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Subject: Re: Have You Found the Legal Times articles by Chief Justice Roberts?
Date: Thu, 30 Aug 2007 11:22 am
Attachments: roberts_articles.doc (81K)

They're both attached in a word document.

-Marisa

RIDING THE COATTAILS OF THE SOLICITOR GENERAL

Legal Times

1993 March 29

By: John G. Roberts Jr.

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Analysis

A PRIVATE LITIGANT CAN GAIN A SIGNIFICANT ADVANTAGE BY HAVING THE UNITED STATES SUPPORT ITS POSITION AS AMICUS CURIAE. HERE'S HOW TO INCREASE YOUR CHANCES OF GETTING THAT PARTICIPATION

One ofthe most significant advantages a litigant before the Supreme Court can gain is to have the United States support its position. By regulation, 28 C.F.R. 0.20(c), the decision whether to participate as amicus curiae is vested in thesolicitorgeneral.

In the last complete term ofthe Supreme Court, thesolicitorgeneral appeared as amicus curiae in half ofthe cases argued on the merits in which the United States was not a party. The outcome urged by thesolicitorgeneral prevailed more than 70 percent ofthe time. At the certiorari stage, prior to deciding whether to grant review, the Supreme Court requested the views ofthesolicitorgeneral in 36 cases in which the government was not a party. Thesolicitorgeneral's recommendation was followed more than 80 percent ofthe time. Responsible counsel with a case before the Court or seeking review by the Court obviously need to know how to go about securing government support--or avoiding government opposition.

The government's help is most critical at the certiorari stage, where thesolicitorgeneral's amicus support dramatically increases a private litigant's chances of securing review by the Supreme Court. The catch is that the Office oftheSolicitorGeneral only rarely supports a private petition for certiorari--maybe two times a term--in the absence of an invitation from the Court. The office is understandably concerned that if it began expressing its view that certain private cases were certworthy, the Court would draw a negative inference with respect to all other cases, in effect requiring the office to assume the herculean task of reviewing all pending petitions. The practice that has developed is for the Court generally to request the views ofthesolicitorgeneral in private cases in which there may be a significant but unclear federal interest and for thesolicitorgeneral usually to refrain from expressing his views at the certiorari stage unless invited by the Court to do so.

Still, if your petition arguably implicates a federal interest and the government is likely to be on your side, it cannot hurt to ask. The most effective approach is to enlist the federal agency or division in the Justice Department most directly affected by your case as an ally in seeking to convince thesolicitorgeneral's office that yours is that rare case that the government should weigh in on uninvited. If you eventually receive the expected negative reply from a deputy solicitorgeneral, that person will likely explain that, in the event the Court grants your petition, the office will certainly consider amicus participation at that stage. That is, of course, small consolation, since the biggest hurdle for the private litigant is getting certiorari. Counsel with a realistic candidate for review, however, should regard discussions with the government at the certiorari stage as a chance to predispose the government to a favorable view on the merits.

Most solicitor-general filings in private cases at the certiorari stage are in response to an order from the Court inviting the views ofthe United States on a pending petition. The

Court does not explain why it wants thesolicitorgeneral's views in a particular case. Any one justice can precipitate an invitation, so the order may not mean much at all. The Court may be seeking to determine whether there is a federal interest lurking in the case that has not been fleshed out by the private parties, whether representations in the private parties' papers about the government's views or interests are accurate and current, or whether the government might take a position that would make the case more significant than it otherwise is. The Court rather routinely asks for the government's views in certain types of cases, such as often procedurally difficult voting-rights cases. The Court hardly ever asks for the views ofthe United States in state criminal matters. The Court sets no deadline for response to its invitations. The procedure ofthe Office oftheSolicitorGeneral in responding (which it always does) is to request a draft from the pertinent Justice Department division in 30 days and to try to meet an informal, internal deadline for responding to the Court in 60 days. The office may even have met that deadline once or twice, but the pressure of real deadlines for other filings--heightened in an era when extensions for filing briefs are rare and short--necessarily means that the invitations are the first matters to slide. In practice, the office makes a sincere effort to dispose of all overdue invitations prior to the Court's opening conference in the fall; the last conference for cases that, if certiorari were granted, would be heard during the term (in January); and the last conference ofthe term for granting certiorari in new cases (in May).

If the Court issues an invitation to thesolicitorgeneral in your case, you should immediately contact the responsible deputy solicitorgeneral, requesting a meeting and advising that you will be sending a letter. During my time there, the office generally pursued an open-door policy, meeting with any party that wanted to meet. These discussions were often quite valuable from the government's point of view, helping bring us quickly up to speed in cases that may have been totally new to us.

