



State Attorneys General Powers and Responsibilities

Edited by
Emily Myers
National Association of Attorneys General



FOURTH EDITION
NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Courtesy Chapter

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*This book is dedicated to Attorneys General
and the men and women who work for them in the
56 jurisdictions. They continue to make an important
contribution to state government and the American legal
system. Without them, there would be no book to write.*

Courtesy Chapter

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This book is a collaborative effort, in which different authors with expertise in each substantive area contribute their time and talent. The principal authors are noted on each chapter, but we would like to thank them again here for their hard work and dedication. Many thanks to the following authors:

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CHAPTER 23

The Supreme Court of the United States

By Dan Schweitzer, Director, Center for Supreme Court Advocacy, NAAG

United States Supreme Court decisions directly affect attorney general offices' ability to enforce state laws and defend government officials' conduct. A single favorable decision can bring victory in dozens of pending cases, while years of litigation progress can be lost by an adverse decision. For this reason, attorney general offices devote significant resources to their Supreme Court practice.

THE SCOPE OF THE STATES' ACTIVITY IN THE COURT

States as Parties

Attorneys general are second only to the United States Solicitor General in frequency of appearance before the high Court. In the 2015 Term, for example, attorneys general served as counsel in 22 of the 69 cases in which the Court heard oral argument. The variety of issues litigated by attorneys general in the Court attests both to the breadth of responsibility attorney general offices possess and the importance of their work in the Court. Among the subjects the states have addressed multiple times before the Court in recent years are:

- Fourth, Fifth, and Sixth Amendment challenges to criminal convictions. See *Utah v. Strieff*, 136 S. Ct. 2056 (2016); *Heien v. North Carolina*, 135 S. Ct. 530 (2014); *Kentucky v. King*, 563 U.S. 452 (2011); *Maryland v. Shatzer*, 559 U.S. 98 (2010); *Oregon v. Ice*, 555 U.S. 160 (2009).
- Eighth Amendment challenges to capital, and other, sentences. See *Kansas v. Carr*, 136 S. Ct. 633 (2016); *Glossip v. Gross*, 135 S. Ct. 2726 (2015); *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Kansas v. Marsh*, 548 U.S. 163 (2006);

Ewing v. California, 538 U.S. 11 (2003); *Atkins v. Virginia*, 536 U.S. 304 (2002).

- Habeas corpus proceedings brought to overturn state court convictions and sentences. See *White v. Woodall*, 134 S. Ct. 1697 (2014); *Ryan v. Valencia Gonzales*, 133 S. Ct. 696 (2013); *Harrington v. Richter*, 562 U.S. 86 (2011); *Whorton v. Bockting*, 549 U.S. 406 (2007); *Williams v. Taylor*, 529 U.S. 362 (2000).
- First Amendment challenges to state statutes or conduct. See *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015); *Doe #1 v. Reed*, 561 U.S. 186 (2010); *Virginia v. Black*, 538 U.S. 343 (2003); *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U. S. 600 (2003).
- Indian law disputes. See *Nebraska v. Parker*, 136 S. Ct. 1072 (2016); *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014); *Carcieri v. Salazar*, 555 U.S. 379 (2009); *Nevada v. Hicks*, 533 U.S. 353 (2001).
- Takings actions brought against state entities. See *Stop the Beach Renourishment, Inc. v. Florida Dep't of Env't'l Protection*, 560 U.S. 702 (2010); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).
- Federalism (defense of states' prerogatives against federal intrusion). See *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012); *Chamber of Commerce v. Whiting*, 563 U.S. 582 (2011); *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000).
- Taxation (defense of state tax laws and tax collection). See *Alabama Dep't of Revenue v. CSX Transportation, Inc.*, 135 S. Ct. 1136 (2015); *Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010); *Director of Revenue of Missouri v. CoBank ACB*, 531 U.S. 316 (2001).
- Sovereign immunity. See *Coleman v. Court of Appeals of Maryland*, 566 U.S. 30 (2012); *Sossamon v. Texas*, 563 U.S. 277 (2011); *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

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- Voting Rights Act litigation. See *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006); *Abrams v. Johnson*, 521 U.S. 74 (1997).
- Boundary and water-rights disputes between states. See *Montana v. Wyoming*, 563 U.S. 368 (2011); *New Hampshire v. Maine*, 532 U.S. 742 (2001); *New Jersey v. New York*, 523 U.S. 767 (1998).

