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Executive Branch Advocate v. Officer of the Court: The Solicitor General's Ethical Dilemma

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Executive Branch Advocate v. Officer of the Court: The Solicitor General's Ethical Dilemma

Drew S. Days, III

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I. INTRODUCTION

It is truly a pleasure to be with you at Nova Southeastern this week. I want to thank my friends, Dean Joseph Harbaugh and Professor Bruce Rogow, for all their efforts in making my visit possible. For those of you in your first year at the Law Center, let me explain how complicated those efforts were. You see, I was originally scheduled to spend several days here last March. A funny thing happened to me, however, "on my way to the forum." A disc in the lumbar region of my spine decided to herniate, break off, and put significant pressure on a nerve running to my left leg, producing excruciating pain. As a result, rather than enjoying the wonderful companionship and climate Nova Southeastern had to offer, I spent late March and early April going through surgery and recuperation. Consequently, I am especially gratified to be here and to be able to stand before you pain free and ambulatory.

I must admit, an additional reason for my finding this task so enjoyable is that I am the *former* Solicitor General—not the current incumbent. Consequently, I stand before you with *no* government crises on the horizon to which I have to respond, *no* court filing deadlines bearing down on me, *no* hours of preparation ahead of me for oral arguments, and *no* anxiety-ridden weeks until the end of the term when the most important decisions of the

Supreme Court are usually announced. I do not mean to suggest that my over three-year stint as the Solicitor General was partially unrewarding; it was far from it. I believe that being the Solicitor General is the best lawyer's job in the country.

While I was in Washington, the Legal Adviser to the State Department and I debated the question of who had the better job. The only concession I was willing to make to him was that the Legal Adviser gets better travel. He goes to London, Paris, The Hague, and Beijing. For the most part, the Solicitor General's travel entails a five-minute car ride from the Department of Justice to the Supreme Court and an equally short return trip. On my side of the ledger, of course, is the fact that the Solicitor General *dresses* better than the Legal Adviser. No other lawyer in America has the opportunity, as does the Solicitor General, to don striped pants, a cutaway dark vest, and silver and black tie for a "day at the office."

But, on a more serious note, the rewards of the Solicitor General's job come from his being able to survey the entirety of federal government litigation throughout the United States and to control the flow of that litigation up through the lower federal courts to the Supreme Court. Once cases reach the Supreme Court, the Solicitor General plays an important role in the development of American law and can have an impact upon the establishment of constitutional and other principles that will affect our lives for years to come. This is because the Solicitor General has responsibility not only for representing the United States in the Supreme Court, but also for authorizing all appeals from federal trial courts to the courts of appeals, for all *amicus* filings in appellate courts, and for interventions by the government where the constitutionality of federal laws is drawn into question.

In order to give you some sense of the magnitude of this undertaking, during my tenure I argued seventeen cases before the Supreme Court and one before a federal court of appeals. I also personally reviewed over 3000 recommendations with respect to petitions for certiorari, appeals, *amicus* briefs, and interventions. My staff and I filed roughly 100 certiorari petitions, over 200 merits briefs, and presented oral argument to the Supreme Court in about two-thirds of all the cases the Court heard during the three terms I served as Solicitor General.

I have entitled my talk "Executive Branch Advocate v. Officer of the Court: The Solicitor General's Ethical Dilemma" in an effort to capture an inherent tension in the Solicitor General's role that I am certain all those who preceded me experienced. It is, I believe, a *creative* tension that, on balance, produces more responsible government advocacy before the

Supreme Court than otherwise. However, it also provides a Solicitor General with some of the loneliest and most difficult moments of his tenure.

I had more than a few such moments during my time as Solicitor General, but I will not attempt to provide you this afternoon with a catalogue in that regard. Rather, I am going to discuss four occasions where this tension appeared to me particularly acute.

