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Stewart A. Baker

James R. Asperger

AFTERWORD: MORE ABOUT THE CENTER

*Stewart A. Baker**
*James R. Asperger***

This marks the end of the symposium. The story of the proposed Center for State and Local Legal Advocacy, however, will continue. The articles in the symposium are just a sample of the activities that the report recommended the center undertake.[1] To place them in perspective, this Afterword offers a more detailed summary of the full range of activities proposed for the center.

The structure and purpose of the recommended office combine features of the Solicitor General's Office with features of the litigation "back-up" centers established by some advocacy groups to deal with particular issues. Although the Solicitor General's Office, with its almost exclusive focus on defending the federal government before the Supreme Court, is the most obvious inspiration for the recommended center, the diversity of state and local governments necessitates substantial changes in this basic model. For example, unlike the Solicitor General's federal clients, state and local governments already have their own lawyers and will seldom wish to surrender control of their cases to a centralized office. The report, therefore, recommends that the center concentrate on aiding existing legal representatives of state and local governments in presenting their cases. Thus, rather than acting as an independent representative of state and local interests, the center would serve individual clients—either state and local governments themselves or their associations. This means that it must provide the services that the legal representatives of these governments want and will use. Our consultations uncovered a number of services that would prove valuable to these clients.

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* A.B. 1970, Brown University; J.D., 1976, University of California, Los Angeles. Mr. Baker is currently with the Washington, D.C. law firm of Steptoe & Johnson, Chartered.

** B.A. 1975, University of California, Davis; J.D., 1978, University of California, Los Angeles. Mr. Asperger is currently with the Washington, D.C. law firm of Latham, Watkins & Hills.

1. For a discussion of the origins of the report, see Foreword, 31 CATH. U.L. REV. 367 (1982).

I. General Services

A. Monitoring

The attorneys general and many other state and local lawyers interviewed in the course of preparing the report expressed the virtually unanimous view that Supreme Court developments should be monitored more closely. Few state or local government lawyers have the leisure to stay current with the opinions of the Supreme Court, let alone follow its decisions to grant or deny certiorari, to vacate lower-court judgments in light of decided cases, to affirm or reverse summarily, to affirm by an equally divided court, to dismiss certiorari as "improvidently granted," or to grant or deny a stay in a case pending appeal. Yet, all of these actions may offer guidance about the Court's approach to certain issues. A small staff whose sole function is to follow the Supreme Court would be aware of the direction of these decisions and could use such insights to assist other state and local government lawyers. This monitoring capacity is the essential first step toward coordinated, effective, legal strategy before the Supreme Court.

The report also suggests that the staff monitor federal appellate decisions, occasionally contacting the state or local governments that were parties below and urging that a certiorari petition be filed.[2] The staff would keep track of certiorari petitions which raise claims of interest to state and local governments. It would also review all granted petitions for issues affecting state and local governments generally.[3] For significant cases, the center would send out bulletins to member governments and organizations, alerting them to the issues and recommending a course of action. Currently, amicus briefs on behalf of state and local governments are rarely filed, unless the state or local government that is a party takes the initiative by asking for assistance.

The key contribution of the center would be to make supportive action a presumption, rather than an exception. The current "system" tends to rely

2. It was evidently just such monitoring by an able member of the Maryland Attorney General's Office that led to the certiorari petition in the Southeastern Community College v. Davis, 442 U.S. 397 (1979), and then to the important and favorable decision on the merits.

3. Currently, state and local governments rely on an informal network of lawyers to bring important petitions to the attention of the governments. This is not always effective, however, in part because not all cases of vital interest to state and local governments are brought or defended by state and local government lawyers. For example, an important *National League of Cities* issue—whether operating a commuter rail system is a traditional and integral state function—was decided by the Supreme Court without the participation of the state's Attorney General. *See* United Transp. Union v. Long Island R.R., 50 U.S.L.W. 4315 (March 24, 1982).

heavily on volunteers from other state and local governments. These volunteers have many other duties, and they are frequently notified of pending cases rather late in the briefing schedule. Coordination for each brief, then, must be arranged ad hoc. Considering the difficulties, the number of amicus briefs filed in recent years is a tribute to the industry and concern of government lawyers. Nevertheless, an organization concerned primarily with state and local representation before the Supreme Court would be able to monitor the Court more closely and respond more swiftly to cases of general concern.

