; Van Ness, Feldman & Curtis; Perkins Coie; Wildman, Harrold, Allen & Dixon).

<sup>45</sup> See *infra* Table 5 (Mayer Brown was petitioner once, in *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992), and won, and respondent once, in *United States v. Bestfoods*, 524 U.S. 51 (1998), and lost; Andrew Pincus was counsel in the winning case; Kenneth Geller, in the losing case).

<sup>46</sup> See *infra* Table 5.

<sup>47</sup> See cases cited *supra* note 25 (The firms included: Ogletree, Deakins, Nash, Smoak, & Stewart; Crowell & Moring; Eckert, Seamans, Cherin & Mellott; Mayer Brown; Kirkland & Ellis; Squire, Sanders & Dempsey; O’Melveny & Myers; Hogan & Hartson; Sidley Austin; Pierce Atwood; Covington & Burling; Latham & Watkins; Quinn Emmanuel; and Gibson Dunn).

<sup>48</sup> See *infra* Table 5.

<sup>49</sup> See *infra* Table 5.

<sup>50</sup> See *infra* Table 5.

<sup>51</sup> See cases cited *supra* note 35 (The firms included: Latham & Watkins; Sidley Austin; Greins, Martin, Stein & Richard; Mayer Brown; Robbins Russell; Hunton & Williams; Jenner & Block; Jones Day; and Kirkland & Ellis).

<sup>52</sup> See *infra* Table 5 (Sidley Austin represented various industry groups in *Am. Elec. Power Co. v. Connecticut*, 131 S.Ct. 2527 (2011), *S. Union Co. v. United States*, 132 S. Ct. 2344 (2012), *EPA v. EME Homer*, 134 S.Ct. 1584 (2014), and *UARG v. EPA*, 134 S.Ct. 2427 (2014); Hunton &

An additional three had presented oral argument in previous periods: Latham & Watkins, Mayer Brown, and Kirkland & Ellis.<sup>53</sup> Robbins Russell has also presented oral argument twice, but only once on behalf of industry; the second appearance was on behalf of the environment.<sup>54</sup> The Pacific Legal Foundation also represented industry in one case.<sup>55</sup>

Table 5.<sup>56</sup>

Law firm	Number of appearances 1980-89	Number of appearances 1990-99	Number of appearances 2000-09	Number of appearances 2010-15	Total
Cleary Gottlieb	3	-	-	-	3
Covington & Burling	4	1	1	-	6
Hogan & Hartson	2	-	1	-	3
Kirkland & Ellis	1	1	1	1	4
Mayer Brown	-	2	2	1	5
O'Melveny & Myers	-	-	2	-	2
Sidley Austin	-	-	2	4	6
Latham & Watkins	-	-	2	1	3
Hunton & Williams	-	-	-	3	3
<b>Other</b>			-		
Pacific Legal Foundation	1	-	1	1	3

Williams represented the Utility Air Regulatory Group in *EPA v. EME Homer*, 134 S.Ct. 1584 (2014), *UARG v. EPA*, 134 S.Ct. 2427 (2014), and *Michigan v. EPA*, 135 S.Ct. 2699 (2015)).

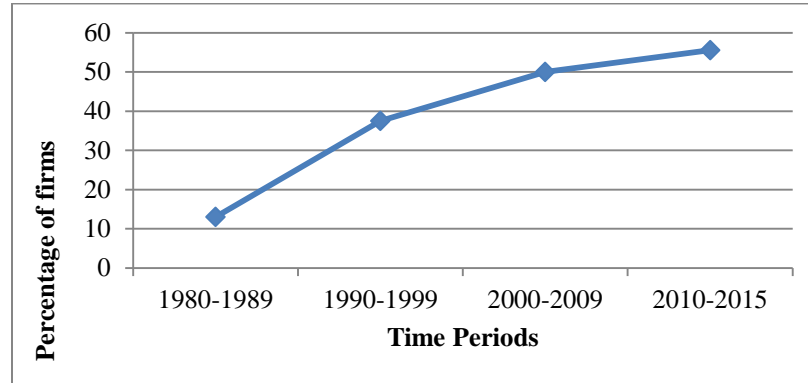
<sup>53</sup> See *infra* Table 5.

<sup>54</sup> See dockets for *Am. Trucking Ass'n, Inc. v. City of Los Angeles*, 133 S. Ct. 2096 (2013) (Robbins Russell represented industry); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010) (Robbins Russell represented environmental side).

<sup>55</sup> *Sackett v. EPA*, 132 S. Ct. 1367 (2012).

<sup>56</sup> See cases cited *supra* notes 11, 20, 25, 35 (information in this table is based on a review of the dockets in these cases).

Figure 3. Percentage of firms who made more than one appearance on behalf of industry<sup>57</sup>



The pattern is clear: the small group of “experts” that increasingly dominates general advocacy before the Court dominates environmental advocacy before the Court as well.

### III. INDUSTRY POSITION AND SUCCESS

Even more notable is industry’s increasing presence in environmental law cases before the Court. In addition, industry has increasingly served as the petitioner, decreasingly been on the respondent’s side, and has enjoyed increasing success on the merits. From 1980 to 1989, for example, industry was present in twenty-five of the thirty-three cases heard (76 percent), serving as petitioner in thirteen of those twenty-five cases (52 percent) and respondent in twelve cases (48 percent).<sup>58</sup> In the next decade, 1990 to 1999, industry was present in ten of the fifteen cases (67 percent), serving as petitioner in seven of those ten cases (70 percent) and the respondent in three (30 percent).<sup>59</sup> From 2000 to 2009, industry appeared in all but five cases (16 of 21 cases, totaling 76 percent).<sup>60</sup> In the cases in which it took part, industry appeared solely as petitioner twelve times (75 percent), as both petitioner and respondent once (6

<sup>57</sup> See *supra* Table 5 (calculations for this figure derived from the information in Table 5); Formula (for y-axis): # of firms who made more than one appearance on behalf of industry (including preceding periods, if applicable) / # of firms who represented industry.

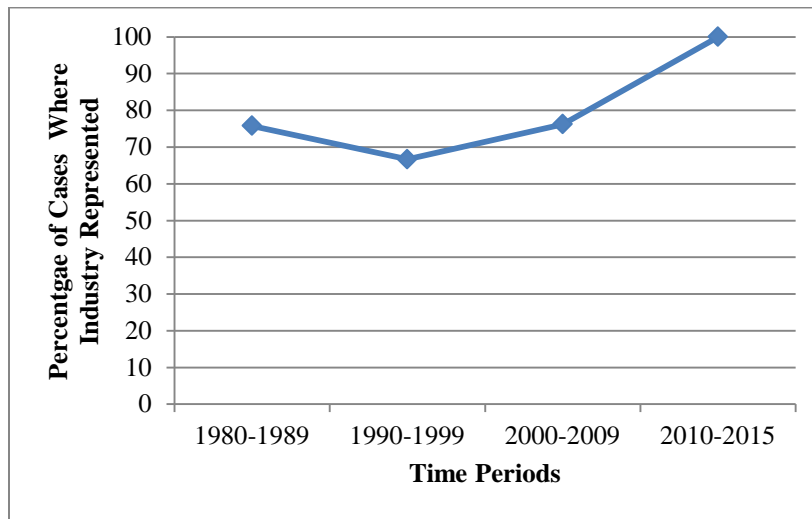
<sup>58</sup> See cases cited *supra* note 11; see also *infra* Table 10 (for a comprehensive overview of all cited cases).

<sup>59</sup> See cases cited *supra* note 20; see also *infra* Table 10 (for a comprehensive overview of all cited cases).

<sup>60</sup> See cases cited *supra* note 25; see also *infra* Table 10 (for a comprehensive overview of all cited cases).

percent),<sup>61</sup> and as respondent three times (19 percent).<sup>62</sup> In the last five years, industry has been present in every environmental case before the Court<sup>63</sup> and was the petitioner in all but one (91 percent).<sup>64</sup>

Figure 4. Industry Presence by Percentage of Cases<sup>65</sup>



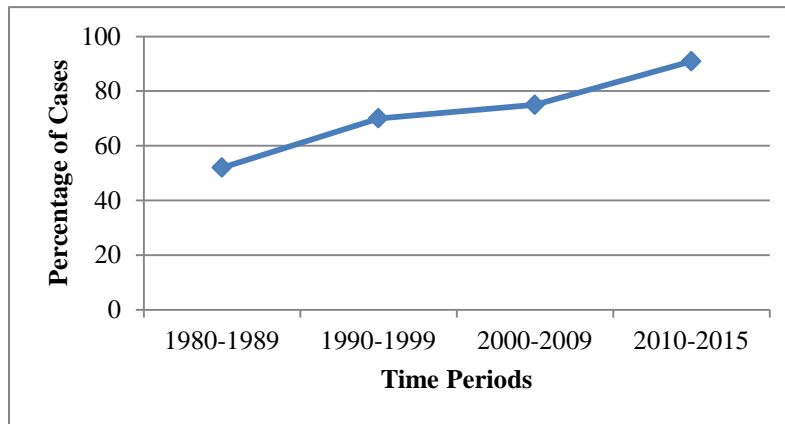
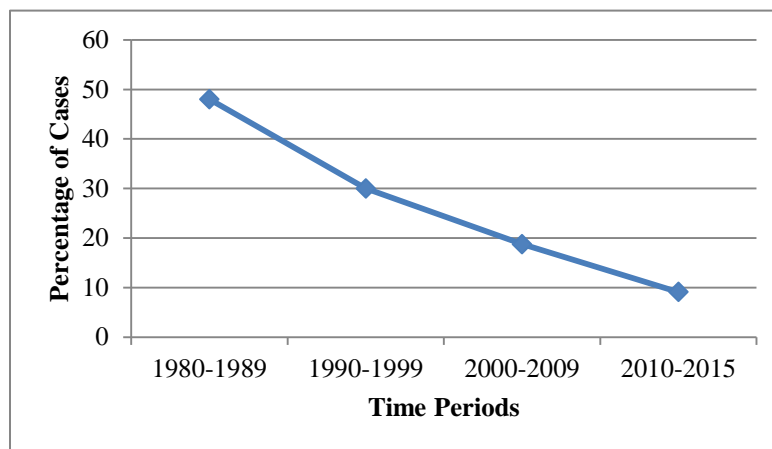
<sup>61</sup> See *Cooper Indus. v. Aviall Servs.*, 543 U.S. 157 (2004) (this case pitted one industry against another).

<sup>62</sup> See *Friends of Earth, Inc. v. Laidlaw Envtl. Services*, 528 U.S. 167 (2000); *Whitman v. Am. Trucking, Inc.*, 531 U.S. 457 (2001); *Envtl. Defense v. Duke Energy Corp.*, 549 U.S. 561 (2007).

<sup>63</sup> See cases cited *supra* note 35 (list of all 11 environmental cases from the last five years); see also *infra* Table 10 (for a comprehensive overview of all cited cases).

<sup>64</sup> See *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014) (industry was the respondent). In the case of *Michigan v. EPA*, 135 S. Ct. 2699 (2015), industry was present as both the petitioner and respondent, but was primarily petitioner and is therefore classified here as petitioner.

<sup>65</sup> See *infra* Table 10 (calculations for this figure derived from the information in Table 10); Formula (for y-axis): Cases in which industry was represented (regardless of side) / total number of cases.

Figure 5. Industry Petitioner by Percentage of Cases<sup>66</sup>Figure 6. Industry Respondent by Percentage of Cases<sup>67</sup>

These statistics suggest that industry has been highly successful in getting its case heard before the Supreme Court when it loses in the lower court. It would appear that very few environmental law cases are heard before the Court if industry is not involved in some capacity. The expert advocates and firms that

<sup>66</sup> See *infra* Table 10 (calculations for this figure derived from the information in Table 10); Formula (for y-axis): Number of cases in which industry was the petitioner / Number of cases in which industry was present.

