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Preface

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THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

THE OFFICE OF SOLICITOR GENERAL

PREFACE

If any legal position warrants the appellation, “the appellate lawyer’s lawyer,” it is that of Solicitor General. Seth Waxman, himself a former Solicitor General, has pointed out that “the office of the Solicitor General of the United States is a wonderful and unique creation,”¹ noting that only the holder of that office, among all the officers of the federal government, is required by statute to be “learned in the law.”² President after president has complied with that instruction: The list of Solicitors General that follows this preface includes the names of some of this country’s most distinguished lawyers.

There may even be those who think of the Solicitors General as a corps of immortals, for as Waxman discovered, “[s]ome 60 years ago, a letter found its way into the United States mail addressed simply ‘The Celestial General, Washington, D.C.’”³ The inadequacy of the address notwithstanding, the Post Office “apparently had no trouble discerning to whom it should be delivered. It went to Robert H.

1. Seth P. Waxman, Speech, *Presenting the Case of the United States As It Should Be: The Solicitor General in Historical Context* (address to the Supreme Court Historical Society, Washington, June 1, 1998) at 1 (available at <<http://www.usdoj.gov/osg/about/osg/sgarticle.html>>).

2. *Id.*

3. *Id.*

Jackson, then Solicitor General of the United States.”⁴ Waxman is quick to point out that neither he nor any of his predecessors had “pretensions of other-worldliness,” but he does acknowledge that they “have all been fortunate to have been able to serve in what Thurgood Marshall called ‘the best job I’ve ever had.’”⁵

We in the law can see that it is indeed a special job, for the Solicitor General is the only lawyer who, as Francis Biddle put it, “has no master to serve except his country.”⁶ The responsibilities of the job are great, but so are the rewards. In a recent term of the United States Supreme Court, the Office of the Solicitor General “participated in oral argument in 75% of the cases the [Supreme Court] heard on the merits.”⁷ The Office of the Solicitor General is the leading appellate advocate before the Supreme Court. It is little wonder, therefore, that John W. Davis, another former Solicitor General, thought that “the office of the Solicitor General is the most attractive office within the gift of the government for the man who loves the practice of law.”⁸

Given the significance of the Solicitor General’s appellate responsibilities, we decided to make the work of that office a focus of this issue. We are pleased to share with you in former Solicitor General Drew Days’s essay an insider’s description of what can happen when the Solicitor General must handle a politically sensitive case. We follow that with an essay by Seth Waxman that draws from the work of perhaps the finest appellate lawyer of all time, Daniel Webster, some important principles that remain relevant to the work of appellate advocates today. We have also included James Layton’s article

4. *Id.*

5. *Id.*

6. Francis Biddle, *In Brief Authority* 98 (Doubleday 1962).

7. Waxman, *supra* n. 1, at 11. Waxman also noted there that “[i]n the nearly thirteen decades since the Office of the Solicitor General was created, its core litigation functions have largely remained the same. During [a recent term, the lawyers in the Office of the Solicitor General] handled approximately 2800 cases before the Supreme Court. [They] filed 30 petitions for a writ of certiorari and . . . decided whether to authorize appeal or to appear as an intervenor or amicus in over 2300 cases, covering subjects as varied as the activities of the government we represent.”

8. William H. Harbaugh, *Lawyer’s Lawyer, The Life of John W. Davis* 89 (U. Va. Press 1990).

about state solicitors general, which provides a historical overview of their work and an outline of their responsibilities. And finally, we bring you a number of tributes to one of the great appellate advocates of the twentieth century, Rex E. Lee, a former Solicitor General of the United States. Many of those tributes are personal, but they also describe the professional qualities that combined to make Rex Lee “an appellate lawyer’s lawyer.”

We hope that you enjoy this special section, and we hope as well that you find it helpful and enlightening.

RKS

Memphis

December 21, 2001

SOLICITORS GENERAL OF THE UNITED STATES

| <i>Name</i> | <i>Term</i> | <i>President</i> |
|---------------------------|----------------------------|------------------|
| Benjamin H. Bristow | October 1870–November 1872 | Grant |
| Samuel F. Phillips | November 1872–May 1885 | Grant |
| John Goode (Acting) | May 1885–August 1886 | Cleveland |
| George A. Jenks | July 1886–May 1889 | Cleveland |
| Orlow W. Chapman | May 1889–January 1890 | Harrison |
| William Howard Taft | February 1890–March 1892 | Harrison |
| Charles H. Aldrich | March 1892–May 1893 | Harrison |
| Lawrence Maxwell, Jr. | April 1893–January 1895 | Cleveland |
| Holmes Conrad | February 1895–July 1897 | Cleveland |
| John K. Richards | July 1897–March 1903 | McKinley |
| Henry M. Hoyt | February 1903–March 1909 | Roosevelt |
| Lloyd Wheaton Bowers | April 1909–September 1910 | Taft |
| Frederick W. Lehmann | December 1910–July 1912 | Taft |
| William Marshall Bullitt | July 1912–March 1913 | Taft |
| John William Davis | August 1913–November 1918 | Wilson |
| Alexander C. King | November 1918–May 1920 | Wilson |
| William L. Frierson | June 1920–June 1921 | Wilson |
| James M. Beck | June 1921–June 1925 | Harding |
| William D. Mitchell | June 1925–March 1929 | Coolidge |
| Charles Evans Hughes, Jr. | May 1929–April 1930 | Hoover |

| | | |
|---------------------------|------------------------------|------------|
| Thomas D. Thacher | March 1930–May 1933 | Hoover |
| James Crawford Biggs | May 1933–March 1935 | Roosevelt |
| Stanley Reed | March 1935–January 1938 | Roosevelt |
| Robert H. Jackson | March 1938–January 1940 | Roosevelt |
| Francis Biddle | January 1940–September 1941 | Roosevelt |
| Charles Fahy | November 1941–September 1945 | Roosevelt |
| J. Howard McGrath | October 1945–October 1946 | Truman |
| Philip B. Perlman | July 1947–August 1952 | Truman |
| Walter J. Cummings, Jr. | December 1952–March 1953 | Truman |
| Simon E. Sobeloff | February 1954–July 1956 | Eisenhower |
| J. Lee Rankin | August 1956–January 1961 | Eisenhower |
| Archibald Cox | January 1961–July 1965 | Kennedy |
| Thurgood Marshall | August 1965–August 1967 | Johnson |
| Robert H. Bork | June 1973–January 1977 | Nixon |
| Wade H. McCree | March 1977–August 1981 | Carter |
| Rex Lee | August 1981–June 1985 | Reagan |
| Charles Fried | October 1985–January 1989 | Reagan |
| Kenneth W. Starr | May 1989–January 1993 | Bush |
| Drew S. Days, III | May 1993–July 1996 | Clinton |
| Walter Dellinger (Acting) | August 1996–August 1997 | Clinton |
| Seth P. Waxman | November 1997–January 2001 | Clinton |
| Theodore B. Olson | June 2001–Present | Bush |