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BECKET AT THE BAR—THE CONFLICTING OBLIGATIONS OF THE SOLICITOR GENERAL

*Eric Schnapper**

I. INTRODUCTION

Eight centuries ago Henry II, anxious to extend his influence over an all too independent church, arranged the selection of Thomas à Becket, the King's Chancellor and longtime aide and comrade, as Archbishop of Canterbury. Once installed at the see of Canterbury, however, Becket repeatedly found himself compelled to place his responsibilities as the head of the church ahead of his loyalty to and friendship for Henry, with ultimately tragic consequences for all, most especially the Archbishop himself. Today the Solicitor General seems increasingly a Becket-like figure, forced to make an unhappy choice between representing the policies of the President, or at least of the President's more activist staff and supporters, and meeting his obligations to the Supreme Court.¹ The first sign of trouble surfaced in January, 1982, in a footnote to the government's brief in *Bob Jones University v. United States*,² which warned the Supreme Court that the then Acting Solicitor General did not agree with the administration's new position that the IRS was legally required to grant tax exempt status to racially segregated private schools.³ The

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1. Former Solicitor General Rex Lee commented in 1987: "I have frankly concluded that it is virtually impossible in today's world to occupy a position like solicitor general without, on the one hand, incurring the disfavor of some groups with very strong ideological views or, on the other, impairing your credibility with the Court." Freiwald, *Right Turns Against Fried*, Legal Times, May 18, 1987, at 1, col. 3 [hereinafter Legal Times].

2. 461 U.S. 574 (1983).

3. Brief for the United States at 1, *Goldboro Christian Schools, Inc. v. United States*, 454 U.S. 892 (1981) (No. 81-1) and *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (No. 81-3):

This brief sets forth the position of the United States on both questions presented. The Acting Solicitor General fully subscribes to the position set forth on question number two, only. His views on question one are set forth in the Brief for the United States filed in this Court in September 1981, in response to the petitions for certiorari in these cases. Those views are more fully developed in a draft brief on the merits

Bob Jones brief itself provoked outrage from supporters of civil rights and prompted the Court to take the unusual step of appointing an *amicus curiae* to present the position that had been abandoned by the government. Six months later the denunciations came from a very different quarter, the National Right to Work Committee demanding the dismissal of Solicitor General Rex Lee for conduct allegedly "in direct conflict with the Reagan Administration policy."⁴ Less than four weeks after that attack the *New York Times* castigated Lee for filing a brief which it described as merely a "political tract . . . suited to the partisan purposes of an Administration eager to appease its disgruntled right wing" and for "trashing the [Justice] department's reputation as a source of principled counsel to the Court."⁵ A series of news reports regarding subsequent controversies⁶ culminated in a March, 1987 hearing by a subcommittee of the House Judiciary Committee,⁷ a provocative series of articles in the August, 1987 issues of *The New Yorker*,⁸ and the publication of *The Tenth Justice*⁹ by Lincoln Caplan, the author of *The New Yorker* series.¹⁰

which was ready to be printed for timely filing in early January 1982. Copies of that draft brief were furnished by the Department of Justice in late January 1982, pursuant to request, to the Senate Finance Committee and the House Ways and Means Committee, along with other documents requested by those committees.

Question one concerned whether the Internal Revenue Code authorized the IRS to deny tax exempt status to racially discriminatory private schools. The second question presented concerned the constitutionality of the IRS regulations denying tax exemptions to such schools.

4. N.Y. Times, July 9, 1982, at A12, col. 2.

5. N.Y. Times, Aug. 4, 1982, at A22, col. 1.

6. See, e.g., Wash. Post, July 7, 1986, at A7, col. 1 ("A series of High Court Rebuffs for Reagan: Solicitor General's Decision to Push Ideological Claims Has Proved Costly, Critic Says"); *id.*, Mar. 18, 1986, at A17, col. 1 ("Legal Office Shaken by Staff Departures: Solicitor General Defends New Activism"); *id.*, Jan. 7, 1986, at A8, col. 1 ("Solicitor General Takes On Critics"); *id.*, May 1, 1985, at A4, col. 1 ("U.S. Solicitor General Lee Resigning Amid Controversy"); Wall St. J., Sept. 6, 1984, § 1, at 1, col. 1 ("Reagan Conservatives Assail Solicitor General For His Independence"); N.Y. Times, Dec. 1, 1982, at B4, col. 1 (Lee Criticized by Justices Blackmun and Stevens during oral argument); *id.*, July 30, 1982, at D16, col. 3 (brief on abortion filed by Solicitor General Lee).

7. Testimony of Professor Burt Neuborne, New York University Law School, Before the Subcommittee on Oversight of the House Judiciary Committee, March 19, 1987 (unpublished) (copy on file at Loyola of Los Angeles Law Review Office) [hereinafter Neuborne Testimony].

8. Caplan, *Annals of Law: The Tenth Justice—I*, NEW YORKER, Aug. 10, 1987, at 29; Caplan, *Annals of Law: The Tenth Justice—II*, NEW YORKER, Aug. 17, 1987, at 30.

9. L. CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1987).

10. For previous commentaries on the office of the Solicitor General, see Memorandum Opinion for the Attorney General: Role of the Solicitor General, 1 Op. Off. Legal Counsel 228 (1977) [hereinafter 1977 Memorandum]; F. BIDDLE, *IN BRIEF AUTHORITY* (1962); Cox, *The Government in the Supreme Court*, 44 CHI. B. REC. 221 (1963); Fahy, *The Office of the Solicitor General*, 28 A.B.A. J. 20 (1942); Griswold, *The Office of the Solicitor General—Representing the Interests of the United States Before Supreme Court*, 34 MO. L. REV. 528 (1969); Perlman, *The Work of the Office of the Solicitor General of the United States*, 54 MD. ST. B.

Some of the more specific disputes have been rendered moot by subsequent events. Solicitor General Lee, ultimately more unpopular with the right than with the left, resigned in the spring of 1985. His successor, Charles Fried, was during his first year in office even more controversial than Lee, but Caplan reports at least a change in tone in the Solicitor General's office during the 1986-87 Term of the Supreme Court.¹¹ In the spring of 1987, Fried distanced himself from the more strident wing of the Justice Department, strongly disavowing a casual suggestion by a Department colleague that the Reagan Administration's racial policies would be furthered by the departure from the Court, or from this life, of a few sitting Justices.¹² More recently Fried has had the good fortune to be criticized by conservatives as well as by liberals, surely a sign that he is doing something right.¹³ But the controversies of the last several years have brought to light major unresolved questions about the proper role of the Solicitor General, the answers to which will be of ongoing importance to the Justice Department and the Court long after Solicitor General Fried has forsaken his comparatively quiet and congenial public life for the far more politicized and disputatious world of Harvard Law School.

Although the position of Solicitor General has existed for 118 years,¹⁴ relatively little attention has been paid to the manner in which the Solicitor General and his or her assistants ought to do their work. In the past it had been generally assumed that the only threat to the proper functioning of the Solicitor General's office was an external one, that serious problems would be avoided so long as the Solicitor General was not subject, at least save in extraordinary circumstances, to supervision or

ASS'N 265 (1949); Sobeloff, *Attorney for the Government: The Work of the Solicitor General's Office*, 41 A.B.A. J. 229 (1955) [hereinafter Sobeloff I]; Sobeloff, *The Law Business of the United States*, 34 OR. L. REV. 145 (1955) [hereinafter Sobeloff II]; Stern, *The Solicitor General's Office and Administrative Agency Litigation*, 46 A.B.A. J. 154 (1960) [hereinafter Stern I]; Stern, "Inconsistency" In *Government Litigation*, 64 HARV. L. REV. 759 (1951) [hereinafter Stern II]; Uelman, *The Influence of the Solicitor General Upon Supreme Court Disposition of Federal Circuit Court Decisions: A Closer Look at the Ninth Circuit Record*, 69 JUDICATURE 361 (1986); Werdegar, *The Solicitor General and Administrative Due Process: A Quarter Century of Advocacy*, 36 GEO. WASH. L. REV. 481 (1968); *Solicitor General: Has Office Been Politicized?*, 72 A.B.A. J. 20 (1986) [hereinafter *Office Politicized*]; Comment, *Government Litigation in the Supreme Court: The Roles of the Solicitor General*, 78 YALE L.J. 1442 (1969).

11. L. CAPLAN, *supra* note 9, at 274-75.

12. N.Y. Times, Mar. 28, 1987, at A1, col. 5.

13. Legal Times, *supra* note 1 (noting attacks on Fried in *Judicial Notice* and *Human Events*); 47 Human Events, May 23, 1987, at 428, 429.

14. The best history of the origin of the Solicitor General's office is in Lee, *Lawyering in the Supreme Court: The Role of the Solicitor General*, SUP. CT. HIST. SOC'Y Y.B. 15, 16 (1985).

control by others in the government, particularly by his or her nominal superiors, the Attorney General and the President. Francis Biddle, who served as Solicitor General in 1940-41, argued that that independence was central to the nature of the Solicitor General's office:

[The Solicitor General] 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. He is responsible neither to the man who appointed him nor to his immediate superior in the hierarchy of the administration. The total responsibility is his[.] . . . The Solicitor General has no master to serve except his country.¹⁵

In 1977, the Office of Legal Counsel (OLC), asked to provide guidance as to the manner in which the Solicitor General should formulate and present the government's positions before the Supreme Court, emphasized that same independence both from the Attorney General and "within the executive branch as a whole."¹⁶ The most important reason for that status, OLC argued, was "the prevalent belief that such independence is necessary to prevent narrow or improper considerations (political or otherwise) from intruding upon the presentation of the Government's case in the Nation's highest Court."¹⁷ Cases in which the Solicitor General's office might properly consider the views of the Attorney General or President were so rare, OLC maintained, and the danger that the process would be distorted by an expression of their views was so great, that neither official should express any position on a case unless asked to do so by the Solicitor General. "If the independent legal advice of the Solicitor General is to be preserved, it should normally be the Solicitor General who decides when to seek the advice of the Attorney General or the President in a given case."¹⁸ In their dealings with the Solicitor General, the Attorney General and the President were not to speak unless spoken to. Neither Becket nor any other Archbishop of Canterbury ever enjoyed such stature in his dealings with the English monarchy.

Measured by this standard of independence from supervisory control, the tenure of the current Solicitor General, Charles Fried, should have been a halcyon era in the history of that office. There appear to have been repeated efforts to persuade the Attorney General to overrule Fried's predecessor, Rex Lee, and it has been suggested that the Attorney

15. F. BIDDLE, *supra* note 10, at 97.

16. 1977 Memorandum, *supra* note 10, at 228, 230.

17. *Id.* at 231.

18. *Id.* at 235.

General should have given Lee greater backing in these disputes than actually occurred.¹⁹ But there seem to be no claims that the Attorney General or President have intervened in Fried's decision making, or even given unsolicited advice. Professor Neuborne "accept[s] at face value [Fried's] assertions that his [positions] . . . reflect his own views about what the law should be."²⁰

The controversy surrounding Fried's tenure as Solicitor General has concerned, not interference with his decisions by the Attorney General or the President, but the positions which the Solicitor General's office itself has taken in a variety of cases. That controversy involves not only some essentially factual disputes about what the Solicitor General's office has done, and how the Court has reacted, but also several fundamental disagreements about what the Solicitor General *ought* to be doing. Central to this dispute has been a disagreement about whether the Solicitor General's primary responsibility is to the administration in which he or she serves or to the Supreme Court. Bruce Fein, a former Reagan Justice Department official, whose views on such matters may be fairly described, in the tradition of the Soviet Union's Victor Posner, as semi-official, remarked in 1984, while stationed at the FCC, "My conception

19. Wall St. J., Sept. 6, 1984, § 1, at 1, col. 1, contained the following account of efforts by Assistant Attorney General William Bradford Reynolds to overcome Lee's opposition to filing a Justice Department amicus brief in *Wallace v. Jaffree*, 472 U.S. 38 (1985):

[I]t was clear that Mr. Reynolds had the support of the White House. "There was a real back channel to the White House," says one participant in the debate who sided with Mr. Lee. "More than once, our positions were shot down at the White House by people who shouldn't even have known what we were doing." Mr. Fein confirms that Mr. Meese [then White House counselor] was kept informed of developments and supported Mr. Reynolds. . . .

Attorney General Smith again intervened. "What am I going to tell the White House?" he asked Mr. Lee when the solicitor general expressed reservations. . . .

. . . .

A spokesman for the attorney general, acknowledging the controversy, says the "attorney general doesn't shrink from differences of opinion among his staff; on the contrary, he encourages them."

The evident meaning of the Attorney General's spokesman was that he encouraged other members of "his staff" to disagree with the Solicitor General, presumably intending to resolve any such disagreements himself. Caplan reports that "running to the AG" was a common practice by Reynolds when he was dissatisfied with Lee's position. L. CAPLAN, *supra* note 9, at 88. Lee's controversial brief in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), was reportedly cleared by White House aides Meese and Baker. N.Y. Times, July 30, 1982, at D16, col. 3.

20. Newborne Testimony, *supra* note 7, at 8-9; *see also*, Wash. Post, Feb. 16, 1987, at A21, col. 1; N.Y. Times, July 18, 1986, at A6, col. 1; Assistant Attorney General Reynolds commented in 1987, "I place myself in the camp of a colleague who works with [Fried] and disagrees with him at times, but he makes the calls on the Supreme Court." Legal Times, *supra* note 1. Mr. Reynolds' attitude towards Solicitor General Lee was evidently less deferential. *See supra* note 19.

of the office of [S]olicitor [G]eneral . . . is that it should be a foremost promoter of the policies of the president before the court."²¹ Former Chief Justice Burger, responding to published criticism of Fried, insisted: "It has always been my view that the [S]olicitor [G]eneral is the government's advocate in the Supreme Court, not the Supreme Court's representative in the executive branch."²² Although Chief Justice Rehnquist is apparently skeptical about the view that the Solicitor General owes special deference to the Court,²³ an anonymous Justice in commenting on the Justice Department, not on Chief Justice Rehnquist, reportedly commented "[t]he notion that the SG has no obligation to help the Court is an outrage."²⁴ Professor Neuborne squarely rejects Fein's position, insisting that the Solicitor General traditionally has not been, and ought not become, a "mouthpiece" for the President or "an ideological cheerleader for the administration."

I believe that the Solicitor General's office—like the great institution it serves, the Supreme Court, should function at a level of principle that minimizes, even if it cannot eliminate, the influence of politics and partisan ideology on the growth of law. I believe that the principal task of the Solicitor General's office is to provide the Executive branch and the Supreme Court with technically excellent advice about the meaning and logical application of existing law. I do not believe that the talent and prestige of the Solicitor General's office should be expended in sustained ideological attempts to push the law in a particular direction.²⁵

Solicitor General Cox has advanced an intermediate view, urging "the Solicitor General has conflicting obligations—to his client and to the

21. Wall St. J., Sept. 6, 1984, § 1, at 1, col 1. See also McClellan, *A Lawyer Looks at Rex Lee*, 1 BENCHMARK: A BIMONTHLY REP. ON THE CONST. & THE CTS., 1, 2 (1984) ("As a spokesman and strategist for the Reagan Administration . . . Lee's performance has been less satisfactory."); McLaughlin, *From Washington Straight: Social Agenda Stymied*, NAT'L REV., May 27, 1983, at 611 (criticizing Lee for failing to meet his "responsibility for engineering . . . changes . . . in the constitutional and statutory jurisprudence handed down by the Warren and, alas, Burger Courts," changes that are "[t]he chief struts of President Reagan's social agenda"; detailed analysis of Lee's briefs under the heading "Whose SG?"); *supra* note 1 ("You either serve your master, the attorney general, or you resign, charges Daniel Popeo, general counsel of the conservative Washington Legal Foundation").

22. Wash. Post, Aug. 20, 1987, at A21, col. 1.

23. L. CAPLAN, *supra* note 9, at 265.

24. *Id.* at 267 (quoting confidential interview).

25. Neuborne Testimony, *supra* note 7, at 2-3. Neuborne regards the Solicitor General as having obligations as well to the administration, but insists that those obligations are subsidiary to the Solicitor General's responsibilities to the Court.

Court—and, I think, has about as much duty to one as to the other.”²⁶

Critics of Solicitor General Fried have asserted that he has “politicized” the Solicitor General’s office, a charge which Fried earnestly denies.²⁷ This dispute may reflect not so much a disagreement about what has occurred during Fried’s tenure as a difference of opinion regarding what constitutes improper politicization. Some of Fried’s critics have argued that Fried failed to frame government briefs to conform to the present views of a majority of the Court; Fried insists that doing so would itself be improper politicization: “‘I think there’s something condescending about only saying things which, on some kind of nose-counting prognostication, the court is going to adopt. . . . I think it is *less* political, not more political . . . to speak to the logic of the case as we see it.’”²⁸ When Fried asserts that his office is untainted by politics, he is evidently referring to partisan politics; Fried regards his personal philosophy as an entirely legitimate factor in the framing of government briefs.

I do not believe that our office has been politicized, and I would not wish to serve as Solicitor General in order to further a process of politicization. I suppose that the President has nominated me because he has some sense of what my philosophy is, and that philosophy enters my judgment of what the law is on a particular matter, and what arguments should be made. But certainly partisan political considerations have never entered into our judgments, never should enter into our judgments, and I would never allow them to enter into our judgments.²⁹

26. Cox, *supra* note 10, at 222; see also Griswold, *supra* note 10, at 535 (noting “the peculiar ambivalence of the function we must fill as lawyers. We are lawyers, representing a client; we are also, in a special sense, officers of the Court. The Solicitor General has a special obligation to aid the Court as well as to serve his client.”).

27. *Office Politicized*, *supra* note 10; Wash. Post, March 18, 1986, at A17, col. 1; Wash. Post, Jan. 7, 1986, at A8, col. 1.

28. Wash. Post, Jan. 7, 1986, at A8, col. 1 (emphasis in original).

29. L. CAPLAN, *supra* note 9, at 151. In a separate interview, Fried suggested that he was guided by his personal views on some, but not all, issues:

A: . . . [I]f the Antitrust Division believes that certain kinds of positions ought to be pursued as a matter of antitrust policy, then I carry that forward. What is more interesting and perhaps a bit more distinctive is that this is an administration which has a specific view not just about particular legal subjects, but about how the law itself should be developing. It has a view about the role of courts, about the proper forms of statutory interpretation, which is rather careful, tending towards the literal. We have a view about things like the use of legislative history.

Q: You just said “we”?

A: I do indeed say that because I was attracted from being a teacher to come to work here because I had certain views about the development of law. I thought in fact that we had gotten into sort of a bad way in a number of areas and as a professor I had written in this area and had the sense that the administration had many of the same

In 1973, on the other hand, Robert Bork advised the Senate that he would disregard his own philosophical views while serving as Solicitor General.

Senator Tunney. . . . The one thing that I must say from these hearings is that I have gained the impression that you are prepared to put aside your own personal philosophy and to argue cases on appeal and to bring cases up for appeal on the basis of the policy as enunciated by the agencies and the Attorney General and on the basis of the law as it presently stands.

Mr. Bork. That is correct, Senator.³⁰

Bork indicated he would press the Supreme Court to overrule a precedent only "if there was reason to believe that the Supreme Court wished to reconsider the subject. I do not think I ought to take appeals up just because I would like to reconsider the subject."³¹ But conservatives have criticized Solicitor General Rex Lee for taking the cautious approach urged by Bork, arguing that precedents should be challenged whenever the President's policies called for reconsideration of a reigning precedent. One such commentator objected: "During his . . . tenure in office, Solicitor General Rex Lee has not urged the Supreme Court to overrule a single prior decision . . ."³² The same conservative also noted that: "Instead of confronting the Justices with principled arguments, challenging them to defend the rationale of their opinions, and demanding reversal of liberal precedents, Lee has consistently addressed the Court as a dutiful and fawning serf might approach the Czar."³³ Within the last year Solicitor General Fried reportedly declined to authorize an attack on *Miranda v. Arizona*,³⁴ despite the Attorney General's long public disagreement with that decision, a refusal which apparently triggered con-

dispositions that I do. I have not had to bother very much checking to see whether people agree with my views because I have this sense that I'm Solicitor General because of the views that I have rather than the other way around. So on things like standing, on things like statutory interpretation, on things like the use of legislative history, on various aspects of constitutional law, these are things that I had thought a lot about and took very seriously before I ever came to the department and my views were well known. I think it is because of those views that I was chosen. And I simply continued to hold them.

A Special Interview with Solicitor General Charles Fried, 1 WASH. LAW., 48, 50 (1987).

30. *Nominations of Joseph T. Sneed, of North Carolina, to be Deputy Attorney General and Robert H. Bork, of Connecticut, to be Solicitor General: Hearings Before the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 24 (1973) [hereinafter *Bork Hearings*]. For a discussion of Solicitor General Bork's remarks, see *infra* note 232, and accompanying text.

31. *Bork Hearings*, *supra* note 30, at 13.

32. McClellan, *supra* note 21, at 2.

33. *Id.* at 14.

34. 384 U.S. 436 (1966).

servative criticism of Fried similar to that earlier directed at Rex Lee.³⁵

Although some of these disagreements have been sparked by disputes about the merits of the particular cases at issue, they also reveal very different views about the manner in which an independent Solicitor General ought to use that independence. To those who have strongly disagreed with many of the briefs filed by Solicitors General Lee and Fried, it is tempting to try to formulate a set of guidelines for the Solicitor General's Office which, if accepted, would assure that few if any such offending briefs would be filed in the future. But rules which emasculated the Solicitor General's office would prevent it from doing good as well as from doing harm. If a fresh analysis of the role of the Solicitor General's office is to spawn more plausible and specific traditions which might prevent the types of problems said to have occurred in recent years, that analysis must be founded in part on a recognition that even an ideal Solicitor General will, under a conservative administration, legitimately file briefs with which liberals strongly disagree, and on a careful attempt to distinguish differences over policy from disagreements about the proper role of the Solicitor General as such.

This Article suggests that the Solicitor General has five quite distinct responsibilities: to provide the Supreme Court with accurate and balanced information, to help to shape the Court's docket, to assure that the government's presentations maintain a high level of professionalism, to frame government positions which strike an appropriate balance between justice and advocacy, and to identify the interests and policies of the government client whom he represents. These responsibilities at times place the Solicitor General under conflicting obligations, not merely conflicts between his or her duties to the Court and to the administration, but conflicts in the Solicitor General's obligations to different agencies and factions within the executive branch. There is no simple or general rule for resolving these problems; they are, rather, an ongoing and unavoidable part of the work of the Solicitor General's office. Administration and agency policies properly play a greater role in the framing of Supreme Court briefs than has generally been recognized; the critical problem is not to insist that that role expand or contract, but to define the circumstances when such policies ought and ought not be among the factors considered by the Solicitor General, and to ascertain what the policies and priorities of an administration may be on a given issue. In order to strike the proper balance among these competing obli-

35. *Legal Times*, *supra* note 1.

gations and policies, the Solicitor General must avoid becoming the personal partisan of any particular agency or of specific ideological goals.

