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Justices listen to a key voice State solicitors general get more time in high court.

By Marcia Coyle
STAFF REPORTER

WASHINGTON—An excellent term for a U.S. Supreme Court advocate is victory in one of the most important cases on the docket. An extraordinary term is that victory plus an opportunity to argue—win or lose—in a second high-profile case. The excellent R. Ted Cruz of Texas is about to have an extraordinary term.

Cruz is not a member of the private Supreme Court bar, whose collection of quill pens and generally high fees reflect its members' considerable skills and successes before the justices. He is a state solicitor general, an office whose remarkable growth in the states in the past 10 years represents one of the most significant developments in appellate practices in the high court, as well as in other federal and state courts.

On March 25, the Supreme Court, in a 6-3 decision, ruled in favor of Texas, represented by Cruz, in *Medellin v. Texas*, No. 06-984, a death penalty case with major implications for international law, separation of powers and state criminal procedures. One week later, the high court granted Cruz's motion for argument time on April 16 as an amicus party in *Kennedy v. Louisiana*, No. 07-343.

The *Kennedy* case and *Baze v. Rees*, No. 07-5439, are two of the most important death penalty challenges to confront the justices in recent years. In *Kennedy*, the court will examine the scope of capital punishment by answering whether it is unconstitutional to impose a death sentence for a nonhomicide: aggravated rape of a child under 13. In *Baze*, which is pending decision, the justices will decide whether a particular manner of execution—Kentucky's three-drug protocol for lethal injection—passes constitutional muster.

In *Kennedy*, Cruz, representing nine states supporting Louisiana, will share argument time with Louisiana's counsel. It will be Cruz's eighth high court argument. They will face Jeffrey Fisher of Stanford Law School, who represents another remarkable development in Supreme Court practice: the increased number and participation of law school Supreme Court clinics.

Fisher, who co-chairs Stanford's clinic, will be making his third argument this year—one a month since February.

The Supreme Court rarely grants argument time to amicus parties. The exceptions are the solicitor general of the United States, who nearly always gets time when requested, and the states.

Cruz, who became Texas solicitor general in early 2003, and several of his counterparts in other states said there is no clear pattern as to when or why the justices give states argument time as an amicus party.

"If the United States is already there, they won't grant it," said Cruz. "The United States has been granted time even when a party to the case doesn't consent, but I'm not aware of states being granted time when parties don't consent. It's not clear why that's a sensible distinction. Beyond that, I have not been able to ascertain a clear pattern."

More active role

But there are cases in which the states are the most significant amicus on behalf of a party, and *Kennedy* may be one of those cases.

Cruz's amicus brief argues that the modern trend in the states favors the



A big year for
R. Ted Cruz,
Texas solicitor
general.

MARK MATSON

death penalty for child rape.

"The argument is there has been an evolving understanding in the states, consistently in the direction of recognizing the unique and irreparable harm visited on the child by rape," he said. "As a consequence, the modern trend is states providing for capital punishment for that crime."

Although there is no clear pattern to the justices granting states argument time, what is clear is that the high court has granted such time to them more often in recent years, said former Illinois Solicitor General Gary Feinerman,

partner in the Chicago office of Sidley Austin.

He noted key amicus arguments by former New York Solicitor General Caitlin Halligan, now head of the appellate practice at New York's Weil, Gotshal & Manges, in commerce clause and Native American cases; current New York Solicitor General Barbara Underwood in the major "Dr. Miles" antitrust challenge last term; and former Alabama Solicitor General Kevin Newsom, now co-chairman of the appellate practice group at Birmingham's Bradley Arant Rose & White, in a 2005 Title IX retaliation challenge.

"What this reflects, I think, is the more active role that the states are playing at the Supreme Court and also the enhanced respect that the states have earned from the court through their improved advocacy in the past years," said Feinerman.

And that is clearly due to the role of state solicitors general.

There are 35 attorney general offices, including the District of Columbia and Puerto Rico, that have solicitors general or someone with those responsibilities but a different title, said Dan Schweitzer, head of the Supreme Court Project in the National Association of Attorneys General (NAAG). The NAAG project works to improve state advocacy in the high court through moot courts, training opportunities and facilitation of amicus briefs.

"States are increasingly recognizing the importance of appellate practice and, perhaps more precisely, of making sure important appeals are handled by appellate experts," he said.

