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David R. Stras

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THE SUPREME COURT'S DECLINING PLENARY DOCKET: A MEMBERSHIP- BASED EXPLANATION

*David R. Stras**

INTRODUCTION

The decline in the Supreme Court's plenary docket over the past thirty years has puzzled commentators. A number of hypotheses for the decline have been advanced in the scholarly literature, including the impact of the cert pool,¹ Congress's elimination of most of the Supreme Court's mandatory appellate jurisdiction,² greater homogeneity in the personnel of lower federal courts,³ a reduction in the number of cases in which the United States has sought plenary review from the Court,⁴ and changes in personnel on the Supreme Court.⁵ Investigation of the latter hypothesis has been hampered by the limitations of available data, particularly for the Terms of the Supreme Court in which the most drastic declines in the plenary docket have occurred, such as from 1992 to 1993 when the number of opinions of the Court declined from 114 to 87, the greatest single-year

* Associate Justice, Minnesota Supreme Court. This Essay was written while I was a Professor of Law at the University of Minnesota Law School. Special thanks go to Shaun Pettigrew for coding the data and to Caitlin Dwyer for assisting me with the figures and tables in this Essay. I especially appreciate the excellent comments on an earlier draft provided by James Spriggs and Timothy Johnson.

1. See David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 985-96 (2007) (reviewing TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* (2006) and ARTEMUS WOOD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* (2006)).

2. See Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 751-58 (2001); Arthur D. Hellman, *The Shrunk Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 408-12 (1996).

3. See Cordray & Cordray, *supra* note 2, at 771-76.

4. See *id.* at 763-71; Hellman, *supra* note 2, at 417-19.

5. See Cordray & Cordray, *supra* note 2, at 776-90; Hellman, *supra* note 2, at 412-13.

percentage drop since the October 1953 Term of the Supreme Court.⁶

This Essay develops support for the hypothesis that changes in the Court's membership have contributed to the decline in the Supreme Court's plenary docket. The unique dataset contains the certiorari votes of all Justices for every case between October Term 1986 and October Term 1993 in which one or more Justices voted to grant certiorari or join three other Justices in doing so.⁷ The data and figures in this Essay demonstrate that personnel changes have had an impact on the decline in the Supreme Court's plenary docket.

I. THE SHRINKING PLENARY DOCKET

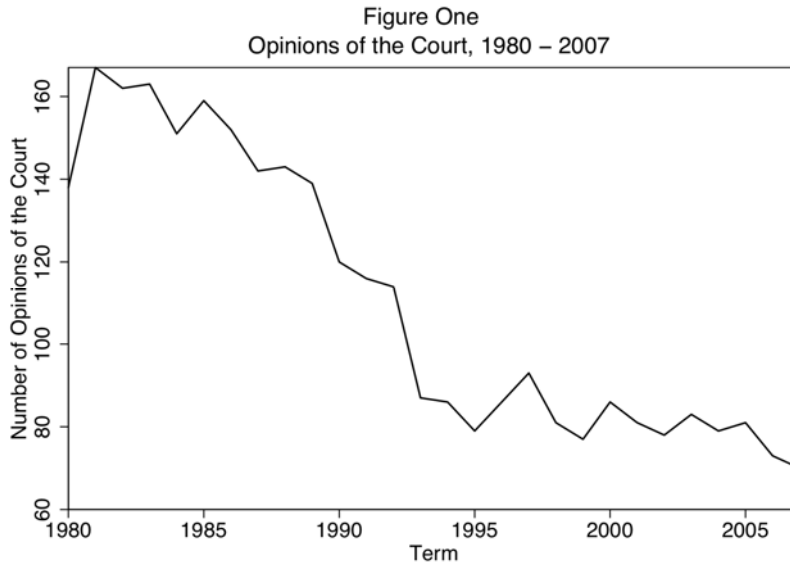
The recent decline in the Supreme Court's plenary docket is extraordinary. The Court's plenary docket reached a modern high of 167 Opinions of the Court in October Term 1981, but has since declined to a modern low of 70 in October Term 2007, a 58% reduction in the number of cases decided by the Court. The transformation of the plenary docket coincides with a period of rapid personnel turnover on the Supreme Court. In contrast to the unprecedented lack of *any* turnover on the Supreme Court from October Term 1994 to October Term 2005, five new Justices joined the Court between 1986 and 1993. The following five personnel changes occurred: (1) Antonin Scalia for Warren Burger in 1986;⁸ (2) Anthony Kennedy for Lewis Powell in 1987; (3) David Souter for William Brennan in 1990; (4) Clarence Thomas for Thurgood Marshall in 1991; and (5) Ruth Bader Ginsburg for Byron White in 1993. Given that the high turnover rate coincides perfectly with acceleration in the decline of the plenary docket, it is unsurprising that some scholars have speculated that membership changes have caused or at least contri-

