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LECTURE

In Search of the Solicitor General’s Clients: A Drama with Many Characters*

BY DREW S. DAYS III**

I want, first, to express my sincerest appreciation for the invitation to deliver the Ninth Judge Mac Swinford Lecture at the University of Kentucky College of Law. It is a pleasure for me to get out of Washington for a change — to begin with, to remind myself of what life is like “outside of the Beltway.” I also saw this as an opportunity to see friends here at the law school whom I can no longer plan on encountering each year at the annual meeting of the Association of American Law Schools, since I am on leave from my law faculty. But, most importantly, there is a certain “rightness,” I think, in being here as the Fortieth Solicitor General, since the first person to occupy my position was Benjamin H. Bristow, a Kentuckian.1

Benjamin H. Bristow, the first Solicitor General of the United States, was one of the leading lawyers of his generation. A Kentuckian, he served as a colonel during the Civil War. He later became United States Attorney for the District of Kentucky, where he was renowned for his vigor in enforcing the federal Civil Rights Acts.2 Before becoming Solicitor General in 1870, he practiced law with his fellow Kentuckian and future Supreme Court Justice, the first John Marshall Harlan.3

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* This is an edited and embellished version of the Ninth Judge Mac Swinford Lecture, delivered at the University of Kentucky College of Law on November 10, 1994.

** Solicitor General of the United States.


3 BIOGRAPHICAL DIRECTORY OF THE UNITED STATES EXECUTIVE BRANCH, supra
After serving as Solicitor General, Bristow became a leading railroad lawyer and almost became Attorney General in the Grant Administration. His name was frequently mentioned for the Supreme Court, but he was instead appointed Secretary of the Treasury by President Grant in 1873. He later attempted to secure the Republican nomination for President but failed after a strong first ballot showing. In his later years, Bristow conducted a successful law practice in New York.4

But Bristow was just the first of three Solicitors General from Kentucky, according to my research. The second, William M. Bullitt, born in Louisville, was appointed Solicitor General in July of 1912 by President Taft and served until March of the following year. After leaving office, Bullitt became a prominent private practitioner in the state who also on occasion was recruited to represent the federal government in particularly important litigation.5 He also was known for his Bullitt's Civil and Criminal Codes of Kentucky,6 published in 1899 and re-edited in 1902.7

The third, Stanley F. Reed, who later became an Associate Justice of the United States Supreme Court, was born in Mason County, Kentucky. Prior to being appointed Solicitor General in March of 1935 by President Franklin Roosevelt, Reed carried on a distinguished private practice in Maysville, Kentucky, and served as a member of the Kentucky House of Representatives from 1912 to 1916. During his tenure as Solicitor General, Reed had the responsibility of defending, in the Supreme Court, most of Roosevelt's "New Deal" laws whose constitutionality had been challenged. In January of 1938 Reed left his post as Solicitor General to accept an appointment to the Supreme Court.8

I. BACKGROUND

The Office of Solicitor General was established in 1870 to provide the Attorney General with assistance in discharging his or her official duties.9 Over the intervening 124 years, however, a tradition of independence, both within the Department of Justice and the Executive Branch as a whole, developed with respect to the Solicitor General's role.

4 Id.
5 Note, Mr. Justice Reed — Swing Man or Not, 1 STAN. L. REV. 714, 715-16 (1949).
6 Id.
8 Mr. Justice Reed, supra note 5, at 716-18.
Although the Solicitor General is appointed by the President and works for the Attorney General, it is rare for his decisions to be overruled by either of his superiors.\textsuperscript{10}

Consequently, for most purposes, the Solicitor General has the last word with respect to whether, and on what grounds, the United States will seek review in the Supreme Court, and he determines what cases from the federal trial courts the government will seek to reverse on appeal. In this process, the Solicitor General is not a "hired gun." To be sure, he is not a policy-maker in the sense that other presidential appointees at the cabinet and sub-cabinet levels are. But in the course of acting as a legal policy-maker regarding governmental litigation, the Solicitor General not only advises his colleagues as to means to achieve certain ends but also helps them to clarify ends in light of the wisdom that is often gained from court challenges to federal policies.