<sup>67</sup> See *infra* Table 10 (calculations for this figure derived from the information in Table 10); Formula (for y-axis): Number of cases in which industry was the respondent / Number of cases in which industry was present.

make up the Supreme Court Bar have witnessed increasing and significant success in advocating on behalf of industry in environmental law cases. Although “it is not possible to discern the full extent to which expert Supreme Court counsel are being hired to oppose cert petitions for the simple reason that those briefs are quite often ghost written,”<sup>68</sup> the decreasingly small percentage of cases in which industry is respondent makes clear that the Court now rarely hears cases in which industry procured a favorable result in the lower court.<sup>69</sup> Whether that is attributable to the composition of the Court or the Supreme Court Bar is unclear, but is likely a combination of both.

Moreover, this marked increase in industry’s participation as petitioner has led to a corresponding increase in industry wins. Although the petitioner generally enjoys a substantial advantage over the respondent,<sup>70</sup> industry’s petitioner advantage in environmental law cases is substantially greater than the average. In recent decades, the overall petitioner win rate has been 61 percent; that number rises to 75 percent when the Solicitor General’s office joins the petitioner’s side.<sup>71</sup> For industry in environmental cases, its overall win rate as petitioner ranges from a low of 85 percent from 1980 to 1989 to a high of 90 percent from 2010 to 2015.<sup>72</sup> Industry’s greater-than-average petitioner win rate in environmental cases throughout the time periods studied may suggest a the Court’s relative hostility of the Court to environmental law. In the last five years, however, that win rate has jumped even higher,<sup>73</sup> suggesting that better advocacy on behalf of industry and/or a Court increasingly hostile to environmental interests has played a role in industry’s success.

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<sup>68</sup> Lazarus, *supra* note 1, at 1511.

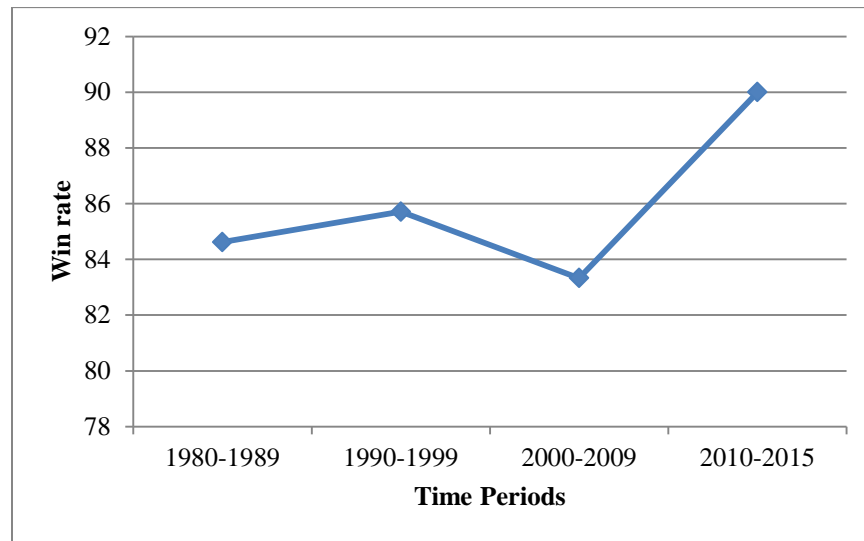
<sup>69</sup> See *supra* Figure 6.

<sup>70</sup> See, e.g., Lazarus, *supra* note 1, at 1494.

<sup>71</sup> Corey A. Ditslear, Office of the Solicitor General Participation Before the U.S. Supreme Court: Influences on the Decision-making Process 32 (2003) (unpublished Ph.D. dissertation, Ohio State University) at 34-35, cited by Lazarus, *supra* note 1, at 1494.

<sup>72</sup> See *infra* Figure 7.

<sup>73</sup> See *infra* Table 7.

Figure 7. Win Rate with Industry as Petitioner<sup>74</sup>

Meanwhile, since 1990, industry's chances of winning as respondent have dropped to zero.<sup>75</sup> However, because industry has decreasingly represented the respondent side (less than 10 percent of cases from 2010 to 2015),<sup>76</sup> this trend seems almost inconsequential. It may be that in the relatively small fraction of cases in which the Court grants certiorari in a case that industry won below, it does so because the decision is so obviously wrong as to warrant overturning by the Court. In such cases, the skill of the advocates may be less consequential, at least with respect to classifying the decision as a "win" or a "loss."<sup>77</sup> However, their skills may come into play in other ways: in many of the cases in which the industry respondent "lost," the advocates nevertheless succeeded in greatly tempering the win for the environmental side.<sup>78</sup>

<sup>74</sup> See *infra* Table 10 (calculations derived from the information in Table 10); Formula (for y-axis): Number of cases in which industry was petitioner and won / Number of cases in which industry was petitioner.

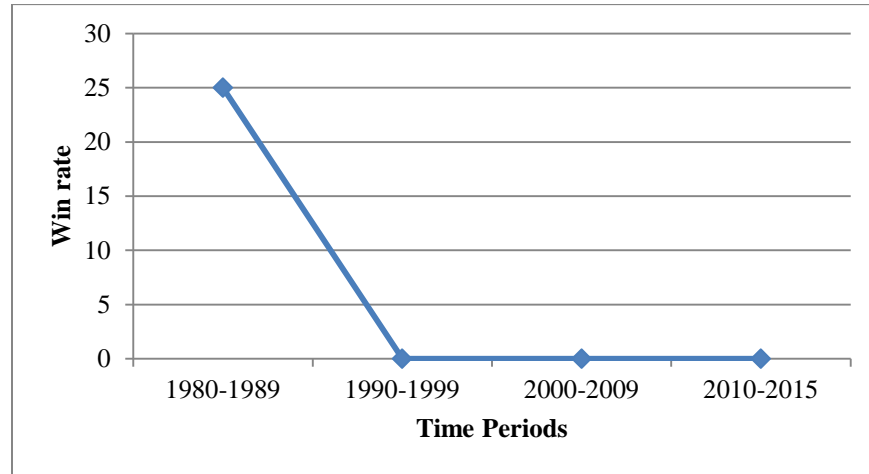
<sup>75</sup> See *infra* Figure 8.

<sup>76</sup> See *supra* Figure 6.

<sup>77</sup> For example, in two relatively recent cases in which the Supreme Court took a case in which industry had won below, the decisions were 6-2 and unanimous. See *EPA v. EME Homer City Generation*, 134 S. Ct. 1584 (2014) (6-2 decision); *Env'tl. Def. v. Duke Energy Corp.*, 549 U.S. 561 (2007) (unanimous decision).

<sup>78</sup> *UARG v. EPA*, 134 S. Ct. 2427 (2014) is a prime example of this. See, e.g., Jody Freeman, *Why I Worry About UARG*, 39 HARV. ENVTL. L. REV. 9, 9-10 (2015) (explaining that while "the short-term outcome was favorable to EPA", UARG is a "decision laced with the legal equivalent of improvised explosive devices" for EPA authority to regulate GHGs).



Figure 8. Win Rate with Industry as Respondent<sup>79</sup>

#### IV. GOVERNMENT POSITION AND SUCCESS

Industry has not enjoyed its success in a vacuum—the federal government has also played a role. While the Solicitor General’s participation in merits cases has risen overall (from 60 percent during the 1980s to over 75 percent in the 1990s and 2000s),<sup>80</sup> the Solicitor General has participated at an even higher rate in environmental litigation.<sup>81</sup> Most notable is the fact that over time the Solicitor General’s office has increasingly aligned with the petitioner and non-environmental side.<sup>82</sup>

From 1980 to 1989, for example, the Solicitor General’s office was present in all but two of the thirty-three environmental cases before the Supreme Court (94 percent).<sup>83</sup> In the thirty-one cases in which the U.S. government presented argument, the government aligned with the environmental side in nineteen cases (61 percent)<sup>84</sup> and the non-environmental side in twelve cases (39 percent).<sup>85</sup> During the next decade, 1990 to 1999, the Solicitor General’s office was present

<sup>79</sup> See *infra* Table 10 (the calculations for this figure are derived from the data in Table 10); Formula (for y-axis): Number of cases in which industry was respondent and won / Number of cases in which industry was respondent.

<sup>80</sup> Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General’s Changing Role in Supreme Court Litigation*, 51 B.C. L. R. 1323, 1324 (2010).

<sup>81</sup> See *infra* Figure 9.

<sup>82</sup> See *infra* Figure 17.

<sup>83</sup> The Solicitor General’s office did not participate in *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980) or *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

<sup>84</sup> See *infra* Figure 10.

<sup>85</sup> See *infra* Figure 11.

in thirteen of the fifteen environmental cases (87 percent),<sup>86</sup> aligning with the environmental side in six cases (46 percent)<sup>87</sup> and the non-environmental side in seven cases (54 percent).<sup>88</sup> From 2000 to 2009, the United States joined in all twenty-one environmental cases.<sup>89</sup> The Solicitor General's office aligned with the environmental side in nine of those cases (43 percent).<sup>90</sup> In one case, the government took a position that aligned with the environmental side in part and with the non-environmental side in part.<sup>91</sup> The Solicitor General's office aligned itself with the "non-environmental" side in twelve cases (57 percent).<sup>92</sup> Finally, from 2010 to 2015 the Solicitor General's office appeared in all eleven cases,<sup>93</sup> aligning with the environmental side in five cases (45 percent)<sup>94</sup> and the non-environmental side in six (55 percent).<sup>95</sup>

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<sup>86</sup> See *infra* Table 10 (the two cases in which the Solicitor General's office did not appear were *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res.*, 504 U.S. 353 (1992) and *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994)).

<sup>87</sup> See *infra* Figure 10 (in one of these cases—*Arkansas v. Oklahoma*, 503 U.S. 91 (1992)—the government's position mostly favored the environment, but not in its entirety. The government took the position that the Clean Water Act "required compliance with Oklahoma's water quality standards," *id.* at 97 (pro-environmental position), but also argued in support of the EPA's "determination that discharges from a sewage treatment plant would not produce a detectable violation of those standards." *Id.* at 98.

<sup>88</sup> See *infra* Figure 11. In one of these cases—*Key Tronic Corp. v. United States*, 511 U.S. 809 (1994)—the government mostly took the non-environmental side, but not entirely. The case concerned fee-shifting provisions under CERCLA, which are difficult to categorize neatly.

<sup>89</sup> See *infra* Figure 9.

<sup>90</sup> See *infra* Figure 10.