6. Throughout this Essay, the number of opinions of the Court is derived from *Harvard Law Review's* annual Supreme Court Statistics, which has continuously tracked data on the Supreme Court since the October 1948 Term. According to the *Harvard Law Review*, an opinion of the Court is a "signed decision of the Court disposing of a case on its merits or a per curiam decision disposing of a case on its merits and containing substantial legal reasoning." *The Statistics*, 119 HARV. L. REV. 415, 415 (2005).

7. See *infra* notes 20–21 and accompanying text. The total number of cases in the dataset is 2,528 and the individual votes were obtained from the docket sheets contained in the papers of Justice Harry Blackmun, which are housed at the Library of Congress in Washington, D.C.

8. Of course, Antonin Scalia technically filled the seat vacated by William Rehnquist, who replaced Warren Burger as Chief Justice in 1986. The only new member of the Court appointed in 1986, therefore, was Justice Scalia.

buted to the decline.⁹ Indeed, in October Term 1986, the Court issued 152 Opinions of the Court, but by October Term 1993, that number had declined to just 87. Figure One graphically displays the trend.



II. THE EFFECT OF CHANGING MEMBERSHIP

The most direct method of determining whether membership changes have contributed to the declining plenary docket is to look at the individual votes of Justices on a Term-by-Term basis.¹⁰ Fortunately, Justice Harry Blackmun kept meticulous records, including docket sheets containing the certiorari votes for every Justice while he served on the Supreme Court. Accordingly, the Blackmun papers provide crucial voting information from the period of greatest decline in the plenary docket from 1986 to 1993.

Several limitations for the data must be recognized at the outset. First, although the individual votes of Justices are coded by docket number in the dataset, the aggregate data presented in

9. See Cordray & Cordray, *supra* note 2, at 776–90.

10. The Court applies a “Rule of Four,” in which a case is granted plenary review if at least four Justices vote to grant certiorari. A “Join-3 Vote” is a vote by a Justice to grant certiorari if three of her colleagues vote to do so.

this Essay do not indicate the *types* of cases on which certain Justices voted to grant certiorari. Peggy and Richard Cordray have noted, for example, that Justices Brennan and Marshall voted to grant review in a greater number of criminal cases in which the petitioner proceeded *in forma pauperis*.¹¹ In other words, the subtle nuances in aggregate voting patterns by each individual Justice are not captured in this Essay. Second, the aggregate voting data by Justice do not capture other factors that influence grants of certiorari by the Supreme Court, such as whether the United States Solicitor General is the party seeking plenary review or the number of amicus briefs filed at the certiorari stage. Third, the aggregate voting data do not correlate perfectly with the Term in which a plenary case is heard and decided by the Supreme Court. There is often a delay of three or more months between a grant of certiorari and the oral argument to permit the parties to have adequate time for briefing. Thus, a vote to grant a case during the late spring of October Term 1992 would not be heard until one of the Court's first few sittings of October Term 1993. Even so, the aggregate data provide the most persuasive case to date in support of the hypothesis that changes in the Court's personnel have contributed to the declining plenary docket of the Supreme Court.