Your work, however, should not be limited to thesolicitorgeneral's office. While responsibility for the final position rests with thesolicitorgeneral, he will give great weight to the considered views ofthe affected division or agency. It is therefore critically important that you promptly contact the responsible officials at that level, seeking to affect their recommendation to thesolicitorgeneral.

In my experience, the most effective approach for a petitioner--before both the pertinent agency or division and the Office oftheSolicitorGeneral--is to focus less on the abstract legal issues or a blow-by-blow account ofthe dispute's progress through the courts, and more on what it is about the case that should concern the government from the government's perspective. The legal issues presumably will be adequately framed by the decisions below and the parties' papers. And however much particular miscarriages of justice visited upon your client by the lower courts may still rankle, the government really does not care whether you got a raw deal. It wants to know why it should care whether the Court takes the case.

Thus, if the decision below will interfere directly with a federal program, make that clear. If the decision itself will not but the legal principle behind the decision might, argue that. Recognizing that your case implicates a federal interest to such an extent that it makes sense for the government to participate in oral argument if the Court grants review, and offering to share your argument time, may be helpful in piquing the government's interest.

Keep in mind that your main objective is persuading thesolicitorgeneral to recommend certiorari. While it would be best to have the government say that the Court should grant review because the decision below is wrong, the next best alternative is to have the government opine that the decision below is correct but that the Court should nonetheless grant review to settle the issue. It is not unusual for thesolicitorgeneral to do

just that, which at least helps you get in the door.

If you are the respondent, it is best to emphasize why the case is not a suitable vehicle for vindicating any perceived government interest. This is true whether or not that interest coincides with your position on the merits. Thesolicitorgeneral exercises great care and caution in selecting which government cases to bring to the Supreme Court, and urging the Court to review a private party's petition uses up one ofthe Court's very limited argument slots. The government has more control over litigation to which it is a party rather than a mere amicus, and thesolicitorgeneral would prefer not to go through the trouble of developing and articulating a position for the United States if the case is going to go south for procedural or state law reasons.

When thesolicitorgeneral files an amicus brief in response to the Court's invitation (limited to 20 pages, like any other amicus brief at the certiorari stage), your work is not done. The Court allows the parties to file supplemental briefs under Rule 15.7, responding to the views ofthesolicitorgeneral. Such a brief (limited to 10 pages) should be filed promptly, because the case will be rescheduled for conference soon after thesolicitorgeneral's brief is filed.

One point to keep in mind when drafting a petition for certiorari is that it is possible to encourage the Court to request the views ofthesolicitorgeneral--and wise to do so if you believe that the government might be inclined to support your petition. This is not done expressly, but if you can cite prior government briefs or rulings that support your contentions, a justice might well be inclined to find out from the horse's mouth what the government thinks.

Presenting the Merits

Every case in which the Supreme Court does grant certiorari is reviewed by the Office oftheSolicitorGeneral in order to determine whether to file an amicus brief on the merits. If you think the government might file on your side, you should encourage it to do so. Even if the government is likely to be hostile, counsel should press any reasonable argument for government support. You will not be alerting the office to a case that it is not already aware of, and you might help deflect the presentation that your opponent is sure to be making. Doing nothing is always a seductive option for overworked government attorneys, and if there seem to be reasonable arguments on both sides for government participation, not filing begins to look like the better part of valor.

The procedure for seeking government amicus support on the merits is similar to that cutlined above at the petition stage, but your canvassing of affected government agencies should be broader. The federal bureaucracy is large enough that there is likely to be *some* entity disposed to your position. Find that entity and urge it to weigh in with thesolicitorgeneral. If you represent an environmental interest, talk to the Environmental Protection Agency; if you represent an entity being sued under environmental laws, talk to government agencies, like the Army Corps of Engineers, that often run up against those same laws. Do not limit yourself to the specific issue in your case, but consider the impact ofthe legal principle. For example, if you are arguing for an implied right of action, you might find an ally in the Securities and Exchange Commission, even if your case has nothing to do with securities law. If such efforts do not result in an amicus brief on your side, they can still be helpful in forestalling a brief supporting your opponent or in tempering the government's position against you.

