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Book Review: Supreme Court Practice. by Robert L. Stern, Eugene Gressman, and Stephen M. Shapiro.

Barry Sullivan

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**SUPREME COURT PRACTICE.** By Robert L. Stern,<sup>1</sup> Eugene Gressman,<sup>2</sup> and Stephen M. Shapiro.<sup>3</sup> Washington, D.C.: The Bureau of National Affairs, Inc. 1986. Pp. xlvi, 1030. \$95.00.

*Barry Sullivan*<sup>4</sup>

In *The Meaning of Treason*, Dame Rebecca West describes the oral arguments given in the House of Lords in the post-war treason trial of William Joyce, a man better known as "Lord Haw Haw," the Third Reich's preeminent English-speaking propagandist. Dame Rebecca writes:

There in the House of Lords there was being given a performance far finer than the highest level of the proceedings in the Court of Appeal: as far superior to that, as that had been superior to the Old Bailey. When these four old Judges had a passage with counsel, it was as good as first-class tennis.<sup>5</sup>

In Supreme Court advocacy, as in first-class tennis, the outcome of the match depends greatly upon the preparation which precedes the event. Indeed, it is no mean achievement in Supreme Court practice merely to assure that the match is scheduled for play, because the path to the Supreme Court is beset with traps for the unwary, all of which must be successfully navigated if even the most important case is to reach the oral argument stage.<sup>6</sup>

For that reason, the authors' goal in *Supreme Court Practice* is the necessarily immodest one of "set[ting] forth in a single volume to the extent possible everything that a lawyer would want to know as to how to prosecute or defend a case in the Supreme Court." The extent to which the authors have met that goal in previous editions of this work has long made *Supreme Court Practice* indispensable to

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1. Member, Illinois bar.

2. William R. Kenan, Jr. Professor of Law, University of North Carolina, Chapel Hill.

3. Member, Illinois bar.

4. Member, Illinois bar. In the interest of full disclosure, the author of this review wishes to note that he served with Stephen Shapiro in the Office of the Solicitor General from March 1980 through December 1981. For the same reason, he also wishes to acknowledge that he was personally involved in four of the cases noted or discussed in this essay: Griffith v. Kentucky, 107 S. Ct. 708 (1987); Batson v. Kentucky, 106 S.Ct. 1712 (1986); Shapiro v. Drug Enforcement Admin., 721 F.2d 215 (7th Cir. 1983), *vacated*, 469 U.S. 14 (1984), *on remand*, 762 F.2d 611 (7th Cir. 1985); and United States Postal Serv. Bd. of Govs. v. Aikens, 453 U.S. 902 (1981).

5. R. WEST, *THE MEANING OF TREASON* 46 (1947). As the authors of *Supreme Court Practice* note, however, "some members of the Court have voiced increasing disappointment at the quality of some of the [oral] arguments that are being made."

6. See, e.g., *Donovan v. Richland County Ass'n*, 454 U.S. 389 (1982) (Secretary's appeal dismissed because appeal erroneously taken to court of appeals when Supreme Court had exclusive jurisdiction to review judgment entered by district court).

lawyers who practice before the Court. Indeed, it should be considered prima facie evidence of malpractice for any lawyer, no matter how experienced, to fail to consult this work when preparing a case for submission to the Supreme Court. The new edition, necessitated by the Court's wholesale revision of its Rules in 1980,<sup>7</sup> and by its evolving case law on procedural matters, carries forward that standard of excellence and indispensability.

The book contains essential information ranging from such practical matters as how to find the Clerk's Office to a rigorous scholarly analysis of the Court's certiorari and appellate jurisdictions. Particularly useful discussions concern the pitfalls that must be avoided when a case seems to fall within both the certiorari and appellate jurisdictions, when a case involves independent state grounds, or when opposing counsel has moved for summary affirmance. In addition, the book contains excellent discussions of issues hotly debated by the Justices, such as the practice of dissenting from denials of certiorari,<sup>8</sup> the significance that should be attributed to denials of certiorari, and the proper standard of poverty to be applied in evaluating applications for leave to proceed in forma pauperis. Finally, even when a subject does not warrant extensive treatment because, as in the case of oral argument, it is not peculiarly a matter of Supreme Court practice, the authors provide references to a well-chosen selection of the more general literature.

