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"WE'RE YOUR GOVERNMENT AND WE'RE HERE TO HELP": OBTAINING AMICUS SUPPORT FROM THE FEDERAL GOVERNMENT IN SUPREME COURT CASES

Patricia A. Millett*

Litigating in the United States Supreme Court can be an exciting, yet intimidating, experience. The rarity with which such cases arise, combined with the intellectual challenge of briefing and arguing issues of great significance to the law before a nine-member panel of highly intelligent, rigorously well-prepared, actively engaged, and analytically demanding jurists can be a highlight of a lawyer's career.[1] At the same time, the Court's unique procedures, the dauntingly high expectations of the Justices, and the particularized demands of judicial decisionmaking at the nationwide level can leave even experienced appellate attorneys at sea.

Accordingly, as is true for so many adventures in life, it might be better to travel on your Supreme Court voyage with an experienced guide. And there is no one better to navigate the Court with than the Solicitor General of the United States. Obtaining amicus curiae support from the Solicitor General can be of significant benefit in both obtaining or avoiding Supreme Court review in the first instance, and preparing a case and framing legal arguments for plenary review after certiorari is granted. The Solicitor General, after all, is a repeat player before

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1. The Justices are very active at oral argument, asking as many as eighteen questions of counsel in a ten-minute argument, *see* Transcr. of Oral Argument at 29-36, *Devlin v. Scardelletti*, 536 U.S. 1 (2002) (argued Mar. 26, 2002), and as many as seventy questions during a thirty-minute argument, *see* Transcr. of Oral Argument at 19-39, *Gisbrecht v. Barnhart*, 535 U.S. 789 (2002) (argued Mar. 20, 2002).

the Supreme Court—appearing in approximately seventy to eighty percent of the Supreme Court's cases every Term—and her arguments speak to the Court with the voice of the coordinate branches of the federal government.[2] As a result, having the Solicitor General appear on your side of a case can ensure the most comprehensive presentation of the arguments in your favor, and it can enhance your prospects for success because of the weight and respect that the view of the United States government is generally accorded. For that reason, it is important for Supreme Court counsel to understand what it takes to obtain the Solicitor General's support in a case.

I. THE SOLICITOR WHAT?

By way of background, the Solicitor General is an Executive Branch officer within the United States Department of Justice who is charged with, among other things, representing the interests of the United States before the Supreme Court.[3]

2. In the 2008 Term, the Solicitor General participated in sixty-nine percent of the cases granted plenary review by the Supreme Court. *See* Supreme Court of the United States, *Argument Calendars (October Term 2008)*, http://www.supremecourtus.gov/oral_arguments/argument_calendars.html (indicating that the Court heard seventy-eight cases in the 2008 Term) (accessed June 3, 2009; copy on file with Journal of Appellate Practice and Process); Office of the Solicitor General, U. S. Dept. of Just., *Briefs*, http://www.usdoj.gov/osg/briefs/search.html [hereinafter *OSG Briefs*] (containing lists: click on "Type of Filing by Term," then click on "2008," and then click on each category of briefs filed; together, these lists show a total of fifty-four cases) (accessed June 3, 2009; copy on file with Journal of Appellate Practice and Process). In the 2007 Term, the Solicitor General participated in seventy-eight percent of the cases granted plenary review by the Supreme Court. *See* Supreme Court of the United States, *2007 Term Opinions of the Court*, http://www.supremecourtus.gov/opinions/07slipopinion.html (indicating that the Court heard and decided seventy-three cases in the 2007 Term) (accessed May 1, 2007; copy on file with Journal of Appellate Practice and Process); *OSG Briefs* (containing lists: click on "Type of Filing by Term," then click on "2007," and then click on each category of briefs filed; together, these lists show a total of fifty-six cases) (accessed May 1, 2007; copy on file with Journal of Appellate Practice and Process). *See also* Richard Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 Geo. L.J. 1487, 1546 (2008) (noting that Solicitor General participated in seventy-six percent of cases heard in the 2006 Term).

3. For a more in-depth discussion of the Solicitor General and the Office, see Lincoln Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* (Knopf 1987); Seth P. Waxman, U.S. Solicitor Gen., Address to S. Ct. Historical Socy., *Presenting the Case of the United States as It Should Be: The Solicitor General in Historical Context* (Wash., D.C., June 1, 1998), http://www.usdoj.gov/osg/aboutosg/sgarticle.html (accessed May 1, 2009; copy on file with Journal of Appellate Practice and Process).

While the Solicitor General is appointed by the President and confirmed by the Senate, her charge to represent the interests of the United States as a whole gives her a unique degree of independence.[4] The Solicitor General heads a small staff of approximately twenty lawyers in the Office (four Deputy Solicitors General and roughly sixteen Assistants to the Solicitor General) who assist her in the formulation of legal positions and the drafting of briefs and certiorari-stage filings for Supreme Court cases.[5] With the exception of the Principal Deputy Solicitor General, who is chosen by the Solicitor General, the lawyers in the Office are career government lawyers who are all schooled in the intricacies and idiosyncrasies of Supreme Court practice, as well as in the task of developing and defending the institutional interests of the United States government in litigation.[6]

4. For example, the Justice Department is charged with defending the constitutionality of Acts of Congress, whether or not the President supported those laws, and the Solicitor General generally fulfills that role unless either (i) no reasonable arguments can be made in defense of the law's constitutionality, or (ii) the legislation transgresses the separation of powers and, in particular, trenches upon Executive Branch power or autonomy. Analysis of the precise standard by which either of those exceptions is triggered is beyond the scope of this article. Readers interested in learning more about the issue, however, can consult *Recommendation That the Department of Justice Not Defend the Constitutionality of Certain Provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984*, 8 Op. Off. Leg. Counsel 183 (Aug. 27, 1984), and Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 L. & Contemp. Probs. 7 (2000).

