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**COURT RULES AND WORKLOAD:
A CASE STUDY OF RULES
GOVERNING AMICUS CURIAE PARTICIPATION***

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Given recent comments from several Justices of the current U. S. Supreme Court concerning their workload, this note examines whether the Court has invoked its own rules to limit the number of amicus curiae briefs with which it deals each term. Our findings indicate that the Justices rarely reject petitions to file amicus curiae briefs pursuant to Rule 27(a). One possible explanation for this result, which is explored here, is that members of the Court rely heavily on amicus curiae briefs to formulate their opinions.

Introduction

In 1949, the United States Supreme Court changed its rules to limit the number of amicus curiae briefs that it received each term (see Appendix A). The Justices found many of the briefs had only limited value, and thus were unnecessary additions to the paperwork involved in their already spiraling caseload.

Although many have noted that the 1949 rule change immediately reduced the number of amicus curiae briefs submitted to the Court (Harper and Etherington, 1952; Krislov, 1963; Puro, 1971; Schubert, 1959), by 1961, the rule no longer had any appreciable effect (see Krislov, 1963; Puro, 1971). Given recent frequent comments from several Justices concerning their workload, we hypothesized that the Court would invoke the 1949 rule to limit the number of amicus curiae briefs that it is presented with each term because failure to enforce their own rules clearly contributes to workload. Our findings, however, indicate that the Justices rarely reject petitions to file amicus curiae briefs. Thus, while this study is limited to an examination of only one court and one rule, the failure of courts to take full advantage of their own rules to limit workload is deserving of analysis. It may be, as indicated by further analysis here, that these briefs actually assist the Justices in dealing with their workload

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because many provide useful information that the Justices use to formulate their opinions.

Evolution of the Amicus Curiae Brief as a Lobbying Device

While the antecedents of amicus curiae participation date back to Roman law (Bouvier, 1914; Wiggins, 1976), modern day use of the amicus curiae brief began in the United States in 1823. In *Green v. Biddle* (1823), the Court permitted Henry Clay to participate as amicus curiae because the Justices suspected collusion between the major litigants. Thus, *Green* provided an important turning point in the evolution of the amicus curiae in the United States because for the first time, the Court recognized their utility.¹

Another important stage in the development of the amicus curiae can be traced to a change in nomenclature. Samuel Krislov (1963) noted that as late as 1919, amicus curiae briefs usually were named after the attorneys who actually prepared the briefs. By the 1930s, however, it became a common practice to attribute amicus curiae briefs to their sponsoring organizations. Krislov claimed that this transition signalled a definitive change in the role of the amicus curiae. For example, several groups including the National Association for the Advancement of Colored People, the American Civil Liberties Union and the American Jewish Congress began to use the amicus as an important component of their litigation strategies (see Vose, 1958, 1959; Yale Comment, 1949). Because interest groups began to use these briefs so frequently, according to Krislov, the amicus curiae ceased to be "a neutral amorphous embodiment of justice, but (instead) an active participant in the interest group struggle" (Krislov, 1963: 703). Thus, by the late 1940s, it became clear both to the Court and to the interest groups themselves that the amicus curiae brief had become a "lobbying device" (Harper and Etherington, 1952: 1172; Puro, 1971; Weiner, 1954: 80).

Rules Governing the Submission of Amicus Curiae Briefs

Prior to 1949, the Court relied upon both informal and formal rules to govern amicus curiae participation. As early as 1903, in *Northern Securities Company v. United States* (1903), the Court indicated that amicus need only demonstrate an interest in the issues at hand in order to participate. The Court's definition of "interest," however, never was clearly defined. Although it seemed to require that a party demonstrate a legal interest in

1. Later, in *Florida v. Georgia* (1854), the Court expanded the scope of amicus participation. In *Florida*, the Attorney General was permitted to appear as an amicus even though both parties opposed his intervention.

common with the major participant (Beckwith and Sobernheim, 1948: 44), it specifically discouraged participation as amicus curiae by a party having only a generalizable interest in the outcome of litigation.