II. THE SOLICITOR GENERAL AS EXECUTIVE BRANCH ADVOCATE

Although the Solicitor General is appointed by the President and serves in the Justice Department headed by the Attorney General, identifying the Solicitor General as an Executive Branch advocate does not *begin* to explain the position's true function. One of the first questions that a new Solicitor General has to ask is: "Who am I representing?" The Solicitor General finds, before much time has passed, that the answer to that question is rather complicated. Indeed, the American Bar Association Model Rules of Professional Conduct note cryptically in the section on the "*Organization as Client*,"¹ defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context." The Solicitor General may, at any given point, conclude that the client is: 1) the people of the United States; 2) the federal government; 3) the administration in which he serves; 4) the President; 5) the Attorney General; 6) the Executive Branch departments and agencies; 7) individual federal employees; 8) independent regulatory agencies; and 9) the Congress.

A. *The Solicitor General and the National Rifle Association*

One of the apparent surprises on my list was more than likely independent regulatory agencies because they are, as any basic course on administrative law or civics would reveal, supposed to be substantially *independent* of Executive Branch control. For that reason, independent regulatory agencies have bipartisan memberships and terms that often extend beyond the four years of any administration. Nevertheless, with few exceptions, Congress has entrusted the Attorney General and the Solicitor General with the responsibility for representing such agencies before the Supreme Court. As my encounter in the spring of 1994 with the Federal

1. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1995).

Election Commission ("FEC") made clear, the agencies themselves are not always amused by this arrangement.

Of all the agencies that one would think deserved to be free of any Executive Branch control, it would be the FEC, a body with responsibility for investigating and prosecuting both civil and criminal violations of the federal election laws. The FEC does things like investigating activities of the major political parties and congressional and presidential election committees. FEC litigation matters probably qualify better than most as political "hot potatoes" for Executive Branch officials and are unlikely to do much good for one's career if mishandled.

This dynamic probably contributed to the general conclusion accepted by both the FEC and the Solicitor General's office for over twenty years that the FEC had independent litigating authority in the Supreme Court. Indeed, a short written description of the Solicitor General's responsibilities that I found upon taking office explicitly singled out the FEC as one of the very few agencies with such authority. However, I was prompted by a notification from the FEC in 1994 that it intended to seek certiorari in a case involving the National Rifle Association ("NRA") to sit down and read the FEC's enabling legislation. I concluded from my research that the FEC *had* no independent litigating authority in that type of controversy. At issue was whether, as the United States Court of Appeals for the District of Columbia Circuit had held, the FEC's composition violated separation of powers.² At that time the Secretary of the Senate and the Clerk of the House of Representatives were included as nonvoting members of the Commission.³ Moreover, on the merits, I believed, contrary to the FEC's position, that the FEC's makeup *was* unconstitutional.

The FEC decided that it would file its own petition, without my authorization, but subsequently accepted a letter from me to the Supreme Court to the effect that, if the FEC were wrong on that point, it had my post hoc authorization. I then filed a brief challenging the FEC's independent litigating authority and arguing that its makeup was unconstitutional.⁴ After certiorari was granted, and full briefs and oral argument had taken place on the merits of the constitutional challenge, the Supreme Court dismissed the case on the grounds that the Commission lacked independent litigating

2. See *Federal Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 827 (D.C. Cir. 1993).

3. *Id.* at 823.

4. See Brief for the United States as *Amicus Curiae*, *Federal Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88 (1994) (No. 93-1151).

authority and that the Solicitor General's authorization came after the time for filing the petition had expired.⁵ The Supreme Court provided no guidance on the merits, whatsoever. At issue was the authority of the Solicitor General to represent independent agencies in the Supreme Court unless Congress directed otherwise. But also at stake was the ability of the Executive Branch to challenge consistently and effectively any efforts by Congress to enlarge *its* powers unconstitutionally. As curious as it may seem, I was, in a sense, both defending and attacking Congress at the same time.

