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Fair Weather Friends

Robert E. Rains

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It is Saturday. It is August. It is hot. Sensible people are at the shore, the lake, the pool. I am at my desk. Why? I am a friend of the Court. I try to call my colleagues in Philadelphia, New York, Ohio, Arizona, to discuss some of the fine points. No one answers the phone. My colleagues are sensible people.

Why am I doing this, I ask myself again and again. Does it matter? Will anyone read another amicus curiae brief? Anyone who matters? Can it possibly influence the outcome of a case?

This is too much work to do just for the sake of having one's name on a pleading filed in the U.S. Supreme Court. A study of Supreme Court decisions from 1969 to 1981 found that amicus briefs were specifically cited by at least one Justice in only 18 percent of the cases in which one was filed.[1] Since cases in which one amicus brief is filed often provoke multiple amicus briefs — seventy-eight were filed in *Webster v. Reproductive Health Services*[2] — the chances of any one amicus being cited are considerably lower than 18 percent. Of course, it is possible that a brief may influence a Justice even though it is not cited in any opinion.

It is necessary to think seriously about the nature of this particular friendship. How does one approach an amicus curiae brief? What is one trying to accomplish? This is not, after all, a party brief, but something quite different in nature. In *Supreme Court Practice*, the authors caution:

> All amicus briefs are not read by the Justices. The number is so great that most of the Justices have their law clerks sift out the briefs or parts of briefs which they think add enough to the parties' briefs to be worth reading. Many "say little more than 'me too' —

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1. O'Connor & Epstein, *Court Rules and Workload: A Case Study of Rules Governing Amicus Curia Participation*, 8 JUST. SYS. J. Spring 1983, at 34, 42.

2. 109 S. Ct. 3040 (1989); *see also High Court has 78 "Friends" in Abortion Case*, NAT'L L.J., Apr. 17, 1989, at 5.

> the amicus agrees with one side in the controversy." Such briefs may impress the members of the amicus organization, but they will not help with the Supreme Court. Merely stating one's views as to how a case should be decided is not a legitimate reason for filing an amicus brief. . . .
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> Briefs which add nothing to the substantive factual or legal presentations by the parties are not likely to survive the preliminary examination by the law clerks, or to influence favorably a Justice or clerk who reads them. On the contrary they will be regarded as wasteful of valuable Court time.[3]

This seems to be sound advice, by and large. I do think, however, that there may be rare occasions when a "me too" brief has some impact, given the right "me." I'm thinking primarily of man-bites-dog situations, where the Court may be impressed by the existence of an unexpected ally. Say, for example, the state sues the Wobbly Widget Works for violating the Uniform Widget Workers' Wages Act. Wobbly defends, saying the act violates due process and equal protection. It asserts that the UWWWA would destroy the U.S. widget industry by making it uncompetitive in world markets. The National Association of Widget Manufacturers files an amicus brief in support of the state and the statute. This may grab the Court's attention.

In fact something similar actually happened in the landmark case of *Gideon v. Wainwright*.[4] The state of Florida was defending against a constitutional challenge to the right of a state to try an indigent felony defendant without providing him counsel. As related by Anthony Lewis in *Gideon's Trumpet*,[5] the attorney general of Florida wrote to his fellow state attorneys general asking them to file amicus briefs supporting Florida in the case.

The attorney general of Minnesota, one Walter Mondale, was so enraged by Florida's position that he not only refused, but precipitated the filing of an amicus brief opposing Florida's position. That brief was endorsed by 22 states. Did it influence the Court? I don't know. The amicus is cited in neither the opinion for the Court nor in any of the three concurring opinions. On the other hand, Florida lost unanimously.

In any event, it is unlikely that the Court will ordinarily be impressed by how many organizations sign on to each side of a case. One could hardly expect the least democratic branch of government to

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3. R. STERN, E. GROSSMAN, S. SHAPIRO, SUPREME COURT PRACTICE 573 (6th ed. 1986).
4. 372 U.S. 335 (1963).
5. A. LEWIS, GIDEON'S TRUMPET 141-48(1964).

be swayed by a head count.

SEARCHING FOR THE KEY

So I am back to finding a handle, something to open a door to the inner sanctum. An amicus brief does have one primary advantage. It is not bound by the record. The amicus brief is an opportunity to supplement the record without the messy necessity of going through a trial. Of course, the absence of objections and cross-examination heightens the duty of an officer of the Court to be scrupulous in presenting new facts. Documentation is critical. The amicus brief is an opportunity to point out to the Court how a decision may have unintended consequences for a group that is not directly before the Court.

Of course, several people influence the amicus brief. Lead counsel, who represents the party you are supporting, must act as linchpin, and counsel for fellow amici must be involved. The lead counsel has several critical liaison functions: contacting potential amici; giving amici drafts of the primary brief for their information and comment; asking amici to address or elaborate on specific issues that cannot be adequately handled in the main brief; reviewing drafts of amicus briefs; and circulating updated lists of names, addresses and telephone numbers of potential amicus writers. This is a heavy agenda for someone who is also writing the lead brief on the merits.

