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To Decide or Not to Decide, That is the Question: The Supreme Court's Amicus Appointment Practice When the Parties Agree[1]

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Almost every term in the last dozen, the Supreme Court has agreed to hear a case, usually involving the federal government, in which the Court has appointed a lawyer to argue the case as an amicus curiae because the parties agreed that the lower court erred. Doing that presents a problem because, under Article III of the Constitution, federal courts may only decide legal questions when they are presented in a "case or controversy," which requires that there be adverse parties with a stake in the outcome of the litigation.[2] In the alternative, the Court could refuse to hear the case or it could grant review and summarily reverse, but, as explained below, those options are less desirable in many cases for a number of reasons. As a result, the Court usually invites an attorney to serve as an amicus.[3] The 2019 term was no exception: the court-appointed amicus in *Seila Law v. Consumer Financial Protection Bureau*,[4] also urged the Court not to decide the constitutional issue it was asked to argue, thereby squarely presenting the question presented by this essay.[5]

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[1] This essay is an outgrowth of an amicus brief I filed in *Seila Law, LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020), in which I urged the Court not to decide the constitutional question presented there for reasons discussed in this essay.

[2] *Raines v. Byrd*, 521 U.S. 811, 818-820 (1997).

[3] The Court refers to these orders as both invitations and appointments, and this essay will use the terms "appointed" and "invited" interchangeably.

[4] *Seila Law*,140 S. Ct. 2183, 2195 (2020).

[5] The Court's amicus appointment practice, which dates back to at least 1926, has been the subject of two prior published studies. The first, an extended student note by Brian P. Goldman, focused on the question of whether an amicus should be appointed at all in these cases. *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decision?*, 63 Stan. Law Rev. 907 (2011). It preceded the Court's decision in *United States v. Windsor*, 570 U.S. 744 (2013), in which the Court also had to decide whether to rule on the merits in a case where the parties agreed that the law in question – the Defense of Marriage Act – was unconstitutional, and the House of Representatives had intervened to defend the law. This essay builds on that note, but also asks whether the Court

Although the practice of appointing an amicus appears to be less than a century old, the absence of adversity on issues before the Supreme Court is not a new phenomenon. In the cases discussed below, the lack of adversarial presentations did not prevent the Court from reaching the merits, and in two of the most significant cases ever decided by the Court, not only were there no adversarial presentations, but the Court decided the merits with *no* briefing on the constitutional issues that the Court decided.

The first, *Marbury v. Madison*,[6] is the decision without which there would be no other constitutional decisions. Chief Justice John Marshall, apparently sua sponte, raised the question of whether Congress' grant of original jurisdiction to the Supreme Court was limited to those cases set forth in Article III, or whether Congress could, as it did for the applicable mandamus statute in *Marbury*, add to that list, and if so, did the Court have the power to declare that provision unconstitutional. Not only was there no adverse presentation on any of these issues, but they were not even briefed or argued by either side. In fact, it appears that neither Secretary of State James Madison nor President Thomas Jefferson, whose orders Madison was carrying out, were represented by counsel. Thus, *Marbury* was not a case in which constitutional issues were decided by a one-sided presentation, but rather they were decided by a no-sided presentation in which the Justices ruled based on their own understanding of the Constitution, with no help from even a court-appointed amicus.[7]

The second case, *Erie Railroad Co. v. Tompkins*,[8] overruled *Swift v. Tyson*,[9] which held that it would be unconstitutional if the Rules of Decision Act, part of the Judiciary Act of 1789, were construed to allow federal courts to apply federal common law instead of state law in diversity cases in federal court. The parties were adverse as to the desired outcome of the case, but they had not expressed any views on this issue because the Court had not granted certiorari on whether to overrule *Swift*. Justice Butler's dissent objected to the Court's deciding that issue because it had not been briefed by the parties, but that did not stand in the majority's way. In addition, Justice Reed's dissent had a further objection to which the Court paid no heed: a federal statute, now found in 28 U.S.C. § 2403, required all federal courts to invite the Attorney General of the United States to participate where, as in *Erie,* the constitutionality of a federal statute was called into question and the Attorney General was not involved in the case.

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should decide the legal issue, even with an amicus present, and it does so by differentiating among categories of cases based on the type of issue on which there is agreement by the parties. The second study, by Cardozo Law Professor Katherine Shaw, *Friends of the Court: Evaluating the Supreme Court's Amicus Invitations*, 101 Cornell L. Rev. 1533 (2016), focused on the relation between the individual chosen to be an amicus and one or more of the Justices, finding that most, but not all, of the appointments went to former law clerks, often as their initial Supreme Court argument. Professor Shaw's in-depth research, plus her updated list of amicus cases, provided the database without which I would not have undertaken this project.

[6] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137(1803).

[7] Original citations for this paragraph are found in the Supreme Court's archives which are temporarily unavailable, but the basic facts are reported in many constitutional law casebooks.

[8] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

[9] *Swift v. Tyson*, 41 U.S. 1 (1842).

The third case, *Muskrat v. United States*,[10] involved a dispute over the validity of a federal statute that had the effect of diminishing rights in certain lands and funds granted to certain Native American tribes under a prior statute. Congress had authorized the claimants under the first statute to sue the United States, but not the other claimants, to obtain a ruling on the question presented. Even without the assistance of a court-appointed amicus, the Court concluded that it should not decide the merits because, although the plaintiff and the United States did not agree on the merits, the absence of the other claimants, whose interests were in direct conflict with those of the plaintiffs, meant that there was no Article III case-or-controversy. *Muskrat* is a case where the failure to appoint an amicus resulted in no harm because the Court was not swayed by the agreement of the parties, but there would have been a problem if the Court had decided the merits.[11]

Marbury and *Erie* provide examples of one option for the Court when the parties agree on the merits of an issue: proceed to decide the question presented without the help of an amicus. Especially when the question is a constitutional one, that choice has little to recommend it because the "price" of inviting an amicus to present the other side is small, and the benefit from an adverse presentation is significant, and perhaps required by Article III's case or controversy requirement. The third case, *Muskrat,* was also decided without an amicus, and the Court there concluded that the lack of adversity prevented it from ruling on the substantive issue presented. While in hindsight, the absence of an amicus to argue that the Court should abstain was not fatal or even important, that outcome was not known until after briefing and argument. It would have been far better, at the point at which the Justices realized that there was a serious Article III question, to appoint an amicus to argue the other side.