One of my predecessors who later became Attorney General, Francis Biddle, was prompted by this tradition to remark:

He [the Solicitor General] determines what cases to appeal and the client has no say in the matter, he does what his lawyer tells him, the lawyer stands in his client's shoes, for the client is but an abstraction . . . [H]is guide is only the ethic of his profession framed in the ambience of his experience and judgment.\textsuperscript{11}

This is a rather rhapsodic and inaccurate picture of the Solicitor General's role. However, this description does capture the fact that his responsibility is ultimately not to any particular agency or person in the federal government but rather to "the interests of the United States" which may, on occasion, conflict with the short-term programmatic goals of an affected governmental entity. Furthermore, the Solicitor General occupies an especially prominent position as an officer of the federal courts, particularly the Supreme Court, where the "ethic of his profession framed in the ambience of his experience and judgment\textsuperscript{12} must be punctiliously observed. Even if he were not inclined by reasons of principle to adhere to high standards of candor and fair dealing before the Court, the pragmatics of the Solicitor General's "repeat player" status before the Court would require such adherence.\textsuperscript{13} In many


\textsuperscript{11} Id. at 7; see also LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 18 (1987).

\textsuperscript{12} SALOKAR, supra note 10, at 7.

\textsuperscript{13} Id. at 30-31 (citing Marc Galanter, Why the "Haves" Come Out Ahead:
ways, the Solicitor General is invited by tradition, as well as statute and regulation, to step out from the role of partisan advocate to assist in the orderly development of the law and to insist that justice be done even where the immediate interests of the federal government may not appear to benefit. Let me give three examples. First, Solicitors General have "acquiesced" in efforts by opponents in litigation to obtain Supreme Court review of cases in which the government prevailed below. They have done so because, while confident of the government's position, they believed that it was in the best interests of the country to have a contested legal question definitively resolved by the Supreme Court. Second, they have "confessed error" in other cases where the government won in the lower courts but they concluded that a "fundamental error" had led to that result. I should note that lower court judges do not look favorably upon confessions of error. Judge Simon Sobeloff was quoted as saying: "When I was Solicitor General, I thought that confessing error was the noblest function of the office. Now that I am a circuit judge, I know that it is the lowest trick one lawyer can play on another." And Judge Learned Hand, the subject of Professor Gerald Gunther's well-received biography, said, "It is bad enough to have the Supreme Court reverse you, but I will be damned if I will be reversed by some Solicitor General." Finally, the Solicitor General is often asked formally by the Supreme Court through a process referred to in the relevant jargon as "CVSG," a call for the views of the Solicitor General, to express his views on whether a pending petition for certiorari in a nongovernment case should be granted. In such instances, the Court is not seeking the advice of an advocate or a partisan but rather of an officer of that Court committed to providing his best judgment with respect to the matter at issue.

You will recall that I just called Francis Biddle's description of the Solicitor General's role "rather rhapsodic and inaccurate." I did so because his claim that the Solicitor General's "client is but an abstraction" fails to take into account the many interests, if not clients in the

Speculations on the Limits of Legal Change, 9 LAW & SOC'Y REV. 95 (1974)).

14 Id. at 118-19.
15 Id. at 119-20.
18 Cox, supra note 16, at 224-25.
19 See CAPLAN, supra note 11, at 257-58.
20 See supra note 11 and accompanying text.
strictest sense of the word, that the Solicitor General has to keep in mind in carrying out his official responsibilities. To paraphrase one of my distinguished predecessors, Dean Erwin Griswold: "Being Solicitor General is like walking a tightrope; he always has to keep his balance."21 I have entitled my lecture today, In Search of the Solicitor General's Clients: A Drama with Many Characters as a way of inviting you, along with Francis Biddle's ghost, to explore with me four of the Solicitor General's most important clients or relationships. They are present at the lower court level but take on far greater intensity and significance once cases become candidates for the Supreme Court.

II. THE SOLICITOR GENERAL'S RELATIONSHIP TO THE PRESIDENT

The first is the relationship between the President and the Solicitor General. Some things about that relationship are obvious: the President appoints the Solicitor General,22 and the President, not the Solicitor General, appears in the Constitution.23 Consequently, the President has the last say, from a constitutional standpoint, as to what the administration's position before the Supreme Court will be. And there have been a few occasions in recent years where Presidents have exercised that constitutional authority by giving explicit instructions to their Solicitors General to advance certain arguments before the Supreme Court and lower federal courts. Let me describe the extent to which the literature has identified significant instances of direct presidential involvement in the Solicitor General's work.

In the Truman Administration, the President was reportedly involved in the decision to authorize the filing of the government's first friend of the court, or amicus curiae brief, in a civil rights case, Shelly v. Kraemer, which held state enforcement of racially restrictive covenants unconstitutional.24 However, the idea to participate as amicus originated in Solicitor General Philip Pearlman's office, and it appears that Attorney General Tom Clark probably made the decision after consulting with Truman.25 President Eisenhower personally added several sentences to

23 U.S. Const. art. II.
24 334 U.S. 1, 18-23 (1948).
25 See Phillip Elman, The Solicitor General's Office, Justice Frankfurter, and Civil
the government's brief in *Brown v. Board of Education*, which were then edited by an assistant in Solicitor General Simon Sobeloff's office. President Nixon ordered Acting Attorney General Kleindienst to drop the government's appeal to the Supreme Court of an antitrust suit involving International Telephone & Telegraph Co., an appeal which Solicitor General Erwin Griswold had approved. After biding time seeking several extensions, Griswold eventually received clearance to file the government's brief. It was later reported that IT&T had promised to contribute $400,000 for the 1972 Republican National Convention if the administration would settle the suit.

