

OHIO STATE LAW JOURNAL

Volume 47, Number 3, 1986

Lawyering for the Government: Politics, Polemics & Principle*

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Every litigating lawyer, I submit, plays two basic roles. First, the lawyer is an advocate for a client whose objective is to achieve the most favorable result possible in that particular case. Second, he or she is also an officer of the court. In that role, the objective is to assure that the processes function as they should and that justice is done in that particular case and in the courtroom in general.

In their broadest aspects, these two objectives are mutually supportive because the best way that a lawyer can serve justice and perform as an officer of the court is to serve the client in the particular case. But there are instances in which there can be a tension between the two roles, and as members of the legal profession we have few responsibilities that are more important than striking just the right balance between them. The basic theme that I would like to develop here concerns the differences that that task poses for the government lawyer as compared with his or her private sector counterparts.

I begin by asking the question whether this distinction between the lawyer as advocate for a client and the lawyer as officer of the court has any significance beyond the academic. There is an argument that the concept of the officer of the court as an enforcer of a broad, nebulous principle of justice is so abstract, and the objectives it attempts to serve are so difficult of identification, that the concept has no practical value. This argument contends that the only way a lawyer in our system can truly serve justice as an officer of the court is to do the best job that he or she can in representing a particular client in a particular case, and that anyone who pretends otherwise just does not understand the adversary system. I understand that argument, and I used to be one of its adherents. I now believe, however, that all lawyers must be conscious of their two separate professional responsibilities, and be responsive to both. This view is based principally on my experiences as a government lawyer.

I will review three distinct ways in which the government lawyer as a litigator has an enhanced responsibility as an officer of the court precisely because he or she is a government lawyer.

First, because both the government lawyer and the courts before which the government lawyer practices are a part of government—and thus have the same

* These remarks were delivered as the Law Forum Lecture at The Ohio State University College of Law on March 19, 1986.

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employer and the same ultimate objectives—the government lawyer must be more sensitive to the values on the other side of the lawsuit than is true of lawyers in general. It is true that he is still an advocate, but the government's opponent, whether in a criminal case, a civil rights case, an antitrust case, or any other kind of case, is also part of the public whose total interest the lawyer serves.

Second, unlike the private practitioner, the government lawyer who files a lawsuit has an obligation to take into account that the suit is going to consume a scarce resource of the government that is the lawyer's employer and client. That resource is the time of the judge and the cost of operating the courtroom. While it appears that no reliable studies have been done on this subject, my guess, based mostly on conversations with knowledgeable people, is that the average cost of operating an American courtroom, including the cost of the real estate, personnel, and physical facilities, is somewhere between 500 and 700 dollars an hour. Who pays that cost? The taxpayers do. The same taxpayers who pay the government lawyers.

I think that one of the things that is wrong with our lawyering system today is that many times we go to trial on issues that do not involve an amount that is equivalent to the number of hours that will be spent in that courtroom multiplied by six or seven hundred dollars. I think that there is a particular obligation imposed on the government lawyer to take that factor into account. The preliminary inquiry should be whether the good that I will do for the government is offset by the cost that is going to be imposed on the government because I am consuming a scarce governmental resource.

Third, and the subject of my principal focus this evening, the government lawyer should be more sensitive to his or her officer of the court responsibilities than a private sector attorney, simply because it will help win more lawsuits, and the contribution that attention to one's officer of the court status will make to victory in the courtroom is greater for the government lawyer than for the private practitioner.

My views in this respect are influenced principally by my experience at the Solicitor General's office and it is on mainly that experience that I draw. I think, however, that the general views I express also demonstrate a broader principle that applies across the entire spectrum of government lawyering.

Let me begin by reviewing a few numbers. The reason that the Solicitor General of the United States has the greatest lawyering job in the world is that one of his two responsibilities is to handle litigation for only one client, the United States of America, before only one court, the United States Supreme Court. In other words, he represents the world's most interesting client before the world's most interesting court.

The Supreme Court in any given year will consider about 160 cases on the merits. The Solicitor General's client is a party in about sixty of those cases. In addition, his client will participate as *amicus curiae* both in the briefing and the oral argument of about twenty-five or thirty more cases. Those numbers alone render unique the relationship of this particular little twenty-three member law firm to the only court before which it practices. I know of no other court of general jurisdiction in the world in which one law firm appears in more than half of its cases.

There are some other numbers that make this relationship even more remarkable. First, the national average for winning cases before the United States Supreme Court is fifty percent. (Now if you poll the lawyers it will come out slightly higher than fifty percent, but I will assure that by any objective measurement it is fifty percent.) But this particular firm rather consistently wins seventy percent or more.

Next, the national average for persuading the Court to consider the case on the merits—that is to note jurisdiction of appeals or to grant certiorari—is about three percent to five percent. For the Solicitor General's office, it is somewhere between sixty percent and seventy percent. A final example, and perhaps the most significant of all, is this: About two dozen or more times each year, the United States Supreme Court will enter an order asking the Solicitor General to express the views of the United States in a case in which the United States is not involved as a party.