In this Issue Brief, I have divided the cases in which an amicus was appointed into four categories, based on the type of question on which there was party agreement: (1) jurisdictional issues; (2) statutory issues, some where there would be an impact on third parties and others involving criminal sentencing and similar issues affecting only the government; (3) constitutional issues, not involving challenges to statutes; and (4) constitutional challenges to statutes. In most but not all of the cases, the agreement was between a private party and the Solicitor General, who speaks for the United States and all federal agencies in the Supreme Court. In some, the other party was a State, and in a few the opposing party was not a government entity or individual, but I concluded that the "whether to decide" question should still be addressed. In cases that might fall into more than one category, I chose the category that provided the strongest reason for the appointment.[12]

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[10] *Muskrat v. United States*, 219 U.S. 346 (1911).

[11] *See also Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 48 (1971), where both the plaintiffs and the state agreed that the state anti-busing statute was unconstitutional, and the Court dismissed the case, and *United States v. Johnson*, 319 U.S. 302 (1943).

[12] I have also included in an Addendum a brief description of the twenty-five cases cited by Professor Shaw (or which post-date her work), in which an amicus was appointed for reasons other than party agreement. In most of

The order in which I address the four categories is based on my conclusion that in the first (jurisdiction), the Court did not have the option of not deciding, and in the second and third, the arguments in favor of deciding were much stronger than the alternatives. It is the final category – in which *Seila Law* falls – that presents the most difficult cases in which the Court is asked to decide whether a statute is constitutional, with no party there to defend it. One tension with a strong application of Article III's mandate of party adversity is that, in some cases, not deciding might deprive the private party of any relief, which would be a very unjust result.

I do not argue the Court should alter its amicus appointment practice, but, when it does make such an appointment, it should also focus more on the legal issue on which there is agreement among the parties in deciding whether to reach the merits. That is because, as I argue below, the nature of the merits issue is critical in determining which cases justify the Court's reaching the merits and which do not. I also urge the Court in deciding whether to decide to consider the impact of that choice on non-parties who are likely to be affected by the outcome. In the end, I conclude that in most cases the Court should reach the merits, but before doing so, it should more fully engage on the question of whether to decide, and in some cases, such as *Seila Law*, should decide not to decide.

Although this essay argues that there are cases in which the parties agree on the merits of an issue, and which the Court should refuse to decide the issue, it does not suggest that the Court is ever *required* to appoint an amicus to help it either on the merits or on whether it should even reach them. Rather, I use the fact that the Court has invited an amicus to participate in a case as a reminder that the Court should also focus on whether to reach the merits of the agreed-on issue. In the end, I conclude that the appointment of an amicus in these cases was generally justified for a variety of reasons, and that the appointment of an amicus, or failure to do so, should not be the dispositive fact for the Court in deciding whether to rule on the merits of the issue on which there is agreement.

I. The Court May Have Lacked Jurisdiction

The term "jurisdiction" has been given many (oft-misleading) meanings,[13] but in this context, it will refer to the non-waivable limits that Congress has placed on the authority of a court to entertain the action in question. Those limits are often imposed with a purpose in mind, typically prohibiting a court from hearing a particular type of case, preferring one court rather than another to do so, or imposing absolute time bars on when a case may be heard. The cases discussed in this section principally involve questions about whether the purpose behind the

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these cases, I have been able to identify the reason for the appointment and have included what I found or, in a few instances, surmised. I have organized the cases in the Addendum according to the four categories of cases in the body of the Issue Brief. I do not discuss the facts of every case in which there is an agreement between the parties because many are similar to those that I do discuss, but I have included all of those cases in the footnotes under the appropriate category.

[13] *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90 (1998); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006).

statute applies to the case at issue, with the Court invoking the specific words used to help it decide the issue. Where the issue was, as in *Reed Elsevier, Inc. v. Muchnick*,[14] whether a particular limit is "jurisdictional," that case is included within the statutory cases discussed below in Section IIC. It is important to note that, while the parties in these cases agreed on jurisdiction, they did not agree on the merits.[15]

A prime example of a jurisdictional issue on which the parties agreed and in which the Court properly appointed an amicus (and then rejected his arguments), is *NFIB v. Sebelius*.[16] The consolidated cases involved various challenges to the Affordable Care Act, and one challenge was to the individual mandate under which taxpayers who did not have coverage to pay for their health costs would, subject to certain exceptions, have to pay what was denominated a penalty as an incentive to purchase insurance. The penalty was assessed via the individual's federal income tax return and was administered by the Internal Revenue Service. Initially, the government took the position that the claim was jurisdictionally barred by the Tax Injunction Act, 26 U.S.C. § 7421, which, with certain exceptions not applicable there, prohibits federal courts from enjoining the collection of federal taxes. By the time that the case reached the Supreme Court, the government no longer asserted that section 7421 barred the suit, but all parties agreed that if that section applied, it was a jurisdictional bar to the plaintiffs' claim. To cure the absence of adversity on this threshold issue, the Court appointed an amicus to argue that section 7421 applied, rather than deciding the question on its own, but in the end, it rejected the applicability of section 7421.[17]

In *Montgomery v. Louisiana*,[18] the issue on the merits was whether the constitutional limits on the imposition of mandatory life sentences for juveniles established by one of the Court's earlier decisions applied retroactively, and hence barred the defendant's life sentence. The Court's jurisdiction over cases coming from state courts is limited, and it was uncertain whether jurisdiction was proper in this case. Therefore, the Court invited an amicus to oppose the parties who agreed that the Court could hear the case. Similarly, in *Hohn v. United States*,[19] the parties agreed that the Court could review the denial of a certificate of appealability in a habeas case where the prisoner raised a constitutional claim on the merits, and the Court appointed an amicus to defend the contrary jurisdictional ruling below.

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[14] *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010).

[15] A similar question prompted the Court to appoint an amicus to argue that the requirement that a pro se party sign his notice of appeal was jurisdictional in *Becker v. Montgomery*, 552 U.S. 757 (2001). *See also Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145 (2013), where the Court appointed an amicus to argue that a 180-day filing rule was jurisdictional even though no party took that position.

[16] *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

[17] The government initially argued that the plaintiffs lacked standing and that the case was not ripe, but it had also abandoned those defenses in the Supreme Court, and the Court's opinions did not mention them.