I have yet to write my memoirs of my tenure as Assistant Attorney General for Civil Rights in the Carter Administration where I was directly involved with Solicitor General Wade McCree in writing the government's amicus brief in the *Bakke* case. But I am prepared to attest to the general accuracy of published accounts of presidential involvement in that event. The central question in the administration's conflict over the *Bakke* case concerned the government's amicus participation in the case. The Civil Rights Division of the Justice Department recommended amicus participation in support of the University of California and its affirmative action program; the Assistant and Deputy in the Solicitor General's office recommended amicus participation in favor of Bakke. Before McCree became fully involved in the case, President Carter gave a press conference at which he pledged to support affirmative action in the case. The Solicitor General's office drafted a brief supporting Bakke, which met with resistance from White House aides. Following contentious meetings at various levels, Attorney General Griffin Bell attempted to shield McCree from pressure emanating from the White House and the Department of Health, Education and Welfare; McCree reported that he never received any direct orders from the White House but was certainly aware of the pressure being put on Bell. McCree did not follow the advice of his career staff and eventually decided to recommend that the Court remand the case to California for the state court to decide.

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as a personal note, that the government's brief in Bakke, which McCree and I, with top staff, wrote in a nearly nonstop session spanning several days, was embraced significantly by Justice Powell in his opinion. Justice Powell held that race may, under some circumstances, be an admissions criterion, so long as quotas were avoided.\footnote{Bakke, 438 U.S. at 320.}

During the Reagan Administration, a major controversy arose over the Bob Jones University case, which involved the question of a tax exemption for a religious, but racially segregated, institution.\footnote{Bob Jones Univ. v. United States, 461 U.S. 574 (1983).} Solicitor General Rex Lee decided, because of his prior involvement in the debate over tax exemptions for religious institutions, to recuse himself from handling the case. As a result of Lee's decision, the Senior Deputy Solicitor General, a career lawyer, became Acting Solicitor General. He, however, had already signed a brief in the Supreme Court during the Carter Administration in support of the Internal Revenue Service's revocation of the university's tax-exempt status. The Reagan Administration pushed for an argument supporting the university. The government brief ultimately filed argued the administration's line under a compromise in which the Acting Solicitor General signed the brief on the condition that it included a footnote pointing out that he personally did not subscribe to the government's position on the first and central question presented in the brief.\footnote{See CAPLAN, supra note 11, at 51-64; SALOKAR, supra note 10, at 61-62.}

The Court eventually ruled eight to one in favor of the Internal Revenue Service.\footnote{Bob Jones Univ., 461 U.S. at 585.}

Charles Fried, who succeeded Rex Lee as Solicitor General in the Reagan Administration, recounts only one incident of White House interference with his work. The case, \textit{Communications Workers of America v. Beck}, involved the use of union dues and fees to support pro-union candidates and parties.\footnote{487 U.S. 735, cert. denied, 487 U.S. 1233 (1988).} Fried felt that no state action was

\begin{footnotes}
\footnote{Bakke, 438 U.S. at 320.}
\footnote{Bob Jones Univ. v. United States, 461 U.S. 574 (1983).}
\footnote{See CAPLAN, supra note 11, at 51-64; SALOKAR, supra note 10, at 61-62.}
\footnote{Bob Jones Univ., 461 U.S. at 585.}
\footnote{487 U.S. 735, cert. denied, 487 U.S. 1233 (1988).}
\end{footnotes}
involved in the practice and that the Taft-Hartley Act could not be plausibly read as forbidding the compulsory use of union dues. Proofs of Fried's brief were circulated to the White House, and someone at the White House contacted Attorney General Edwin Meese to express displeasure with the brief. Following a meeting called by Meese, Fried's brief was ultimately filed in the court. Nonetheless, the White House position — namely, that the Taft-Hartley Act could be construed to prohibit the compulsory use of union dues — prevailed five to three in the Court. Concerning this incident, Fried emphasized that "I in Beck [he] received no direct order [but] was made aware that 'the White House' did not like the position [he] was about to take." It is reported that my immediate predecessor, Kenneth Starr, had the following experience in the Bush Administration. After a meeting with a group of black college presidents, President Bush ordered Starr to reverse the government's position in *United States v. Fordice*, to support increased state aid to black public colleges to remedy discrimination. In the opening brief in the case, which was at that time titled *United States v. Mabus*, the government had argued that Mississippi should not be responsible to provide additional funding for traditionally black colleges. After presidential intervention, the government’s reply brief took the opposite stance and urged that the state should supply additional funding to traditionally black colleges to overcome the effects of its segregated system of higher education. My story would be incomplete, and I would be less than candid with you, if I failed to note that last September, President Clinton directed me to withdraw our brief and not participate in oral argument in a case in the United States Court of Appeals for the Eighth Circuit. The case,  