In sum, *Supreme Court Practice* continues to be invaluable. Not only is the treatment thorough and the advice sound, but the writing is elegant as well. This book easily can be read from cover to cover without any sense of boredom or loss of attention. Rather than attempting to survey the entire book, I will focus on one issue, which, from a practitioner's perspective, is crucial: how to influence the Court's decision to grant review in a case.

With respect to the Supreme Court's certiorari jurisdiction, for instance, it is well known that the Court does not sit to correct errors. The Court ordinarily will grant review only to resolve a settled pattern of conflict among the courts of appeals on an important

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7. Sup. Ct. R., 445 U.S. 983 (1980).

8. As the authors point out, Justice Stevens has strongly expressed the view that such dissents should be discouraged, particularly because they tend "to compromise the otherwise secret deliberations in our Conferences." *Singleton v. Commissioner*, 439 U.S. 940, 946 (1978) (Stevens, J.). Justice Brennan, on the other hand, has taken the view that such dissents serve the useful purpose of "herald[ing] the appearance on the horizon of a possible reexamination of what may seem . . . to be an established and unimpeachable principle." Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 480 (1973). A particularly interesting pair of opinions on the denial of a petition for a writ of certiorari is to be found in *McCray v. New York*, 461 U.S. 961 (1983). Cf. *Batson*, 106 S.Ct. 1712 (1986).

question of federal law. Indeed, even in cases clearly involving important questions of federal law, the Court will sometimes permit a persistent conflict to remain unresolved for several years, presumably to permit a fuller development of the law in the lower federal courts.<sup>9</sup> My impression, like that of the authors, is that the mere existence of a conflict does not carry the weight that it once did. With the recent, explosive growth in statutory enactments and federal appellate case law, the Supreme Court seems increasingly willing to tolerate intercircuit conflicts that clearly would have warranted review only a few years ago. Thus, the intrinsic importance of the issue presented has taken on increasing significance in the Court's decision-making process.

Given the staggering volume of petitions and jurisdictional statements that are now filed each Term,<sup>10</sup> the Justices can be expected to spend no more than an average of five minutes on each set of papers. As Justice Harlan once observed, "[f]requently the question whether a case is 'certworthy' is more a matter of 'feel' than of precisely ascertainable rules."<sup>11</sup> Nonetheless, some guidance can be gleaned from the Justices' unofficial writings on the subject, which the authors thoroughly canvass. In this instance, the fishes talk, and only a fool would bait the hook before listening carefully to what they have to say.

In all of this excellent book, there is only one area that might profit from greater attention: the special problems presented in litigating against the government at the petition stage. In Supreme Court litigation, as elsewhere, the words of the scriptures ring true: "For everything there is a season." New Supreme Court decisions and new legislation beget further unresolved constitutional and legal questions that begin to be litigated in various courts throughout the country, and then work their way up through the system. Because many cases are proceeding to the Supreme Court at various speeds along parallel tracks, timing is important.<sup>12</sup> Notwithstand-

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9. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (resolving long-standing conflict concerning so-called "control group test" for attorney-client privilege).

10. As the authors correctly note, the raw numbers are somewhat deceptive because the vast majority of cases filed in the Court are not even serious contenders for Supreme Court review. Justice Brennan has observed that "the Court is unanimously of the view in 70 percent of all docketed cases, that the questions sought to be reviewed do not even merit conference discussion." Brennan, *supra* note 8, at 479.

11. Harlan, *Manning the Dikes*, 13 REC. A.B. CITY N.Y. 541, 549 (1958).

12. The outcome of the race to the Supreme Court may have substantial consequences for the particular parties involved. In the past, these consequences have been most dramatic where the Court has been asked to articulate a new principle of constitutional criminal procedure, which may or may not be applied to other cases pending on direct appeal at the time the new rule is announced. See, e.g., *Shea v. Louisiana*, 470 U.S. 51 (1985); *Mackey v. United States*, 401 U.S. 667, 675 (1971) (Harlan, J., concurring); *Desist v. United States*, 394 U.S.

ing the role of fortuity in this process, the Solicitor General's rate of success in securing Supreme Court review continues to be overwhelming, as the authors note. Because of the large volume of cases from which the Solicitor General may pick and choose, and the deference that the Court traditionally has given to the views of the Solicitor General,<sup>13</sup> litigating against the government at the petition stage presents some particularly challenging problems.