Sharing Argument

When thesolicitorgeneral has filed an amicus brief on the merits, he typically seeks argument time. The procedure is for an attorney from the office to seek the consent ofthe party supported to a division ofthe party's 30 minutes--usually 20 minutes for the party and 10 minutes for the government. If the government is supporting you with no

significant divergence of views, by all means consent. Yielding 10 minutes may shorten your moment in the sun, but it is very reassuring to have the formally attired government lawyer at your side. With rare exceptions, the government will not pursue divided argument in the absence of consent.

Once consent is given, thesolicitorgeneral files the requisite motion under Rule 28. Although the rule says that [d]ivided argument is not favored, the Court lately has tended to grant the government's motions for divided argument.

If the adversary/government axis is arrayed against you, I do not recommend opposing the motion for divided argument. An opponent is peculiarly ill-suited to opine on who should be allowed to argue against him.

Be aware that a curious Supreme Court rule affects the filing time for thesolicitorgeneral's motion, complicating a party's decision whether to consent. Under Rule 28.4, the motion for divided argument must be filed 15 days after service ofthe petitioner's brief. If you are the petitioner, this is fine: Since thesolicitorgeneral's amicus brief is due at the same time as the brief ofthe party it supports, you can read the government's brief and check to ensure that there are no major differences of opinion before consenting to share your time.

If you are the respondent, however, you are being asked to buy a pig in a poke: consent to sharing your time with thesolicitorgeneral before you even see his brief. The practice has developed ofthe private party giving conditional consent in such cases, with thesolicitorgeneral filing a timely motion that is not circulated by the clerk until after the filing of bottom-side briefs. A simpler solution would seem to be amending the rule to require that the motion for divided argument be filed a reasonable period after all briefs have been filed or after the brief ofthe party supported has been filed.

In sum, the possibility ofthesolicitorgeneral's support (or opposition) at the certiorari stage, briefing on the merits, and oral argument should not be overlooked by counsel seeking to provide effective representation before the Supreme Court.

NEW RULES AND OLD POSE STUMBLING BLOCKS IN HIGH COURT CASES

- **Legal Times**
- **1990 February 26**
- ***View All Articles in this Issue***

By: E. Barrett Prettyman Jr. and John Roberts Jr.

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Analysis

YOU CAN'T BE TOO CAREFUL IN PROSECUTING OR REBUFFING A SUPREME COURT PETITION. HERE, EXPERIENCED LITIGATORS EXPOSE THE TRAPS AWAITING THE WARY AND UNWARY ALIKE

Practice before the Supreme Court of the United States can be bewildering for first-timers, and even for those who have made several trips to our highestcourt. Mistakes are legion. Some errors, however, are more persistent than others. We have attempted here, with the help of the Clerk's Office, to compile a list of those that continue to confound practitioners and that often cause filings to be rejected long before they reach

the justices. Though these examples range from the picayune to the momentous, responsible counsel will regard any glitch in a Supreme Court filing as a serious matter--as no doubt will their clients.

Recent amendments to the Supreme CourtRules--which went into effect Jan. 1, 1990--removed several of these traps for the unwary. Most prominently, the five-day workweek has at last come to the Clerk's Office. Under oldRule 34(1), the office was open on Saturday--with a skeletal crew, to be sure, but open-- and a filing due on Saturday had to be filed by Saturday. The most common reason petitions for certiorari (and other filings) were filed out of time was that attorneys assumed a petition due on Saturday was, in fact, not due until the next Monday, as is the rulein most courts. Under newRule 30.1, that is now the case before the Supreme Court.

Supporting the U.S. Mail

The new guidelines also cleared up some ambiguity in the mailbox rule, which had regularly resulted in untimely filings. A not-infrequent problem arose when practitioners assumed that a private carrier such as Federal Express--a quicker and often more reliable service than the U.S. mail--was the preferable way to file and serve Supreme Court papers. But Rule 29.2, permitting filing by mail, specifies that the U.S. Postal Service must be used. If a petition is due on Monday and is sent that day to the Court by Federal Express or another private courier, it will be considered filed when received the next day--out of time. If the same petition is sent by first-class, postage-paid U.S. mail on Monday, it will be considered timely filed on Monday, even though it may not actually be received by the clerk until the end of the week or later. NewRule 29.2 expressly warns the bar that [a] document forwarded through a private delivery or courier service must be received by the Clerk within the time permitted for filing.

