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# FOREWORD: TOWARD A CENTER FOR STATE AND LOCAL LEGAL ADVOCACY

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One of the natural consequences of an adversary legal system is that, all other things being equal, the side that hires the better lawyer will win. This unpalatable truth is much resisted. Most of us believe that a litigant's case should turn on whether he or she is right, not on a lawyer's cleverness, and academics dutifully ignore the advocate's role when analyzing judicial opinions. Yet as practicing lawyers, our professional lives are premised on the belief that good lawyering makes a difference.

The effects of persuasive advocacy are nowhere more significant than at the level of the United States Supreme Court. The Supreme Court makes law for the nation; millions who will never argue before the Court must obey its rulings. Although the Supreme Court has more resources than most other courts to overcome imbalanced advocacy—a relatively light caseload, frequent amicus participation, clerks by the dozen, and a tradition of writing separate opinions that read like opposing briefs—a skilled advocate may nonetheless greatly affect the decision-making process. Because the stakes are so high—a footnote may undo years of lower-court litigation—even a small advantage means a great deal.

## I. STATE AND LOCAL ADVOCACY IN THE SUPREME COURT

The far-reaching import of Supreme Court decisions makes it vital that the representatives of the parties be evenly matched, at least over the long run. There is reason to fear, however, that this is not always the case. Among the parties appearing most frequently before the Court, state and local governments participate in nearly half of the cases. The issues presented and decided in these cases generally have a substantial impact

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on the state and local role within the federal system. Despite the frequency of their appearances before the Supreme Court and the importance of the issues, state and local governments lack a coordinated strategy for the representation of their common interests. As a result of this lack of coordination, the quality of legal representation with respect to state and local issues is as varied as the number of state and local governments.

There is a widespread consensus among Court-watchers—including law professors, veteran Supreme Court advocates, Supreme Court clerks, and even Supreme Court justices—that state and local governments frequently fail to present their cases in the most effective manner. Justice Powell, for example, has expressed his “disappointment” in the quality of Supreme Court briefs and oral arguments of state and local governments. In criminal cases, he noted, state and local government prosecutors are “frequently outgunned and overmatched by the defense”:

In a few states the local prosecutor remains responsible for the case all the way to the Supreme Court. In most cases, however, the state will be represented by an assistant from its attorney general's office. Some of the weakest briefs and arguments come from these representatives of the public interest.<sup>1</sup>

In contrast, Justice Powell had high praise for the lawyers who represent the advocacy groups that frequently oppose state and local government: “In the ‘big’ cases, especially where the frontiers of constitutional or criminal law are sought to be extended in the protection of rights of accused persons, interested national organizations will provide first rate lawyers, often including faculty members with special competency in the particular area involved.”<sup>2</sup>

The imbalance is not simply the result of inherent limits on government lawyering. Some state and local government advocates—such as Slade Gorton, former Attorney General of Washington—have a well-deserved reputation for excellence in presenting Supreme Court arguments. The Office of the Solicitor General, which represents the federal government

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1. Address by Justice Lewis F. Powell, Fifth Circuit Judicial Conference (May 27, 1974) (on file with the Catholic University Law Review).

2. *Id.* The Justice added his view that this imbalance has affected the law:

There is little doubt that the marked trend of the law toward expanded rights of defendants, a trend so noticeable over the past two decades, has been influenced in part by the imbalance of the representation equation before the Court.

I do not imply that the central core of this trend would not have been pretty much the same. . . . But the fact is, as every judge knows, that the quality of advocacy—the research, briefing and oral argument of the close and difficult cases—does contribute significantly to the development of precedents.

*Id.*

before the Supreme Court, is among the most respected advocates appearing before the Court. It comprises a small, hard-working staff that closely monitors the Court and is able to anticipate and respond to the concerns of individual Justices, to develop a sophisticated estimate of what will strike a responsive chord with a majority of the Court, and to develop an ongoing, strategic approach to Supreme Court litigation on behalf of the federal government.<sup>3</sup>

An examination of the success of the Office of the Solicitor General during recent Supreme Court terms illustrates the enormous potential of an office with comparable capabilities for the representation of state and local interests before the Court. For example, between 1970 and 1978, the Supreme Court decided almost 180 cases holding unconstitutional a provision of state or local law;<sup>4</sup> in the same period, the Solicitor General saw only eighteen federal laws meet the same fate.<sup>5</sup> There are many possible explanations for this ten-to-one ratio, some having nothing to do with the level of advocacy,<sup>6</sup> but the figures are nevertheless suggestive.