37 Id. at 198.  
38 112 S. Ct. 2727 (1992) (holding that the state of Mississippi violated equal protection by failing to rectify racial imbalances in school system attributable to prior de jure discrimination by state).  
Christians v. Crystal Evangelical Free Church,\textsuperscript{42} awaiting decision, pits the recently enacted Religious Freedom Restoration Act\textsuperscript{43} against the federal Bankruptcy Code. Specifically, it presents the question of whether gifts made by debtors to their churches while insolvent and within one year of their petitioning for bankruptcy may be recouped by the trustee in bankruptcy for the benefit of creditors. In the brief we filed in the Eighth Circuit, we took the position that the new act did not alter prior practice in such situations and that recoupment was, consequently, proper. During the intervening period between our filing and oral argument, the President—who takes personal pride in having signed the Religious Freedom Restoration Act, is strongly committed to its effective enforcement, and is a lawyer—decided that the Administration should not pursue its original position.\textsuperscript{44}

What is notable about the history I have just recounted is not that incidents of direct presidential involvement in the work of the Solicitor General have occurred but that they have been so relatively few in number. There are several reasons for this fact. The most mundane is that it is extremely difficult for the President and his White House staff to oversee the work of the Solicitor General on a day-to-day basis. Second, given the way that the decision-making process works, by the time a case has reached the point of possible appellate court or Supreme Court review, the policy concerns of the President have usually been fully presented to the Solicitor General by his appointees in the affected departments and agencies. Third, and the reason set forth most often, is that a tradition has developed over the years of respect for the Solicitor General’s independence within the entire Executive Branch.

From a pragmatic standpoint, Presidents have concluded that their direct interference in the Solicitor General’s decision-making process in a particular case may damage the administration’s credibility, especially in the Supreme Court, with respect to its entire litigation program. To paraphrase one of my predecessors, what an administration needs is a Solicitor General, not a “Pamphleteer General.”\textsuperscript{45} Whether this concern is valid has not been confirmed, to my knowledge, but the tradition endures.

\footnote{\textsuperscript{42} Christians v. Crystal Evangelical Church (In re Young), 148 B.R. 886 (Bankr. D. Minn. 1992), aff’d, 152 B.R. 939 (D. Minn. 1993).}
\footnote{\textsuperscript{43} 42 U.S.C. § 2000b (Supp. V 1993).}
\footnote{\textsuperscript{44} See Paul M. Barrett, Clinton Orders Justice Agency to Withdraw Brief, WALL ST. J., Sept. 16, 1994, at B5; Pierre Thomas, Clinton Stops Justice Department from Seeking Forfeiture of Tithes, WASH. POST, Sept. 16, 1994, at A8.}
\footnote{\textsuperscript{45} Rex E. Lee, Lawyering for the Government, Politics, Polemics & Principle, 47 OHIO ST. L.J. 595, 600 (1986); see CAPLAN, supra note 11, at 107.}
This should not suggest, however, that the Solicitor General operates completely isolated from and insensitive to the President’s concerns. Indeed, it is reasonable to assume that most Solicitors General have been selected, in part, because they are likely to generally be supportive of the President’s policies and objectives. Moreover, the White House staff can be an extremely helpful source of policy guidance when executive departments and agencies are internally conflicted or disagree with one another over policy priorities. There are also circumstances where the legal considerations are in equipoise and the administration’s policy preference becomes dispositive. This calculus becomes highly sensitive, however, where the Solicitor General is contemplating taking a position on an issue that differs from one embraced by a prior administration. My position is that such changes should not be lightly undertaken. When they are, the new arguments advanced should have legal integrity.