[18] *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

[19] *Hohn v. United States*, 524 U.S. 236 (1998).

The plaintiff in the Social Security disability case of *Forney v. Apfel*,[20] won a remand to the agency, but was not satisfied because he sought outright reversal. He took an immediate appeal, which was dismissed by the court of appeals for want of jurisdiction. The government agreed with the plaintiff's cert petition, as it had below, that the court of appeals had jurisdiction, and the Court appointed an amicus to defend the judgment that the court of appeals lacked jurisdiction after the remand, a position with which the Court subsequently disagreed.

The final three cases in this category raised jurisdictional issues in cases in which non-citizens objected to rulings in immigration cases. The jurisdictional provisions in this area of law are quite complex and have been changed frequently, resulting in many jurisdictional disputes. In most cases, the government argues against jurisdiction, but in these cases, it agreed that there was jurisdiction, and the Court appointed an amicus to defend the contrary jurisdictional rulings below: *Mata v. Lynch;*[21] *Kucana v. Holder;*[22] and *Cheng Fen Kwok v. INS*.[23]

In each of these cases, the government agreed that the Court had jurisdiction to decide the claim of the private party, while still defending the merits ruling in its favor. Under those circumstances, the Court was correct to appoint an amicus to assist it in deciding the jurisdictional question in all of these cases.

II. The Proper Interpretation of a Statute

A. Impact on Others

In the first and most justifiable sub-category of cases within the statutory interpretation grouping are four cases in which an amicus was appointed to defend a judgment that the government agreed was wrong, but where there were individuals who would benefit from the contrary lower court ruling, but were not represented in the litigation. The most significant of these is *Bob Jones University v. United States*.[24] The IRS originally took the position, upheld below, that the tax code prohibited granting a tax exemption under section 501(c)(3) because of the university's segregationist policies. When the case reached the Supreme Court, the Reagan Administration concluded that Congress did not require it to deny tax exemptions to schools that had these policies, and so it was prepared to restore Bob Jones's tax exemption, which would eliminate the dispute between the government and the university. But the legal issue was undeniably important, and the government had changed its position from the one it persuaded the court of appeals to uphold. Therefore, unless the Court appointed an amicus to defend the judgment below, countless students who attended schools with similar policies and

[20] *Forney v. Apfel*, 524 U.S. 266 (1998).
[21] *Mata v. Lynch*, 135 S. Ct. 2150 (2015) (refusal to exercise discretion to reopen proceedings).
[22] *Kucana v. Holder*, 558 U.S. 233 (2010) (jurisdiction over specific type of BIA decision).
[23] *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968) (jurisdiction to grant stay of deportation).
[24] *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

who were not otherwise represented in the lawsuit would be denied the benefits that Congress intended when it imposed conditions on granting tax exemptions.

Another case in which the Court appointed an amicus also had potentially far-reaching implications. *Granville-Smith v. Granville Smith*[25] was a divorce action that was filed in the Virgin Islands involving a married couple that had lived in New York, where the law would not have permitted them to divorce. A Virgin Islands statute allowed a party with six weeks residence to file for a divorce there, which in this case was uncontested by the other party. In a prior case, in which the non-filing spouse had raised due process objections to the forum for the divorce, the Third Circuit, to which appeals from Virgin Island federal court go, agreed that the statute violated due process, and the Supreme Court eventually dismissed the case as moot. The same issue came back to the Court in *Granville-Smith*, after the Third Circuit set aside the ruling granting the divorce, this time with the parties agreeing on the availability of the Virgin Islands forum to adjudicate their divorce. In that posture, the Court appointed Erwin Griswold, then dean of the Harvard Law School, to argue that the Virgin Islands forum was not available.

Several points stand out about this case. Neither of the parties was a government entity, but they relied on a Virgin Islands statute to obtain their relief. Second, although the parties both embraced this statute, many other defendant-spouses would not, and their interests were not adequately represented. Third, the case was framed as a due process issue, but in the end the Court ruled that the Virgin Islands had exceeded the grant of power given to it by Congress, which extended only to enacting local laws, and this one had a major effect on outsiders. Because of the potential impact of the ruling on others, I have included this case in this sub-category, but it also could have been examined as a case in which the Court used an amicus to help resolve a constitutional question on which the existing parties agreed.

A similar rationale would have supported the appointment of an amicus in *Culbertson v. Berryhill*.[26] The precise legal issue was whether an attorney whose client prevailed in a Social Security disability case was limited to a total fee cap of 25%, including for work on remand. The government agreed that the lower court ruling imposing the cap was incorrect, and the Court granted review to resolve a circuit conflict. Although the government confessed error, the impact of doing so did not result in it paying out more of its own money. Instead, the additional funds would reduce what the claimant would receive, yet this claimant – and all future claimants who might be adversely affected by this case – would not be represented unless the Court appointed an amicus to do so.

McLane Co. v. EEOC [27] is another case in which the interest of third parties was not obvious but provided a sensible justification for the appointment. The issue was whether a court of appeals should review a district court's decision to enforce or quash an EEOC subpoena *de novo* or for

[25] *Granville-Smith v. Granville-Smith*, 349 U.S. 1 (1955).
[26] *Culbertson v. Berryhill*, 139 S. Ct. 517 (2019).
[27] *McLane Co. v. Equal Emp't Opportunity Comm'n*, 137 S. Ct 1159 (2017).

abuse of discretion. The district court quashed the subpoena, and the court of appeals reversed, upholding the EEOC's subpoena. In doing so, it applied de novo appellate review, which the government conceded in the Supreme Court was incorrect. That position—that abuse-of-discretion review applied—benefitted the private party in *McLane*, but it would not benefit other private parties when a district court enforced an EEOC subpoena in the first instance. In that situation, the private party would prefer the de novo standard that the amicus was chosen to defend, and that rationale provides a strong justification for inviting an amicus in *McLane Co.*

Two other cases fall into the category where an amicus serves to represent persons not parties to the case, but who will be affected in similar cases in the future. In *Gutierrez de Martinez v. Lamagno*,[28] the plaintiff sued the federal employee who caused his injury in an automobile accident. Because the accident occurred outside the United States, the Federal Tort Claims Act did not apply, and so the United States was not liable. The government, applying the Westfall Act,[29] certified that the employee was acting within the scope of his employment, which had the effect of also immunizing the employee from liability. The plaintiff then asked the district court to overturn the certification, but the court of appeals concluded, consistent with the government's view at the time, that the Act barred judicial review of a scope-of-employment certification. At the Supreme Court, the government reversed its position, agreeing with the plaintiff that the certification was subject to judicial review. The principal impact of this concession there was on the employee-defendant, not the government, but it would also affect federal employees in future cases (whose interests the government generally wishes to protect), which made the appointment of an amicus to defend the judgment below particularly appropriate.