Timing problems also arose under the oldrules because of confusion about when time starts to run for filing an appeal or a petition for certiorari. Indeed, the question is currently before the Courtin the school desegregation case*Missouri v. Jenkins*, No. 88-1150 (argued Oct. 30, 1989). The oldrules specify that the time runs from the date of judgment or from the date of the denial of a timely petition for rehearing (filed by *any* party). This tolling provision does not apply to a suggestion for rehearing *en banc*. If a party asks only for rehearing *en banc*, the time for seeking certiorari runs from the original judgment date--which can, of course, create serious difficulties if the *en banc* motion is still pending when the petition for certiorari is due. The moral is clear: If you might seek Supreme Court review and want to seek *en banc* review, always file for rehearing by the panel as well as by the full court. InnewRule 13.4, the tolling provision for petitions for rehearing is retained, but an express warning is added that [a] suggestion made to a United States Court of Appeals for a rehearing in banc . . . is not a petition for rehearing within the meaning of this Rule.

New Rule 34 puts the nail in the coffin for legal-size paper. It conforms Supreme Court practice to that of the lower courts--8 1/2 11 inch paper--which will likely reduce the number of filings attempted on paper of the wrong size.

Pitfalls for the Unwary

The newrules, however, do not address all the problems the clerk regularly encounters, and the following will probably continue to arise:

Questions Presented. Beginning at the very beginning, one of the most common reasons that the clerk rejects petitions for certiorari is that the Questions Presented do not appear on the first page after the cover. Perhaps not unreasonably, many attorneys (and many printers) start with a table of contents, a table of authorities, and other preliminary material. Such a petition will not be accepted for filing. The justices want a succinct statement of the questions right off the bat. Indeed, newRule 14.1(a) mandates

that no other information appear on the first page after the cover.

Case Captions. The style of a case is often different in the Supreme Court than it was below. A casein a U.S. Court of Appeals bears the same caption it bore in the District Court, regardless of which party is appealing, under Fed. R. App. P. 12. Not so in the Supreme Court. Under Rule 33.2(a)(4), those petitioning the Court are listed first in the caption.

Who's Who. Surprisingly, the Clerk's Office has noted that about one out of 15 petitions never specifically identifies by name *who* is seeking review of *what* judgment. Your case may well present a profound legal issue that you are anxious to discuss, but it is first and foremost *a case*, and the justices need to know who struck whom and what the lower courts actually decided. A clear statement of these basic facts--along with the exact dates the pertinent orders were entered--is critical at the beginning of the petition. (If you are relying on Rule 12.2, which permits review of multiple judgments *from the same court*in a single petition, you should expressly cite the ruleand identify petitioners for each judgment.)

Printing Problems. Fully 50 percent of petitions rejected by the Clerk's Office are turned away because of printing problems. Rule 33 is quite precise in setting forth the applicable standards. Printed slip opinions issued by many circuits (e.g., the D.C. Circuit) satisfy the requirements and may be photocopied in the appendix to the petition. The material that appears in F.2d or the regional reporters does *not*and must be reset by your printer or retyped in house. Make certain that the copy of the lower-court opinion lists the panel members, as well as the date the opinion was filed and the lower-courtcase number.

Serving Papers. Service mistakes also occur with some frequency. Rule 29.5 sets forth the special form for a Supreme Court certificate of service: It should appear on a separate sheet of paper accompanying the printed brief or petition. If your case involves the United States, you must serve the solicitor general; it is courteous but insufficient to serve the lawyer who handled the case for the government in the lower courts. The time for the government's response starts running only upon service of the solicitor general. In the case of a state, the office responsible for handling Supreme Courtcases should be served, be it the state attorney general, the district attorney, or the special assistant attorney general for the casein question. And you must always name the *individual* served, not simply his or her office, and the proper address.

There is some confusion about who must be served when a case arises out of a decision by a hybrid federal agency, like the Federal Reserve Board. The safe course is to serve *both* the solicitor general *and* the general counsel of the agency, and let them figure out who will represent the governmental entity before the Supreme Court.

Corporate Disclosures. Every filing with the Court on behalf of a corporation must contain a Rule 29.1 listing of parents and non-wholly owned subsidiaries (or a cross-reference to such a listing in a printed document previously filed in the Court*in that case*). The purpose of the rule is to identify publicly traded entities in which one of the justices may have an interest. Therefore, those entities not publicly traded need not be listed.

Object or Waive. If a question presented in the petition was not raised below or is otherwise not properly presented, the brief in opposition must object, or at least some of the justices will consider the problem waived. NewRule 15.1 expressly states that [a]ny defect of this sort in the proceedings below that does not go to jurisdiction may be deemed waived if not called to the attention of the Court by the respondent in the brief in opposition. Feel free to rephrase the questions presented if they have been misstated or distorted by the petitioner. It is important to address *all* issues legitimately raised in the petition.