Although I have not made any systematic study of these problems, I did come face-to-face with them in a case I handled three years ago. In early 1984, I was attempting, despite the strong opposition of the Solicitor General, to secure Supreme Court review for my clients in *Shapiro v. Drug Enforcement Administration*.<sup>14</sup> Although the Solicitor General conceded that the issue warranted Supreme Court review, he wished to have the issue decided by the Court in another case, *United States Department of Justice v. Provenzano*,<sup>15</sup> which he doubtless believed to present the issue in a factual context more favorable to the government's position.

The events leading up to my contest with the Solicitor General actually began in late 1981. The Reagan Administration, in a brief filed in the District of Columbia Circuit in *Greentree v. United States Customs Service*,<sup>16</sup> altered the government's long-standing litigating position concerning the proper relationship of the Privacy Act<sup>17</sup> and the Freedom of Information Act,<sup>18</sup> so as to limit severely the disclosure rights of so-called "first-party requesters"—persons

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244, 256 (1969) (Harlan, J., dissenting). The Supreme Court has recently simplified the law in this area by repudiating the so-called "clear break" exception to retroactivity. See *Griffith*, 107 S.Ct. 708 (1987). In the future, the most serious consequences apparently will befall the premature, rather than the tardy, that is, the defendant who files an unsuccessful petition for certiorari before the Court is ready to decide the question presented, and who will therefore have passed beyond the direct appeal stage at the time the new rule is announced. See *Allen v. Hardy*, 106 S. Ct. 2878 (1986). Given the need for compliance with the Court's jurisdictional time limitations, that is a circumstance over which counsel will have little, if any, control in most cases.

13. See, e.g., *Aikens*, 453 U.S. at 906 (Marshall, J., dissenting):

I am at a loss to understand this disposition, as I suspect the Court of Appeals will be. Perhaps it reflects the pressures of the end of the Term, or an excessive deference to the views of the Solicitor General, or a desire for an easy, temporary solution to a potentially troublesome issue.

Cf. *United States Postal Serv. Bd. of Govs. v. Aikens*, 460 U.S. 711 (1983).

14. 721 F.2d 215 (7th Cir. 1983).

15. 717 F.2d 799 (3d Cir.), *reh. denied*, 722 F.2d 36 (3d Cir. 1983), *vacated*, 469 U.S. 14 (1984). A detailed discussion of the legal issue involved in the *Shapiro* and *Provenzano* cases is not warranted here, but that issue was the subject of contemporaneous comment in numerous legal periodicals. See, e.g., Note, *Administrative Law—Privacy Act Exemption (j)(2) Does Not Specifically Preclude Disclosure of Information Within Meaning of Exemption (3) of the Freedom of Information Act*, 56 TEMP. L.Q. 127 (1983).

16. 674 F.2d 74 (D.C. Cir. 1982).

17. 5 U.S.C. § 552 (1980), *amended by* 5 U.S.C. § 552 (1982 & Supp. 1985).

18. 5 U.S.C. § 522a (1980), *amended by* 5 U.S.C. § 522a (1982 & Supp. 1985).

seeking disclosure of government information about themselves. Previously, the government had taken the view that the disclosure rights afforded by the two statutes were complementary and cumulative. In late 1981, however, the government adopted the position that the Privacy Act was the sole means by which persons could secure information about themselves. Hence, they had no right to disclosure under the Freedom of Information Act. Since the Privacy Act contained exemptions from disclosure that were far broader than those contained in the Freedom of Information Act, information that was available to third parties under the Freedom of Information Act would no longer be available to the subjects themselves under the government's new construction of the two statutes.