Even this extensive list leaves out numerous weighty matters argued before the Supreme Court by attorney general offices. See, e.g., *Texas v. United States*, 136 S. Ct. 2271 (2016) (on the validity of the President's order deferring action on the removal of certain categories of unlawful aliens); *Massachusetts v. EPA*, 549 U.S. 497 (2007) (holding that EPA has authority to regulate greenhouse gas emissions); *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006) (rejecting facial challenge to New Hampshire's parental-notification-of-abortion statute); *Gonzales v. Oregon*, 546 U.S. 243 (2006) (holding that U.S. attorney general lacks authority to prohibit physician-assisted suicide pursuant to the Oregon Death with Dignity Act); *Connecticut Dep't of Public Safety v. Doe*, 538 U.S. 1 (2003) (upholding Megan's Law against due process challenge); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (upholding state law banning assisted suicide); *Kansas v. Hendricks*, 521 U.S. 346 (1997) (upholding state sexually violent predator act); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (striking down state term limits statute).

States as Amici Curiae

Attorney general offices have also been active in the Court through their role as amici curiae. The Court cares deeply about the states' views. Amicus curiae briefs are one mechanism by which states can take advantage of that inclination and convince the Court to issue favorable decisions on important issues. Supreme Court Rule 37.4 specifically exempts from the usual consent requirements any amicus briefs filed by a state "when submitted by its attorney general."

Amicus briefs may be most significant at the certiorari stage. An amicus brief from a number of states urging the Court to grant review, by its very nature, tells the Court that a case is of nationwide importance—one of the principal criterion for granting certiorari.¹ In the 2010 through 2014 Terms, the Court granted review of more than 40% of the 92 petitions the states supported through amicus

¹ See S. Ct. R 10(c).

briefs. That success rate dwarfs the typical 4% success rate of other paid (non-in forma pauperis) petitions.

At the merits stage, attorney general offices collectively filed amicus briefs in more than 27 cases per Term over the past five Terms, a time in which the Court heard about 70 cases per Term. Although it is usually difficult to gauge the impact amicus briefs have on the Court's decisions, there can be little doubt that a good number of the state amicus briefs have helped guide the Court towards the disposition the states sought.²

PRACTICAL AND MANAGEMENT CONSIDERATIONS FOR ATTORNEYS GENERAL

State Solicitors General and Appellate Chiefs

One notable development in the management of state attorney general offices is the increasing use of solicitors general to oversee the offices' respective appellate practices. On the criminal law side, most attorney general offices almost exclusively engage in appellate work. The head of the criminal section is therefore usually a de facto solicitor general for that portion of the office's work. On the civil side, however, most attorney general offices traditionally had no single hand guiding their respective appellate practices. The various civil sections (e.g., environmental, consumer protection, civil rights, defense of state agencies) would independently oversee their sections' appellate briefs and arguments. Over the past 20 years, this has changed. More than 40 states now have a solicitor general (or a person with a different title who serves that role), whose responsibility is to oversee the office's civil appellate work to ensure high quality and consistency of position.³

2 An admirable effort to analyze the impact of amicus briefs on Supreme Court decisions is Kearney and Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000). See also Ross and Catalano, *How State and Local Governments Fared in the Supreme Court of the United States for the Past Five Years*, 20 URBAN LAWYER 341 (1988).

3 See generally Layton, *The Evolving Role of the State Solicitor: Toward the Federal Model?*, 3 J. APP. PRAC. & PROCESS 533 (2001) (chart showing which offices have solicitors general). Subsequent to publication of the article, the Alaska, Arkansas, California, Connecticut, Delaware, Georgia, Louisiana, Massachusetts, Montana, Nebraska, Nevada, North Carolina, Oklahoma, South Carolina, Vermont, West Virginia, and Wisconsin attorney general offices instated their first solicitors general.

