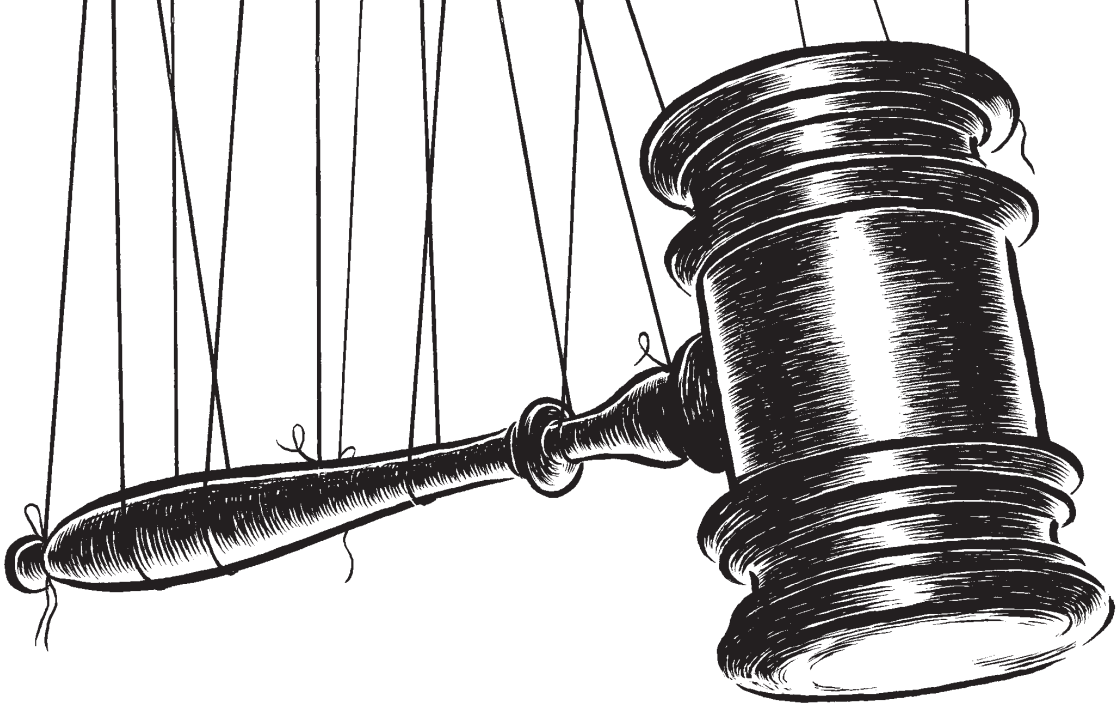

Alan Morrison

SUPREME COURT
ASSISTANCE PROJECT 2008

PUBLIC CITIZEN | LITIGATION GROUP

"Thank you again for your excellent counsel and work product. It's especially nice knowing there are people and groups out there helping consumers and lawyers fight these corporate giants. Well done!"

— Kirk Hulett, attorney for whom we wrote a brief in opposition in a class action consumer rights case

This report discusses the work of the Alan Morrison Supreme Court Assistance Project (SCAP) and its fellowship program for fiscal year 2008, which ended on September 30, 2008. We hope our report demonstrates the unique service provided by SCAP and persuades you to contribute this year. We need your support to ensure that SCAP can continue offering pro bono legal assistance to litigants at both the certiorari and merits stages of Supreme Court review.

Julia Graff served as the 2007–2008 SCAP Fellow. Donations from individuals and law firms significantly defrayed the cost of Julia's fellowship. Julia completed her fellowship in August, and she is now working for a small firm in D.C. that specializes in employment discrimination law. Leah Nicholls succeeded Julia in August after completing a clerkship with the Supreme Court of Texas. She has already provided more than a dozen lawyers with certiorari-stage assistance, co-counseled and provided research support on several briefs in opposition to cert, and has coordinated nineteen moot courts.

The Project and Fellowship

In 1990, SCAP was founded as a program of Public Citizen Litigation Group to help ameliorate the imbalance in experience and resources between parties at the Supreme Court level. On one hand, business clients are typically represented by an elite, expensive cadre of Supreme Court practitioners, and the government relies on the Office of the Solicitor General or a state Attorney General, all with extensive experience practicing before the highest state and federal appellate courts. On the other side are often small firms, solo practitioners, public interest or legal services attorneys — excellent in their fields, but with little or no Supreme Court experience and very limited resources. A recent study by Georgetown law professor Richard Lazarus indicates that this Supreme Court advocacy gap continues to grow: During the 2007 Term, excluding arguments presented by the Solicitor General, twenty-eight percent of oral arguments were presented by advocates who had argued ten or more cases before the Supreme Court — a dramatic increase from the nine percent of arguments in 2000 and two percent in 1980. Thus, our goal of equalizing this imbalance is all the more relevant to today's changing Supreme Court landscape.