A similar rationale presumably was at the root of the amicus appointment in *Toibb v, Radloff*,[30] where the issue was whether an individual, who did not own a business, could use chapter 11 of the Bankruptcy Code to reorganize, when his debts were too high to use chapter 13 (which is typically used by individuals to reschedule their debts). His efforts were successfully opposed below by a federal official (the United States Trustee), but at the Supreme Court the Solicitor General agreed that chapter 11 was available. Because allowing the use of chapter 11, instead of chapter 7, would also impact the debtors' creditors in this and other cases (although in ways that might be difficult to predict), the appointment of an amicus to defend the appeals court ruling effectively provided them representation when the Court made its decision.

The final case in which the Court's decision would have an impact on others is *Setser v. United States*.[31] The Court granted review to consider whether a district court, in sentencing a defendant for a federal offense, properly ordered that the federal sentence be consecutive to an anticipated state sentence that had not yet been imposed. In the Supreme Court, the

[28] *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995).
[29] 28 U.S.C. §2679.
[30] *Toibb v. Radloff*, 501 U.S. 157 (1991).
[31] *Setser v. United States*, 566 U.S. 231 (2012).

government conceded that the sentence was improper, and the Court's amicus was asked to defend the contrary position. If that position had been upheld, it would have an (uncertain) impact on the ability of state court judges to craft an appropriate sentence on this and future defendants in similar situations.[32]

B. Government Concession in Sentencing & Other Similar Situations Where the Impact Is Limited to the Government

In eight of the cases in which the Court appointed an amicus, all of them in the last dozen years, the issue of statutory interpretation involved the meaning of a federal statute governing criminal sentencing. Until the enactment of the Sentencing Reform Act of 1984, sentencing was largely a matter of judicial discretion, and hence there was little chance that the Supreme Court would be called on to resolve any sentencing issue. These cases all were heard because there was a circuit conflict, and in each of them, the government had changed its position to align with the defendant.

In a case that the Court decided last term, *Holguin-Hernandez v, United States*,[33] the issue was whether a formal objection after pronouncement of sentence is necessary to authorize appellate review of the length of a defendant's sentence. Because no such objection was made, the court of appeals applied plain-error review to determine whether the sentence was substantively unreasonable. Because the government agreed that the plain-error standard was incorrect, and that ordinary reasonableness review was appropriate (although arguing that the misapplication was harmless error), the Court appointed an amicus so that it could resolve the standard-of-review issue.

The issue in *Dorsey v. United States*[34] was whether a new statute imposing a lower mandatory minimum sentence applied to offenses committed before the statute's effective date, when the sentence was imposed after that date. When the government agreed that the lower sentence applied, the Court appointed an amicus to take the position of the appeals court, which had held otherwise.[35] Other sentencing cases in which amicus was appointed were those in which the issue was whether a court could impose an enhanced sentence to ensure that the defendant was fully rehabilitated,[36] whether a court on re-sentencing could consider interim

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[32] *Setser* was an unusual sentencing case because the agreement between the defendant and the government had an impact not just on other defendants, but on third parties, there state court judges. Similarly, in one of the cases challenging the individual mandate in the Affordable Care Act, the court of appeals struck down the mandate, but ruled that it was severable from the rest of the act, a position with which no one else agreed and for which the Court appointed an amicus. *NFIB v. Sebelius*, 567 U.S. 519 (2012). Although the impact of upholding that position was uncertain, it was likely that it would not have been limited to the government and the actual parties to the case. Because the mandate was upheld, the severability issue became moot.

[33] *Holguin-Hernandez v. United States*, 140 S. Ct. 762 (2020).

[34] *Dorsey v. United States*, 567 U.S. 260 (2012).

[35] Two other cases in which the Court appointed an amicus to defend lack of retroactivity were *Welch v. United States*, 136 S. Ct. 1257 (2016), and *Bouseley v. United States*, 523 U.S. 614 (1998).

[36] *Tapia v. United States*, 564 U.S. 319 (2011).

rehabilitation,[37] whether the sentencing judge must give the defendant notice of his intent to depart above the guidelines,[38] and whether the court of appeals may correct an unlawful sentence that was too lenient when only the defendant has appealed.[39]

Outside the sentencing area, in two civil cases, Congress had waived sovereign immunity and allowed suits against the government. They are analogous to the sentencing cases because only the government would be affected by the agreement with the private party on that issue. *Green v. Brennan*[40] posed the question of when the statute of limitations applicable to constructive discharge discrimination claims against the government starts to run. And in *Millbrook v. United States*,[41] the issue was whether the Federal Tort Claims Act's waiver of immunity in assault cases extended to federal prison guards. When the United States agreed that it did, the Court appointed an amicus to take the other side. Both cases were taken to resolve circuit splits, and hence inviting amicus participation enabled the Court to have an adverse presentation when resolving the questions presented.

In theory, when the government and the private party that lost below agree that an error of law has been made, and no one else would be affected, the Court could simply reverse the judgment and remand for further proceedings, with the government presumably taking the same position in all future cases. Leaving aside the fact that Administrations change, and hence the government might reverse its position again, there are two other sets of interests that counsel against the Court acting without hearing arguments on the other side. First, lower-court judges in this and other cases who reached the opposite conclusion have an interest in not being summarily reversed simply because the Solicitor General has taken a different view, especially if there is a conflict among the circuits, as there often is in these cases. As then-Associate Justice William Rehnquist observed in a dissent, "I harbor serious doubt that our adversary system of justice is well served by this Court's practice of routinely vacating judgments which the Solicitor General questions without any independent examination of the merits on our own.").[42] Second, Congress arguably has chosen a position less favorable to the private party and did not wish to have the government be more lenient, not simply in one case, but in all cases presenting this question. For these reasons, and because the offsetting considerations of the kind discussed in the following Sections are not present in these cases, the Court is acting appropriately when it appoints an amicus to defend a sentence or other similar ruling favorable to the government that it now agrees is incorrect.[43]