In March 1982, the District of Columbia Circuit decided the *Greentree* case, rejecting the government's new position in a lengthy opinion by Chief Judge Wald.<sup>19</sup> Despite the conflict in the circuits created by the decision in *Greentree*, the government did not file a petition for a writ of certiorari. Presumably, the government hoped to enhance the likelihood of ultimately prevailing in the Supreme Court by convincing another circuit to rule in its favor, but based on a more defensible line of legal analysis than that employed in the two poorly reasoned cases that already favored the government.<sup>20</sup> After *Greentree*, the government therefore continued to deny disclosure to first-party requesters and to litigate the issue in the lower federal courts.

The next relevant development occurred on September 15, 1983, when the Third Circuit decided two cases in which district courts in New Jersey and Pennsylvania had upheld the government's new position. In *Porter v. United States Department of Justice*,<sup>21</sup> which the Third Circuit treated as the lead case, the plaintiffs were a professor at Bryn Mawr College, and her husband, both of whom had been targets of FBI surveillance because of their political activities. They were represented by Raymond J. Bradley, a leading Philadelphia lawyer and a partner in the firm of Wolf, Block, Schorr & Solis-Cohen. In a lengthy and well-reasoned opinion, the Third Circuit panel unanimously rejected the government's new position and decided to stand with the District of Columbia Circuit. The government neither petitioned for rehearing nor filed a petition for a writ of certiorari in *Porter*.

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19. *Greentree*, 674 F.2d at 88-89.

20. *Terkel v. Kelly*, 599 F.2d 214 (7th Cir. 1979), cert. denied, 444 U.S. 1013 (1980); *Painter v. FBI*, 615 F.2d 689 (5th Cir. 1980).

21. 717 F.2d 787 (3d Cir. 1983).

In the companion case, *Provenzano v. United States Department of Justice*,<sup>22</sup> which had been argued orally in tandem with *Porter*, the plaintiff was a federal prisoner and reputedly a high-ranking New Jersey mobster. He was represented by Harvey Weissbard, who practiced with a two-person law firm in West Orange, New Jersey. The Third Circuit panel rested on its opinion in *Porter* and disposed of the *Provenzano* case in a per curiam opinion which covers less than half a page in the Federal Reporter.

The government decided to petition for rehearing en banc only in *Provenzano*. Obviously, the government believed that the *Provenzano* facts were stronger. In addition, by jettisoning the *Porter* case, the government was also ridding itself of a formidable adversary in the person of Mr. Bradley.

The government's strategy was not successful with the en banc court, which denied the petition for rehearing on November 10, 1983, by a vote of seven to four.<sup>23</sup> However, Judge Adams, in his dissent from the denial of rehearing en banc, ran with the government's ball. He criticized the court for requiring FBI records to be turned over to "Anthony Provenzano, who has a host of serious convictions on his record and who admittedly has been involved in organized crime."<sup>24</sup> Presumably, Judge Adams's rhetoric would have been different if he had had to deal with Professor Porter's case as well as Mr. Provenzano's.

On September 16, 1983, the day following the announcement of the Third Circuit's panel opinions in *Porter* and *Provenzano*, the Seventh Circuit heard oral argument in *Shapiro v. Drug Enforcement Administration*.<sup>25</sup> The plaintiffs, Gregory Wentz and Alfred Shapiro, had been convicted of federal drug offenses, but neither of them had an extensive criminal record. I represented Mr. Shapiro and Mr. Wentz as court-appointed counsel.

On November 16, 1983, six days after the Third Circuit had denied the government's petition for rehearing in *Provenzano*, the Seventh Circuit ruled against us, rejecting the reasoning in *Greentree* and *Porter*, and reaffirming a prior Seventh Circuit holding.

At that point, the race was on. It seemed to me a virtual certainty that certiorari would be granted in either *Provenzano* or *Shapiro*, while the other case would probably be held on the Court's docket for later summary disposition. Needless to say, I hoped that *Shapiro* would be the case chosen for plenary review. Objectively,

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22. 717 F.2d 799 (3d Cir. 1983).

23. *Provenzano*, 722 F.2d at 36.