II. INFORMING THE COURT: THE 38TH CLERK

The aspect of the Solicitor General's work that is most unlike that of an ordinary litigator, and perhaps the most important to the Supreme Court, is the Solicitor General's responsibility for providing the Court, in the words of 1977 OLC Memorandum, with "balanced summaries of the records in the cases that are presented for review" and "an accurate and expert statement of the legal principles that bear upon the questions to be decided."³⁶ The Court's need for such assistance is particularly great because of the increase in the number of cases being brought to the Court for review. Today the Court receives certiorari petitions, and in a much smaller number of instances jurisdictional statements, in over 4,000 cases a year.³⁷ The sheer volume of these documents would overwhelm the time and abilities of most mortal justices; if the average request for review, response and annexed opinions totalled only 100 pages in length, the volume of material to be read each week would exceed 8,000 pages.

The actual problem is both less and more serious than is suggested by this figure. On the one hand, a mistake by the Supreme Court in deciding which case to take is far less serious than an error in resolving a case on the merits. A denial of certiorari, although often dispositive of the claims of the immediate parties, sets no precedent binding on the lower courts or the Supreme Court itself. If an issue raised by a petition is of substantial importance, one of the critical factors in determining whether review is appropriate, that issue is likely to arise again in another case; thus the Court, if forced by a lack of time and understanding to run a risk of error, can afford to err on the side of denying review. On the other hand, the risk of such error is even higher than the sheer volume of litigation would suggest. Many petitions prepared by private counsel lack either a discussion of the considerations that the Court regards as relevant to the cert-worthiness of the case, an account of the issues and history of the proceedings which would be comprehensible to a justice or law clerk with limited time to devote to the case, or both. Often considerable additional research or analysis is necessary to evaluate the desirability of granting review, tasks which the Court is ordinarily in no position to undertake. In the absence of such efforts the Court

36. 1977 Memorandum, *supra* note 10, at 231; *see also* Comment, *supra* note 10, at 1455 n.64, 1476.

37. 55 U.S.L.W. 3038 (1986) (4413 cases added to the Court's docket during October Term, 1986).

necessarily runs a substantial risk that it will agree to hear a number of cases which, on closer examination, do not warrant review; each year the Justices, after having granted review and invested the considerable time necessary to master the briefs and appendices, conclude that they made a mistake in taking a particular case, and dismiss the petition as improvidently granted. The problems posed by *pro se* petitions are, understandably, even more severe.

In resolving the cases it agrees to hear on the merits, about 150 each year,³⁸ the Court has significantly more time, but the stakes for the Court and the country are considerably higher. A Justice can devote on average no more than one working day to deciding how he or she will vote on a given case, about enough time to read the briefs and lower court opinions and to confer briefly with the Justice's law clerks or colleagues.³⁹ In some instances that will be sufficient time, but frequently it will not. Often, if not ordinarily, the competence of the appellate counsel, particularly in drafting their briefs, is of critical importance. In order to make a sound decision about the resolution of a case, a Justice needs to have and master a body of essential information—the factual circumstances of the case, the legal framework in which the questions arise, the broader factual context in which the case must be considered, the ramifications of the case for other litigation and areas of the law, and so on. Sometimes all of this is self-evident, or apparent from the decision of the courts below, but often it is not. Where additional information or analysis is essential, and the parties do not provide it, the Court may be left to its own devices to master thousands of pages of testimony, to explicate an obscure and highly technical statutory scheme, to evaluate the state of the law and the nature of the related issues in an unfamiliar area, or to predict the consequences of the various rules it is being urged to adopt.

The nine Justices, in assessing material of this sort, necessarily rely heavily on the reading and research of their law clerks. But although the Justices are authorized to select a total of thirty-seven clerks, there are limits as well to what the clerks can do. The volume of material, of course, makes it difficult for even the law clerks to research all or perhaps most issues in depth, particularly in evaluating requests for review. The law clerks, unlike the Justices for whom they work, have virtually no legal experience, and ordinarily began their legal studies no more than five years before their clerkship. Few law clerks will have mastered

38. *Id.*

39. If a Justice were to devote one day each to deciding how to vote on each case, that would leave two days a week for reviewing certiorari opinions and writing opinions, tasks which almost certainly consume considerably more time.

many of the issues that come before the Court, and most will have no greater understanding of the practical importance and impact of the issues presented than would a moderately diligent reader of the *New York Times*.

The resources which the Solicitor General has for addressing problems of this sort differ from the resources of the Supreme Court in three critical respects. First, although the Solicitor General's office itself is small, today numbering only twenty-two lawyers other than the Solicitor General himself, the office can draw on the time and knowledge of any of the tens of thousands of other attorneys within the executive branch. The nature of an opaque tax statute, for example, can be elucidated by a lawyer in the tax division; an attorney in one of the Justice Department's divisions can be detailed to spend days or weeks summarizing or evaluating a bulky record.⁴⁰ Even though this work product is checked, reconsidered, and revised by the Solicitor General's office, the task of that office is often made far easier and less time consuming by this assistance. Second, the Solicitor General and his or her deputies have a breadth of experience far greater than any law clerk, and the deputies, who traditionally specialize in particular types of issues, frequently bring to a case greater knowledge and expertise than most members of the Court itself. Third, the Solicitor General's office, because it is not constrained by the restrictions applicable to the judiciary regarding *ex parte* communications, can do research that would be impossible, or far more difficult, for the Court. If some aspect of a record is unclear, or the circumstances in which a case arose are obscure, the Solicitor General's office, unlike the Court, can simply telephone or meet with the relevant attorney and often clear the matter up directly. The practical expertise, knowledge and records of the entire array of federal agencies are available, at least in theory, to an attorney in the Solicitor General's office, while the Court itself would often have no direct way of acquiring the same information. Much of the information which the Solicitor General's office can obtain may in some appropriate manner be set forth in a brief; where that would be inappropriate, the information may nonetheless help to shape the more general conclusions which the Solicitor General offers the Court.

40. Griswold, *supra* note 10, at 532.

[W]ell over 2000 different matters were passed upon by the Office of the Solicitor General in the last . . . year. . . . [W]hat would be a literally impossible task for me and my staff becomes practicable only as a result of the able and highly professional assistance we receive from the functional divisions of the Department of Justice and from the other departments and agencies involved.

Id.; see also, Perlman, *supra* note 10, at 270; Stern I, *supra* note 10, at 154.

Oftentimes the information which the Solicitor General can provide the Court is essentially factual, albeit mixed with a degree of analysis and evaluation—how often a particular problem arises, what the consequences of a particular decision might be for the work of an affected agency, and so forth. But the Solicitor General can also aid the Court by offering a dispassionate scholarly analysis of the law, assisting the Court to understand the nature of the various issues and subissues in a case, pointing out the range of alternative conclusions which the Court might adopt, and providing a balanced overview of the arguments and of the relevant materials, such as cases or legislative history, which the Court needs to consider in reaching a sound conclusion. Analyses of this sort can be of considerable help to the Court in framing the issues it will address and in structuring its evaluation of the contentions of the parties. In some cases, of course, the issues may be sufficiently simple or familiar to the Court that the Solicitor General would have little to offer, but in other instances the complexity or novelty of the questions, possibly combined with inadequate briefs from the parties other than the government, may make such scholarly analysis invaluable.

A classic example of this informational role occurred in *Cramer v. United States*,⁴¹ in which the petitioner's challenge to his treason conviction turned in part on the history of the law of treason and the interpretation of the treason clause of article III.⁴² In addition to its brief, the government commissioned and filed with the Court some 400 pages of legal and historical analyses . . . prepared at the request of the . . . Solicitor General, in the main by persons not connected with the Department of Justice, but believed to be fully qualified by training and experience in the respective fields assigned to them. The experts whose services were enlisted for this project were the Chief of the Foreign Law Section of the Law Library of Congress, a Research Assistant in that Section, a Professor of History of Canon Law at Catholic University, . . . and an Associate Professor of Law at the University of Wisconsin.⁴³

In submitting the studies to the Court, the government commented:

The authors of the appendices were requested to avoid argumentative support of any particular position, and to select material for inclusion or exclusion solely on the basis of its

41. 325 U.S. 1 (1945).

42. "No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt act, or on Confession in open Court." U.S. CONST. art. III, § 3, cl. 1.

43. Perlman, *supra* note 10, at 285.

reliability and its relevance to the questions under review by the Court. . . . [W]e have chosen to present the studies to the Court in the form in which they were prepared and submitted to us, and we offer them as constituting in our judgment a fair, dispassionate and informative analysis of the history of the law of treason. In so offering them we do not in any way assume responsibility for, or necessarily agree with, all the inferences drawn or conclusions expressed by the authors.⁴⁴

The Supreme Court, although ruling against the government, expressed gratitude to the Solicitor General for having "lightened our burden of examination of the considerable accumulation of historical materials."⁴⁵

The ability of the Solicitor General's office to play these often vital informational roles depends heavily on the extent to which the Solicitor General understands the Court's concerns and priorities. The Court in some instances asks the Solicitor General to express the views of the United States,⁴⁶ but it does not ordinarily present the Solicitor General with written interrogatories or requests for the production of documents.⁴⁷ The Solicitor General and his staff must be able to anticipate the types of information which the Court will want and need, and the kinds of analyses the Court will find of value. Anticipation of this sort requires the Solicitor General's office to put aside the administration's own agenda and values, where they may differ from those of the Court itself, in order to focus on the matters of likely concern to the Justices.

The role which the Solicitor General plays in this respect is not that of a tenth Justice, but of a thirty-eighth law clerk. The members of the Supreme Court itself do not, with any consistency, provide in their opin-

44. *Id.* at 285-86.

45. 325 U.S. at 8 n.9.

46. During the 1986 Term the Court on 17 occasions invited the Solicitor General to express the views of the United States. *Shell Oil Co. v. Director of Revenue*, 108 S. Ct. 483 (1987); *United Metal Prods. Corp. v. National Bank*, 107 S. Ct. 3260 (1987); *Continental Can Co. v. Gavalik*, 107 S. Ct. 3226 (1987); *Bennett v. Arkansas*, 107 S. Ct. 1969 (1987); *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 107 S. Ct. 1952 (1987); *Mackey v. Lanier Collections Agency & Serv.*, 107 S. Ct. 1623 (1987); *Manufacturers Ass'n v. Knepper*, 107 S. Ct. 1564 (1987); *Regents of Univ. of Cal. v. Public Employment Relations Bd.*, 107 S. Ct. 1345 (1987); *Louisiana Land & Exploration Co. v. Texaco, Inc.*, 107 S. Ct. 1279 (1987); *Communications Workers of Am. v. Beck*, 107 S. Ct. 641 (1986); *Western Air Lines, Inc. v. Board of Equalization*, 107 S. Ct. 451 (1986); *Basic Inc. v. Levinson*, 107 S. Ct. 267 (1986); *Commonwealth Elec. Co. v. Department of Pub. Util.*, 107 S. Ct. 56 (1986); *American Elec. Power Co. v. Kentucky Pub. Serv. Comm'n*, 107 S. Ct. 56 (1986); *Laborers Health & Welfare Trust Fund for N. Cal. v. Advanced Lightweight Concrete Co.*, 107 S. Ct. 56 (1986); *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 107 S. Ct. 55 (1986); *AZL Resources, Inc. v. Margaret Hall Found., Inc.*, 107 S. Ct. 55 (1986).

47. *But see* Comment, *supra* note 10, at 1471 n.135.

ions an utterly balanced and dispassionate summary of the facts and issues. On the contrary, and perhaps not surprisingly, judicial opinions, especially when the Court is divided, are often as tendentious and one-sided as the briefs of the litigants themselves. To the extent that the Justices have in the past relied on the Solicitor General for a dispassionate appraisal of the issues and facts of a case, they ask of the Solicitor General a greater degree of fairness and objectivity than the Justices may expect or at times receive, from one another. To the extent that a Solicitor General fails to meet that standard he or she significantly complicates the work of the Court, and may fairly be criticized—but such a failure occurs, not because the Solicitor General has failed to act like a tenth Justice, but precisely because the Solicitor General has in fact done so.

It is not difficult to understand why the Supreme Court would want the Solicitor General to act as a semi-permanent scholar-clerk, but it is not self-evident why the Solicitor General would want to play that role. The Solicitor General is after all, an advocate with clients to represent. An ordinary advocate does not attempt to provide a neutral, dispassionate summary of the facts or law, but points a court only to the evidence, precedents or authorities which favor his or her client, largely ignoring the material on the other side, and hoping that it will be overlooked, or poorly presented, by opposing counsel. The problem is not one of deliberate misrepresentations, although they may occur, but of omission, a failure to disclose or mention testimony, legislative history materials or cases that are contrary to the interests of the party which the lawyer represents. When the Solicitor General chooses to file a brief, the government *does* care about the outcome of the case; the government would ordinarily settle any case whose outcome was a matter of indifference, and would not file amicus briefs unless it had a preference as to the proper disposition of at least some issue. Except in the extraordinary cases in which there is essentially no serious argument to support the contentions of the opposing party—cases so one-sided that they are unlikely to come before the Supreme Court—there will always be a tension between the Solicitor General's responsibility to inform the Court, and the Solicitor General's desire to persuade the Court to reach a particular result.⁴⁸

48. Solicitor General Cox describes a case in which the lawyer for a criminal defendant had failed to object at trial, or attack on appeal, a jury instruction, patently inconsistent with the fifth and sixth amendments, which authorized a jury to draw an inference of guilt from the fact that two witnesses had claimed the privilege against self-incrimination:

Then the defendant filed a petition for certiorari, seeking to have the Supreme Court review numerous questions, but never saying a word about the error in the charge. Now, what should the government do under these circumstances? There

Despite the potentially adverse consequences for the government's chances in any given case, however, the Solicitor General's office has long sought to provide the Court with the sort of dispassionate factual and legal analysis that would serve the Court's needs. To some degree this practice is a matter of tradition; Solicitor General Bork observed: "[t]he Solicitor General, as you know, bears a special relationship to the Court. He owes it complete intellectual candor even when that impairs his effectiveness as an advocate. . . . To that tradition of this office I will endeavor to adhere."⁴⁹ Solicitor General Fried commented more recently:

In terms of the special relationship to the Court, the most important part of that relationship comes from the scrupulous accuracy of our submissions, that when a record is presented to the Court, when the facts are stated to the Court, they should be stated in the fullest possible way, all the warts completely apparent.

I like to think that a statement by the Solicitor General's brief of the facts and of the record is one which could be gladly adopted by the opposing side.⁵⁰

The type of candor to which Bork and Fried referred was not merely the ethical duty of an attorney not to misrepresent facts or legal principles, but a duty of complete and balanced disclosure that might be expected of, although not necessarily met by, an academic or a judge. The willingness of Solicitors General to apply to themselves standards more stringent than would be expected of a private practitioner may stem, in part, from that fact that eight of the last nine Solicitors General came to that position from either the bench or law school faculties.⁵¹ The concern

was certainly an error of law in the charge. Whether the error was prejudicial, and was so plain that the court [sic] should notice it, without assignment, might be subject to argument.

We had some differences among ourselves as to what we should do, but everyone agreed that at the very least, it was our obligation to call the error to the attention of the Supreme Court, even though it might lead to reversal. Our difference was on whether we should also argue that under all the rules of procedure the point was not open to defendant, or we should ask the Supreme Court to reverse the judgment and send it back to the First Circuit, so that it could consider whether the error, which we suspected it had over-looked, was prejudicial. We took the latter course.

Cox, *supra* note 10, at 224. No private attorney would consider himself obligated to call to the attention of the Court a potentially dispositive fact overlooked by opposing counsel.

49. Bork, *The Problems and Pleasures of Being Solicitor General*, 42 A.B.A. ANTITRUST J. 701, 705 (1973).

50. *Oversight Hearings on the Solicitor General's Office and the U.S. Trustee Program*, House Subcomm. on Monopolies and Commercial Law, Comm. on the Judiciary, transcript lines 246-54 (Stenographic Minutes no. HJU078050) (Mar. 19, 1987).

51. Solicitors General Sobeloff, Marshall and McCree were former judges. Solicitors Gen-

with these standards is not unique to the Solicitor General's office; attorneys throughout the federal government ought to be, and at times are, equally conscientious.

But there is a second, essentially pragmatic consideration which virtually compels a Solicitor General, however litigious he or she may be by temperament, to adhere to a level of candor far more stringent than that common among ordinary attorneys. Virtually all other lawyers who handle litigation in the Supreme Court are involved in only a single case, or a handful of cases, in their entire careers; most law offices simply have too little contact with the Court to permit the Justices to form, or recollect, any firm judgment, for good or for ill, about the quality of their work. An attorney who is unlikely to appear again in the Supreme Court has little reason to worry about what impression he or she may be making, so long as he or she does not say something so patently dishonest as to harm his or her client or provoke a public denunciation at oral argument. The Court itself would certainly be pleased if the several thousand lawyers who each year file with it only one or two briefs apiece were to adhere to the sort of scholar-law-clerk standard described above, but precisely because those appearances are isolated the failure of any one attorney to do so has only a *de minimis* impact on the Court's work.

But the relationship between the Solicitor General and the Court is not a one-case-stand, but a permanent, indissoluble marriage; as passionately as the Solicitor General may desire a particular result, he must also worry about whether the Court will still respect him when the case is over. What distinguishes the relationship between the Solicitor General and the Supreme Court from the relationship of virtually any other attorney to that, or any other court, is the extraordinary frequency with which the Solicitor General's office participates in cases before the high Court. Among the cases which the Court sets down for briefing and argument, approximately 150 to 200 a year, the Solicitor General appears in about 65%; of these appearances, about two thirds are as a party, and one third as an amicus.⁵² This is not a new phenomenon; in 1952 the government participated in 64% of all argued cases, although a higher proportion of these were as a party rather than as an amicus,⁵³ and in 1931 Solicitor General Thacher reported that the government was

eral Cox, Griswold, Bork, Lee and Fried were law school professors prior to becoming Solicitor General.

52. 1984 ATT'Y GEN. ANN. REP. 9.

53. 1959 ATT'Y GEN. ANN. REP. 43. Of the 66 cases in which the government participated in 1953, only 10 were as an amicus. 1964 ATT'Y GEN. ANN. REP. 55.

a party in fully 60% of the cases resolved by the Court.⁵⁴ The average Justice writes a majority, concurring or dissenting opinion in no more than 20% of the cases decided by the Court; the Solicitor General takes a written public position three times as frequently. Lawyers for the United States, most often members of the Solicitor General's office, argue in half of the cases presented,⁵⁵ appearing in about six different cases during each week the Court sits for oral argument. Among the roughly 4,000 requests for review received by the Court each year, the United States was a party, usually the respondent, in approximately 40% of the cases, a level of participation that has existed for at least a quarter of a century;⁵⁶ the hundreds of written positions taken by the Solicitor General each year with regard to certiorari petitions or jurisdictional statements dwarf the handful of cases in which members of the Court themselves write opinions commenting on decisions to grant or deny review.

This incessant government participation in Supreme Court cases has two major, interrelated consequences. First, the quality of the Solicitor General's presentation, particularly whether the Supreme Court can rely on the Solicitor General to provide a balanced overview of the facts, issues, and law in each case, has an enormous impact on the Court's workload. If the Solicitor General provides such information, as has generally been the practice in years past, that reduces substantially the amount of time the Justices and their law clerks may have to spend on research and analysis, particularly in disposing of requests for review. The nature of the Solicitor General's presentations in response to requests for review are especially important, because hundreds of those requests are *pro se* petitions which may be far from cogent, or even coherent.⁵⁷ But whether the Solicitor General is of material assistance to the Court turns, not on whether the Solicitor General *sometimes* offers a dispassionate presentation of the facts and law, but whether the Solicitor General does so with such unerring regularity as to give the Court confidence in the reliability of his or her presentations. A Solicitor General who provides balanced and complete information to the Court 50% of the time is only slightly more helpful than one who does so 10% of the time—in either situation

54. Thacher, *Genesis and Present Duties of Office of Solicitor General*, 17 A.B.A. J. 519, 521 (1931).

55. Government attorneys argue in some, but not all, of the cases in which the United States has filed an amicus brief.

56. See, e.g., 1984 ATT'Y GEN. ANN. REP. 7; 1975 ATT'Y GEN. ANN. REP. 43; 1964 ATT'Y GEN. ANN. REP. 55.

57. R. Stern & E. Gressman, *SUPREME COURT PRACTICE* 541 n.1 (5th ed. 1978). The current practice of the Solicitor General's office is to waive its right to respond to many *pro se* petitions unless the Court itself requests a response.

the Solicitor General's briefs would be sufficiently unreliable so that all of their representations would have to be double checked. The Solicitor General and the government may be under no greater legal or ethical obligation to serve as a predictably balanced source of information than is any private attorney, but a failure of the Solicitor General to do so has far more severe consequences for the Court than similar conduct by an ordinary practitioner, and would inevitably provoke the displeasure, if not the wrath, of all the Justices, liberal and conservative alike.

The frequency with which the Solicitor General's office handles cases in the Supreme Court also means that the Solicitor General and his staff will over time develop in the minds of the Justices a reputation, for good or ill, regarding the candor of their legal and factual presentations, a reputation which will affect the general credibility of the Solicitor General's analyses and arguments, and thus the effectiveness with which the office can represent the interests of the United States. If a private practitioner, to save a weak or important case, bends the facts or law a bit, the worst that can happen is that the tactic will hurt a claim which might have been hopeless without a bit of legerdemain; but if the Solicitor General unsuccessfully attempts to do the same thing in some government cases, the resulting impact on the Solicitor General's credibility may impair for months or years the office's ability to advance the interests of the government in other cases. If, in a given case, an ordinary lawyer incurs the annoyance, or incredulity, of the Court, neither that attorney nor his other clients will bear any adverse consequences. But if, on a Monday morning, the Court begins to doubt the reliability of the representations made by the Solicitor General's office, the odds are that another case being argued by that same office will be heard Monday afternoon, and on perhaps half a dozen occasions before the week is out, and those arguments could be colored by concerns raised in the Court's mind by the first presentation. Precisely because all of the Solicitor General's appearances in the Supreme Court are on behalf of one overall client, the United States, the Solicitor General must be concerned with how his presentation of any single case on behalf of that client will affect the government's other interests in subsequent proceedings.

It is not enough that the Solicitor General's office refrain from misrepresenting the facts or the state of the law; just as other cases could be hurt by a suspicion of mendacity, so too those other cases could well be helped by a reputation for dispassionate scholarly analysis, a reputation for being not only truthful but balanced and forthcoming. It is true, as Solicitor General Bork observed, that absolute candor might impair in a particular case the Solicitor General's effectiveness as an advocate, but a

uniform practice of offering such dispassionate presentations would clearly enhance the Solicitor General's general effectiveness. Thus, Solicitor General Thacher was making a tactical as well as an ethical point when he insisted that he, like William Howard Taft, John W. Davis, Charles Evans Hughes, Jr., and others before him, had come "to regard the interests of the Government as best served by an attitude toward litigation of absolute candor and fair dealing"⁵⁸ But the Solicitor General's traditional credibility with the Supreme Court has been acquired, and can only be maintained, at a cost, because the degree of candor involved will at times be harmful, perhaps fatally so, to the chances of a particular agency in a specific case. A Solicitor General who confesses error with considerable scrupulousness and regularity undoubtedly by so doing adds to his or her stature with the Court, but not with any agency, division or prosecutor whose hard won victory is sacrificed in that cause.

