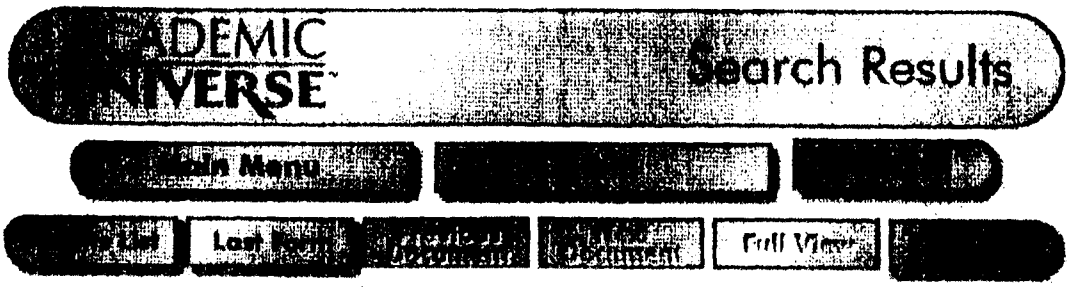

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Legal Times

March 29, 1993

SECTION: ANALYSIS; Pg. 30

LENGTH: 2278 words

HEADLINE: Riding the Coattails of the **Solicitor General**

BYLINE: BY JOHN G. ROBERTS JR.; John G. Roberts Jr., a partner in D.C.'s Hogan & Hartson, served as principal deputy solicitor general from 1989 to 1993.

HIGHLIGHT:
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.

BODY:
One of the 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 the **solicitor general.**

In the last complete term of the Supreme Court, the **solicitor general** appeared as amicus curiae in half of the cases argued on the merits in which the United States was not a party. The outcome urged by the **solicitor general** prevailed more than 70 percent of the time. At the certiorari stage, prior to deciding whether to grant review, the Supreme Court requested the views of the **solicitor general** in 36 cases in which the government was not a party. The **solicitor general's** recommendation was followed more than 80 percent of the 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 the solicitor general's amicus support dramatically increases a private litigant's chances of securing review by the Supreme Court. The catch is that the Office of the Solicitor General only rarely supports a private petition for certiorari -- may be 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 of the solicitor general in private cases in which there may be a significant but unclear federal interest and for the solicitor general 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 the solicitor general'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 solicitor general, 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 of the United States on a pending petition. The Court does not explain why it wants the solicitor general'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 of the United States in state criminal matters.

The court sets no deadline for response to its invitations. The procedure of the Office of the Solicitor General 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 of the term for granting certiorari in new cases (in May).

If the Court issues an invitation to the solicitor general in your case, you should immediately contact the responsible deputy solicitor general, 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 the solicitor general's office. While responsibility for the final position rests with the solicitor general, he will give great weight to the considered views of the affected division or agency. It is therefore critically important that you promptly contact the responsible officials at the level, seeking to affect their recommendation to the solicitor general.

In my experience, the most effective approach for a petitioner -- before both the pertinent agency or division and the Office of the Solicitor General -- is to focus less on the abstract legal issues or a blow-by-blow account of the 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 the solicitor general 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 the solicitor general 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. The solicitor general exercise 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 of the 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 the solicitor general 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 the solicitor general 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 of the solicitor general. Such a brief (limited to 10 pages) should be filed promptly, because the case will be rescheduled for conference soon after the solicitor general'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 of the solicitor general -- 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 of the Solicitor General 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 outlined 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 the solicitor general. 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 of the legal principle. For example, if you are arguing for an implied right of action, you might find any 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 the solicitor general 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 of the party supported to a division of the 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 reasoning 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, the solicitor general files the requisite motion under Rule 28. Although the rule says that "[divided] 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 the solicitor general'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 of the petitioner's brief. If you are the petitioner, this is fine: Since the solicitor general's amicus brief is due at the same time as the brief of the 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 the solicitor general before you even see his brief. The practice has developed of the private party giving "conditional" consent in such cases, with the solicitor general filing a timely motion that is not circulated by the clerk until after the filing of bottom-side briefs. A simpler solution would seen 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 of the party supported has been filed.

In sum, the possibility of the solicitor general'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.

GRAPHIC: Illustration, no caption, JOSEPH AZAR

LANGUAGE: ENGLISH