5. Attorneys in the Solicitor General's Office also assist the Solicitor General in the execution of the Office's other major task: the supervision and authorization of appellate litigation by the United States government. 28 C.F.R. § 0.20 (2008). Every affirmative appeal by the United States government (with the exception of those advanced by a few independent agencies) must be authorized by the Solicitor General, who approves not just the decision to appeal but also precisely which arguments will and will not be advanced in the appeal. *Id.* The Solicitor General also must authorize every petition for rehearing en banc, every intervention in any court (trial or appellate, state or federal), and every amicus curiae brief filed in the courts of appeals (federal or state). *Id. See also* Office of Solicitor General, U.S. Dept. of Just., *About the Office of the Solicitor General*, http://www.usdoj .gov/osg/about_us.htm (describing duties and activities of Solicitor General) (accessed May 3, 2009; copy on file with Journal of Appellate Practice and Process).

6. For the last couple of decades, the Office has also hired up to four young lawyers, generally right after law school and a federal-court clerkship, as Bristow Fellows. The Fellows spend one year in the Office assisting with the appeal authorization process and the hundreds of briefs in opposition to certiorari filed annually by the United States. The Fellows are also extensively involved in helping the Office's attorneys write briefs and prepare for oral argument in merits cases before the Supreme Court. *See* Office of the Solicitor General, U.S. Dept. of Just., *Opportunities: Bristow Fellows*, http://www.usdoj

II. THE SOLICITOR GENERAL'S ROLE AT THE CERTIORARI STAGE

A. *An Invitation That Cannot Be Refused*

When a petition for a writ of certiorari is pending in the Supreme Court, the petitioner hopes against hope to receive one of those rare orders informing her that: "The petition for a writ of certiorari is granted."[7] The respondent opposing certiorari, of course, hopes to see the much more commonplace order that: "The petition for a writ of certiorari is denied." But there is a third option. After the case is considered by the Court (that is, after the case is "conferenced"), the parties in approximately fifteen cases a year receive an order reciting that "The Solicitor General is invited to file a brief in this case expressing the views of the United States."[8] Those orders are known within the Solicitor General's Office as "invitations," and commonly referred to outside that Office as "CVSGs" ("Calls for the View of the Solicitor General"). The concurrence of four Justices is needed before the Solicitor General's views will be requested in a case.[9]

.gov/osg/opportunities/bristapp.html (accessed May 1, 2009; copy on file with Journal of Appellate Practice and Process).

7. Orders granting certiorari review are few and far between. In the 2007 Supreme Court Term, less than one percent of certiorari petitions were granted. *See* John G. Roberts, Jr., *2008 Year-End Report on the Federal Judiciary* 10, http://www.supremecourtus .gov/publicinfo/year-end/2008year-endreport.pdf [hereinafter *Chief Justice's Report 2008*] (showing that while 8241 cases were filed in the 2007 Term, the Court granted plenary review in only seventy-five cases); *The Statistics*, 122 Harv. L. Rev. 516 (2008) [hereinafter *Harvard Statistics*] (showing seventy opinions of the Court issued). After factoring out *in forma pauperis* petitions by prisoners and original cases, closer to four percent of petitions were granted. *See e.g.* James C. Druff, *Annual Report of the Director, Judicial Business of the United States Courts 2008* at 82 (tbl. A-1) [hereinafter *Annual Report 2008*] (showing 1,969 paid petitions filed and eighty-five petitions granted).

8. The number of such orders each Term varies. As of June 1, 2009, the Court had issued eleven orders during its 2008 Term requesting the views of the Solicitor General. The total for the 2007 Term was particularly high, with twenty-five such orders, while in the preceding four Terms, the numbers ranged from twelve to eighteen. *See* Office of the Solicitor General, U. S. Dept. of Just., *Briefs*, http://www.usdoj.gov/osg/briefs/search.html (containing lists of cases: click on "Type of Filing by Term," then click on relevant year, and then click on "Invitations") (accessed June 3, 2009; copy on file with Journal of Appellate Practice and Process).

9. *See Medellin v. Tex.*, 552 U.S. ___, ___, 129 S. Ct. 360, 364 (2008) (Breyer, J., dissenting) (noting that "[a] sufficient number of Justices . . . (four)" had voted to request the views of the Solicitor General).

CVSGs are a unique feature of Supreme Court practice, and they underscore the special position of the Solicitor General in Supreme Court litigation. The Court is seeking the views of a non-party, not on the merits of the case, but on whether the Court should exercise its discretionary certiorari jurisdiction to hear the case at all.[10] Moreover, the Solicitor General is the almost-exclusive recipient of such extraordinary "invitations."[11]

Why would the Court issue such an invitation? Surely the Court itself is fully equipped to apply its own traditional criteria for granting certiorari.[12] The Supreme Court's rules offer no insight on what motivates the Court's decision to seek the Solicitor General's views. Indeed, the Court's rules do not mention the practice at all. The answer lies, instead, in tracking the Court's practice over time.