The need to safeguard the Solicitor General's credibility is particularly great because of the nature of the information which the Solicitor General often wants to provide and which the Court often needs to have. In addition to the state of the law and the evidence introduced in the lower courts, the sound resolution of a case may turn on consideration of factual information that is not in the record. The tradition of including such materials in presentations in the Supreme Court is at least as old as the famous brief filed by Louis Brandeis in *Muller v. Oregon*.⁵⁹ The factual information or arguments in such briefs may be based on matters of general knowledge, documents subject to judicial notice, or less authoritative sources. A Brandeis brief may be inconsistent to some degree with strict adherence to the rules of evidence, but the Supreme Court recognized long ago that when a decision will affect the lives of thousands or millions of people, it ought to try to make the most informed decision possible, rather than run the risk that it will come to the wrong result because a lawyer representing the particular individuals before the Court failed to introduce some critical document at trial.

58. Thacher, *supra* note 54, at 521.

59. 208 U.S. 412 (1908). In *Muller*, the Court stated:

It may not be amiss, in the present case, before examining the constitutional question, to notice the . . . expressions of opinion from other than judicial sources. In the brief filed by Mr. Louis D. Brandeis . . . is a very copious collection of all these matters

. . . .
[The brief included] extracts from over ninety reports of committees, bureaus of statistics, commissioners of hygiene, inspectors of factories, both in this country and in Europe

Id. at 419 & n.1.

For the Solicitor General this practice presents a special problem and opportunity, because he or she also has access to the enormous amount of information that is in the possession of the government officials, but which is outside the realm of materials that would be readily available, or available at all, to any other litigant. Some of this government information is documentary; in other instances it consists of facts known to agencies or particular officials, or which can be ascertained by federal officials through calculation or research. Information of this type may be every bit as valuable to the Court, and to the Solicitor General's arguments, as the more common materials that would be available to any litigant in framing the sort of argument found in a Brandeis brief, but utilization of this government information gives the United States a potentially serious unfair advantage, because it may be difficult for the Court or opposing counsel to confirm or dispute the accuracy of the Solicitor General's assertions, or to assess the reliability of documents first produced by the United States when a case is in the Supreme Court. Of course there is unlikely to be any objection if the information provided by the Solicitor General favors the opposing party, but the use of information favorable to the government raises a different, and significant, problem. The possible unfairness is particularly great where the government is a party to the case at issue, and could thus have offered the information at trial, rather than an amicus participating in the litigation only after it reaches the Supreme Court.

The willingness of the Supreme Court to credit information or assertions of this sort depends largely, if not entirely, on the reliability and perceived integrity of the Solicitor General's office. If the Court has doubts about the Solicitor General's summary of a record, it can always review the record itself and could conclude that the summary at issue, however inaccurate past assertions might have been, was correct. But if the Solicitor General makes an essential but undocumented assertion about the practices of the IRS, or about the technology of heroin production as it is understood by government narcotics experts,⁶⁰ the Court often has little choice but either to accept the assertion at face value, or to disregard it entirely, since the Court may have no independent method of verifying the representation. For that reason the reliability of assertions of this sort by the Solicitor General's office must be absolutely beyond reproach, for if the Court were to doubt the accuracy or completeness of even a few such representations, it would begin to disregard all of them. Opposing counsel may not be able to carefully cross-

60. *See, e.g.,* *Turner v. United States*, 396 U.S. 398, 412 nn.15, 16 & 18, 414 nn.24 & 26, 418 n.36, 419 n.37 (1970).

examine the relevant officials, double-check their calculations and research, and search their files for possibly inconsistent materials, but if the Solicitor General's office itself does not do so the agency may fool the Solicitor General, and the Court, and even prevail as a result, but the long term consequences for the government would be extremely serious.

The potential importance of government representations regarding the general factual background of a case is illustrated by the 1986 decision in *Riverside v. Rivera*.⁶¹ The question at issue in that case was whether counsel fee awards under 42 U.S.C. section 1988 should be limited to a proportion of the monetary judgement won by a civil rights plaintiff. Since the underlying purpose of the statute was to assure that private counsel would be available to the victims of unconstitutional government action, the case turned to a significant degree on whether the proposed limitation on fee awards would in practice have discouraged private attorneys from representing plaintiffs with small claims. The government had some basis for evaluating that essential issue, since federal lawyers frequently worked with private counsel in Title VII actions in which counsel fees were sought and awarded. The Solicitor General advised the Court that, although the plaintiffs in *Riverside* had won an award of only \$33,000, a proportionality rule would not in practice have interfered with the stated purpose of the counsel fee statute: "[t]he prospect of recovering \$11,000 for representing [respondents] in a damages suit (assuming a contingency rate of thirty-three percent) is likely to attract a substantial number of attorneys."⁶² Since the plaintiffs' counsel in *Riverside* had expended nearly 2,000 hours over a ten year period, a fee award of \$11,000 would have yielded an hourly rate of \$5.65.⁶³ The Solicitor General's suggestion that "a substantial number of attorneys" would take a case paying \$5.65 an hour, like the amusingly fictional claims of television personality Joe Isuzu, was well calculated to get the Court's attention, but not to be believed. The EEOC, the agency with the most practical experience in this area, had expressly advised the Solicitor General that a proportionality rule would in practice have the effect of making private counsel unavailable in certain cases.⁶⁴ The

61. 106 S. Ct. 2686 (1986).

62. *Id.* at 2697 n.10 (quoting Brief for the United States as Amicus Curiae 23).

63. *Id.*

64. *EEOC Memorandum on Award of Attorney's Fees and Brief of Justice Department to Supreme Court in Case of City of Riverside v. Rivera*, Daily Lab. Rep. (BNA) No. 6, at E-1 to E-5 (Jan. 9, 1986) [hereinafter *EEOC memo*].

The memo stated:

[A] rule restricting the award of attorney's fees solely because the dollar amount of damages is low . . . would . . . discourage private attorneys from taking Title VII cases which involve only individual claims. . . . The standard suggested . . . —that

Solicitor General's assertion to the contrary cannot have increased the Court's confidence in the reliability of government representations in other cases.

Caplan notes the Solicitor General's practice of lodging non-record documents with the Supreme Court has been criticized in some quarters as giving the Solicitor General an unfair advantage since private attorneys are unaware that the Court accepts such submissions.⁶⁵ This argument is somewhat overstated; the NAACP Legal Defense Fund, for example, is well aware of the practice, and has utilized it for many years, and other private attorneys do so as well, albeit more intermittently. More fundamentally, however, the practice of lodging is a natural and generally desirable side effect of the use of Brandeis brief arguments, for it enables the Court and opposing counsel to examine critically the documents which a litigant might in any event have cited in its written arguments. It is essential for the Court, and ultimately for the Solicitor General, that any materials filed by the government be exhaustive and balanced, encompassing all material favorable to the other side as well as matters supporting the government; in the absence of procedures such as have evolved in the trial courts under *Brady v. Maryland*,⁶⁶ the Solicitor General on his or her own initiative has an obligation to search for and produce all relevant documents, in an absolutely unbiased manner, and should not file documents supporting the government unless he or she is able to vouch personally for their authenticity or reliability. If in any past instance the document lodged to support an argument were insufficiently balanced or trustworthy, the government erred, not simply in lodging the documents, but in making the argument which depended upon those materials. There is, to be sure, some danger of abuse inherent in this practice, but it would seem unwise to forbid the Solicitor General to lodge non-record documents, or to provide the Court with information outside the record, since any sensible Solicitor General will understand, or quickly learn, that any such abuses would substantially impair the ability of his or her office to effectively litigate subsequent cases.

There is, in sum, an almost inevitable conflict in any particular case between the long-term interests of the United States, and the Solicitor General's office, and the immediate interests of the agencies and officials

attorney's hours otherwise reasonable and necessary to the litigation should not be fully compensated if their value exceeds the amount of damages recovered—will necessarily . . . frustrate Congress's intent to award fees 'adequate to attract competent counsel . . .' (Senate Report at 6), inasmuch as competent attorneys will have less incentive to represent individual claimants who cannot finance their own litigation.

65. L. CAPLAN, *supra* note 9, at 21-24.

66. 373 U.S. 83 (1963).

involved in that specific case. It is a conflict raised to some degree by every decision to include, or omit, facts or precedents that militate against the government's position in a given case, and by every proposal to stray from a standard of dispassionate scholarship in summarizing the evidence or analyzing the state of the law. Agency officials, of course, are not entirely devoid of ethical sensibilities, and not every deviation from perfect balance will impair the Solicitor General's credibility, but the Solicitor General must remain mindful of the inherent potential conflict between the interests of agencies and officials who must be represented in future cases, and the interests of the agencies or officials concerned primarily, if not exclusively, to prevail in the case immediately at hand. One of the great values of an independent Solicitor General's office is that the very existence of that office institutionalizes a semi-adversarial process in which different attorneys represent these distinct interests, the Solicitor General's staff sensitive to the office's long term credibility, the agency lawyer's anxious to win the case involved, and those differing interests can be balanced and adjusted in a relatively open and deliberate process.

III. SHAPING THE COURT'S DOCKET: THE FOURTH JUSTICE

Another of the Solicitor General's most critical responsibilities—to the Court and to the government—stems from the manner in which the Supreme Court selects the cases which it will hear and decide. The Court does not simply peruse recent volumes of Federal Reporter Second, or state reports, and choose cases that strike its fancy. The Court's role is an essentially passive one—the Justices limit their choices to cases in which one of the parties has decided to ask for review, and are, as we have seen, quite dependent on the judgment of counsel, especially counsel for petitioners, both regarding what question is presented by a case, and for information bearing on the petition's certworthiness. Like a baseball hitter who can decide whether or not to swing at a ball, but cannot force the pitcher to throw strikes, the Court can refuse to hear a case proposed by counsel, but it cannot ordinarily take on an issue no one is asking it to resolve. The Court has considerably less control over this process than it does over the outcome of the cases which it ultimately decides on the merits, yet what issues the Court decides is often as important to the development of the law as how the Court actually decides them.

The pivotal role of the Solicitor General is reflected in two statistics. For at least the last quarter century, approximately twenty-five percent of the cases decided on the merits by the Supreme Court had been taken

at the behest of the Solicitor General,⁶⁷ and the Court now agrees to review about 75% of the cases in which the government seeks certiorari.⁶⁸ The very large proportion of government petitions granted by the

67. Each year, in addition to the petitions granted and set for briefing and argument, a number of petitions are granted and disposed of summarily; most of these summary dispositions are orders remanding the case for reconsideration in light of some recent Supreme Court decision. A number of appeals are summarily remanded for similar reasons. The proportion of argued cases in which the Government participated as either a petitioner or an appellant was as follows:

<u>Term</u>	<u>Total Cases Argued</u>	<u>U.S. Petitioner or Appellant</u>
1952	141	43 (30.5%)
1953	116	27 (23.3%)
1954	105	26 (24.8%)
1955	123	22 (17.9%)
1956	145	30 (20.7%)
1957	154	30 (19.5%)
1958	143	24 (16.8%)
1959	130	38 (29.2%)
1960	147	24 (16.3%)
1961	136	22 (16.2%)
1962	150	27 (18.0%)
1963	144	32 (22.2%)
1964	122	33 (27.0%)
1965	131	35 (26.7%)
1966	150	30 (20.0%)
1967	179	33 (18.4%)
1968	139	25 (18.0%)
1969	144	26 (18.1%)
1970	151	33 (21.9%)
1971	173	37 (21.4%)
1972	177	40 (22.6%)
1973	170	37 (21.8%)
1974	173	50 (28.9%)
1975	179	44 (24.6%)
1976	176	29 (16.5%)
1977	164	35 (21.3%)
1978	168	29 (17.3%)
1979	156	43 (27.6%)
1980	154	31 (20.1%)
1981	184	30 (16.3%)
1982	183	44 (24.0%)
1983	184	46 (25.0%)
1984	175	37 (21.1%)
1985	171	39 (22.8%)

1985-1986 SOLICITOR GEN. ANN. REP., table III; 1984 ATT'Y GEN. ANN. REP. 9; 1970 ATT'Y GEN. ANN. REP. 41; 1963 ATT'Y GEN. ANN. REP. 53.

68.

<u>Term</u>	<u>Government Petitions</u>		<u>Government Appeals</u>	
	<u>Filed</u>	<u>Granted</u>	<u>Filed</u>	<u>Probable Jurisdiction Noted</u>
1952	62	34 (55%)	24	15 (63%)
1953	43	21 (49%)	12	9 (75%)
1954	44	24 (55%)	3	3 (100%)
1955	52	32 (62%)	12	10 (83%)

Court contrasts sharply with the Court's treatment of other petitions, less than five percent of which are granted.⁶⁹ In an average term the Solicitor General files about forty petitions, all but a half dozen of which are granted. The Solicitor General's office also files amicus briefs in support of five to ten non-federal petitions a year, and these petitions fare about as well as those filed by the United States itself.⁷⁰ Caplan suggests that under Solicitor General Fried's tenure the government's petitions lost credibility with the Court. Whatever problems may or may not have

1956	42	31 (74%)	21	15 (71%)
1957	31	20 (65%)	8	4 (50%)
1958	40	33 (83%)	13	10 (77%)
1959	32	24 (75%)	5	5 (100%)
1960	33	16 (48%)	6	6 (100%)
1961	33	23 (70%)	12	10 (83%)
1962	29	21 (72%)	15	11 (73%)
1963	29	16 (55%)	9	8 (89%)
1964	36	29 (81%)	9	7 (78%)
1965	30	21 (70%)	17	13 (76%)
1966	30	25 (83%)	9	5 (56%)
1967	38	24 (63%)	11	8 (73%)
1968	27	22 (81%)	5	3 (60%)
1969	37	19 (51%)	20	12 (60%)
1970	45	31 (69%)	20	11 (55%)
1971	39	27 (69%)	14	10 (71%)
1972	52	36 (69%)	21	9 (43%)
1973	61	39 (64%)	14	11 (79%)
1974	66	47 (71%)	14	10 (71%)
1975	50	38 (76%)	11	8 (73%)
1976	48	37 (77%)	17	5 (29%)
1977	57	33 (58%)	11	3 (27%)
1978	52	37 (71%)	8	5 (63%)
1979	55	43 (78%)	10	7 (70%)
1980	50	31 (62%)	10	8 (80%)
1981	56	45 (80%)	17	12 (71%)
1982	66	39 (59%)	8	6 (75%)
1983	38	30 (79%)	7	4 (57%)
1984	36	29 (81%)	7	4 (57%)
1985	41	34 (83%)	10	9 (90%)

1985-1986 SOLICITOR GEN. ANN. REP. tables II-A and II-B; 1984 ATT'Y GEN. ANN. REP. 7-8; 1970 ATT'Y GEN. ANN. REP. 38-39; 1963 ATT'Y GEN. ANN. REP. 50.

69. In the 1985 Term the Court granted 108 of the 3802 petitions which were neither filed nor supported by the United States. 1985-1986 SOLICITOR GEN. ANN. REP. table II-A.

70. In the last five terms the number of such amicus briefs, and the disposition of the petitions, were as follows:

<u>Term</u>	<u>Government Amicus Briefs In Support of Petitions</u>	<u>Supported Petitions Granted</u>
1981	16	12 (75%)
1982	14	12 (86%)
1983	9	7 (78%)
1984	6	5 (83%)
1985	7	4 (57%)

Id.

arisen in specific cases, there appears to be no evidence of a general decline in the rate in which government petitions were granted. In the 1985 Term, Fried's most controversial, the Court granted eighty-three percent of the government's petitions, a rate not exceeded by any Solicitor General in the previous twenty-five years.⁷¹

There are two somewhat interrelated reasons for the extraordinary but consistent frequency with which the Court grants petitions filed by the Solicitor General. The first is that the Solicitor General, in selecting the cases in which review will be sought, generally attempts to apply the same standards which the Court itself utilizes in passing on petitions. Justice Frankfurter insisted that the Solicitor General had an obligation to do so.

The various Governmental agencies are apt to see decisions adverse to them from the point of view of their limited preoccupation and too often are eager to seek review from adverse decisions which should stop with the lower courts. The Solicitor General, however, must take a comprehensive view in determining when certiorari should be sought. He is therefore under special responsibility, as occupants of the Solicitor General's office have recognized, to resist importunities for review by the agencies, when for divers reasons unrelated to the merits of a decision, review ought not be sought.⁷²

Another source at the Court insisted that "[t]he Solicitor General should guard the gate."⁷³ Many of the Solicitors General who have served in that office during the last half century have expressly agreed with this view.⁷⁴ This practice is of enormous assistance to the Court, which would be even further swamped with petitions if the government

71. See *supra* note 68.

72. *Andres v. United States*, 333 U.S. 740, 764 n.9 (1948).

73. Lewis, *Our Extraordinary Solicitor General*, THE REPORTER, May 5, 1955, at 27, 29.

74. Solicitor General Griswold stated:

[T]he government presents to the Supreme Court only those cases that meet the Court's own exacting standards for review. . . . In this period of increasing court congestion, and the Supreme Court's own concern over its rapidly mounting docket which makes it so difficult for the Court adequately to consider all the cases it is asked to review, it is particularly important that the Court have presented to it on behalf of the government only those cases that appear appropriate for the Court to review.

Hearings Before the Subcomm. on Commerce and Finance of the Comm. on Interstate and Foreign Commerce on H.R. 5050 and H.R. 340, Bills to Amend the Securities Exchange Act of 1934; to Provide Authorizations for Appropriations for the Securities and Exchange Comm. for Fiscal Years 1974, 1975, and 1976; and for Other Purposes, 93d Cong., 1st Sess. 278 (1973) (testimony of Solicitor General Griswold) [hereinafter 1973 House Hearings].

Solicitor General Stern stated:

sought review in every one of the hundreds of cases it loses each year in

In determining whether to petition for certiorari the Solicitor General . . . attempts to apply the Supreme Court's standards. . . .

The reasons underlying this traditional approach by the Solicitor General are partly self-serving and partly not. . . .

. . . .
A heavy additional burden would be imposed on the Court if the Government, with its great volume of litigation, disregarded that policy and acted like the normal litigant who wants to take one more shot at reversing a decision which is obviously wrong because he lost.

Stern I, *supra* note 10, at 155.

Solicitor General Cox noted that:

A[n] . . . area in which the differences between the role of the ordinary lawyer and of the government's Supreme Court lawyers is very apparent, is deciding what cases to take to the Court upon petition for a writ of certiorari. . . .

We are much stricter in applying the conventional standards for seeking certiorari as set forth in the Court's rules

Cox, *supra* note 10, at 225-26.

Solicitor General Griswold also noted that:

These figures [as to the success rate of government petitions] are not cited to show any special prowess on the part of the Solicitor General in presenting cases to the Court. They illustrate, rather, the success of our policy of pruning from the cases lost in the courts of appeals the decisions that properly went against us or that, even if believed in error, are not of general significance. Less than one case in ten lost in the court of appeals becomes the subject of a government certiorari petition I . . . believe that our record in having certiorari granted comes from the objective soundness of our assessment that the case is, in the jargon of our highly specialized trade, "certworthy."

Griswold, *supra* note 10, at 535.

Solicitor General Perlman commented that:

[S]ince it is necessary not to swamp the Supreme Court with more business than it can handle, the Solicitors General, in order to assist the Court to function efficiently and expeditiously as a vital segment of our governmental structure, have long recognized the wisdom, from the standpoint of the general public interest, of attempting to bring before the Court only those cases in which there seems to be real need for Supreme Court adjudication.

Perlman, *supra* note 10, at 266-67.

Solicitor General Thacher stated:

[The Solicitor General] has . . . a peculiar responsibility to the Court, in taking infinite pains to see that the cases presented are only such as are worthy of its review. This responsibility is assumed not only in considering whether the Government shall ask review, but in opposing, or concluding not to oppose, petitions for certiorari filed by adverse parties.

Thacher, *supra* note 54, at 521.

Hearings on H.R. 1468, H.R. 1470 and H.R. 2271 before Subcomm. No. 3 and 4 of the House Judiciary Comm., 80th Cong., 2d Sess. 130 (1949) (statement of Solicitor General Perlman) [hereinafter 1949 House Hearings]:

We deal with the Supreme Court all the time on questions of applications for writ of certiorari. And I think that the experience that those in the Solicitor General's office have enables them to consider those questions with a degree of judgment as to what not only is possible to present to the court but what is probable

Lots of times we think that an application would be rejected by the Supreme Court and we think it is proper not to present it

We save the Government, we think, and we save the Supreme Court, a lot of unnecessary effort and expense by only filing applications which we think we have a reasonable chance of having granted.

the appellate courts, rather than in only a few dozen. But this approach is also sound advocacy, for there would ordinarily be no point in filing a petition in a case which the Solicitor General had every reason to know the Court would not agree to hear.

The government's petitions also fare well because the Solicitor General's recommendations have traditionally carried considerable weight with the Court. Former acting Solicitor General Robert Stern noted:

It is hoped and believed—although no one who has not been on the Court can be sure—that the Court will realize that the Solicitor General will not assert that an issue is of general importance unless it is—and that confidence in the Solicitor General's attempt to adhere to the Court's own standards will cause the Court to grant more Government petitions.⁷⁵

Justice Stevens indicated during a recent oral argument that the Solicitor General's views do indeed carry weight with the Court.⁷⁶ The degree of deference shown to government petitions is, of course, subject to any vicissitudes in the relationship between the Solicitor General and the Court. Regardless of what problems may or may not have occurred in recent years, the proportion of government petitions granted by the Court would certainly decline if the Solicitor General were to file a significant number of palpably uncertworthy petitions, or were to file petitions in 100 cases a term, regardless of whether all of them warranted serious consideration by the Court. On the other hand, the Solicitor General's office has an unparalleled degree of experience with and understanding of the certiorari process; every term it considers several hundred agency proposals for certiorari petitions and receives more than a thousand peti-

75. Stern I, *supra* note 10, at 156.

76. The following colloquy occurred in a discussion of why the Supreme Court had granted a stay at an earlier stage of the proceedings:

QUESTION: But isn't it true on the stay, just reflecting, I don't remember the particular application, but this is a case that involved a great deal of money, did it not? Fifty or sixty or seven [sic] million dollars?

Mr. Merrill: It involved \$60 million.

. . . .

QUESTION: The government also comes in in these cases. Don't we almost routinely grant the stays with that kind of fact pattern?

Transcript of Oral Argument at 17, *Pierce v. Underwood*, 108 S. Ct. 255 (1987) (No. 86-1512).

The fact that the Court would "routinely" grant such a stay when requested by the Solicitor General is significant because stays are not ordinarily granted unless there is "a reasonable probability that four members of the Court will consider the issue sufficiently meritorious to grant certiorari . . ." *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972). See also *Study of the Securities Industry, Part 3: Hearings Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess. 1809-10 (1971) (Letter of Chief Justice Burger) ("[T]he Solicitor General exercises a highly important role in the selection of cases to be brought here in terms of the long-range public interest.").

tions filed in cases the government won below. The Solicitor General, if inclined out of a sense of obligation or enlightened self-interest to utilize the Supreme Court's own standards, can be of great assistance to the Justices in selecting from the thousands of government cases in the lower courts the handful that warrant consideration by the Supreme Court.

The Solicitor General's views might matter less if each year, out of perhaps 4,000 certiorari petitions, there were 150 that clearly warranted review, and 3,850 which just as obviously did not. But the petitions filed with the Court do not divide in this manner. Each year there are perhaps a few dozen cases which undeniably ought to be heard by the Court, and a far larger group, possibly several hundred, which appear to be moderately certworthy.⁷⁷ The choices that must be made within this latter group depends in part on a more detailed inquiry into the facts and legal context of each case, and in part on a judgmental evaluation of the overall importance of the issues which it raises. The views of a Solicitor General who understands the concerns and criteria of the Court can be particularly helpful in making selections within this larger group of arguably certworthy cases.