We hope that, by lending our experience in Supreme Court practice to "underdog" lawyers, we can help those lawyers preserve or win a public interest victory. By the end of the 2007 Term, Public Citizen attorneys had argued fifty-five cases before the High Court and had appeared as lead counsel, co-counsel, or in an amicus capacity in hundreds of other Supreme Court cases.

SCAP's mission is to offer free, pro bono legal assistance at the certiorari stage, by opposing petitions for certiorari to protect public interest victories in lower courts and filing petitions for certiorari asking the Supreme Court to review open legal questions. Our cases often involve claims of government misconduct or situations where workers, civil rights claimants, or tort plaintiffs have won significant victories or established important rules of law. When trying to preserve public interest victories by keeping cases out of the Court, SCAP focuses not only on the merits of the case, but also on technical legal issues (such as whether the Supreme Court has jurisdiction) and the often complex question of what makes a case "cert-worthy." If the Supreme Court agrees to hear a case, SCAP assists attorneys in writing briefs and preparing for oral argument, including conducting moot courts. During each Supreme Court Term, SCAP is involved, on average, in about twenty-five cases in which the Court grants certiorari (out of approximately seventy-five that the Court hears).

The SCAP Fellow focuses on identifying cases that warrant our assistance. She spends a substantial portion of her time reading all paid petitions for certiorari. Working under the supervision of one of the Group's senior lawyers, the Fellow makes an initial judgment about whether the case concerns the public interest and, in cases that are potentially cert-worthy, prepares a memo on the strength of the petition and offers help in appropriate cases. All petitions granted by the Court for full review are also considered for SCAP assistance.

When a lawyer accepts the Fellow's offer of help, one of Public Citizen's lawyers assumes principal responsibility for that SCAP case. The Fellow participates fully in all aspects of the project, including assisting with briefs, conducting research, participating in moot courts, and attending oral arguments.

Our Docket: The 2007 Term

In the 2007 Supreme Court Term, which stretched from October 2007 through June 2008, Public Citizen Litigation Group (PCLG) provided substantial certiorari-stage assistance in twenty-two cases. Members of the Group served as the principal drafter of the opposition to cert in nine of those cases; filed two petitions for certiorari; and filed one amicus brief in favor of a grant. At the merits stage, Group lawyers argued a record four cases before the Court and provided moot courts to help prepare advocates in another fourteen cases. The following representative cases demonstrate the broad range of issues and the wide variety of legal assistance provided. For a complete list of cases on which we are currently working, visit our website at www.citizen.org/supremecourt.

Briefs In Opposition

***Tyson Foods, Inc. v. de Asencio*:** The world's largest poultry company had refused to pay workers in some of its chicken-processing plants for the time they spent putting on, taking off, and cleaning sanitary and protective clothing before and after their work shifts and breaks. In February, the company asked the Supreme Court to take its case and rule that those tasks do not count as compensable "work" under the Fair Labor Standards Act (FLSA). In support of the workers' attorney, Fred Santarelli, PCLG attorneys Greg Beck and Brian Wolfman wrote the brief in opposition to cert, successfully arguing that there was no split among the circuit courts of appeal on this issue, and that Congress has made clear that these activities are covered under the FLSA. The workers can now proceed with their claims against the company for back pay and other relief.

***T-Mobile USA, Inc. v. Laster*:** Customers who bought wireless phones and service plans from T-Mobile brought a class action law suit, alleging that the company violated state consumer protection laws. T-Mobile moved to compel individual arbitration, invoking a class-action ban it had embedded deep within the "Welcome Guide" that arrived with the phones. The Ninth Circuit held that the class-action ban was unconscionable as a matter of state law because it would effectively allow the company to avoid liability for small consumer claims. The company sought Supreme Court review. PCLG attorneys Deepak Gupta, Scott Nelson, and Bonnie Robin-Vergeer, assisting lawyers Kirk Hulett, Craig Nicholas, and Matthew Butler, showed in their brief in opposition that the state high courts and federal appellate courts agree that the Federal Arbitration Act does not preclude state courts from assessing the unconscionability of class-action bans under state contract law.