MANY MASTERS

So I am serving many masters and interests. I am representing a client but also supporting someone else's client. In the real world, even allies can disagree over certain issues. This can lead to serious editorial dilemmas.[6] Ordinarily an amicus does not wish to bring such a conflict to the attention of the Court and opposing counsel. There are similar problems vis-'a-vis fellow amici. The ideal is neither to undermine a position taken by a fellow amicus nor to repeat the arguments of a fellow amicus. This is another potential "me too" problem. And since law as well as politics can make strange bedfellows, the veneer of unanimity may be hard to maintain. Indeed, in some cases, one will unfortunately have no choice but to contradict a fellow amicus.

Finally, after consulting with client, colleagues, lead counsel, and fellow amici, after losing sleep and canceling vacation time, I discern it: my issue. It will illuminate the case. It will supplement the record. It is

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6. *See Matthew* 6:24.

not being addressed by my co-amici and, since it involves an issue outside the record, cannot be addressed effectively by lead counsel. It will focus the crucial legal issue. In this case, which is against the federal government, it will demonstrate with concrete examples and logic that the government is not doing what it says it is doing.

My client approves; lead counsel approves. Colleagues provide raw materials and many insightful comments. Still, I am the one sitting here on hot August Saturdays (and Sundays and evenings) because one of the great, yet awful, aspects of the practice of law is the deadline—the amicus brief is due when your party's brief is due.[7]

That deadline is rapidly approaching. Draft replaces draft. I am making, I hope, my main point. Rightly or wrongly, I cannot restrain myself from injecting a few zingers directed at the government's brief.

Lead counsel has cleared my final draft, as has my client. Now what can I obsess about? Citations! This should be easy; I'll just copy the Solicitor General's form of citations. The problem is, once I focus on it, that I've never seen citations that look like his. Neither has our legal-writing instructor. Neither has my printer.[8] Yet I must assume that the Solicitor General, whose primary function, after all, is to appear before the Supreme Court, knows what he's doing. Finally I fudge; I use his citations from plus mine, figuring that at least one of our styles will be acceptable.

There is, of course, the usual back and forth with the printer, the reading and rereading of galleys. An amicus brief to the Supreme Court of the United States is no place for a typographical—error a statue of limitations or the Statute of Liberty. It's amazing how a chore can be both incredibly boring and incredibly stressful at the same time.

Finally, it is done. The galley is corrected. The printing press or computer or laser or whatever does its thing. The brief is filed with the Court, served on every counsel who has ever even thought about the case, and, best of all, there is a stack of printed briefs on my desk. The job is done, and quite frankly I never want to read it again. After all, what if I discover that last remaining typo? Even if I don't find one, there's always that I-wish-I'd-had-another-week feeling, that one-more-edit feeling. Overall, though, I am satisfied.

It is now late fall. My case (not really mine of course) has been set for oral argument. I make arrangements to take a few interested law

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7. SUP. CT. R. 36.2.

8. Did I mention that early reservation of a printer with experience with Supreme Court briefs is a must? It's a must.

students to the Supreme Court for the big day. (Yes, they are interested, but can I honestly deny the desire to look like a big shot to them?) The adrenalin of last summer is starting to flow again as the Court date approaches.

Then a wet blanket descends on me. "Supreme Court Clamps Down on Friend-of-the-Court Filings," proclaims the headline in the *Pennsylvania Law Journal Reporter*. The article begins: "Last year's intense amicus efforts in abortion and race-discrimination cases may have left the U.S. Supreme Court a little shy about making new 'friends of the court.' "[9]

The gist of the article is that the Court is sick to death of amicus briefs and rejects them at every opportunity. Can this be true? It may be rationalization on my part, but after picking myself up off the floor I decide that this is a non-story. The Court is simply doing what it has always done, denying untimely motions to file amicus briefs.[10] I recover.

DAY OF RECKONING

Now it is here, the Big Day. I wake up at 5 a.m., pick up my students and head for One First Street, N.E. On the road, we talk of life and law and The Case. I say that I will be satisfied if my amicus brief generates one question from the bench to opposing counsel. That's what I want. Then I'll know it was worth it, that someone read my brief and got the point.

We arrive an hour early; after all, I don't do this every day, and parking near the Supreme Court is almost as hard as writing a brief. Then there is a talismanic sign: an empty parking space two blocks from the Court. This is going to be a very good day.

We enter and clear security. I sit up front in the area reserved for members of the Bar of the Supreme Court. My students sit in the general audience section located behind me. Counsel are at their tables. The audience rises. They, these nine Justices with such awesome

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9. PA. LAW J. REP., Nov. 13, 1989, at 3.

10. R. STERN, E. GROSSMAN & S. SHAPIRO, *supra* note 3. "In recent years the number of amicus briefs has substantially increased. They now are filed in most cases argued before the Supreme Court. Four hundred sixteen amicus briefs were filed in 114, or 80 percent, of the 142 decisions in argued cases during the year 1982. In over 40 of those cases, four or more such briefs were filed, frequently on both sides of the case. Most of the amicus briefs were filed with the consent of the parties, and motions for leave to file where the parties did not consent were almost always granted *unless they were untimely*." *Id.* at 572 (emphasis added).

power, enter the courtroom.