Most commonly, when the Court invites the Solicitor General's views, the question presented for review involves the interpretation and application of a federal statutory or regulatory scheme that a federal agency administers. In such cases, the parties' views on the impact and reach of the lower court's ruling and its implications for the administration of federal law are likely to be diametrically opposed. The petitioner will no doubt insist (to spark the Court's interest in certiorari review) that the statute or regulatory scheme has been rendered non-functional and that important federal programs have now been paralyzed. Correspondingly, the respondent will insist that the ruling has no discernible impact beyond the unique and infrequently recurring facts of the specific case. In the face of such arguments, the objective view of the Solicitor General on the impact of the court of appeals' ruling on what is, after all, the federal government's own statutory or regulatory program

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10. The Court also invited the Solicitor General's views on a motion for a stay of a judgment affecting the operation of a cooperative state-federal program in *Washington State Department of Social & Health Services. v. Guardianship Estate of Keffeler*, 537 U.S. 371 (2003).

11. On rare occasions, the Court has issued such orders to state attorneys general. *See Younger v. Harris*, 393 U.S. 813 (1968) (inviting attorney general of California "to file a brief in this case expressing the views of the State of California"); *Milne v. Milne*, 381 U.S. 948 (1965) (inviting attorney general of Maryland "to file a brief expressing the views of the State of Maryland").

12. For a general discussion of those criteria, *see* Eugene Gressman et al., *Supreme Court Practice*, ch. 4 (9th ed., BNA 2007) [hereinafter *Supreme Court Practice*].

can help the Justices gauge more accurately whether the question presented has the type of wide-ranging consequence that merits Supreme Court review.[13] The Solicitor General is also uniquely positioned to explain whether legislative or regulatory amendments—or other administrative measures that might independently resolve any problem created by the lower court's ruling—are planned, thereby making Supreme Court review arguably unnecessary.[14] In addition, the Court may seek the views of the Solicitor General when the case implicates an international treaty, international law, or some other aspect of foreign relations, about which the political branches have particular expertise.[15]

Calls for the views of the Solicitor General are exceptional not only in their function and purpose, but also in their processing. They typically come with no Court-imposed deadline for filing by the Solicitor General.[16] That distinctive act of inter-branch comity apparently reflects the Supreme Court's

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13. *See e.g.* Br. for U.S. Supporting Petr. as Amicus Curiae, *Quanta Computer, Inc. v. LG Elecs., Inc.*, ___ U.S. ___, 128 S. Ct. 2109 (2008) (urging Supreme Court review of patent exhaustion ruling); Br. for U.S. as Amicus Curiae Supporting Respt., *Riegel v. Medtronic, Inc.*, ___ U.S. ___, 128 S. Ct. 999 (2008) (arguing against Supreme Court review of question whether FDA approval of medical device preempts common law action); Br. for U.S. as Amicus Curiae Supporting Petrs., *N.Y. St. Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995) (urging Supreme Court review of ERISA question).

14. *See e.g.* Br. for U.S. as Amicus Curiae Supporting Respt., *Progress Energy, Inc. v. Taylor*, ___ U.S. ___, 128 S. Ct. 2931 (2008) (recommending denial of certiorari based on proposed regulatory amendment); Br. for U.S. as Amicus Curiae Supporting Respt., *Minn. v. Martin*, 539 U.S. 957 (2003) (recommending denial of certiorari based on ability of Center for Medicaid and Medicare Services to resolve the problem through administrative measures).

15. *See e.g.* Br. for U.S. as Amicus Curiae Supporting Petr., *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, ___ U.S. ___, 2009 U.S. LEXIS 3118 (2009) (enforcement of judgments against foreign governments and their domestic debtors); Br. for U.S. as Amicus Curiae Supporting Petrs., *Republic of the Philippines v. Pimentel*, ___ U.S. ___, 128 S. Ct. 2180 (2008) (whether foreign government is a necessary party to a suit affecting its assets when foreign government was dismissed from action under Foreign Sovereign Immunities Act). *See also Medellin*, 552 U.S. at ___, 129 S. Ct. at 364 (Breyer, J., dissenting) (decrying Court's failure to seek the views of the Solicitor General on the foreign-relations impact of the pending execution of a foreign national).

16. When, in *Keffeler*, the Court sought the Solicitor General's views on a stay motion, a deadline for filing was set. *Keffeler*, 534 U.S. 1122 (inviting Solicitor General "to file a brief in this case expressing the views of the United States on or before 3 p.m., Friday March 1, 2002").

recognition of the practical challenges imposed by a request that the Executive Branch suddenly immerse itself in a case to which it is not a party and with which it may not have had any prior affiliation, and then formulate an official governmental position on both the merits and the certworthiness of what is, almost invariably, an important, complex, and unanswered question of federal law.