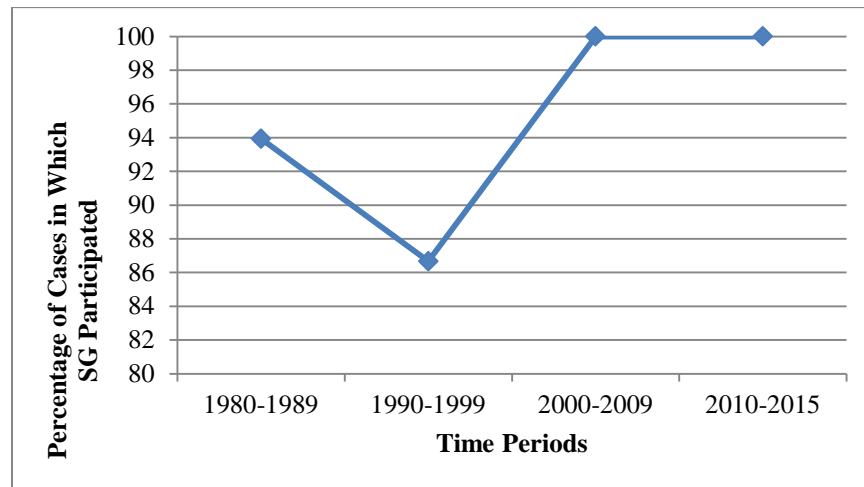
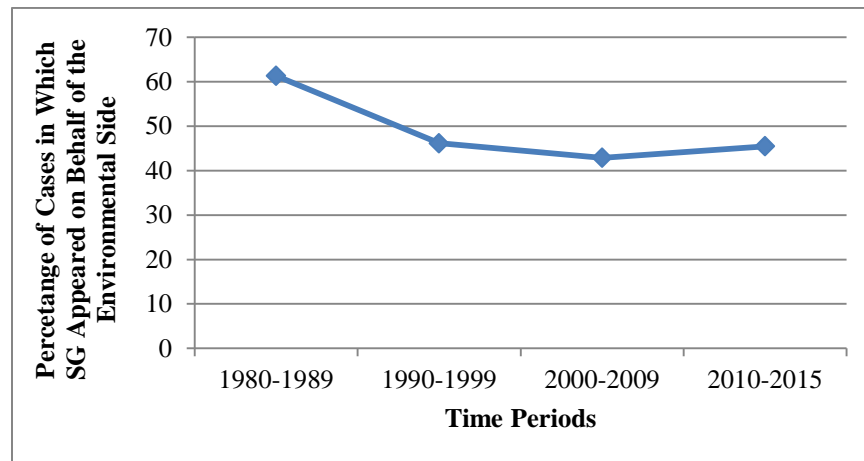
<sup>91</sup> See *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001). For the purposes of calculating statistics, I have characterized *Whitman* as a case in which the government aligned with the environmental side. Although certain elements of the government's position – namely, its argument that it could consider costs when promulgating national ambient air quality standards ("NAAQs") – could be characterized as aligning with the non-environmental side, the overarching thrust of the government's argument – i.e. that the Clean Air Act properly delegated power to the EPA to promulgate NAAQs – represented a pro-environmental position.

<sup>92</sup> See *infra* Figure 11. However, in two of these cases—*United States v. Atl. Research Corp.*, 551 U.S. 128 (2007) and *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004)—the position was not entirely against the environment. The former involved reimbursement of costs under CERCLA, and the latter centered on competing factual disputes about the distinctness (or lack thereof) of various bodies of water.

<sup>93</sup> See *infra* Figure 9.

<sup>94</sup> See *infra* Figure 10.

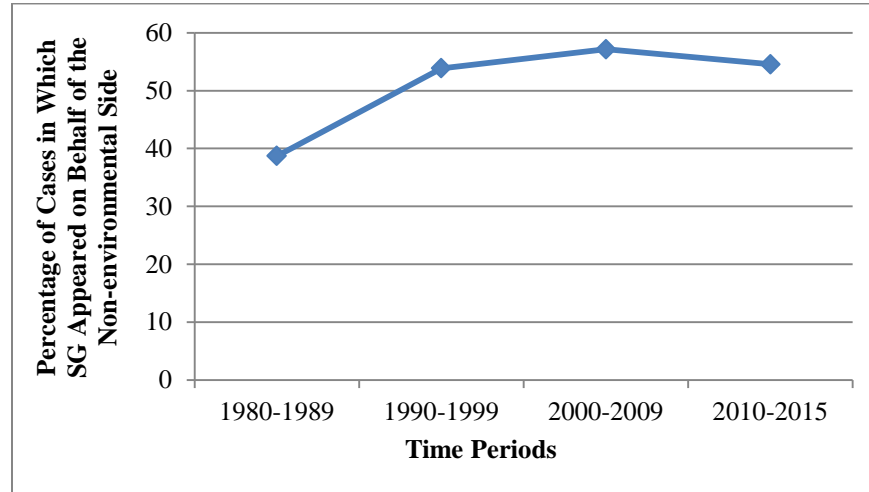
<sup>95</sup> See *infra* Figure 11.

Figure 9. Solicitor General Participation by Percentage of Cases<sup>96</sup>Figure 10. Government as Representing the Environment by Percentage of Cases<sup>97</sup>

<sup>96</sup> See *infra* Table 10 (calculations for this figure are derived from the data in Table 10); Formula (for y-axis): Number of cases in which SG participated / Total number of cases.

<sup>97</sup> See *infra* Table 10 (calculations for this figure are derived from the data in Table 10); Formula (for y-axis): Number of cases in which SG participated on behalf of the environmental side / Number of cases in which SG participated.

Figure 11. Government as Not Representing the Environment by Percentage of Cases<sup>98</sup>



The Solicitor General's win rate varies quite a bit, but is higher overall when aligned with the non-environmental side.<sup>99</sup> From 1980 to 1989, the Solicitor General's office prevailed in twenty-three cases (74 percent) and lost in eight (26 percent).<sup>100</sup> Of the nineteen cases in which it aligned with the environmental side, it won in twelve (63 percent) and lost in seven (37 percent).<sup>101</sup> Of the twelve cases in which the government aligned with the non-environmental side it won in all but one (92 percent win rate).<sup>102</sup> From 1990 to 1999, the Solicitor General's office lost only three times (85 percent win rate):<sup>103</sup> two cases where it represented the environmental side (31 percent win rate when representing the environment)<sup>104</sup> and one in which it took the non-environmental side (86 percent

<sup>98</sup> See *infra* Table 10 (calculations for this figure are derived from the data in Table 10); Formula (for y-axis): Number of cases in which SG participated on behalf of the non-environmental side / Number of cases in which SG participated.

<sup>99</sup> Compare *infra* Figure 13 with *infra* Figure 14.

<sup>100</sup> See *infra* Figure 12.

<sup>101</sup> See *infra* Figure 13 (in one of these four, *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987), the environmental "loss" was only partial: while the Court held that the Clean Water Act preempted Vermont nuisance law to the extent that that the law sought to impose liability on a New York point source, it also held that the Act did not bar aggrieved individuals from bringing a nuisance claim pursuant to the law of the source state).

<sup>102</sup> See *infra* Figure 14; see also *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) (case in which the government aligned with the non-environmental side, but lost).

<sup>103</sup> See *infra* Figure 12.

<sup>104</sup> See *infra* Figure 13 (represented the environment and lost in *New York v. United States*, 505 U.S. 144 (1992) and *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998)).

win rate when taking the non-environmental side).<sup>105</sup>

In the next decade, 2000 to 2009, the Solicitor General's Office lost in only five out of 21 environmental cases (76 percent win rate overall).<sup>106</sup> In four of the five cases in which the Solicitor General's Office "lost" it was aligned with the "environmental" side; in the remaining loss it had aligned with the non-environmental side.<sup>107</sup> Thus, the government's win rate when aligning with the environmental side was 67 percent<sup>108</sup> and its non-environmental win rate was 92 percent.<sup>109</sup> In one of the "wins" the Court split 4-4, thereby affirming the lower court's decision and ruling for the petitioner—in this case the government—who represented the environmental side.<sup>110</sup> Thus, although the government did not "win" in the sense of gaining a majority, its position was upheld.

In the last five years, the Solicitor General's Office lost only three times; all were cases in which the Office joined the environmental side.<sup>111</sup> The government's total win rate was 73 percent and its loss rate 27 percent.<sup>112</sup> In *UARG v. EPA*, the Solicitor General ostensibly "won" while aligned with the "environmental side, but the Court's decision may have in fact signaled a "loss" for the EPA and for more robust environmental regulation.<sup>113</sup> Overall, the government's win rate when representing the environment was 40 percent,<sup>114</sup> as opposed to a 100 percent win rate when representing the non-environmental side.<sup>115</sup>

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<sup>105</sup> See *infra* Figure 14 (represented the non-environmental side and lost in *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328 (1994)).

<sup>106</sup> See *infra* Figure 12. One of these losses—*Rapanos v. United States*, 547 U.S. 715 (2006)—was not a total loss. Although Justice Kennedy's concurrence did not embrace as broad a view of "navigable waters" as did the dissent, he did not endorse the even more restrictive interpretation set forth by the four conservative justices. See *id.* at 759 (Kennedy, J., concurring) (advancing the idea of a "significant nexus" test). On the flip side, one of the "wins"—*S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004)—was only a partial "win" because the Court remanded it for further proceedings regarding the factual dispute. See *id.* at 96.

<sup>107</sup> See *infra* Table 10.

<sup>108</sup> See *infra* Figure 13.

<sup>109</sup> See *infra* Figure 14.

<sup>110</sup> *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 484 (2008).

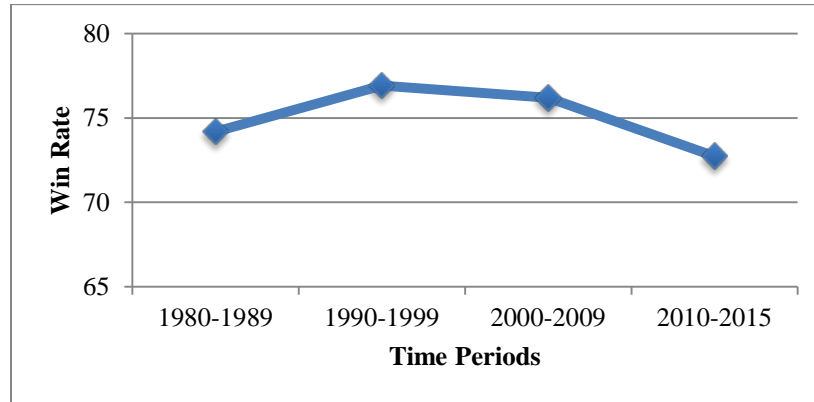
<sup>111</sup> See *infra* Table 10 (the office joined the environmental side and lost in: *Michigan v. EPA*, 135 S. Ct. 2699 (2015); *Sackett v. EPA*, 132 S. Ct. 1367 (2012); and *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012)).

<sup>112</sup> See *infra* Figure 12.

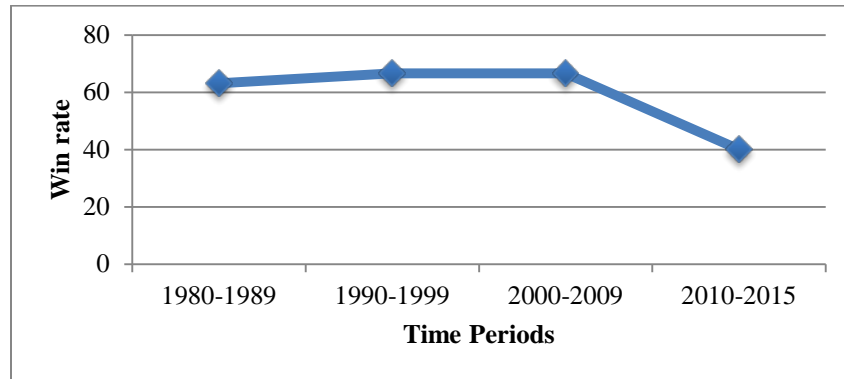
<sup>113</sup> See *Freeman*, *supra* note 78, at 19 (explaining that while "the short-term outcome was favorable to EPA", *UARG* is a "decision laced with the legal equivalent of improvised explosive devices" for EPA authority to regulate GHGs).

<sup>114</sup> See *infra* Figure 13.

<sup>115</sup> See *infra* Figure 14.