Those numbers are only part of the story. Beyond the numbers there is a widely held, and I believe substantially accurate, impression that the Solicitor General's office provides the Court from one administration to another—and largely without regard to either the political party or the personality of the particular Solicitor General—with advocacy which is more objective, more dispassionate, more competent, and more respectful of the Court as an institution than it gets from any other lawyer or group of lawyers.

The relationship I have just described is one that has great advantages for both institutions. The advantage to the Court is that in more than half of its cases it has a highly-skilled lawyer on whom it can count consistently for dependable analysis rendered against the background of an unusual understanding and respect for the Court as an institution.

The benefit to the Solicitor General and his clients is obvious. What lawyer would not value a relationship in which the court before which he appears with frequency, asks him, "what should we do about this case in which you are not involved?" I think that it is not only proper for the Solicitor General to use the adversarial advantages that result from that kind of relationship; it would be a breach of obligation to the President who appointed him to fail to do so. But it must be done with discretion, with discrimination, and with sensitivity, lest the reservoir of credibility which is the source of this special advantage be diminished, with adverse consequences not only to the government's ability to win cases, but also to an important institution of government itself.

Let me give you three examples of temptations that exist to consume the Solicitor General's capital in the interest of particular cases. It would be an exaggeration to use the metaphor of killing the goose that laid the golden egg, but there are some similarities.

The first of my examples concerns the filing of petitions for certiorari. I mentioned a moment ago that of the 160 cases that the Court considers each year, about sixty or so are cases in which the government is a party. How do those cases get there? About five or ten of them get there over the government's opposition; they are filed by opposing parties in cases that the government won in the lower courts. But most of them are there because the Solicitor General makes a conscious decision

to file a petition for certiorari. Since about two-thirds of the Solicitor General's petitions for certiorari are granted, the sixty or so cases reviewed on the merits are the product of some eighty to ninety petitions for certiorari. Those eighty to ninety filings represented a culling from about five or six times that many recommendations from cabinet heads, U.S. attorneys, and assistant attorneys general and general counsel of the various departments and agencies. Thus, after an initial screening we would have about 300 to 350 recommendations to file petitions for certiorari, and we would file about one-sixth that number.

There is great pressure to file more. Put yourself in the position of a cabinet head, or the chairman of an independent regulatory commission. You have lost a case in a Court of Appeals and you want to take it to the United States Supreme Court. Assume also that you have come from private industry where you have been accustomed to dealing with lawyers. In the private sector, when you want to file a petition for certiorari you go to a lawyer and he or she asks only two questions: is it a responsible position, and are you willing to pay the fee? If the answer to both questions is yes, he will file the petition for certiorari.

Not so, if you work for the United States of America. Even if the position is meritorious, the chances are only about one in six that the United States Supreme Court will even see a cert petition. And the judgment whether to file will not be made within your department or your agency, even though the issue is crucial to your program. The judgment will be made by someone in the Justice Department. And what makes it even worse, the person tells you no, (as he will five times out of six) not because he disagrees with your position, but solely because he perceives that filing that case might affect his relationship with the Court.

I have heard this question many times: "What possible difference can it make to this nebulous thing you call your credibility with the Court if we file just this one more cert petition?"

Well, let us just assume that there was a change in the approach I have described. Assume that the Solicitor General did change his standards for filing cert petitions and he filed not seventy-five per term, but twice that many. Or, assume that he simply applied the same standards that the private practitioner applies. The result would probably be that about 400 petitions for certiorari would be filed for the federal government each year. (That assumes that the same kind of screening would still go on within each department and agency.)

What would be the consequence? I believe that over the first year the number of the Solicitor General's certiorari petitions granted would increase dramatically. Concomitantly, the percentage of the Supreme Court's decisional capacity consumed by the United States of America would probably increase from around forty percent to something higher. But I also believe that if the members of the Court consciously faced the issue, most of them would probably share my view that something in the range of forty percent of its decisional capacity is about what the United States is entitled to. Thus, over a longer period (probably about three or four years) we would settle back to just about the same number of government cert petitions that were granted before the Solicitor General changed his policy.

Two things would have happened in the process. First, the government would file 400 petitions instead of eighty in order to get the same number of grants. This would increase the Supreme Court's work load; the justices, rather than the executive branch, would be doing the screening. Second, the executive branch itself would be disadvantaged. Any given administration ought to be in a better position than the Court to make a judgment as to the comparative importance to its total program of a petition from one department or another.