Parties to a case in which a CVSG is issued need not worry, however, that their cases will be left wasting away while the Solicitor General tends to other business. The Solicitor General's Office strives to file pending CVSGs in time to meet the Court's traditional cut-off dates for action each Term.[17] As a matter of practice, briefs responding to CVSGs issued in the Fall are generally filed by the December cutoff date, while CVSGs granted in the Winter or early Spring are generally filed by the May cutoff date. CVSGs issued late in the Spring or early in the Summer are commonly filed in time to permit the Court's action when the Term commences in October. Thus, while no external deadline is imposed by the Court, the Solicitor General's Office has imposed deadlines on itself—to which the Office generally adheres—in order to permit the orderly processing and disposition of petitions for certiorari.

B. Dealing with the Court-Invited Stranger

1. Making Contact

What are parties to do when the Court, of its own initiative, injects a stranger into their case? As Emily Post would no doubt advise: greet, meet, and engage the invitee in conversation. Indeed, to do otherwise would profoundly disserve one's client. Why? Because, once requested by the Supreme Court, the Solicitor General's analysis of the importance of a question

17. "Cut-off dates" are the dates by which briefs in opposition to certiorari must be filed in order to permit the Court to conference the case, grant certiorari and hear the case in either (i) the current Term—that is, the date (usually in December) by which oppositions must be filed in time for the case to be considered on the last conference in January granting cases to be argued in April (and thus to be decided before the Court's summer recess), or (ii) the upcoming Term—that is, the date (usually in late May) by which oppositions must be filed for the case to be considered on the last conference in June granting cases to be argued in the Fall or Winter.

presented and the necessity and appropriateness of certiorari review carry significant weight with the Court.[18] During the 2007 Term, the Supreme Court granted certiorari in eleven of the twelve cases in which the Solicitor General recommended review.[19] Thus, when the Solicitor General recommends that certiorari be granted, a petitioner's statistically dismal (approximately one percent) chance of having certiorari granted can increase exponentially. By the same token, when the Solicitor General recommends against certiorari, the prospects for Supreme Court review become even more remote. The Supreme Court denied review in the 2007 Term in every case in which the Solicitor General recommended that course.[20]

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18. The respect accorded the judgment of the Solicitor General's office reflects not only the Office's distinctive perspective on the question of federal law presented and its importance, but also that Office's intimate familiarity with and experience in applying the Court's exacting criteria for certiorari review. Indeed, the Solicitor General's tradition of closely scrutinizing a case's suitability for High Court review explains why the Solicitor General's own petitions for certiorari are granted (either for review or summary disposition) roughly sixty to seventy percent of the time. *See Supreme Court Practice*, *supra* n. 12, at 237. In the 2007 Term, the Solicitor General filed fifteen petitions that were acted upon by the Court, of which twelve were granted at least in part.

19. *See* David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 Geo. Mason L. Rev. 237, 276 (2009) (noting that, from 2001 to 2004, the Court agreed with the Solicitor General's recommendation in favor of certiorari review ninety-three percent of the time). *But see id.* (from 1998 to 2000, the Court's grant of certiorari review paralleled the Solicitor General's recommendation only forty-four percent of the time). The cases in which the Court granted certiorari following a Solicitor General brief recommending review in the 2007 Term were *Metropolitan Life Insurance Co. v. Glenn*, ___ U.S. ___, 128 S. Ct. 2343 (2008); *Quanta Computer, Inc. v. LG Electronics, Inc.*, ___ U.S. ___, 128 S. Ct. 2109 (2008); *Chamber of Commerce of the United States v. Brown*, ___ U.S. ___, 128 S. Ct. 2408 (2008); *Republic of the Philippines v. Pimentel*, ___ U.S. ___, 128 S. Ct. 2180 (2008); *Wyeth v. Levine*, ___ U.S. ___, 129 S. Ct. 1187 (2009); *Meacham v. Knolls Atomic Power Laboratory*, ___ U.S. ___, 128 S. Ct. 2395 (2008); *Crawford v. Metropolitan Government of Nashville & Davidson County*, ___ U.S. ___, 129 S. Ct. 846 (2009); *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, ___ U.S. ___, 129 S. Ct. 1109 (2009); *AT & T Corp. v. Hulteen*, ___ U.S. ___, 128 S. Ct. 2957 (2008); *Harbison v. Bell*, ___ U.S. ___, 129 S. Ct. 1481 (2009); and *Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, ___ U.S. ___, 128 S. Ct. 2957 (2008) (recommending that the petition be granted and that the decision of the court of appeals be summarily vacated and remanded). The Court denied certiorari in *Amschwand v. Spherion Corp.*, ___ U.S. ___, 128 S. Ct. 2995 (2008), notwithstanding the Solicitor General's recommendation that certiorari be granted.