B. *The Case of the Speedway Bomber*

A second example of the Solicitor General's difficulty in identifying the client arises in the context of what are called *Bivens*⁶ actions, in which federal government officials are sued for allegedly violating another person's constitutional rights. If the plaintiffs in such cases are successful, they may be able to recover money damages directly from the officials. The Justice Department usually provides federal officials with legal representation in *Bivens* actions. However, officials facing suit must devote significant time and energy to defending themselves, even if they are ultimately vindicated. Over a number of years, the Supreme Court has attempted to ensure that frivolous *Bivens* actions are identified and dismissed at the earliest possible stage in the litigation. But there are occasions where the interests of the individual official and those of the government diverge, as proved to be true during the 1994–95 Term in a case called *Kimberlin v. Quinlan*.⁷

Although the name of the case may not be familiar, the facts have been the subject of significant media attention in recent years. Kimberlin had been convicted and was serving a fifty-one-year sentence for federal drug and explosive offenses when the events of importance here allegedly took place.⁸ He had been convicted for, among other things, a series of bombings in and around Indianapolis for which he gained the name "The Speedway Bomber."⁹ Kimberlin alleged that, shortly before the 1988 presidential election, he was placed in administrative detention by Quinlan, Director of the Federal Bureau of Prisons, and other federal officials, in order to prevent

5. See *Federal Election Comm'n*, 513 U.S. at 98.

6. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

7. 6 F.3d 789 (D.C. Cir. 1993), *vacated*, 515 U.S. 321 (1995).

8. *Id.* at 791 n.3.

9. *Kimberlin v. White*, 7 F.3d 527, 528–29 (6th Cir. 1993).

him from communicating with the media.¹⁰ The story that the defendants wanted squelched, according to Kimberlin, was that he had sold marijuana during the 1970s to a law student named Dan Quayle, the Republican vice-presidential candidate in 1988.¹¹

Kimberlin sued the federal officials, alleging a violation of his First Amendment free speech rights.¹² Department of Justice lawyers defended Quinlan in the trial court, but were unsuccessful in getting the case thrown out.¹³ On appeal, the federal defendants wanted to argue that the case should have been dismissed by the trial court because Kimberlin had introduced no “direct evidence” of unconstitutional motivation on their part, as precedent required.¹⁴ The United States District Court for the District of Columbia had determined that where government officials acted in a manner that might be perfectly legal—for example, a prison official’s placing an inmate in administrative detention—but for the claim of unconstitutional motivation, the plaintiff must make more than conclusory allegations with respect to motivation.¹⁵ My predecessor, Ken Starr, had, in an earlier case,¹⁶ rejected that “direct evidence rule” as a government position, and I concurred with his view. Consequently, on appeal, the government withdrew from representing Quinlan and the other officials and authorized them to obtain private counsel at taxpayer expense. As a result of pressing that argument, the defendants won on appeal¹⁷ and Kimberlin sought Supreme Court review.¹⁸

As it does from time to time, the Supreme Court invited the Solicitor General, even though the government was no longer involved in the case, to advise it as to whether it should grant Kimberlin’s petition for a writ of certiorari.¹⁹ In so doing, the Supreme Court placed me in a rather awkward position. I could urge it not to take the case, thereby, if the Supreme Court agreed, ending the case and rendering final the federal officials’ lower court

10. *Kimberlin*, 6 F.3d at 791–93.

11. *Id.* at 791.

12. *Id.*

13. *Kimberlin v. Quinlan*, 774 F. Supp. 1, 10 (D.D.C. 1991), *rev’d*, 6 F.3d 789 (D.C. Cir. 1993).

14. *Kimberlin*, 6 F.3d at 793–94 (D.C. Cir. 1993).

15. *Kimberlin*, 774 F. Supp. at 6.

16. *See* Brief for Respondent at 11–12, *Siegert v. Gilley*, 500 U.S. 226 (1990) (No. 90-96).

17. *Kimberlin*, 6 F.3d at 798 (D.C. Cir. 1993).

18. *Kimberlin v. Quinlan*, 513 U.S. 1123 (1995).