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[37] *Pepper v. United States*, 562 U.S. 476 (2011)
[38] *Irizarry v. United States*, 553 U.S. 708 (2008).
[39] *Greenlaw v. United States*, 554 U.S. 237 (2008).
[40] *Green v. Brennan*, 136 S. Ct 1769 (2016).
[41] *Millbrook v. United States*, 569 U.S. 50 (2013).
[42] Mariscal v. United States, 449 U.S. 405, 407 (1981).
[43] Other cases in this category are *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145 (2013), and *Ogbomon v. United States*, 519 U.S. 1073 (1997). The latter was an in forma pauperis case with an appointment of counsel involving the legality of certain sentencing practices, which the government agreed were unauthorized. After review

C. Open Procedural Questions

Another category of statutory interpretation cases in which appointment of an amicus seems to have few downsides, and where it has the positive benefit of providing an adverse presentation, arises where the issue is procedural. In those cases, unlike the matters of substantive law discussed above, it is often more important that the question be resolved than that it be decided one way or the other. For example, in *Smith v. Berryhill*,[44] the question was whether the dismissal by the Social Security's Administration Appeals Council of a claimant's appeal (in that case because it was untimely) is a final decision made after a hearing so as to allow judicial review. The question had produced a 7-2 split among the circuits, and the appointment of an amicus, when the government finally agreed that review was available, enabled the Court to resolve this procedural question, knowing that Congress could change it if it disagreed. Similarly, *Clay v. United States*[45] presented the question of what is the starting event for the one-year period in which a habeas petition must be filed by a federal prisoner who does not seek certiorari after a denial of his direct appeal. When the government agreed that the longer period applied, the Court invited an amicus to help it resolve a deep and recurring circuit split.

III. Non-Statutory Constitutional Issues

There are four criminal cases in which the Court appointed an amicus who was asked to brief a constitutional issue that did not involve a challenge to a statute. There was adversity in that the prosecutor did not agree fully with the defendant, who argued that he was entitled to acquittal, but the parties agreed on one constitutional issue in a case that the Court had agreed to hear. At issue in *Alabama v. Shelton*,[46] was whether a defendant is entitled to appointed counsel when the trial court imposes only a suspended sentence. The Alabama Supreme Court ruled that counsel was not required even if there was a possibility of incarceration. The state argued that counsel was required only if imprisonment had been ordered (as might happen later if the defendant violated the terms of his probation), and the Court appointed an amicus to argue that, as long as a suspended sentence was imposed, counsel never had to be appointed, as the Alabama Supreme Court had ruled.

Ornelas v. United States[47] raised the issue of whether an appellate court should use a de novo or a more deferential standard in reviewing a trial court's conclusion that there had been reasonable suspicion authorizing a *Terry* stop.[48] The court of appeals had applied outcome determinative, deferential review in refusing to overturn the ruling favorable to the government, but in the Supreme Court, the parties agreed that the court of appeals had erred in failing to apply de

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was granted, the petition was dismissed as improvidently granted when the government argued that the case had become moot and also pointed to a recent statute that appeared to answer the legal issue presented.

[44] *Smith v. Berryhill*, 139 S. Ct. 1765 (2019).
[45] *Clay v. United States*, 537 U.S. 522 (2003).
[46] *Alabama v. Shelton*, 535 U.S. 654 (2002).
[47] *Ornelas v. United States*, 517 U.S. 690 (1996).
[48] See *Terry v. Ohio*, 392 U.S. 1 (1968).

novo review, with the Court appointing an amicus to defend the deferential ruling. Because claims involving *Terry* stops occur more frequently in state than in federal prosecutions, a district attorney association filed a brief supporting the deferential review standard, presumably because prosecutors win more *Terry* challenges in the trial courts than they lose. The position on which there was agreement helped the defendant in this case who had lost in the trial court, but in other cases, where the *Terry* stop was upheld by the trial court, the prosecution would benefit from deferential review. Both reasons justified the appointment of an amicus to defend the ruling below.

In a series of cases, the Supreme Court has ruled that the enhanced punishment provided in various statutes enacted by Congress were unconstitutionally vague. *See e.g., Johnson v. United States*.[49] In *Beckles v. United States*,[50] the petitioner argued, and the government agreed, that the vagueness doctrine applied not only to statutes but to the non-mandatory Federal Sentencing Guidelines. The Court appointed an amicus to take the other side of the issue, and it then agreed with its amicus that the doctrine did not apply to the guidelines. The decision provided important guidance not only for federal sentencing, but to state courts and legislatures that operate under similar non-mandatory guidelines.

The defendant in *Bond v. United States*,[51] argued that Congress had exceeded its enumerated Article I powers in passing the statute under which she was prosecuted. Initially, the government took the position that the defendant, as a private party, did not have standing to make this federalism challenge, but then reversed its position on standing when the case was in the Supreme Court, while still defending the law's constitutionality. Whether the standing issue is seen as jurisdictional or as another constitutional question, it was a threshold matter that the Court had to decide. The Court's decision to invite an amicus to ensure that it was fully informed on the standing issue was appropriate, and surely better than simply reversing and remanding the case with a direction to the lower court to entertain the defendant's constitutional claim on its merits, because similar issues might arise in the future and because it was desirable to settle the standing question.

In some, but not all of these cases in this Section, the issue was the subject of circuit conflicts, and the question was likely to arise in future cases in which a different governmental entity might be involved and might not agree with the private party. In addition, when the defendant is the petitioner, and the government subsequently agrees with him, it would be grossly unfair to dismiss the petition because there is no longer a live dispute. In that situation, appointing an amicus prevents that from happening and also ensures an adverse presentation. Finally, assuming that the Court accepts review, there is a strong likelihood that there will be amicus briefs from state attorneys general, district attorneys, and/or other law enforcement agencies to

[49] *Johnson v. United States*, 135 S. Ct. 2551 (2015).
[50] *Beckles v. United States*, 137 S. Ct. 886 (2017).
[51] *Bond v. United States*, 564 U.S. 211 (2011).

oppose the position on which there is agreement if that position has merit and is of significance to the law enforcement community. In all, appointing an amicus in these constitutional cases seems generally appropriate if not necessary, even though it means that the Court will decide a constitutional issue that it might not need to decide in the particular case.