III. The Solicitor General’s Relationship to the Attorney General

The second relationship I would like to address is that between the Solicitor General and the Attorney General. The Solicitor General’s position was created in 1870 to assist the Attorney General as circumstances dictated. Indeed, Benjamin Bristow had no sooner been sworn into office before he headed south to Mississippi to prosecute members of the Ku Klux Klan. But as the complexity of the Attorney General’s responsibilities has increased, the role of the Solicitor General has become more specialized. For the Attorney General must be, at once, both the chief law enforcement officer of the United States and a member of the President’s cabinet, a political officer. Other societies have attempted to divorce these two functions between a career “Attorney General” and a political “Minister of Justice,” but we have not.

In any event, in part because of this tension, a tradition has developed of Solicitor General independence within the Justice Department. Although the Attorney General is, by law and regulation, the Solicitor General’s boss, prior occupants have been left generally free “to consider the questions involved and to formulate [their] own initial views with respect to them without interference from the Attorney General.” The clearest, most succinct consideration of this relationship is found in an

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46 See Salokar, supra note 10, at 10-11.
47 See Caplan, supra note 11, at 5.
Opinion of the Office of Legal Counsel in September of 1977. Leaving the Solicitor General alone at the initial stage of deliberation, the opinion suggests, ensures that the Attorney General and the President get the benefit of the Solicitor General's independent judgment in every case and that the Attorney General does not exercise her supervisory powers gratuitously.

Given the extensive involvement of the Attorney General in policy matters, the opinion argues that both the Attorney General and the President are benefitted by a Solicitor General who is accorded a large measure of independence free of policy considerations that "might, on occasion, cloud a clear vision of what the law requires." Attorney General Janet Reno and I have taken the arrangement set out in the 1977 opinion as the guide for our relationship. I take the responsibility to advise her in advance of my intended decisions in high profile cases should she have any guidance or any questions. She, of course, has the power to overrule me.

Charles Fried said he "took comfort" from the fact that the Attorney General could overrule him. Whenever another Justice Department or administration official challenged one of his decisions, Fried would simply direct them to the Attorney General.

It seemed to me that this freed me to take whatever position seemed right to me, while giving people a sense that a route of correction was open. It also clarified my relations to the Attorney General, since I could engage in all kinds of informal exchanges with him but still make the point when I was making a final decision on my personal authority. If the Attorney General did not approve it, he could overrule it.

IV. THE SOLICITOR GENERAL'S RELATIONSHIP TO INDEPENDENT REGULATORY AGENCIES

The third relationship involves independent regulatory agencies. Since 1870, the Attorney General has directed and controlled most federal regulations.
litigation.\textsuperscript{55} Independent regulatory agencies were established by Congress to enjoy a certain degree of autonomy from the Executive Branch. A few independent regulatory agencies have the authority to litigate their own cases in the Supreme Court.\textsuperscript{56} But even those agencies do not exercise it in most instances, since it is thought that the absence of the Solicitor General's involvement raises questions about the merits of such filings; in fact, such briefs are described as having a "tin can tied to them."\textsuperscript{57} Therefore, the Solicitor General is usually the Supreme Court lawyer for such agencies. He is confronted with the question of how to carry out his "gate-keeper" function of ensuring that only the most meritorious and promising government cases get to the Court, while respecting the independence of the regulatory agency. More often, however, the challenge arises when an executive department and an independent regulatory agency are at odds as to what position should be taken in a Supreme Court case involving other parties. What should the amicus brief say? Should there be one at all, for that matter? Imagine, if you will, conflicts between the National Labor Relations Board and the Department of Labor, or between the Environmental Protection Agency and the Federal Energy Regulatory Commission.

A recent commentator, Professor Neal Devins, identifies three principal arguments (all of which he then discounts) favoring the Solicitor General's centralized litigating authority: (1) a trust that the Solicitor General will remain sensitive to an independent agency's concerns, (2) a belief that agencies exchange control to make use of the Solicitor General's prestige and expertise in Supreme Court advocacy, and (3) the idea that centralization benefits the Court by resolving intra-executive

\textsuperscript{55} Congress instituted this centralization of litigating authority in the Department of Justice "under the pressure of legal claims arising from the Civil War." Susan M. Olson, Challenges to the Gatekeeper: The Debate Over Federal Litigating Authority, 68 JUDICATURE 71, 75 (1984) (citing "Exhibit 1: Summary [of History of the Distribution of Litigating Authority] by Department of Justice," 18 CONG. REC. 2182-85 (daily ed. June 21, 1972)); see 28 U.S.C. § 516 (1988) ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof, is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."); Hughes Aircraft Co. v. United States, 534 F.2d 889, 901 (Ct. Cl. 1976) (explaining that since the power under 28 U.S.C. § 516 (1988) is so "broadly inclusive," it must be narrowly construed).