B. Analyzing Supreme Court Developments

These analyses, examples of which appear in the symposium, would keep state and local lawyers abreast of the most important Supreme Court rulings and their implications for state and local governments. A number of law reviews have expressed an interest in publishing a collection of these analyses on a regular basis.

In addition to analyses of the sort published in this symposium, the report recommends that the center devote some resources to providing limited topical analyses in other areas. For example, if invited, the office could provide thoughtful testimony on legislation which addresses Supreme Court decisions. The current legislative efforts to overturn *Owen v. City of Independence*[4] and *Maine v. Thiboutot*[5] are the sorts of matters on which testimony from the office might be expected. The report recommends, however, that any assistance in this area be undertaken cautiously out of concern for the center's tax status, potential conflicts, and the need to conserve scarce resources. Even with these constraints, the center may well be able to play a valuable role in legislative efforts.

C. Proselytizing for Federalism

The report notes that federalism is endangered for reasons more fundamental than the quality of Supreme Court advocacy. Many young lawyers interested in public service believe that serving the public interest is inconsistent with representing state and local governments. Reversing this attitude is clearly a task beyond the capacity of any one institution. The report suggests, however, that the center contribute to its reversal by supplementing the center's permanent staff with a revolving group of fellows and interns, in the hope of spreading to a larger number of young lawyers and law students its commitment to both excellence and federalism.

4. 445 U.S. 622 (1980).
5. 448 U.S. 1 (1980).

The center could take advantage of law school clinical and "extern" programs; law professors who follow the Supreme Court may well be eager to spend several months "in residence" at the center; pro bono assistance from the private bar is another resource. (The report and the sample analyses were prepared largely by private practitioners working on a pro bono basis).[6]

Finally, the report recommends that the center offer six-month or one-year "fellowships" to one or two state or local government attorneys each year. The center might split salary costs with the state or local government, obtain a foundation sponsor for the fellowship, or allow the state or local government's continued payment of the attorney's salary to substitute for cash dues. One attorney general has already expressed strong interest in the possibility of sending a staff attorney to the center for several months to handle the state's Supreme Court business and assist on center matters.

All of these devices, in addition to serving a proselytizing function, might also improve the center's cost effectiveness to the point where it could afford to offer substantial assistance to state and local governments involved in litigation at the federal agency or lower court level.

II. Services in Individual Cases

Although informational services such as those described above are important, the center's primary role must be to provide actual support for litigation before the Supreme Court. This support could take the form of assisting on a party's brief or drafting an amicus curiae brief. Ordinarily, assistance on a party's brief is preferable to the filing of an amicus brief. Amici curiae may not file reply briefs, and in "big" cases with many amicus briefs, only the briefs of the parties are certain to command attention.

A. Services to State and Local Parties

The center could provide a number of valuable services to state and local governments involved in Supreme Court cases, depending on their needs.

6. The report recommends that the Center use the Intergovernmental Personnel Act of 1970, Pub. L. No. 91-648, 84 Stat. 1909 (codified as amended in 5 U.S.C. §§ 1304, 3371-3376 & 42 U.S.C. §§ 4701-4772), to expand its resources. This act permits the federal government to "detail" employees to state and local institutions to work on mutually beneficial projects. Although in many cases the Justice Department and the center will be on opposite sides, in some areas state and federal interests are parallel. This is particularly true in the area of criminal defendants' and prisoners' rights.

1. Oral Argument Preparation

Most state and local government attorneys will want to argue their own cases in the Supreme Court because it can bring substantial publicity to an elected lawyer and is a great honor for any lawyer. Thus, while the center should stand ready to handle oral arguments, it will ordinarily confine its efforts to ensuring that the state or local government lawyer who does argue the case is as thoroughly prepared as possible.

Former Attorney General Gorton attributed much of his success before the Supreme Court to intensive preparation prior to argument. Despite a busy schedule, he would come to Washington almost a week before oral argument, immerse himself in the case, read the record and all relevant cases, and undergo a barrage of questions from a group of able deputies. By the time Attorney General Gorton stood up to argue, he had considered the answer to almost any question the Justices were likely to ask.

While the key to a successful oral argument is intensive preparation, that preparation must be done in the company of lawyers who understand what the Court is likely to be looking for. More than any other court, the Supreme Court is interested in policies and principles as well as precedent. The Justices often ask "hypothetical" questions to find out just how far an advocate wishes to extend the principle that will win the case. The attorney must understand the weaknesses and limits of the principle before urging it upon the Court. Casual answers to what seem to be academic questions can be disastrous.