By 1938, however, the Supreme Court found it necessary to formulate a written rule to govern amicus curiae participation because of the ambiguity of its informal policies and the increasing number of groups seeking to participate as amicus curiae (Puro, 1971). This formal rule specifically required a party seeking to participate as an amicus to secure written consent of *all* parties to a case (see Appendix A). Rule 27(9), though, did not apply to the United States Solicitor General, to the federal government, or to the states.

Frequent disregard of this rule, however, prompted the Court to amend Rule 27(9) in 1949 (Harper and Etherington, 1952: 1172-1173; Krislov, 1963: 709; Puro, 1971: 40). Many of the amicus curiae briefs filed after 1938 were "propaganda" statements, devoid of any legal merit (Puro, 1971: 39; Weiner, 1954: 80-81). Additionally, many briefs were filed at the jurisdictional level, urging the Court to accept the case for review. Such briefs placed pressure on the Court, yet rarely presented it with useful information not already contained in the briefs of the main litigants (Puro, 1971: 39-40). Thus, given the increasing number of amicus curiae briefs and their limited utility to the Justices, the Court acted in 1949 to reduce further the number of amicus curiae briefs presented to it annually (see generally, Harper and Etherington, 1952; Krislov, 1963; Puro, 1971; Vose, 1958; Weiner, 1954).²

Several sections of the amended rule merely reaffirmed provisions of the 1938 rule: section a required the consent of both parties before filing and section d restated that the United States and state governments were exempt from the consent requirement (see Appendix A). The 1949 amendment, however, was far more specific than its predecessor. In addition to formalizing other Court policies, it set out more stringent standards to guide amici. In particular, it required parties wishing to participate as amicus curiae to present motions for leave to file with the Court if permission was refused by either party to the action.

The amended rule was very successful in the short term. Amicus curiae participation decreased from involvement in 31.6 percent (n=31) of the 98 cases decided in 1949 to 13.6 percent (n=13) of the 95 cases decided in 1951 (Puro, 1971: 57). In fact, the effect of the Court's rule change was so far

2. One case in particular is heralded as precipitating the Court's decision to revise its rules concerning the amicus curiae. *Lawson v. United States* (1950), involving the "Hollywood Ten," drew amicus curiae briefs from 40 organizations, urging the Court to accept the case (Vose, 1958: 29).

reaching that scholars criticized the Court for its actions. Harper and Etherington, for example, concluded that the new amendment was too extreme because it prevented respectable organizations with legitimate interests from filing valuable briefs (Harper and Etherington, 1952: 1176-1177). Similarly, a comment in the *Northwestern Law Review* criticized the transition of discretion from the Court to the parties (1960: 476). Its authors noted that in the period immediately following adoption of the new rule, the Court rejected 76 percent of the motions for leave to file amicus curiae briefs.

Another source of criticism came from the Court itself. In particular, several Justices criticized the Solicitor General's policy of routinely withholding consent for motions to file amicus curiae briefs when the United States was a party to the suit (Puro, 1971; Scigliano, 1971). Justice Felix Frankfurter, for example, noted that the Solicitor's policy defeated the purpose of the rule because his blanket denial only increased the number of motions that the Court would have to hear. In *Lee v. United States* (1952), he claimed that:

(If all litigants were to take the position of the Solicitor General, either no amicus curiae briefs . . . would be allowed, or a fair sifting process for dealing with such applications would be nullified and undue burden cast upon the Court. Neither is conducive to the wise disposition of the Court's business . . . (342 U.S. 942, 1952).

Two years later, Justice Hugo Black also noted that:

(I) have never favored the almost insuperable obstacles of rules put in the way of briefs sought to be filed by persons other than the actual litigants. Most of the cases before the Court involve matters that affect far more than the immediate record parties. I think the public interest and judicial administration would be better served by relaxing rather than tightening the rule against amicus curiae briefs (346 U.S. 947, 1954).

