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## NO STRIPED PANTS AND MORNING COAT: THE SOLICITOR GENERAL IN THE STATE AND LOWER FEDERAL COURTS

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### INTRODUCTION

It is an honor and a pleasure for me to have been asked to deliver the Sixteenth Henry J. Miller Distinguished Lecture, joining an impressive list of practitioners, legal academics, and jurists who have preceded me. I want to thank the College of Law and, in particular, my friend, Professor Stephen Wermiel, for making this visit possible. I also want to express my appreciation to you for your willingness to reschedule the Miller Lecture from September, when surgery for a ruptured Achilles tendon made it impossible for me to travel. I am certain you can understand how good it feels for me to be able to stand before you without a cast, crutches, or any other mechanical aids. I am also happy to be back in Atlanta where I was born and still have family, as well as a number of friends from my Carter Administration days who were able to resist "Potomac Fever."

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## I.

I am particularly appreciative of this invitation because it provides me with an opportunity to talk about a dimension of the Solicitor General's responsibilities that is very rarely discussed and even less understood. To the extent that there is public awareness of the fact that a Solicitor General exists—thanks to books like Lincoln Caplan's *The Tenth Justice*<sup>1</sup>—that knowledge tends to be limited to his duties before the Supreme Court where he represents the United States in a wide variety of cases each Term. Indeed, the Solicitor General and his staff are true “repeat players” before the Court, arguing about two-thirds of all the cases heard each Term. Nothing captures the public imagination more, I suspect, than the thought of the Solicitor General standing up to argue before the Supreme Court in striped pants and morning coat, as tradition dictates.

The Solicitor General has another major responsibility, however, beyond that of filing briefs and arguing cases in the Supreme Court. He is also charged with, to quote the relevant regulation, “[d]etermining whether, and to what extent, appeals will be taken by the Government to all appellate courts . . .,”<sup>2</sup> and “[d]etermining whether a brief *amicus curiae* will be filed by the Government, or whether the Government will intervene, in any appellate court.”<sup>3</sup> This means, in other words, that when the Government loses a case in the federal district courts, no appeal of that “adverse decision” may be pursued without the Solicitor General's authorization.

It also means that there can be no appearance by the Government in any appellate court by way of intervention or as a “friend of the court” without the Solicitor General's approval. But since the Solicitor General rarely appears in courts below the Supreme Court (and does not wear his striped pants and morning coat when he does), there is little reason for the public to know that he is even involved. The briefs on appeal filed by the Government do not usually contain the Solicitor General's name and are for the most part written and argued by lawyers

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1. LINCOLN CAPLAN, *THE TENTH JUSTICE* (1987).

2. 28 C.F.R. § 0.20(b) (1994).

3. *Id.* § 0.20(c).

from one of the Justice Department's six litigating divisions<sup>4</sup> or United States Attorneys' offices.

In this and certain other respects, I doubt that I am alone among Solicitors General in feeling some ambivalence about our hazy public image. Sometimes, one secretly welcomes headlines that say, "President does X," or "Attorney General does Y," when the Solicitor General knows responsibility for an unpopular decision should rightly be placed at his door. At other times, one feels insulted for not receiving credit for a job well done. Only a few months into my tenure, for example, I found myself confronted with a district court opinion that seemed to leave the North American Free Trade Agreement (NAFTA) high and dry.<sup>5</sup> The stock market in Mexico City was plunging, and the Administration needed a quick decision on whether I would authorize an appeal.

Shifting myself, my staff, and an entire division of the Justice Department into high gear, I was able to have several analyses of the opinion done, to have recommendations completed by the affected litigating division and my staff, and promptly thereafter to reach a decision in favor of appeal. I was rather proud of myself as I communicated my decision by telephone, only four hours after the trial court's opinion was released, to an anxious Ambassador Mickey Kantor as he headed into a packed news conference to announce the appeal decision.<sup>6</sup> The Ambassador acknowledged my role in the process. But later that evening, having turned to other matters on my desk, I decided to hear what National Public Radio had to say about the appeal. The lead was as follows: Today, Treasury Secretary Lloyd Bentsen announced that an appeal will be taken in the NAFTA case!