Figure 12. Win Rate of Solicitor General<sup>116</sup>

The Solicitor General's office enjoyed significant success in the period from 1990 to 1999, but its success since then has steadily declined.<sup>117</sup> However, while the Solicitor General has a somewhat unpredictable record when it represents the environment, it has enjoyed increasing success when representing the non-environmental side.<sup>118</sup>

Figure 13. Win Rate of Solicitor General When Representing Environment<sup>119</sup>

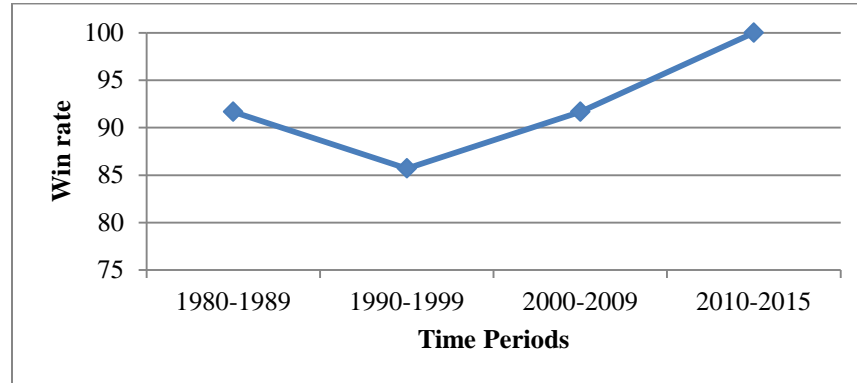
<sup>116</sup> See *infra* Table 10 (calculations for this figure are derived from the data in Table 10); Formula (for y-axis): Number of cases in which SG won / Number of cases in which SG participated.

<sup>117</sup> See *supra* Figure 12.

<sup>118</sup> See *infra* Figures 13 and 14.

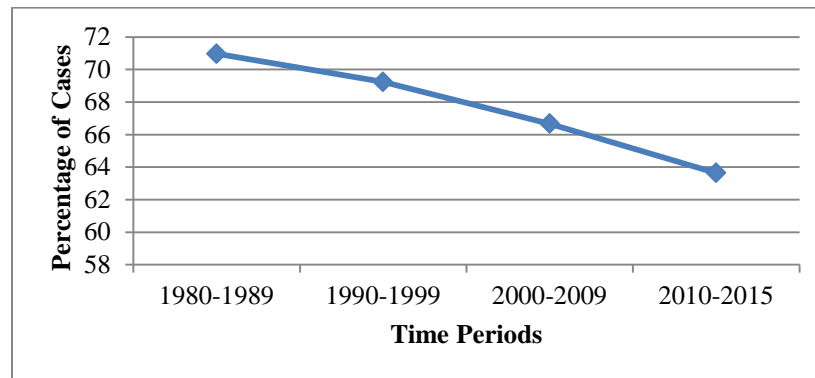
<sup>119</sup> See *infra* Table 10 (calculations for this figure are derived from the data in Table 10); Formula (for y-axis): Number of cases in which SG participated on behalf of the environmental side and won / Number of cases in which SG participated on behalf of the environment.

Figure 14. Win Rate of Solicitor General When Not Representing the Environment<sup>120</sup>



The statistics are far more striking when the side the Solicitor General's office joins—petitioner or respondent—is taken into account. Over time, the Solicitor General has participated as petitioner less,<sup>121</sup> and when it does participate as petitioner it does so increasingly for the non-environmental side.<sup>122</sup>

Figure 15. Solicitor General as Petitioner by Percentage of Cases<sup>123</sup>



<sup>120</sup> See *infra* Table 10 (calculations for this figure are derived from the data in Table 10); Formula (for y-axis): Number of cases in which SG participated on behalf of the non-environmental side and won / Number of cases in which SG participated on behalf of the non-environmental side.

<sup>121</sup> See *infra* Figure 15.

<sup>122</sup> See *infra* Figure 17.

<sup>123</sup> See *infra* Table 10 (calculations for this figure are derived from the data in Table 10); Formula (for y-axis): Number of cases in which SG participated as petitioner / Number of cases in which SG participated.

Figure 16. Solicitor General as Petitioner for Environment by Percentage of Cases<sup>124</sup>

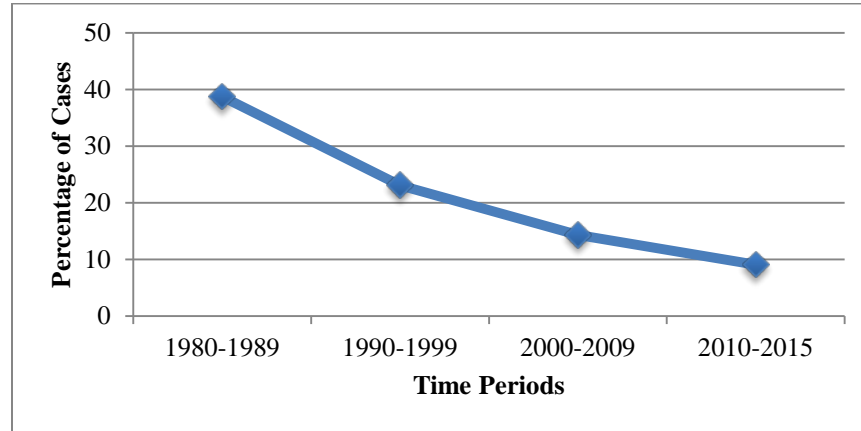
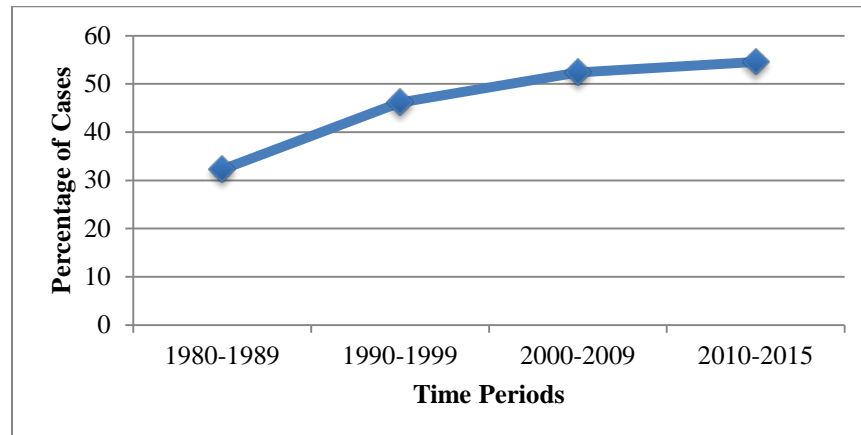


Figure 17. Solicitor General as Petitioner for Non-Environment by Percentage of Cases<sup>125</sup>



However, when the Solicitor General *does* choose to represent the

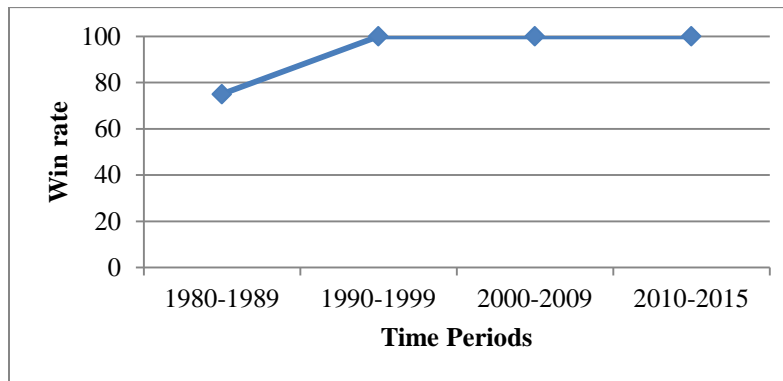
<sup>124</sup> See *infra* Table 10 (calculations for this figure are derived from the data in Table 10); Formula (for y-axis): Number of cases in which SG participated as petitioner for the environmental side / Number of cases in which SG participated.

<sup>125</sup> See *infra* Table 10 (calculations for this figure are derived from the data in Table 10); Formula (for y-axis): Number of cases in which SG participated as petitioner for the non-environmental side / Number of cases in which SG participated.



environmental side as petitioner, it enjoys marked success.<sup>126</sup> It just doesn't choose to do so often.<sup>127</sup>

Figure 18. Solicitor General Win Rate as Petitioner for Environment<sup>128</sup>



This invites the question: if neither industry nor the government is representing the environment, then who is? Environmental nonprofits, and at times the states, represent environmental interests, but they appear before the Court far less frequently.<sup>129</sup> The Court may be in large part to “blame” for this, as it has increasingly chosen to *not* hear cases when the environmental side lost in lower courts.<sup>130</sup> However, this may also be because environmental petitioners, like the National Resource Defense Council (NRDC) or Defenders of Wildlife, often lack the resources to hire the expert counsel that industry enjoys.<sup>131</sup> Without the help of the Supreme Court Bar or the Solicitor General, their chances of having the Supreme Court grant certiorari are greatly reduced.<sup>132</sup>

That said, the federal government *has* increasingly represented the

<sup>126</sup> See *infra* Figure 18.

<sup>127</sup> See *supra* Figure 16.

<sup>128</sup> See *infra* Table 10 (calculations for this figure are derived from the data in Table 10); Formula (for y-axis): Number of cases in which SG participated as petitioner for the environmental side and won / Number of cases in which SG participated as petitioner for environment.

<sup>129</sup> See *infra* Table 10 (cases where n/a is listed under the “Industry petitioner or respondent” column represent cases where states or nonprofit organizations were party to suit).

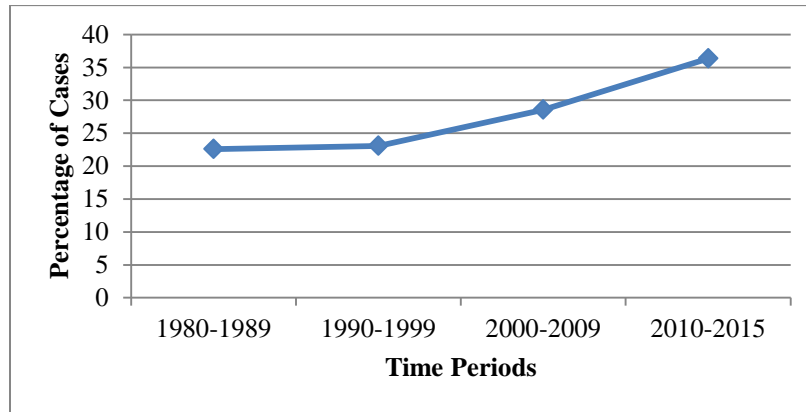
<sup>130</sup> See, e.g., Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L.J. 1507, 1521 (2012) (explaining how the Supreme Court has not once granted review in a NEPA case in which “the lower court failed to apply NEPA with sufficient rigor”).

<sup>131</sup> See Lazarus, *supra* note 1, at 1518 (“A cert petition can easily cost one \$100,000, and there are petitions that can cost even more than that because of the significant work these experts put into a case at the jurisdictional stage to persuade the Court to grant certiorari.”).

<sup>132</sup> See *id.* at 1518.

environmental side as respondent.<sup>133</sup> But this is unsurprising: if industry challenges environmental victories in lower courts, the government will necessarily be a respondent whenever challenges to federal law or regulation are involved.

Figure 19. Solicitor General as Respondent for Environment by Percentage of Cases<sup>134</sup>



In the time period surveyed by this article, the government has never represented the respondent, non-environmental side to a significant degree. From 1980 to 1985, for example, the percentage of such cases stood at 6 percent.<sup>135</sup> The number has further dropped to zero in the period from 2010 to 2015.<sup>136</sup> This aligns with the fact that non-governmental environmental petitioners rarely make it to the Supreme Court in the first place.<sup>137</sup>

<sup>133</sup> See *infra* Figure 19.

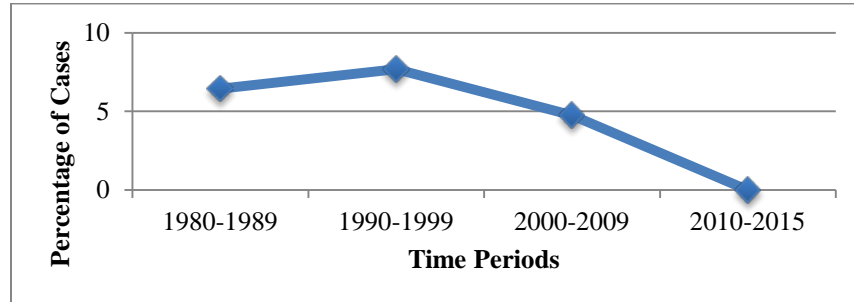
<sup>134</sup> See *infra* Table 10 (calculations for this figure are derived from the data in Table 10); Formula (for y-axis): Number of cases in which SG participated as respondent for the environmental side / Number of cases in which SG participated.