The authors' own analysis of Court opinions further documents the effectiveness of the Solicitor General. From the beginning of the October 1976 Term through the end of the October 1979 Term, the Court wrote more than 250 opinions implicating state and local interest.<sup>7</sup> In a number of the cases, both the Solicitor General's office and a state or local govern-

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3. Justice Powell exempted the Office of the Solicitor General from his criticism: "To be sure this imbalance does not exist when the United States is a party. The Solicitor General's Office, although overworked to the point where it has difficulty in keeping current, affords a high level of representation both in briefing and arguing cases." *Id.*

4. CONGRESSIONAL RESEARCH SERVICE, *THE CONSTITUTION OF THE UNITED STATES ANALYSIS AND INTERPRETATION*, S. DOC. NO. 82, 92d Cong., 2d Sess. 1760-85 (1972); CONGRESSIONAL RESEARCH SERVICE, *THE CONSTITUTION OF THE UNITED STATES*, S. DOC. NO. 26, 96th Cong., 1st Sess. S276-93 (Supp. 1978).

5. CONGRESSIONAL RESEARCH SERVICE, *THE CONSTITUTION OF THE UNITED STATES ANALYSIS AND INTERPRETATION*, *supra* note 4, at 1619; CONGRESSIONAL RESEARCH SERVICE (1978 Supp.), *supra* note 4, at S274-75.

6. One of the factors is undoubtedly the larger number of state laws challenged before the Court. Professor Sager performed his own "rough count" of Supreme Court decisions upholding or invalidating government conduct in the face of constitutional attack. Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 55-56 n.112 (1981). Although his methodology differs from ours, Professor Sager also finds many more state and local losses than federal losses. The ratio is about seven-to-one. If one controls for the smaller number of challenges to federal action, this ratio declines somewhat, but the federal win-loss record remains more than four times better than the state and local record. *Id.* In short, Professor Sager concludes, that "federal conduct is challenged less frequently and is far less frequently invalidated." *Id.*

7. These figures cover only those cases falling within the Court's appellate jurisdiction; they do not include cases arising under the Court's original jurisdiction.

ment filed briefs, sometimes supporting and sometimes opposing each other. With the United States in opposition, state and local governments prevailed in only 33% of these cases. With the Solicitor General on their side, however, state and local governments won 68%, well above their record even in cases without federal participation.<sup>8</sup>

Perhaps the most impressive achievement of the Solicitor General's office is its success in persuading the Court to grant certiorari. Supreme Court review is largely a matter of discretion; only 5.8% of all petitions for certiorari were granted in one recent five-year period.<sup>9</sup> When the Solicitor General was the respondent in opposition to the petition, the petitioner's chances for Supreme Court review shrank almost in half—to 3.2%. Yet, when the Solicitor General's office itself petitioned for certiorari, its success rate was an astounding 70.6%.<sup>10</sup>

The authors' analysis shows that the advocacy groups praised by Justice Powell also have an enviable record before the Court. The American Civil Liberties Union and its local affiliates are the most active groups in opposing state and local government interests, having filed briefs in thirty-five such cases during the period studied. The ACLU prevailed in 71% of these cases, while state and local governments won only 23%.

In this area, statistics should not be given too much weight; Supreme Court advocacy cannot be reduced to simple win-loss records. Nonetheless, the figures generally indicate that both the Solicitor General and advocacy groups have had a significantly higher rate of success before the Supreme Court than state and local governments, and that state and local governments might improve the quality of their representation before the Supreme Court by the development of comparable capabilities.

For example, the Solicitor General's success at the certiorari stage is no doubt due in part to that office's selectivity and control over the decision to petition for certiorari. But it is also due to a very specialized knowledge of the standards the Court applies at this stage. Many lawyers writing an appeal are reluctant to admit that the court below had substantial case support for its ruling. When the federal government petitions for certiorari, however, the Solicitor General may deliberately raise cases supporting the other side to demonstrate that the circuits are in conflict and that numerous cases raising the same question have already arisen—all factors favoring Supreme Court review. In opposing certiorari, the Solicitor General is quick to point out a case's hidden problems to the Court. These

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8. The Solicitor General's office also improved its usual record when joined by a state or local party, but only by three percentage points.

9. 1980 ATT'Y GEN. ANN. REP. 7.

10. *Id.*

may be aspects of a case that never had any importance before the certiorari stage, i.e., the facts may be unlike those of other cases raising the same issue, or the circuit conflict may be unlikely to arise again because of changes in administrative practices or other nonlegal developments.

In short, the lesson to be learned from the impressive records of the Solicitor General and the advocacy groups is not necessarily that state and local governments need "better" lawyers but that these litigants would benefit from more specialized and consistent monitoring of the intricacies of Supreme Court practice.