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4. Those divisions are: Antitrust, Civil, Civil Rights, Criminal, Environment and Natural Resources, and Tax.

5. See *Public Citizen v. Office of the United States Trade Representative*, 822 F. Supp. 21 (D.D.C.), *rev'd*, 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994).

6. See Peter Behr, *NAFTA Pact Jeopardized by Court; District Judge Orders Environmental Study*, WASH. POST, July 1, 1993, at A1; Peter G. Gosselin, *Environmental Ruling Blocks Free Trade Pact*, BOSTON GLOBE, July 1, 1993, at 1; Steven Greenhouse, *Judge Gives Order That May Delay Trade Pact*, N.Y. TIMES, July 1, 1993, at D3.

## II.

I had a rough sense of this part of the Solicitor General's job prior to my assuming the post, based upon my experience as head of the Civil Rights Division in the Carter Administration. My perspective then, however, was that of a subordinate official petitioning the Solicitor General to approve appeals in cases that my division had lost at trial. But nothing adequately prepared me for what I found was the immense volume of appellate matters that require the Solicitor General's review and decision. I asked a lawyer on my staff, as I prepared these remarks, to determine exactly what this workload had been since I took office. What she found was that between May 28, 1993 (the day I was sworn in) and March 2, 1995, I had acted on 1756 recommendations related to the Government's appearance in appellate courts or roughly three each day, including weekends and holidays, for the twenty months that I had been on the job.

The Supreme Court has, on several occasions, noted the importance of the Solicitor General's role in serving as a "gate keeper" or "traffic cop" with respect to government litigation at that level.<sup>7</sup> At the appellate court level, the Solicitor General serves a similar, but not identical, function. His approval is necessary only when the Government has lost in the trial court; if the Government has been successful, the appeal is taken by the other side and the Solicitor General plays no direct role in that process. In the Supreme Court, in contrast, the Solicitor General exercises control over what the Government does, irrespective of whether it has won or lost in the lower courts. Consequently, in the appellate courts, the Solicitor General is, properly speaking, only "half of a traffic cop."

In that capacity, the Solicitor General's job is to weed out those adverse decisions worthy of further review from those that are not. Where decisions unfavorable to the Government lack precedential significance (for example, because they are unpublished or involve unique factual characteristics), or turn on factual determinations by trial judges that are unlikely to be reversed on appeal, or have deficient records, the Solicitor General will normally deny authorization to appeal. Solicitors General may come away from reviewing such recommendations

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7. See *Federal Election Comm'n v. NRA Political Victory Fund*, 115 S. Ct. 537, 542 (1994); *United States v. Providence Journal Co.*, 485 U.S. 693, 706 (1988).

with the gut sense that error was committed in some of these cases. But, given the thousands of criminal prosecutions and civil suits brought by the Government, as well as the number of claims filed *against* federal agencies and officials, the absence of a screening process for Government appeals would put further stress on the already overly-burdened appellate court dockets. It would also result in the waste of precious human and financial resources on a number of ultimately lost causes.

The Solicitor General serves as a "screen" at another stage of the appellate process as well. In cases where the Government loses an appeal before a panel of three federal appellate judges, it may seek review of that decision by the entire court of appeals bench. Georgia, for example, is in the Eleventh Circuit with an authorized strength of twelve judges. No such petition for what we call en banc review before all twelve judges, should the case arise in the Eleventh Circuit, may be filed by the Government without the Solicitor General's authorization. According to the federal rules, petitions for en banc review should be filed only in cases "(1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance."<sup>8</sup> There is an understandable tendency of government lawyers who have lost on appeal to view that adverse ruling as necessarily generating questions of "exceptional importance." It is the Solicitor General's job, however, to resist that notion and to take seriously the concern of federal appellate courts that en banc review not be sought routinely. To give you a sense of the difference between the operation of the initial appeal screen and the en banc screen, I have authorized appeals in just under eighty percent of the cases presented to me during my tenure; in contrast, I have approved only fifty percent of recommendations seeking en banc review.

