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WHEN THE PRESIDENT SAYS "NO": A FEW
THOUGHTS ON EXECUTIVE POWER AND THE
TRADITION OF SOLICITOR GENERAL
INDEPENDENCE

Drew S. Days, III*

INTRODUCTION

Although the Solicitor General is appointed by the President and serves under the Attorney General, he has gradually come to enjoy a tradition of independence in carrying out his official responsibilities. He is only rarely subject to direction by either the President or the Attorney General, and as a practical matter, he is in most cases the final decisionmaker with respect to both designing a strategy for government litigation in the Supreme Court and deciding whether to appeal trial court decisions adverse to the government.

On occasion, however, a President will put deference aside and involve himself directly in determining what the government's legal positions are going to be. Documented instances of such presidential involvement are rare, since most occur in the course of rather low-profile discussions within the administration that never become known to the public. Nevertheless, a few examples have received significant attention, either contemporaneously or some years afterwards, often as the result of revealing memoir accounts.

In the Truman Administration, for example, the President was reportedly involved in the groundbreaking decision to authorize the government's amicus brief in *Shelley v. Kraemer*,¹

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1. 334 U.S. 1 (1948).

its first in a civil rights case.² For his part, President Eisenhower added several sentences to the government's brief in *Brown v. Board of Education*,³ which were then edited by an assistant in Solicitor General Simon Sobeloff's office.⁴ And President Nixon once ordered Acting Attorney General Kleindienst to drop the government's pursuit of an important antitrust suit, although Solicitor General Erwin Griswold had already approved an appeal to the Supreme Court. But Griswold bided his time and sought several extensions while waiting for final instructions, and eventually received clearance to file the government's brief.⁵

A comprehensive history of the Solicitor General's office would probably include other examples, but I discuss in this essay only some recent cases in which Presidents intervened, most of which are familiar to me from firsthand experience. However I learned about each, though, I hope that my insider's perspective will give the reader an appreciation for the ways in which the realities of the political world and the power of the Presidency can have an impact on the Solicitor General's work.

THE PRESIDENTS AND THE CASES

Carter

I have yet to write a memoir of my tenure as Assistant Attorney General for Civil Rights in the Carter Administration. I can, however, offer this personal account of events leading up to the government's filing of its amicus brief in *Regents of the University of California v. Bakke*.⁶ Under my leadership, the Civil Rights Division of the Department of Justice recommended amicus participation in support of the University

2. See Barton J. Bernstein, *The Ambiguous Legacy: The Truman Administration and Civil Rights*, in *Politics and Policies of the Truman Administration* 269, 296-97 (B. Bernstein ed., Quadrangle Books 1970).

3. 349 U.S. 294 (1955).

4. Victor H. Kramer, *President Eisenhower's Handwritten Changes in the Brief on Relief in the School Segregation Cases: Minding the Whys and Wherefores*, 9 *Constitutional Commentary* 223 (1992).

5. Richard Ben-Veniste & George Frampton, Jr., *Stonewall: The Real Story of the Watergate Prosecution* 377-378 (Simon & Schuster 1977).

6. 438 U.S. 265 (1978).

of California and its affirmative action program, while the Assistant and Deputy in Solicitor General Wade McCree's office recommended amicus participation in favor of Bakke. Before McCree himself became fully involved, President Carter gave a press conference at which he pledged to support affirmative action. The Solicitor General's office nonetheless drafted a brief supporting Bakke, which, unsurprisingly, met with resistance at the White House. Following contentious meetings at various levels, Attorney General Griffin Bell attempted to shield McCree from the pressure emanating from the White House and the Department of Health, Education and Welfare, and McCree indicated later that he never received any direct orders from the White House.⁷ He was, however, aware of the pressure being put on Bell.⁸

In the end, McCree did not follow the advice of his career staff, and he eventually decided to recommend that the Court remand the case to the California courts for decision.⁹ He and I then spent several days working with his top staff in a nearly nonstop session that produced a brief supporting the principle of affirmative action. That brief appears to have influenced Justice Powell, for he opined—as we had argued—that race may, under some circumstances, be used as one factor in a system that includes a whole range of admissions criteria, so long as no quotas result.¹⁰

Reagan

The Bob Jones Case

During the Reagan Administration, a major controversy arose over *Bob Jones University v. United States*,¹¹ which involved the question of a tax exemption for a religious, but

7. See Lincoln Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* 47 (Alfred A. Knopf, Inc. 1987).

8. Caplan, *supra* n. 7, at 46.

9. *Id.* at 39-46; Rebecca Mae Salokar, *The Solicitor General: The Politics of Law* 75-76 (Temple U. Press 1992).