The role of the solicitor general and his or her team of deputies and assistants varies from office to office. Most solicitor general units do not take over the bulk of their respective offices' civil appeals. Rather, they provide editorial assistance and general advice to various other attorneys scattered throughout the office. Among the exceptions are the solicitor general units in New York, Oregon, and the District of Columbia, and the Civil Appeals unit in Illinois, which handle most of their respective offices' civil appeals.⁴

There are many reasons why an attorney general office with sufficient resources would select a person, or establish a unit, to oversee its civil appellate work. First, solicitors general improve the quality of an office's briefs and oral arguments. By reviewing the office's appellate briefs (at least those to be filed with the U.S. Supreme Court, state supreme court, and the federal appellate courts), a solicitor general ensures that only first-rate work appears under the office's name. The lawyers in attorney general offices have varying experience, expertise, and writing ability. A solicitor general can help bring all of the office's written work up to the high level the office, and the courts, expect. Likewise, by overseeing and participating in a moot court program, the solicitor general improves the quality of the office's oral arguments.

Second, solicitors general help ensure consistency of positions. One of the great challenges each attorney general office faces is making certain it does not take inconsistent positions in its many briefs. Line attorneys working on particular cases may not be aware of how the office has represented its position in other briefs filed in other courts. A solicitor general, by reviewing a large number of the office's appellate briefs, can spot inconsistencies and develop a consensus on the office's position.

Third, solicitors general improve the process for deciding when to appeal. One of the little-known, but most important, functions performed by the U.S. Solicitor General's office is deciding when the United States should appeal adverse lower court decisions. Although trial attorneys are often anxious to appeal, larger policy and practical considerations may counsel against that course. It is important that a "big picture" person with an understanding of the appellate process—such as a solicitor general—be involved in making that decision.

Finally, chief deputies and division heads almost invariably have a host of other responsibilities that prevent them from spending a significant amount of time on the office's appellate practice. Thus, even when they have the appellate skills necessary to perform the various roles, and accomplish the various

⁴ See Layton, *supra*, at 538-39; *Effective Management for Appellate Advocacy* (NAAG Supreme Court Series 1995) (describing how several different state appellate models operate).

objectives, described above, only a solicitor general has the time and focus to broadly improve the office's appellate product.

Selecting the Attorney to Argue the Case

Who within an attorney general office should argue a case before the Supreme Court depends on a variety of factors, including the interest and background of the attorney general, whether the office has a solicitor general, the subject matter of the case, and the appellate experience of other attorneys working on the case. Given the demands of preparing for a Supreme Court argument—including weeks devoted to little else—it is not surprising that most state arguments are not made by the attorney general. In the 2015 Term, attorneys general personally made two of the 19 arguments conducted by members of attorney general offices; in the 2014 Term, they made none of the 17 arguments.

In most cases, the solicitor general or criminal appellate head conducts the argument. A few offices have retained the tradition of giving the argument to the attorney who handled the case in the lower courts. Still other offices select a senior attorney (such as the chief deputy) to conduct the argument. There is no simple or universally correct decision. What is certain is that the decision should be thought through carefully and made with the understanding that the outcome of the case will have ramifications that long outlive the particular dispute. Moreover, the states collectively have an interest in increasing their standing before the Court—an interest that is furthered when the “right” person is selected to conduct the oral argument.

Selecting the Cases to Take to the Court

The states affect their credibility with the Court through their choices of which cases to bring. One of the reasons the U.S. Solicitor General's office maintains its high credibility is its careful selection of cases in which it petitions for certiorari. The Court knows that when the federal government seeks review, the case is important and is selected with an eye toward the criteria the Court itself has set forth.⁵

When seeking review, attorneys general should remember that only about 70 of approximately 1,600 paid petitions filed each year are actually granted plenary Supreme Court review. There are therefore many instances when a state should not to file a petition even though it strongly disagrees with the result below. If the case does not present an important federal question that has divided

5 See Supreme Court Rule 10 (captioned “Considerations Governing Review on Certiorari”).

the lower courts, or if it has serious factual or procedural complications, the Court is unlikely to review it.

SERVICES FROM THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

The NAAG Center for Supreme Court Advocacy was founded during the 1982 Supreme Court Term to help states present cases effectively before the Court, both as parties and as amici curiae. The Center has expanded from its initial focus on improving state oral arguments to include editing and providing advice on state briefs, facilitating communication among states on amicus briefs, holding annual training programs, and assisting states in the development of appellate units within their offices. The main services the Center offers to attorney general offices in connection with Supreme Court litigation are described briefly below.