\textsuperscript{56} See Neal Devins, Unitariness and Independence: Solicitor General Control Over Independent Agency Litigation, 82 CAL. L. REV. 255, 274-76 (1994); Olson, supra note 55, at 73.

conflicts on policy matters prior to presentation of an issue to the Court and enhancing the Court’s ability to manage its docket by relying on the Solicitor General’s recommendations on a case’s “cert-worthiness.”

On the other hand, it is argued that agency lawyers generally will have more intricate knowledge of each case and have more expertise concerning their own programs, regulatory structure, and applicable legal precedent. The Solicitor General also may be influenced by (from the agency’s point-of-view) different outside interests, such as the President. Any disparities in general trial and appellate expertise between Justice Department and agency lawyers may simply reflect the agency lawyers’ inability to obtain sufficient experience under the current centralized scheme. Because of these factors, cases for or against independent litigating authority cannot be satisfactorily based solely on qualities such as experience or objectivity.

It is generally accepted that the Solicitor General’s ability to exercise control over an aspect of an agency’s litigation does “to some extent curtail” its freedom. Through the Solicitor General, the Executive can, for specific legal issues, control policies central to many independent agencies. In fact, even the unexercised threat of such control might alter an agency’s litigating strategy; in such cases, in a dynamic similar to a presidential veto, an agency may be forced to reassess or compromise its independent policies to accommodate the Solicitor General’s views. Apparently, Solicitors General have felt correlative pressures to accommodate the independent agencies, as exemplified by a 1966 study

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58 Devins, supra note 56, at 280; Todd Lochner, The Relationship Between the Office of Solicitor General and the Independent Agencies, 79 Va. L. Rev. 549, 569-70 (1993) (listing four functions of the Solicitor General: acting as a gatekeeper, providing one governmental voice, representing wide-ranging governmental interests, and providing his expertise); see also Olson, supra note 55, at 78-79 (reporting 1980 speech by Associate Attorney General Robert Ford as stressing five values of centralization: “economy and efficiency, uniformity, rational priority setting, expertise, and objectivity (i.e., better representation of the public’s interests or the ‘broader governmental interests’ beyond one case or one program)

59 See Olson, supra note 55, at 80, 85 (citing more extensive discussion in DONALD L. HOROWITZ, THE BUREAUCRACY: GOVERNMENT LAWYERS, AGENCY PROGRAMS, AND JUDICIAL DECISIONS 3 (1977)).


61 As has been noted, “[b]y not allowing the agency to make the certiorari petition decision itself, the Solicitor General often has the last word on judicial resolution of independent agency-executive branch policy disputes.” Devins, supra note 56, at 259; see Olson, supra note 55, at 71, 85; Robert L. Stern, “Inconsistency” in Government Litigation, 64 Harv. L. Rev. 759, 769 (1951).
indicating that the Solicitor General is far more likely to seek certiorari requests from independent agencies (roughly two-thirds of requests) than from other agencies (one-fifth of requests).62

My impression is that the degree of curtailment of agency freedom changes with each Solicitor General's unique perspective on the need for a central voice in government litigation (particularly before the Supreme Court) and the value of agency independence. Each Solicitor General also brings a different style to the office, which may directly affect each agency's perception of the "due process" given to it in a particular case and, thus, its willingness to accept the Solicitor General's counsel. For example, some Solicitors General seem more willing to take a mediation approach to inter-departmental conflicts.63 When the Solicitor General mediates disputes between agencies on specific legal issues, however, he risks resolving the issues to the "lowest common denominator amalgam of views."64

The Solicitor General's own independence also affects the relationship with independent regulatory agencies. The less control other clients exert over the Solicitor General, the less likely that controversy will arise or that any such controversy will become too acrimonious to resolve informally. Non-agency clients also may exert their own views in a particular case, thereby increasing the volatility of the situation, as my earlier remarks about the roles of the President and the Attorney General suggest.65 Viewing the Solicitor General's relationship with independent agencies in isolation, therefore, necessarily presents an incomplete picture.

V. THE SOLICITOR GENERAL'S RELATIONSHIP TO CONGRESS

By now, you may be losing count of the Solicitor General's clients. Is anyone left? Yes, the United States Congress! Commenting on this

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65 See supra notes 22-53 and accompanying text.
relationship, one scholar has remarked, that "[o]f the roles the Solicitor General plays, this is perhaps the one that has been least examined." 66