20. *See* Thompson & Wachtell, *supra* n. 19, at 276 (from 1998 to 2004, the Court agreed with the Solicitor General's recommendation to deny certiorari between seventy-five and eighty-three percent of the time). The cases in which the Court denied review in the 2007 Term, consistent with the Solicitor General's recommendation, were *Sprint Nextel*

Indeed, given how significantly the Solicitor General's support can influence a petition's disposition, counsel for clients seeking Supreme Court review would be well-advised to write their petitions for certiorari with an eye to obtaining, if not an outright grant of certiorari, then an order from the Court requesting the Solicitor General's views. If the petition presents the type of question that could appropriately support a CVSG, the petition should highlight the federal government's expertise with the statutory scheme, the federal government's critical role in administering the statute, and/or the likely impact of the decision below on distinctly governmental interests or operations.[21]

Thus, when the Court invites the Solicitor General's views in a case, counsel for both parties—whether seeking to obtain or to avoid Supreme Court review—should promptly initiate a dialogue with the Solicitor General's Office. Counsel can call the Office and request the names of both the Deputy Solicitor General and the Assistant to the Solicitor General assigned to the case. Counsel should then contact those individuals and request a meeting with them to discuss the government's position. The Solicitor General's Office has a long tradition of meeting with any interested party in such cases and factoring their arguments and concerns into the Office's certiorari calculus.[22] Because the federal government has not been a party

Corp. v. National Association of State Utility Consumer Advocates, ___ U.S. ___, 128 S. Ct. 1119 (2008); *Teck Cominco Metals, Ltd. v. Pakootas*, ___ U.S. ___, 128 S. Ct. 858 (2008); *General Electric Co. v. Commissioner, New Hampshire Department of Revenue Administration*, ___ U.S. ___, 128 S. Ct. 529 (2007); *United States ex rel. Bly-Magee v. Premo*, ___ U.S. ___, 128 S. Ct. 1119 (2008); *AT & T Pension Benefit Plan v. Call*, ___ U.S. ___, 128 S. Ct. 2900 (2008); *Geddes v. United Staffing Alliance Employee Medical Plan*, ___ U.S. ___, 128 S. Ct. 2993 (2008); *Exxon Mobil Corp. v. Doe*, ___ U.S. ___, 128 S. Ct. 2931 (2008); *Board of Education v. Gulino*, ___ U.S. ___, 128 S. Ct. 2986 (2008); *Clark County v. Vacation Village, Inc.*, ___ U.S. ___, 128 S. Ct. 2956 (2008); *Goss International Corp. v. Tokyo Kikai Seisakusho*, ___ U.S. ___, 128 S. Ct. 2957 (2008); and *PT Pertamina (Persero) v. Karaha Bodas Co.*, ___ U.S. ___, 128 S. Ct. 2958 (2008).

21. This, of course, makes the most sense if counsel is optimistic that the Solicitor General would file a brief supporting review. But, given that the odds against certiorari are so extraordinarily high, framing the petition to highlight the need for Solicitor General input might be worth the gamble in some cases even if counsel is uncertain about the federal government's views.

22. For parties who do not have counsel in the Washington, D.C., area, and who lack the resources to travel to the Department of Justice for a meeting, the Solicitor General's Office is generally willing to discuss the case through a conference call.

to the case and thus generally will have nothing more at hand than the certiorari papers, counsel can further facilitate the Solicitor General's review by offering to provide in advance any needed record materials and to answer any questions about the issues, the record, or the implications of the case.

2. Preparing for the Meeting

Once a meeting is arranged, counsel's preparation for and conduct of the meeting should proceed with an appreciation of the Solicitor General's traditional role and approach to CVSGs. The Solicitor General (even if ultimately expecting to support your side of the case) will be speaking for and setting forth the legal position of the United States. Accordingly, the Solicitor General will seek input from all affected federal agencies, especially those charged with administering and implementing the law or regulation in question. The Solicitor General will also seek the views of interested offices within the Department of Justice—such as the Tax Division in tax cases, the Antitrust Division in antitrust cases, the Environment and Natural Resources Division in environmental cases, and the Civil Division in civil cases. Counsel can expect that representatives of the interested offices and agencies will attend the meeting with the Solicitor General's Office, and thus should be prepared to address any specific questions or concerns that might arise from the specialized expertise with which attorneys in those offices will analyze the question(s) presented.[23]

Because the Solicitor General's position will be controlled by the policy and litigating interests of the federal government, attempts to obtain the Solicitor General's support should speak in that language. Complaining about the particular injustice done to your client or attempting to generate case-specific sympathy will do little to advance the ball. Instead, counsel should be prepared to address why it is in the interest of the United States government to support or oppose certiorari. More specifically, counsel should explain from their perspective:

23. While different Solicitors General have taken their own approaches to such meetings, they are commonly conducted by a Deputy Solicitor General with the Solicitor General's personal participation, if any, generally limited due to time and work pressures.

- How the ruling below will or will not affect the day-to-day administration of a federal regulatory program:

  - Has a federal regulation been invalidated?

  - Has the agency's established interpretation or practice been called into question or disrupted in operation?

  - Does the court's decision have the practical effect of changing how the agency does business?

  - Will the decision affect the scope of a program or the cost of administering it?

  - Is the court's ruling fact-bound or is it likely to affect agency operations more broadly?

- How the decision below will or will not affect legal positions and rules of law that the federal government has sought to establish or resist:

  - Does the ruling favor or disfavor such traditional governmental doctrines as agency deference, prosecutorial discretion, sovereign immunity, the immunity of government officials from suit, executive privilege, the confidentiality of sensitive governmental information, the need for law enforcement flexibility, the uninterrupted collection of revenue, state-federal cooperation, or the like?

  - Is the interpretation of statutory or constitutional law contrary to the reading of the law advanced by the government in its own cases in that jurisdiction or elsewhere?