The second example of temptations that can consume the Solicitor General's capital concerns the selection of cases in which to file as *amicus curiae*. Return to our numbers for just a moment. Each year there are about ninety to 100 Supreme Court merits cases in which the government is not a party. By definition these are important cases. Almost every one of them involves questions in which I either have an interest or could easily develop one. And I will tell you that in every single case the Court would be better off if it had the benefit of my views. That is true today, and it was also true when I was Solicitor General. But I started from the premise that if I filed in every single case, the Court would not have taken me as seriously. It is almost as though I had a certain number of chips that I could play. Where was the best place to play them? If you assume that you are going to file as *amicus* in about twenty-five or thirty cases (and that is probably about right), how do you select those twenty-five or thirty?

These are the guidelines that I used. I divided the non-government cases into two categories. The first class of cases—the easier one—consisted of those that involved direct federal law enforcement interests. Examples are Title VII cases, antitrust cases, securities cases, voting cases, or criminal cases, in which the federal government did not happen to be one of the litigants, but the holding in the case would probably have a larger impact on the interests of the United States than it would have on the immediate parties.

The harder cases fall in the second category: cases that have nothing to do with any federal law enforcement responsibility, but which fall right at the core of the current administration's broader agenda. For me these included cases involving obscenity, the religion clauses, and abortion. There are people who argued with great force during my four years in office that the Solicitor General should never file in this kind of case. They believed that pursuing the President's social agenda was not a legitimate objective for the President's Supreme Court lawyer. There were others who argued that I should file in virtually every one of them because the only person who can speak for the President in the United States Supreme Court is the Solicitor General. If he does not speak, then the President's views will not be heard on those important issues; and since most important changes that will occur in the law of abortion, obscenity, and freedom of religion will be changes in judge-made law, the President's view must be made known to those who have final decisional authority in those areas.

My own view is an intermediate one and it is this: It is not only all right to file in a few of those non-federal enforcement issue cases, it is a part of your job, but it is a mistake to file in too many. This is one instance where precedent actually works in reverse. The fact that I had already filed several *amicus* briefs in these "category

two” cases during a particular term was a strong argument against doing it again. The reason is that while I think it is proper to use the office for the purpose of making my contribution to the President’s broader agenda, a wholesale departure from the role whose performance has led to the special status that the Solicitor General enjoys would unduly impair that status itself. In the process, the ability of the Solicitor General to serve any of the President’s objectives would suffer.

I come now to the third and final example of a temptation to consume the Solicitor General’s capital. Should the Solicitor General make arguments that he knows the Court will reject? There are two arguable reasons for taking a position which you know the Supreme Court will reject. First, even though the Court will disagree now, you may start a dialogue (either within the Court or in other quarters) which might eventually contribute to the Court’s adopting your view. If I ever found a case in which I really thought that that chain of events was a reasonable possibility, I would not hesitate to make an argument knowing that the Court would reject it. But, in my opinion, such cases are extremely rare. In my four years of experience as Solicitor General, I found no such case. The more probable result is this: the assertion of a position that the Solicitor General knows will be rejected will lead not only to its rejection, but also to a more strongly-worded opinion. The result is that at some later time, with a Court more favorably disposed to your view, the job of getting the position accepted will be even more difficult because the earlier experience led to more formidable adverse precedent.

The other argument in favor of taking positions that the Solicitor General knows will be rejected takes as its premise that the nine members of the Court do not constitute the Solicitor General’s only audience. There are other people who read his briefs and have an interest in what the Solicitor General says. It is very proper, even required (so the argument goes), to take this broader audience into account. If you don’t believe in the President’s program, you shouldn’t be the Solicitor General. And if you do believe in it, why don’t you say so? If you get a chance to say what you believe, you should say it. To decline to do so is not only unwise, but borders on dishonesty.

That argument profoundly misunderstands the Solicitor General’s office and function. The audience for his briefs and arguments consists of nine people and nine people only. To the extent that his efforts to persuade those nine people also yield some other benefits, that is fine, but that is not his job. Public relations and mass communications are not what he was trained for and not what he does well. He is not the pamphleteer general nor the neighborhood essayist.

During my tenure, for example, it was seriously urged that we advance—as one argument in support of the constitutionality of Alabama’s moment of silence statute—that the first amendment generally and the establishment clause in particular were not binding on the states. As a matter of historical and legal analysis, a respectable argument along those lines can be made. As a practical matter, however, it comes forty years too late. If, as the Solicitor General of the United States, I had advocated that the first amendment was not binding on Alabama, I would have destroyed—with one single filing—the special status that I enjoyed by virtue of my office. I would

have also acquired a new status, equally special. The Court would have written me off as someone not to be taken seriously.

There has been built up, over 115 years since this office was first created in 1870, a reservoir of credibility on which the incumbent Solicitor General may draw to his immediate adversarial advantage. But if he draws too deeply, too greedily, or too indiscriminately, then he jeopardizes not only that advantage in that particular case, but also an important institution of government. The preservation of both—and striking just the right balance between their sometimes competing demands—lies at the heart of the Solicitor General's stewardship.

