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When the Supreme Court Comes Calling: WilmerHale Partner Invited to Argue Next Term

When the U.S. Supreme Court agreed to review a Tenth Circuit decision, it had one problem: neither of the parties actually agreed with the circuit court's reasoning.

So the task of finding someone to defend the U.S. Court of Appeals for the Tenth Circuit's position fell to Justice Sonia Sotomayor, the circuit justice for the Tenth Circuit.

She landed on Wilmer Cutler Pickering Hale and Dorr LLP partner Catherine M.A. Carroll, Washington, to argue *Green v. Brennan*, *granted*, 83 U.S.L.W. 3819 (U.S. April 27, 2015) (No. 14-613).

But like so many other aspects of U.S. Supreme Court practice, how Sotomayor made her pick is cloaked in mystery.

Really Rare. Part of the reason we know so little about the process is because it happens so infrequently, Jeffrey A. Lamken of MoloLamken LLP, Washington, told Bloomberg BNA August 3.

There has been just under one appointment per term since the court began the practice in 1954, according to ''Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?,'' 63 Stan. L. Rev. 907 (2011).

While the court has already appointed two attorneys for the upcoming term—the court also appointed Willkie Farr & Gallagher LLP partner Richard D. Bernstein, Washington, to argue a jurisdictional issue in *Montgomery v. Louisiana*, *granted*, 83 U.S.L.W. 3742 (U.S. March 23, 2015) (No. 14-280)—it only appointed one the previous term, and none the term before that, research conducted by Bloomberg BNA revealed.

It's just a really rare case where neither of the parties will defend the judgment below, Lamken said.

With so few data points, it's hard to get a complete picture of the process, he added.

Who's Who. Just like so many other established Supreme Court ''rules,'' there isn't actually a written rule regarding high court appointments, Lamken said.

He pointed to the long-followed ''Rule of Four'' as another example. Under that rule, it takes four justices to agree to hear a case.

That's not an actual ''rule,'' Lamken said, but something the justices follow as a matter of practice.

With regard to Supreme Court appointments, when ''the Court wishes to appoint a member of the Bar to advocate in support of an otherwise-unrepresented view, the Circuit Justice for the court of appeals from which the case arises usually assumes responsibility for identifying the potential amicus and arranging the appointment,'' Carroll said in a July 30 e-mail.

Lamken said the nomination is then referred to the full court.

He said he doesn't know if any nomination has ever been rejected by the justices, but he expects not.

That's because the appointments list is a ''who's who'' of the Supreme Court bar, Lamken said.

He noted that the court has appointed would-be judges and a former solicitor general to argue cases.

Chief Justice John G. Roberts Jr. was himself appointed to argue a False Claims Act case in *United States v. Halper*, 488 U.S. 906 (1988).

Everyone wants to argue a Supreme Court case, Lamken—who has argued over 20 high court cases himself—said. So it's no surprise that even former solicitor generals offer to argue a case basically for free, he said.

Carroll noted that she and her firm are doing the *Green* case pro bono.

Though ''we are permitted to submit the invoice for the costs of printing the briefs to the Court for reimbursement,'' she said.

An appointed amicus is also ''entitled to be reimbursed for 'necessary travel expenses,' '' a leading Supreme Court treatise, Stephen M. Shapiro et al., Supreme Court Practice § 14.2 (10th ed. 2013), said.

Making a List? Lamken said an appointed attorney is often a former clerk of the circuit justice responsible for the initial nomination. There's a correlation, he said, but it's not always the case.

Here, Sotomayor appointed Carroll, who was a former clerk to retired Justice David H. Souter.

Lamken said he has no idea how Sotomayor got a hold of Carroll's name, except that she has a great reputation around Washington.

It's unlikely that the justices have a list of names for these appointments, Lamken said.

But one thing is for sure, he added: whomever the justices pick will be someone that they have extreme confidence in—both in their capabilities and in their integrity.

The Order. For Carroll, her official invitation to argue at the Supreme Court came in a July 28 order.

The one-paragraph order arose from an employment discrimination dispute involving the U.S. Postal Service.

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''Catherine M.A. Carroll, Esq., of Washington, D.C., is invited to brief and argue this case, as *amicus curiae*, in support of the judgment below,'' the order said.

Carroll told Bloomberg BNA she learned about the appointment before that though.

''The Circuit Justice's chambers reached out to us to ask whether we would be available and willing to accept the appointment,'' Carroll said. ''Once we confirmed that we were able to do so, the Court issued the order.''

Trouble Afoot. But the first hint that trouble was afoot in *Green* came long before that—when the petitioner, a Colorado postmaster that worked for the Postal Service for nearly 40 years, filed his original cert. petition.

The petition asked when the filing period for a constructive discharge claim begins to run—at the time the employee resigns or when the employer's last allegedly discriminatory act occurred.

A constructive discharge occurs when the employer's actions make the working environment so intolerable that the employee is essentially forced to resign.

''The federal government itself has provided conflicting answers to the question'' of when the limitations period is triggered, the petition said.

And when the government filed its brief in response, it didn't ''even attempt to defend the Tenth Circuit's ruling'' that the limitations is triggered upon the last discriminatory act, the petitioner's reply brief noted.

Instead, the government's brief argued that the Tenth Circuit's decision should be affirmed because the case was untimely even under the petitioner's requested rule.

Nevertheless, the Supreme Court granted cert., triggering the deadlines to file the parties' briefs on the merits.

But before those deadlines were up, Solicitor General Donald Verrilli Jr.—whose office represents all federal agencies before the Supreme Court—sent a letter to the clerk of the court, telling him that he would ''not defend the rationale of the court of appeals' decision.''

The Solicitor General would continue to defend the court of appeals' actual judgment dismissing the case, the letter said.

''Under the circumstances, the Court may wish to invite an amicus curiae'' to defend the Tenth Circuit's reasoning, the letter concluded.

That's just what the court did. On July 28, the Supreme Court entered the two-sentence order, inviting Carroll to brief and argue the Tenth Circuit's position.

That same day, the government filed its merits brief, agreeing with the petitioner that the limitations period doesn't begin to run until the employee gives notice. The parties, however, disagree about when that occurred in this case.

Carroll's brief is due in August.

By order of the court, she will argue that limitations period is triggered earlier—on the date of the employer's last allegedly discriminatory act.

BY KIMBERLY ROBINSON

The Supreme Court's order in Green v. Brennan *can be found here: http://pub.bna.com/lw/GreenOrder.pdf.*

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