- How does the court's ruling compare to positions the Solicitor General has taken in other court of appeals or Supreme Court filings?

- Whether the ruling below is consistent or inconsistent with the policy interests of the United States:

  - Does the ruling affect the conduct of foreign affairs or national security?

  - Does the decision promote or impair marketplace competition or consumer protection?

  - Does the analysis by the court of appeals trench upon areas generally left to agency or Executive Branch discretion?

  - Does the ruling undermine civil rights enforcement?

- Based on an analysis of Supreme Court precedent, what are the prospects of obtaining or not obtaining through Supreme Court review a decision that is consonant with the federal government's interests?

  - How could arguments be formulated that are consistent with both the short-term and long-term interests of the federal government in the development of the particular area of law?

- Is this an appropriate case and time for Supreme Court review?

  - Is there a genuine conflict in the circuits or other sound reason for Supreme Court intervention?

- Is the impact of the ruling widespread or is the question frequently recurring?
- Is the case interlocutory, so that review could await a final judgment?
- Are there jurisdictional or other procedural barriers to the Court's resolution of the question presented?
- Could the problem be more appropriately addressed through amendment or promulgation of a regulation, the formulation of agency guidance, or statutory revision?
- Is pertinent legislation pending that would either fix the problem or stanch its prospective significance?[24]

Oftentimes, it is productive for counsel to submit to the attorneys in the Solicitor General's Office a brief (three- to five-page) written memorandum in advance of the meeting that supports the party's position and outlines the reasons why the government should take a similar view of the case. Such pre-meeting submissions can help focus the discussion, crystallize areas of potential agreement or disagreement, and provide a helpful reference point for the government attorneys involved in formulating the United States' position in the case.

3. Conducting the Meeting

Because the meeting is part of the Solicitor General's process of formulating its own position, counsel should not expect attorneys from the Office to discuss their anticipated

24. For other views on the Office's amicus criteria, see Rex E. Lee, *Lawyering for the Government: Politics, Polemics, & Principle*, 47 Ohio St. L.J. 595 (1986); Richard L. Pacelle, Jr., *Amicus Curiae or Amicus Praesidentis? Reexamining the Role of the Solicitor General in Filing Amici*, 89 Judicature 317 (May-June 2006).

position in the case. Instead, the Solicitor General's Office generally views such a meeting as an opportunity to hear from interested parties and to obtain information and analysis from them that is relevant to the Solicitor General's decisionmaking process. As a result, counsel should be prepared to open the discussion and to encounter extensive questioning and analysis of the client's position (somewhat like a very respectful and cooperative, yet rigorous, moot court) both on the merits and on the appropriateness of Supreme Court review. The best way to anticipate the questions and informational needs of the Solicitor General's Office is for counsel to put herself in the shoes of the Solicitor General, deciding whether to petition for or to oppose certiorari, and simultaneously to imagine being in the shoes of a skeptical Supreme Court Justice, debating in conference whether this is really a question of law that the Court should decide at this time and in this case.

4. After the Meeting

Finally, it is important to remember that, once the Solicitor General files a brief, the parties can each file supplemental briefs that respond to the points made by the Solicitor General.[25] Those briefs are limited to 3000 words,[26] and should generally be filed within ten to fourteen days of the Solicitor General's brief to ensure their inclusion when the case is circulated to the Justices' chambers.[27]

C. The Uninvited Guest

Because of the weight that the Solicitor General's views carry, one might wonder why counsel for petitioners do not anticipatorily request the Solicitor General's support as amicus when first filing their petition rather than wait for the Court's

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25. *See* U.S. S. Ct. R. 15(8) (LEXIS 2009).

26. *See* U.S. S. Ct. R. 33(g)(iv) (LEXIS 2009).

27. Cases are circulated on the first distribution date that falls at least ten days after the filing of the Solicitor General's brief, so calculation of the exact circulation date requires consulting the Court's publicly available case distribution schedule. *See e.g.* Supreme Court of the U.S., *Case Distribution Schedule October Term '08*, http://www.supremecourtus.gov/casedistribution/casedistributionschedule2008.pdf (accessed May 2, 2009; copy on file with Journal of Appellate Practice and Process).

sua sponte invitation of the Solicitor General's views. The reason is that obtaining the federal government's support without a CVSG order by the Court is extraordinarily difficult. Only infrequently does the Solicitor General file unsolicited amicus briefs at the certiorari stage. After all, if the Court believes that the government's views would be helpful to its decision, it will ask for them. By the same token, if the case is not one in which the Court believes that the Solicitor General's views would contribute distinctively to the certiorari debate, then the amicus brief is less likely to carry its usual weight.