But the Solicitor General's recommendations may also be significant, and entitled⁷⁸ to weight, because they reflect not only the Court's own criteria, but also the policies of the executive branch. The Solicitor General's informational role is one which is best filled without regard to the priorities or interests of executive agencies. But the evaluation of the importance of a case—to the country, to the functioning of the federal government, to the development of the law—is not so bloodless a task. A given agency, limited to seeking review in a single case a year, would make that choice in part based on the relative priority which it attached to the various issues involved. Thus a conservative NLRB might select a case in which it had sought to expand the prerogatives of management, while a liberal NLRB might look for a vehicle to increase the protections afforded to union members. Because the executive branch is the arm of the national government responsible for the execution of federal law, considerable weight ought to be accorded to the views of that branch regarding which aspects of federal law require further explication. The Solicitor General has an obligation to the Court to keep down the

77. See Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681 (1984).

78. See 1973 *House Hearings*, *supra*, note 74, at 288 ("I would say the Court can't hear a fourth of the cases that are worthy of consideration by a national court. In that situation, an office in the Government which helps to filter out the cases and to get before the Court those which are really of that first importance . . .").

number of requests for review, and to limit the requests to cases which are arguably certworthy, but so long as the selections are made within that group, whatever the executive branch regards as important to the attainment of its policies might presumptively be regarded as important by the Court as well.

The Solicitor General's ability to shape the Court's docket is comparable to, and conceivably even greater than, that of any single member of the Court itself. So far as is known the Justices do not accord to one another the degree of deference shown to the Solicitor General concerning which cases to review; in the 1985 Term there were several hundred cases in which the Court denied review over the objection of one or more Justices,⁷⁹ but only seven cases in which the Court declined to review a petition filed or supported by the Solicitor General.⁸⁰ The views of any given Justice are decisive only when the other eight members of the Court are divided five-three against granting certiorari; when that occurs the disposition of the case will turn on whether the remaining Justice sides with the minority and provides the fourth vote needed to hear the case. The power actually exercised by the Solicitor General is comparable to that of the fourth Justice in that situation, although the Solicitor General may be in a position to exercise that power more often than any actual member of the Court itself. Of course, the executive branch may at times want to embroil the Court in issues which the Court prefers to avoid; when that occurs the Justices are free to reject the Solicitor General's recommendations. But so long as the Solicitor General proposes review of only a modest number of arguably certworthy cases, the Solicitor General does the Court no disservice by making those selections in part on the basis of administration policy; indeed, it would probably be impossible to make such selections without doing so.

The Solicitor General's responsibility to select the small number of cases in which review will be sought requires him or her to face and resolve unavoidable conflicts among the interests of the numerous federal agencies aggrieved each year by lower court decisions. The filing of a palpably uncertworthy petition, however important the issue to the agency involved, would necessarily compromise the weight which the Solicitor General's recommendations would carry in subsequent cases in which the Solicitor General represents other agencies.⁸¹ Solicitor Gen-

79. The orders denying the petitions in October Term, 1985, are set out in volumes 89-92 of *Lawyers Edition*, Second.

80. See *supra* note 68. There were 41 government petitions filed. A total of 34 petitions were granted. *Id.*

81. Solicitor General Griswold explained his reasons for declining to seek review of a case

eral Cox observed that: "One who is much stricter in deciding when to ask for certiorari, is bound to have a better batting average";⁸² it is equally true that, a hitter known to swing at bad pitches is taken considerably less seriously. But more is involved than merely the need to avoid submitting frivolous petitions; choices must be made among the arguably certworthy cases. If the Court were to announce that each year it would grant certiorari in forty, and only forty, cases of the Solicitor General's choice, or in whichever ten non-government cases the Solicitor General chose to support with an amicus brief, the nature of the conflict, and the need for policy related decisions, would be starkly apparent.⁸³ The actual process, with decisions made on a rolling basis, and the Solicitor General's office itself required to screen out the cases that are clearly unworthy of review, masks to some degree the nature of the problem. But in the final analysis the selection of cases in which review will be recommended requires the Solicitor General to assess not only the concerns of a given agency, but also the overall policies and priorities of the entire administration, for the Solicitor General must choose to pursue litigation regarding certain agencies and programs at the cost of abandoning cases involving other departments or activities.⁸⁴ The selection of cases in which review will and will not be sought, like the selection of agencies whose budgets will be increased or decreased, necessarily and properly reflects to some degree the particular priorities of each administration. The Solicitor General has an obligation to both the Court and the administration to make his or her decisions in light of the full array of executive branch interests or policies, rather than favoring the particular priorities of a particular agency or division of the Justice Department; a Solicitor General who placed undue emphasis, say, on seeking review in

he thought uncertworthy in such terms: "The Solicitor General has only so much capital with the Court and, if we spent some of it on this case, it would almost surely be wasted because there was no real prospect that the Court would take the case, in the judgment of my office, . . ." *1973 House Hearings, supra* note 74, at 276.

82. Cox, *supra* note 10, at 226.

83. Solicitor General Griswold noted: "the pressure that we are under to try to hold down the cases which are sought to be taken before the Supreme Court because that has become so massive that unless we are extremely careful we may not get in some fairly important cases that we ought to get in." *1973 House Hearings, supra* note 74, at 295.

84. Former Solicitor General Sobeloff stated:

A sometimes bothersome feature of the solicitor general's duty of deciding what business to present to the Supreme Court is dealing with the government agencies concerned. His is the task of resisting their tearful importunities to seek review of cases they have lost. The loss seems to them calamitous. Their preoccupation is with the immediate result, or at least their purview is likely limited to their particular work. The solicitor general must seek a broad perspective of the total law business of the United States, not merely the program of any single agency.

Sobeloff II, *supra* note 10, at 151.

Social Security cases would do so at a significant cost to other federal agencies and programs.

It will not always be clear how a Solicitor General is to assess the comparative importance of different agencies and programs. In order to select the thirty or forty most important cases in a given year, the Solicitor General not only must evaluate the impact of a particular issue on a given agency, but also must decide which policies and practices are to be given priority consideration. These assessments might well be better made by the cabinet, or the President, if the interrelated legal issues—e.g., is this issue a little, moderately, or very certworthy? What will be the actual legal impact of the lower court decision? Is another case raising the same issue likely to come along soon?—could be separated out, but often such distinctions are impracticable. The final decisions ordinarily fall to the Solicitor General's office, both because policy and legal issues cannot readily be separated, and because of the institutional problems which would arise if agencies unhappy with a Solicitor General's refusal to authorize certiorari petitions in their particular cases could go over the Solicitor General's head to appeal to policymakers.

A rather different potential conflict, between the interests of the Court and those of the government, arises when a decision against the government presents a certworthy issue, but the Solicitor General concludes that the circumstances of the case make it a poor vehicle for litigating that particular question. There has been some disagreement about whether the Solicitor General's obligations to the Court would require the Solicitor General to seek review of such a case. In 1973 Solicitor General Griswold testified at a House hearing that his office deliberately avoided seeking review in cases of that sort:

One of the major considerations the Solicitor General applies in deciding whether to ask the Supreme Court to hear a case is the suitability of the case as a vehicle for deciding the issue. Bad facts frequently color the Court's reaction to the legal issues, and it has been the experience of the office over many years that the government is ill-advised to litigate in the Supreme Court an important legal issue in a factual context in which the Court's sympathies are likely to be with the other side.⁸⁵

At his Senate confirmation hearing the same year, Solicitor General Bork took a somewhat different approach. "I do not see how a Solicitor General who imposed his own views upon the appeal process and kept cases from the Court that the Court thinks it ought to have, could conceivably

85. 1973 House Hearings, *supra* note 74, at 279.

retain the trust of that Court."⁸⁶ Ironically, however, one of the few recent incidents in which the Solicitor General's office was criticized for keeping a case from the Supreme Court occurred when Bork was Solicitor General.⁸⁷ While the Supreme Court may believe that the importance of a particular issue would warrant a grant of certiorari, the Court is unlikely to object to the Solicitor General's efforts to present that issue in a case whose circumstances favor the government, so long as the Solicitor General's attempt to await a more propitious case does not prevent the Court from considering the issue in a timely fashion, but merely works a brief postponement in that consideration.

Another institutionally delicate problem arises when the entity pressing the Solicitor General to seek certiorari is an independent agency to which Congress has by statute given authority to set its own policies and priorities without regard to the views of the President or the executive departments. The Solicitor General's statutory authority for handling virtually all Supreme Court litigation on behalf of the United States literally entails the power to make litigation decisions, not only on behalf of officials and agencies accountable to the President, but also on behalf of independent agencies.⁸⁸ There will at times be direct, even vituperative disagreements between independent agencies and either the White House or other executive branch officials; such agencies are by statute accorded independence precisely because Congress believed that their work was likely to give rise to such disputes. The Solicitor General's litigation authority could in theory be used, in such occasions, to impose on an independent agency the views of the administration, if he refused,

86. *Bork Hearings*, *supra* note 30, at 11. Previous Solicitors General had shared Bork's view. Former Solicitor General Archibald Cox stated that: "[I]n deciding what cases to take to the Court, you hear lawyers in the office frequently say, 'Well, is this a case that would be good for the Court to have,' rather than 'Is this a case that it would be good for us to have the Court consider.'"

Cox, *supra* note 10, at 223.

Also, former Solicitor General Perlman asserted:

The Solicitor General would not perform his duty to the Government or to the people if he took to the Supreme Court only cases which he thought would add to the Government's score of victories. Cases often involve questions of such importance that the public interest requires that they be brought to the Supreme Court for settlement or clarification, irrespective of the chances of winning the particular controversies.

Perlman, *supra* note 10, at 267.

87. *See, e.g.*, N.Y. Times, Jan. 30, 1975, at A34, col. 5 (Sen. Edward Kennedy on pocket veto issue); *id.*, Jan. 24, 1975, at A30, col. 5 (Solicitor General Bork on pocket veto issue); *id.*, Nov. 10, 1974, at A44, col. 1 (Ford criticized on pocket veto); L.A. Times, Nov. 1, 1974, pt. 2, at 6, col. 3 (criticism of Ford pocket veto issue).

88. The earliest exception is the authority conferred by statute on the Interstate Commerce Commission to handle its own cases in the Supreme Court. 28 U.S.C. § 2323 (1982).

for example, to authorize the filing of a certiorari petition because the administration was pleased that a particular agency practice or action had been overturned by the lower courts. Such a policy-based refusal would squarely pose a conflict between the Solicitor General's general authority to supervise Supreme Court litigation and the more specific statutory charter guaranteeing the independence of the agency involved.

Regardless of how such a legal dispute might be resolved, even assuming that some judicial forum could be found to resolve it, past Solicitors General have generally recognized that they ought not use their supervisory authority to impinge in this manner on the autonomy of independent agencies. A 1966 study concluded that the Solicitor General was authorizing approximately sixty-five percent of the certiorari petitions requested by independent agencies, compared to only twenty percent of the petitions sought by other executive agencies.⁸⁹ In 1973, Solicitor General Griswold advised Congress that his office was approving about seventy-six point six percent of the proposed petitions submitted by independent agencies,⁹⁰ and was disapproving such petitions only if he thought the issues were not certworthy, or provided a weak case in which to litigate the questions presented. If the question which an agency wanted the Court to consider were a certworthy one, but the Solicitor General was unable in good conscience to present the legal arguments the agency wished to make, "the customary practice has been for the Solicitor General himself not to sign the brief but to authorize the agency to represent itself."⁹¹ In 1983, when Solicitor General Lee declined to authorize a certiorari petition to review a circuit court decision overturning a controversial Consumer Product Safety Commission order, Lee made a point of assuring the agency in writing that his decision did "not reflect any disagreement with the merit of the commission's decision."⁹² The potential for conflict between independent agencies and an administration, however, is unavoidable, and when those conflicts do arise the Solicitor General should decline to file or authorize the filing of a certiorari petition only where necessary to protect the Court from an uncertworthy case.⁹³

89. See Comment, *supra* note 10, at 1454 (quoting study).

90. 1973 *House Hearings*, *supra* note 74, at 272, 281 (from the years 1963 to 1973, Solicitor General filed petitions in 98 of 128 instances in which agencies requested such action).

91. *Id.* at 281.

92. N.Y. Times, Aug. 26, 1983, at A13, col. 3. See Comment, *supra* note 10, at 1458 ("If the basis of the Solicitor General's decision [not to file a petition] is founded on policy differences, the agency should be able to appeal on its own, since the Solicitor General is no longer protecting the Court from cases clearly unworthy of its consideration.")

93. This tradition has not been followed with complete uniformity. In one instance the

IV. SENIOR PARTNER

Many aspects of the Solicitor General's work derive from the special relationship of that office to the Supreme Court, and from the unique nature of the Solicitor General's client. But the Solicitor General also functions, of necessity, as the ranking attorney responsible for supervising appellate litigation, a role that in some ways is similar to that of the senior litigation partner in a private firm. The Solicitor General ordinarily exercises final authority over the tactical judgments about how best to prevail in a given case or regarding a particular issue. The framing of a brief often involves a large number of these decisions—which arguments to advance, what concessions to make, whether to seek a broad or narrow opinion, and so on. Lawyers can disagree endlessly about such matters, their disputes sometimes reflecting conflicting styles and judgments and sometimes masking philosophical or political disagreements. As former acting Solicitor General Robert Stern observed, in the government, as in private practice, “the final decision must be made somewhere.”⁹⁴

The Solicitor General has for several distinct reasons been accorded the responsibility for making those legal judgments. First, the handling of Supreme Court litigation requires a considerable degree of expertise that does not generally exist among government attorneys outside of the Solicitor General's office, an understanding not only of such narrow procedural questions as the type of case the Court will deem certworthy, but more broadly of the types of reasoning and concerns likely to sway the Court's decisions on the merits of a case. Attorney General Clark once observed:

Very few lawyers, as you well know, ever argue a case in the Supreme Court of the United States. It is a procedure that is foreign for many lawyers. I am sure that if you could see some of the briefs and applications that are filed there, you would understand just what I mean when I say that you have to have someone that knows his business when he gets to the Supreme Court.⁹⁵

Solicitor General refused to permit the filing of a petition, which he acknowledged raised a certworthy issue of national importance, because he personally agreed with the decision of the court of appeals. *See* Comment, *supra* note 10, at 1456.

94. Stern I, *supra* note 10, at 218.

95. *Providing For the Review of Orders of Certain Agencies, and Incorporating into the Judicial Code Certain Statutes Relating to Three-Judge District Courts: Hearings Before Subcomm. No. 3 and Subcomm. No. 4 of the Comm. on the Judiciary, House of Representatives on H.R. 1468, H.R. 1470, and H.R. 2271 and Before Subcomm. No. 2 on H.R. 2915 and H.R.*

Because of their different role within the federal judiciary, for example, the Justices are less likely than circuit judges to be concerned with relevant, but not controlling, Supreme Court precedents, and more likely to be sensitive to the practical consequences of their decisions; an attorney whose career has been limited to the lower courts might well be unfamiliar with such differences. Second, not all federal employees who have passed the bar have the same ability to write appellate briefs; the differences reflect variations in both innate talent and in legal experience. The Solicitor General's office traditionally recruits particularly gifted attorneys, and necessarily provides them with a degree and type of brief-writing experience that is unique in the legal profession. Third, because the Solicitor General's staff must represent a wide variety of federal agencies and officials, it is better able, and more likely, to frame the government's position in light of the total law business of the United States, rather than simply from the perspective of a single agency or program manager. Finally, because the Solicitor General's office is not ordinarily involved in a case before it reaches the Supreme Court,⁹⁶ the Solicitor General and his or her staff can evaluate the issues and arguments from a fresh, more objective perspective than might be possible for agency attorneys who had been fighting the same case for years.

These considerations are somewhat analogous to the concerns which often prompt large private institutions to turn to outside counsel to handle major litigation. One would not expect this sensible allocation of responsibility for overseeing Supreme Court cases to occasion any substantial controversy, and until recently it did not. Somewhat surprisingly, however, much of the criticism and debate since 1981 about the Solicitor General's office has focused on whether the Solicitor General had played, or should play, the sort of role which was commonplace in the past.

That the final decisions regarding legal tactics and arguments should be left in the hands of the Solicitor General seems a matter of organizational and professional common sense. The Attorney General often will be less skilled than the Solicitor General in making those judgments.

2916, 80th & 81st Cong. 125 (1949) [hereinafter 1949 *Hearings*]. See also 1973 *House Hearings*, *supra* note 74, at 274, wherein Solicitor General Griswold commented:

we inevitably embody a very large amount of experience in Supreme Court work, not only with respect to its practice but with respect to the types of arguments which seem to be effective, and I think that reservoir of experience in the Solicitor General's Office is a very important asset to the Government.

Id.

96. In some instances the Solicitor General's office will have been involved because it was required to assent to an appeal from an adverse district court opinion.

Frequently the Attorney General will have been selected because of his policy-making and management skills; at worst he may have been chosen simply because he was a personal friend or confidante of the President. Only a few Attorneys General could seriously have claimed to be qualified to serve as Solicitor General. The same is doubtless true of most members of the White House staff, and no President since William Howard Taft even pretended to be a serious lawyer.

On any given legal issue, as is discussed at greater length below, there may well be more than one plausible position which the government could take, and the choice among those alternatives might legitimately be influenced by administration policy. But not every conceivable legal argument falls within this range; some are simply too strained, or too inconsistent with unquestioned law or undisputed facts, to be taken seriously. At times it simply is not possible to craft with intellectual integrity any basis for a desired conclusion, however earnestly that result may be sought. Not every conceivable legal contention is equally plausible, or plausible at all; implicit in the statutory requirement that the Solicitor General be "learned in the law"⁹⁷ is a recognition that the law is an intellectual system with specific rules, principles and limitations to be learned and respected. In the past Solicitors General have properly regarded themselves as obligated to assure that briefs filed by the United States did not contain arguments that were "absurd,"⁹⁸ "unsound,"⁹⁹ "completely untenable,"¹⁰⁰ or without a "substantial basis."¹⁰¹

The Solicitor General is always under some pressure to expand his or her view of the limits of plausibility. The Solicitor General's reputation with the Court for advancing only reasonable arguments gives his or her contentions a special credibility. In any individual case, however, that reputation would give a certain patina of reasonableness to an argument that might seem far-fetched if advanced by any other lawyer. Individual agencies, anxious to advance whatever legal contentions would be most favorable to their particular programs, practices, or prerogatives, are understandably less concerned than the Solicitor General about the possibility that their arguments, although possibly successful in the case at hand, might in the long term undermine the Solicitor General's credibility with the Court. A Solicitor General who resists the efforts of a given agency to make some expansive but dubious argument is imposing

97. 28 U.S.C. § 505 (1982).

98. Stern II, *supra* note 10, at 762.

99. Cox, *supra* note 10, at 225.

100. Sobeloff II, *supra* note 10, at 157.

101. Perlman, *supra* note 10, at 274.

on the agency, not his or her views of what the law is, but his or her views about how to maximize the ability of the Solicitor General's office to represent a large number of federal agencies over an extended period of time. In such situations, Justice Brandeis observed, "[t]he Solicitor General should be a general."¹⁰² At times the defense of a vital policy, or the presentation of a novel doctrine, may require the making of arguments more innovative or novel than would be thought wise in an ordinary case; but the government has only so much institutional capital to spend on such arguments, and the Solicitor General is responsible for keeping the books.

Efforts to persuade the Solicitor General to make implausible arguments are not new; in 1950, for example, the ICC unsuccessfully urged the Solicitor General to argue that the Commission could direct the segregation of blacks in railroad dining cars.¹⁰³ What was different under the Reagan Administration, in part, was that the pressures on the Solicitor General evidently came from, or were made in the name of, the White House. In *Wallace v. Jaffree*,¹⁰⁴ for example, members of the administration asked the Solicitor General to authorize the filing of a brief arguing that a district judge could disregard longstanding Supreme Court establishment clause decisions simply because those decisions were, in the view of the judge and some administration members, incorrect. Professor Bator, who served in the Solicitor General's office during this era, reported: "We were being urged to do this because the President had said the same in speeches and otherwise that it was his policy to restore prayer in the public schools."¹⁰⁵ An anonymous lawyer in the Solicitor General's office, discussing problems later in the administration, complained "we've been asked to do a lot of ridiculous things, take indefensible positions and do it because it's the agenda of these ideologues."¹⁰⁶

There has also been, in recent years, less acceptance of the very notion that there are any limits on what legal arguments are plausible, or that the Solicitor General has a mandate to enforce those limits. In 1984, the *Wall Street Journal* reported that both Solicitor General Lee and Professor Bator were criticized by administration conservatives for being "too lawyerly and insufficiently political in [their] thinking."¹⁰⁷ A right wing journal in that year denounced Lee's reliance on Supreme Court

102. Lewis, *supra* note 73, at 29.

103. Stern II, *supra* note 10, at 761-62 (citing *Henderson v. United States*, 339 U.S. 816 (1950)); *Railway Labor Executives Ass'n v. United States*, 339 U.S. 142 (1950)).

104. 472 U.S. 38 (1985).

105. L. CAPLAN, *supra* note 9, at 100.

106. *Office Politicized*, *supra* note 10.

107. Wall St. J., Sept. 6, 1984, at 1, col. 1.

precedents as "servile" and "slavish."¹⁰⁸ Conservatives both inside and outside the Reagan Administration seem at times to have been unable to comprehend that lawyers in the Solicitor General's office might resist making a particular argument, not because they objected to the social or political consequences of prevailing, but because they thought the arguments so hare-brained that they would lose the case at issue and imperil others as well. Having insisted for decades that Supreme Court decisions with which they disagreed were mere policy making by unelected judges, some conservative legal theorists may have lost the capacity to recognize that a legal view to which they objected could possibly be anything other than more social policy masquerading as law. It was as if constitutional controversies had become a form of total war, in which legal principles were not permitted to be neutral, but were required either to enlist on one side or be deemed enemy aliens. A lawyer—to use the term loosely—who was convinced that sound legal analysis always led to conservative results, and that legal argument which supported an undesirable liberal result was certain to be incorrect and probably disingenuous, would lose the ability to distinguish between plausible and off-the-wall conservative arguments, and would naturally come to doubt the good faith of anyone who questioned the reasonableness of his or her contentions.

Conservative critics of Rex Lee's purported failure to aggressively pursue the President's social policies also failed to understand that the Solicitor General's office, like the Supreme Court itself, is in many ways a passive institution, one whose ability to influence the law is restricted by the nature of the cases which other parties bring before it, and by respect for the laws, rules and precedents which control how and when those cases are to be decided. Even if the Solicitor General were willing to disregard the normal rules of civil procedure and Supreme Court practice in his or her haste to achieve a given result, it is unlikely that the Court would be prepared to do so. The principles of sound lawyering restrict the Solicitor General's ability to pursue an administration's legal agenda, no matter how great his or her desire to do so. A Solicitor General who ignores those constraints does so at his or her peril.