<sup>135</sup> See *infra* Figure 20.

<sup>136</sup> See *infra* Figure 20.

<sup>137</sup> See generally Lazarus, *supra* note 1 (explaining how non-profit organizations have more difficulty getting their cases heard before the Supreme Court).

Figure 20. Solicitor General as Respondent for Non-Environment by Percentage of Cases<sup>138</sup>



#### V. AMICUS

As the Solicitor General has increasingly participated in cases before the Court, much of that growth has taken place in cases in private litigation—that is, cases in which the government was not a party.<sup>139</sup> This means that the Solicitor General participates in more cases as amicus than as a party to suit.<sup>140</sup> However, despite the federal government’s increased participation as amicus overall, its participation as amicus in environmental law cases did not increase in a linear or predictable fashion.<sup>141</sup> From 1980 to 1989, the United States served as amicus in eight environmental cases (24 percent of environmental cases in that time period).<sup>142</sup> During the next decade, the United States served as amicus in six environmental cases (40 percent). From 2000 to 2009, the United States served as amicus five times (24 percent).<sup>143</sup> Finally, in the last five years the government has served as amicus four times (36 percent).<sup>144</sup>

<sup>138</sup> See *infra* Table 10 (calculations for this figure are derived from the data in Table 10); Formula (for y-axis): Number of cases in which SG participated as respondent for the non-environmental side / Number of cases in which SG participated.

<sup>139</sup> Cordray & Cordray, *supra* note 80.

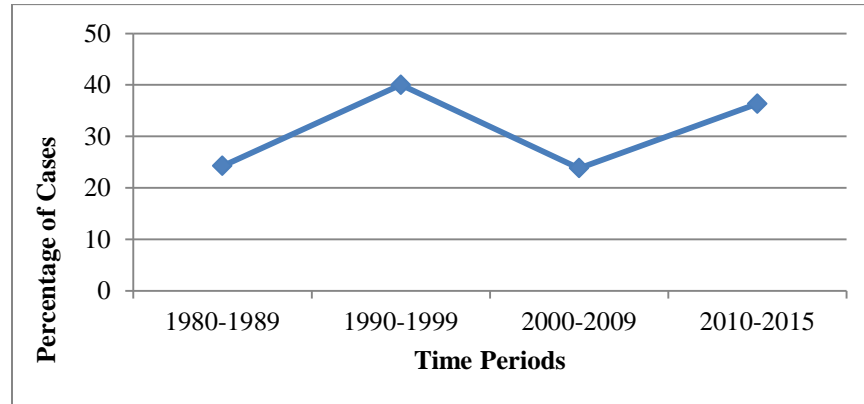
<sup>140</sup> See *id.*

<sup>141</sup> See *infra* Figure 21.

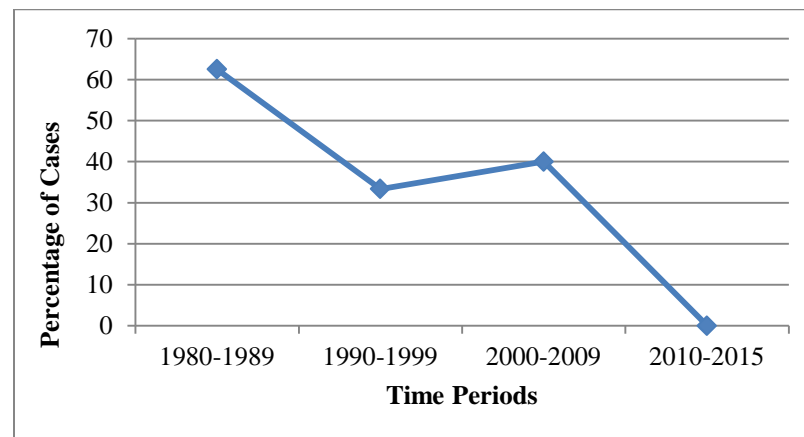
<sup>142</sup> See *infra* Figure 21.

<sup>143</sup> See *infra* Figure 21.

<sup>144</sup> See *infra* Figure 21.

Figure 21. Government as Amicus by Percentage of Cases<sup>145</sup>

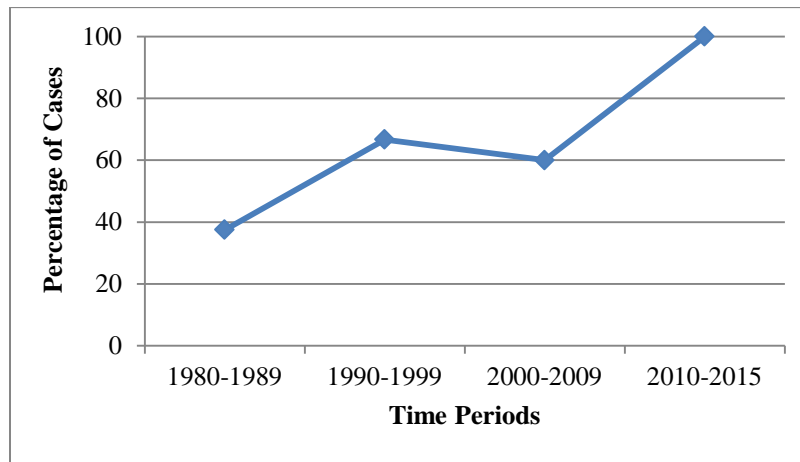
However, the Solicitor General's *alignment* as amicus has changed markedly over time, reflecting the same pattern as its alignment in environmental law cases overall. That is, the Solicitor General's office is increasingly representing the non-environmental side as amicus.<sup>146</sup>

Figure 22. Solicitor General as Amicus for Environment<sup>147</sup>

<sup>145</sup> See *infra* Table 10 (calculations for this figure are derived from the data in Table 10); Formula (for y-axis): Number of cases in which SG participated as amicus / Total number of cases.

<sup>146</sup> See *infra* Figure 23.

<sup>147</sup> See *infra* Table 10 (calculations for this figure are derived from the data in Table 10); Formula (for y-axis): Number of cases in which SG participated as amicus for environment / Number of cases in which SG participated as amicus.

Figure 23. Solicitor General as Amicus for Non-Environment <sup>148</sup>

The Solicitor General has also increasingly served as amicus for petitioner<sup>149</sup> and decreasingly for respondent.<sup>150</sup> These categories, unsurprisingly, overlap. For example, the Solicitor General's office has increasingly served as amicus for the petitioner, non-environmental side.<sup>151</sup> Its representation as amicus for the petitioner, environmental side has greatly varied.<sup>152</sup> Finally, the Solicitor General's office has gone from serving as amicus for respondents with regularity to representing respondents not at all.<sup>153</sup>

<sup>148</sup> See *infra* Table 10 (calculations for this figure are derived from the data in Table 10); Formula (for y-axis): Number of cases in which SG participated as amicus for non-environment / Number of cases in which SG participated as amicus.

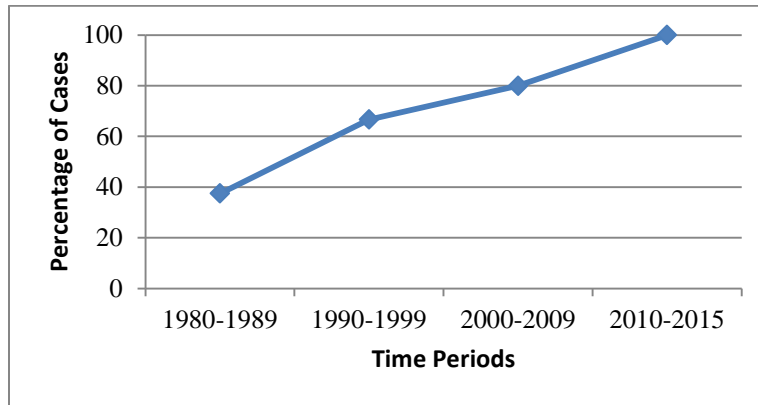
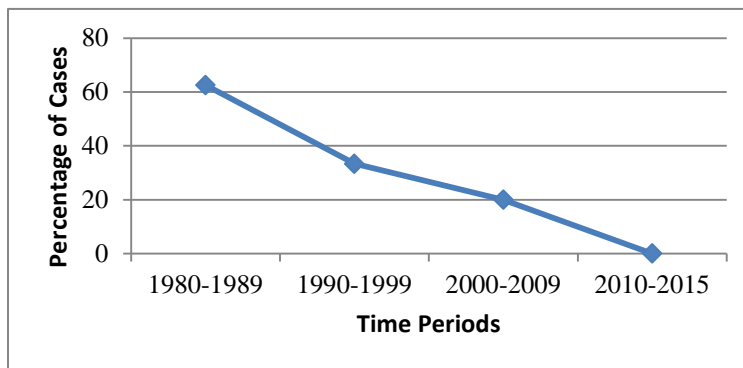
<sup>149</sup> See *infra* Figure 24.

<sup>150</sup> See *infra* Figure 25.

<sup>151</sup> See *infra* Figure 26.

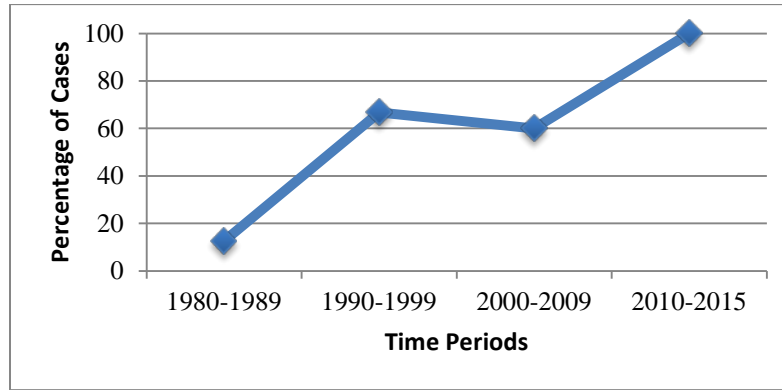
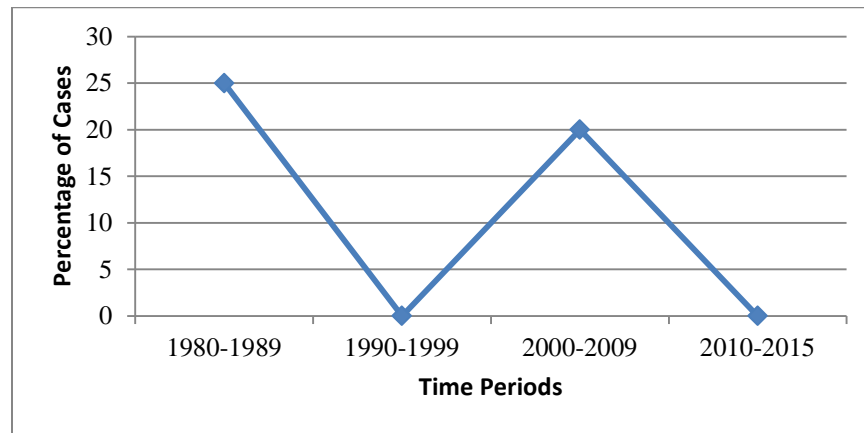
<sup>152</sup> See *infra* Figure 27.

<sup>153</sup> See *infra* Figures 25, 28, 29.