IV. Unconstitutionality of a Statute

The Court has appointed an amicus in six cases in which there was no party to argue one side of a case challenging the constitutionality of a statute, all but one of which involved a federal statute. In the cases discussed in the prior sections, the Court appropriately appointed an amicus to help it decide an issue where the existing parties agreed on how it should be resolved, despite the general principle embedded in Article III that federal courts should only decide cases in which there are adverse presentations from both sides. However, when the Court is asked to resolve a question as to the constitutional validity of a federal statute, the Court should be reluctant to appoint an amicus and to decide the question presented, unless there are special circumstances that would justify a divergence from the norm of Article III. The reasons for this reluctance and the situations that justify an exception can be found in the following cases.

The most controversial case in which the Court appointed an amicus is *United States v. Windsor*,[52] in which the plaintiff challenged the constitutionality of the Defense of Marriage Act ("DOMA"). DOMA limited the definition of marriage in over 1100 federal laws to opposite sex couples, thereby precluding same sex married couples from significant benefits under federal law, even if the marriages were performed in states where they were lawful. After initially defending DOMA, the Obama Administration changed its position and agreed with the plaintiffs in several cases that DOMA violated the Equal Protection Clause. At that point, the House of Representatives, which was controlled by the opposing party, was permitted to intervene to defend DOMA. Despite its agreement on the merits, the government refused to provide the plaintiffs in any of these cases the relief that they sought, insisting that only a Supreme Court decision would suffice to permit federal officials to refuse to abide by DOMA.

The *Windsor* plaintiff prevailed below, and both the Obama Administration, on behalf of the United States, and the House sought Supreme Court review. There was no need to appoint an amicus to defend DOMA; the House was performing that function. But the Court was concerned that the agreement between the plaintiff and the United States precluded the Court, under Article III principles, from deciding the merits of the constitutional claim, and it appointed an amicus to argue that it lacked the power to reach the merits.

Justice Anthony Kennedy, for the five-justice majority, concluded that the Court had the authority to decide the fate of DOMA based on the petition of the United States and proceeded to set the law aside. The basis on which he reached that conclusion is less than clear, but it

[52] *United States v. Windsor*, 570 U.S. 744 (2013).

seems to be largely founded on practical considerations and the presence of the House that was vigorously defending DOMA. Justice Samuel Alito agreed that the Court could reach the merits (although he would have upheld the law) based solely on the House's intervention as a party in the trial court and thereafter.

Justice Antonin Scalia, joined by Chief Justice John Roberts and Justice Clarence Thomas, dissented on justiciability, as well as on the merits. To them, the absence of an adverse party precluded the Court from deciding the constitutional question presented. But even they were not prepared to take their argument to its logical conclusion. If they had taken that path, once the United States agreed with the plaintiff, no court – not even the district court – had the right to rule on the legal issue. Instead, the dissenters would have allowed the plaintiff to recover the $365,000 in federal estate taxes she claimed she had overpaid on account of DOMA, but it was unclear how that could have happened without a ruling that DOMA was unconstitutional.

For the combined reasons set forth in those opinions, the majority found that the case satisfied Article III perhaps because, without a ruling on the merits, the plaintiff would be denied a remedy that the government agreed she was entitled to receive. Indeed, she would have been *worse off* than if the government had opposed her claim in court. For these reasons, at least where there is no doubt that the other side of the issue is being competently briefed on behalf of an entity that has a strong interest, even if not a legally protected one, in the outcome, the Court was correct to decide the merits, especially because there was no other way for the issue to reach the Court – unless a new President, four years later, shifted positions and chose to defend DOMA.

Hollingsworth v. Perry[53] was a very similar case to *Windsor*. Both involved Equal Protection challenges to laws that disfavored or prohibited same sex marriages, and in both the government defendants refused to defend the law. The law in *Hollingsworth* was enacted through the initiative process in California, and its proponents intervened to defend the law in the district court, just as the House did in *Windsor.* However, unlike in *Windsor,* the Court did not appoint an amicus to argue that the Court should not reach the merits on which the challengers prevailed below. The majority opinion, written by Chief Justice Roberts and joined by Justices Scalia, Ginsburg, Breyer, and Kagan, concluded that the proponents of the initiative lacked standing to appeal because they suffered no legally cognizable injury from the district court ruling, which could also have been said of the House in *Windsor.* Even then, the Justices agreed that the plaintiffs were entitled to keep their judgment, although it technically benefitted only the four named parties because the case was not a class action. There is one practical difference that justified the differences in outcome from *Windsor* and likely motivated at least some of the Justices: there were at least 20 other states that had laws similar to California's and that had officials anxious to defend their bans on same sex marriages, so that the Court had no

[53] *Hollingsworth v. Perry*, 570 U.S. 693 (2013).

concern that it would be unable to pass on the constitutionality of those laws with fully adverse parties on both sides as soon as the issue came to the Court.

In *Lucia v. SEC*,[54] the petitioners, who had been found by an administrative law judge (ALJ) and the SEC to have violated various SEC rules, argued that ALJs at the SEC are inferior officers under the Appointments Clause and thus must be appointed by the SEC itself and not its staff. The SEC argued below that ALJs are employees, who need not be appointed under that Clause, but the government reversed that position at the Supreme Court, which necessitated the appointment of an amicus to defend the ruling below that ALJs are employees, not inferior officers. The Court could not have refused to decide the constitutional question because that would have penalized the petitioners for having persuaded the government that they were correct. In addition, the ruling below was also defended by amicus briefs by those with a real stake in the controversy - ALJ associations. Interestingly, no Justice even suggested that there might no longer be a case or controversy even though the actual parties agreed that the ALJs were not properly appointed, although perhaps that was attributable to the fact that Justice Scalia, who had written the dissent on this issue in *Windsor*, was no longer on the Court.

A similar problem arose in *Dickerson v. United States*.[55] The Fourth Circuit ruled that a federal statute that overrode the Court's decision in *Miranda v. Arizona*,[56] permitted the government to admit certain evidence that would have been inadmissible under *Miranda.* The government agreed with the defendant that the statute could not countermand a constitutional ruling and that the evidence should not have been admitted. In that posture, the Court appointed counsel to defend the law. It would have been inappropriate to overturn the lower court's constitutional ruling based on the government's concession alone, nor could it have refused to pass on the question that the defendant had squarely presented and which he had lost below.

