Court Rules As Gatekeeping: A Case Study of Rule 27(9)

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Introduction

In 1949, the United States Supreme Court changed its rules to limit the number of amicus curiae briefs it received. The Justices found many of the briefs to be useless, and thus unwelcome additions to the paperwork involved in their already spiraling caseload.

Although scholars 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 that the Justices of the Burger Court, in particular, regularly complain about their workload, we examine whether the current Court has revived the 1949 rule as a gatekeeping device.

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. Regardless of the Court's motivation, however, Green provided an important turning point in the Court's perception of the proper role of the amicus curiae.[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 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, minorities, including the National Association for the Advancement of Colored People, began to use the amicus as part of their litigation strategies (see Vose, 1958,1959). Later, groups such as the American Civil Liberties Union and the Ameican Jewish Congress also invoked the amicus curiae as a political weapon in litgation (Yale Comment, 1949). Thus, 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).

Krislov's observations were partially based on data reported earlier by Harper and Etherington (1952). They found, for example, that during the Court's October 1948 Term, 75 amicus briefs were filed in 57 cases (Harper and Etherington, 1952:1172). 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 precise definition of "interest," however, was somewhat ambiguous. It seemed to require that a party demonstrate a legal interest in common with the major participant (Beckwith and Sobernheim, 1948:44). Northern Securities, however, specifically discouraged participation as amicus curiae by parties having only a generalizable interest. Additionally, the Justices reaffirmed that amicus participation was at their discretion.

By 1938, however, the Supreme Court found it necessary to formulate written rules to govern amicus curiae participation. These rules, which superceded earlier enunciated informal policy, specifically required 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, soon became a source of irritation to the Court (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 amended Rule 27(9) in 1949 in an effort to reduce further the number of amicus curiae briefs presented to it annually (see generally, Harper and Etherington, 1952; Krislov, 1963; Vose, 1958; Puro, 1971; Weiner, 1954).[2]

Several sections of the amended rule merely reaffirmed existing provisions: 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 rule (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 if permission was refused by either party to the action.

According to the Court, such motions should:

> 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 be adequately be, presented by the parties, and their relevancy to the disposition of the case (338 U.S. 959).

Additionally, to discourage amicus curiae briefs at the jurisdictional appeals stage, Rule 27(9) stated that "such motions are not favored," and that motions for leave to file could not be submitted simultaneously with a brief on the merits (338 U.S. at 959).[3]

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 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 rules, 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 his consent for motions to file amicus curiae briefs (Puro, 1971; Scigliano, 1971). Justice 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:

> (I)f 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 an 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 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 noted their disapproval of the government's policy. Additionally, these statements indicated that "(B)oth Justices presumed that the amicus curiae aided both the Court and the litigants" (Puro, 1971:42).

Not surprisingly, then, given scholarly criticism coupled with the Court's views, 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 Burger 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 briefs were submitted by interest groups" (O'Connor and Epstein, 1981-1982:317).

While many interest groups view amicus curiae participation as a major outlet for expression of their views before the Court (Krislov, 1963; O'Connor and Epstein, 1982; Pfeffer, 1981; Piper, 1967), 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 195 amicus curiae briefs to read.

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 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 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" (Margolick, 1982:14).

While the Court itself 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 of the brief for leave to file..." (Rule 27(9)(c)). By regularly rejecting these motions, the Court could use Rule 27(9) as an efficient gatekeeping device. Thus, given the increasing demands on the Court's time, we hypothesize that the Burger Court, in fact, has routinely invoked Rule 27(9) to reject these motions.

Research Methods

To test the hypothesis that the Burger Court has used Rule 27(9) as a gatekeeping device, 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.[4] Motions to enter cases in which certiorari was denied were excluded. Additionally, this paper deals only with amicus curiae briefs submitted by interest groups because neither the federal government nor the states need permission to participate as friends of the court.

Findings

Table 1 indicates the number of motions for leave to file as

(Table 1 about here)

amicus curiae that were granted or denied by the Burger Court. Over the 13 Term period, the Burger 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, the Justices have readily given their approval to the vast majority of these petitions.

The willingness of the Justices to grant leaves to file is particularly well illustrated when untimely briefs and those of 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 Ernest. When these denials are excluded, the Court rejected only 8 percent (n=68) of the 832 motions.

Interestingly, during only two terms 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 recognizable 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 Burger Court, particularly since 1977, has not invoked Rule 27(9) in a routinized fashion or as a gatekeeping device.

Explanations

Based on the data presented in Table 1, the Court could have reduced the number of interest group briefs presented to it by 37 percent if it rejected 100 percent of the motions filed pursuant to Rule 27(9) over the 13 term period. For example, during the 1973 Term, 171 briefs were filed; 38 percent (n=62) were granted by the Court. Therefore, given complaints about workload, it is unclear why the Court does not routinely reject these motions.

One possible explanation for the Court's willingness to grant leaves to file, however, may be the Justices' belief that amicus briefs, in general, have some utility. Justices Frankfurter and Black, for example, both indicated the importance of amicus curiae briefs to the Court's decision-making process. To examine this explanation further, we reviewed all opinions of the Burger Court to determine if the Justices, in their opinions, directly referred to briefs of interest group amici.

Table 2 indicates the percentge of cases in which at least one opinion

(Table 2 about here)

(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 twenty-eight cases with amicus curiae participation. Overall, the Burger Court Justices relied on interest group amicus curiae briefs in 18 percent (n=149) of the 813 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 at best minimal indicators of the usefulness of interest group amicus curiae briefs to the Court.