Figure 24. Solicitor General as Amicus for Petitioner<sup>154</sup>Figure 25. Solicitor General as Amicus for Respondent<sup>155</sup>

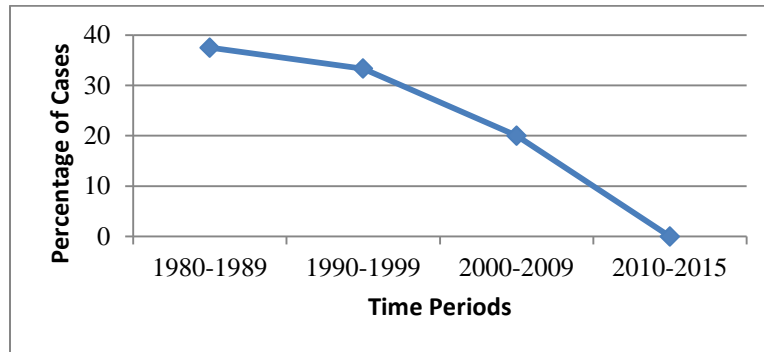
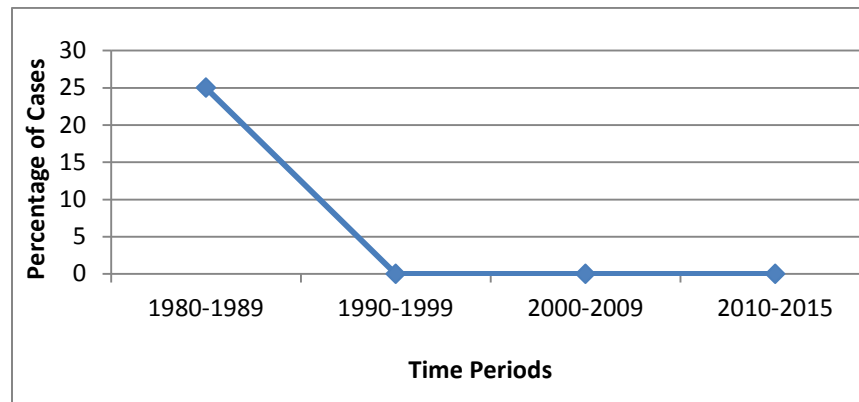
<sup>154</sup> See *infra* Table 10 (calculations for this figure are derived from the data in Table 10); Formula (for y-axis): Number of cases in which SG participated as amicus for petitioner / Number of cases in which SG participated as amicus.

<sup>155</sup> See *infra* Table 10 (calculations for this figure are derived from the data in Table 10); Formula (for y-axis): # of times SG serves as amicus for respondent / # of times SG serves as amicus (for either side).

Figure 26. Solicitor General as Amicus for Petitioner, Non-Environment<sup>156</sup>Figure 27. Solicitor General as Amicus for Petitioner and Environment<sup>157</sup>

<sup>156</sup> See *infra* Table 10 (calculations for this figure are derived from the data in Table 10); Formula (for y-axis): # of times SG serves as amicus for petitioner and non-environmental side / # of times SG serves as amicus (for either side).

<sup>157</sup> See *infra* Table 10 (calculations for this figure are derived from the data in Table 10); Formula (for y-axis): # of times SG serves as amicus for petitioner and environmental side / # of times SG serves as amicus (for either side).

Figure 28. Solicitor General as Amicus for Respondent and Environment<sup>158</sup>Figure 29. Solicitor General as Amicus for Respondent and Non-Environment<sup>159</sup>

These trends underscore the federal government's general increase in advocacy for non-environmental private petitioners: in short, industry.

#### VI. GOVERNMENT-INDUSTRY ALIGNMENT

The data presented here reveals a clear pattern of increasing government alignment with industry. From 1980 to 1989, the Solicitor General's office aligned with industry in only six cases (19 percent of the cases in which the

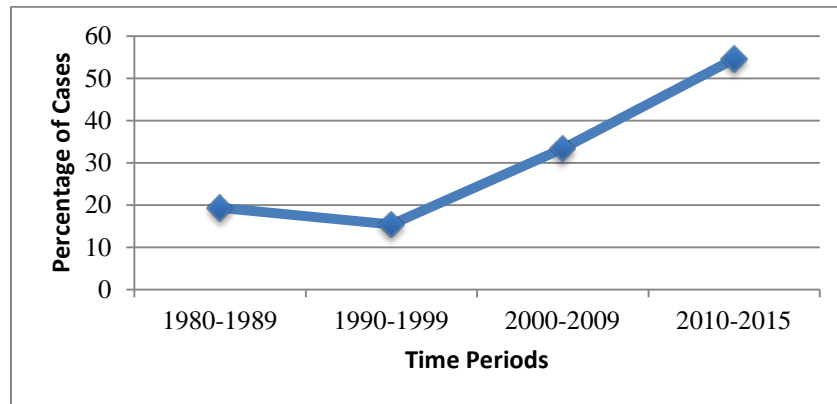
<sup>158</sup> See *infra* Table 10 (calculations for this figure are derived from the data in Table 10); Formula (for y-axis): # of times SG serves as amicus for respondent and environmental side / # of times SG serves as amicus (for either side).

<sup>159</sup> See *infra* Table 10 (calculations for this figure are derived from the data in Table 10); Formula (for y-axis): # of times SG serves as amicus for respondent and non-environmental side / # of times SG serves as amicus (for either side).



government took part).<sup>160</sup> In the next decade, the United States joined industry in only two cases (15 percent),<sup>161</sup> both as petitioner.<sup>162</sup> From 2000 to 2009, the government joined industry in seven cases, all as petitioner, and won in each case.<sup>163</sup> In an additional case,<sup>164</sup> industry represented both sides; the government joined the petitioner and the petitioner won. Finally, from 2010 to 2015, the government fully aligned with industry in six cases, all as petitioner.<sup>165</sup> The government (and industry) “won” in all six of those cases.<sup>166</sup>

Figure 30. Government Aligned with Industry by Percentage of Cases<sup>167</sup>



The Solicitor General’s office represents the broad and long-term interests of the United States, as opposed to a specific client in a specific case, ostensibly allowing it to exercise “far more independence and authority in crafting litigation strategies before the High Court” than would an attorney representing private clients.<sup>168</sup> It could be argued that the government’s interests have

<sup>160</sup> See *infra* Figure 30.

<sup>161</sup> See *infra* Figure 30.

<sup>162</sup> See *infra* Table 10.

<sup>163</sup> See *infra* Table 10.

<sup>164</sup> See *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004).

<sup>165</sup> See *infra* Table 10.

<sup>166</sup> See *infra* Table 10. However, some of these “wins” were not entirely wins, or at least not entirely “losses” for the environmental side. *E.g.*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010) (ruling that a permanent injunction by the district court was an abuse of discretion, but not ruling out a partial injunction).

<sup>167</sup> See *infra* Table 10 (calculations for this figure are derived from the data in Table 10); Formula (for y-axis): # of times SG’s position aligned with industry / # of times SG present in the case.

<sup>168</sup> *Lazarus, supra* note 1, at 1495 (citing *Drew S. Days, III., In Search of the Solicitor General’s Clients: A Drama with Many Characters*, 83 *KY. L.J.* 485, 487-88 (1995)).

increasingly converged with those of industry and against environmental interests. It seems likely, however, that at least some portion of this increasing alignment is due to the rise of the Supreme Court Bar. The majority of the most expert advocates, after all, previously spent time in the Solicitor General's office.<sup>169</sup> As a result, many of these expert advocates are familiar with the Solicitor General's office, both on a personal level with the attorneys who work there, but also with the mechanics of how the office chooses to join a case.<sup>170</sup> This familiarity likely gives Supreme Court Bar attorneys a significant advantage in convincing the Solicitor General's office to join their side.

Such collaboration is not necessarily bad; it does, after all, make for excellent advocacy before the Court. Better advocacy makes for better, more well-informed Court decisions,<sup>171</sup> particularly in a complex area like environmental law.<sup>172</sup> But this increasing collaboration also gives cause for concern. Environmental interests are underrepresented even without the presence of the Solicitor General.<sup>173</sup> The Supreme Court Bar, made up of the most effective private advocates, generally represents industry.<sup>174</sup> One of the potentially strongest counterbalances to the Bar is the Solicitor General's office.<sup>175</sup> If the government increasingly aligns with industry, however, it makes an already uneven playing field that much steeper for environmental parties.<sup>176</sup> And the numbers speak for themselves: the environment is not faring well.<sup>177</sup>

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<sup>169</sup> See Lazarus, *supra* note 1, at 1492 (“The ten attorneys who have argued the most cases before the Court since the beginning of the twentieth century all worked with the Solicitor General’s Office for a significant part of their careers.”).

<sup>170</sup> *Id.*

<sup>171</sup> See Lazarus, *supra* note 1, at 1554.

<sup>172</sup> *Id.* at 1549.

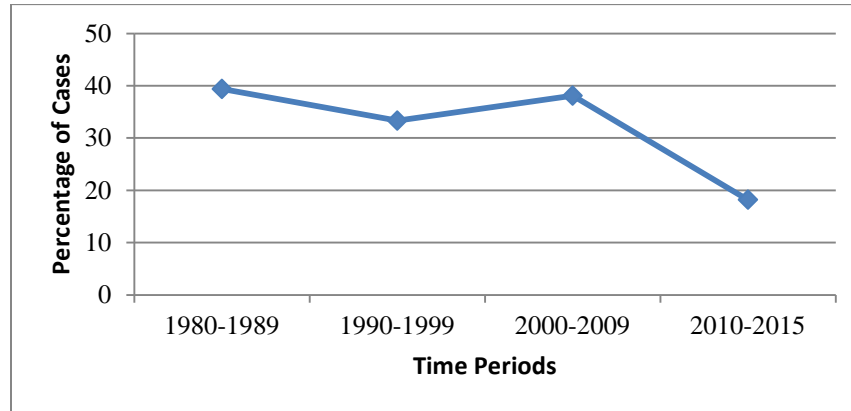
<sup>173</sup> See Lazarus, *supra* note 1, at 1560 (explaining that law firms generally decline to take up environmental cases).

<sup>174</sup> *Id.* at 1554.

<sup>175</sup> The Solicitor General’s office enjoys great expertise, and it usually wins environmental cases. See *infra* Table 10.

<sup>176</sup> The law itself, particularly with respect to the “injury-in-fact” requirement to demonstrate standing, also puts environmental interests at a disadvantage. See, e.g. Christopher B. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972) (proposing that the environment should be granted legal rights); *Sierra Club v. Morton*, 405 U.S. 727 (1972) (rejecting that view and holding that the Sierra Club lacked standing to challenge an environmentally-damaging project); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (articulating a demanding bar for environmental plaintiffs to demonstrate injury-in-fact); *but see Massachusetts v. EPA*, 549 U.S. 497 (2007) (finding that Massachusetts had standing to challenge EPA’s decision not to regulate greenhouse gases). *But see Summers v. Earth Island Institute*, 555 U.S. 488, 488 (2009) (“[G]eneralized harm to the forest or environment will not alone” support standing). Industry, however, as a regulated industry, has little difficulty demonstrating standing.

<sup>177</sup> See *infra* Figure 31.

Figure 31. Environmental Wins by Percentage of Cases<sup>178</sup>

These trends are undoubtedly alarming for those who care about the environment. And in fact, a majority of Americans believe that the U.S. government is doing “too little” in terms of protecting the environment<sup>179</sup> and support stricter environmental laws and robust environmental protection.<sup>180</sup>

Table 6.<sup>181</sup>

	<b>Too much</b>	<b>Too little</b>	<b>About right</b>	<b>No opinion</b>
2015 Mar 5-8	16	48	34	1
2014 Mar 6-9	17	48	34	1
2013 Mar 7-10	16	47	35	2
2012 Mar 8-11	17	51	30	2

<sup>178</sup> See *infra* Table 10 (calculations for this figure are derived from the data in Table 10); Formula (for y-axis): # of times the pro-environment side won (when SG was participating in the case, but regardless of which side the SG took) / total # of cases.

<sup>179</sup> *Environment*, GALLUP, <http://www.gallup.com/poll/1615/environment.aspx> (last visited Apr. 3, 2017).

