Cert Work, Pooled and Solo

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By tradition, the first Monday in October marks the start of a new Term at the Supreme Court of the United States. On October 6, 2008, the Chief Justice and the Associate Justices took the bench for the first time since they recessed last June.

Of course the Justices and their law clerks worked in private throughout the summer and early fall. Their tasks has included close review of almost 2,000 pending requests that the Court, which has discretionary jurisdiction, review lower court judgments—*i.e.*, that the Court decide to take cases for full briefing, oral argument and, before the Term ends next June, written decisions. These requests for Court review are called petitions for writs of *certiorari*, or "certs." At the start of its 2008 Term, the Court issued an 82-page Order List that, reflecting considerable work during the "recess," included over 1,800 cert denials.[1]

In the background of the Court's recent (and future) actions on cert petitions is Justice Samuel Alito's individual decision, reported recently, no longer to participate in the Justices' "cert pool."[2] The pool, which started in the 1970s, is a system in which participating Justices, as a collective, have one of their law clerks summarize and evaluate each cert petition. In theory, the pool clerk's memorandum could be the only document that a pool-participating Justice reads before voting whether to grant or deny a cert petition. Before Justice Alito's decision, Justice John Paul Stevens was alone in not participating in the pool—he had, and still has, his own law clerks evaluate and advise him on each cert petition.

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For a selected archive of Jackson List posts, see my homepage at www.law.stjohns.edu. To subscribe to the Jackson List, which does not display recipient identities or distribute their email addresses, send a note to barrettj@stjohns.edu.

[1] The October 6, 2008, Order list is available at www.supremecourtus.gov/orders/courtorders/100608zor.pdf.

[2] *See* Adam Liptak, *A Second Justice Opts Out of a Longtime Custom: The 'Cert. Pool,'* N.Y. TIMES, Sept. 25, 2008, *available at* www.nytimes.com/2008/09/26/washington/26memo.html?_r=3&ref=washington&oref=slogin&oref=slogin&oref=slogin.

In Justice Jackson's days on the Court, there was no formal cert pool. Each Justice took his own approach, but most had their own clerks review and make recommendations on pending cert petitions. That was Jackson's approach—indeed, that was his clerk's primary job during the clerkship, for Jackson almost always wrote, from first drafts forward, his own opinions.

Jackson's only general exception to his autonomous writing practice was that, at least once during a law clerk's employment (and usually later in the clerkship, after Justice Jackson had trained and trusted the clerk and he, in turn, knew the Justice's thinking and writing style), the Justice would let the clerk have the heady experience of drafting a Supreme Court opinion. Sometimes these assignments were to draft a "Jackson" concurrence or a dissent. On occasion he let a clerk take his hand at executing a Chief Justice assignment to Jackson of responsibility for writing an opinion of the Court. If Jackson found the clerk's draft satisfactory, he would edit it only lightly, have it printed, circulate it to the other Justices and, if enough then joined the opinion, finalize it and announce it for the Court just as if it had come from his own pen.

During the Court's 1949 Term, Jackson law clerk Howard C. Buschman, Jr., had, simultaneously, the experiences of drafting a Jackson opinion and working in something of a "cert pool."

These Buschman experiences began on a Saturday in late February 1950. Jackson returned to his chambers from the Justices' private Conference. He gave Buschman the assignment—the special opportunity—to draft a Supreme Court opinion. The law clerk, thrilled and highly motivated, went to work. Over the next days, he stinted on everything else, including the one-page summary and recommendation memoranda that he was supposed to be writing for Justice Jackson about pending cert petitions.

Jackson expected—and his law clerks knew that he expected—to receive law clerk cert memos on Fridays. The Justices met in Conference on Saturdays beginning in the late morning, and Jackson would use his preceding Fridays (and sometimes his Friday nights and his Saturday early mornings) to review clerk memos in preparation for Conference discussions and votes on cert petitions.

Thus it came to pass that on one Friday during that winter of 1950, law clerk Buschman went into Justice Jackson's office to deliver bad news.

The law clerk reported, with chagrin, that his cert memos for Jackson in preparation for the next day's Conference were not written. "I have been working on this opinion," Buschman said, "and I haven't finished the cert notes."

"Oh," replied Jackson. He then walked with Buschman from the Justice's office through his secretary's office into the law clerks' office. Jackson took the handle on a library cart that was filled with Buschman's unread cert petitions, wheeled it around and headed back to his office.

More than an hour then elapsed. Buschman was filled with stress and maybe even dread. (Some judges, you may assume, have yelled at—maybe some even have fired—one or more law clerks for lesser transgressions.)

Justice Jackson then reappeared, with the cart full of cert petitions, in Buschman's doorway. He began to apologize, and to offer a solution to the problem of his incomplete work. "I know you haven't had a chance to go over those thoroughly," he began. The good news, Buschman continued, was that he had borrowed the cert memos that another Justice's law clerk had written for his boss, and that Jackson could review them.

"Well, let me see," said Jackson. He sat down. He picked up the list of petitions that the Justices would be discussing the next day in Conference. It contained only docket numbers and parties' names. It had no synopses of the issues raised in the petitions or the details of the underlying decisions. It was just a naked list of cases.

Many years later, Buschman described what happened next from vivid memory:

> He said, "Well, Al Jones against Smith." He sat there with no notes. He said, "That involved such and such." He said, "I don't think that warrants cert for these reasons" and reeled off the reasons. And then he went to the next one and he gave me the facts of the next one. He gave me the facts in every one, every—
> Thirty-five of them or so, from memory, just like that, with no notes. And [he said for each case], "You know, let's see, that involved such and such an issue."

> I sat there and I was actually astounded. I said you don't need these cert notes that I had borrowed from somebody else.

Justice Alito's 2008 decision to climb out of the cert pool is, like Justice Stevens's decades of non-participation in the pool, a good thing. The logic of "three heads are better than two" suggests that multiple law clerks evaluating cert petitions independently and then advising various Justices in separate channels will increase the chances that important petitions, issues and implications will be recognized and handled properly.

With due respect to Supreme Court law clerks, however, the size of any cert pool and its risks may be beside the point. The Court itself is the many-headed decision maker. It seems likely that it has today, as it did in 1950, Justices who, especially in a pinch, can do their petition-reviewing work quite well without a memorandum from anyone.