The size of the Court also makes a difference for an advocate. The Justices frequently suggest new lines of analysis at oral argument, sometimes to help the attorney and sometimes to communicate their thoughts indirectly to the rest of the panel. Attorneys must learn to recognize "helpful" questions and to answer irrelevant questions in a way that leads back to the main thread of their argument. Finally, they must have a working knowledge of related opinions recently issued by the Court and of the issues raised in cases recently argued and still under submission, since the Justices frequently apply debates and learning from one case to the oral argument of another.

The center could assist state and local lawyers in preparing for this ordeal by establishing a short "training" course for all lawyers facing their first Supreme Court argument. Tapes of past oral arguments are available from the National Archives. The report recommends that examples of typical Supreme Court arguments—good and bad—be assembled and supplemented by videotaped lectures on oral argument by prominent Supreme Court advocates.

It is possible to tailor this course to each oral argument. In many cases, the staff of the center will have assisted on the brief and thus will be familiar with the issues likely to arise. For a relatively small cost, perhaps only travel expenses, academics and other appellate advocates might also be willing to come to Washington to participate in "moot courts"—mock oral arguments in which every conceivable question is thrown at the lawyer who will argue the case.

2. Briefs

Well-drafted briefs are also vital to any Supreme Court presentation. A hallmark of the Solicitor General's Office is its crisp, concise, graceful style and careful research. As with oral argument, Supreme Court briefs must be grounded in policy and principle. The center can help state and local government lawyers retain control over oral argument and enhance the quality of advocacy by concentrating on improvement of state and local government briefs.

To achieve this goal, drafting and research services would be made available to the state and local government lawyers who control the briefs. Ideally, the center should play the same role as any other outside counsel retained to represent a client—it would draft a brief for the client's approval and file it. Where the state or local government attorney wished to play a more active role, the center could supply a first draft, draft only a portion of the brief, or simply provide editorial comments on the government attorney's draft. Where appropriate, the center should be listed as acting "of counsel" to the state or local government attorney. One important resource of the Solicitor General's Office is its reputation for consistently high-quality advocacy and trustworthiness. If state and local governments are to obtain the same advantage, the center must establish a similar reputation with the Court. This can only be done if the center receives credit for its efforts on the brief.

B. Amicus Curiae Briefs

In some cases, state or local government parties will not want, or need, a great deal of assistance from the center, and filing a brief amicus curiae may be the appropriate course. In other cases, the decision to file an amicus brief may be a tactical consideration.

1. Petitions for Certiorari

The best examples of tactical amicus briefs probably occur in support of petitions for certiorari. The Court receives more than fifteen petitions seek-

ing review for every one that it grants.[7] The remaining lower court decisions are allowed to stand without argument. The tactical considerations surrounding a petition for review may be complex. In some cases, denial of review may effectively foreclose later Supreme Court consideration of the issue. In other cases, an important issue may be presented in a factual context that strongly prejudices one side or the other, thus arguing forcefully for or against seeking Supreme Court review.[8]

There are several benchmarks to be considered in deciding whether to petition for certiorari. It is helpful to know the general attitude of the Supreme Court with respect to the issues to be presented, the treatment those issues have received in other lower court decisions, and the implications of the result being urged. Frequently, an issue of great concern to the Court—perhaps not even central to the opinion below—can be overlooked because a party is not aware of what the Court is looking for. Thus, the center could provide valuable assistance in analyzing cases that state and local governments believe merit Supreme Court review and could factor those various considerations into the ultimate decision whether or not to file a review petition. While the number of petitions for review that are filed with the Court by state and local governments may not permit the center to work on all of them during its start-up phase, the center could participate in a fair number and offer advice on many others.

The center may conclude, for tactical reasons, that it should encourage other interested state and local governments to join in an amicus curiae brief, rather than assisting the party seeking certiorari. The decision to grant certiorari is a discretionary one, and it turns in large part on an estimate of the "importance" of the lower court's ruling. The presence of an amicus brief supporting a petition for certiorari is by itself an argument in favor of granting review, since it indicates that more than one party is concerned about the implications of the challenge of the decision. For obvious reasons, then, the center would rarely wish to file an amicus brief opposing a grant of review—in those cases, it would ordinarily provide assistance to the party opposing certiorari.

2. Briefs on the Merits

There may be times when the center should file amicus briefs on the merits. In some cases, there will be two ways of winning a case—one nar-

7. 1979 ATT'Y GEN. ANN. REP. 7 (compiled statistics for years 1974-78).