<sup>180</sup> Bruce Drake, *How Americans view the top energy and environmental issues*, PEW RESEARCH CENTER (Jan. 15, 2015), <http://www.pewresearch.org/key-data-points/environment-energy-2>.

<sup>181</sup> *Environment*, *supra* note 179.

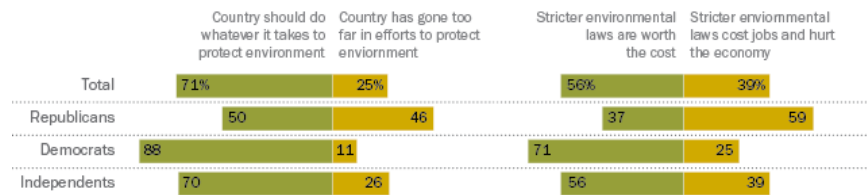
	<b>Too much</b>	<b>Too little</b>	<b>About right</b>	<b>No opinion</b>
2011 Mar 3-6	16	49	33	2
2010 Mar 3-6	15	46	35	4
2006 Mar 13-16	4	62	33	1
2005 Mar 7-10	5	58	34	3
2004 Mar 8-11	5	55	37	3
2003 Mar 3-5	7	51	37	5
2000 Apr 3-9	10	58	30	2
1992 Jan 5-Mar 31	4	68	26	2

*Do you think the U.S. government is doing too much, too little, or about the right amount in terms of protecting the environment?*

Table 7.<sup>182</sup>

**Broad Public Support for Environmental Protection, But is it Worth the Cost?**

% saying ...



Survey conducted Jan. 23-March 16, 2014

PEW RESEARCH CENTER

Even for those less worried about environmental protection—or for those who would argue that public opinion has no place in the courtroom—balanced argument before the Court should be an important interest. After all, “better

<sup>182</sup> Drake, *supra* note 180.

decisions require better advocacy on all sides, not just on behalf of some sides.”<sup>183</sup> Promoting parity in environmental law advocacy would promote better judicial decision-making.

## VII. RECOMMENDATIONS

Industry’s increasing presence and success in environmental law cases gives cause for concern, both for those who care about environmental interests and for those who value balanced advocacy before the Court. The Solicitor General’s increasing alignment with industry only exacerbates that worry. As the most experienced and effective Supreme Court advocates increasingly represent non-environmental, industry interests, environmental interests will increasingly lose out. But this need not be the case.

Professor Richard Lazarus has set forth a number of proposals to remedy the gap posed by the Supreme Court Bar’s representation of industry.<sup>184</sup> His proposals, although aimed at the representation of non-industry interests more generally, easily transfer to the specific area of environmental law. The Supreme Court Bar, for example, could serve as pro bono counsel in environmental law cases.<sup>185</sup> The Bar does in fact undertake pro bono work, but it does so on a “largely ad hoc” basis.<sup>186</sup> Moreover, the pro bono work it undertakes is usually limited to areas of law that likely won’t upset its “financially important business clients.”<sup>187</sup> Environmental law, unfortunately, is one such area for which the Bar generally declines to provide assistance.<sup>188</sup> But it does not have to be this way. Although taking up environmental causes might upset business clients, it rarely poses a “true legal ethical” problem.<sup>189</sup> Law school clinics could also level the playing field.<sup>190</sup> However, because members of the Bar often teach the Supreme Court clinics, the same possible conflicts limit the range of cases they will take.<sup>191</sup> Another possibility is for the Court to appoint experts where counsel is lacking and to more readily permit organizations represented by accomplished advocates to present oral argument as amicus.<sup>192</sup>

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<sup>183</sup> See Lazarus, *supra* note 1, at 1554.

<sup>184</sup> *Id.* at 1561-62.

<sup>185</sup> *Id.* at 1561.

<sup>186</sup> *Id.* at 1560.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 1562.

<sup>190</sup> *Id.* at 1558.

<sup>191</sup> *Id.* at 1560.

<sup>192</sup> *Id.* at 1562 (“The Court routinely grants motions for divided argument filed by the Solicitor General as amicus curiae, even in cases in which the federal interest hardly seems central to the case . . . While the Court currently routinely denies almost every request by amicus to present oral argument, the Court should now be willing to grant motions for divided argument on behalf of interests not so well represented before the Court by the parties themselves. . . .”).

Finally, at least in the case of environmental law, the Solicitor General's office could enact a policy to align less with industry. The Solicitor General potentially provides the most effective counterweight to the experience of the Supreme Court Bar.<sup>193</sup> If the office of the Solicitor General chooses to take the opposite side of industry, it will help ensure that each side benefits from comparable resources and advocacy. A particularly effective strategy would be for the Solicitor General's office to take up the environmental side when it has lost in lower courts. The data in Figure 18 demonstrates that when the Solicitor General's office serves as petitioner for the environmental side it enjoys remarkable success.<sup>194</sup> Although this could reflect the Solicitor General's decision to only take the petitioner and environmental side when it has a strong case, it also suggests that the Solicitor General is resoundingly successful as petitioner. If the Solicitor General's office turns more of its attention to representing the environmental side as petitioner, it—and the environment, in turn—may enjoy increased success.

#### VIII. CONCLUSION

The rise of the Supreme Court Bar may spell trouble for environmental interests. The data in this paper suggest that it already has. Advocacy matters, and as the most experienced Supreme Court advocates increasingly represent industry interests, those interests will continue to enjoy ever-greater success—often at the expense of the environment. Although the increasing representation and success of industry may not come as a huge surprise, the magnitude of that success should serve as a call to action.

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<sup>193</sup> *See id.* at 1494-95 (“A petitioner’s chances of winning increase by an average of 17% if supported by an amicus brief filed by the Solicitor General and decrease by an average of approximately 26% if the Solicitor General instead files an amicus brief in support of respondent.”).

<sup>194</sup> *See supra* Figure 18.

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*Environmental Law and the Supreme Court Bar*

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Table 8.<sup>195</sup>

<b>Year</b>	<b>Number of Supreme Court Opinions<sup>196</sup></b>	<b>Number of “environmental” cases</b>
1980	123	5
1990	112	1
1995	75	0
2000	77	2
2003	73	0
2004	74	6
2005	69	0
2006	67	2
2007	67	4

Table 9.<sup>197</sup>

<b>Practitioner</b>	<b>Affiliation</b>	<b># of Appearances 1980-89</b>	<b># of Appearances 1990-99</b>	<b># of Appearances 2000-09</b>	<b># of Appearances 2010-15</b>	<b>Cumulative total</b>
Andrew Levander	SG	3	-	-	-	3
Charles Lettow	Industry	3	-	-	-	3
William Alsup	SG	2	-	-	-	2
Alan Horowitz	SG	2	-	-	-	2
Kathryn Oberly	SG	2	-	-	-	2
Mary Jacobson	State AG	2	-	-	-	2

<sup>195</sup> See UNITED STATES CENSUS BUREAU, *supra* note 17.<sup>196</sup> See *id.*<sup>197</sup> See cases cited *supra* notes 11, 20, 25, 35.

Practitioner	Affiliation	# of Appearances 1980-89	# of Appearances 1990-99	# of Appearances 2000-09	# of Appearances 2010-15	Cumulative total
Lawrence Wallace	SG	2	5	1	-	8
Theodore Garrett	SG	2	1	-	-	3
Louis Clayborne	SG	2	-	-	-	2
Peter Schiff	State SG	1	1	-	-	2
Andrew Pincus	SG and Industry	1	1	-	-	2
Edward Warren	Industry	1	1	1	-	3
Edwin Kneedler	SG	1	2	3	-	6
Jeffrey Minear	SG	-	2	5	-	7
William Collins	State SG	-	1	1	-	2
Richard Lazarus	Envtl. nonprofits	-	1	1	-	2
Thomas Hungar	SG	-	-	3	-	3
Theodore Olson	SG	-	-	2	-	2
Gregory Garre	SG	-	-	3	1	4
Carter Phillips	Industry	-	-	2	1	3
Timothy Bishop	Industry	-	-	2	1	3
Maureen Mahoney	Industry	-	-	2	-	2
Walter Dellinger	Industry	-	-	2	-	2
Seth Waxman	SG & private law firm, but for local government	-	-	2	-	2
Malcolm Stewart	SG	-	-	1	4	5
Jonathan Mitchell	State SG	-	-	-	2	2
Donald Verrilli	SG	-	-	-	2	2
Peter Keisler	Industry	-	-	-	3	3
Paul Smith	Industry	-	-	1	1	2



Table 10.<sup>198</sup>

Case name And Citation Year	U.S. Solicitor General present?	SG for or against environment	SG petitioner or respondent	Industry petitioner or respondent	Who won (petitioner or respondent)	SG win or lose
<i>Costle v. Pac. Legal Found.</i> 445 U.S. 198 1980	yes	for	petitioner	respondent	petitioner	win; 9-0
<i>Harrison v. PPG Indus., Inc.</i> 446 U.S. 578 1980	yes	for	petitioner	respondent	petitioner	win; 7-2
<i>United States v. Ward</i> 448 U.S. 242 1980	yes	for	petitioner	respondent	petitioner	win; 8-1
<i>Cent. Hudson Gas &amp; Elec. Corp. v. Pub. Serv. Comm'n of N.Y.</i> 447 U.S. 557 1980	no	n/a	n/a	petitioner	petitioner	n/a
<i>Indus. Union Dept., AFL-CIO v. Am. Petroleum Institute</i> 448 U.S. 607 1980	yes	for	petitioner	respondent	respondent	lose; 5-4
<i>EPA v. Nat'l Crushed Stone Ass'n</i> 449 U.S. 64 1980	yes	for	petitioner	respondent	petitioner	win; 9-0

<sup>198</sup> See cases cited *supra* notes 11, 20, 25, 35 (information in this table is based on a review of the dockets in these cases).

Case name And Citation Year	U.S. Solicitor General present?	SG for or against environment	SG petitioner or respondent	Industry petitioner or respondent	Who won (petitioner or respondent)	SG win or lose
<i>Minnesota v. Clover Leaf Creamery Co.</i> 449 U.S. 456 1981	amicus for pet.	for	petitioner	respondent	petitioner	win; 7-1
<i>City of Milwaukee v. Illinois and Michigan</i> 451 U.S. 304 1981	amicus for res.	for	respondent	petitioner	petitioner	lose; 6-3
<i>Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.</i> 452 U.S. 264 1981	yes	for	petitioner	respondent	petitioner	win; 9-0
<i>Hodel v. Indiana</i> 452 U.S. 314 1981	yes	for	petitioner	respondent	petitioner	win; 9-0
<i>Middlesex Cty. Sewerage Authority v. Nat'l Sea Clammers Ass'n</i> 453 U.S. 1 1981	yes	against	petitioner	petitioner	petitioner	win; 7-2
<i>Weinberger v. Romero-Barcelo</i> 456 U.S. 305 1982	yes	against	petitioner	n/a	petitioner	win; 8-1
<i>North Dakota v. United States</i> 460 U.S. 300 1983	yes	for	respondent	no industry	respondent	win; 7-2

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Case name And Citation Year	U.S. Solicitor General present?	SG for or against environment	SG petitioner or respondent	Industry petitioner or respondent	Who won (petitioner or respondent)	SG win or lose
<i>Ruckelshaus v. Sierra Club</i> 463 U.S. 680 1983	yes	against	petitioner	no industry	petitioner	win; 5-4
<i>United States v. Stauffer Chemical Co.</i> 464 U.S. 165 1984	yes	for	petitioner	respondent	respondent	lose; 9-0
<i>Sec'y of the Interior v. California</i> 464 U.S. 312 1984	yes	against	petitioner	petitioner	petitioner	win; 5-4
<i>Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.</i> 467 U.S. 837 1984	yes	against	petitioner	petitioner	petitioner	win; 9-0
<i>Chemical Mfrs. Ass'n v. Nat. Res. Def. Council, Inc.</i> 470 U.S. 116 1985	yes	against	petitioner	petitioner	petitioner	win; 5-4
<i>U.S. v. Riverside Bayview Homes, Inc.</i> 474 U.S. 121 1985	yes	for	petitioner	respondent	petitioner	win; 9-0
<i>Fla. Power &amp; Light Co. v. Lorion</i> 470 U.S. 729 1985	yes	for	petitioner	petitioner	petitioner	win; 8-1
<i>Ohio v. Kovacs</i> 469 U.S. 274 1985	amicus for pet.	for	petitioner	n/a	respondent	lose; 9-0