During the early 1970's, however, state and local governments tended to assume that the perceived "conservatism" of the Court would assure balanced results. This attitude has now been shaken by a dramatic series of cases construing The Civil Rights Act of 1871.<sup>11</sup> In 1978, the Court eliminated local government's municipal immunity from damages under section 1983, an immunity it had conferred in 1961.<sup>12</sup> Two years later, the Court ruled that local governments do not have a "good faith" defense to section 1983, thus exposing them to liability for violating rights that were not judicially recognized at the time the violation occurred.<sup>13</sup> Shortly thereafter, the Court further held that section 1983 provides an enforcement vehicle, not just for civil rights laws but for all federal statutes.<sup>14</sup>

These developments were the subject of substantial debate among the Justices, and the Court remains closely divided about the proper scope of section 1983 liability.<sup>15</sup> We will never know whether a concerted effort on the part of state and local governments to forestall these developments would have succeeded. Only one amicus curiae brief was timely filed on the state and local government side in this series of cases.<sup>16</sup> The advocacy groups, by contrast, took advantage of the opportunity these cases presented. The National Education Association filed amicus briefs in two of the three cases. The ACLU also joined briefs in two of the cases. The Lawyers' Committee for Civil Rights under Law was represented by amicus briefs in all three cases.

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11. 42 U.S.C. § 1983 (Supp. III 1979).

12. Compare *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978) with *Monroe v. Pape*, 365 U.S. 167 (1961).

13. *Owen v. City of Independence*, 445 U.S. 622 (1980).

14. *Maine v. Thiboutot*, 448 U.S. 1 (1980).

15. See, e.g., *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615 (1981).

16. The state of Pennsylvania filed a brief in support of Maine in *Thiboutot*.

## II. THE REPORT

The results in these cases, and others like them, brought home to state and local governments the need for more careful monitoring and coordination in Supreme Court cases. With this in mind, seven state and local government associations<sup>17</sup> began to explore ways of presenting the position of state and local governments in a more coordinated and effective way. Through the nonprofit Academy for State and Local Government, they asked the authors to prepare a report and a set of recommendations concerning state and local advocacy in the Supreme Court.<sup>18</sup>

In preparing the report, we consulted with representatives of numerous state and local associations, including the seven sponsoring organizations.<sup>19</sup> In addition, we interviewed state attorneys general, other state and local attorneys, former Supreme Court clerks, lawyers at public interest law firms, former Solicitors General, other Justice Department lawyers, and numerous academic Court-watchers. From these consultations emerged the report's central recommendation: that state and local governments pool their resources to create a small public-interest legal center concerned primarily with Supreme Court issues—a Center for State and Local Legal Advocacy.

The report's recommendations are described in more detail in the Afterword, but the center's essential mission would be twofold—first, to monitor, analyze, and publicize Supreme Court developments that affect state and local governments; and second, to assist state and local governments in presenting individual cases before the Court.

In the fall of 1981, the executive directors of the seven sponsoring associations accepted the report and immediately began the process of making its recommendations a reality. Consultations with foundations commenced. Other interested organizations, including the National Association of Attorneys General and the National Institute of Municipal Law Officers, were invited to work with the seven associations. Although much needs to be done, and major questions about funding and governance remain, great progress has been made. In January 1982, the Board of Trust-

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17. The seven are: the National Association of Counties, the National Conference of State Legislatures, the National Governors' Association, the National League of Cities, the United States Conference of Mayors, the Council of State Governments, and the International City Management Association.

18. Report on file with the *Catholic University Law Review*.

19. Other organizations consulted include: the National Association of Attorneys General, the National Institute of Municipal Law Officers, the National District Attorneys' Association, the American Association of School Administrators, and the National School Boards Association.

ees of the Academy for Contemporary Problems voted unanimously to commit \$150,000 over two years to establish the center. Additional funding will be sought from foundations and other sources, and the search for a chief advocate has begun. If work continues at this rate, a Center for State and Local Advocacy will be a reality before the end of this year.

### III. SYMPOSIUM ARTICLES

This symposium presents an example of the kind of analyses of Supreme Court developments that such a center could provide. The articles that follow were first prepared as part of the report on the need for a center. They differ somewhat from the usual law review work in that they plainly are written from a point of view sympathetic to state and local governments. They are meant to be not only scholarly, but short and accessible to lay government leaders. The analyses should prove particularly useful to state and local government lawyers engaged in litigation in the lower federal courts. By focusing in a practical way on both the issues that such lawyers should observe, and on doctrinal developments they may wish to use to their advantage, the analyses respond to a widely expressed need for assistance in lower court litigation as well as in litigation before the Supreme Court.