***Exxon Mobil Corp. v. Doe*:** Indonesian villagers and their survivors can now pursue tort claims against Exxon Mobil for human rights atrocities they suffered at the hands of the company's security forces in Aceh province. The company tried unsuccessfully to dismiss the entire case, arguing that continued litigation would jeopardize the United States' foreign policy interests in Indonesia. After the D.C. Circuit declined to allow an interlocutory appeal, the company asked the Supreme Court to expand the collateral order doctrine to encompass denials of motions to dismiss based on the political question doctrine. PCLG attorney Bonnie Robin-Vergeer, working with attorneys Agnieszka Fryszman, Michael Hausfeld, Brent Landau, and Terry Collingsworth, kept the case out of the Supreme Court by demonstrating that the D.C. Circuit's dismissal for lack of appellate jurisdiction was correct and that the federal courts of appeals do not disagree on the availability of appellate jurisdiction in such situations.

***Edwards v. Kenyon*:** The issue in this case was whether a police officer was entitled to qualified immunity after using gratuitous force against a compliant arrestee by shoving his arms behind his back at a high angle while handcuffing him. The officer argued that his arrest technique did not violate any clearly established rights, as evidenced by the fact that the trial court's decision was affirmed by an equally divided appellate court. After PCLG attorneys Michael Kirkpatrick, Julia Graff, and Brian Wolfman, along with the plaintiff's lawyer Robert Newcomb, won a cert denial, the arrestee was able to move forward with his police brutality case.

Moot Courts

Each year, we provide more than a dozen moot courts for attorneys with oral arguments before the Supreme Court. We aim to provide them with highly rigorous, yet supportive, preparation. Cases we mooted this past Term included *Watson v. United States*, *Washington State Grange v. Washington State Republican Party*, *LaRue v. DeWolff*, *Boberg & Associates*, *Sprint United Management v. Mendelsohn*, *FedEx v. Holowecki*, *Ali v. Bureau of Prisons*, *CBOCS West v. Humphries*, *Meacham v. Knolls Atomic Power Lab*, *Gonzales v. United States*, *Riley v. Kennedy*, *Exxon Shipping v. Baker*, *Greenlaw v. United States*, *Engquist v. Oregon Department of Agriculture*, and *Huber v. Wal-Mart*.

"Thank you for the wonderful support you provided us. The moot court was very helpful and your general guidance all along was invaluable."

— Cindy Hyndman, excerpt from a thank-you letter from lawyer handling major employment discrimination case before the High Court

PCLG Argues A Record Four Supreme Court Cases

The 2007 Term caused much discussion in the legal community about the Court's increasing conservatism, its supposed pro-business slant, and its perceived willingness to close the courthouse door to litigants. Although each claim is debatable, there is no doubt that it is harder today than it was a generation ago to garner public interest victories in federal courts.

But that makes our record this year all the more amazing. We argued four cases before the High Court this past term — which is itself remarkable for a nine-lawyer office. That's as many as all but one private law firm — and that firm has more than 1800 lawyers. And we won three of those cases. In each victory, we defeated the Bush administration, and, in two, we were pitted against a big corporation as well.

By the close of the 2007 Term, we had argued fifty-five cases before the Supreme Court. When you take into account all of the Supreme Court briefs we have filed, all the influential amicus briefs we have authored, and all the successful oppositions to cert we have written to preserve public interest victories, we have worked on hundreds of Supreme Court cases over the years.

Although each case we argued last Term is different, they had a common theme: preserving ordinary consumers' access to the courts. Whether it is fighting the pernicious expansion of the federal preemption doctrine, maintaining the vitality of federal attorney fees legislation, or preserving Americans' right to their day in court, SCAP continues to fight for the public interest at the highest level.

>> *Warner-Lambert v. Kent*: Shortly after oral argument in this case, the Supreme Court affirmed a decision rejecting the drug industry's claim to immunity from lawsuits in Michigan. The 4-to-4 decision was a great victory for the patients involved in the case, all of whom suffered very serious liver damage from the diabetes drug Rezulin. At a time when the FDA is by its own admission underfunded, the ability of injured patients to hold drug companies liable for injuries caused by their products is particularly important.

>> *Riegel v Medtronic*: In PCLG's only loss this Term, the Court ruled that the federal medical device law preempts state-law claims seeking damages for injuries caused by medical devices that receive premarket approval from the FDA. Though the decision was very disappointing, we immediately began work on a congressional override.