Of course, Solicitors General sometimes authorize appeals because lower court opinions appear flatly wrong: criminals are set free who deserve to go to jail; private parties in suits against the Government receive monetary awards that simply cannot be justified under prevailing precedents. But I believe that the most important function the Solicitor General performs is that of orchestrating the movement of government litigation up through

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8. FED. R. APP. P. 35(a).

the lower courts toward ultimate Supreme Court review. In view of the nationwide scope of federal government programs and enforcement activities, the most important goal of government litigation, next to having the courts uphold the legality of challenged programs, is that of obtaining uniform legal rules, win or lose.

For example, the Supreme Court accepted for review this Term, at the Government's request, a case that raises the question of what rules should govern the granting of credit toward the reduction of sentences being served by federal prisoners.<sup>9</sup> At the present time, decisions by different federal appellate courts have resulted in conflicting rules that turn upon where a federal prisoner happens to be incarcerated at the time his claim reaches court. The Federal Bureau of Prisons, however, cannot operate under different legal regimes, since it runs a national prison system and routinely transfers inmates between correctional facilities located in different judicial circuits to maintain security and population balance. As things now stand, theoretically, inmates in California, Pennsylvania, or New York sentenced to the same number of years in federal prison, on the same day, may end up being released at different times because of the conflicting court rulings.

The Solicitor General's job is to try to spot such problems early on in the adverse decision process and to try to guide issues over which the lower courts have differed to the Supreme Court for definitive resolution. In so doing, he seeks to identify those decisions that present the Government's position in the best factual and legal context, that is, where the Government's arguments have been clearly and forcefully presented in the lower court and the facts are sympathetic to the Government's position. In the latter regard, to the extent that the Government comes off as over-reaching or heavy-handed in the lower courts, its chances of achieving success on appeal are accordingly diminished.

Where the Government's position has not been successful on appeal in one or several of the twelve regional federal circuit courts of appeals,<sup>10</sup> the Solicitor General may authorize appeals

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9. *Koray v. Sizer*, 21 F.3d 558 (3d Cir. 1994), *cert. granted sub nom. Reno v. Koray*, 115 S. Ct. 787 (1995).

10. The thirteenth, the Court of Appeals for the Federal Circuit, has exclusive jurisdiction over certain classes of suits. *See* 28 U.S.C. § 1295 (1988 & Supp. V 1993).

in the remaining circuits in an effort to obtain a successful ruling. Such a result creates what is called a "circuit split," one of the characteristics that increases the chances of persuading the Supreme Court to accept a case for review down the line. Of course, there may come a point when the response from the appellate courts is so uniformly negative that the Solicitor General may be forced to acknowledge that the Government's position is unlikely to prevail if litigated further and to recommend to the affected government department or agency that a legislative remedy be sought where the question is one of statutory interpretation. In any event, the Solicitor General's decision to press positions in several appellate courts across the country offers the Government an opportunity to adjust and sharpen its legal theories with an eye toward prevailing in the Supreme Court.

I have spoken mostly, up to this point, about the Solicitor General's role with respect to federal appellate litigation. But I do not want to leave you with the impression that only the federal system is involved. In fact, the federal Government also appears from time to time in state courts in an amicus capacity. Where litigation in those courts implicates federal statutes,<sup>11</sup> affects the United States tax system,<sup>12</sup> or involves the rights of Indian tribes to water or fishing grounds,<sup>13</sup> for example, the federal Government seeks to participate to ensure that its interests are not adversely affected.

### III.

Having offered the foregoing outlines of the Solicitor General's role in the state and lower federal courts, I would like to describe in somewhat greater detail how the process actually works. The

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Hence, direct conflicts with the other circuits do not occur.

11. See, e.g., *Tobe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386 (Ct. App. 1994) (holding unconstitutional a local ordinance that authorized criminal sanctions for persons "camping" on any public area). The statute in *Tobe* implicates federal interest in problems of homelessness, as embodied in the Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100-77, 101 Stat. 482 (1987).

12. See *Crowder v. Benchmark Bank*, 889 S.W.2d 525 (Tex. Ct. App. 1994) (presenting question whether, under state law, creditor may foreclose against certain property when it has become subrogated to a federal tax lien).