For the most part, the relationship between the Solicitor General and Congress grows out of the fact that the Solicitor General has the power to decide whether to defend the constitutionality of the acts of Congress or even affirmatively challenge such laws. Because of the respect to which Congress is entitled as a coordinate branch of government, Solicitors General traditionally have recognized a general duty to defend congressional statutes against constitutional challenges. But because the Constitution is "the supreme law of the land," 67 and the President — and by extension the Solicitor General — must "take Care that the Laws be faithfully executed," 68 Solicitors General have not risen to the defense of the acts of Congress in two situations. First, Solicitors General have always sided with the President in disputes over the constitutionality of congressional attempts to circumscribe presidential power. The first such case was Myers v. United States, 69 in which the Solicitor General successfully argued that Congress had impermissibly intruded upon the prerogatives of the Executive Branch by limiting the President's power to remove a postmaster. 70 Second, Solicitors General have not attempted

66 SALOKAR, supra note 10, at 86; see also Joshua I. Schwartz, Two Perspectives on the Solicitor General's Independence, 21 Loy. L.A. L. Rev. 1119, 1152 (1988) (arguing that "the Solicitor General, as the lawyer for the United States in the Supreme Court, has responsibilities that run not only to the executive branch, and the President as its head, but also to the Congress").

67 U.S. CONST. art. VI.

68 Id. art. II, § 3.

69 272 U.S. 52 (1926).

to defend patently unconstitutional laws.71 “In such cases,” Solicitor General Wade McCree has written, “the Solicitor General’s Office is called upon to give full faith and credit to the fundamental law embodied in the Constitution, even at the expense of the federal statute.”72

The best formal statement of the Justice Department’s policy of defending congressional statutes may be that made by Solicitor General Rex Lee — who was then an Assistant General — in testimony before the Senate:

The defense of statutes attacked on constitutional grounds is an important part of the Justice Department’s work. There are essentially two situations in which the Department will not defend the constitutionality of a statute. The first situation involves those cases in which upholding the statute would have the effect of limiting the President’s constitutional powers or prerogatives. It is neither shocking nor surprising that the Congress in enacting legislation occasionally takes a view different from that of the President concerning the President’s rights. It is equally clear that the President is entitled to a defense of his perceived rights.

... The second situation in which the Department will not defend against a claim of unconstitutionality involves cases where the Attorney

In two other cases, the Solicitor General argued that a bill passed by both houses of Congress did not become a law. See Wright v. United States, 302 U.S. 583, 589, 598 (1938) (holding that a bill vetoed by the President and returned to the Secretary of the Senate on a day when the Senate was in recess is not law); The Pocket Veto Case, 279 U.S. 655, 672, 691-92 (1929) (holding that a bill subjected to “pocket veto” by the President is not law).

In three other cases, the Solicitor General defended the Executive’s authority to prosecute a member of Congress or investigate a criminal case, notwithstanding the Speech or Debate Clause of Article I, § 6 of the U.S. Constitution. See Gravel v. United States, 408 U.S. 606, 621-22 (1972) (holding that Speech or Debate Clause applies to the aide of a member of Congress but does not immunize aide from testifying before a grand jury about alleged arrangement for private publication of the Pentagon Papers); United States v. Brewster, 408 U.S. 501, 527-29 (1972) (holding that member of Congress may be prosecuted for accepting a bribe in exchange for a promise relating to an official act); United States v. Johnson, 383 U.S. 169, 181-85, cert. denied, 385 U.S. 889 (1966) (holding that a conspiracy charge may not be based on a speech delivered by member of Congress).

71 One scholar and alumnus of the Solicitor General’s office has formulated this exception in a slightly different way. See Schwartz, supra note 66, at 1155 (“The constitutionality of acts of Congress is to be defended in all cases, unless no professionally respectable argument can be made in defense of the statute.”) (citations omitted).

General believes, not only personally as a matter of conscience, but also in his official capacity as the Chief Legal officer of the United States, that a law is so patently unconstitutional that it cannot be defended. Such a situation is thankfully most rare.73

Another important statement of the Justice Department’s policy was made by Benjamin Civiletti, President Carter’s second Attorney General, in a formal letter to Congress:

The Attorney General has a duty to defend and enforce the Acts of Congress. He also has a duty to defend and enforce the Constitution. If he is to perform these duties faithfully, he must exercise conscientious judgment. He must examine the Acts of Congress and the Constitution and determine what they require of him, and if he finds in a given case that there is conflict between the requirements of the one and the requirements of the other, he must acknowledge his dilemma and decide how to deal with it. That task is inescapably his.74

The Solicitor General’s policy of defending congressional statutes may have originated as a result of the fact that, historically, Congress lacked the formal authority to litigate on its own behalf and thus generally relied upon the Justice Department to do so.75 In those cases in which the Executive and Legislative Branches were irretrievably at loggerheads, Congress was forced to hire private counsel or even send one of its own members into court.76 The Ethics in Government Act of 1978,77 however, created the Office of the Senate Legal Counsel, which is empowered and required to intervene or appear as an amicus in any case “in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue.”78 In such cases, the Senate Legal Counsel is required to “defend vigorously” the