24. *Id.*

25. 721 F.2d 215 (7th Cir. 1983).

my clients were more attractive plaintiffs than Mr. Provenzano. In addition, the issue presented involved extremely complex questions of statutory construction. The resources of a large firm would be useful in preparing the case. From a subjective standpoint, my clients obviously did not relish the possibility of having their fates decided in a case in which they were not parties. The government, as soon became obvious, desperately wanted the Supreme Court to decide the issue only in the context of Mr. Provenzano's case.<sup>26</sup>

Prior to filing a petition for a writ of certiorari, a number of recommendations generally are assembled and reviewed by the Solicitor General and his staff. The government's decision to seek Supreme Court review is a bureaucratic decision which ordinarily requires time. Thus, despite the fact that the Third Circuit's denial of rehearing en banc had been issued six days before the Seventh Circuit's decision in *Shapiro*, it seemed likely that we could get our petition on file first. If that happened, we thought that the Court might grant our petition and hold *Provenzano*, or, at least, grant the petitions in both cases and consolidate them for oral argument.

On December 6, 1983, we filed our petition for a writ of certiorari in *Shapiro*. Nine days later, on December 15, I wrote to the Solicitor General to suggest that the government acquiesce in the granting of certiorari in *Shapiro*. On December 27, an assistant to the Solicitor General responded to my letter. He stated:

We agree that there is a clear conflict among the circuits on the question whether the Privacy Act is an Exemption 3 statute and that the question deserves Supreme Court resolution. The Solicitor General therefore has authorized the filing of a petition for a writ of certiorari in *Provenzano* (a copy of that petition is enclosed). We also are currently considering the appropriate response to the *Shapiro* petition and expect to file it shortly.<sup>27</sup>

Acting with exceptional speed, the government had filed its petition in *Provenzano* four days earlier, on December 23. In January, Mr. Provenzano waived the right to file a response, but the Court subsequently ordered that a response be filed by March 1, 1984.

In the meantime, and contrary to the Solicitor General's letter of December 27, the government decided to delay filing its response to the *Shapiro* petition. On January 4, 1984, the Solicitor General requested a thirty-day extension of time to file his brief in opposition. This extension was necessary, the Solicitor General asserted,

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26. At some point, the Civil Division attorney handling both cases suggested that I disqualify myself from representing Mr. Shapiro and Mr. Wentz because of my prior employment with the Department of Justice. Since there was no statutory or ethical ground for disqualification, I refused to do so, and the suggestion was thereafter dropped.

27. Letter from Elliott Schulder, Assistant to the Solicitor General to Barry Sullivan (Dec. 27, 1983).



"because government counsel with primary responsibility for preparing the government's response have been occupied with preparing other previously assigned matters."<sup>28</sup> As with virtually all first requests for an extension of time in which to file a brief in opposition, the government's application was granted.

On February 3, the government requested a second extension of time to March 9, this time "because the nature of our response in this case may depend on the substance of the response to our petition in *Provenzano*,"<sup>29</sup> the latter being due for filing on March 1. The government's second application was also granted.

When, on March 9, the Solicitor General finally filed his three-page response to the petition in *Shapiro*, he recited the procedural history of the case in the lower courts, restated the question presented, and then stated:

We agree with petitioners that this question, as to which there is a conflict among the circuits, warrants review by this Court. We therefore have filed a petition for a writ of certiorari seeking review of this question in *United States Department of Justice v. Provenzano*, No. 83-1045. Accordingly, we suggest that the Court defer disposition of the instant petition pending its disposition of our petition in *Provenzano*.<sup>30</sup>

Since there was no obvious or compelling reason for the Court to defer to the government's request that plenary review be granted in *Provenzano*, rather than in *Shapiro* (which had been filed first), the Solicitor General suggested in a footnote that "there is some question whether one of [the two] petitioners is entitled to proceed *in forma pauperis*," and that "[a]ny uncertainty regarding [his] right to proceed *in forma pauperis* should be clarified while the issue common to these cases is resolved in *Provenzano*."<sup>31</sup> There was in fact little, if any, good faith basis for questioning Mr. Shapiro's entitlement to proceed *in forma pauperis*, but the government's ploy was a good one in view of the Supreme Court's then-recent expressions of concern about parties who had improperly sought to proceed as paupers.<sup>32</sup>

We deemed it necessary to file a speedy and hard-hitting reply, which we did three days later. With respect to the government's *in forma pauperis* argument, we made two points. First, we pointed

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28. Letter from Hon. Rex E. Lee, Solicitor General of the United States to Hon. Alexander Stevas, Clerk, Supreme Court of the United States (Jan. 4, 1984).