Both Lee and his successor, Charles Fried, were also criticized from other quarters for allegedly having done precisely what conservatives complained they had failed to do. In 1982, the *New York Times* denounced in unusually harsh language an amicus brief filed by Solicitor General Lee defending the abortion restrictions at issue in *City of Akron*

108. McClellan, *supra* note 21, at 3, 4.

*v. Akron Center for Reproductive Health, Inc.*¹⁰⁹

The Reagan Justice Department filed a curious document with the Supreme Court last week in connection with pending abortion cases. Though called a brief for the United States as a friend of the court, it is in fact a 20-page lecture. . . .

We trust that the Court, which needs no such lecture, will ignore this political tract, for it is of scant help in deciding the complex cases to be heard in the fall term. The brief is better suited to the partisan purposes of an Administration eager to appease its disgruntled right wing. A Justice Department official demonstrated as much when he made sure that a Washington conference of abortion opponents was promptly notified of the filing.

Still, even if the document persuades no justice, it does harm. One way is by trashing the department's reputation as a source of principled counsel to the Court.¹¹⁰

Lincoln Caplan's *The Tenth Justice*,¹¹¹ on the other hand, suggests that Lee made a more determined and successful effort than did Fried to avoid advancing off-the-wall arguments framed largely to appease the far right.

This Article argues elsewhere that a number of criticisms of Lee and Fried, voiced by Caplan and others, are unwarranted or miscast, and it may well be that certain controversial positions were taken over their objections. But whatever the purpose and process involved, some of the briefs filed in the last six years do contain arguments that exceeded the limits of legal plausibility, and that predictably carried no votes on the Court. The difficulty with the *Akron* brief was not, as the *Times* suggested,¹¹² that it defended the specific abortion restrictions there at issue; three members of the Court ultimately concluded that those restrictions were consistent with *Roe v. Wade*.¹¹³ But the government's amicus brief did not advance an orthodox legal argument that *Roe* permitted imposition of the *Akron* restrictions, but instead urged the Court to hold that it was primarily for the state legislatures, not the federal judges, to interpret and apply the decision in *Roe*.¹¹⁴ That contention was neither based

109. 462 U.S. 416 (1983).

110. N.Y. Times, *supra* note 5.

111. L. CAPLAN, *supra* note 9.

112. N.Y. Times, Aug. 4, 1982, at A22, col. 1 (Mr. Lee "insists that the Court defer even to the most burdensome restrictions").

113. *Akron*, 462 U.S. at 452 (O'Connor, White, & Rehnquist, JJ., dissenting).

114. Brief for the United States as Amicus Curiae in Support of Respondents at 3, 8, City of

on nor limited to any problem peculiar to abortion cases, but was grounded on a sweeping attack on the very principle of judicial review. Where, as is commonly the case, the resolution of a constitutional claim would involve weighing two or more competing interests, the brief argued that the choices were fundamentally "policy issues" which elected legislators were better equipped to make.¹¹⁵ Judicial review in such cases, the argument continued, was not only unwise but a threat to democracy itself.¹¹⁶ At the oral argument, Justice Blackmun, noting that the brief appeared to call for the overruling of *Marbury v. Madison*,¹¹⁷ asked Lee with incredulity: "Did you write this brief personally?"¹¹⁸

Similar difficulties were to be found in the government's amicus brief in *Thornburg v. Gingles*,¹¹⁹ the first case to come before the Court regarding the 1982 amendments to the Voting Rights Act.¹²⁰ The fact that the brief disagreed with the interpretation of the law taken by civil rights groups, and with the decision of the trial court, was not per se unreasonable; the Court itself was divided about the exact meaning of the

Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) (Nos. 81-746 & 81-1623):

The Court should declare that the governing standard is whether the state regulation at issue unduly burdens the abortion decision, and that in deciding on a case to case basis whether the burden is permissible or impermissible, courts should give heavy deference to the state legislative judgment. . . . In the future the effect will be to channel further refinements of abortion law largely into the stream of state legislative authority.

Id. at 20.

115. *Id.* at 12.

116. *Id.* at 15 n.11:

[T]he exercise of [the judiciary's power of review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.

Id. (quoting J. THAYER, JOHN MARSHALL 106-07 (1901)).

117. 5 U.S. (1 Cranch) 137 (1803).

118. N.Y. Times, Dec. 1, 1982, at B4, col. 2-3:

"Are you asking that *Roe v. Wade* be overruled?", Associate Justice Harry A. Blackmun, the author of the landmark decision, asked Mr. Lee.

"No, I am not," the Government's chief Supreme Court advocate replied.

"It seems to me," Justice Blackmun said in a near whisper, "that your brief asks either that or the overruling of *Marbury v. Madison*." . . .

No, Mr. Lee replied, he was not making such a radical request, because "at the end of the day, the ultimate decision is still for the courts[.]"

Holding the Government's brief in the air Justice Blackmun glared down at the Solicitor General. "Did you write this brief personally?" he asked.

"Very substantial parts of it," Mr. Lee replied.

119. 106 S. Ct. 2752 (1986).

120. Voting Rights Act Amendments of 1982, P.L. No. 97-205, 96 Stat. 131, 134 (1982).

statute, and voted to vacate part of the order appealed from. But in defending its own view of section 2, the government argued that the reports of the Senate and House Judiciary Committees, which had written the law, were not the best guide to the intent of Congress, denigrating the Senate report in particular as the work of a mere "faction."¹²¹ This contention was based on assertions that the House bill faced defeat in the Senate because the Senate was "deadlocked," and that the Senate language was intended to alter the meaning of the House bill; both of these assertions were simply incorrect.¹²² The Solicitor General also urged the Court to defer to President Reagan's interpretation of section 2, arguing that his "support" "ensured its passage";¹²³ in fact, however, the Reagan Administration, and the President personally, actively opposed the language of section 2 until Senator Dole warned publicly that he had the

121. Brief for the United States as Amicus Curiae Supporting Appellants at 8 n.12, *Thornburg v. Gingles*, 106 S. Ct. 2752 (1986) (No. 83-1968) [hereinafter *Gingles* Brief]. The government repeatedly relied on the views of Senator Hatch, one of the few opponents of the legislation. See *id.* at 10 nn.18 & 19, 13 n.27, 17 n.39. The brief also cited other Senate opponents of the legislation, particularly Senator Grassly. *Id.* at 9-17.

122. The brief described the language of the Dole amendment, which was adopted by the Senate Committee, as having been necessary "[t]o break the deadlock." *Id.* at 12. Even before the time the amendment was offered, the original bill was already supported by 61 Senate sponsors. *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Judiciary Comm. on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112: Bills to Amend the Voting Rights Act of 1965*, 97th Cong., 2d Sess., (vol. 2-app.) at 4, 30, 157 (1983) [hereinafter *Senate Hearings*]. Senator Hatch had agreed to report the bill to the floor even if the Committee adopted the amendment to section 2 to which he objected, *Senate Hearings, supra*, at 69, saying passage of the bill had been certain "for many months."

The Solicitor General argued that "the most significant feature" of the Dole amendment was intended to "modify and expand" certain limitations written into the House bill. *Gingles* Brief, *supra* note 121, at 12. Supporters of the Senate bill insisted it was in substance the same as the House approved measure. S. REP. NO. 417, 97th Cong., 2d Sess. 27, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 179; *Senate Hearings, supra*, at 60, 61, 68; 128 CONG. REC. S6960-61 (daily ed. June 17, 1982) (statement of Sen. Dole); 128 CONG. REC. H3840 (daily ed. June 23, 1982) (statement of Rep. Edwards). Senator Hatch agreed, complaining, "The proposed compromise is not a compromise at all, in my opinion. The impact of the proposed compromise is not likely to be one wit different than the unamended House measure . . ." *Senate Hearings, supra*, at 70.

In an amicus brief in a related case, *City Council v. Ketchum*, 471 U.S. 1135 (1985), the Solicitor General asserted that Senator Hatch "supported the compromise adopted by Congress." Brief for United States as Amicus Curiae in Support of Appellants, at 16 n.15, *City Council of Chicago v. Ketchum*, 471 U.S. 1135 (1985) (No. 84-627). In fact Hatch voted against section 2 in committee, *Senate Hearings, supra*, at 85-86, and sought to have it removed on the floor, 128 CONG. REC. S6965 (daily ed. June 17, 1982).

The Supreme Court rejected the Solicitor General's suggestion that it give little weight to the Senate Committee report. *Thornburg v. Gingles*, 106 S. Ct. at 2762 n.7.

123. *Gingles* Brief, *supra* note 121, at 12 (Dole offered amendment "with the backing of the President"). In an earlier amicus brief, urging the Court to note probable jurisdiction, the Solicitor General asserted Mr. Reagan's "support for the compromise ensured its passage." *Gingles* Brief, *supra* note 121, at 8 n.6.

votes necessary to override a veto.¹²⁴ It might be understandable if a draft with arguments of this sort had been written by Assistant Attorney General Reynolds, since he had led the administration's opposition to section 2, and might well have wanted to reverse in the Supreme Court the defeat he had suffered in the halls of Congress. But it was the Solicitor General's responsibility to excise from the brief overreaching arguments that could not fairly be squared with the legislative history of the statute, and that clearly did not occur.

Problems of this sort may have stemmed in part from the desire of administration conservatives to have a Solicitor General who was in enthusiastic agreement with their legal and social views. Solicitor General Fried, responding to assertions that he had taken particular positions at the direction of the Attorney General or others, insisted that such orders had not been given and would have served no purpose, since he was even more conservative than his supervisors and colleagues at the Justice Department.¹²⁵ One would expect any Solicitor General to be comfortable with the policies of the administration in which he or she serves, but undue enthusiasm for those programs can interfere with the Solicitor General's responsibility to ensure that policy-related briefs do not, out of excessive zeal, transgress the limits of plausible argument. The 1977 OLC Memorandum argued that the Attorney General and President ought not personally frame the government's position in Supreme Court cases because "extensive involvement in policy matters . . . might, on occasion, cloud a clear vision of what the law requires."¹²⁶ The vision of a Solicitor General can become clouded in the same way.

While Solicitor General Lee's brief in *Akron* provoked some harsh words from the *New York Times* and at oral argument, a minor firestorm of controversy was triggered by a brief filed three years later by Solicitor General Fried in *Thornburgh v. American College of Obstetricians*,¹²⁷ in which Fried argued, inter alia, that *Roe v. Wade* should be overruled. Justice Blackmun characterized the *Thornburgh* brief as "very amazing,"¹²⁸ a phrase evidently not intended as a term of approbation. Pro-

124. *Senate Hearings*, *supra* note 122, at 763 (Reagan opposed to section 2); *Voting Rights Act: Hearings Before the Subcomm. of the Comm. on the Judiciary on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112: Bills to Amend the Voting Rights Act of 1965*, 97th Cong., 2d Sess. 70-97 (vol. 1) (1983). (Justice Department opposed to section 2); *L.A. Times*, May 4, 1982, at A1, col. 3 (Dole warning of sufficient votes to override veto); *Wall St. J.*, May 4, 1982, at 8, col. 2 (same); *N.Y. Times*, Dec. 18, 1981, at B7, col. 4 (Reagan opposed to section 2).

125. L. CAPLAN, *supra* note 9, at 150.

126. 1977 Memorandum, *supra* note 10, at 232.

127. 476 U.S. 747 (1986).

128. L. CAPLAN, *supra* note 9, at 143 (citing Rex Lee, draft of History of the Office of the Solicitor General, at 32-34).

fessor Tribe denounced Fried's brief as "unprincipled . . . divisive, and . . . dangerous."¹²⁹ Eighty-one members of Congress joined in a brief deploring Fried's action as "extraordinary and unprecedented."¹³⁰ Caplan devotes a full chapter of *The Tenth Justice* to the brief.¹³¹

The *Thornburgh* controversy is particularly important because it served to highlight two basic disputes between Solicitor General Lee and his conservative critics. The most detailed conservative criticism of Lee, printed in a 1984 issue of *Benchmark*, denounced the Solicitor General precisely because he had failed to urge the Supreme Court to overturn any of the numerous decisions to which the right wing, and to some degree the President, objected:

The fourth year of the Reagan Presidency is almost history.

....

. . . But during the past four years, the Supreme Court has not overruled a single Warren Court decision

....

. . . [One reason is that] Solicitor General Rex Lee has not urged the Supreme Court to overrule a single prior decision, including *Roe v. Wade*, the New York Prayer case, and *Mapp v. Ohio*.¹³²

....

. . . Lee has won most of his cases since he took office [T]hese personal triumphs for Rex Lee . . . are, in large measure, defeats for President Reagan; for these decisions being delivered by the Burger Court, *not one of which overturns a prior ruling*, have the effect of preserving intact existing case law and the underlying doctrinal assumptions that brought us the constitutional revolution begun under Franklin Roosevelt.¹³³

The article argued that Lee's brief in *Akron*, precisely because it had failed to repudiate the Court's prior abortion decisions, was a "qualified endorsement of the *Roe* rationale" ¹³⁴ The Solicitor General, it

129. *Id.* (citing Planned Parenthood Conference 3, 17 (Sept. 3, 1985)).

130. Brief of Amicus Curiae of Senator Bob Packwood at 3, *Thornburgh v. American College of Obstetricians*, 476 U.S. 747 (1986) (Nos. 84-495 & 84-1379) [hereinafter Packwood Brief]. "For the first time in the history of the Solicitor General's office, in a case in which the United States is not even a party, and a case in which the issue was not presented by the parties, the Department of Justice has urged the repudiation of a liberty long since declared fundamental by this Court." *Id.*

131. L. CAPLAN, *supra* note 9, at 135-54.

132. McClellan, *supra* note 21, at 1-2.

133. *Id.* at 14.

134. *Id.* at 4.

urged, ought to adopt a strategy of "confronting the Justices with principled arguments, challenging them to defend the rationale of their opinions, and demanding reversal of liberal precedents . . ." ¹³⁵

Solicitor General Lee, on the other hand, regarded even the indirect questioning of *Roe* in his *Akron* brief as having been a tactical error. ¹³⁶ In a subsequent letter Lee argued:

I do not believe that the Court should never be urged to reverse past precedent. Indeed, it is all right to urge that cases be overruled, but there is a large cost in doing so, particularly if you know—and the Court knows that you know—that there is no chance for overruling in that particular case. ¹³⁷

Caplan attributes to Lee a considerably more restricted view of the role of the Solicitor General, quoting from the draft of a speech prepared by Lee prior to the *Thornburgh* brief.

"Let me give you the practical reasons why I don't think the Solicitor General can or should take it upon himself to tell the Supreme Court what he may very well believe are its errors of constitutional doctrine.

. . . .

. . . No lawyer worth his salt would think of going before the Supreme Court . . . and telling its members point blank that they were wrong on some case they decided just several years before, even if the lawyer strongly believes they were. That approach would simply not be in his client's best interest, and the reason is obvious: the Court as an institution would find it offensive. In a close case—as so many of the cases are in the Supreme Court—the lawyer's impertinence might well cost the client the one or two votes needed to win. It would therefore be both a tactical mistake and a professional violation of the lawyer's ethical duty to advance his client's cause. But more than that, it would deeply injure the Solicitor General's personal credibility with the Court

And so my practical argument against those who would have the Solicitor General rail against the perceived excesses and errors of the Supreme Court is simply that it would be bad lawyering, period. . . . In his speeches, in his writings, or, in later life, in the classroom . . . the Solicitor General has the

135. *Id.* at 14.

136. Wash. Post, July 7, 1986, at A7, col. 1.

137. Letter from Rex E. Lee to Julius L. Chambers (Mar. 23, 1988) (on file at Loyola of Los Angeles Law Review Office).

right . . . to speak his mind on the issues, and to say where he thinks the law . . . should be going. He has no business doing so as an advocate, however"¹³⁸

Lee chose, however, not to deliver the speech at issue in this form, and the passage quoted by Caplan does not appear to reflect Lee's final view of this matter. Professor Meador opposes frontal attacks on existing decisions, arguing that "[p]recedents are chipped away, not just tumbled."¹³⁹

The overruling of a reigning precedent is not an act so obnoxious to the Court that no sensible lawyer would dare speak its name, or seek to achieve it save by a coy process of indirect intellectual seduction. The Supreme Court regularly overturns its prior decisions, sometimes granting certiorari to consider that very action, sometimes asking the parties on its own initiative to discuss that possibility, sometimes acting *sua sponte*. No member of the Court who had written opinions overruling prior decisions, or who had seen his or her own handiwork overturned, could fairly take offense merely because an attorney suggested that a past opinion was incorrect. Since members of the Court frequently urge that previous decisions be overruled, it is hard to see why they would object if a lawyer advanced a similar contention. The Court could not adequately evaluate the advisability of overruling a precedent if counsel were inhibited from discussing the wisdom of doing so, and there seems no reason to forbid the Solicitor General to sit out the debate on a controversial precedent until the outcome of that controversy is a foregone conclusion. Nor is it the case, as Meador suggests, that precedents are undone only by a process of erosion; some are altered by avulsion when an argument demonstrates persuasively that an earlier case was based on inadequate research, or had proved unworkable. Where the Solicitor General, or the Administration in which he serves, disagrees with a particular precedent, both the Court and the Solicitor General's credibility would certainly be better served by a candid acknowledgement of that disagreement than by an attempt to misrepresent the holding or implications of the disputed decision. It is not unheard of, although admittedly uncommon, for an amicus to urge the Court to overrule a decision which none of the parties had attacked; an amicus brief in *Welch v. State Department of Highways and Public Transportation*¹⁴⁰ took precisely that approach, arguing that the Court should overrule *Hans v. Louisiana*,¹⁴¹ without visibly offending

138. L. CAPLAN, *supra* note 9, at 144-45 (quoting draft speech of Rex Lee).

139. Wash. Post, Jan. 7, 1986, at A8, col. 1.

140. 107 S. Ct. 2941, 2957-58 (1987) (Scalia, J., concurring).

141. 134 U.S. 1 (1890).

any member of the Court.

Solicitor General Lee also disagrees with his critics, and perhaps with his successor, regarding the propriety of advancing in the Supreme Court an argument which is unlikely in the short term to command the support of five justices. *Benchmark* asserted that it would be wrong for a Solicitor General to deliberately avoid arguing for an important legal principle merely because he believed the Court would rule against him:

By seeking short-term litigation gains, we thus sacrifice enduring truths This is a struggle for men's minds, a war of ideas and jurisprudential values, that can never come to pass unless these ideas are publicly articulated, debated, and discussed at the highest levels of state. There must be frequent recourse to sound political and legal principles, if they are to prevail in the Courts¹⁴²

Solicitor General Lee, however, has insisted that the government should be exceedingly reluctant to advance arguments unlikely to be "accepted by a majority of the Court."

This is not to say that it is never advisable for a Solicitor General to take a position that he knows the Court will reject. There could be long-term objectives to be served by such a filing. All I am saying is that there are large costs, and it is rarely advisable. In my four years I never did it¹⁴³

Lee believed that his tentative foray in the *Akron* brief had proved counterproductive because it had led to a reaffirmation of *Roe*. "A major factor to be taken into account is whether you can win. There are major costs to a loss in the Supreme Court, and the principal one is you may strengthen the precedent against you. We paid a price."¹⁴⁴ Solicitor General Fried, on the other hand, has defended his more aggressive record by explaining that his aim was not solely to win cases in the short term, but also to influence the Court's long term direction.¹⁴⁵

The correct approach probably lies somewhere in between. The Supreme Court would be unlikely to take offense if the Solicitor General, in a straightforward and judicious manner, submitted a brief staking out a position which both the Solicitor General and the Court knew would

142. McClellan, *supra* note 21, at 14.

143. L. CAPLAN, *supra* note 9, at 146.

144. Wash. Post, Jan. 7, 1986, at A8, col. 1. See also Wash. Post, July 7, 1986, at A7, col. 1; *Office Politicized*, *supra* note 10.

145. Wash. Post, July 7, 1986, at A7, col. 1 (Fried's aim "is not solely to win cases in the short run but rather to exert a long-term influence on the court's direction in a broad range of areas").

not for the time being command five votes. The Justices themselves do precisely that scores of times each year; the very purpose of a dissent is to articulate a minority view in the hope that it will eventually prevail. It might seem a bit presumptuous for an ordinary lawyer to take such a long term perspective, in part because neither ordinary lawyers nor ordinary clients are likely to return to the Court to pursue an issue further, but the Solicitor General and his client have the sort of ongoing relationship with the Court and the development of the law that make such a perspective entirely appropriate. A brief which questions reigning precedent may not be helpful to the majority which accepts that precedent in resolving the case immediately at hand, but might nonetheless contribute to a larger debate which took place over the course of several years and a number of decisions. An unsuccessful assault on an existing precedent will not necessarily add to the strength of the precedent. The decision in *Akron* would undoubtedly have involved a reapplication, and at least an implicit reaffirmation of *Roe v. Wade*, regardless of what position Lee had taken in that case.

It would be unfortunate indeed if liberals unhappy with briefs filed by Lee or Fried, or concerned about how the Solicitor General might act under future Republican administrations, were now to espouse the view that the government should never criticize an existing precedent or advance an argument that could only prevail in the long term. Such an approach would have been utterly disastrous during the administration of Franklin Roosevelt. Today there are reigning Supreme Court precedents which liberals might want to overrule as much as conservatives would like to overturn *Roe v. Wade*. The decision in *Maher v. Roe*,¹⁴⁶ for example, upholding the denial of Medicare funds for abortions, poses a major problem for women in many states, and *McClesky v. Kemp*¹⁴⁷ has sanctioned a degree of racial discrimination in the administration of the death penalty. No one can foresee whether future Solicitors General will be liberal or conservative, but stifling the voice of the Solicitor General is surely not an appropriate method for influencing the development of the law.

That is not to say that the *Thornburgh* brief was a masterpiece of appellate advocacy. But surely Justice Blackmun did not characterize the brief as "amazing" merely because it disagreed with *Roe*; most of the adult population in the United States knew that the Reagan administration disagreed with *Roe*, and it could hardly have come as a surprise to the Court when the administration said so in a brief. But having under-

146. 432 U.S. 464 (1977).

147. 107 S. Ct. 1756 (1987).

taken the delicate task of criticizing a line of decisions which the government surely knew a majority of the Court supported, the brief proceeded in a notably injudicious manner. The brief attacked the decisions of the lower courts in harsh language which, while probably inappropriate in any government brief, was particularly provocative because it smacked of the strident rhetoric of the anti-abortion movement.¹⁴⁸ The brief also contained a section which argued that, even if *Roe* was correct, *Akron* had been wrongly decided.¹⁴⁹ At the time the *Thornburgh* brief was filed, the *Akron* decision was only twenty-five months old. It is easy to understand that the Court might have been provoked by a request that it overrule a decision which the government had lost barely two years before; that proposal was less a principled stand on a matter of ongoing importance than a disgruntled and out-of-time petition for rehearing. Some parts of the criticism of *Roe* itself were traditional and lawyerly.¹⁵⁰ The argument avoided the particularly rigid concept of original intent then popular in some administration circles, and expressly distinguished *Roe v. Wade* from other earlier privacy cases, which it did not challenge.¹⁵¹ But the brief did not stop at arguing that *Roe* had been incorrectly decided; it went on to describe the reasoning of that decision as "disturbing," "difficult to grasp" and "particularly ill-founded,"¹⁵² and in five different passages characterized the holding of *Roe* as "arbitrary."¹⁵³ The majority opinion in *Roe* was said to "leap to its conclusion,"¹⁵⁴ and to exemplify an approach which rendered "constitutional adjudication . . . a picnic to which the framers bring the words and the judges the

148. Brief for the United States as Amicus Curiae in Support of Appellants at 2, *Thornburgh v. American College of Obstetricians*, 476 U.S. 747 (1986) (Nos. 84-495 & 84-1379); *id.* at 2 (lower courts' "manifest eagerness to strike down the state statutes in question . . . ;" decisions "harsh and one-sided"); *id.* at 3 (lower court opinions "betrayed unabashed hostility to state regulation of abortion and ill-disguised suspicion of state legislators' motives"); *id.* at 4 (Third Circuit "antipathy" to state regulation of abortion; demonstrated "zeal to place the worst possible construction upon the . . . statute . . ."); *id.* at 5 (Third Circuit decision "unprecedented and remarkable"); *id.* at 7 ("[t]he courts' approach is unjustifiable and can only be explained as an attempt to censor printed matter the majority did not like"); *id.* at 10 (Third Circuit opinion "far-fetched;" Seventh Circuit decision "ignores elementary principles of jurisdiction, comity and federalism in its relentless determination to invalidate the challenged provisions at all costs"); *id.* at 11 ("court's reasoning . . . remarkable"); *id.* at 12 (decision "had absolutely no basis"); *id.* at 15 (reasoning "strained"); *id.* at 16 ("[t]he approach of the courts below betrays in our view an extreme and unseemly hostility to legitimate state regulation of abortion").