Thus, Justices Frankfurter and Black clearly conveyed their disapproval of the Court's rules governing amicus curiae participation as well as their consequences. Additionally, their statements indicated their belief "that the amicus curiae aided both the Court and the litigants" (Puro, 1971: 42).

Not surprisingly, then, given scholarly criticism coupled with judicial sentiment, the effect of the new amendment to Rule 27(9) was short-lived. By the mid-1950s, the Solicitor General's office liberalized its policy toward amicus curiae participation, which led to a corresponding increase in the number of briefs filed (Puro, 1971; Scigliano, 1971). In fact, by 1960 the

number of amici filed before the Court exceeded all prior rates (Puro, 1971: 57).

Interest Groups As Amici in the Burger Court

The trend of increasing amicus participation noted by Puro and others (see Hakman, 1969; Krislov, 1963) continued into the 1970s. Amicus curiae briefs were filed in 53.4 percent (n= 449) of the 841 non-commercial cases decided by the Court from 1970 to 1980. In fact, in 26.7 percent of those cases "where at least one brief was filed, four or more amicus curiae were submitted by interest groups" (O'Connor and Epstein, 1981-1982: 317).

Although many interest groups view amicus curiae participation as a major outlet for expression of their views before the court (Krislov, 1963; Pfeffer, 1981; Piper, 1967; Wasby, forthcoming), growing use of this lobbying device has added tremendously to the Court's workload. For example, instead of simply being presented with the briefs of the major litigants, during its 1981 Term, the Court was confronted with an additional 231 amicus curiae briefs to read even though each was limited to 30 pages in length.³

This kind of activity, in conjunction with the Court's other work has prompted several scholars (see, for example, Casper and Posner, 1974; Hoffman, 1982), as well as the Justices themselves, to comment upon increasing demands on the Court's time. For example, in an interview conducted in 1970, Chief Justice Warren E. Burger noted that the Court "cannot perform its constitutional and historic function if it must review over 4,000 cases a year and hear arguments in 150 to 160" (quoted in Baum, 1981: 97). Twelve years later, in a speech delivered to the American Judicature Society, Justice John Paul Stevens indicated that the Court's workload still remains a significant problem. In explaining why the Court could not deal with the "proliferation of petitions for review" this term, he claimed that "we were too busy to decide whether there was anything we could do about being too busy" (Stevens, 1982).

While the Court can do little to remedy complaints concerning the number of petitions it must review each term, the Court can use its rules to limit amicus curiae participation. According to Rule 27(9), when parties refuse to grant permission to another party for leave to file an amicus curiae brief, the party denied permission can make a "motion, independent

3. In 1980, the U.S. Supreme Court again amended its rules governing amicus curiae. Rule 36 now limits length of briefs to 30 pages while also providing for specific time requirements for filing.

of the brief for leave to file . . ." (Rule 27(9)(c)). By regularly rejecting these motions, the Court could use Rule 27(9) to reduce its workload. Thus, given the increasing demands on the Court's time, we hypothesized that the Court would routinely invoke Rule 27(9) to limit the number of amicus curiae briefs that it is presented with each term.

Research Methods

To test the hypothesis that the Court has used Rule 27(9) to limit its workload we examined the Court's orders concerning all interest group motions for leave to file amicus curiae briefs. These motions were identified through use of LEXIS, a legal information retrieval system. Each order was reviewed and then coded by term, beginning in 1969 and ending in 1981. Motions to enter cases in which certiorari was denied were excluded so that we could assess the relative impact of these briefs on actual caseload. Additionally, this note deals with only amicus curiae briefs submitted by interest groups because neither the federal government nor the states need permission to participate as friends of the court.