Consistent with the observation that Justices fail to agree to a unanimous disposition in the majority of plenary cases, Justices also differ in how they approach the certiorari process. As Peggy and Richard Cordray explain, “[t]he grant rate of a particular Justice . . . combines aspects of personality, judicial philosophy, practical administration, political theory and historical perspective.”¹² For any given case, the Justices may disagree on whether the case is important enough for plenary review, whether it provides a good vehicle for answering the question posed in the petition for certiorari, and whether plenary review of the case is likely to result in an outcome or holding that is consistent with their ideological views. With respect to the latter point, some Justices engage in strategic voting, in which they cast a vote for a “defensive denial” in a case “to fend off an undesirable result on the merits,”¹³ or an “aggressive grant” if they are confident that

11. Cordray & Cordray, *supra* note 2, at 787.

12. *See id.* at 781.

13. Margaret Meriwether Cordray & Richard Cordray, *Setting the Social Agenda: Deciding to Review High-Profile Cases at the Supreme Court*, 57 U. KAN. L. REV. 313, 322 (2009) (quoting Gregory A. Caldeira et al., *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549, 558 (1999) (describing “defensive denials” and “aggressive grants”)).

the Court “is aligned with their preferences . . . in an attempt to move the law.”¹⁴ In other words, Justices’ voting behavior at the certiorari stage is partially dependent on the ideological composition of the Court itself.

Moreover, voting behavior at the certiorari stage may also represent a fundamental difference in how Justices view the supervisory role of the Supreme Court. Justice White, for example, held an “unswerving view that the Court ought not let circuit splits linger, that it should say what the federal law is sooner rather than later.”¹⁵ That robust view of the Court’s supervisory role is reflected in Justice White’s frequent dissents from denials of certiorari for cases involving a circuit split.¹⁶ Finally, Justices have noted that the vote on certiorari is “highly personal,”¹⁷ “rather subjective,”¹⁸ and “more a matter of ‘feel’ than of precisely ascertainable rules.”¹⁹ Thus, the certiorari votes of individual Justices are dependent not only on ideological and philosophical considerations, but also the idiosyncratic preferences of the Justices who cast them.

It is unsurprising, therefore, that individual Justices vote to grant certiorari at considerably different rates. For the eight Terms studied, the average number of votes to grant certiorari by a Justice per Term is 105.5, the median is 104.5, and the standard deviation is 41.37. Table One displays the aggregate number of votes to grant certiorari per Term for each Justice who served between October Term 1986 and October Term 1993:

14. Frank B. Cross & Emerson H. Tiller, *Understanding Collegiality on the Court*, 10 U. PA. J. CONST. L. 257, 265 (2008).

15. Ruth Bader Ginsburg, *Remembering Justice White*, 74 U. COLO. L. REV. 1283, 1285 (2003).

16. See, e.g., *Kindler v. United States*, 504 U.S. 946, 948–50 (1992) (mem.) (White, J., dissenting from denial of certiorari); *McMonagle v. Ne. Women’s Ctr., Inc.*, 493 U.S. 901, 904 (1989) (mem.) (White, J., dissenting from denial of certiorari).

17. WILLIAM O. DOUGLAS, *THE COURT YEARS: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS, 1939-1975* 175–76 (1980).

18. WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 265 (1987).

19. John M. Harlan, *Manning the Dikes*, 13 REC. ASS’N B. CITY N.Y. 541, 549 (1958).

Table One
Votes to Grant by Justice Per Term, 1986-1993

| | 1986 | 1987 | 1988 | 1989 | 1990 | 1991 | 1992 | 1993 |
|----------------|--------|--------|--------|--------|--------|--------|-------|-------|
| Rehnquist | 138 | 129 | 121 | 99 | 124 | 91 | 73 | 50 |
| Brennan | 108 | 148 | 128 | 106 | | | | |
| White | 207 | 206 | 195 | 200 | 233 | 214 | 151 | |
| Marshall | 85 | 133 | 127 | 91 | 122 | | | |
| Blackmun | 80 | 101 | 98 | 92 | 121 | 82 | 70 | 75 |
| Powell | 113 | | | | | | | |
| Stevens | 105 | 119 | 130 | 113 | 132 | 122 | 106 | 120 |
| O'Connor | 109 | 136 | 114 | 90 | 121 | 104 | 62 | 54 |
| Scalia | 92 | 106 | 111 | 92 | 100 | 64 | 48 | 58 |
| Kennedy | | 68 | 120 | 94 | 105 | 67 | 54 | 52 |
| Souter | | | | | 73 | 69 | 60 | 55 |
| Thomas | | | | | | 94 | 69 | 45 |
| Ginsburg | | | | | | | | 56 |
| TOTAL | 1037 | 1146 | 1144 | 977 | 1131 | 907 | 693 | 565 |
| AVERAGE | 115.22 | 127.33 | 127.11 | 108.56 | 125.67 | 100.78 | 77.00 | 62.78 |

No examination of the relationship between the certiorari votes of Justices and the size of the plenary docket would be complete without also taking into account “join-3 votes,” in which a Justice effectively votes to grant certiorari if three or more of her colleagues cast “grant” votes in a particular case. David O’Brien has argued that “[j]oin-3 votes clearly lowered the threshold for granting cases and contributed to the inflation of the plenary docket” by relaxing the Rule of Four.²⁰ His conclusion was based on the fact that, according to the bench memos contained in the papers of Justice Thurgood Marshall, 192 cases (or 12% of the total number of plenary cases) were placed on the plenary docket between 1979 and 1990 with less than four grant votes and one or more join-3 votes. Consistent with the treatment of join-3 votes by other scholars and the findings of Professor O’Brien, I will treat a join-3 vote as the functional equivalent of a vote to grant certiorari because a join-3 vote serves as a grant if three other Justices unconditionally vote to hear the case.²¹ Accordingly, Table Two combines grant and join-3 votes into one convenient table by Justice and Term.

20. David M. O’Brien, *Join-3 Votes, The Rule of Four, the Cert. Pool, and the Supreme Court’s Shrinking Plenary Docket*, 13 J.L. & POL. 779, 798 (1997).

21. See, e.g., Cordray & Cordray, *supra* note 2, at 780.

Table Two
Votes to Grant and Join-3 by Justice Per Term, 1986-1993

| | 1986 | 1987 | 1988 | 1989 | 1990 | 1991 | 1992 | 1993 |
|----------------|--------|--------|--------|--------|--------|--------|-------|-------|
| Rehnquist | 159 | 146 | 146 | 122 | 138 | 107 | 91 | 63 |
| Brennan | 116 | 153 | 131 | 117 | | | | |
| White | 221 | 223 | 210 | 210 | 247 | 230 | 168 | |
| Marshall | 98 | 143 | 131 | 105 | 146 | | | |
| Blackmun | 113 | 136 | 135 | 140 | 160 | 126 | 102 | 108 |
| Powell | 121 | | | | | | | |
| Stevens | 105 | 119 | 131 | 113 | 133 | 122 | 106 | 120 |
| O'Connor | 130 | 150 | 126 | 105 | 137 | 133 | 89 | 74 |
| Scalia | 93 | 108 | 111 | 92 | 100 | 65 | 49 | 59 |
| Kennedy | | 68 | 120 | 94 | 108 | 75 | 60 | 63 |
| Souter | | | | | 92 | 88 | 82 | 70 |
| Thomas | | | | | | 94 | 76 | 45 |
| Ginsburg | | | | | | | | 63 |
| TOTAL | 1156 | 1246 | 1241 | 1098 | 1261 | 1040 | 823 | 665 |
| AVERAGE | 128.44 | 138.44 | 137.89 | 122.00 | 140.11 | 115.56 | 91.44 | 73.89 |

Between 1986 and 1993, the average number of votes to grant plenary review²² by a Justice per Term is 118.5, the median is 114.5, and the standard deviation is 42.83.