8. In almost every one of the cases, the state or local government is a party. Although state and local governments do file amicus briefs with some regularity, most such briefs are written in cases where other state and local governments are already parties. Only four or five *amicus* briefs per term are filed in cases not involving state or local government parties.

row and relatively safe, the other broad and risky. The state or local government litigant may wish to take the narrow and safe ground, while encouraging the center to file an amicus brief urging the broader and more controversial ground.

Even in filing an amicus brief, the center cannot purport to speak for state and local governments generally. The center would file the brief on behalf of those state and local governments—and those associations of state and local governments—that were willing to adhere to the views expressed in that particular brief. There are several advantages to this procedure. First, if a particular association or government does not feel that the amicus brief represents its position precisely but has no strong objection to the center's filing such a brief, it need not join that brief. Second, associations and governments sometimes come under pressure to file amicus briefs in "big" cases, even when their position simply parallels that of many other associations and governments. By filing one, carefully-crafted brief on behalf of many associations and governments, the center would achieve substantial economies of scale.

III. The Center's Caseload

A. Categories of Cases

The center's caseload would ordinarily be limited to the approximately seventy cases per term in which state or local governments are parties. The cases fall into the following categories:

Civil Constitutional Issues: 40%

These cases include such issues as cities' obligation to provide free abortions for the poor, the commerce clause as a limit on laws favoring state residents, restrictions on pornography, paddling students as a violation of the eighth amendment, restrictions on "commercial" speech, reapportionment, and gender distinctions in state laws.

Defendants' and Prisoners' Rights: 30%

These cases include such issues as the scope of *Miranda*, poor medical care as cruel and unusual punishment, the constitutionality of the death penalty, prisoners' right to access to law libraries, and the due process rights of parolees.

Interpreting Federal Statutes: 20%

These include such issues as the scope of the Voting Rights Act of 1965, the standards of proof to be applied in discrimination suits against local governments, and strikers' entitlement to federal benefits.

Conflicts Among State or Local Jurisdictions: 5%

These are cases in which state or local governments are on both sides of

a case. About half of the conflicts are between states; the remainder find a state on one side and a local government on the other. Conflicts are not common, primarily because many issues that divide state and local governments are not questions of federal law.[9] The issues include the constitutionality of imposing restrictions or taxes on out-of-state businesses or residents, and the obligation of a state to help pay for a city's desegregation.

Other: 5%

Unclassifiable issues such as abstention, Indian rights, and the like would be included in this category.

How many, and which, of these cases the center could enter would depend on the size of the staff and available resources. Of course, the center would stay out of direct conflicts between states or conflicts between state and local jurisdictions. It might also choose to stay out of areas of indirect conflict in which the long-term interests of state and local governments are not clear. (The best example of such an area is the use of the commerce clause to limit discrimination against nonresidents.) This would leave about fifty cases a year, from which the center could choose the twenty-five or thirty with the greatest importance for state and local governments. If the productivity of the Solicitor General's office is any measure, this caseload could be handled by as few as three or four attorneys.

B. The Center's Position

The center's position generally would be regarded as "conservative," because in defending state and local governments it would ordinarily advocate less federal court interference with state legislative judgments, more local authority to deal with social issues like obscenity and abortion, and fewer federal requirements for procedural due process. In other cases, however, defending a state's freedom might mean defending "liberal" policy positions. Two fairly recent cases that arguably fit this mold are *Illinois Brick Co. v. Illinois*,[10] in which many states sought the right to bring antitrust suits on behalf of "indirect" victims of price fixing, and *United States Trust Co. v. New Jersey*,[11] in which a corporation claimed that a state's retroactive repeal of a bond covenant violated the federal Constitution's contract clause.

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9. Bear in mind as well that this is an analysis of the Court's appellate, rather than original, jurisdiction. Original actions by one state against another are not included.

10. 431 U.S. 720 (1977).

11. 431 U.S. 1 (1977).

IV. ORGANIZING THE CENTER

In the long run, the center must be funded in one fashion or another by its clients.[12] For the short term, however, dues contributions will not be sufficient. The office must establish itself before substantial contributions from individual governments can be expected. Therefore, some foundation assistance will be needed to support the center in its early years.

12. Some costs, particularly those for printing, xeroxing, and publications, can be passed through to individual state or local governments. Some possibilities for support from individuals and foundations will continue over the long run, but ultimately the bulk of the center's expenses must be met by contributions from state and local governments.