More importantly, unless the case involves the type of distinctive governmental function or viewpoint that might trigger a CVSG, it is unlikely that the case will implicate a sufficiently significant federal interest as to warrant the Solicitor General's stepping into the case uninvited and independently urging the Court's review. As a long-term institutional litigant before the Supreme Court, the Solicitor General knows that the Office's credibility with the Court depends, in large part, on consistently applying extremely selective and exacting criteria before asking the Court to exercise its jurisdiction, and identifying in each instance a distinct federal interest that supports such review. Generally, only cases raising questions of profound and enduring institutional interest to the federal government such as, for example, racial desegregation in education or the conduct of international relations, have inspired the Solicitor General's unilateral amicus filing at the certiorari stage. In such cases, the Solicitor General's filing reflects a judgment that the institutional and legal interests at stake are of such a magnitude that the government cannot stand silent and risk a denial of certiorari review, and that the United States has a distinct message to bring to the certiorari debate.[28]

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28. For example, the Acting Solicitor General has recommended without an invitation that the Court grant review to address whether it is constitutional for a public university to use race or national origin as a factor in admissions decisions. Br. for U.S. as Amicus Curiae Supporting Petrs., *Tex. v. Hopwood*, 518 U.S. 1033 (1996). The Solicitor General also recommended review in a case involving an application of the Alien Tort Statute, 28 U.S.C. § 1350, that had serious consequences for the conduct of foreign relations and that was opposed by the South African government itself, which had implemented a policy of national reconciliation. Br. for U.S. as Amicus Curiae Supporting Petrs., *Am. Isuzu Motors, Inc. v. Ntsebeza*, ___ U.S. ___, 128 S. Ct. 2424 (2008). As an appendix to his brief, the Solicitor General submitted to the Court diplomatic letters from a number of foreign governments expressing concern about the litigation. *See* http://www.usdoj.gov/osg/briefs

Beyond that, appearing as amicus at the certiorari stage more frequently would be unworkable. Approximately 8000 petitions for certiorari are filed annually.[29] Were the Solicitor General's Office to get into the habit of routinely filing uninvited amicus briefs, the Office—with its already spartan staffing levels—would likely be overwhelmed by the number of requests for such support. More importantly, the Solicitor General would have difficulty picking and choosing the cases in which to intervene while maintaining the Office's tradition of political independence and the government's important obligation of evenhandedness in dealing with its constituents.

Finally, the number of cases that simultaneously present an issue of such paramount concern to the federal government and such an urgent need for Supreme Court review as to warrant unsolicited amicus participation are rare.

For those reasons, counsel generally should not expect to obtain the Solicitor General's participation as amicus at the certiorari stage without a CVSG order from the Court. If counsel wants to try to obtain an unsolicited amicus brief, she will have to identify an extraordinarily compelling need—one that would answer the Solicitor General's weighty presumption against such filings.

III. THE SOLICITOR GENERAL'S ROLE AT THE MERITS STAGE

Whether or not the Solicitor General participates in a case at the certiorari stage, counsel in any case in which certiorari has been granted should discuss the federal government's potential participation with the Solicitor General's Office.

If the government participated as amicus (invited or uninvited) at the certiorari stage, it is virtually certain that the Solicitor General will participate again in the Court's merits review. But even if the Solicitor General specifically declined to

/2007/2pet/5ami/20070919.pet.ami.html (accessed May 2, 2009; copy on file with Journal of Appellate Practice and Process). The petition was denied, however, when recusals by numerous Justices left the Court unable to muster a quorum. *See American Isuzu*, ___ U.S. at ___, 128 S. Ct. at 2424.

29. *See e.g. Chief Justice's Report 2008*, *supra* n. 7; *Harvard Statistics*, *supra* n. 7; Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 Minn. L. Rev. 1363, 1368 (2006) (noting 8593 petitions on the docket in 2004); *Supreme Court Practice*, *supra* n. 12, at 57-60.

file a brief at the certiorari stage and was not invited to do so by the Court, a significant chance remains that the Solicitor General will weigh in as amicus at the merits stage. That is because, by definition, every case in which the Supreme Court grants review involves an important question of federal law, and the number of those questions that do not involve either a constitutional provision that applies to the operations of the federal government or a federal statute or regulation that at least one federal agency has some role in implementing or enforcing are few. Indeed, in the 2007 Term, the Solicitor General filed more briefs as amicus at the merits stage (thirty) than as a party (twenty-seven).[30]

Accordingly, counsel in a case in which Supreme Court review has been granted would be well advised to contact the Solicitor General's Office about its potential participation in the case. As at the certiorari stage, counsel should call the Office and request a meeting or telephonic discussion with the Deputy Solicitor General and Assistant to the Solicitor General who are assigned to the case. At the meeting, counsel should focus on the reasons why the interests of the United States would be served by filing a supporting amicus brief. The emphasis should be on the institutional—litigating, enforcement, constitutional—interests of the federal government, the proposed filing's consistency with prior positions taken by the Solicitor General's Office, the announced policy objectives of the government, and the potential implications for federal legislation or governmental programs and activities of the Court's ruling in the case.