Table 1
The U.S. Supreme Court's Disposition
of Interest Group Motions for Leave
to File Amicus Curiae Briefs

Term	Percentage of Motions Granted		Percentage of Motions Denied		Total Motions	Total Amicus Curiae Briefs Filed
	N=		N=			
1969	100%	(16)	0%	(0)	16	57
1970	95	(54)	5	(3)	57	111
1971	88	(52)	12	(7)	59	139
1972	98	(49)	2	(1)	50	143
1973	83	(62)	17	(13)	75	171
1974	69	(24)	31	(11)	35	101
1975	85	(62)	15	(11)	73	151
1976	74	(49)	26	(17)	66	147
1977	93	(77)	7	(6)	83	194
1978	91	(70)	9	(7)	77	240
1979	86	(60)	14	(10)	70	168
1980	98	(85)	2	(2)	87	199
1981	96	(81)	4	(3)	84	231
Totals	89	(741)	11	(91)	832	2052

Findings

Table 1 indicates the number of motions for leave to file as amicus curiae that were granted or denied by the Court. Over the 13 term period, the Court denied only 11 percent (n=91) of the 832 total motions. In fact, since 1977, even with the increasing number of parties forced to petition the Court because they failed to obtain permission of one of the parties, the Justices have given their approval to the vast majority of these petitions.

The willingness of the Justices to grant motions for leave to file is particularly well illustrated when untimely briefs and those of pro-life attorney Alan Ernest on behalf of the Children Unborn or the Legal Defense Fund for Unborn Children are eliminated. Eight percent (n=7) of the leaves denied during this period were untimely, while 18 percent (n=16) of the denials were those sought by groups represented by Ernest. When these denials are excluded, the Court rejected only 8 percent (n=68) of the 832 motions.

Interestingly, during only two terms (1974 and 1976) did the Court deny leaves to file to more than 20 percent of the groups seeking permission to participate as amicus curiae. A more in-depth analysis of the groups petitioning the Court and of the types of cases accepted for review during these two terms, however, fails to reveal any discernible pattern. For example, during the 1976 Term, only one group—the AFL-CIO—was denied permission more than once. Otherwise, the groups whose motions were rejected ranged from the liberal Natural Resources Defense Council to the conservative Citizens for Decency Through Law. Issues presented in the cases also varied, ranging from union-employer relations to taxation. Thus, it is clear that the Court, particularly since 1977, has not invoked Rule 27(9) in a routinized fashion or to limit its workload.

Discussion

Based on the data presented in Table 1, the Court could have reduced the number of interest group briefs presented to it by 36 percent if it rejected all of the motions filed pursuant to Rule 27(9) over the 13 term period. For example, during the 1973 Term, of the 171 amicus briefs filed, 36 percent (n=62) were filed with the permission of the Court. Similarly, during the 1981 Term, 35 percent (n=81) of the 231 amicus briefs necessitated Court approval. Therefore, given complaints about workload, it is unclear why the Court has not routinely rejected these motions.

One possible explanation for the Court's willingness to grant leaves to file, however, may be the Justices' belief that amicus curiae briefs have some utility. Justices Frankfurter and Black, for example, indicated the

importance of amicus curiae briefs to the Court's decision-making process. To investigate this explanation further, we reviewed all opinions of the Court to determine if the Justices directly referred to briefs of interest group amici.

Table 2
U.S. Supreme Court
Cases Citing Amicus Curiae
Briefs of Interest Group Participation*

Term	Percentage of Cases Citing Amicus Curiae Briefs	N=	Total Cases with One Or More Amicus Curiae Briefs
1969	25%	(7)	28
1970	21	(9)	43
1971	22	(12)	55
1972	11	(7)	66
1973	12	(8)	69
1974	13.5	(7)	52
1975	31	(19)	61
1976	19	(11)	58
1977	17	(12)	72
1978	20	(16)	79
1979	9	(6)	66
1980	26	(22)	85
1981	14	(13)	93
Totals	18	(149)	827

*This table does not indicate Court or judicial mention of amicus briefs filed by the U.S. or state governments.