149. *Id.* at 16-20.

150. *Id.* at 25-27.

151. *Id.* at 28-29 and nn.7 & 8.

152. *Id.* at 22, 23, 25.

153. *Id.* at 21-23.

154. *Id.* at 27.

meaning.”¹⁵⁵ This simply is not the sort of language that a sensible lawyer would use in a brief intended for the eyes of six justices who had either signed or subscribed to the decision under attack.

It is also important to bear in mind the enormous difference between an isolated, considered decision to disagree, in the hope of long term change, with a specific reigning precedent, and a practice of simply taking whatever position the Solicitor General thinks would be wise or sensible regardless of whether it can be squared with the relevant precedent. Solicitor General Fried asserted in 1986:

I think there's something condescending about only saying things which, on some kind of nose-counting prognostication, the court is going to adopt . . . I think it is *less* political, not more political, it is *more* scholarly, not less scholarly, it is *less* manipulative, not more manipulative, to speak to the logic of the case as we see it.¹⁵⁶

One would expect a nonpolitical, nonmanipulative academic to speak to the logic of each issue as he or she saw it, but the Solicitor General's job is to practice law—albeit at times with a long term perspective—not to make candid intellectual pronouncements. Save in exceptional circumstances, the Solicitor General, like any litigator, has to operate within the confines of the legal principles accepted by the Court in which he practices, not because to do so is more or less political, manipulative or scholarly, but because his job is to “conduct and argue suits and appeals in the Supreme Court,”¹⁵⁷ to speak, not to the White House, to the academic community, or to some interest group, but to the Court. The six and one-eighth by nine and one-fourth inch sand gray booklets printed for the Solicitor General by the Government Printing Office are not intended as a private law review of unusually limited albeit prestigious circulation. If the Solicitor General lacks the ability to distinguish between what the Supreme Court will regard as arguable and implausible, or the Solicitor General lacks the inclination or will to heed those distinctions, the documents that result may be clever, well written, and witty, but they will not be briefs.

Perhaps because many of the more controversial positions taken by Solicitors General Lee and Fried were in amicus briefs, rather than in cases in which the government was a party, a number of critics have suggested that the Solicitor General ought only to file amicus briefs when the United States might in some way be materially affected by the out-

155. *Id.* at 24.

156. Wash. Post, Jan. 7, 1986, at A8, col. 1 (emphasis in original).

157. 28 U.S.C. § 518(a) (1982).

come of a case. Commenting on the *Akron* brief, the *New York Times* objected that “[i]n this case, where there is no Federal interest, the Justice Department rushes in to assert one.”¹⁵⁸ One unnamed former member of the Solicitor General’s office, deploring a brief filed by Fried regarding the right of a school board to suspend a student for giving an “indecent” speech, objected, “I don’t see the running of schools as the business of the federal government.”¹⁵⁹ Another member of the office accused Fried of a willingness to file an amicus brief on the thinnest, “‘threadbare,’” claim of federal interest.¹⁶⁰ Caplan suggests that in the past amicus briefs had only been submitted if a case had an impact on the government’s “‘more direct interests.’”¹⁶¹ *Congressional Quarterly* characterized the Reagan Administration as “bombarding the court with . . . briefs . . . in cases that do not directly involve the federal government.”¹⁶²

Both Lee and Fried took issue with the suggestion that amicus briefs should be limited to cases that might, at least conceivably, affect the federal government itself. Lee argued that, in addition to such cases, amicus briefs were also appropriate when the questions before the Court “do not involve any direct responsibility of the United States to enforce the law but concern some issue that is part of the president’s program.”¹⁶³ Fried insisted,

There are cases where what is at stake is not some particular government program but an important and pervasive view of the law or the Constitution. Here we must be particularly infrequent and rare in making a contribution, but historically this office has always spoken on such matters. We have never confined ourselves to filing only in cases where some distinct government program was affected.¹⁶⁴

Historical practice squarely supports the position taken by Lee and Fried. When the Solicitor General filed a brief in *Shelley v. Kraemer*,¹⁶⁵

158. N.Y. Times, Aug. 4, 1982, at A22, col. 1; see also *id.* at cols. 1-2 (“[r]arely has a Solicitor General intervened in a Supreme Court case without clearly identifying a strong Federal interest. But Mr. Lee concedes that Federal law is not implicated in the local abortion rules in the pending cases. The Government’s concern, he says, is ‘in preserving the proper sphere of legislative action.’ That’s just another way of saying to the Court: get out.”).

159. *Office Politicized*, *supra* note 10.

160. L. CAPLAN, *supra* note 9, at 199.

161. *Id.* at 197.

162. Witt, *Reagan Crusade Before Court Unprecedented in Intensity*, 44 CONG. Q. 616 (1986).

163. *Id.*

164. *Id.* at 616; see also L. CAPLAN, *supra* note 9, at 196.

165. 334 U.S. 1 (1948).

he explained that he had chosen to do so simply because “ [t]he Federal Government has a special responsibility for the protection of the fundamental civil rights guaranteed to the people by the Constitution and laws of the United States.”¹⁶⁶ Solicitor General Perlman commented that the government filed an amicus brief in a subsequent case

[a]lthough the Government had no direct interest in the particular litigation [because] we were interested in sustaining what we deemed to be a salutary removal of an unfair discrimination against the citizens of the District of Columbia who had theretofore been denied the same access to the impartial federal judiciary as was available to citizens of the states proper.¹⁶⁷

Between 1950 and 1970 the Solicitor General filed a large number of amicus briefs in cases involving the one-person one-vote requirement,¹⁶⁸ sit-in demonstrations¹⁶⁹ and racial discrimination,¹⁷⁰ and in a series of school integration cases both before and after *Brown v. Board of Education*.¹⁷¹ Solicitors General under both Democratic and Republican presidents have maintained that the manner in which state and local schools

166. Quoted in Perlman, *supra* note 10, at 284. The text of the amicus brief was reprinted by Public Affairs Press, as a book, albeit a book without any notice or claim of copyright. PREJUDICE AND PROPERTY: AN HISTORIC BRIEF AGAINST RACIAL COVENANTS (1948). An introduction to the book, written by Wesley McCune, observed:

It is difficult to exaggerate the importance of the legal cases which moved the Justice Department to prepare this brief. . . . The mere fact that the Justice Department filed this brief with the Supreme Court, even though the federal government is not a party to the covenant cases submitted to that tribunal, illustrates that some progress is being made toward letting the people in on the law

Something must be done to make legal documents more easily available. As things now stand, such documents are beyond the reach of the average library, let alone the average person. Were it not for the public service of the publisher of “Prejudice and Property,” this brief, for example, would probably be gathering dust in the files of a dozen lawyers and judges.

The situation is particularly serious in connection with those cases in which the Justice Department submits a brief *amicus curiae*, as ‘friend of the court,’ which it is doing more frequently. Filings of such a brief recognizes the public interest in the case, yet the public doesn’t really get in on it.

Id. at 6-7. By a happy coincidence, the publisher referred to in this passage is the father of the author of this Article.

167. *Id.* at 281.

168. *Avery v. Midland County*, 390 U.S. 474 (1968); *Dusch v. Davis*, 387 U.S. 112 (1967); *Sailors v. Board of Educ.*, 387 U.S. 105 (1967); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

169. *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Robinson v. Florida*, 378 U.S. 153 (1964); *Barr v. City of Columbia*, 378 U.S. 146 (1964); *Griffin v. Maryland*, 378 U.S. 130 (1964). See also *Walker v. Birmingham*, 388 U.S. 307 (1967) (free speech).

170. *Reitmen v. Mulkey*, 387 U.S. 454 (1967); *Watson v. Memphis*, 373 U.S. 526 (1963) (parks); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (restaurants in publicly owned building); *Boynton v. Virginia*, 364 U.S. 454 (1960) (bus terminal).

171. 347 U.S. 483 (1954).

were run was very much a legitimate concern of the federal government, at least to the extent that those schools were being run on a racially segregated basis.¹⁷²

Caplan suggests that under the standards articulated by Solicitor General Cox, amicus briefs would be limited to cases somehow directly affecting federal activities.¹⁷³ On a closer reading, however, the Cox speech to which Caplan refers describes the existence of such an interest as tending to support the filing of a brief, but not as a necessity:

It is difficult, perhaps it is impossible, to work out any very clear standards for determining when the government should participate *amicus curiae*. One consideration is importance of the question in the development of the law: Is it a basic constitutional question or just an ordinary question of law with no widespread significance. Is a large number of people affected?

. . .

Whether the case will have any impact on the government's more direct interests is certainly an important test. . . .

The fourth standard . . . is . . . "Can we help the Court by taking part?" Frequently the private parties take rather extreme positions; this is true of the sit-in cases. And with someone in there, briefing and arguing an intermediate view, a view which perhaps would lead to some cases going one-way and some another, the Court may achieve a sounder result than if only the parties were present.¹⁷⁴

These various factors are, in Cox's terms, distinct "considerations" which would bear on a decision, not, as Caplan seems to suggest, "requirements." Caplan argues that in *Baker v. Carr*¹⁷⁵ and *Reynolds v. Sims*,¹⁷⁶ in which Cox filed amicus briefs, "the federal government would be directly affected by the outcome of the cases" because "[w]hat the Supreme Court decided about the apportionment of state legislatures would apply to Congress as well. . . ."¹⁷⁷ But following *Baker* and *Reynolds* the Solicitor General's office filed briefs regarding whether the principle of one-person one-vote should be extended to the election of school

172. *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950). Briefs filed in school cases after *Brown*, but prior to the adoption of the 1964 Civil Rights Act, included *Cooper v. Aaron*, 358 U.S. 1 (1958) and *Goss v. Board of Educ.*, 373 U.S. 683 (1963).

173. L. CAPLAN, *supra* note 9, at 197.

174. Cox, *supra* note 10, at 226-27.

175. 369 U.S. 186 (1962).

176. 379 U.S. 870 (1963).

177. L. CAPLAN, *supra* note 9, at 197.

boards, to local political subdivisions, or to residency districts used in at-large elections, issues of no relevance to congressional districting.¹⁷⁸

The Solicitor General's suggestion in *Shelley* that the United States had an interest simply in the vindication of fundamental legal and constitutional¹⁷⁹ rights is more consistent with the traditional role of the Solicitor General's office than the more crabbed and cabined standard recently suggested. When the government does file a brief in the Supreme Court, it has generally been regarded both by the Solicitor General's staff and by the Court itself as obligated to look beyond the narrow and direct interests of the executive branch and to consider what result will further the public welfare and promote the orderly development of the law. It would be incongruous if the Solicitor General were to deliberately ignore those broader considerations in deciding when to file amicus briefs. There may in a very technical sense have been a theoretical federal government interest in cases like *Brown*, *Reynolds*, and *Shelley*, since the Attorney General has broad statutory authority to enforce criminal prohibitions against deliberate deprivations of constitutional rights.¹⁸⁰ But the Solicitor General did not file briefs in these cases because the Justice Department had any interest in or intention of prosecuting the Topeka Board of Education, the Alabama Secretary of State, or the members of the Missouri Supreme Court who issued the injunction forbidding the Shelleys from moving into the house they had bought in St. Louis. The government was not seeking to lay the legal foundation for some new wave of criminal indictments, but to establish what the Truman, Eisenhower and Kennedy administrations thought were fundamental constitutional rights.

The absence of certain types of federal interests may well militate against the filing of an amicus brief, but it is important to understand when and why. The existence of a purely theoretical interest—the possibility, for example, that segregationist school officials might be subject to federal prosecution—is of little or no importance. But it does matter if

178. See cases cited in *supra* note 168.

179. There was no noticeable objection when members of Congress filed an amicus brief in *Thornburgh v. American College of Obstetricians*, despite the absence of any direct federal, or congressional, interest. The brief explained, under the heading "Interest of Amici":

As members of a co-ordinate branch of government, sworn to uphold the Constitution in the face of the most intense political controversy, *Amici* submit this brief in the conviction that the vision of the judicial function and of individual liberty espoused by the Government in these cases is radically at odds with the written Constitution, with the position urged heretofore by the United States in this Court, and with the judiciary's traditional role as a principled and independent guardian of constitutional liberties.

Packwood Brief, *supra* note 130, at 3 (footnote omitted).

180. 18 U.S.C. §§ 241-246 (1982).

the disposition of a given case would in fact further, or obstruct, an actual ongoing federal program or activity which the Solicitor General seeks to protect. In that situation the program or activity helps to shape the position which the Solicitor General will take, and may well provide the government with a special perspective or degree of understanding that would be of assistance to the Court. The existence of such a direct federal stake in the outcome of the litigation would ordinarily alleviate any concerns the Court might have that the administration was filing a brief merely to make a political point or to curry favor with some constituent group.

When a case does not have this sort of direct impact on federal activities, the submission of an amicus brief may be fraught with one or more of several types of problems. First, the weight accorded by the Court to amicus briefs filed by the government in these cases is likely to be significantly lowered if such filings are a common occurrence. Where no direct federal interest is at stake, the Court may wonder why the Solicitor General is filing a brief at all. If such submissions are infrequent, and carefully selected, they may signal that the United States attaches particular importance to the issues in question, and provide a degree of political support, in the broadest sense, for the result urged by the Solicitor General; if the submissions are frequent, or the issues seem minor, the Court may suspect the Solicitor General of officious intermeddling or worse. Second, if the Solicitor General's positions are not rooted in the advancement or protection of some federal activity, then it would be entirely possible for a subsequent Solicitor General to file a brief taking a completely inconsistent position for no reason other than a change in personnel in the Solicitor General's office or the White House. The Court would not ordinarily fault the Solicitor General for taking a different position because the programs he or she was responsible for defending had changed, but the credibility of legal arguments advanced by the Solicitor General's office would be impaired if the office's analysis of relevant legal principles somehow followed the election results. Third, when an ongoing federal program serves to shape the Solicitor General's position, it will ordinarily be a program that has the concurrent support of both the Congress and the executive branch. Absent such a program, amicus briefs could at times become a vehicle by which the administration sought to resolve in the courts its policy disputes with the Congress. Finally, the absence of such related federal programs may diminish the likelihood that the Solicitor General will have something useful to say to the Court. Such potential difficulties are not present in every case, and they may be of different significance depending on whether the contem-

plated brief would deal with the merits of a case, or with whether a grant of certiorari was warranted, but they counsel considerable caution in framing and filing an amicus brief not closely related to some ongoing federal activity, and substantial care in selecting the small number of cases in which the Solicitor General might express a view about a matter with no operational impact on the United States government.¹⁸¹

If there is an argument to be made against the use of amicus briefs by the Reagan administration, it will have to be based on a more detailed analysis than has been offered so far. The mere fact that some of those briefs did not involve a direct federal interest is not by itself a basis for serious criticism. The most celebrated and controversial amicus briefs, those concerning abortion and affirmative action, did indeed reflect the highest domestic priorities of the White House. One may well deplore the values of an administration which was so much more concerned about eradicating abortion and affirmative action than it was about reducing teenage pregnancies or ending racial discrimination, but it seems unreasonable to fault Lee or Fried for not trying to base their decisions on the very different priorities of earlier administrations.

Underlying the Solicitor General's ability to ensure that Supreme Court cases are handled in a sound, lawyerly manner, particularly his or her ability to prevent the filing of a brief advancing an indefensible position or argument, is the prerogative of the Solicitor General to refuse to sign a brief with which he or she is in serious disagreement.¹⁸² Because the craft of a lawyer, like that of a scientist, involves in principle a substantial degree of professional judgment and candor, a directive that a Solicitor General sign a legal document with which he or she disagreed—like a directive to the Surgeon General to sign a scientific analysis which he or she thought inaccurate—would call into question the intellectual honesty, and soundness, of the document at issue and of the office itself. The credibility of the Solicitor General with the Supreme Court rests in part on the assumption, generally well founded, that the Solicitor General would indeed withhold his or her signature from a brief which he or she believed was clearly incorrect. In theory the Attorney General or President could routinely determine the content of briefs, and fire any Solicitor General who withheld his or her signature, but no lawyer worth

181. Solicitor General Griswold commented while in office: "I have been trying very hard, but without too great success, to hold down the number of briefs amicus curiae we file, under the theory that the more you file the less effective they are." *1973 House Hearings, supra* note 74, at 275-76.

182. *See* L. CAPLAN, *supra* note 9, at 8-12; *Bork Hearings, supra* note 30, at 21 ("when I thought the law was wrong but it was the law I would sign the brief. If I think it is not the law, I certainly won't sign the brief.").

having would agree to serve as Solicitor General under such circumstances, and no Solicitor General who did so could be very effective. Precisely because it is a relatively rare occurrence for the Solicitor General to decline to sign a brief, such a refusal, when noted by the Court, calls into serious question both the substance of the government brief and the way it was prepared. The Solicitor General's inherent power to withhold his or her signature constitutes a powerful and ever present deterrent to efforts to override his or her decisions, for a decision by the Attorney General or the White House to do so would almost certainly prove a Pyrrhic victory, as it did in the *Bob Jones* case.

In theory a President or Attorney General might use a threat of dismissal to try to force a Solicitor General to sign a disputed brief, but neither appears ever to have done so,¹⁸³ and with good reason. The dismissal of a Solicitor General under such circumstances would have, at least within the legal community, an impact comparable to the infamous Saturday Night Massacre—crippling the credibility of the brief the dismissed Solicitor General had refused to sign, and generating both enormous support for the Solicitor General and stern disapproval of those who had removed him. It is difficult to imagine a more certain manner in which an administration could lose a case than by dismissing the Solicitor General for refusing to sign its brief; the Supreme Court would almost have to rule against the government in order to protect the competence and candor of future Solicitors General. Since the Solicitor General earns in that position far less than he or she could in private practice, the possibility of dismissal would not be viewed by anyone in that office as a financial threat. Conversely, a Solicitor General who abandoned his or her opposition to a brief in response to such a threat, like a miscreant who agreed to make a blackmail payment, would by doing so induce similar threats or hints of threats in the future.

The most celebrated instance in which a Solicitor General declined to sign a brief occurred in 1955, when Solicitor General Sobeloff withheld his signature from the government's brief in *Peters v. Hobby*.¹⁸⁴ Sobeloff refused to defend the practice of the federal Loyalty Review Board of branding individuals as disloyal, and barring them from federal employment, based on information from sources whose identities were neither disclosed to the accused individuals nor known to the Board itself.¹⁸⁵

183. Acting Solicitor General Lawrence Wallace was reportedly threatened with dismissal for refusing to support the administration's position in *Bob Jones v. United States*, 461 U.S. 571 (1983). Wall St. J., Sept. 6, 1984, § 1 at 1, col. 1.

184. 349 U.S. 331 (1955).

185. See L. CAPLAN, *supra* note 9, at 10-12.

When Sobeloff was subsequently nominated by the Eisenhower Administration for a vacancy on the Fourth Circuit, the nomination was opposed by several witnesses because of his refusal to sign the *Peters* brief. The president of the Virginia League objected:

Solicitor General Sobeloff refused to sign this brief of the Department of Justice and would not appear for the Government before the Supreme Court as the chief law officer of the United States. . . .

. . . .

We will never willingly accept as a public servant a man who so obviously persists in his rebelliousness.¹⁸⁶

The attorney for the Fairfax Citizens Council argued:

My clients feel that he did not do his duty as Solicitor General [T]hey feel that in the *Peters* case he should have gone along with the Government's position or resigned. They do not disagree with his right to assert his own convictions, but feel that he should have either played ball as a member of the team or gotten off the team.¹⁸⁷

Attorney General Brownell responded to this opposition by dispatching his executive assistant to assure the Senate Judiciary Committee that Brownell regarded Sobeloff's conduct as "in the best traditions of the law, and at all times lawyerlike in the highest standards of the profession," and that Sobeloff's action in declining to sign the *Peters* brief "was with the knowledge and consent of the Attorney General."¹⁸⁸

A more recent but potentially serious threat to the independence and integrity of the Solicitor General's office arose in the spring of 1985, following the resignation of Solicitor General Lee. Rather than nominate a new Solicitor General, the Reagan Administration chose instead to leave Charles Fried for several months as "Acting" Solicitor General. This was not a temporary measure taken while the White House or Attorney General were waiting for the FBI to complete a background investigation of Fried, or were considering other possible selections. Rather, Fried was placed on an essentially probationary status from May, 1985, when Lee announced his resignation, until October, 1985, when Fried was finally nominated to serve as Solicitor General, the apparent purpose of this probation being to ascertain whether Fried would insist, as had Lee, on subordinating ideological crusades to the con-

186. *Nomination of Simon E. Sobeloff: Hearings Before the Senate Comm. on the Judiciary*, 84th Cong., 2d Sess. 54-55 (1956).

187. *Id.* at 62.

188. *Id.* at 74 (statement of John V. Lindsay).

straints of lawyerliness.¹⁸⁹ The difference between serving as a Solicitor General subject to dismissal, and as an Acting Solicitor General in hope of permanent appointment, is of enormous importance, for while political realities make it extraordinarily difficult to fire a Solicitor General, the President and Attorney General are accorded essentially absolute discretion not to nominate a possible appointee. The lower level officials and outside groups which a Solicitor General must at times anger if he is to do his job properly, and which could not conceivably bring about the Solicitor General's removal, might well have a decisive influence over whether the Attorney General would select an Acting Solicitor General for permanent appointment. One need not criticize Fried's actions during this probationary period to recognize that the practice of appointing an Acting Solicitor General for any extended period of time is fraught with the same dangers as the probationary appointment of an Acting Supreme Court Justice would be. Such an arrangement may be considerably more serious than a direct effort to override a Solicitor General's decision in a particular case, because the pressures generated operate within the Solicitor General's office, rather than in an overt inter-office dispute. In the future, the Senate would be well advised to intervene promptly if any subsequent attempt is made to force an attorney to serve a probationary period as acting Solicitor General.