Even if the federal government's participation on behalf of your client seems unlikely, a meeting may well be worthwhile to urge the Solicitor General to stay out of the case altogether. After all, if the government will not support your client's position, it would still be beneficial to the client to prevent the

30. Historically, the Office's rate of participation as amicus curiae was much lower. But that was most likely because the Supreme Court's significantly busier docket in the mid-twentieth century kept the Solicitor General's leanly staffed Office fully engaged representing the United States as a party, which left fewer resources available for non-party amicus participation. The increased participation also reflects the ever-expanding reach of the federal government's regulatory arm, such as the enactment of civil rights and workplace laws that apply to virtually all employers, and the growth in cooperative federal-state funding programs, which in turn provides additional sources for Supreme Court cases implicating significant interests of the federal government.

government from joining forces with the opposing party. And even if the federal government's support for your opponent appears inevitable, counsel owes it to her client to at least attempt to persuade the Solicitor General to take a very narrow approach—one that is less damaging to the client's position. For example, counsel could attempt to persuade the Solicitor General that, even if the federal government disagrees with her position on the particular legal question presented in the case, the government should nevertheless support affirmance or reversal of the judgment below on an alternative ground.[31] Or if the court of appeals or opposing counsel is propounding a rigid or extreme legal rule, counsel could try to persuade the Solicitor General to take a more nuanced approach or to advocate a more flexible rule for decision—and perhaps even to suggest a remand to give your client a chance to prevail under that new (albeit less helpful) standard.[32]

Such discussion and dialogue with the Solicitor General's Office are critical because that Office is well-known for adopting its own unique approach to cases and advancing distinctive views of the law and proposed rules for decision in its amicus briefs. Because the Solicitor General is not a party, attorneys in the Office approach cases from a fresh perspective, and, because they are Supreme Court specialists, they review each case with an eye trained on the development of Supreme Court law more broadly. Because it speaks institutionally for the interests of the federal government, the Office does not feel bound to embrace the same legal tactics adopted by the parties or to conceptualize a legal issue as the court of appeals or the

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31. *See e.g.* Supp. Br. for the U.S. as Amicus Curiae Supporting Respt., *Kennedy v. Plan Administrator for DuPont Sav. & Inv. Plan*, ___ U.S. ___, 129 S. Ct. 865 (disagreeing with respondent's statutory construction argument, but arguing for affirmance on an alternative statutory ground); Br. for the U.S. as Amicus Curiae in Support of Vacatur in No. 06-84 and Reversal in No. 06-100, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007) (agreeing with respondents on statutory construction and with petitioners on the application of the statutory standard to the facts).

32. *See e.g.* Br. for the U.S. as Amicus Curiae, *Dist. of Columbia v. Heller*, ___ U.S. ___, 128 S. Ct. 2783 (2008) (disagreeing with petitioner as to the existence of a Second Amendment right to bear arms, but arguing for application of an intermediate level of scrutiny to legislation and advocating a remand for that purpose); Br. for the U.S. as Amicus Curiae Supporting Respts., *Blessing v. Freestone*, 520 U.S. 329 (1997) (advocating a middle-ground standard for identifying rights enforceable under 42 U.S.C. § 1983 and remand for application of that standard).

parties have. Thus, rather than simply file in unqualified support of a party's position, the Solicitor General has a reputation for carving out its own position in litigation and often forges a third approach to decision that is an alternative to, or a middle ground between, the parties' positions.

Indeed, for that very reason, Solicitor General briefs are often healthy reminders of the core Latin meaning of *amicus curiae*—a friend of the Court, not a friend to any particular party. Meeting with the Office thus may give counsel an opportunity to have input into and influence on the Solicitor General's formulation of her strategy. A meeting will also allow counsel to develop her own briefing strategy based on insights gained from those discussions and, in particular, will allow formulation of her brief in a way that either takes advantage of any support provided by the Solicitor General's position or mitigates the harm inflicted by it.

Lastly, counsel should be aware that, when the Solicitor General files a brief as amicus curiae, the Office (with rare exceptions) seeks ten minutes of oral argument time from the party it is supporting. As a general matter, counsel would be well advised to share the time and obtain the Solicitor General's visible support at oral argument. The Office's attorneys are highly experienced in presenting such tag-team oral arguments and using them to advocate most effectively for the legal position asserted.

If the Solicitor General stakes out a position that supports neither party or partially supports both, the Office usually will seek five minutes of argument time from each party.[33] In such circumstances, counsel's decision whether to consent to sharing time will be more complicated and should ultimately depend on whether the Solicitor General's partial support will be more helpful than not. In making that decision, counsel should keep in mind the substantial experience and expertise that the attorneys in the Solicitor General's Office will bring to the argument—experience and expertise that the Office may be able to share with private counsel on issues where their interests overlap.

33. While the Court commonly grants the Solicitor General's motions for divided argument time, they are occasionally denied. *See e.g. Locke v. Karass*, ___ U.S. ___, 129 S. Ct. 24 (2008).

Frequently, the arguing attorney in the Solicitor General's Office will invite private counsel to attend a moot court in the Office, where the case and the arguments will receive the most thoroughgoing and grueling dissection possible. That is invaluable preparation for a Supreme Court oral argument. And even when the Solicitor General's position is sufficiently distinct to prevent cooperative mooting, counsel should discuss with the arguing attorney the areas of agreement between the Solicitor General and the private party and the most effective way in which to present those points at argument. For lawyers presenting their first oral argument to the Supreme Court, attorneys in the Solicitor General's Office can also be a very helpful source of advice and information about argument processes and procedures generally.

IV. CONCLUSION

Whether seeking to obtain or to avoid Supreme Court review, or to win a case after certiorari is granted, lawyers would do well to remember that the Solicitor General's Office is part of your client's government. You and your client have a right to speak with the Office and to seek its assistance in Supreme Court matters. And remember too that understanding how the Office works and how it makes decisions will maximize your effectiveness in undertaking that task.