Table 2 indicates the percentage of cases in which at least one opinion (majority, concurring, or dissenting) specifically mentioned an amicus curiae brief submitted by an interest group. For example, during the 1969 Term, at least one Justice directly referred to an interest group amicus curiae brief in 25 percent (n=7) of the 28 cases with amicus curiae participation. Overall, the Court Justices cited an interest group amicus curiae brief in 18 percent (n=149) of the 827 cases in which at least one amicus curiae brief was filed.

A direct mention, of course, is not the only indicator of amicus curiae influence on, or utility to the Justices (Angell, 1967). Justices, for example, may indirectly mention, adopt, or respond to interest group amicus briefs.

Thus, the data presented in Table 2 are blunt indicators of the usefulness of interest group amicus curiae briefs to the Court.

Conclusion

In 1949, the U.S. Supreme Court amended its rules with the expressed intent of limiting the number of amicus briefs filed each term. Studies examining the effect of these rules during the late 1950s and early 1960s indicated that Rule 27(9) had only a short-term effect.

Given recent comments about the increasing workload of the Court, we hypothesized that the Court would routinely utilize Rule 27(9) as a method by which to reduce its work. The data, however, indicate that the Court rarely denied interest group motions to appear as amicus curiae. In fact, since 1977, it has denied less than 7 percent of the 401 motions.

One possible explanation for the Court's willingness to grant these motions is that the Justices may find some utility in amicus curiae briefs presented by interest groups. We found that in 18 percent of the 827 cases in which one or more amicus curiae was filed, the Justices directly mentioned at least one interest group brief. This finding seems to indicate that the Court views the utility of amicus curiae briefs as outweighing their impact on its already crowded docket. Further research, however, should be conducted to determine the broader impact of amicus curiae briefs on the Court as well as to investigate other rules that could be used by other courts as gatekeeping devices. Thus while this study is limited in focus, it highlights the need for more analyses of this kind.

CASES

- Florida v. Georgia*, 58 U.S. (17 How.) 478 (1854)
Green v. Biddle, 21 U.S. (8 Wheat) 1 (1823)
Lawson v. United States, cert. denied 339 U.S. 934 (1950)
Lee v. United States, 344 U.S. 924 (1952)
Northern Securities Company v. United States, 191 U.S. 555 (1903)

REFERENCES

- ANGELL, Ernest (1967) "The Amicus Curiae: American Developments of English Institutions," 16 *International and Comparative Law Quarterly* 1017-1044.
 BAUM, Lawrence (1981) *The Supreme Court*. Washington, D.C.: Congressional Quarterly.
 BECKWITH, Edmund and Rudolf SOBERNHEIM (1948) "Amicus Curiae — Minister of Justice," 17 *Fordham Law Review* 38-62.
 BOUVIER, John (1914) *Bouvier's Law Dictionary*. Vernon Law Book Co.
 CASPER, Gerhard and Richard A. POSNER (1974) "A Study of the Supreme Court's Caseload," 3 *Journal of Legal Studies* 339-375.
 COVEY, Frank, Jr. (1959) "Amicus Curiae: Friend of the Court," 9 *De Paul Law Review* 30-37.
 HAKMAN, Nathan (1969) "The Supreme Court's Political Environment: The Processing of Noncommercial Litigation," in Joel B. Grossman and Joseph Tanenhaus, eds. *Frontiers of Judicial Research*. New York: John Wiley.