10. *Bakke*, 438 U.S. at 318.

11. 461 U.S. 574 (1983).

racially segregated, institution. Solicitor General Rex Lee decided to recuse himself from the case, because he had before becoming Solicitor General been involved in the debate over tax exemptions for religious institutions. As a result of Lee's decision, Lawrence Wallace, the Senior Deputy Solicitor General, became Acting Solicitor General. But as a career member of the Solicitor General's staff, Wallace too had a history. He had signed a Supreme Court brief during the Carter Administration supporting the Internal Revenue Service's revocation of the university's tax-exempt status, which made him understandably uncomfortable about supporting the successor administration's contrary position. The Reagan administration nonetheless pushed for an argument in support of the university.

After what must have been several highly charged discussions, the government's brief ultimately argued the administration's line, but Wallace was authorized to include a footnote pointing out that he personally did not subscribe to the government's position on the first and central question presented.¹² The Court eventually ruled eight to one in favor of the Internal Revenue Service,¹³ demonstrating among other things that the President's success in prevailing upon the Solicitor General's office to espouse his position is no guarantee of his administration's success before the Supreme Court.

The Beck Case

Charles Fried, who followed Rex Lee as President Reagan's Solicitor General, recounts only one incident of White House interference with his work. The case, *Communications Workers of America v. Beck*,¹⁴ involved the use of union dues and fees to support pro-union candidates and parties. Fried believed that no state action was involved in the practice, and that the Taft-Hartley Act could not plausibly be read to forbid the compulsory use of union dues in support of union-approved

12. See Caplan, *supra* n. 7, at 51-64; Salokar, *supra* n. 9, at 61-62.

13. *Bob Jones U.*, 461 U.S. at 585.

14. 487 U.S. 735 (1988).

candidates.¹⁵ When proofs of Fried's brief were circulated to the White House, however, someone there contacted Attorney General Edwin Meese to express displeasure with Fried's analysis of the law.¹⁶ This objection prompted Meese to call a high-level meeting at which various members of the administration expressed dissatisfaction with the brief,¹⁷ but it was ultimately filed as written. In the end, the White House position—that the Taft-Hartley Act could be construed to prohibit the compulsory use of union dues—prevailed five to three in the Court.¹⁸ Discussing the incident later, Fried emphasized that “[i]n *Beck* [he] received no direct order [but] was made aware that ‘the White House’ did not like the position [he] was about to take.”¹⁹

Bush

In the first Bush Administration, my predecessor as Solicitor General, Kenneth Starr, argued for the government in *United States v. Mabus*²⁰ that the state of Mississippi should not be responsible for providing additional funding for traditionally black colleges.²¹ After meeting with a group of black college presidents, however, President Bush ordered Starr to reverse the government's position in the case (eventually to be known as *United States v. Fordice*²²), and to argue instead that increased state aid to black public colleges was necessary in order to remedy past discrimination. Deferring to the President, Starr filed a reply brief that urged the Court to require the state to supply additional funding to traditionally black colleges in order to overcome the effects of its segregated system of higher education.²³

15. Charles Fried, *Order and Law: Arguing the Reagan Revolution—A Firsthand Account* 178-80 (Simon & Schuster 1991).

16. *Id.* at 180.

17. *Id.* at 181.

18. *Beck*, 487 U.S. at 745.

19. Fried, *supra* n. 15, at 198.

20. 499 U.S. 958 (1991).

21. Br. of Petr. at 40-41, n. 39, *U.S. v. Mabus*, 505 U.S. 717 (1992).

22. 505 U.S. 717 (1992).

23. Reply Br. of Petr. at 16-17, *U.S. v. Mabus*, 505 U.S. 717 (1992).

Clinton

No doubt it is obvious by now that “into every Solicitor General’s life a little rain must fall!” And so it was with me. I remember two occasions on which President Clinton either in effect, or explicitly, directed me to reverse legal positions that I had taken after consulting with the Attorney General.