19. *See id.*

victory. Alternatively, I could recommend that the petition be granted and argue that the dismissal by the court of appeals of Kimberlin's suit based upon the "direct evidence rule" was erroneous and should be reversed. The former approach would underscore the Attorney General's commitment to vigorous defense of federal officials in *Bivens* actions. Such an approach would be consistent with the Supreme Court's concern that baseless suits with their threat of personal liability and burdens of litigation, unless "nipped in the bud," may discourage talented individuals from entering public service or drive others from office. The latter, setting to one side the fact that it might produce headlines reading, in effect, "Government Joins Speedway Bomber in Constitutional Suit Against Federal Officials," would be consistent with the Attorney General's responsibility for ensuring that persons with legitimate civil rights claims do not have their cases, against either federal or nonfederal officials, dismissed prematurely. For the Supreme Court's prior rulings in *Bivens* cases, although involving suits against federal officials, had been readily applied to civil suits against state and local officials.²⁰

After extensive consultation with the Attorney General, I concluded that my duty was not to the specific federal defendants but to ensuring that unreasonable barriers were not placed in the path of the civil rights plaintiffs. No distinction is made anywhere else in the law between the probativeness of "direct evidence" on the one hand and "circumstantial evidence" on the other,²¹ and I saw no reason to do so in *Bivens* actions. The "direct evidence rule" would require the plaintiffs in such cases to produce a "smoking gun," something tantamount to a defendant's confession of unconstitutional motivation, in order to avoid having their suits summarily dismissed.

I must say that this decision was rendered especially difficult; first, because those of us involved in determining the government's position knew *we* were present or potentially future defendants in *Bivens* actions where the direct evidence rule might prove very handy. Second, we were also aware that anything other than all-out defense of government officials in such cases, even if not fully justified, has an unavoidably depressive effect upon employee morale. One may hear from other federal officials in this context: "Am I going to be left to hang out to dry by the Attorney General when a

20. *See, e.g.*, *Butz v. Economou*, 438 U.S. 478, 504 (rejecting a distinction between state and federal government officials' liability under 42 U.S.C. § 1983 (1970) and *Bivens*, respectively).

21. *See, e.g.*, *United States v. Hatchett*, 31 F.3d 1411, 1421 (7th Cir. 1994) (stating that "circumstantial evidence is not less probative than direct evidence, and, in some cases is even more reliable") (citing *United States v. Rose*, 12 F.3d 1414, 1417 (7th Cir. 1994)).

groundless suit is brought against me?" But here, my client turned out to be, perhaps, the citizenry at large, *not* the federal defendants.

I should report the weeks of " Sturm and drang" over what position the government would take in *Kimberlin* ultimately went for naught. The case was accepted for review, oral arguments took place, and the Supreme Court, in a paragraph per curiam opinion, vacated and remanded the case back to the United States Court of Appeals for the District of Columbia Circuit for reconsideration in light of the Supreme Court's decision announced earlier that week in another *Bivens* case raising a related, but not identical, question.²²

III. THE SOLICITOR GENERAL AS OFFICER OF THE COURT

The Solicitor General's role as Executive Branch advocate, with all the complexity I have just described, is complicated further by the position's responsibilities as an officer of the Supreme Court. In this regard, the Solicitor General cannot hope to discharge these responsibilities unless he has established a reputation before the Supreme Court for absolute candor and fair dealing. One would like to think that anyone charged with representing the United States in the Supreme Court would have acquired those characteristics prior to assuming that post. But were that not the case, certain pragmatic considerations would lead a Solicitor General to acquire them rather quickly. For, as I mentioned earlier, the Solicitor General and the staff are involved in approximately two-thirds of the cases the Supreme Court hears each term. Moreover, the Solicitor General files literally hundreds of briefs each term responding to certiorari petitions by others seeking review of lower court decisions in the government's favor. The Solicitor General also periodically seeks extraordinary relief, such as a stay, from the Supreme Court or one of its Justices in lower court litigation.

The Solicitor General's traditional success in obtaining review in the Supreme Court of adverse decisions, and of resisting petitions filed against the government by others, can be attributed, I think, to the fact that the Justices *believe* the Solicitor General when the Solicitor General says that a matter warrants or does not warrant their attention; they *rely* upon the Solicitor General's reputation for telling the truth and for not hedging or distorting to gain a short-term advantage. Indeed, the Supreme Court looks to the Solicitor General to serve as a "gatekeeper" with respect to the flow of

22. *Kimberlin v. Quinlan*, 515 U.S. 321, 322 (1995) (remanding for further consideration in light of *Johnson v. Jones*, 515 U.S. 304 (1995)).