29. Letter from Hon. Rex E. Lee, Solicitor General of the United States to Hon. Alexander Stevas, Clerk, Supreme Court of the United States (Feb. 3, 1984).

30. Memorandum for the Respondent at 2-3 (No. 83-5878) (filed March 9, 1984) (footnotes omitted).

31. *Id.* at 3 n.2.

32. See, e.g., *Brown v. Herald Co.*, 464 U.S. 928 (1983); *Garcia v. United States*, 462 U.S. 1116 (1983).

out that the government had raised no question with respect to Mr. Wentz's entitlement to proceed in forma pauperis.<sup>33</sup> We then noted that Mr. Shapiro's affidavit established that his total assets, at the time the petition was filed, consisted of \$314. We argued: "It is manifest that Mr. Shapiro, who had only recently been released from custody [when the petition was filed], could not have paid for the printing of his petition, let alone the docketing fee."<sup>34</sup>

Second, we questioned why the government had delayed in raising the issue until after the petition in *Provenzano* had been fully briefed and was ready for conference. We noted that the government had offered no explanation as to "why it was necessary to take 90 days to raise this question [of Mr. Shapiro's entitlement to proceed in forma pauperis], which is admittedly the only issue raised in its memorandum."<sup>35</sup> We also noted that although petitioners' counsel "has had several telephone conversations with government counsel [in the ninety days following the filing of the petition in *Shapiro*], the alleged issue of Mr. Shapiro's entitlement to proceed in forma pauperis has never been raised prior to the filing of the government's memorandum."<sup>36</sup>

On March 13, I telephoned the Clerk's Office to find out whether the petitions in *Provenzano* and *Shapiro* had been scheduled for conference.<sup>37</sup> I then learned that the government's strategy had worked. The Chief Deputy Clerk told me that *Provenzano* had

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33. Petitioners' Reply Memorandum at 2-3 (No. 83-5878) (filed March 12, 1984). We also argued: "While asking that the Court give preference to the government's petition in *Provenzano*, the Solicitor General does not point to a single substantive or procedural difference between the two cases to suggest that *Provenzano* might be a better vehicle for Supreme Court review." *Id.* at 2.

34. *Id.* at 3 (footnote omitted). In a footnote, we further developed the point: The government asserts . . . that Mr. Shapiro should not be allowed to proceed in forma pauperis because he currently earns \$1500 per month. To make this gross monthly income sound more substantial, the government assumes that Mr. Shapiro will continue to be employed at this amount, and thus states that Mr. Shapiro earns \$18,000 per year. Even assuming Mr. Shapiro's continued employment and salary, the import of the government's argument is that Mr. Shapiro—who is being represented by court-appointed counsel, has virtually no assets, and has two children to support—should not be allowed to vindicate his rights unless he is willing to devote an amount equal to perhaps two or three months' gross income to the payment of the costs that would necessarily be incurred in the printing of briefs in this case. How Mr. Shapiro, with virtually no assets to begin with, is to accumulate that surplus in time to pay his printing bills is a question that remains unanswered in the government's footnote.

*Id.* at 3 n.2.

35. *Id.* at 3 (footnote omitted).

36. *Id.* at 3 n.3.