The Knox Case

The first was in *Knox v. United States*,²⁴ which involved the child-pornography conviction of a Penn State graduate student who had a previous conviction for receiving child pornography through the mails. Using information that came to their attention some time after his earlier conviction, law enforcement agents obtained and executed a search warrant at Knox’s residence, turning up several videocassettes that contained vignettes of barely dressed teenage and pre-teen girls.²⁵ The legal issue before the district court was whether any of the tapes depicted a minor engaging in “sexually explicit conduct,” which was defined in the statute as “lascivious exhibition of the genitals or pubic area.”²⁶ The court concluded that the tapes fit that definition, finding that although none of the girls were nude, the videos’ focus on areas in close proximity to the genitals, specifically “the uppermost portion of the inner thigh,” was included within the statute’s prohibition against displays of the pubic area.²⁷

Knox took an appeal. Although it first went out of its way to reject the district court’s definition of pubic area, the Third Circuit affirmed, holding that “nude exposure of the genitals or pubic area [was] not necessary for an exhibition to take place.”²⁸ Knox then filed a petition for certiorari that was granted over the government’s opposition.²⁹ And that is where I came in. My job was to prepare the brief on the merits.

24. 510 U.S. 939 (1993).

25. *U.S. v. Knox*, 977 F.2d 815, 817 (3d Cir. 1992).

26. *U.S. v. Knox*, 776 F. Supp. 174, 180 (M.D. Pa. 1991).

27. *Id.*

28. *Knox*, 977 F.2d at 823.

29. *Knox v. U.S.*, 508 U.S. 959 (1993).

I reviewed the case, and concluded that the Third Circuit's decision represented an extremely strained and incorrect construction of the statute. I was concerned, therefore, that the grant of certiorari did not bode well for the government's defense of that interpretation. I was also concerned about the possibility of the Court's issuing a broad adverse ruling likely to jeopardize later child-pornography prosecutions that presented no novel questions like those raised in *Knox*.

My consideration of the facts surrounding Knox's prosecution made me even more uneasy. First, no other such prosecution had ever been brought by the Justice Department. Second, the United States Attorney who brought the *Knox* prosecution did so without prior approval from the Department of Justice, which was a violation of department regulations. Third, the prosecutor had intentionally left out evidence of Knox's collection of hard-core child pornography because, as he told me, he wanted it to be a test case.

Given the legal and factual circumstances, I believed that it was important to get the *Knox* case out of the Supreme Court as quickly as possible. I did so by filing a brief confessing error and urging the Court to vacate and remand the case to the Third Circuit for further consideration in light of an alternative reading of the statute, one that inferred a test requiring the genitals or pubic area to be discernible in order for a particular pose to constitute an illegal exhibition.³⁰

The Supreme Court did as I requested,³¹ and "all hell broke loose." Now, I was prepared for *some* criticism of my decision. A distinguished career lawyer in my office had in fact advised me simply to advance the arguments already made by the office, which would have allowed the Supreme Court to rule against the position so unwisely taken by the federal prosecutors who had initiated the case. I knew, then, that there were those who disagreed with my strategy, but I had no idea that my decision would produce a torrent of criticism from Congress, child

30. Br. of Respt. at 22-23, *Knox v. U.S.*, 510 U.S. 939 (1993).

31. *Knox*, 510 U.S. at 939.

protection groups, and fundamentalist religious organizations.³² Unhappily for me, however, it did so.

The Senate responded to the Supreme Court's ruling by passing a unanimous resolution that indicated its rejection of my analysis.³³ Shortly thereafter, the President publicly released a letter to Attorney General Janet Reno in which he fully agreed "with the Senate about what the proper scope of the child pornography law should be," and directed her to work with Congress to develop "the broadest possible protections against child pornography and exploitation."³⁴ On another front, a former Justice Department official who had been in charge of child pornography prosecutions in the Bush administration took out after me publicly.³⁵ Although he was on record in earlier testimony before the Senate as actually agreeing with my construction of the statute, he helped generate a wave of critical calls to the Justice Department that nearly immobilized our telephone system for two days. The House ultimately joined the Senate in criticizing my position, and it too passed a resolution that rejected my reading of the statute, albeit by a smaller margin.