13. See *Atlantic Salmon Fed'n v. Maine Bd. of Env'tl Protection*, No. KEN-94-779 (Me. Sup. Ct. filed Dec. 10, 1993) (raising question of scope of Indian tribes' fishing rights under state statute enacted to implement a federal statute and ratified by Congress).

first example involves a case that was accepted for review in the Supreme Court this Term, has already been argued, and is now awaiting decision, *City of Edmonds v. Washington State Building Code Council*.<sup>14</sup>

The Fair Housing Act (FHA) makes it unlawful “[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of . . . that buyer or renter.”<sup>15</sup> The Act requires that “reasonable accommodations” in rules and policies be made to enable persons with disabilities to enjoy equal housing opportunities.<sup>16</sup> Congress did create an exemption, however, for “reasonable . . . restrictions regarding the maximum number of occupants permitted to occupy a dwelling.”<sup>17</sup>

Beginning with the Bush Administration, the Justice Department’s Civil Rights Division has been actively involved in a series of cases that tests the meaning of the maximum occupancy exemption. Many cities around the country have zoning ordinances that restrict the number of *unrelated*, but not the number of related, persons who may live together in single-family residential zones; these ordinances have been relied upon in some communities to bar ten- to twelve-person group homes consisting of persons recovering from drug or alcohol addiction. The Government’s position—which draws on the language, purpose, and legislative history of the Act—is that these ordinances really are “family-composition” restrictions, not “maximum occupancy” restrictions, and therefore are not exempt from scrutiny under the federal law. The Government’s concern has been that construing the Act to exempt completely single-family zoning would undermine Congress’s intent to provide the disabled with meaningful opportunities to live in desirable and wholesome residential environments.<sup>18</sup>

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14. 18 F.3d 802 (9th Cir.), *cert. granted*, 115 S. Ct. 417 (1994).

15. 42 U.S.C. § 3604(f)(1)(A) (1988).

16. *Id.* § 3604(f)(3)(B).

17. *Id.* § 3607(b)(1).

18. In 1988, Congress enacted Section 2036 of Title II of the Anti-Drug Abuse Act of 1988 (ADAA) to encourage the development of Oxford Houses and similar group homes. Pub. L. No. 100-690, 102 Stat. 4181, 4202 (currently codified at 42 U.S.C. § 300x-25 (Supp. V 1994)). That legislation requires states receiving certain federal block grants to make loans available to help establish Oxford Houses and other group homes for former substance abusers. 42 U.S.C. § 300x-25 (Supp. V 1994). The ADAA reflects the view that “after detoxification and inpatient rehabilitation many [people] need to live in an alcohol- and drug-free environment for some time in order to avoid

Various would-be group homes and their members have sued municipalities challenging the “unrelated-persons” limits. The United States has participated in these lawsuits in two ways: In some cases, my immediate predecessor and I have authorized amicus participation; in others, the United States has itself brought an enforcement action under the Fair Housing Act against the municipality, which suit is then typically consolidated with the private suit. In 1992, in a case in which the Government participated as amicus, the Eleventh Circuit became the first court of appeals to rule on the issue. It held, in a suit against the City of Athens, Georgia, that unrelated-persons rules *do* fall within the Fair Housing Act exemption as reasonable occupancy restrictions.<sup>19</sup>

Two years later, in March 1994, the Ninth Circuit adopted the Government’s view in the *Edmonds* case,<sup>20</sup> from Washington State, thus creating a conflict with the Eleventh Circuit. The Government was a party in *Edmonds*. In this case, the other side, rather than the Government, sought and obtained Supreme Court review. But it was our expectation that once a circuit split occurred, the Supreme Court would find it an attractive issue to consider. In recent months, I have continued to approve amicus participation in suits presenting the question raised in *Edmonds*<sup>21</sup> and have authorized an appeal to the Eighth Circuit of an adverse decision on the question in a case involving St. Joseph, Missouri.<sup>22</sup> Decisions in these cases likely will not be rendered by the lower courts, however, until the Supreme Court resolves *Edmonds*.

