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Low-Key Supreme Court Litigator Wins High-Profile Case

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WASHINGTON — Roy T. Englert Jr. is by his own admission a "risk-averse stick in the mud."

But in May 2001, at age 42, Englert decided to take a big gamble, along with four other partners in the Washington, D.C., office of Chicago's Mayer, Brown & Platt. The lawyers left the security of the firm's highly regarded Supreme Court and appellate litigation practice section to start their own firm.

"I was very happy and well-treated, but I was approached by people with a vision for a smaller firm," the unassuming Englert recalled. "It was a painful choice because either way I would lose some colleagues I didn't want to lose."

"But while it was risky and new, I felt I was young enough to give it a try," he added. "And there is more freedom in a small firm and something exciting about it, so I said, 'Why not?'"

Englert is thriving at Robbins, Russell, Englert, Orseck & Untereiner. The firm has six partners, one associate and one counsel, and its revenues topped $4.5 million last year.

Among other things, Englert enjoys being able to continue arguing and working on Supreme Court cases — he made his 13th argument last December — and to pursue his interest in antitrust issues.

Englert's most recent high court appearance was notable because he got the assignment only eight days before the argument and had to squeeze his regular preparation into a very small time frame.

The firm represents the anti-abortion defendants who prevailed in *Scheidler v. National Organization for Women Inc.,* 2003 DJDAR 2087 (U.S. Feb. 26, 2003).

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Roy T. Englert Jr.
Robbins Russell

The justices Wednesday, reviewing a decision by the Chicago-based 7th U.S. Circuit Court of Appeals, by an 8-1 vote ruled that abortion-rights plaintiffs may not use the federal Racketeer Influenced and Corrupt Organizations Act, with its treble damages, against abortion protesters who try to shut down clinics. The justices ruled that the protesters conduct did not constitute extortion.

RICO requires a predicate act, the circuit noted, and in this case, it approved "extortion" under the Hobbs Act.

Englert had "kibitzed a little" on the petition for review, but partner Alan Untereiner was handling the case.

"The clients decided very late in the game that they wanted someone more experienced than Alan [with one prior high court argument] to argue the case," Englert said. "He asked me, and I said yes — at 5 p.m. on the Tuesday before Thanksgiving [with the argument the following Wednesday]."

"So I sat with all the papers in a back conference room, emerging only long enough to eat and sleep," Englert recalled. "And I did a moot court in our conference room on that Monday morning."

Englert gave a workmanlike performance with only one glitch, his inability to answer Justice John Paul Stevens' question about an 1892 case dealing with extortion. But he recovered on rebuttal, after Untereiner had filled him in on the precedent.

"It was possible for me to learn what I needed to know to argue the case," Englert said, "but not possible to know 16 years of litigation in the case and 100 years of precedent."

"You don't need that [knowledge] to succeed in the Supreme Court," he added. "You need judgment as to what matters to the justices and what doesn't, and the client thought I had that."

Englert's ability to handle such tough assignments is not surprising to those who know him.

"Roy is very cool and unflappable," said Stephen M. Shapiro, founder and senior

member of the Supreme Court and appellate litigation practice in the Chicago office of Englert's old firm, now known as Mayer, Brown, Rowe & Maw.

"He doesn't get rattled during arguments and doesn't get thrown off target," Shapiro added.

Stephen P. Sawyer, assistant general counsel of United Airlines in Chicago, praised Englert.

"[He gives] on-the-spot efficient and substantial advice that I have always found to be sound advice," Sawyer said.

"He's very responsive, very analytical and very pragmatic," he added.

Englert's ability as a quick study should not be surprising. The native of Virginia's suburbs near Washington, D.C., graduated in 1978 from Princeton University — at age 19.

He intended to pursue a career in mathematics.

"But I was the dumbest person in the math department," he said with a laugh.

"I didn't want to go to work, and my father [a lawyer] encouraged me to take the LSAT," he added.

Englert got "a perfect score" in the test and went to Harvard Law School, graduating cum laude in 1981. He also served as executive editor of the Harvard Law Review.

Next came a clerkship on the U.S. Circuit Court of Appeals for the District of Columbia.

"I was a court law clerk, a job they don't have anymore, working for all the judges," Englert said. "But I worked most often for [now Supreme Court Justice] Ruth Bader Ginsburg."