The tables reveal two important trends not available from any other dataset. To begin with, the data demonstrate that membership changes appear to have influenced the size of the plenary docket; three membership changes, all occurring after the October 1989 Term, are particularly significant. First, Justice Souter, who voted to grant plenary review an average of 83 times per Term from 1990 to 1993, replaced Justice Brennan, who voted to grant plenary review an average of 129.25 times per Term from 1986 to 1989. Second, Justice Thomas, who voted to grant plenary review an average of only 71.7 times per Term from 1991 to 1993,²³ replaced Justice Marshall, who voted to grant plenary review an average of 124.6 times per Term from 1986 to 1991. Finally and most significantly, the substitution of Justice Ginsburg for Justice White likely had a transformative effect on the size of the plenary docket. Justice White voted to grant plenary review a prodigious 215.6 times per Term, on average, between 1986 and 1992, or 67% more often than Justice Brennan, who voted to grant plenary review the second most often of any member of the Court during the period. Meanwhile,

22. For purposes of this Essay, a “vote to grant plenary review” includes both grant and join-3 votes.

23. Justice Thomas’s votes to grant plenary review for the October 1991 Term do not reflect data for an entire Term because he did not join the Court until October 23, 1991, after the Court’s conference disposing of the petitions for certiorari filed during the summer. Even so, his aggregate voting data for October Terms 1992 and 1993 demonstrate that he is far more stingy in his votes to grant certiorari than was his predecessor, Justice Thurgood Marshall.

consistent with her scholarly writings urging the Court to exercise self-control in managing the size of its plenary docket,²⁴ Justice Ginsburg voted to grant plenary review during the October 1993 Term only 63 times, or 29.2% as often as her predecessor.

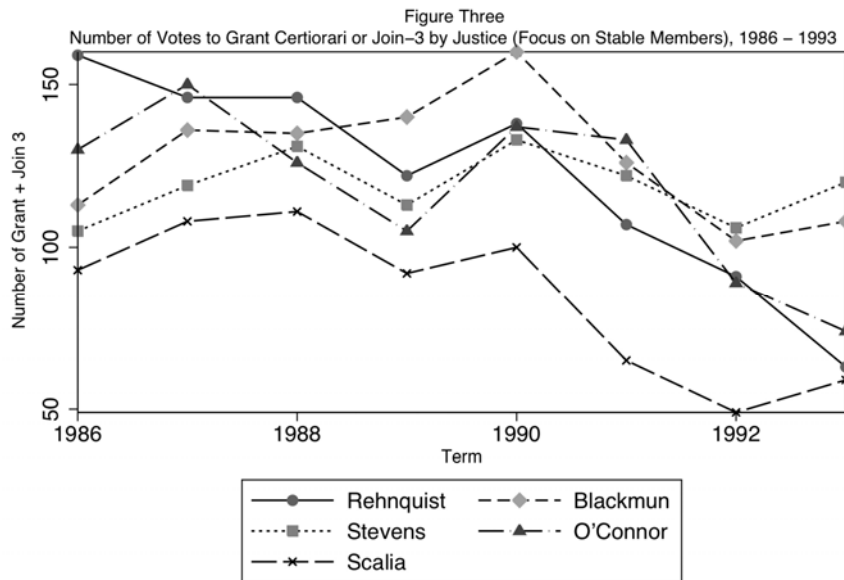
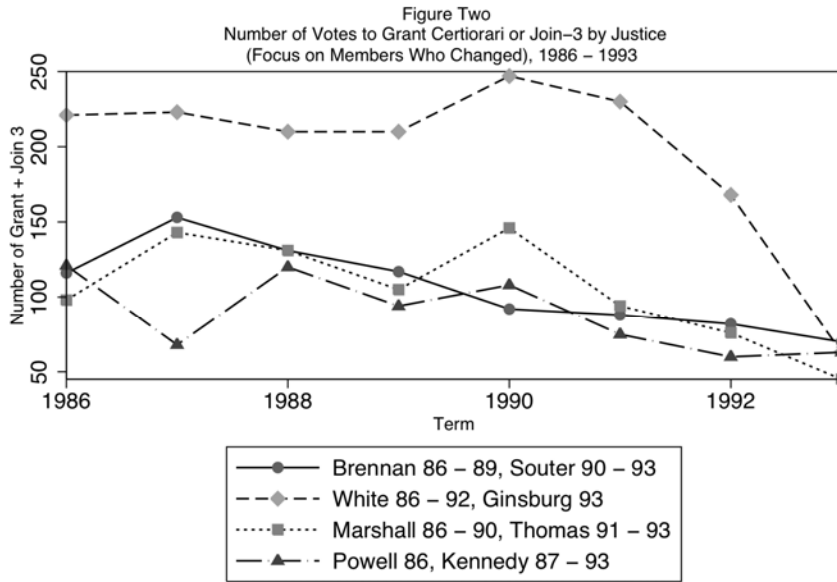
By 1993, those three membership changes alone had accounted for an average reduction of 251.75 votes per Term in favor of plenary review. Given that the mean number of votes to grant plenary review per Justice during the period is 118.5 votes, it is as if by 1993, the membership changes on the Court had reduced the number of votes cast in favor of plenary review by two full members of the Court, meaning that the Rule of Four was essentially operating with the functional equivalent of only seven of the members of the pre-1990 Court.²⁵ As Figure Two demonstrates, each of the new Justices appointed between 1986 and 1993 was stingier with their votes to grant plenary review than their predecessors. Figure Four powerfully illustrates the differences in voting behavior between Justices appointed prior to 1986 and those appointed thereafter.²⁶ It shows that, regardless of the other factors that influenced the decline in the plenary docket in the late 1980s and early 1990s,²⁷ changes in membership on the Court played a role. Justices appointed in 1986 or later voted to grant plenary review, on average, 46.2 times less often per Term than their more senior colleagues during the entire period from 1986 to 1993.