I was happy to escape the storm by getting back to the work of briefing the case, and on remand, the Third Circuit affirmed in a way that I found promising. In essence, it concluded that Knox's conviction should be affirmed irrespective of whether its reading of the statute or mine controlled.³⁶ Knox sought certiorari once again. I thought that the prudent approach at this juncture was for the government to file an opposition to certiorari on the grounds that any ruling from the Court would be unlikely to affect Knox's conviction. Under such circumstances, I believed that the Court would not be predisposed to accept the case for review a second time. But the Attorney General concluded that we should express our wholehearted agreement with the Third Circuit's test. She and I

32. See e.g. Henry J. Reske, *A Flap over Flip-Flops*, 80 ABA J. 12 (Jan. 1994); Stuart Taylor, Jr., *As Politics Take Over, Justice Suffers in Kidporn Case*, Conn. L. Trib. 19 (Dec. 6, 1993).

33. See Taylor, *supra* n. 32.

34. *Id.*

35. See Julie Cohen, *A Legal About-Face into a Minefield*, Leg. Times 2 (Nov. 22, 1993).

36. *U.S. v. Knox*, 32 F.3d 733, 754 (3d Cir. 1994).

attempted in earnest to reach a compromise but failed, because I told her that I could not sign briefs taking diametrically opposing positions at different stages of a single case. She respected that decision, and filed a brief bearing her signature and those of certain other Department of Justice officials, but no signature from anyone in my office. And there it all ended, for certiorari was denied.³⁷

The Christians Case

The second occasion on which the power of the Presidency had a direct impact on my work in the Clinton administration occurred about a year later in a case with the incredibly ironic title of *Christians v. Crystal Evangelical Free Church*.³⁸ There, a trustee in bankruptcy brought an adversary proceeding against Crystal Evangelical to recover about \$13,500.00 in pre-petition contributions. The bankruptcy court granted the trustee's motion,³⁹ the district court affirmed,⁴⁰ and the church then appealed to the Eighth Circuit.⁴¹

By the time the case reached the circuit court, Congress had passed and the President had signed as one of his first pieces of legislation, the Religious Freedom Restoration Act (RFRA).⁴² That act provided that the government was permitted to substantially burden a person's exercise of religion only if it demonstrated that the burden met a compelling governmental interest and was the least restrictive means of achieving that important end. The Eighth Circuit notified the Attorney General of the case and invited her views on the apparent conflict between the Bankruptcy Code and RFRA.

After a long and spirited debate in the Justice Department, I decided, with the Attorney General's approval, to file a brief supporting the trustee. In short, our position was that the Code did not in this case substantially burden free exercise, since the

37. *Knox v. U.S.*, 513 U.S. 1109 (1995).

38. 148 B.R. 886 (Bankr. D. Minn. 1992)

39. *Id.* at 897.

40. *Christians v. Crystal Evangelical Free Church*, 152 B.R. 939 (Bankr. D. Minn. 1993).

41. *Christians v. Crystal Evangelical Free Church*, 82 F.3d 1407 (8th Cir. 1996).

42. 42 U.S.C. § 2000bb (1993).

money given to the church actually belonged to the bankruptcy estate when the debtors made their tithes, and the debtors were not entitled to treat the estate's money as their own. Moreover, even if there was a substantial burden, the bankruptcy law's treatment of pre-petition transfers like these met a compelling need—preventing tax evasion by those inclined to hide their assets by pretending to have donated them to churches—that could not be achieved in a less restrictive manner. Satisfied with our analysis, we filed our brief and waited for the case to be set for oral argument.

Several months passed. And then, about ten days before the Eighth Circuit was to hear the case, I began to get a sense that some members of the White House staff and, more important, the President himself, were having second thoughts about our brief. In an effort to satisfy those questioning the Justice Department's position, the Attorney General held a mock oral argument at which I presented our position, and a top official in the Department who disagreed with me argued for the church. Afterwards, the Attorney General expressed her continuing approval of the brief we had filed. I was heartened and relieved.