75 See SALOKAR, supra note 10, at 87.
76 For example, in Myers v. United States, 272 U.S. 52, 65-77 (1926), Senator George Wharton Pepper was allowed to represent Congress in the Supreme Court by special invitation to the Court. See SALOKAR, supra note 10, at 87.
78 Id. § 288c(a).
constitutionality of congressional acts and joint resolutions. The bill resulting in the Senate Legal Counsel originally was to have created a joint House-Senate Office of Congressional Legal Counsel. But because the House of Representatites ultimately did not agree to the creation of a joint office, the bill was later amended to create only the Office of Senate Legal Counsel. The House, however, has used its internal rule-making powers to make the House Speaker's legal counsel the functional equivalent of the Senate Legal Counsel.

Because both houses of Congress now have the formal capacity to represent themselves in court, one could argue that the need for Solicitors General to presume the constitutionality of and defend in court, the acts of Congress is less than it once was. The question may be posed: should the Solicitor General defend a federal statute that is not patently unconstitutional but is nonetheless probably unconstitutional, given that Congress now has the ability to defend its own handiwork? For those who believe that the Solicitor General should exercise independent judgment, the policy of defending all but the most blatantly unconstitutional congressional statutes must seem a departure from the office's tradition of independence. Nevertheless, the Solicitor General's traditional willingness to champion the acts of Congress fosters comity between the Executive and Legislative Branches in two important ways. First, by making it unnecessary for Congress to become involved in litigation except in unusual cases, the Solicitor General's policy of defending the acts of Congress ensures that the government speaks with one voice in the Supreme Court while at the same time reinforcing the Executive Branch's status as the litigating arm of the government. Second, the policy prevents the Executive Branch from using litigation as a form of post-enactment veto of legislation that the current administration dislikes.

As a concomitant of the Solicitor General's general duty to defend the constitutionality of federal law, the Attorney General is required by law to notify Congress of any decision by the Solicitor General (or the Attorney General) not to defend an act of Congress. These written communications

79 Id. § 288h.
82 See SALOKAR, supra note 10, at 90.
83 See Schwartz, supra note 66, at 1152, 1154.
84 See SALOKAR, supra note 10, at 87; Schwartz, supra note 66, at 1153-54.
85 The Ethics in Government Act of 1978 provides in part: The Attorney General shall notify the [Senate Legal] Counsel with respect to any proceeding in which the United States is a party of any determination by the Attorney General or Solicitor General not to appeal any court decision.
are revealing, as they have sometimes been used as an opportunity to express the Justice Department's view as to the scope of its obligation to defend congressional statutes. Michael Davidson, the Senate's Legal Counsel, has collected a number of such letters. The Davidson Collection reveals that Attorney General Griffin Bell closed his letters with the following statement: "The Department of Justice is, of course, fully mindful of its duty to support the laws enacted by Congress. Here, however, the Department has determined, after careful study and deliberation, that reasonable arguments cannot be advanced to defend the challenged statute."  

Thus far, I have declined in a few instances to defend acts of Congress on one or the other of these grounds. When such declinations occur, Congress is so advised and may assume responsibility for the defense itself. In one instance, Congress seemed to accept the decision not to go forward. In another, the administration has worked with Congress to amend the statute at issue to remove what I viewed as a major constitutional defect.

But life for the Solicitor General is never simple. Through all of these twists and turns, it is important for the Solicitor General to keep in mind his responsibility to be a forceful and effective advocate for the government while ensuring that he maintains a reputation for "absolute candor and fair dealing" in the Supreme Court and lower federal courts.

I know all of this sounds very complicated and anxiety-producing. And it is on occasion. But I'll let you in on a secret — when all is said and done, the job is just downright fun.

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affecting the constitutionality of an Act or joint resolution of Congress within such time as will enable the Senate to direct the Counsel to intervene as a party in such proceeding pursuant to section 288e of this title.


On a more general level, these communications are of interest because Congress and the Solicitor General rarely communicate with each other in formal settings. In the past 32 years, Congress has called the Solicitor General to Capitol Hill to testify only once. See Solicitor General's Office: Hearing Before the Subcomm. of Monopolies and Commercial Law of the Comm. on the Judiciary, 100th Cong., 1st Sess. 133 (1987); see also SALOKAR, supra note 10, at 93-94. One commentator expressed the view that these hearings were held "as a shot across the bow of the Solicitor General's bureaucratic ship" to warn against politicization of the office. John O. McGinnis, Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory, 44 STAN. L. REV. 799, 812-13 (1992).