In fact, many lawyers holding the position now, as well as the initial crop a decade ago, are former Supreme Court clerks, such as Cruz, Feinerman and Newsom. New York's Underwood is a former acting solicitor general of the United States. Underwood's appointment, said many of her counterparts, was a "huge statement" on the position's importance.

The explosive growth in state solicitor general offices can be traced partly to former Ohio Solicitor General Jeffrey Sutton, also a former Supreme Court clerk who now is a federal appellate judge, said Cruz and others.

"Ohio became a national player at the U.S. Supreme Court," said Cruz. "Sutton perceived an interest of all states in articulating robust principles of federalism and he was successful. What one saw was a number of other state attorneys general looking around and thinking that works pretty well and they moved to replicate it."

Small and large players

The state offices vary in structure and number of lawyers. When he held the position in Alabama, Newsom said, he had only a criminal-side deputy and a civil-side deputy working with him.

"Basically, I tried to keep my eye on the big three courts: U.S. Supreme Court, 11th [U.S.] Circuit Court of Appeals and the Alabama Supreme Court," recalled Newsom. "Anything going on in intermediate state courts of appeals, unless a deputy said there was a reason to get involved, we didn't."

Texas's Cruz puts Alabama at one end of the of-

fice spectrum and New York and Illinois at the other end. Both of those two states have about 40 lawyers and handle every appeal, he noted.

Texas is in the middle of the spectrum with 14 lawyers, he said, and an office "very explicitly and quite shamelessly" modeled after the federal solicitor general's office. The office approves and supervises every appeal in the state and directly litigates about 5% of state appeals.

Ultimately, the position's success depends principally on support from their attorneys general, said Cruz. The Texas office was launched in 1999 by then Attorney General John Cornyn, who had been a state judge, as was his successor, current Attorney General Greg Abbott. Both men, he said, have an appreciation for constitutional law.

"Part of my mandate was to look across the U.S. Supreme Court docket and, if there were cases where we could make a significant impact and advance the state's interests, we were charged with doing so," Cruz said.

To that end, Cruz, son of a Cuban immigrant and a graduate of Harvard Law School, has filed more than 70 briefs in the high court. Among other cases, he has successfully defended a Ten Commandments monument in a First Amendment challenge and the state's controversial congressional redistricting plan, and he has led amicus efforts by the states in the Supreme Court's pledge of allegiance and Second Amendment cases.

Texas, Illinois, Ohio, California, New York and Virginia are the most active states in the high court today, according to NAAG's Schweitzer.

While the Supreme Court part of the practice is sexy and high-profile, Cruz and his counterparts said their state court litigation was a significant area in which they have had an impact.

"Exactly as the United States government is able to do over time in the Supreme Court, this position enables the state to develop a line of jurisprudence in the state supreme court," said Cruz.

"You're going to be up there over and over again. We have been quite successful in our state

supreme court on the issue of sovereign immunity. Going back to 1999, the office very systematically looked for good cases to take there and to build the doctrine to protect the state interest."

Missouri State Solicitor General James Layton, who is the longest-serving state "SG," agreed. "Most of these positions were created at a time when there was no centralized management of civil appeals in the offices of various attorneys general. That created problems with quality control, consistency of position and sophistication of argument. I honestly believe we have made a real impact, discernible to state supreme courts."

Missouri Supreme Court Justice William Ray Price Jr. said, "The role of the state solicitor is that, in the most important cases, the attorney general is providing to us a person who is familiar with the way the court addresses issues and provides reliable assistance, especially if that person holds the respect of the court."

But it is not a career job, tied as it is to the fate of an elected attorney general. Layton has served the longest because his attorney general is in his fourth term, which ends in January.

"Even though I could go out and make more money as a first-year associate, there's no place where I can go and have this quality of work on the appellate level every day," he said.

But it can be a career for the other lawyers in the office, noted Cruz, adding that he envisions twin tracks: lawyers who spend three to five years getting great experience, and lawyers who spend 20 or more years litigating the most important appeals.

As for Cruz, a former Bush administration Department of Justice and Federal Trade Commission attorney who also aided the Bush presidential effort in the 2000 Florida recount battle, he has been touted as a potential gubernatorial candidate, as well as a potential federal appellate judge.

"This has been a fabulous job and we'll see what the future brings," he said. Most immediately, that future includes a date with the Supreme Court. **NLJ**

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