Ginsburg, who invites Englert to her annual clerk reunions, sent him a congratulatory note for winning two cases in the 1998-99 term. Englert displays the memento on a wall of his bright corner office with a view of downtown Washington, D.C.

Englert began practicing in 1982, with Washington, D.C.'s Wilmer, Cutler & Pickering, where he worked mainly on antitrust matters. In November 1983, he moved to the firm's London office for a year, working on the European Union's antitrust case against IBM Corp. and British airline rebel Freddie Laker's suit against the major airlines.

His litigation experience included two trials, but in 1986, Englert got the chance to be an appellate lawyer in the major leagues, as an assistant U.S. solicitor general.

Representing the federal government before the Supreme Court provided "incredible training," Englert said.

"It was a radical change of focus," he added. "I had done very little Supreme Court work, and then it became predominantly Supreme Court work, and I have been doing that mainly since."

During his three years in the solicitor general's office, Englert argued eight cases before the justices, five of them criminal.

"But I also got to do the fun part of antitrust, a civil appeal," he said.

Like almost every other lawyer, Englert clearly remembers his first Supreme Court argument.

"It was a completely trivial case" on a narrow Fourth Amendment search issues, he said.

He won it 7-2, Englert said, referring to *United States v. Dunn*, 480 U.S. 294 (1987).

"I was surprised at how unnervous I was," he said. "The physical setup of the Supreme Court is more conducive to putting counsel at ease than any other court."

"The justices are not high up, and you are close to the bench, so you are not distracted by who else is in the courtroom," Englert added.

Despite all the allure of the job, Englert left the solicitor general's office in 1989.

My peers were becoming partners in big firms, and it was hard for my mind not to wander, especially when you feel your future is in private practice," he said.

"Also, [Solicitor General] Charles Fried was leaving, and it took long time for the Bush administration to name Ken Starr to the job, and I got restless," he added.

Englert considered returning to Wilmer Cutler, but they didn't have an appellate practice section at the time.

Three years earlier, however, three lawyers in the solicitor general's office had left to set up a Supreme Court and appellate practice in Mayer Brown's Washington, D.C., office.

One of them, Andrew Frey, "told me that the practice was successful and expansion-minded, and that was very attractive to me," Englert said.

He spent two years as an associate and 10 years as a partner at Mayer Brown as part of the firm's appellate and antitrust practices, including trying an antitrust case in 1991 in Los Angeles before U.S. District Judge Mariana R. Pfaelzer (he lost) and the appeal before the 9th Circuit (he won).

"Mayer Brown is a great law firm in all sorts of ways," Englert said. "Their appellate practice continues to be a success and has many imitators, along with other firms who were in there early."

Englert realized that breaking away to start a new firm was a big gamble.

"But there was some reason to believe that some clients would follow us, and Larry Robbins is a great business developer," Englert said. "We had talent and someone to sell it, so we had a good chance to make a go of it."

Among the Mayer Brown clients providing work to the new firm are BellSouth Corp., Ernst & Young and United and Northwest airlines.

"[These clients] continue to use Mayer Brown, but they also send us some work, and sometimes Mayer Brown and we work together," Englert said. "We have a friendly and generally successful relationship."

Robbins Russell's corporate clients also include Napster, Echostar and Amtrak. And after the firm's victory in *Barnes v. Gorman*, 122 S.Ct. 2097 (2002), the firm has attracted some noncorporate clients — municipalities.

In *Barnes*, argued by Lawrence Robbins, the justices held unanimously that punitive damages may not be assessed under the American with Disabilities Act. The decision overturned the award of such damages against Kansas City police officers in a suit by a paraplegic arrestee who claimed he was injured while being transported to a police station in a van not equipped to handle disabled people.

The firm then was hired by the city of Oxnard and police Sgt. Ben Chavez to urge the justices to overturn a 9th Circuit decision against them. The circuit had held that Chavez could be sued for damages for violating the Fifth Amendment rights of a farmworker whom he grilled for 45 minutes without a *Miranda* warning as the man lay severely wounded in an ambulance and a hospital emergency room. *Chavez v. Martinez* 2002 DJDAR 6137 (U.S., cert. granted June 3, 2002).

Robbins argued the case the same day as Englert argued *Scheidler* — a big day for the young, small firm. A decision in *Chavez* is pending.

And Englert currently has a municipal case — a petition before the justices on behalf of the city of Sacramento in another Americans with Disabilities Act suit. The 9th Circuit ruled that all existing sidewalks

in the city must be made immediately accessible to the disabled. *City of Sacramento v. Barden*, 02-815.