The party seeking review in *United States v. 12 200-foot Reels of Super 8 mm Film*,[57] was the government, which contended that the lower court ruling that the statute forbidding the importation of obscene materials for personal use violated the First Amendment. The pro se importer chose not to appear in the Court, which would have permitted the Court to reverse the adverse judgment against the United States, but that would have left the ruling of unconstitutionality on the books, with perhaps an uncontested summary reversal as subsequent history. Justice Scalia might have followed that path, with the recognition that the opinion was only from a district court, and that if there were others who wanted to test the law, their cases would properly present the issue. Instead, the Court appointed an amicus who, aided by the ACLU, unsuccessfully supported the ruling of the district court.

[54] *Lucia v. Sec. & Exch. Comm'n*, 138 S. Ct 2044 (2018).
[55] *Dickerson v. United States*, 530 U.S. 428 (2000).
[56] *Miranda v. Arizona*, 384 U.S. 436 (1966).
[57] *United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123 (1973).

The last of these pre-2020 cases challenging the constitutionality of a law, *Gomez v. Perez*,[58] differs from the others in several respects. The law was that of a state (Texas) not the United States; the case was between private parties; and the respondent, who prevailed below, did not appear in the Supreme Court. The petitioner was the mother of a child born out of wedlock, but under Texas law, only the mothers of children born in a marriage could sue the father (respondent) for child support. The mother asked the Court to hold that the Texas law was unconstitutional, which it could properly do only if there were an appointed amicus to defend the law and the judgment below. That practical consideration, plus the fact that the state attorney general filed an amicus brief supporting Texas law, justified the Court ruling on the merits, even in the absence of a party who would defend the law's constitutionality.

The cases in which the legal issue is the constitutionality of a statute, especially a federal statute, are those that should give the Court the most pause before allowing the appointment of an amicus, opposing an agreement between the parties, to enable it to decide the constitutional issue presented. On the one hand, there is the doctrine of constitutional avoidance, but on the other, in many of these cases, refusing to decide would deny a party, who has convinced the government that action taken against her is unconstitutional, the relief to which she is entitled. Even the dissenters in *Windsor* did not go that far, suggesting that Article III does not compel that kind of injustice. But, as *Hollingsworth* shows, the Court should exercise its discretion to avoid deciding major constitutional questions when it can still provide justice to the private party in the case by fashioning an appropriate, but less sweeping, remedy, in that case by allowing the district court ruling to stand.

Had the Court followed this approach in *Seila Law, LLC v. Consumer Financial Protection Bureau*,[59] it would not have decided the merits. There the petitioner and the United States agreed that the restrictions on the removal of the CFPB director are unconstitutional because they improperly limit the President's constitutional obligation to take care that the laws are faithfully executed. In the lower courts, the CFPB defended on the merits, but in the Supreme Court the Solicitor General represented the agency and agreed with the petitioner that the removal limits are unconstitutional. In addition to the question of whether the Court can or should decide the constitutionality of a federal statute in a case in which no party supports the statute, there was also an unusual standing issue. The private party challenged the limit on the removal power of the President, and the question was whether that claim could only be brought as a defense if the President fired the director, who then brought suit to reclaim her position or recover backpay. The case was further affected by the fact that the current CFPB director had taken office on the understanding that she can be removed at will by the President and because the prior director had served for ten months under this President, who did not attempt to remove him.

[58] *Gomez v. Perez*, 409 U.S. 535 (1973).
[59] *Seila Law, LLC*, 140 S. Ct. 2183 (2020).

Various amicus briefs, including that of the author of this essay, and the amicus who was invited by the Court to defend the merits of the removal restrictions, urged the Court not to decide the very significant constitutional issue under these circumstances. But the Court, in an opinion written by Chief Justice Roberts, did not accept that advice and decided the merits in favor of the President and the petitioner, holding the removal restrictions unconstitutional.[60] Together with its ruling that the private law firm had standing, the decision is quite likely to launch a wave of litigation challenging the removal restrictions on the appointees to every multi-member body, ranging from the Federal Trade Commission to the Federal Election Commission, to the Federal Communications Commission to the Federal Reserve, as well as to the 2000 or so administrative law judges who handle cases for most federal agencies.[61]

The Court did not devote many words to support its conclusion on why it was proper to reach the merits, relying on *United States v. Windsor*, *supra.* The choice of *Windsor* is remarkable for several reasons. The vote on this aspect of the ruling there was 6-3 with Justice Alito agreeing to reach the merits only because the House of Representatives had intervened to defend the law in the lower courts, which had not happened here. Second, as noted above, if the Court had not been willing to decide the constitutional question in *Windsor*, it might never have been able to do so, whereas here, any President who wanted to test the validity of the removal restrictions could simply fire the director and a clear case would be in court. Because that had not happened there, *Seila Law* is much more like *Hollingsworth,* where the Chief Justice's majority opinion declined to reach the merits, than *Windsor* where it decided them. Third, the uncertainty over the fate of DOMA and its impact on more than 1100 laws, affecting all three branches of government, provided a further practical justification that was lacking in *Seila Law.* Last, and perhaps more ironic that legally significant, the Chief Justice dissented in *Windsor* on this issue as well as on the merits, which he would have preferred to avoid there, but to decide here. In my view, in contrast to *Windsor*, there was no reason to push the limits of the case or controversy requirement of Article III here, and many reasons not to do so.[62]

V. Conclusion

This essay does not suggest that the Court should not invite an amicus when the parties to a case before it agree on the merits of the question and when the party who prevailed below is not

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[60] *Id.*

[61] This is not the place to debate the merits of upholding the standing of a private law firm, resisting the enforcement of an agency's information demand, to assert the right of the President to remove the agency head at will. However, I cannot resist noting that, for a Court that has been very tough on most plaintiffs seeking to enforce federal rights in federal court, its willingness to accept the unadorned claim of the law firm, that it had the right to have an agency head removable at will by the President, could be viewed by cynics as proof that the Court's standing jurisprudence is sufficiently flexible to enable it to reach the merits when it wants to do so. The same should also be said for the Department of Justice, which normally raises standing whenever it can, but did not do so here.