V. BALANCING JUSTICE AND ADVOCACY

On the friezes and interiors of federal offices throughout the nation's capital are carved a wide array of bromides about government service, most of which often have little relationship to, or impact on, the activities that take place in those buildings. Among these is an inscription on the rotunda outside the office of the Attorney General, on the fifth floor of the Department of Justice, which reads "The United States wins its point whenever Justice is done its citizens in the courts."¹⁹⁰ These words may have limited relevance to the primarily administrative and policy-making tasks of the Attorney General himself, and may be of no significance to some units within the department. But for the staff of the Solicitor General's office, that creed has by tradition been a very real and operative premise of its work, of considerably greater day-to-day significance than anything to be found, for example, in the Code of Federal Regulations.

The phrase itself was coined early in the century by Solicitor General Frederick Lehmann; since that time it has regularly been cited by

189. L. CAPLAN, *supra* note 9, at 149-50.

190. *See infra* note 191.

other Solicitors General¹⁹¹ and by the Supreme Court itself.¹⁹² Solicitor General Perlman described the manner in which in his time Lehmann's words related to the functioning activities of the Solicitor General's staff:

Although I have held office for almost two years, I am as much impressed today as I was during . . . 1947 . . . that government lawyers, generally, are more interested in arriving at exact justice, with a proper consideration of the equities involved, than in making a record based on a won and lost count of cases. None of the less fortunate persons whose interests have been involved may ever know of the time and effort and talent expended in their behalf by lawyers they never heard of and whose services they could not employ, but it is a fine and great thing for those close to government procedure to know that the word "justice" has vitality and meaning, that it is alive and active, and that it guides our judgments and tempers our actions.¹⁹³

For Perlman the role of the Solicitor General and his staff, quite unlike that of private lawyers, was at times "semi-judicial" and "non-adversary."¹⁹⁴

In recent years conservatives have propounded a very different conception of the Solicitor General's duties, arguing that he is essentially like a private attorney retained to represent the President;¹⁹⁵ the sole measure of a Solicitor General's success and responsibility, on this view, is the extent to which he succeeds in winning Court decisions that advance the social and political philosophies of whoever happens to occupy the White

191. Cox, *supra* note 10, at 223; Perlman, *supra* note 10, at 289; Sobeloff II, *supra* note 10, at 148; see 1977 Memorandum, *supra* note 10, at 231.

192. Brady v. Maryland, 373 U.S. 83, 87 (1963).

193. Perlman, *supra* note 10, at 279-80.

194. *Id.* at 280; see also Sobeloff II, *supra* note 10, at 148 ("Unlike the lawyer, the judge is confined by his sense of responsibility for the symmetry of the law and by his obligation to maintain its continuity and conformity to basic principles and traditions. The solicitor general, too, though an advocate, must not forget that his client is the United States government, which is dedicated to the same principles."); 1973 House Hearings, *supra* note 74, at 292 ("[T]he traditions of the office, not only within the office but within the Department are that it is—I don't want to overstate this—but that it is quasi-judicial.").

195. McClellan, *supra* note 21, at 2 ("As a spokesman and strategist for the Reagan Administration . . . Lee's performance has been less satisfactory"); Wash. Post, July 7, 1986, at A7, col. 6 ("Fried has said he views the president as his client"); cf. Legal Times, *supra* note 1 ("'You either serve your master, the attorney general, or you resign,' charges Daniel Popeo, general counsel of the conservative Washington Legal Foundation"). This attitude led conservatives to criticize Solicitor General Lee for having defended the constitutionality of statutes they thought were inconsistent with President Reagan's policies. See *infra* note 221 and accompanying text.

House on a given day. The contrary tradition in the Solicitor General's office reflects not only the fact that other attorneys, such as the counsel to the President, have the responsibility to serve as the President's lawyer, but also the statutory mandate which created the position of the Solicitor General. The responsibility of the Solicitor General is "to attend to the interests of the United States,"¹⁹⁶ not to attend to the interests of the President or any particular federal official. The wishes of any given federal official are only part, in some instances a minor part, of the policies and programs which delineate the interests of the United States. If, for example, a state were to grant letters of marque and reprisal, and the President personally thought this a good development for foreign policy, the "interests of the United States" which the Solicitor General would have to represent would continue to be controlled by article I, section 10 of the Constitution, which flatly prohibits such grants. The Constitution and federal statutes literally define what the interests of the United States are in many instances. The interests of the United States and the cause of justice coincide because both are vindicated by the fair enforcement of the law; "to establish justice" is one of the express stated purposes of the Constitution which the Solicitor General is sworn to uphold and defend.¹⁹⁷ Thus Solicitor General Sobeloff, although eschewing Perlman's non-adversarial imagery, made essentially the same point when he argued, "[T]he solicitor general is not a neutral, he is an advocate; but . . . [m]y client's chief business is not to achieve victory but to establish justice."¹⁹⁸

Yet Lehmann's creed, like the preamble itself, is necessarily cast in abstract terms. Over time, the Solicitor General's commitment to seeking justice has taken three different forms. In its broadest sense that commitment has led the Solicitor General to select the results he seeks in a given case, not merely in light of vindicating the practices of agency officials, or winning or saving as much money as possible, but also from the perspective of what would be in the best long term interests of the nation as a whole. Solicitor General Griswold observed:

The Solicitor General's client in a particular case cannot be properly represented before the Supreme Court except from a broad point of view, taking into account all of the factors which affect sound government and the proper formulation and devel-

196. 28 U.S.C. § 517 (1982); *see also* 28 U.S.C. §§ 516, 518(a) (1982).

197. *See Schnapper, Legal Ethics and the Government Lawyer*, 32 REC. ASS'N B. CTRY N.Y. 649 (1977); *cf. Brady*, 373 U.S. at 87 ("Society wins not only when the guilty are convicted, but when criminal trials are fair.").

198. Sobeloff II, *supra* note 10, at 147-48.

opment of the law. In providing for the Solicitor General . . . to attend to "the interests of the United States" in litigation, the statutes have always been understood to mean the long-range interests of the United States, not simply in terms of its fisc, or its success in the particular litigation, but as a government, as a people.¹⁹⁹

The interests of the United States might be ill-served by a decision which, although entailing victory for a particular agency or official in the dispute at hand, created rules or precedents that would in other cases result in substantial hardship or injustice to third parties.²⁰⁰

Second, for a century it has been the occasional practice of the Solicitor General, at least in cases involving specific individuals rather than ongoing federal programs,²⁰¹ to confess error and abandon victories won in the lower courts. Such a confession of error, although not binding on the Supreme Court, is usually accepted by the Court. This practice is utilized primarily in criminal cases²⁰² or in other litigation, such as immigration matters, which "could result in drastic and serious consequence" for the opposing party.²⁰³ Confessions of error, although frequently described as a single practice undertaken to prevent "a miscarriage of justice,"²⁰⁴ have in fact been offered, and justified, for several distinct kinds of reasons. Solicitor General Cox noted that in some instances a confession of error was required because no plausible basis could be found to justify the decision below:

I am still persuaded that the practice of confessing error when we are plainly wrong ought to be continued. . . .

[T]o argue cases that seem unsound is certainly a waste of the Supreme Court's time

In addition, a government lawyer . . . should [not] be required to assert propositions which really seem untenable, if not unconscionable²⁰⁵

199. *Griswold*, *supra* note 10, at 535 (footnote omitted); *see also Cox*, *supra* note 10, at 225 (Solicitor General's office should not take a position "contrary to the public interest").

200. *Stern I*, *supra* note 10, at 158. A sample of cases in which the Solicitor General has confessed error can be found in Comment, *supra* note 10, at 1468-69 nn.112-21.

201. *But see* Comment, *supra* note 10, at 1468 n.114 (tax cases).

202. *Cox*, *supra* note 10, at 223:

It is in criminal cases that the differences between the government's role, as we conceive it, and the role of the all-out advocate, become most apparent. In the criminal cases an extraordinary amount of time is spent in looking to see whether the accused really did have a fair trial, and whether the conviction really should stand.

203. *Perlman*, *supra* note 10, at 288.

204. *Young v. United States*, 315 U.S. 257, 258 (1942).

205. *Cox*, *supra* note 10, at 225; *see also id.* at 224 ("case in which it is our judgment that

The Solicitor General has also been willing at times to confess error where he concluded that, although a plausible argument might be available to support the lower court decision, the decision nonetheless appeared on balance to be incorrect,²⁰⁶ an approach related to Perlman's judicial model. Finally, the Solicitor General has been willing in the past to waive the government's right to complain about some procedural default on the part of a defendant where it appeared that the assertion of that tactical right by the United States would prevent consideration of a substantial argument that the decision below was wrong on the merits.²⁰⁷

Confessions of error can have an impact which reaches beyond the particular litigants involved. Solicitor General Cox commented:

The practice of confessing error . . . is especially important because it affects all litigation. It tests the strength of our belief that the office has a peculiar responsibility to the Court. It affects the way all our other cases are presented. If we are willing to take a somewhat disinterested and wholly candid position even when it means surrendering a victory, then all our other cases will be presented with a greater degree of restraint, with a greater degree of candor, and with a longer view, perhaps, than otherwise.²⁰⁸

The Solicitor General's willingness to confess error in some cases doubtless contributes to the Solicitor General's credibility with the Court in other instances.

Third, the Solicitor General's office often attempts, in formulating its position and arguments on a given issue, to ascertain what the correct

government couldn't and shouldn't win in the Supreme Court"); Perlman, *supra* note 10, at 288 ("We thought the law was clear that *res judicata* had no application to habeas corpus. . . . In another case the defendant had been convicted under a section of the Selective Service Regulations not in effect at the time the offense was committed—a point not discovered until the case reached the Supreme Court. The Government conceded that the conviction was improper."); Stern I, *supra* note 10, at 158 ("no respectable argument on the Government's side").

206. Cox, *supra* note 10, at 223 ("whether the accused really did have a fair trial, and whether the conviction really should stand"); Perlman, *supra* note 10, at 289 ("A careful consideration of the record led me to conclude that the evidence was not sufficient to warrant a refusal of citizenship"); Stern I, *supra* note 10, at 158 (Solicitor General "willing to concede that the Government was wrong when he was convinced of that fact.").

207. Cox, *supra* note 10, at 224 (Solicitor General called Court's attention to possibly controlling precedent, or recent decision, overlooked by opposing counsel); Perlman, *supra* note 10, at 289 (Government waived right to object that inmate petitioner had failed to make a timely motion to substitute a new warden as respondent); *cf.* Thacher, *supra* note 54, at 521 ("There is in this office a relationship of responsibility to the Courts and to litigants opposed to the Government which implies that the citizen shall not be impeded in the enforcement of his rights").

208. Cox, *supra* note 10, at 225.

disposition of the case would be from the perspective of a disinterested judge applying the Supreme Court's reigning precedents. Solicitor General Biddle suggested that in determining his positions the Solicitor General was to be guided only by "the ethic of his law profession framed in the ambience of his experience and judgment."²⁰⁹ The process involved is not as abstract or subjective as Biddle's formulation suggests. The law is an elaborate set of premises, principles, and rules of inference; that system, when brought together with the facts and legislative and other materials relevant to a given case, often can fairly be said to point to a specific conclusion. Legal reasoning, of course, is not mathematics; reasonable minds can disagree about the proper inferences, and a good deal of judgment and experience is required to evaluate in a given case the interplay of general principles and particular circumstances. Nonetheless, there is an undeniable difference between attempting to ascertain what result is indicated by an unbiased evaluation of an issue, and trying to fashion an argument, even a plausible argument, that would lead to a predetermined outcome.

This attempt to ascertain what the law fairly requires, to look at a case from the perspective of a judge rather than that of an attorney with an ordinary client, is important in part because the Solicitor General must consider what the correct disposition of a question may be in order to decide where the interests of the United States lie. This approach may also help to safeguard the integrity of the Solicitor General's informational responsibilities to the Court. If an attorney in the Solicitor General's office drafts a brief or memorandum with a determination to arrive at a particular conclusion, that desire will almost inevitably skew the information—factual or legal—which is set out in the document; in traditional brief writing of this sort the preferred outcome normally determines what information is disclosed, emphasized, minimized or ignored. Conversely, if a neutral-principled judge seeks to arrive at the just determination of an issue, the facts will tend to determine the outcome, rather than vice versa. Of course, this overstates the differences, for lawyers can attempt to provide a dispassionate disclosure of the relevant information, and judges often bring their own preconceptions to a case, but the less committed an attorney is to reaching a pre-determined result, the more likely he or she will be to provide a balanced account of the relevant legal and factual circumstances. If a dispassionate analysis of this sort is part of the brief writing process in the Solicitor General's office, the likelihood that the ultimate brief will be a balanced one is increased,

209. F. BIDDLE, *supra* note 10, at 97.

because an attempt to edit out embarrassing or unhelpful facts is more likely to provoke internal controversy than would a failure ever to mention those circumstances in any working draft or document.

To the extent that the Solicitor General advances a dispassionate analysis of a given case, unaffected by a desire to arrive at any particular result, the Solicitor General assists the Court in a manner which is more than simply informational. Proceeding from premises accepted by a majority of the Supreme Court, and bearing in mind the concerns and style of reasoning which affect the Court's own approach, the Solicitor General can scout the legal terrain of a case, and suggest to the Court in a uniquely persuasive manner how the issues should be resolved. When he or she proceeds in this way the Solicitor General provides the Court with something no ordinary litigant could purport to offer, a disinterested evaluation of the fair and proper disposition of the case, an analysis which may well involve arguments which neither those litigants nor the lower courts raised or would want to articulate, and perhaps a different proposed legal standard as well. It is precisely because of his tradition of approaching cases in this manner that the Solicitor General has been referred to as the tenth justice. But although the judicial analogy is apt, the number is not, for while a tenth justice might proceed from premises previously rejected by a majority of the Court, the Solicitor General bases his analysis on the decisions accepted by that majority. The Solicitor General acts more like a sixth justice, attempting to draft analyses that would be accepted by five other members of the Court.

The closer the government's position comes to this sort of approach, the more likely it is to be accepted by the Court; over time the extent to which the Solicitor General seeks to act like a sixth justice will increase the credibility of his office with the Supreme Court. A generation ago a Court source commented: "It's a perfectly human thing to read a brief in one frame of mind or another, depending on who wrote it—to feel of a Solicitor, 'Out of that mint can come only true coin.'" He must be a man who would rather lose a case here than present it on an unfair basis.²¹⁰ This passage expressly recognizes that a Solicitor General can only maintain such a reputation if he is willing to lose cases, and to win some on grounds narrower than his client might have wished. In cases where the application of controlling legal principles is particularly clear, the Solicitor General's informational responsibility to the Court may make it difficult or impossible to frame an argument for the result which the Solicitor General or Administration might prefer as a matter of policy. Explain-

210. Lewis, *supra* note 73, at 29.

ing the government's brief in *Communications Workers of America v. Beck*,²¹¹ which was denounced by conservatives because it defended the legality of using certain union fees for political purposes,²¹² Solicitor General Fried commented:

[P]eople were unhappy about it. . . . I wasn't happy about the bottom line. . . . I have a warm feeling towards the Right to Work Committee and as a philosophical matter I am more sympathetic to the Committee's view of what the world should look like than the other side. On the other hand, this was a court request and I was asked to tell the truth. They asked us to tell the truth about what the words of the Taft-Hartley Act and what the legislative history meant. And to tell the truth about the doctrine of state action. I simply had to face the music.²¹³

Professor Neuborne has suggested that the Solicitor General, in formulating positions and framing arguments, ought to function, and traditionally has functioned, solely, or at least primarily, in this sort of sixth justice role, providing the Court and the President with "reliable, non-ideological and essentially non-political . . . technically excellent advice about what the law is . . . as opposed to which it ought to be."²¹⁴ On Neuborne's view a Solicitor General who takes into consideration the actual policies of an administration would be little more than a "mouth-piece" for the President, "an ideological cheerleader for the administration, as concerned with justifying deviations from legal norms as with assuring compliance with the law."²¹⁵ The 1977 OLC Memorandum offered a variant of this approach, insisting that although the Solicitor General ought to frame the government's legal positions without regard to administration practice or policy, in certain special and infrequent circumstances the Attorney General might properly overrule the Solicitor General on policy grounds.²¹⁶

These analyses do not provide a realistic account of how in the past Solicitors General have arrived at the government's position on a given question. Each year the Solicitor General's office files literally scores of briefs in Supreme Court cases which either directly affect some ongoing

211. 800 F.2d 1280 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 2480 (1987).

212. *Key Justice Official Sides With Union Bosses*, Human Events, May 9, 1987, at 1 [hereinafter *Union Bosses*].

213. *A Special Interview with Solicitor General Charles Fried*, 1 WASHINGTON LAWYER 48, 50 (May-June 1985).

214. Neuborne Testimony, *supra* note 7, at 5-6.

215. *Id.* at 7.

216. 1977 Memorandum, *supra* note 10, at 228, 234-35.

federal program or activity, or are important to the broader goals of the administration.²¹⁷ The fact that the Solicitor General's briefs almost invariably support those activities or goals, albeit with somewhat varying degrees of enthusiasm, is not simply a curious but recurrent coincidence. Obviously, consideration of actual government practice and policy does consistently play a major role in the way in which the Solicitor General's office formulates positions and frames arguments, and until recently this had not been thought to be a proper basis of criticism. The litigation goals of liberal administrations were not disparaged as mere "ideology," and Solicitors General who advanced government policies under, for example, Presidents Kennedy and Johnson were not dismissed as "mouthpieces."

That government policy should play such a role is neither surprising nor undesirable. Of course, there would be a serious problem if the Solicitor General were to give decisive weight to defending government policy when there was simply no plausible legal basis for that policy. If, for example, the Department of Health and Human Services (HHS) simply refused to make grants to Massachusetts, insisting the Bay State was really a province of Canada, and the White House supported that view because it favored the removal of several annoying liberal Democrats from Congress, the Solicitor General, refusing to advance an argument that was obviously frivolous, would have to urge the Supreme Court to hold that HHS had acted illegally. But cases of such patent illegality by federal agencies are rare—not as rare as they used to be, perhaps, but rare nonetheless. The complexities of modern life and government spawn a never-ending series of legal issues regarding which there are no dispositive Supreme Court precedents. The legal profession prospers because it is so often possible to frame, on the basis of existing precedents, entirely colorable arguments on both sides of a given legal issue. A significant portion of the cases which the Supreme Court decides on the merits are accepted for review only after, and indeed because, lower court judges have come to conflicting conclusions.²¹⁸ It is often impossible to declare with any degree of certainty how a majority of the Supreme Court would rule on a given issue. The question, assuming it is a different question, regarding what the law on the issue really "is," is at least as difficult to resolve.

217. On occasion the Court may ask the Solicitor General to express the views of the United States regarding a question of federal law which has no impact on Administration programs or policies; when that occurs the Solicitor General is free to advance whatever conclusion appears to him, most consistent with the relevant facts, precedents, and statutory or legislative materials.

218. See SUP. CT. REV. 17.1.

When, as is frequently the case, the law is unclear, it is far harder to maintain that the Solicitor General should frame the government's legal position without regard to its consequences for the policies of the federal government. The problem is very much one of degree. The less clear the law is on a given issue, the less likely it is that arguing for government policies would be inconsistent with any obligation to the Court; the more important the policy involved, the greater the Solicitor General's obligation to defend it. One could, of course, maintain that the Solicitor General should adhere to his or her personal views about the law no matter how close the legal issues; even if, for example, the Solicitor General thinks the odds he or she is correct are only fifty-one of one hundred. But this would overuse beyond all reason the sometimes benign fiction that the law, and answers to all legal issues, exist, like an elaborate *Corpus Juris Tertium*, engraved in some enormous set of ethereal tablets, awaiting discovery by the eye of the mind. There are simply legal issues about which reasonable lawyers can disagree—about what the law is, about what the Supreme Court will do—and the nature of the Solicitor General's obligations in such cases is different than in cases in which the law is, in one sense or the other, clear.

The proper role of the Solicitor General seems to be to strike a delicate balance between justice and advocacy, considering the clarity of the law, on the one hand, and the nature and significance of the affected policy or program, on the other. Outright confessions of error have traditionally been limited to cases affecting only a few individuals. Where an agency program or the constitutionality of a statute is at issue, the Solicitor General ordinarily looks very hard for some plausible ground, however narrow, to sustain that activity or enactment; the law being what it is, some such argument can usually be found, although the Solicitor General may blush a bit when he or she makes it in open court. The Solicitor General's effort to find some basis for defending an ongoing federal practice may serve the interests of the Court, which might otherwise be left to resolve a question of general application and importance without having heard arguments on both sides of the issue. When the issue before the Court is neither the validity of a statute or ongoing program nor a question with serious potential financial impact on the United States, the Solicitor General, while bearing in mind the policy preferences of agency officials whose activities might be incidentally affected, may appropriately give greater weight to what seems to him the correct disposition of the underlying legal dispute. Particularly complex and interesting problems often arise when the Solicitor General undertakes to determine which legal theory to offer in support of the administration's

programs or policies and whether to file an amicus brief in a case to which no federal agency or official is a party. These situations typically present the Solicitor General with a range of positions of varying cogency, each of which, in turn, would have a different degree or type of impact on various agency or administration policies and practices that may or may not themselves be directly under challenge in the case itself. Given the wide range of positions that may be possible in a case, and the differing possible ramifications of various arguments, it is entirely normal and probably desirable that the attempt to strike the proper balance will occasionally provoke spirited disagreements within the Solicitor General's office and the administration as a whole. It is entirely appropriate that the final choice between plausible alternatives be made in part in order to further, rather than frustrate, the practices and policies of the Solicitor General's agency client, even if the result may be a position which the Solicitor General might not have favored were he or she on the bench.²¹⁹

To insist, when it is contrary to fact, that administration policy plays no role in the decisions of the Solicitor General is to risk turning the Solicitor General's office into a smokescreen behind which executive branch officials can make and seek to implement policy while denying any political responsibility or accountability. That occurred during the *Bob Jones* controversy when, in the face of fierce public criticism of its decision to grant tax exempt status to segregated private schools, the administration insisted that it actually opposed such treatment as a matter of policy, and that it had decided to grant the exemptions solely because its lawyers discovered they were legally required.²²⁰ The patent mendacity of that assertion fooled no one. But it demonstrated, to use an image coined by CIA Director Casey in another context, that by insisting that the Solicitor General's decisions are always made purely on legal grounds, an administration could turn the Solicitor General's office into an off-the-shelf self-contained operation for making and implementing policies while giving the White House a claim of plausible deniability. To suggest that the Solicitor General is an impervious bastion of jurisprudential rectitude, while the rest of the Justice Department is totally dominated by policy considerations, is to ignore as well the important extent to which other officials within the Department should and often

219. See *Union Bosses*, *supra* note 212, at 7 ("if you've got a couple of different legitimate interpretations . . . why don't you pick the interpretation that supports our overall policy? The trouble with Fried is he doesn't know what the hell he's here for.").

220. These events are briefly summarized in L. CAPLAN, *supra* note 9, at 58-60.

do attempt to temper policy goals with concern for the broader interests of the nation and of the law.

