Combative Supreme Court Brief Gets Personal with Trump (Corrected)

Kimberly Strawbridge Robinson

November 29, 2018

A high court challenge to President Donald Trump's acting attorney general appointment equates the president to King George III and accuses the Solicitor General's Office of misleading the court with "inaugural-crowd-level math."

Veteran Supreme Court litigator Thomas C. Goldstein, of Goldstein and Russell, Bethesda, Md., filed the unusually no-holds-barred reply brief in relation to a motion to substitute Deputy Attorney General Rod Rosenstein for Matthew Whitaker as the acting attorney general.

High court briefs with strong language may gain attention from a wider audience, but they likely won't change the outcome of the case, a high court watcher told Bloomberg Law.

The motion claims Whitaker's appointment violates the Attorney General Succession Act. Other challenges to Whitaker's appointment have also been filed in lower federal courts.

"This is a constitutional crisis," the brief begins.

The brief claims that Trump "hand-picked" Whitaker to curtail the special counsel investigation into his campaign's potential collusion with Russia to sway the 2016 presidential election. It says the president has "gone well past disheartening tweets. This is a power grab."

"Yes, the Court can blink at that reality, decline to act, and move on," the brief says. "But history will regret that it did."

At the Margins

It's not unusual to see strong, evocative, or memorable language in Supreme Court briefs, Ilya Shapiro, of the Cato Institute, Washington, told Bloomberg Law.

Shapiro has filed more than 300 friend-of-the-court briefs in the Supreme Court on behalf of Cato, a libertarian think tank.

Shapiro said Cato will often file briefs aimed at a larger audience beyond just the justices and their clerks to the media, public, and even potential sponsors. They do that "by using clear, sometimes punchy language," and on occasion have filed "funny briefs" that "dial up the the satire" in order to broaden their readership.

Here, though, it isn't an amicus using that kind of language, but rather a party, Shapiro noted. Still, it probably has the same intent of reaching a broader audience, he said.

"At the margins," the motion itself could make it less likely that the court agrees to hear the case, which is on a wholly different issue—to avoid having to rule on the motion, Shapiro said. Some justices and their clerks may be rolling their eyes—or nodding their heads—at some of the phrases in the brief, he said.

But ultimately, "the court is going to do what's it's going to do" on the motion regardless of the strong language, Shapiro said.

The motion hasn't yet been set for consideration by the justices.

The case is Michaels v. Whitaker, U.S., No. 18-496, filed 11/28/18.