Analysis

How A $3K Pro Se Claim Led To A 9-0 High Court Decision

By **Daniel Wilson** · Listen to article

Law360 (May 17, 2024, 9:05 PM EDT) -- Stuart R. Harrow once shared a common misperception that government workers aren't driven. Once he began working for the Pentagon, however, he quickly discovered that he shared a strong sense of work ethic and principled values with his colleagues.

Stuart R. Harrow and his legal team outside the U.S. Supreme Court after oral arguments on March 25, 2024. (Courtesy of Hillel Wolfson)

"Many people look at the federal government, and they cast a jaundiced eye. 'You guys work for the federal government, do you really do any work?'" Harrow said in an interview with Law360. "But there's an awful lot of people who literally work quite hard ... There's an implicit contract. You know, we give you 110%, and you pay us."

That dedication to working hard in exchange for a fair day's pay was the driving force behind Harrow's dogged determination to pursue a more than 10-year battle — all the way up to the U.S. Supreme Court — against the government for $3,000 in wages he lost during a furlough. Once at the high court, an **irritated Justice Neil Gorsuch** complained about the "extraordinary" efforts the government was taking to fight Harrow.

Less than two months after Gorsuch's revealing remark, the high court returned with a 9-0 **decision** Thursday in Harrow's favor, ruling that he could fight his six-day furlough from 2013 in court despite having missed a deadline to appeal it.

"I'm back in the game," Harrow said. "That is a big deal, to now present the case before the Federal Circuit. And there's a bit of work ahead."

Harrow, who joined the Defense Contract Management Agency in 1985, according to his LinkedIn profile, has a good chance of getting to the merits of his case at the Federal Circuit, given that Justice Elena Kagan said in her opinion that the government will have to hurdle a "high bar" to show he isn't eligible for equitable tolling of his appeal deadline.

Harrow's saga started when a federal sequester led to a six-day furlough at the U.S. Department of Defense. Harrow sought an exemption for financial hardship, but the Merit Systems Protection Board took more than seven years to deny his claim, partly because it lacked a quorum for most of that time.

In the meantime, the DOD changed its email systems, leading the MSPB to send its decision to Harrow's old email address, and Harrow subsequently missing a statutory 60-day deadline to appeal the denial to the Federal Circuit.

Harrow filed suit anyway and the circuit court tossed his case, ruling that the missed deadline put the case out of its jurisdiction. Up until then, Harrow had been representing himself, his efforts as a "make-believe lawyer" being driven by principle, he said.

"There are many, many people who are quite qualified and could be on the outside, and they can make more money, but there's a sense of commitment," he said, noting that what broke him was that the government had violated "a shared understanding" that federal workers would be paid if they committed themselves to their work.

But along the way, he discovered the writings of Scott Dodson, a professor at the University of California College of the Law, San Francisco, director of the school's Center for Litigation and Courts, and an expert in the jurisdictional issue underpinning the appeal.

Dodson rebuffed Harrow's initial request for help, but Harrow continued to copy the professor on his filings to the court, and Dodson continued to independently track the case, according to Harrow. Harrow and Dodson differed on who reached out to whom after the Federal Circuit refused to reconsider its decision, but either way, Dodson eventually agreed to take the case to the Supreme Court, pro bono.

"The day that I got the denial of rehearing ... he says, 'I want to be your lawyer,'" Harrow said. "He is a gentleman, and he took a chance on me."

The Supreme Court takes up less than 2% of the roughly 10,000 cases that land before it each year, but Dodson told Law360 he believed that the underlying jurisdictional issue had been wrongly decided, and that the case had a better chance than average of drawing the justices' attention.

Jurisdictional requirements, and whether Congress has made a "clear statement" about those requirements, are an ongoing issue that the high court has been "rather obsessed with" over the past two decades, taking roughly one related case per term over that period, Dodson said.

"And beside that fact, I think the court likes to take some of these nerdy technical issues every once in a while, both to have a break from the high profile political cases that it often gets attention for, but also because this is what judges do ... deal with, sometimes, the mundane of the law," he said. "And that mundane aspect of it affects real people, and real cases."

Harrow's petition to the high court, drafted by Dodson, said the jurisdictional issue was relevant to potentially hundreds of federal employees' cases each year, and the justices agreed to take the case in December 2023.

At that stage, Dodson and Harrow brought in two experienced appellate and Supreme Court advocates, John Roberts and Mark Harris of Proskauer Rose LLP.

Harris, a friend of Harrow, told Law360 that he didn't think Harrow was "getting a fair deal" and wanted to help "craft the very best briefs possible." Dodson's academic expertise, together with the Proskauer attorneys' knowledge of the Supreme Court, "really made this work," Harris said.

The Big Law attorneys also helped to prepare Josh Davis, a Berger Montague shareholder and research professor at the law school alongside Dodson, for his first-ever argument before the Supreme Court.

Davis, an experienced appellate litigator, said he was eager to argue before the justices, and that although cognizant of the importance of the venue and occasion, he tried to take his usual approach to oral arguments.

"Mostly, you're just trying to, in a very humble way, educate them, not talk down to them, like a good teacher — not the arrogant ones who pissed you off," he said. "The ones who you actually liked and felt like, 'Yeah, they knew some things you didn't know, because they'd been studying this for a long time, but they respected your opinion and they're just trying to think it through with you.'"

Ultimately, a series of moot courts leading up to the March **oral argument** proved to be "a lot more brutal than the justices in some ways," Davis said.

Several justices were openly sympathetic to Harrow's position, most prominently Justice Gorsuch, who said Harrow had "acted as quickly as he could" once he got wind of the MSPB's decision and expressed incredulity that the government had fought so hard against Harrow's claim.

Although Justice Gorsuch's comments were supportive of Harrow's arguments, that was also a difficult moment for Davis, trying not to "come across as petty." He said he used the opportunity to highlight the honor he and Harrow felt having their case before the high court.

"It's the strategically wise thing to do; I don't want to be critical of the government, I want to take the high road," he said. "He gets to express his frustration — he's the justice. But I'm the lawyer, I don't get to do that."

After the argument, Harrow's legal team immediately recognized and acknowledged the favorable tenor of the questions, Harrow said.

"Afterwards, they looked at me, and they said, 'Stuart, you've won,'" he said. "But I said, 'You know what, wait for the decision.' ... I held my breath."

While Harrow, who has argued that the MSPB did not properly apply its precedent or underlying legislation regarding furloughs, will need to continue to pursue his claim at the Federal Circuit, the Supreme Court's decision enabling him to keep fighting shows the potential value in continuing to pursue a matter of principle, "no matter what the stakes," Dodson said, a view echoed by Harris.

"I don't mean to sound corny, but he just thought this was wrong, and this is not the way this is supposed to go," Harris said. "And it's a wonderful thing about the system that a case like that can end up at the Supreme Court. I think that's what everybody finds so refreshing and uplifting about this, is that it doesn't matter the number of dollars involved, what matters is the principle."

The case is Harrow v. Department of Defense, case number 23-21, in the Supreme Court of the United States.

--Editing by Michael Watanabe.