government litigation to the Court. As the Supreme Court stated only a few terms ago:

[T]he practice [of concentrating the litigating authority in the Solicitor General] also serves the Government well; an individual Government agency necessarily has a more parochial view of the interest of the Government in litigation than does the Solicitor General's office, with its broader view of litigation in which the Government is involved throughout the state and federal court systems. . . . The Government as a whole is apt to fare better if these decisions are concentrated in a single official.²³

By the same token, once a Solicitor General's word can no longer be trusted by the Supreme Court and the justices begin to think that the government briefs need to be double checked, the special relationship is likely to suffer significantly. Furthermore, to the extent that the Justices' fears are borne out, retribution may be swift and certain. Unlike most lawyers appearing before the Supreme Court who may argue there only once in their lives, the Solicitor General and staff—proverbial “repeat players”—are there on almost a daily basis during the Term. They must answer tomorrow for today's misrepresentations, if they occur. But, telling the truth is not always a painless activity, as the following two examples reflect.

A. *AIDS, AZT, and Patent Law*

During the 1995–96 Term, the Supreme Court was asked to review a dispute over patent rights to the drug azidothymidine (“AZT”).²⁴ Burroughs Wellcome's patent was being challenged by a manufacturer of generic drugs, Barr Laboratories.²⁵ Barr Laboratories contended that it had a right to share in the patent based upon a license to it granted by the United States Government.²⁶ In short, at an early stage in Burroughs Wellcome's development of the compound that became AZT, scientists at the National Institutes of Health (“NIH”) conducted tests of the drug on mice at the company's request.²⁷ Barr argued that it was only after the NIH tests, and in reliance upon their results, that Burroughs Wellcome determined that AZT

23. *Federal Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 96 (1994).

24. *Burroughs Wellcome Co. v. Barr Lab., Inc.*, 40 F.3d 1223 (Fed. Cir. 1994).

25. *Id.* at 1225–27.

26. *Id.* at 1226.

27. *Id.*

was worth patenting.²⁸ Burroughs Wellcome asserted that, on the contrary, AZT was sufficiently patentable *before* the NIH tests.²⁹ The lower courts had held for Burroughs Wellcome.³⁰ If the former scenario was correct, the federal government had a right to share in the patent and to license Barr Laboratories to exploit that interest.

Once again, the Supreme Court asked for the views of the Solicitor General.³¹ Here, the tension over what position to take was caused by the administration's concern that Barr Laboratories' failure to prevail in its challenge would leave intact Burroughs Wellcome's monopoly over the production and sale of AZT. Those responsible in the government for policy on acquired immunodeficiency syndrome ("AIDS") along with public interest groups urging aggressive AIDS research and treatment believed that, were the challenge successful, the monopoly would be broken. As a result, there would be a drop in the price of AZT and a greater availability to those carrying the virus or suffering from full-blown AIDS.

But my job as Solicitor General was, while keeping those policy concerns in mind, to decide what the best *legal* answer was to the patent law question presented to the Supreme Court by Barr Laboratories' petition for certiorari. After a great deal of research and thought, my staff and I concluded that Burroughs Wellcome's position, not Barr Laboratories', was the correct one as a matter of patent law.³² Moreover, we also identified an important public policy interest consistent with our legal analysis. There was good reason to fear that the government's claim to patent rights under circumstances like those presented by this case might discourage pharmaceutical companies from seeking federal assistance altogether.³³ As a consequence, once on the market, the costs of research and of the drugs themselves might increase, as might the delay in the process, and the government might find itself denied an opportunity to have *any* impact on the development of valuable new pharmaceutical products.³⁴ I informed the

28. *Id.* at 1228.

29. *Burroughs*, 40 F.3d at 1227.

30. *Burroughs Wellcome Co. v. Barr Lab., Inc.*, 828 F. Supp. 1208, 1209 (E.D.N.C. 1993), *aff'd in part, vacated in part*, 40 F.3d 1223, 1227 (Fed. Cir. 1994).

31. *Barr Lab., Inc. v. Burroughs Wellcome Co.*, 515 U.S. 1130 (1995) (inviting the Solicitor General to file a brief expressing the views of the United States).