[62] I hope that my views on justiciability were not affected by my view that the dissent of Justice Kagan on the merits in *Seila Law*, was more persuasive than the majority opinion of the Chief Justice. The dissent did not address any of the justiciability issues.

defending a favorable ruling. Rather, its goal is to present a typology of cases in which appointment has been and should continue to be considered, which better enables the Court and interested parties to determine when appointment and deciding the merits of the question sought to be adjudicated is and is not appropriate. As it turns out, in most cases, an invitation is proper, indeed necessary, to ensure fairness when one party, typically a private party (often against the federal government), is seeking to reverse the judgment below, or where the agreement is on a jurisdictional issue which, by definition, cannot be waived. But there are dangers of appointing an amicus, particularly in constitutional challenges to statutes, and the Court should weigh them in deciding whether to appoint an amicus or find other means to resolve the case before it. The latter option may result in postponing a ruling on the legal issue presented, an option that should be particularly appealing when the question on which the parties agree is that a federal statute is unconstitutional.

About the Author

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The American Constitution Society (ACS) believes that law should be a force to improve the lives of all people. ACS works for positive change by shaping debate on vitally important legal and constitutional issues through development and promotion of high-impact ideas to opinion leaders and the media; by building networks of lawyers, law students, judges and policymakers dedicated to those ideas; and by countering the activist conservative legal movement that has sought to erode our enduring constitutional values. By bringing together powerful, relevant ideas and passionate, talented people, ACS makes a difference in the constitutional, legal and public policy debates that shape our democracy.

ADDENDUM

The twenty-five cases listed below, and summarized briefly, constitute the remainder of Professor Shaw's data set. They are listed in reverse chronological order and are grouped by the categories in the body of this Issue Brief. In each case, the Court invited an amicus, but not, in my judgment, because the parties agreed on a significant legal issue before the Court, and thus the case did not raise any Article III concerns. Of these appointments, only two were in cases decided after 1990, which is about the time when large law firms, hoping to expand their Supreme Court practices (and provide Supreme Court work for associates who had clerked on the Court) began looking for pro bono possibilities by seeking out unrepresented clients, which is one of the reasons for some of these amicus appointments.

Where the Court May Have Lacked Jurisdiction

Great West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204 (2002) (ERISA jurisdictional issue on which respondent's counsel submitted a brief not responsive to question presented).

United States v. Fausto, 484 U.S. 139 (1988) (amicus appointed for pro se plaintiff when government appealed ruling of no statutory jurisdictional bar to suit).

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) (respondent in jurisdictional dispute under Foreign Sovereign Immunities Act failed to file brief and Court appointed an amicus, who was also counsel for a similar defendant in another case, to argue for respondent).

To Protect the Interests of Those Not Represented

Levin v. United States, 586 U.S. 503 (2013) (counsel appointed to represent pro se petitioner in FTCA case).

Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989) (Court appointed an amicus when respondent did not appear to defend decision that federal patent law preempted Florida law providing added protection to inventors generally).

Mackey v. Lanier Collection, 486 U.S. 825 (1988) (validity of state garnishment statutes under ERISA, with amicus appointed when respondent did not appear).

Mathews v. Weber, 423 U.S. 261 (1976) (U.S. objected to reference of Social Security cases to magistrate as beyond statute; Court invited amicus to defend ruling below).

Kokoszka v. Belford, 417 U.S. 642 (1974) (amicus appointed to take side of *in forma pauperis* petitioner in bankruptcy case where issue was whether $250.90 tax refund was property of the estate).

Daniel v. Paul, 395 U.S. 298 (1969) (suit to enjoin respondent from denying African Americans admission to his recreational facility; amicus appointed when respondent did not file brief).

Commissioner v. Stidger, 386 U.S. 287 (1967) (pro se taxpayer respondents had amicus appointed to defend deductions by military officer for meals overseas).

United States v. Cores, 356 U.S. 405 (1958) (amicus appointed to defend favorable venue ruling in criminal case when respondent did not appear).

Sentencing Cases

Vermont v. Cox, 484 U.S. 173 (1987) (State objected to sentencing ruling in case in which Court appointed counsel for defendant as amicus, and then dismissed case as improvidently granted).

Open Procedural Questions

Int'l Union of Operating Eng'rs v. Flair Builders, Inc., 406 U.S. 487 (1972) (in litigation over whether a dispute under collective bargaining agreement was arbitrable, the Court invited attorney who represented respondent below to brief and argue the case as an amicus).

Myers v. United States, 272 U.S. 52 (1926) (lower court ruled against plaintiff on ground of laches, which U.S. conceded was incorrect; petitioner filed adequate merits brief, but Court appointed amicus for re-argument on the right of the president to remove principal officers without Senate consent as required by statute).

Constitutional Issues

New York v. Harris, 495 U.S. 14 (1990) (suppression of subsequent statement after arrest without warrant; counsel appointed after defense counsel did not file merits brief).

United States v. Halper, 490 U.S. 435 (1989) (counsel appointed when defense counsel in a civil penalty case did not file a brief on whether mandatory penalty of 220 times actual loss to U.S. of $585 violated double jeopardy).

O'Connor v. Ortega, 480 U.S. 709 (1987) (counsel appointed to defend Fourth Amendment rights of pro se public employee plaintiff).

Pennsylvania v. Ritchie, 480 U.S. 39 (1987) (counsel below was appointed as amicus to defend confrontation ruling favorable to defendant).

United States v. Sharpe, 470 U.S. 675 (1985) (after respondents became fugitives, court appointed their counsel as amicus to defend ruling below that short-term detention of respondents was unlawful).

Thigpen v. Roberts, 468 U.S. 27 (1984) (amicus appointed after respondent's counsel filed ten-page brief in case where defendant exercised right to de novo trial of misdemeanor conviction and prosecutor raised charges to felony).

Keeton v. Hustler Magazine, 465 U.S. 770 (1984) (shortly before oral argument, respondent Larry Flynt fired lawyer in order to argue himself; Court appointed counsel for existing amicus to argue for respondents in Due Process personal jurisdiction case).

Kolender v. Lawson, 461 U.S. 352 (1983) (Court appointed counsel for existing amicus to present oral argument when party wanted to argue pro se in case involving vagueness defense to loitering charge).

Lambert v. California, 355 U.S. 225 (1957) (amicus appointed to supplement work of initial counsel in Due Process challenge to state vagrancy registration statute).

Williams v. Georgia, 349 U.S. 375 (1955) (amicus appointed after petitioner's attorney filed 9-page brief in capital case in which state used different color paper to identify white and negro jurors).

Unconstitutionality of Statute

Brown v. Hartlage, 456 U.S. 45 (1982) (First Amendment challenge to election-related speech rejected below, and Court invited amicus to defend ruling when respondent did not file a brief on merits).