Case name And Citation Year	U.S. Solicitor General present?	SG for or against environment	SG petitioner or respondent	Industry petitioner or respondent	Who won (petitioner or respondent)	SG win or lose
<i>Midatlantic Nat. Bank v. N.J. Dept. Of Envtl. Prot.</i> 474 U.S. 494 1986	amicus for res.	for	respondent	petitioner	respondent	win, 5-4
<i>Exxon Corp. v. Hunt</i> 475 U.S. 355 1986	amicus for pet.	against	petitioner	petitioner	petitioner	win, 7-1
<i>Dow Chemical Co. v. United States</i> 476 U.S. 227 1986	yes	for	respondent	petitioner	respondent	win; 5-4
<i>Tull v. United States</i> 481 U.S. 412 1987	yes	for	respondent	petitioner	petitioner	lose; 9-0
<i>Int'l Paper Co. v. Ouellette</i> 479 U.S. 481 1987	amicus for respond ent	for	respondent	petitioner	petitioner	lose (in part); 5-4
<i>Cal. Coastal Com'n v. Granite Rock Co.</i> 480 U.S. 572 1987	amicus for res.	against	respondent	respondent	petitioner	lose; 5-4
<i>Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found. Inc.</i> 484 U.S. 49 1987	yes	for	respondent	petitioner	petitioner	lose; 9-0

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Case name And Citation Year	U.S. Solicitor General present?	SG for or against environment	SG petitioner or respondent	Industry petitioner or respondent	Who won (petitioner or respondent)	SG win or lose
<i>Pennsylvania v. Delaware Valley Citizens' Council for Clean Air</i> 483 U.S. 711 1987	yes	against	petitioner	n/a	petitioner	win; 5-4
<i>Lyng v. Northwest Indian Cemetery Prot. Ass'n</i> 485 U.S. 439 1988	yes	against	petitioner	n/a	petitioner	win; 5-3
<i>Robertson v. Methow Valley Citizens Council</i> 490 U.S. 332 1989	yes	against	petitioner	n/a	petitioner	win; 9-0
<i>Hallstrom v. Tillamook Cty.</i> 493 U.S. 20 1989	amicus for res.	against	respondent	n/a	respondent	win; 7-2
<i>Pennsylvania v. Union Gas Co.</i> 491 U.S. 1 1989	no	n/a	n/a	respondent	respondent	n/a
<i>General Motors Co v. United States</i> 496 U.S. 530 1990	yes	for	petitioner	respondent	petitioner	win; 9-0
<i>City of Burlington v. Dague</i> 505 U.S. 557 1992	amicus for pet.	against	petitioner	n/a	petitioner	win; 6-3

Case name And Citation Year	U.S. Solicitor General present?	SG for or against environment	SG petitioner or respondent	Industry petitioner or respondent	Who won (petitioner or respondent)	SG win or lose
<i>Arkansas v. Oklahoma</i> 503 U.S. 91 1992	yes	mostly for; partiall y against	petitioner	petitioner	petitioner	win; 9-0
<i>U.S. Dept. of Energy v. Ohio</i> 503 U.S. 607 1992	yes	against	petitioner	n/a	petitioner	win; 6-3
<i>Chemical Waste Mgmt., Inc. v. Hunt</i> 504 U.S. 334 1992	amicus for pet.	against	petitioner	petitioner	petitioner	win; 8-1
<i>Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dept. of Nat. Res.</i> 504 U.S. 353 1992	no	n/a	n/a	petitioner	petitioner	n/a
<i>Lujan v. Defenders of Wildlife</i> 504 U.S. 555 1992	yes	against	petitioner	n/a	petitioner	win; 6-3
<i>New York v. United States</i> 505 U.S. 144 1992	yes	for	respondent	n/a	petitioner	lose; 6-3
<i>C &amp; A Carbone, Inc. v. Town of Clarkstown</i> 511 U.S. 383 1994	no	n/a	n/a	petitioner	petitioner	n/a

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Case name And Citation Year	U.S. Solicitor General present?	SG for or against environment	SG petitioner or respondent	Industry petitioner or respondent	Who won (petitioner or respondent)	SG win or lose
<i>PUD No. 1 of Jefferson Cty. v. Was. Dept. of Ecology</i> 511 U.S. 700 1994	amicus for res.	for	respondent	petitioner	respondent	win; 7-2
<i>City of Chicago v. Env'tl. Def. Fund</i> 511 U.S. 328 1994	amicus for pet.	against	petitioner	n/a	respondent	lose; 7-2
<i>Key Tronic Corp. v. United States</i> 511 U.S. 809 1994	yes	mostly against	respondent	petitioner	both (partial win, partial loss)	6-3 (part win, part loss)
<i>Meghrig v. KFC Western, Inc.</i> 516 U.S. 479 1996	amicus for pet.	against	petitioner	respondent	petitioner	win; 9-0
<i>Steel Co. v. Citizens for Better Env't</i> 523 U.S. 83 1998	amicus for res.	for	respondent	petitioner	petitioner	lose; 9-0
<i>United States v. Bestfoods</i> 524 U.S. 51 1998	yes	for	petitioner	respondent	petitioner	win; 9-0
<i>Friends of Earth, Inc. v. Laidlaw Env'tl. Services</i> 528 U.S. 167 2000	amicus for pet.	for	petitioner	respondent	petitioner	win; 7-2
<i>United States v. Locke</i> 529 U.S. 89 2000	yes	against	petitioner	petitioner	petitioner	win; 9-0

Case name And Citation Year	U.S. Solicitor General present?	SG for or against environment	SG petitioner or respondent	Industry petitioner or respondent	Who won (petitioner or respondent)	SG win or lose
<i>Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers</i> 531 U.S. 159 2001	yes	for	respondent	petitioner	petitioner	lose; 5-4
<i>Whitman v. Am. Trucking, Inc.</i> 531 U.S. 457 2001	yes	mostly for	petitioner	respondent	petitioner	win; 9-0
<i>Cooper v. Aviall</i> 543 U.S. 157 2004	amicus for pet.	against	petitioner	both	petitioner	win; 7-2
<i>Alaska Dept. of Envtl. Conservation v. EPA</i> 540 U.S. 461 2004	yes	for	respondent	petitioner	respondent	win; 5-4
<i>S. Fla. Water Mgmt. Dist. v. Micosukee Tribe of Indians</i> 541 U.S. 95 2004	amicus for pet.	mostly against	petitioner	petitioner	petitioner	win; 9-0 (but didn't win all)
<i>Engine Mfr. Ass'n and W. States Petroleum Ass'n v. S. Coast Air Quality Mgmt. Dist.</i> 541 U.S. 246 2004	amicus for pet.	against	petitioner	petitioner	petitioner	win; 8-1
<i>Dep't of Transportation v. Pub. Citizen</i> 541 U.S. 752 2004	yes	against	petitioner	n/a	petitioner	win; 9-0



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Case name And Citation Year	U.S. Solicitor General present?	SG for or against environment	SG petitioner or respondent	Industry petitioner or respondent	Who won (petitioner or respondent)	SG win or lose
<i>Norton v. S. Utah Wilderness Alliance</i> 542 U.S. 55 2004	yes	against	petitioner	n/a	petitioner	win; 9-0
<i>S.D. Warren Co. v. Maine Board of Env'tl. Prot.</i> 547 U.S. 370 2006	amicus for res.	for	respondent	petitioner	respondent	win; 9-0
<i>Rapanos v. United States</i> 547 U.S. 715 2006	yes	for	respondent	petitioner	petitioner	lost (but not a total loss); 4-1-4 split
<i>Nat'l Ass'n of Homebuilders v. Defenders of Wildlife</i> 551 U.S. 644 2007	yes	against	petitioner	petitioner	petitioner	win; 5-4
<i>Env'tl. Def. v. Duke Energy Corp.</i> 549 U.S. 561 2007	yes	for	petitioner	respondent	petitioner	win; 9-0
<i>Massachusetts v. EPA</i> 549 U.S. 497 2007	yes	against	respondent	n/a	petitioner	loss; 5-4
<i>United States v. Atl. Research Corp.</i> 551 U.S. 128 2007	yes	against	petitioner	n/a	respondent	loss; 9-0

Case name And Citation Year	U.S. Solicitor General present?	SG for or against environment	SG petitioner or respondent	Industry petitioner or respondent	Who won (petitioner or respondent)	SG win or lose
<i>Winter v. NRDC</i> 555 U.S. 7 2008	yes	against	petitioner	n/a	petitioner	win; 5-4
<i>Exxon Shipping Co. v. Baker</i> 554 U.S. 471 2008	yes	for	respondent	petitioner	respondent (effect- ually)	4-4 split, but win result for gov./ resp.)
<i>Entergy Corp. v. Riverkeeper, Inc.</i> 556 U.S. 208 2009	yes	against	petitioner	petitioner	petitioner	win; 5-4
<i>Burlington N. &amp; Santa Fe Ry. Co. v. United States</i> 556 US 599 2009	yes	for	respondent	petitioner	petitioner	loss; 8-1
<i>Coeur Alaska, Inc. v. Se. Alaska Conservation Council</i> 557 U.S. 261 2009	yes	against	petitioner	petitioner	petitioner	win; 6-3
<i>Monsanto Co. v. Geertson Seed Farms</i> 561 U.S. 139 2010	yes	against	petitioner	petitioner	petitioner	win (but not a total win); 7-1
<i>American Elec. Power Co. v. Connecticut</i> 131 S.Ct. 2527 2011	yes	against	petitioner	petitioner	petitioner	win; 9-0

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Case name And Citation Year	U.S. Solicitor General present?	SG for or against environment	SG petitioner or respondent	Industry petitioner or respondent	Who won (petitioner or respondent)	SG win or lose
<i>Sackett v. EPA</i> 132 S.Ct. 1367 2012	yes	for	respondent	petitioner	petitioner	loss; 9-0
<i>Southern Union Co. v. United States</i> 132 S.Ct. 2344 2012	yes	for	respondent	petitioner	petitioner	lose; 6-3
<i>L.A. Cty. Flood Control Dist. v. NRDC</i> 133 S.Ct 710 2013	amicus for pet.	against	petitioner	petitioner	petitioner	win; 9-0
<i>Decker v. Nw. Envtl. Def. Center</i> 133 S.Ct 1326 2013	amicus for pet.	against	petitioner	petitioner	petitioner	win; 9-0
<i>Am. Trucking Assns, Inc. v. Los Angeles</i> 133 S.Ct 2096 2013	amicus for pet.	against	petitioner	petitioner	petitioner	win; 9-0
<i>EPA v. EME Homer City Generation</i> 134 S.Ct. 1584 2014	yes	for	petitioner	respondent	petitioner	win; 6-2
<i>Utility Air Regulatory Group v. EPA</i> 134 S.Ct. 2427 2014	yes	for	respondent	petitioner	respondent	win; 9-0 (but not a total win)
<i>CTS Corp. v. Waldburger</i> 134 S.Ct. 2175 2014	amicus for pet.	against	petitioner	petitioner	petitioner	win; 7-2

Case name And Citation Year	U.S. Solicitor General present?	SG for or against environment	SG petitioner or respondent	Industry petitioner or respondent	Who won (petitioner or respondent)	SG win or lose
<i>Michigan v. EPA</i> 135 S.Ct. 2699 2015	yes	for	respondent	both; classified as petitioner	petitioner	lose; 5-4