32. Brief for United States as *Amicus Curiae* at 990, *Barr Lab., Inc. v. Burroughs Wellcome Co.*, 116 S. Ct. 771 (1996) (No. 94-1527).

33. *Id.* at 15-17.

34. See Brief for United States as *Amicus Curiae*, *Barr Lab., Inc.* (No. 94-1527).

Supreme Court of the government's view of the law and urged the Court to deny certiorari.³⁵ It did so.³⁶

B. *Ivan the Terrible*

Here is my final example. Early in my tenure, I found myself wrestling with questions growing out of the government's handling of the case of John Demjanjuk, thought to be "Ivan the Terrible," an executioner in the Nazi death camp at Treblinka, Poland. The Justice Department determined that Demjanjuk had lied on his immigration papers by omitting his Nazi affiliation, and thereafter successfully obtained court orders denaturalizing him and directing his deportation.³⁷ But before his deportation, the Israeli government sought his extradition so that he could stand trial for genocide. Demjanjuk was tried in Israel, convicted, and sentenced to death. While his case was on appeal to the Israeli Supreme Court, however, materials from newly uncovered Soviet archives raised serious doubts about whether Demjanjuk was, in fact, "Ivan the Terrible."³⁸

Meanwhile, the federal court of appeals that had affirmed the denaturalization and deportation orders in Demjanjuk's case, upon hearing about the new Soviet records, appointed a district court judge as a special master to take evidence and to report back on the question of whether Justice Department lawyers had acted improperly in their handling of the case.³⁹ Perhaps, reinforcing the court of appeals' resolve in this regard, the Israeli Supreme Court reversed Demjanjuk's conviction and ordered him freed based upon this new evidence.⁴⁰

The special master, after conducting an extensive review, concluded that government lawyers had not violated any ethical or professional standards with respect to Demjanjuk's case, although he did identify certain instances of oversight that he found unfortunate in retrospect.⁴¹ The court of appeals, however, rejected the special master's determination, holding

35. *Id.*

36. *Barr Lab. Inc.*, 116 S. Ct. at 771.

37. *See In re* Extradition of John Demjanjuk, 612 F. Supp. 544 (N.D. Ohio 1985) (deporting Demjanjuk); *United States v. Demjanjuk*, 518 F. Supp. 1362 (N.D. Ohio 1981) (denaturalizing Demjanjuk).

38. *See* Clyde Haberman, *Soviet Files Presented in Appeal of War-Crimes Verdict in Israel*, N.Y. TIMES, June 2, 1992, at A3.

39. *Demjanjuk v. Petrovsky*, 10 F.3d 338, 339 (6th Cir. 1993).

40. *Id.* at 342.

41. *Id.* at 348.

instead that the government lawyers were guilty of what could be called “good faith fraud”—an offense previously unknown to the law.⁴² This finding represented a devastating blow to the reputations of three highly regarded federal prosecutors and damaged the credibility of the entire government program to identify, denaturalize, and deport Nazi war criminals. Under the circumstances, although the odds were against us, I decided that a certiorari petition should be filed to vindicate those interests.

While I awaited the Supreme Court’s action on our petition, a lawyer on my staff walked into my office and asked to talk to me about a matter that was troubling him. I invited him to sit down. His area of responsibility among the assistants to the Solicitor General was handling tax cases, but he said that he had taken a look at our petition in the *Demjanjuk* case just out of curiosity and found himself recalling a conversation he had some fourteen years earlier. Although he admitted his memory was somewhat hazy, the conversation was with another lawyer who, at the time, had just left the Solicitor General’s office to join the “Nazi Hunter” unit in the department. According to my assistant, that lawyer mentioned in passing that he was involved in an important case in which the government team had some information that might be conflicting as to the Nazi camp where the person targeted for denaturalization and deportation had served. When asked by my tax assistant whether that was information that should be provided to that person’s lawyer, the new member of the “Nazi Hunter” team said that he did not believe so.