>> *Richlin Security Service Co. v. Chertoff*: This past summer, the Supreme Court ruled 9-to-0 that paralegal services must be reimbursed as attorney fees at market rates under the Equal Access to Justice Act (EAJA) — the attorney fees-shifting statute that applies to most cases brought against the federal government. Over the years, EAJA has been the means for awarding fees to "little guys," such as Social Security claimants, disabled veterans, and small businesses that challenge unlawful government conduct.

>> *Taylor v. Sturgell*: In this case, the Supreme Court rejected an expansive theory of "virtual representation" and held that nonparties to litigation can only be bound by a judgment under very limited circumstances. In its unanimous decision, the Supreme Court rejected the idea that someone can be barred from bringing a case based on the theory that he was adequately represented by a party to a previous case if that previous party did not understand himself to be representing the nonparty. Our victory in *Taylor* upheld the basic principle of American law that everyone is entitled to his or her own day in court.

Our Growing Environmental Docket

Because Public Citizen Litigation Group is a general practice public interest law firm, we are particularly well suited to offer assistance to colleagues from law firms and non-profit organizations with practices focused on particular substantive areas of law that present tricky procedural questions or matters of general administrative law. For example, over the last couple of Terms, environmental lawyers around the country have looked to PCLG for our expertise in public law to help them advocate for their cause at the Supreme Court.

During the 2007 Term, PCLG attorney Scott Nelson took the lead in developing our environmental docket, which included work on the following cases at the cert stage and on the merits in granted cases:

>> ***Coeur Alaska v. Southeast Alaska Conservation Council*:** on whether the Army Corps of Engineers has authority under section 404 of the Clean Water Act to grant a "fill material" permit for an industrial wastewater discharge that is prohibited by the EPA's effluent limitations. The Supreme Court granted cert and argument will be heard in January. We have continued to work with the respondent's attorney at the merits stage and will host a moot court prior to the argument.

>> ***Entergy Corp. v. Riverkeeper*:** on whether the Clean Water Act permits the EPA to conduct a cost-benefit analysis to determine the "best technology available" to minimize environmental harm in selecting cooling water intake structure regulations. We provided cert-stage assistance to the respondent.

>> ***Summers v. Earth Island Institute*:** on whether the Forest Service's promulgation of a rule constituted final agency action ripe for judicial review under the APA and whether the Ninth Circuit properly issued a nationwide injunction. We worked closely with the respondent's attorney on the briefs and in preparation for oral argument, which took place in October.

>> ***City of Healdsburg v. Northern California River Watch*:** on whether a municipal sewage treatment plant must obtain a National Pollutant Discharge Elimination System permit under the Clean Water Act before it may discharge partially treated wastewater into wetlands. We assisted the respondent with the brief in opposition and cert was denied.

During the 2006 Term, we wrote successful briefs in opposition to cert in two additional environmental cases:

>> ***U.S. Forest Service v. Earth Island Institute*:** on the proper standard for a preliminary injunction under the APA that barred the Forest Service from proceeding with salvage logging projects in the Eldorado National Forest.

>> ***Mineral Co. v. Ecology Center, Inc.*:** on whether the National Environmental Policy Act and the National Forest Management Act required the U.S. Forest Service to verify its hypothesis that commercial thinning and prescribed burning of old-growth stands in the Lolo National Forest would not be harmful to the forest environment and its wildlife.

Although PCLG is not an environmental organization, we welcome opportunities to support the work of environmental lawyers and other colleagues in the public interest bar who, while expert in their discrete areas of law, desire assistance before the Supreme Court. We look forward to continuing this line of work in Terms to come.

The Litigation Group's Supreme Court work is as vital and important as ever. We are counting on you to help us continue our fight for the rights of consumers and other public interest litigants well into the future.

Thank You

Thank you for reviewing this Annual Report and supporting SCAP to continue the tradition begun by Alan Morrison in 1990. Many thanks also to those lawyers and law professors who referred cases to SCAP, participated in our moot courts, and worked with us on cases.

Our "satisfied customers" include skilled and dedicated attorneys working daily in the trenches to vindicate their clients' constitutional and statutory rights. We consider it an honor to guide these lawyers as they prepare to litigate for the underdog before the Supreme Court. But we can't continue this important work without the help of the many people who agree with our mission.

We would be grateful for any contribution you could make toward our efforts in the coming year. Please feel free to contact us if you have any questions or would like further information.

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