The second example provides an insight into the process by which an important constitutional issue is working its way up to the Supreme Court and the role that the Government is playing to try to shape and focus litigation over that issue by intervening,

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relapse,” and that Oxford Houses “provide the kind of support necessary for [those] individuals.” 134 CONG. REC. 33,140-41 (1988) (remarks of Rep. Madigan); *see also* H.R. REP. NO. 592, 101st Cong., 2d Sess. 21 (1990) (“The Oxford House concept represents a ‘missing link’ in the treatment process . . .”).

19. *Elliott v. City of Athens*, 960 F.2d 975 (11th Cir.), *cert. denied*, 113 S. Ct. 376 (1992).

20. *City of Edmonds v. Washington State Bldg. Code Council*, 18 F.3d 802 (9th Cir.), *cert. granted*, 115 S. Ct. 417 (1994).

21. *See, e.g., Elderhaven, Inc. v. City of Lubbock*, No. 94-10648 (5th Cir. filed July 11, 1994).

22. *See United States v. City of St. Joseph*, Nos. 91-6122-CV-SJ-8, 91-6022-CV-SJ-8 (W.D. Mo. filed Nov. 21, 1991).

with the Solicitor General's authorization, in the lower courts. Whenever a suit is brought in federal court in which the constitutionality of any act of Congress "is drawn in question" and to which the United States is not a party, the court has a duty to advise the Attorney General of that fact.<sup>23</sup> The United States then has a statutory right to intervene in the case with all the rights of a party in order to present evidence or argument on the constitutionality question.

The United States has recently availed itself of that procedure in a number of cases involving the Religious Freedom Restoration Act (RFRA),<sup>24</sup> enacted in November 1993. In RFRA, as it is called, Congress sought to overrule a 1990 Supreme Court decision which held that laws of general applicability that burden the free exercise of religion need not be subjected to strict judicial scrutiny.<sup>25</sup> RFRA thus provides that a state or federal government may "substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person" furthers a compelling government interest and is the least restrictive means of doing so.<sup>26</sup>

RFRA has been challenged primarily on the grounds that Congress lacked Article I authority to promulgate the Act, and that the Act infringes on the rights reserved to the states by the Tenth Amendment. The Government's position is essentially that Congress's broad remedial powers under section five of the Fourteenth Amendment support the Act's constitutionality. Many of the cases involve claims by state prisoners that certain conditions of their confinement violate RFRA; the states then defend on the ground that the statute is unconstitutional. For example, a state prisoner in Hawaii contends that prison officials scheduled his law library time to conflict with a religious program,<sup>27</sup> and an inmate in Virginia complains that the prison will not serve kosher meals.<sup>28</sup> In another context, a church has alleged that a zoning regulation which prohibits it from expanding its facilities violates RFRA.<sup>29</sup>

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23. 28 U.S.C. § 2403(a) (1988).

24. 42 U.S.C. §§ 2000bb-1 to -4 (Supp. V 1994).

25. *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990).

26. 42 U.S.C. § 2000bb-1(b) (Supp. V 1994).

27. *Coronel v. Hawaii*, Civ. No. 93-00165 (D. Haw. filed Feb. 26, 1993).

28. *Cochran v. Morris*, No. 94-6104 (4th Cir. filed Dec. 30, 1993).

29. *Flores v. City of Boerne*, No. 95-67 (5th Cir. filed May 23, 1994).

To date, I have authorized intervention in eighteen actions in which RFRA's constitutionality has been challenged—in one federal circuit court,<sup>30</sup> fifteen district courts,<sup>31</sup> and two state courts.<sup>32</sup> One significant benefit of intervention, as opposed to amicus participation, is that intervention accords the United States status as a party and thus enables the Government to appeal an adverse decision. Indeed, the Government has intervened in one case in which the magistrate judge recommended a finding of constitutionality,<sup>33</sup> partly in order to preserve the ability to appeal should the district court rule to the contrary. As these cases wend their way up through the lower courts, it is our aim to develop the strongest defense of the Act's constitutionality and build a body of decisions to that effect, fairly certain in the knowledge that the issue will be before the Supreme Court soon.