To illustrate further the utility of amicus curiae briefs to the Court, we examined the amicus activity of one group, the Equal Employment Advisory Council (EEAC). The EEAC was formed specifically to file amicus curiae briefs in "precedent-setting cases" involving employment discrimination (EEAC, 1982:). It was selected for analysis here because it typifies a growing

number of groups that formed solely to file amicus curiae briefs (see O'Connor and Epstein, 1982).

Between 1976 and 1982, the EEAC filed amicus curiae briefs in 26 cases that resulted in full-opinion Supreme Court decisions. Twenty were filed with the consent of both parties; in the remaining five, the EEAC was granted leave to file as an amicus curiae by the Court. Although there were no direct mentions of EEAC briefs of the sort noted in Table 2, the Justices appear to have found information and/or arguments contained in EEAC briefs useful in their opinion formulation processes, as indicated in Table 3.

(Table 3 about here)

In fact, in only six cases did the Court fail to mention, adopt, or respond to EEAC arguments.

Of the 26 cases in which the EEAC participated, the Court mentioned information contained in its amicus curiae briefs on two occasions. For example, in County of Washington v. Gunther (1981), a case involving equal pay for comparable work, the majority opinion made reference in a footnote to an EEAC publication, Comparable Worth: Issues and Alternatives (1981).

Additionally, in in two of the 26 cases, the Court responded to arguments advanced only in EEAC briefs. In Fullilove v. Klutznick, for example, (1980), the Court rejected an EEAC argument, which suggested that minority set-aside provisions were "enacted without any Congressional finding of discrimination..." (EEAC, 1982:19). Thus, even though the Court failed to adopt this argument, it felt compelled to address issues raised by the EEAC.

Finally, the Court adopted arguments contained in EEAC briefs in in 16 of the 26 cases. For example, in East Texas Motor Freight Systems v. Rodriguez (1977), in which the Court considered whether plaintiffs were

appropriate representatives of the class, each of the three points cited by the Court in denying plaintiffs relief were contained in the EEAC's brief.[5]

Thus, it appears that the Court and/or the individual Justices found the EEAC's amicus curiae briefs useful. In fact, of the EEAC's 26 appearances as amicus curiae, the Justices indirectly mentioned, adopted, or responded to its arguments in 77 percent (n=20) of the 26 cases.

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 complaints about the increasing workload of the Court, we hypothesized that the Burger Court has routinely utilized Rule 27(9) as a gatekeeping device. The data, however, indicate that the Burger Court rarely denied interest group motions to appear as amicus curiae. In fact, since 1977, it has denied less than 11 percent (n=91) of the 832 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 (n=144) of the 849 cases in which one or more amicus curiae was filed, the Justices directly mentioned at least one interest group brief. Additionally, a case study of the EEAC revealed that its amicus curiae briefs were helpful to the Justices in formulating their opinions. Thus, given these findings, it seems that the Burger Court views the utility of amicus curiae briefs as outweighing their impact on the Court's already crowded docket.

Notes

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.

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).

3. The rule prohibiting simultaneous submissions of motions and briefs was intended to prevent amici from forcing the Court to read an amicus curiae brief that was buried in a motion for leave to file the brief (Puro, 1971:4; Weiner, 1954).

4. At the time of this writing, only cases decided prior to late June 1982 were available on LEXIS. Thus, 20 full opinion cases and their accompanying amicus curiae briefs (if any) were excluded from analysis.

5. First, the Court claimed, as did the EEAC, that the plaintiffs had suffered no injury since they were not qualified for the jobs they sought. Second, the EEAC had briefed the Court's finding that the plaintiffs had lost their opportunity to represent the class when they failed to "move for certification prior to trial." Finally, both the Court and the EEAC offered that the plaintiffs inadequately represented their class because their complaint advocated a merger of collective bargaining units that their fellow mwmbers had specifically rejected.

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Table of Cases

Appendix A

Rule 27(9)

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)

(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 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 this Court, and shall be accompanied by proof of service on all parties to the case (338 U.S. 959-960 1949).

Table 1

The Burger Court's Disposition of Interest Group Motions for Leave to File Amicus Curiae Briefs

Term	Percentage of Motions Granted	N=	Percentage of Motions Denied	N=	Total Motions	Total Amicus Curiae Briefs Filed
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	195
Totals	89	(741)	11	(91)	832	2016

*See note 4.

Table 2

Cases Citing Amicus Curiae Briefs

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*	16.5	(13)	79
Totals	18	(149)	813

*See note 4.

Table 3

The Burger Court's Utilization of EEAC Amicus Curiae Briefs

Abbreviated Case Name	Mention	Respond	Adopt	Not Utilized
California Brewers			X	
Cannon			X	
Carson			X	
Christianburg	X			
Chrysler			X	
County of Washington	X			
Delaware State			X	
Delta Airlines				X
EEOC				X
E. Tx. Motor			X	
Fullilove		X		
Furnco			X	
Gardner			X	
General Telephone		X		
Great American S&L			X	
IUE			X	
Lorillard				X
Mohasco				X
NLRB			X	
S.E. Coll.			X	
Teamsters			X	
Tx. Dept.			X	
TWA			X	
United Airlines			X	
United Steelworkers				X
Univ. of Calif.				X
Totals	2	2	16	6