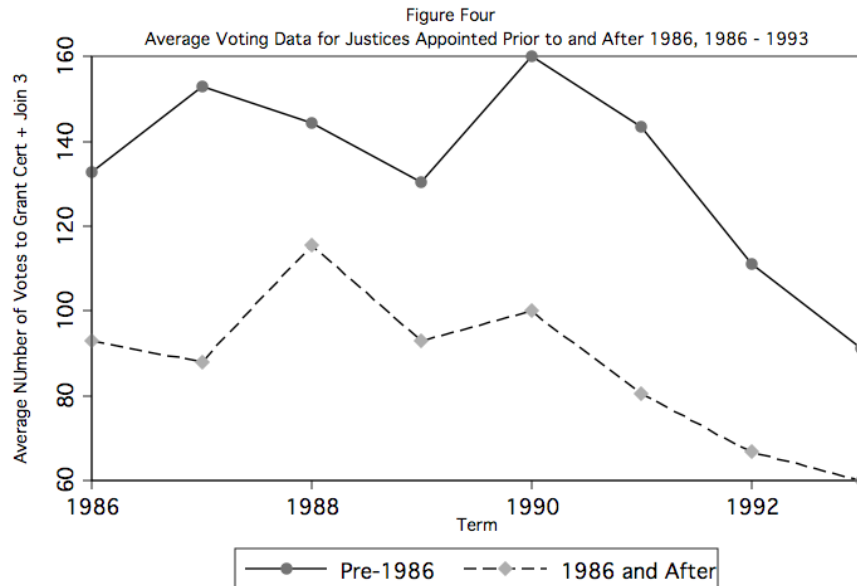
24. See Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1418 (1987).