Our case is the first of the day. The government, being petitioner, is up first. The assistant solicitor general starts his well-rehearsed argument. He is understandably a little nervous at first but knows that he has the home-court advantage. After all, he is asking—let's face it—a rather conservative[11] Court to uphold the method by which a government agency has been implementing a program for several years. Just as he is beginning to warm to his subject, the same thing happens to him that happens to all advocates in this forum: he is peppered with questions.

The Supreme Court of the United States does not entertain oral argument in order to listen to well-rehearsed speeches. The Justices are extremely well prepared. The cases that reach this level are tough cases. They raise difficult questions, and usually have far-reaching social-policy implications. Any decision may affect judicial analysis in future cases. The law proceeds cautiously. The Justices are exploring the logical extensions of deciding for either side in the case and of methods of deciding. This is the proverbial hot bench.

CRITICAL SCENARIO

Soon it happens. A conservative member asks the assistant solicitor general whether a critical scenario could possibly occur under the challenged program. It is mine, my scenario. The question comes from my brief and only from my brief. I've read all the briefs of the parties and all the amici, and I know. I tense. Will the government lawyer 'fess up or will he deny? He takes the middle road; he concedes that it is "theoretically" possible. Immediately comes the follow-up: how can this be true? How can he justify this result in light of the statute? He makes a valiant effort to do so, but I am surely not convinced, and the Justice doesn't look any too convinced, either. The argument quickly moves on.

I'm sure that the rest of the argument is very interesting, and I do pay some attention to it, and maybe I'll even write about it someday in a different context. But I'm floating on a cloud. Someone did read my brief. If not a Justice, a clerk who thought it was important enough to bring to a Justice's attention. Maybe I will have left a toeprint on the sands of time. My friendship has been reciprocated.

The argument is over very quickly, it seems. We are ushered out

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11. I use this term only in the superficial sense. No specific Justice, much less the Court, can be meaningfully labeled as "liberal" or "conservative."

with polite firmness. My students and I have lunch with lead counsel for our side and various other hangers-on. Everyone is elated. We hate to whisper it out loud, but we all think that the argument went remarkably well. We all know it's a jinx to get too optimistic. The Court is famous for issuing decisions favorable to the side that was pummeled at oral argument.

On the ride home, my students report that I sat up several inches higher when that colloquy began. They are polite young people given to understatement.

LONG WAIT

Now comes the hardest part, the big wait. For how long? No one ever knows. *Brown v. Board of Education*[12] was argued three times in three years before the Court issued a decision remanding it back to the lower courts.

Months pass. Spring is approaching. I try not to think about the case. This is particularly hard on opinion days. One mild afternoon I return to my office from a meeting, and there is a phone message from lead counsel: "WE WON!" I call him immediately. There is jubilation. This is a very big case[13] in the highest court of the land, and lawyers do like to win. What was the vote? Who dissented? I politely avoid asking the real question, the one uppermost in my mind. But he knows. He says he just got the opinion, and he doesn't know if my brief is cited.

I must wait it out another day. I receive a photocopy of a photocopy of a fax. I page through it hurriedly. I know what I am looking for. Finally there it is. Buried in a footnote, but nevertheless right there in print, is the fruit of my labors. My seven new friends on the Court note exactly the kernel of my brief and cite it as exemplary of what the government is doing wrong. One word is in italics; in fact, it is the key concept of my brief. And, best of all, the brief is cited by name.

I am ecstatic. But lawyers are a neurotic lot, and immediately the doubts begin. Did I make any difference in the case? The vote was, after all, seven to two. Wouldn't we have won anyway? Even if I influenced one vote, that would not have affected the outcome. Would I be happier with a five-to-four vote? Maybe with a concurrence relying entirely on my brief? Such lines of thought, I finally decide, are too sick

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12. 349 U.S. 294 (1955); 347 U.S. 483 (1954).

13. Sullivan v. Zebley, 110 S. Ct. 885 (1990) (Social Security Administration's Children's Supplemental Security Income regulations denied benefits to children whose disabilities were comparable to adults who did receive benefits under adult programs).

to pursue. So I will rest content.

The main event is over. Of course, lawyers being lawyers, there will be a lot of mopping up, probably taking years.

Would I do it again? Pursue this heady friendship? Not tomorrow, that's for sure. I call a colleague out of state, on a weekday at a sensible hour. We discuss our victory, its implications. There are congratulations. We also discuss another important case that the Supreme Court has just agreed to hear. The outcome will affect many members of our organization. He asks whether it's more effective to help the respondent's counsel with his brief or to write an amicus brief. I say that both may be extremely important; you can do different things with each. The paths are not mutually exclusive.

I don't even give him the chance to ask; I believe in the "best defense" theory. I am humble. You are the expert on this issue, I say. You write our amicus brief this time.