- HARPER, Fowler V. and Edwin ETHERINGTON (1952) "Lobbyists Before the Court," 101 *University of Pennsylvania Law Review* 1172-1177.
- HOFFMAN, Richard B. (1982) "The Bureaucratic Spectre: Newest Challenge to the Courts," 66 *Judicature* 60-72.
- HULL, Kent (1978) "Advocates as Amicus Curiae: Friends of the Court Effect Change," 3 *Amicus* 27-30.
- KRISLOV, Samuel (1963) "The Amicus Curiae Brief: From Friendship to Advocacy," 72 *Yale Law Journal* 694-721.
- NORTHWESTERN COMMENT (1960) "The Amicus Curiae," 55 *Northwestern Law Review* 469-482.
- O'CONNOR, Karen and Lee EPSTEIN (1981-1982) "Research Note: An Appraisal of Hakman's 'Folklore,'" 16 *Law and Society Review* 701-711.
- PFEFFER, Leo (1981) "Amici in Church-State Litigation," 44 *Law and Contemporary Problems* 83-110.
- PIPER, George (1967) "Amicus Curiae Participation — At the Court's Discretion," 55 *Kentucky Law Journal* 864-873.
- PURO, Steven (1971) "The Role of Amicus Curiae in the United States Supreme Court: 1920-1966," Ph.D. dissertation, Buffalo: State University of New York.
- SCHUBERT, Glendon (1959) *Quantitative Aspects of Judicial Behavior*. Glencoe, Illinois: Free Press.
- SCIGLIANO, Robert (1971) *The Supreme Court and the Presidency*. New York: Free Press.
- STEVENS, John Paul (1982) Remarks made at the annual banquet of the American Judicature Society. San Francisco, California: Fairmont Hotel.
- VOSE, Clement E. (1958) "Litigation as a Form of Pressure Group Activity," 319 *Annals of the American Academy of Political and Social Science* 20-31.
- (1959) *Caucasians Only*. California: University of California Press.
- WASBY, Stephen L. (forthcoming) *The Supreme Court* (2nd ed.). New York: Holt, Rinehart and Winston.
- WEINER, Frederick Bernays (1954) "The Supreme Court's New Rules," 68 *Harvard Law Review* 20-94.
- WIGGINS, G. Stephen (1976) "Quasi-Party in the Guise of Amicus Curiae," 7 *Cumberland Law Review* 293-305.
- YALE LAW COMMENT (1949) "Private Attorneys-General: Group Action in the Fight for Civil Liberties," 58 *Yale Law Journal* 574-590.

Appendix A

Rule 27(9) (1938)

A brief *amicus curiae* may be filed when accompanied by written consent of all parties to the case, except that consent need not be had when the brief is presented by the United States or an officer or agency thereof and sponsored by the Solicitor General, or by a State or a political subdivision thereof. Such brief must bear the name of the bar of this Court (306 U.S. 708-709 1938).

Amendment to Rule 27(9) (1949)

(a) *Brief of an amicus curiae in cases before the Court on the merits:* A brief of an *amicus curiae* may be filed only after order of the Court or when accompanied by written consent of all parties to a case and presented promptly after announcement postponing or noting probable jurisdiction on appeal, granting certiorari, or pertinent action in a case upon the original jurisdiction.

(b) *Brief of an amicus curiae prior to consideration of jurisdictional statement or a petition for writ of certiorari:* A brief of an *amicus curiae* filed with consent of the parties, or motion, independent of the brief, for leave to file when consent is refused may be filed only if submitted a reasonable time prior to the consideration for a jurisdictional statement or a petition for writ of certiorari. Such motions are not favored. Distribution to the Court under the applicable rules of a jurisdictional statement or a petition for writ of certiorari and its consideration thereof will not be delayed pending the receipt of such brief or the filing of such motion.

(c) *Motion for leave to file:* When consent to the filing of a brief of an *amicus curiae* is refused by a party to the case, a motion, independent of the brief, for leave to file may timely be presented to the Court. It shall concisely state the nature of the applicant's interest, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevance to the disposition of the case. A party served with such motion may seasonably file in this Court an objection concisely stating the reasons for withholding consent.

(d) *Consent not required:* Consent to the filing of a brief of an *amicus curiae* need not be had when the brief is presented for the United States sponsored by the Solicitor General; for any agency of the United States authorized by law to appear in its own behalf, sponsored by its appropriate legal representative; for a state sponsored by its Attorney General; or a political subdivision of a State sponsored by the authorized law officer thereof.

(e) *Signature of a member of the bar of this Court and proof of service required:* All briefs and/or motions filed under this rule shall bear the signature of a member of the Bar of the Court, and shall be accompanied by proof of service on all parties to the case (338 U.S. 959-960 1949).