25. See Cordray & Cordray, *supra* note 2, at 790. Peggy and Richard Cordray further observed that “[t]he replacement of Chief Justice Burger and Justice Powell with Justices Scalia and Kennedy had the overall effect of almost erasing the complement of votes cast by an average Justice for plenary review in a particular Term.” *Id.* at 785. Given the available voting data, it is safe to assume that membership changes have had a demonstrable impact on the size of the plenary docket.

26. For the 1986 Term, the average number of votes in favor of plenary review in Figure Four for Justices appointed during or after 1986 included only the votes of Justice Scalia. By 1993, however, Figure Four includes the average number of votes in favor of plenary review for Justices Scalia, Kennedy, Souter, Thomas, and Ginsburg, all of whom were appointed between 1986 and 1993.

27. Most of the other hypotheses discussed by scholars as influencing the size of the Supreme Court’s plenary docket, such as greater homogeneity in the Court of Appeals, a drop in the number of petitions for certiorari submitted by the Solicitor General, and the elimination of mandatory appellate jurisdiction, should theoretically have affected both newly-appointed and more senior members of the Court equally.





The data also yield another interesting observation. For every Justice on the Supreme Court except Justice Stevens, the Justices voted to grant plenary review in fewer cases during the October 1992 and 1993 Terms than in 1991. The starkest example is provided by the votes of Chief Justice Rehnquist, who had already reduced his votes in favor of plenary review upon assuming the role of Chief Justice in 1986.²⁸ During the October 1991 Term, Chief Justice Rehnquist voted to grant plenary review in 107 cases, but by 1992 and 1993, his votes to grant plenary review had dropped to 91 and 63 cases, respectively. A similar phenomenon occurred with respect to Justice Thomas, who cast the fewest votes in favor of plenary review during the October 1993 Term. Although beyond the scope of this Essay, several possibilities could explain the pervasive drop in votes in favor of plenary review during the October 1992 and 1993 Terms. One possibility is that other factors—such as moving from six Justices in the cert pool in 1989 to eight by 1991—may have decreased the number of cases considered for plenary review by reducing the number of external checks on the cert pool.²⁹ Another factor that might

28. See Cordray & Cordray, *supra* note 2, at 785 n.243 (noting that Chief Justice Rehnquist voted to grant plenary review nearly 240 times per Term as Associate Justice, but “averaged only about 120 such votes in the 1989–1990 Terms”).

29. See Stras, *supra* note 1, at 953, 974. It is pretty clear that the reduction was not a

explain the decrease in 1992 and 1993 is that, after twelve years of Republican presidential administrations, the composition of the federal appellate courts may have grown more homogeneous, decreasing the number of important circuit splits for the Supreme Court to resolve.

It is also possible that swift membership turnover affected the voting behavior of even the stable members of the Court during the period. As stated above, Justices act strategically and rapid turnover on the Court may affect voting behavior, particularly aggressive grants, because existing Justices cannot be sure of the ideological preferences of their new colleagues. Similarly, it is possible that certain new Justices, like Justice Ginsburg—who had previously written about the bloated size of the plenary docket—could have persuaded some of her colleagues to reduce the number of cases given plenary consideration by the Court. Whatever the reasons, the contraction of the plenary docket (and the general reduction in the number of votes in favor of plenary review) during the October 1991, 1992, and 1993 Terms deserves further scrutiny.

CONCLUSION

This Essay is intended to be the most comprehensive account to date of the impact of personnel changes on the size of the Supreme Court's plenary docket. The most important finding is that every Justice appointed between 1986 and 1993 voted to grant plenary review less often than his or her predecessor. Whether other factors contributed to the declining plenary docket is still open to debate, but given the data presented in this Essay, there is no question that membership changes had some influence on the contraction of the Supreme Court's plenary docket.

result of the federal government filing fewer petitions for certiorari and jurisdictional statements. The federal government filed 35, 38, and 33 petitions or jurisdictional statements during the October 1991, 1992, and 1993 Terms, respectively. *See* OFFICE OF THE SOLICITOR GENERAL WORKLOAD REPORT, June 27, 1998-June 24, 1999, at 1 (on file with author).