#### IV.

One might think of the adverse decision process in terms of a pyramid that starts with a large base of federal litigation in the trial courts. Higher up the pyramid one finds a narrower set of Government appeals; the pinnacle, of course, is the Supreme Court. At that point, the Solicitor General confronts a relatively small group of cases about which a decision must be made whether to seek Supreme Court review. Solicitors General traditionally make clear that the decision to authorize an appeal or en banc review in a case represents no commitment that a petition for certiorari will be filed at the end of the appellate

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30. *Cochran*, No. 94-6104 (4th Cir. filed Dec. 30, 1993).

31. *Coronel*, Civ. No. 93-00165 (D. Haw. filed Feb. 26, 1993); *Muhammad v. Coughlin*, No. 91-Civ.-6333 (S.D.N.Y. filed Sept. 19, 1991); *Jolly v. Coughlin*, No. 92 Civ. 9026 (S.D.N.Y. filed Feb. 11, 1993); *Francis v. Keane*, No. 93 Civ. 0045 (S.D.N.Y. filed Jan. 5, 1993); *Bass v. Grattoli*, No. 94 Civ. 3220 (S.D.N.Y. filed May 3, 1994); *Alameen v. Coughlin*, No. 94-CV-0965 (E.D.N.Y. filed Mar. 4, 1994); *Yates v. White*, No. 94-1322 (W.D. Pa. filed Aug. 8, 1994); *Linton v. White*, No. 94-1604 (W.D. Pa. filed Sept. 19, 1994); *Hughes v. Lehman*, No. 3:94-0731 (M.D. Pa. filed June 18, 1994); *Flores v. City of Boerne*, No. 95-67 (5th Cir. filed May 23, 1994); *Gedo v. Salt Lake County*, No. 94-C-233J (D. Utah filed Mar. 3, 1994); *Snyder v. Murray City Corp.*, No. 94-C-667(G) (D. Utah filed Oct. 6, 1994); *Gates v. Smith*, No. 93-0090-R (W.D. Va. filed Feb. 2, 1993); *Sasnett v. Dep't of Corrections*, No. 94-C-52-C (W.D. Wis. filed Aug. 1, 1994); *Haff v. Cooke*, No. 94-C-0332 (E.D. Wis. filed Mar. 30, 1994).

32. *Rogers v. Fiedler*, No. 94-CV-1054 (Wis. Cir. Ct. filed Mar. 26, 1994); *Doxtator v. Thomas*, No. 94-CV-2096 (Wis. Cir. Ct. filed Sept. 20, 1994).

33. *Coronel*, Civ. No. 93-00165 (D. Haw. filed Feb. 26, 1993).

process, since the screening process at that point must, necessarily, take on greater rigor. As the Supreme Court stated recently with respect to the Solicitor General's screening function, "[t]he Government as a whole is apt to fare better if these decisions are concentrated in a single official."<sup>34</sup> The Solicitor General, as you might expect, is unlikely to be a very popular person at this stage of the process, since the great majority of recommendations for Supreme Court review in Government cases are not approved.

#### CONCLUSION

Most of you probably recall the debates a few years ago that swirled around whether C-SPAN should be allowed to use stationary or mobile cameras in covering congressional floor debates. Some members of the House and Senate feared that mobile cameras might give the viewing public a misimpression of how federal legislators spend their time, since Representatives and Senators on occasion speak from the well to only a handful of their colleagues. Voters might not understand that those not present were busy with committee hearings or providing constituent services elsewhere on Capitol Hill, they complained. The solution was to allow only fixed cameras that would focus on the speaker rather than upon his or her audience.<sup>35</sup>

In much the same spirit, I thought that this speech would serve to reassure you and others who may read or hear about it that the fact that the Solicitor General is not dressed in striped pants and morning coat arguing before the Supreme Court does not mean that he is shirking his responsibilities. He is just back in his office poring over a mound of the day's adverse decisions, amicus or intervention recommendations stacked high on his desk!

Thank you.

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34. *Federal Election Comm'n v. NRA Political Victory Fund*, 115 S. Ct. 537, 542 (1994).

35. See Linda Greenhouse, *TV: The Senate Grins and Bravely Tries to Bear It*, N.Y. TIMES, May 2, 1986, at A20; *House Rejects Rule on Cameras in Chamber*, N.Y. TIMES, June 7, 1984, at D22.