37. Although parties are not notified that their case has been scheduled for conference, the Clerk's Office will provide that information when requested by telephone. In circumstances such as those described here, that information may be very useful and obviously should be requested.

been scheduled for conference on Friday, March 23, but that no conference date had been set in *Shapiro*. I attempted to explain the circumstances to the Chief Deputy Clerk, but he told me that there was nothing he or I could do. I decided to write a letter to the Clerk of the Court, which I sent by messenger that evening. In my letter, a copy of which was sent to the Solicitor General, I stated the following:

In his request for a second extension of time, the Solicitor General stated that the captioned matter "would not be scheduled for argument this Term in any event," thus suggesting that petitioners in the captioned matter would not be prejudiced by the granting of his request. It now appears, however, that petitioners have indeed been prejudiced in that the granting of the Solicitor General's request has delayed the scheduling of the conference in the captioned matter (and has effectively reversed the filing order of the two cases), since the *Provenzano* case appears to be scheduled for conference on March 23, whereas the captioned matter has not yet been scheduled for conference.<sup>38</sup>

After stating my concern that these developments might well preclude Mr. Wentz and Mr. Shapiro from presenting their arguments to the Court, I suggested that, "as a matter of judicial economy, it seems highly desirable that two cases involving identical issues should be considered together at the same conference, so that the Court may decide whether to grant one or both of the petitions with the full benefit of both sets of briefs."<sup>39</sup>

When I telephoned the Clerk's office two days later, I was advised that the Clerk had circulated my letter to the Justices. On March 26, when the Court announced the actions taken at its March 23 conference, the conference at which the *Provenzano* case was to have been discussed, I learned that no action had been taken in either case. On April 2, orders were entered granting both petitions, consolidating the cases for oral argument, and granting the applications of both Mr. Shapiro and Mr. Wentz for leave to proceed in forma pauperis.<sup>40</sup>

As this all-too-protracted illustration may suggest, there are

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38. Letter from Barry Sullivan to Hon. Alexander Stevas, Clerk, Supreme Court of the United States, (Mar. 13, 1984).

39. *Id.*

40. 466 U.S. 926 (1984). Eventually, both cases became moot. See *United States Department of Justice v. Provenzano*, 469 U.S. 14 (1984), when Congress, shortly before the cases were to be argued orally, enacted a "clarifying amendment" to the Privacy Act, providing that "[n]o agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title." 5 U.S.C. § 552a(q)(2) (Supp. III 1985). The purpose of this clarifying amendment, which confirmed the correctness of the *Porter* and *Greentree* decisions, was "specifically [to] reject[] the interpretation set forth in the decisions of the Fifth and Seventh Circuits" and "to clarify and restore the law on this point." H.R. Rep. No. 98-726, 98th Cong., 2d Sess., pt. 2, at 14 (1984).

some telling points to be made about litigating against the government at the petition stage. First, the government has a great deal of capital with the Court. Because of the Solicitor General's traditional role as counsel, not just for a client agency, but for the United States itself,<sup>41</sup> the Solicitor General's views carry a great deal of weight with the Court. Indeed, who but the Solicitor General would have dared to suggest to the Supreme Court that review should be granted in *Provenzano*, and not in *Shapiro*, on grounds which amounted to nothing more than a naked, unexplained preference for the *Provenzano* case? Second, the Solicitor General is not at all shy in trading on his capital with the Court if that will assist him in achieving the government's tactical goals. In the *Shapiro* case, the Solicitor General clearly was using his special relationship with the Supreme Court to manipulate the Justices into taking the course which he preferred. Third, the government can be stopped in its tracks. The Court can be persuaded that the government is abusing its trust.

I do not mean to pass judgment on the ethical questions raised by this illustration but I do suggest that they require a great deal of expertise and tenacity on the part of counsel litigating against the government at the petition stage. The account I have given is necessarily anecdotal, rather than systematic. However, I do believe that this account gives some sense of the practical problems typically faced by private counsel.

With their knowledge and experience, the authors' views on this subject would undoubtedly be of great assistance to the practicing bar. In suggesting that this subject may be an appropriate one for inclusion in future editions of *Supreme Court Practice*, a suggestion which is admittedly a minor one (particularly when viewed against the grandeur of the authors' overall accomplishment), I mean to suggest only a small area of improvement in an already exceptional and indispensable work. Suffice it to say that my admiration for the current edition is great and unqualified.

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41. See, e.g., Griswold, *The Office of the Solicitor General—Representing the Interests of the United States Before the Supreme Court*, 34 MO. L. REV. 527 (1969); McCree, *The Solicitor General and His Client*, 59 WASH. U.L.Q. 337 (1981).