After hearing him out, I was faced with the question of what to do with this report. I could do nothing, for after all, the tax assistant did not recall any mention of Demjanjuk’s name, or of “Ivan the Terrible,” or of Treblinka; the conversation might have been about an entirely different case, even if my tax assistant’s memory was accurate as to what he did recall. But I was struck by the fact that the court of appeals had come down hard on the government lawyers primarily because it felt that they had withheld critical information from witnesses and defense counsel in Demjanjuk’s case. Moreover, whether John Demjanjuk was at Treblinka or another Nazi camp was central to establishing that he was “Ivan the Terrible.” Failure to make complete disclosure to the Supreme Court of the report I had received might, in retrospect, compound damage done by the earlier charges against the Department of Justice.

I decided, therefore, to file a supplemental brief with the Supreme Court, and to advise defense counsel by letter of my conversation with my

42. *Id.* at 354.

assistant, fully aware of the fact that such a filing was unlikely to improve our chances of having certiorari granted. I filed the brief, and shortly thereafter certiorari was denied.⁴³

IV. CONCLUSION

I have discussed four instances during my tenure in which I took positions in the Supreme Court that might appear to be inconsistent with the Solicitor General's role as Executive Branch advocate, and other instances exist that I have not mentioned. But I do not want to leave you with the false impression that Solicitors General spend most of their time devising legal arguments likely to undermine governmental programs and policies. In most cases, the Solicitor General's client is not hard to find. Indeed, were I to spread out my entire record, you might well conclude that there were too *few* occasions when I acted in the long term, rather than the short-term interests of the United States. My purpose here, however, was not necessarily to convince you of the *wisdom* of my decision-making process. Rather, it was to give you a sense of the difficulties a Solicitor General faces in carrying out his responsibilities.

Difficulties though they may be, when the Solicitor General acts in ways that may present short-term problems for the government in the courts, it is a reflection of the tradition of the independence that has grown up around the office of the Solicitor General over the past 127 years, respected with few exceptions by presidents and attorneys general alike. To quote from a 1977 Justice Department statement on the role of the Solicitor General:

It was a Solicitor General, Frederick W. Lehman, who wrote that "the United States wins its point whenever justice is done its citizens in the courts"; and the burden of history is that justice is done most often when the law is administered with an independent and impartial hand. The Nation values the Solicitor General's independence for the same reason that it values an independent judiciary.⁴⁴

So be it. Thank you.

43. See *Rison v. Demjanjuk*, 513 U.S. 914 (1994).

44. John M. Harmon, *Memorandum—Opinion for the Attorney General*, 21 LOY. L.A. L. REV. 1089, 1092 (1988).

Professor of Political Science
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Professor Peter Irons is an award winning legal historian who teaches political science at the University of California in San Diego. The author of seven books on the Supreme Court and constitutional litigation, Professor Irons has received an unprecedented three Silver Gavel Awards from the American Bar Association as well as the J. Willard Hurst Prize for excellence in legal history.

In one of his most influential works, *Justice at War: The Story of the Japanese American Internment Cases* (Oxford, 1983), Professor Irons chronicles the American government's detention of some 120,000 West Coast Japanese Americans during World War II and the subsequent violations of civil rights. Critically acclaimed by the *Los Angeles Times Book Review*, *The Washington Post Book World*, *The New York Times Book Review*, and *Newsweek*, the book showcased Iron's genius at investigating government misconduct and painting an ultimate portrait of injustice. The book also influenced Congress to provide \$1.2 billion in reparations to the survivors of the wartime internment camps.

Professor Irons sparked a major controversy in 1993 with the publication of *May It Please the Court* (New Press), a set of edited recordings of 23 historic Supreme Court cases that prompted a threat by the Court to sue him. After much publicity, the Justices backed down and opened the recordings for any use. The Irons tapes/book set is now used in many constitutional law courses across the country.

Professor Irons, who earned his B.A. from Antioch College, his M.A. and Ph.D. from Boston University, and his J.D. from Harvard University, has recently published *Brennan v. Rehnquist: The Battle for the Constitution* (Knopf, 1994), in which he explores the contrasting philosophies of two judicial giants through the analysis of 100 decisions in which both men express their views.