On the White House front, though, the press reported that a group critical of the Department's position had managed to schedule a meeting with the President at which to express its members' concerns.⁴³ On the afternoon before oral argument, I was advised to stay close to my telephone because the *Christians* case was being actively discussed at the White House. Late that night, I learned that the President had decided that we should withdraw our brief and decline to participate in the oral argument. I immediately called the Civil Division lawyer who was to argue the case, advised him of the President's decision, and got his agreement to sign the withdrawal letter that I was about to fax to his hotel in St. Louis. He filed the letter the next morning, and the Eighth Circuit went on without us,⁴⁴ eventually holding for the church by a two-to-one vote.⁴⁵ I learned later that one of the judges on the panel

43. See e.g. Sherrie F. Nachman, *Bill Clinton's Divine Intervention*, XVI Am. Law. 15 (Nov. 1994).

44. See Pierre Thomas, *Clinton Stops Justice Department from Seeking Forfeitures of Tithes*, Wash. Post A8 (Sept. 16, 1994).

45. *Christians*, 82 F.3d at 1420.

remarked during the argument that the government was absent because “[s]omeone spoke to them from on high.”⁴⁶ And so the President’s view prevailed.⁴⁷

CONCLUSION

Those who view the Solicitor General’s independence as sacrosanct might find the tale I have just told somewhat shocking. Indeed, Francis Biddle, who served as Solicitor General and Attorney General in turn, would almost certainly have found it alarming, for he described the Solicitor General’s role as follows:

He 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.⁴⁸

But although I am admiring of Biddle, the matter is not so simple for me. After all, the executive power of the United States is vested in the President.⁴⁹ He is ultimately responsible, in both legal and political terms, for the positions his administration takes in court. That important reality was never far from my mind when I served as Solicitor General. And perhaps it led me to be a little too candid with President Clinton during what turned out to be my job interview.

Partway through a rather wide-ranging discussion between us in the Oval Office, the President said to me, “What *is* the relationship between the Solicitor General and the President?” I responded, “Mr. President, it is very simple. You are in the Constitution and the Solicitor General is not.” That statement certainly let the President know that I would defer to his

46. Oliver B. Pollak, *Be Just before You’re Generous: Tithing and Charitable Contributions in Bankruptcy*, 29 Creighton L. Rev. 527, 573 (1996); see also Thomas, *supra* n. 44.

47. The Supreme Court later held that RFRA was unconstitutional, at least insofar as Congress sought to legislate pursuant to its powers under section five of the fourteenth amendment. *City of Boerne v. Flores*, 521 U.S. 1114 (1997).

48. Francis Biddle, *In Brief Authority* 97 (Greenwood Press 1976).

49. U.S. Const. art. II, § 1.

authority. And of course I also happened to draw a President who was a lawyer, a former law professor and, I was informed, a faithful reader of my briefs. He was without a doubt sincerely interested in the Solicitor General's work. Whatever the background of a particular President, however, I remain persuaded that the question of the President's involvement in the work of the Solicitor General is not one of whether so much as it is one of when and how.

During my tenure, the President second-guessed my decisions only in cases that raised difficult legal issues about which reasonable people could disagree, so it was no surprise to find that the President and I might see them differently. In the *Christians* case, in particular, the President felt a special responsibility for seeing to it that RFRA was aggressively supported by his Administration, and I respected his position. Appearances matter, however. In neither *Knox*, where the President sent an open letter to the Attorney General, nor *Christians*, where he granted a special audience to critics of the Justice Department's position, did the President's handling of the situation seem to me sufficiently sensitive in this regard. In my estimation, the President should think about the ways in which his intervention will be perceived by those outside the Oval Office, and how it may affect the Solicitor General's continuing ability to serve as a credible advocate for the government, particularly in his appearances before the Supreme Court. I do not think that either *Knox* or *Christians* impaired my later effectiveness, but denied as I am the perspective of history, I will never know for sure. I do know already, though, that these cases hardly fit into the fun-and-games category for me.

Having described several instances in which my predecessors and I experienced the intervention of Presidents in our work, I conclude with the observation that these occurrences are so notable because they have been so few. The history I have related here indicates more that the tradition of an independent Solicitor General retains real vigor 131 years into its history than that it is in any danger of being overwhelmed by undue interference from the President. And that, I think, is as it should be.