Englert also is working as co-counsel with Thelen Reid & Priest in Washington, D.C., on another California case that was granted review Jan. 10 for next term, *Hillside Dairy v. Lyons*, 01-950. The 9th Circuit upheld California milk regulations that out-of-state dairies contend violate the Commerce Clause by discriminating against them.

"We bring appellate expertise, and they have expertise in milk regulation," Englert said. "They came to us to help with some inside-baseball stuff, and we'll sort out later who will argue it."

Englert gets high marks from clients.

Melissa Rogers, associate general counsel at Amtrak in Washington, D.C., hired Englert in an effort to overturn a 9th Circuit decision dealing with the time limits for filing employment discrimination claims under Title VII of the Civil Rights Act of 1964.

"We contacted him when we were filing the cert petition," Rogers said. "He offered a lot of helpful and free advice, and when it was granted, we hired him to do the briefs and argument."

Englert won a mostly favorable decision from the justices last June in *National Railroad Passenger Corp. v. Morgan*, 2002 DJDAR 6371 (U.S. June 10, 2002), and Rogers said she is "a big fan."

"He's the smartest person I've ever encountered in terms of legal analysis," she added.

Rogers recalled how at the moot court in the case Englert quickly picked up the "weird nuance" of the federal government's position "and crystallized exactly what they were saying."

"And he doesn't have the huge ego typical for this town," Rogers said. "That's nice from the client's perspective ... I'd definitely hire him again."

Sawyer also said that Englert "is a pleasure to deal with, always."

Their relationship began while Englert was at Mayer Brown and included both antitrust matters and litigation.

After the airline was sued under the American with Disabilities Act by would-be pilots who need corrective eyeglasses, United chose Englert for a defense before the high court.

"The case was very important to us and [choosing Englert] was evidence of our trust because we had the pick of counsel," Sawyer said.

That trust was rewarded in June 1999, when the justices ruled for the airline, 7-2, in *Sutton v. United Airlines Inc*., 1999 DJDAR 6277 (U.S. June 22, 1999).

"I'd hire him again in a second and will continue to do so," Sawyer said.

Shapiro said, "I miss him greatly; he was a great asset to the firm."

"He's a talented brief writer and advocate in the Supreme Court," Shapiro added. "He has many virtues."

Englert said he "loves" his work, but he has one reservation — his "overwhelming" interest is judo.

"Because of my outside interests, I would like to limit my hours in the office, but it's a byproduct of success that it's hard to do," Englert said.

"I travel the world refereeing judo tournaments," he added.

Englert, who is single, also is vice chair of the U.S. Referee Commission and holds various offices in national and local judo organizations.

"I actually do judo sometimes," Englert said with a smile.

He began at age 9 and competed for 23 years.

"I was a scrawny kid, and my parents thought I should try it," the now-stocky Englert recalled. "It didn't take at first," but after six months, "I was hooked."

Another of Englert's outside interests is work-related. He enjoys serving as a "justice" in moot courts for lawyers about to argue in the Supreme Court.

Englert is "very demanding, insightful and candid" during moot courts, said Richard J. Lazarus, founder and director of the Georgetown University Law Center's Supreme Court Institute.

The institute provides moots for half of the Supreme Court's cases each term, and Lazarus frequently uses Englert as a judge.

"In a recent case, Roy told the advocate, 'You will lose this issue and let me tell you why,'" Lazarus recalled. "And he gave some very good strategic advice."

Lazarus, who was a colleague of Englert's in the solicitor general's office, said Englert in that job was "a workhorse of exceptional ability" who, among other things, came up with procedures to save time in preparing briefs.

"What makes Roy particularly effective," Lazarus said, "is his unsurpassed rigor — he's rigorous and persistent in his analysis and also clear."

"And he's almost without peer in that he has no ideological baggage when he approaches an issue, and he does so in a no-nonsense, matter-of-fact way," Lazarus added.

Englert, asked whether he has any advice for first-time Supreme Court advocates, offered a path of risk avoidance.

"I talked with a lawyer who has an argument coming up soon, and my special advice was to answer the justices' questions," he said. "The mistake I see the most is answering something other than what a justice has asked."

"You can answer, 'Yes, but' or 'No, but,' or 'Yes and no, let me explain,'" Englert added. "But make sure you answer the question."