The Moot Court Program

NAAG instituted its Moot Court Program in the early 1980s to assist state attorneys arguing before the Supreme Court by providing moot court sessions with Supreme Court experts. To date, NAAG has arranged over 900 such exercises for lawyers from every state, the District of Columbia, and Puerto Rico. Moot court panelists are regular Supreme Court practitioners, including members of the U.S. Solicitor General's office, former Supreme Court clerks, and Supreme Court experts in academia, private practice, the U.S. Department of Justice, and state attorney general offices. The exercise is designed to develop the oral arguments most likely to be effective for the Supreme Court in general and for the current Justices in particular. The moot courts are videotaped, which allows the arguing attorney to see how he or she came across to the panel and review suggestions offered by the panel on the argument. In recent years, virtually every state attorney who has argued before the Court has taken advantage of this service.

Brief Writing Assistance

Recognizing that briefs filed with the Court are even more influential than oral arguments, the Center provides a range of services to assist states that are drafting briefs with the Court, whether they be petitions for certiorari, briefs in opposition, merits briefs or amicus briefs. First, the Center's Counsel provides substantive and technical advice to state attorneys who are preparing Supreme

Court briefs. This advice ranges from careful edits of early drafts to fielding questions concerning Supreme Court Rules.

Second, the Center assists states seeking amicus support by circulating memoranda and draft briefs to “amicus contacts” in each state. The Center has developed several memo forms that provide basic information about the case in a quickly transmittable and instantly recognizable format. The memos are written by the state party or state amicus author; after completing the appropriate form, the state attorney e-mails it to the Center, which in turn e-mails it to the amicus contacts. (Circulation of a memo does not connote endorsement of the state’s position by NAAG.)

Supreme Court Advocacy Seminar

Each Term the Supreme Court Center holds a two-day seminar on oral and written advocacy before the Court. The seminar begins with observation of oral arguments at the Court, followed by a discussion with the arguing attorneys. Panels of experienced Supreme Court practitioners then address oral argument, written advocacy (including petitions for certiorari and oppositions thereto, merits briefs, and amicus briefs), and more. One of the highlights is an in-depth presentation by the Clerk’s office.

State Solicitors General and Appellate Chiefs Conference

One of the principal ways by which the Center assists states in developing and improving state appellate units is by organizing an annual two-day seminar for solicitors general and appellate chiefs. The conference provides a forum in which solicitors general and appellate chiefs can exchange ideas and obtain information that will help improve each state’s appellate practice. Part of the conference focuses on practical, hands-on issues, allowing solicitors general and appellate chiefs to learn what management techniques have worked in other offices. Another part of the conference addresses substantive legal issues that are of particular concern to the attendees.

Best Brief Awards

NAAG presents the Supreme Court Best Brief Awards to recognize excellence in brief writing in the Supreme Court by state attorneys. The awards are given at the end of each Term to the best Supreme Court briefs written by state attorneys that Term. All types of briefs written by state attorneys and filed with the Court are eligible, whether filed at the certiorari stage, on the merits, or as amicus. (Briefs with outside counsel listed on the cover are not eligible.) The briefs are judged by a group of distinguished Supreme Court practitioners.

Fellows Program

This program is designed to give lawyers in attorney general offices an opportunity to obtain direct and intensive hands-on exposure to Supreme Court practice. Each of the six Fellows comes to Washington, D.C. for three- to four-month periods during the Court's argument session. They watch oral arguments, participate in the Center's moot Courts, prepare an amicus brief in a Supreme Court case, and draft the Center's regular publications. The program's objective is to ensure that, on each Fellow's return to his or her state office, that state will have the benefit of the newly-gained knowledge to apply to its own Supreme Court work.

Information Services

Twice a month during the Term, the Supreme Court Center sends the NAAG Supreme Court Report by e-mail to all amicus contacts, Working Group members, and various other state attorneys. Written by the Center, the Report provides summaries of opinions issued and cases granted review. The Center's Counsel has also prepared two manuals on Supreme Court practice to assist the states in their efforts: *Preparing Cert Petitions and Oppositions* (NAGTRI 2008); *Fundamentals of Preparing a United States Supreme Court Amicus Brief*, 5 *Journal of Appellate Practice and Process* 523 (2003). Both pieces are concise and practical, and are geared toward the needs and interests of state attorneys.

In addition, the Center e-mails amicus contacts, Working Group members, and others updates on Supreme Court action the day it occurs. The updates provide prompt notification of the Court's actions, which are fleshed out in the Report circulated later in the month.