R.S.V.P. Timing problems often arise with reply briefs. At the certiorari stage, the clerk circulates the petition and opposition promptly upon receipt of the opposition, so any reply--to be effective--must be filed without delay. In addition, under Rule 25.3, which governs reply briefs incases accepted for argument, the reply brief must be either filed within 30 days after receipt of the respondent's brief or actually received one week before oral argument, whichever is earlier. The latter proviso is an exception to the usual rule permitting deadlines to be met by mailing.

Amicus Curiae. Amicus briefs at the petition stage are due when the brief in opposition is due; if the respondent receives an extension of time, an amicus's time is automatically extended. Incases accepted for argument, an amicus brief is due at the same time as the brief for the side the amicus supports. If the amicus supports a middle ground, it must file topside.

Who May Sign. Every attorney knows, of course, that when a document is filed in the Supreme Court, it must be accompanied by a certificate of service. What many do not know is that, according to Rule 29.5, unless the certificate is filed under oath in affidavit form, it *must* be signed by a member of the Supreme Court Bar, not simply a partner or associate who has worked on the caseand whose name appears on the filing. Moreover, the certificate must state that the signer is a Supreme Court Bar member and that all parties required to be served have been served.

Seat of Honor. Clients are often miffed because they are not allowed to sit at the counsel table during the argument of their case. They assume, with some justification, that since it is their interests that are at stake, they should be right up there looking the justices in the eye. Or perhaps they feel that since they are paying for the show, they at least should get a front-row seat. Counsel should forewarn their clients that, unless they are members of the Supreme Court Bar, they will have to stare at the justices from outside the railing.

Arguing Over Argument. There has been uncertainty and some bitterness on the subject of divided argument, particularly where parties supposedly on the same side of a case do not agree on strategy or substance. The Court does not like divided arguments (unless, for example, it has invited or agreed to hear the views of the solicitor general), and a divided-argument motion by a private party is rarely granted. If one is filed, however, Rule 28.4 says that it must be submitted within 15 days of the filing of the *opening* brief, regardless of which side is seeking divided argument. If the motion is denied, the parties-- not the Courtand not the clerk--must decide who will handle the case, no matter how badly splintered their views may be. (The Court recently made an apparent exception to this rule, granting a motion for designation of counsel and denying a competing motion. But that case is an exception that proves the rule.) Rationality leaves some lawyers when a chance to argue before the Court is at stake, and many such disputes end up being resolved by a coin toss.

Seeking Stays. The most common mistake made in connection with a motion for a stay relates to exhaustion of a comparable remedy in the court below. The movant must at least have attempted to obtain a stay below; only if the stay has been denied or the lower court has refused to act at all may the movant seek a stay in the Supreme Court. Such a motion, parenthetically, should have attached to it copies of *all* relevant orders below, including the one denying the stay. If time is crucial, service should be made by hand delivery on opposing counsel. The clerk will not look kindly upon an application claiming a need for emergency action if the service copy is simply deposited in the mail.

Extensions. Another mistake in multiparty cases is the assumption that an extension of time to seek certiorari granted to one party automatically applies to all. That is not the case; an extension only benefits the party or parties that requested it.

Counting the Days. With rare exceptions, time begins to run in federal and state

courtcases from the date of the judgment and*not* from the date (if it comes later) when a mandate issues or the judgment becomes final. State laws should be consulted in state cases. In most federal circuits, the judgment is entered the day the opinion is issued--although only when the opinion is mailed to counsel several weeks later is the judgment certified and does it function as the mandate. (Some National Labor Relations Board cases are an exception, when the U.S. Court of Appeals in its opinion directs the parties to submit a proposed judgment for approval.) Many petitions are filed out of time because counsel mistakenly rely upon the date the judgment was certified as the mandate.

No End Runs. Some attorneys attempt end runs around Rule 33 by filing one typewritten copy of their petition for certiorari on the due date and then following up with the required printed copies on a later date. While the clerk may not reject these single copies out of hand, lawyers should know that such non-compliance will be reported to the Court, and it is not without significance that people in the Clerk's Office cannot recall when one of these petitions by a private party was ever granted. Even more to the point, in*Fallin v. Cunningham*, 58 U.S.L.W. 3467 (Jan. 22, 1990), the Court denied a motion for leave to file 39 printed copies one day out of time after only one printed copy had been timely filed. The petition was then not accepted.

Following the admonitions above will not guarantee you a hearing. They will, however, increase the chances that your filing will at least reach the justices' chambers.