Conversely, to insist that *administration* policy and policy makers ought to have no role in the Solicitor General's decisions is to run the equally serious risk that the policy views of the Solicitor General personally, or of his or her staff, will color the government's briefs, especially in those cases in which ordinary legal reasoning can provide no clear answer, and that briefs may be filed which attack or undermine administration policy. Conservatives criticized Solicitor General Lee for failing to support, and even opposing, President Reagan's policies.²²¹ That criticism may well have been unwarranted in fact, both because the Reagan Administration's policies were often a matter of considerable internal dispute, and because Lee was frequently constrained by the limits of plausible argument; but a charge of this sort, if accurate, ought to be a troubling one. The possible consequences of acting on the view advanced by Professor Neuborne were demonstrated during the Carter Administration in connection with *Regents of University of California v. Bakke*.²²² As of 1977 there were virtually no Supreme Court precedents shedding light on the constitutionality and legality of affirmative action, and a totally plausible argument could have been made on either side of the issue, a state of affairs starkly reflected in the four-one-four vote by which *Bakke* was ultimately decided on the merits. Under those circumstances it was unreasonable to suggest that the substance of the government's position should have turned on whether or not Solicitor General McCree personally thought the plan in *Bakke* constitutional. But although President Carter publicly supported such plans, the White House was not initially consulted by Solicitor General McCree when he drafted a brief arguing that the affirmative action plan at issue in *Bakke* was invalid. Attorney General Griffin Bell insisted that McCree had acted correctly and that it was the exclusive job of the Solicitor General to decide what position the government would take in any given case. Bell deliberately thwarted White House efforts to advise McCree regarding the position the President wanted the government's brief to take, treating those directions as if they were equivalent to an improper *ex parte* communication

221. McClellan, *supra* note 21, at 2 ("Lee . . . has repeatedly taken positions that are directly at odds with the President's program"); *id.* at 4 ("Lee not only opposes the President's program, but has contributed to its defeat"); *id.* at 10 ("Lee's deviation from the Reagan Administration's policies"; "Lee . . . has actually argued against the President's basic philosophy of government").

222. 438 U.S. 265 (1978).

to a sitting judge.²²³ The maintenance of that sort of environment runs some risk of encouraging lawyers in the Solicitor General's office to casually assume that any legal view other than their own, especially if more attuned to administration policy, is necessarily outside the bounds of plausible argument.

The responsibility of the Solicitor General to balance justice and advocacy may confront him with either or both of two types of conflicting responsibilities. First, of course, that balancing process itself ultimately requires the Solicitor General to choose between his obligations to take the course that seems most consistent with the law, and his duty to advance the policies of the government. Second, the Solicitor General may be forced to engage in a form of litigation triage, confessing error, or abandoning arguments in some cases, in order to strengthen, or protect, the government's credibility in others.

VI. IDENTIFYING THE POLICY OF THE UNITED STATES

Identifying the policy of the United States on a given legal issue, and assessing its importance, might at first seem to be simple tasks. In the large number of cases in which a federal agency, or its officials, are already a party, the government policy would appear to be whatever relief had been sought by the federal plaintiff, or whatever activity was being defended by the federal defendant. In practice, however, ascertaining the nature of government policy is often far from simple.

For the Solicitor General the posture taken by the federal parties when a case was in the lower courts represents only the policy of that federal agency, not of the United States; indeed, it may constitute only the policy of that agency for the purposes of the particular litigation at issue. Any one or more of three types of intragovernmental policy conflicts may actually prove to be present. First, the legal position which the agency wants to take in the case at hand may be bad for that very agency in some subsequent case; a harsh rule regarding the deadline for filing notices of appeal, for example, could be detrimental to the agency in other litigation.²²⁴ Second, a legal rule that would generally be good for

223. L. CAPLAN, *supra* note 9, at 42-48; G. BELL & R. OSTROW, *TAKING CARE OF THE LAW* 29-32 (1982).

224. 1973 *House Hearings*, *supra* note 74 at 278-79 (testimony of Solicitor General Griswold) ("It is important that the positions to be taken by a single agency on a question of general concern to the Federal Government and all of its agencies reflect the overall best interests of the entire federal government, and not just the interest of the particular agency in winning the particular case. . . . If there were no such control of the agencies' litigation by the Solicitor General, a particular agency, by pressing its particular case in the Supreme Court, might produce a result that would redound to the overall detriment of the federal govern-

one agency might be adverse to the interests of, and opposed by, another agency.²²⁵ Some problems of this sort arise out of the different roles of the agencies involved. Within the Justice Department itself, the civil division, which often represents federal officials and agencies when they are sued, might prefer procedural rules that favor defendants, while the anti-trust or civil rights divisions, which generally initiate litigation, would want procedural rules that aid plaintiffs. Some federal agencies are in the business of enforcing statutes applicable, directly or indirectly, to other federal agencies; thus the Defense Department, which pays the bills of cost-plus contractors, is naturally inclined to favor a narrower interpretation of the Fair Labor Standards Act (FLSA) than the Wage and Hour Administrator at the Department of Labor might be.²²⁶ Third, among officials or agencies with no inherently different institutional interests, there may be simple differences of opinion about what government policy ought to be. Under the Reagan Administration, for example, there have been repeated internal disagreements about civil rights issues.

Where such differences exist, the Solicitor General should not undertake to frame a position without first attempting to ascertain what result the government wants to achieve in the case, not because the Solicitor General will or ought cavalierly argue for whatever result his agency clients may prefer, but because the Solicitor General, while retaining the ultimate responsibility for deciding what position will be set forth in the government's brief, would not want to make that decision in ignorance of the preference of the affected agencies, if they are indeed capable of agreeing on a single preference. The existence of a case raising the question at issue in the Supreme Court often requires the resolution of policy differences that may have coexisted in the past, because the action of the Court is likely to affect all interested federal agencies, and because, even if the Court skirts that issue, the Solicitor General will be obligated in

ment."); Comment, *supra* note 10, at 1463 ("The Solicitor General often argues for either a more even-handed balancing of different policies within an agency's jurisdiction, or for greater agency sensitivity to the broader implications of its ruling.").

225. Attorney General Clark once warned that if individual agencies could pursue appeals in the Supreme Court "without the Solicitor General, their objective [would] be so single-minded that they will ignore . . . the broad objectives of the United States." *1949 Hearings, supra* note 95, at 123. Solicitor General Griswold once observed about cases involving the Securities and Exchange Commission (SEC): "[I]n all of these cases there are inevitably other interests of the Government and the only place where all the interests come together to be considered is in the Office of the Solicitor General." *1973 House Hearings, supra* note 74, at 287.

226. See Perlman, *supra* note 10, at 282-83; Comment, *supra* note 10, at 1460 ("An overt conflict may develop because an agency's or department's decision affecting one economic interest may adversely affect a group represented by another governmental body.").

any subsequent brief to take a position consistent with that taken in the first.²²⁷ It may at times be important that the United States speak with one voice in the Supreme Court, but it is ordinarily essential that the administration speak with one voice to the Solicitor General, for the Solicitor General cannot in a single argument defend two inconsistent agency practices, or advance two conflicting policies. Frequently, therefore, the Solicitor General, in need of a consensus, or failing that, a decision, about what result the government will favor, finds himself mediating multilateral discussions among the interested client agencies and officials, and their lawyers, discussions which may be framed in terms of policy, but which more often are cast as legal arguments advanced by the participants in support of their preferred policies. Sometimes these exchanges result in a genuine agreement as to what federal policy should be, as each party comes to recognize the legitimate concerns of the others.²²⁸ Occasionally the result is a negotiated settlement yielding a brief that reads more like a consent decree, or a treaty, with various portions of the text and footnotes making arguments that point in somewhat different directions, or a brief which deliberately avoids addressing, or even mentioning, the particular issues about which there were unresolved intragovernmental disagreements.

In some instances, however, the interested federal officials will simply not be able to agree on how to set the government policy that might

227. See Bork, *supra* note 49, at 204; Stern I, *supra* note 10, at 217.

228. Bork, *supra* note 49, at 703 ("Many . . . decisions are extremely difficult and require the resolution of conflicting philosophies of different agencies and divisions. I have been through four such conferences already and have escaped unscathed so far, but I can see that it is impossible to arrive at an amicable settlement every time."); Comment, *supra* note 10, at 1459 (Solicitor General "is most successful in resolving disputes among the divisions of the Justice Department and among the executive departments."). See also *1973 House Hearings*, *supra* note 74, at 274:

There are problems . . . varying interests between different agencies of the Government, where I think the Solicitor General's Office frequently works out bases upon which the Government's views can be most effectively presented.

I remember a case [in which] . . . [t]he Registrar of Copyrights . . . had very strong views . . . and the Federal Communications Commission had very strong views . . . and the Antitrust Division in the Department of Justice had very strong views . . .

They were all different views, and one way to handle it, of course, would have been to let each of these people file their own brief in the Supreme Court and let the Court consider all the arguments that could be made, involving, I suppose, the reading of three such briefs, 200 or 250 pages of arguments, much of which would have been duplicative and repetitious.

Instead, we held extensive conferences, first with each agency separately and then with all three agencies together so each could understand the viewpoint of the other. We finally worked out a brief which had wide acceptance by the three agencies, though not complete agreement.

Id.

affect, but would not necessarily control, the Solicitor General's choice among plausible legal arguments. If the disagreement is an entirely legal one, not colored or motivated by policy differences, the Solicitor General may resolve the matter based on his best judgment as to what the law requires, or may advise the Court of those differences, setting them forth in a single brief²²⁹ or authorizing the filing of more than one brief. Where, however, two or more agencies favor different government positions, not simply because of divergent views of the law, but because as a matter of policy they want different results, the Solicitor General may, and often must, frame the government's position solely on the basis of his evaluation of the legal principles at issue, but ought not base that position on his personal opinions regarding what administration policy ought to be. As Solicitor General Bork correctly emphasized, the Solicitor General's responsibility is to identify and advance government policy, not to make it.²³⁰ The existence of an interagency policy dispute does not con-

229. See, e.g., Comment, *supra* note 10, at 1465.

230. The following is an excerpt from the hearings before the Senate Judiciary Committee on the nomination of Robert Bork for Solicitor General:

Senator HART. It is a policy post?

Mr. BORK. Not particularly, Senator. I view it as a post of being the attorney for the Government.

Senator HART. What if the Government takes a position in the field of antitrust or civil rights that you think is wrong, and have said in the past is wrong, what do you do?

Mr. BORK. What will I do? I will enforce the policy of Government in antitrust as the Government defines it. I do not define it, Senator.

I might say that in practice both for defendants in antitrust cases and for plaintiffs in antitrust cases I frequently urged positions that as an academic I would criticize.

Senator HART. If the Assistant Attorney General in charge of civil rights has recommended action be taken against a school district or several school districts, or if the Assistant Attorney General in charge of antitrust wants to go after a conglomerate, and you believe on the law that you would take a different view in both cases if you were the Assistant Attorney General, as Solicitor General what do you do?

Mr. BORK. Well, of course, Senator, the initial determination to file a lawsuit against a conglomerate or against a school district would not come within my office at all.

Senator HART. That is right.

Mr. BORK. Those cases would be filed and then come to me, if at all, upon appeal. At that stage, I am sure that I would continue the policy of the Justice Department, even if I disagreed as an academic with that policy. But that, I take it, is not relevant to my performance of my duties; that is, my personal academic disagreement would not be relevant to the performance of these duties.

Bork Hearings, supra note 30, at 8.

Senator TUNNEY. . . . I have gained the impression that you are prepared to put aside your own personal philosophy and to argue cases on appeal and to bring cases up on appeal on the basis of the policy as enunciated by the agencies and the Attorney General"

Mr. BORK. That is correct, Senator.

Id. at 24. See also *Hearings on the Nomination of Robert H. Jackson to be Solicitor General before a Subcomm. of the Senate Judiciary Comm., 75th Cong., 3d Sess. 10 (1938)*:

vert the Solicitor General's office into a sort of ad hoc policy-making body like the Office of Management and Budget. If the Secretary of Labor and the Secretary of Defense disagree about what result to seek in an FLSA case, and a plausible argument can be made for both sides, the Solicitor General has no mandate to make a policy-based decision.

Ordinarily no dispositive policy decision will be forthcoming from other quarters. Often the underlying policy dispute simply will not be of sufficient importance to refer to the President or a high level White House aide, particularly where a considerable amount of time and effort would be required to master the relevant arguments and issues; at times the disagreements will be among middle level officials, and never cross the desk of any cabinet secretary. Time constraints frequently preclude referring such matters to the White House, for the underlying differences may involve not maturely developed policies which pre-dated the appeal at issue, but positions which first emerged during the process of attempting to frame a government brief; by the time those differences have become clear, the deadline for filing that brief may be only days away. If no definitive policy decision is to be had, the Solicitor General is in an unusual position. In the absence of any consensus, compromise, or decision, there simply is no executive branch policy to represent. As a consequence, the element of policy drops from the normal balancing process, and the Solicitor General is left to frame the government's position based on his or her best judgment as to what the law requires.²³¹

Precisely because the framing of a Supreme Court brief may precipitate an important, possibly hotly contested internal policy-making dispute, the Solicitor General, whose office will be at the center of that controversy, has an obligation to safeguard the integrity of that process, whether it is a process that results in a consensus, a compromise, or a deadlock breaking higher level decision. The Solicitor General must be careful to assure, first, that all interested agencies and officials are, in an appropriate manner, drawn into the process. Because these policy-related disputes arise in the context of litigation, officials at the Department of Justice may be more likely than others to be aware that a decision is in

Senator KING: I will ask you whether the Solicitor General has charge of the anti-trust policy

Attorney General CUMMINGS: No. That would be the task of Mr. Jackson's successor, whoever he might be, just as it is now Mr. Jackson's task.

Jackson was in charge of the antitrust division at the time he was nominated to serve as Solicitor General.

231. Under some circumstances the Solicitor General might choose to disclose the existence of that unresolved dispute, or even to present in a single brief the differing positions advanced by the agencies involved.

the office. The Solicitor General cannot assume that lawyers or division heads in the Department speak for, or have even consulted with, all relevant constituent agencies, or that any official from whom he has not heard knows of the case and is indifferent about its disposition. Despite the fact that increasing the number of participants may aggravate the magnitude of the internal controversy, the Solicitor General has an obligation to the administration as a whole to bring the matter to the attention of all relevant officials and to solicit an expression of their views.²³²

Second, when a given case calls into question an established federal program, be it in the form of an ongoing activity or a duly promulgated regulation or guideline, the Solicitor General should not allow the government's brief to become a vehicle by which disgruntled administration factions seek to undermine in the courts a policy which they have been unable to change in practice. This is not a merely hypothetical problem. In *Guardians Association v. Civil Service Commission*,²³³ for example, the defendants in effect attacked the validity of certain Title VI regulations, adopted by some forty federal agencies,²³⁴ which prohibited recipients of federal grants from engaging in practices which had a racially discriminatory effect; the Solicitor General declined to file a brief defending those regulations, in large measure because Assistant Attorney General Reynolds was personally opposed to any use of a discriminatory effect standard.²³⁵ Similarly, in *Grove City College v. Bell*,²³⁶ although the applicable Department of Education regulations applied Title IX's ban on discrimination to the entire educational institution receiving federal financial aid,²³⁷ the Solicitor General argued that the law should be construed to apply only to the specific program in which federal funds were being expended. Conversely, in many of the instances in which Solicitor General Lee was criticized by conservatives for failing to defend the President's policies, the briefs in controversy had in fact defended existing regulations which, however much conservatives might have disliked them, the Reagan appointees in charge of those agencies had chosen not to alter.²³⁸ The writing of regulations or guidelines, and the operation of

232. 1973 House Hearings, *supra* note 74, at 279-80.

233. 463 U.S. 582 (1983).

234. *Id.* at 592 n.13.

235. L. CAPLAN, *supra* note 9, at 91.

236. 465 U.S. 555 (1984).

237. *Id.* at 592-93 (Brennan, J., concurring and dissenting). Prior to the filing of the government's brief in *Guardians*, Solicitor General Lee was criticized for failing to support the Civil Rights Division on this issue. McLaughlin, *supra* note 21, at 611.

238. Solicitor General Lee's defense of the regulations regarding discrimination in insurance benefits was denounced in the *National Review*, McLaughlin, *supra* note 21, at 611, and in *Benchmark*, McClellan, *supra* note 21, at 9-10 (discussing *Long Island Univ. v. Spirit*, 463

programs, are the most definitive form of policy-making in an administration.²³⁹ Where policy has been established in this way, the Solicitor General ought to regard those decisions as controlling any policy questions relevant to the government's position. The Solicitor General must, of course, consider the possibility that policies made in this manner were nonetheless unlawful, but where a plausible argument can be made in support of such formally promulgated policies, the Solicitor General should decline to entertain proposals that the policies be attacked or undermined by means of the government's Supreme Court briefs, and should instead advise critics of those policies, whether inside or outside the administration, to take any proposals for policy changes to the President or to the agency officials who established the policies in dispute. The Solicitor General must regard with skepticism claims by individual administration officials that their personal views reflect the unspoken preferences of the President, and should discount those claims in their entirety where they conflict with the actual policies of other officials who are vested with the authority for administering the programs at issue.

Third, where the existence of a Supreme Court case requires the government to fashion a policy where no policy, or no clear policy, existed before, or prompts the administration to reconsider and change a policy, the Solicitor General should assure that the existence of that policy decision is made clear, and kept distinct from, the legal argument offered to support it. Preserving this distinction serves two important purposes. First, it protects the Solicitor General from criticism by the public and, more importantly, the Court, for decisions that were not his own. For example, once a regulation has been promulgated, the Court is unlikely to fault the Solicitor General for defending it, even if only a thin defense can be adduced; but if no policy decision can be identified, the Court will be left with the impression that the Solicitor General has made a personal judgment that the position he is advancing, dicey though it may be, is the correct disposition of the issues. Second, a public display of policy-making will at times be important to the integrity of the policy-making process. If the relevant agency or White House officials can, by hiding behind the Solicitor General's skirts, avoid taking responsibility

U.S. 1223 (1983) and Title VII of the Civil Rights Act of 1964). Lee's defense of the Title IX regulations prohibiting federal grantees to engage in employment discrimination on the basis of sex was also criticized in *Benchmark*. McClellan, *supra* note 21, at 9 (asserting that Lee's support of the Department of Education's regulations was "against the wishes of Secretary Bell" (discussing *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982); Title IX of the Education Amendments of 1972)). It is unclear why *Benchmark* did not suggest that Secretary Bell ought to change the regulations at issue.

239. See *Monell v. New York Dep't of Social Servs.*, 436 U.S. 658, 690-95 (1978).

for the particular result sought in the government's brief, the political accountability of those officials, and of the administration as a whole, will be lessened. At least where a controversial issue is involved, the Solicitor General ought to be prepared to insist that he will not file a brief in support of a policy decision for which the administration, and its appropriate officials, are unwilling first to take clear public responsibility.

Finally, the Solicitor General must exercise considerable caution about permitting government briefs to become a weapon in a policy dispute between the executive branch and Congress. The statutory responsibility of the Solicitor General is to represent "the interests of the United States," a phrase which includes not only the President and his administration, but Congress as well.²⁴⁰ The Solicitor General should be sensitive to the possibility that the issue raised by a given case may involve a policy matter about which the executive branch and Congress are in disagreement. Of course, Congress makes policy, in its most formal manner, through legislation, while regulations and executive orders are the most unequivocal expression of executive branch policy-making, and open conflicts between the two branches are often resolved by votes and vetoes. But on a day-to-day basis in Washington the process of policy-making, both within and between the two branches of government, is both more complex and less formal. In other contexts legislative leaders participate in policy-making through an informal, consultative process, and there is no reason why that could not occur as well where the policy at issue is one which would inform the Solicitor General's decision in the framing of a brief. Although this may not have been the practice in the past, where there appear to be relevant policy differences between the administration and Congress, the Solicitor General, in order to ascertain the policies and interests of the United States, might seek to encourage a policy consensus, or compromise, acceptable to Congress as well as to possibly differing officials within the executive branch. Federal law requires the Justice Department to notify Congress if it intends to decline to defend the constitutionality of a congressionally enacted statute;²⁴¹ surely some less formal type of communication might be appropriate if the Solicitor General is considering arguing for a result which he has reason to believe may be contrary to the wishes of the legislative branch. Where some form of agreement cannot be reached, it may still be appro-

240. Conservatives repeatedly criticized Solicitor General Lee for defending the constitutionality of statutes which were inconsistent with the policies of President Reagan. McLaughlin, *supra* note 21, at 611 (Age Discrimination in Employment Act); *See, e.g.*, McClellan, *supra* note 21, at 6-7 (Public Utilities Regulatory Policies Act of 1978; Age Discrimination in Employment Act of 1967 to State Employee; application of Fair Labor Standards Act to cities).

241. 2 U.S.C. § 288(k)(b) (1982).

priate for the Solicitor General to file a brief on behalf of the executive branch alone, but the very attempt to reach that agreement will make the Solicitor General's actions more informed and deliberate, and will alert Congress to an issue concerning which it may wish to retain its own counsel.²⁴² Discussions with legislative leaders who were actually involved in the framing of a statute, like similar discussions which now occur with the executive branch officials involved, may also have the incidental effect of assisting the Solicitor General's efforts to determine the correct interpretation of that legislation. Because consultations of this sort have not been common in the past, a degree of caution and discretion would undoubtedly be advisable, but some tentative steps in this direction seem to be in order. In the absence of such procedures, the Solicitor General runs the risk of being conscripted, as evidently occurred in *Thornburg v. Gingles*,²⁴³ into an agency's efforts to refight in the Court a battle lost in the halls of Congress.

A second, very different type of problem arises when the policy issues posed by a case are the subject of a disagreement between an independent agency and either the White House, an executive department, or another independent agency. Certain executive agencies are granted independent status precisely for the purpose of assuring that neither the President, nor any executive department, including the Department of Justice, can control their policies, practices or programs. In other contexts the statutory charters of those agencies are sufficiently specific to effectively guarantee their autonomy; where those programs or policies are under attack or at issue in the Supreme Court, however, the Solicitor General's ability to control the representation of those agencies presents a serious potential threat to their autonomy. The manner in which the Solicitor General deals with this problem appears to have changed over the course of the last several decades.

Writing in 1960, Robert Stern, who served as acting Solicitor General in 1952-1953, indicated that the practice of the Solicitor General's office, in the case of an intragovernmental dispute involving an independent agency, was at that time to permit the agency to make its case to the Supreme Court:

These intragovernmental disagreements cannot be settled internally by the Department of Justice. . . . [I]ndependent agencies . . . are not bound to accept the Attorney General's opinion

242. For a discussion of cases in which Congress and the executive branch had separate representation in the Supreme Court, see *1973 House Hearings*, *supra* note 74, at 295-96.

243. 106 S. Ct. 2752 (1986); see also *supra* note 1 and accompanying text.

The Solicitor General has an equal duty to represent each of the two competing Government interests or agencies. In such situations he will try to determine impartially which position he thinks is correct. If he agrees entirely with one side he will give it his support. Sometimes he takes an intermediate position, filing a separate brief of his own. Sometimes he stays out of a case and lets the agencies fight it out themselves. The Court is always apprised of the intragovernmental conflict, and I know of no case in which the Solicitor General has precluded an independent agency from presenting its position.²⁴⁴

In 1969, however, a Yale Law Journal Comment, based on interviews with Solicitors General Griswold and Cox and the staff of the Solicitor General's office, reported a sharp change in the treatment of such disputes. Instances in which the Solicitor General permitted the presentation to the Court of independent agency views with which he disagreed by then occurred only "infrequently":

Where basic policy considerations involving competing statutory or economic interests are involved, the Solicitor General considers it his responsibility to resolve the conflict himself. . . .

The Solicitor General's staff suggested two rationales for shielding the Court from intragovernmental conflicts: (1) that the Executive has a positive obligation to present one position to the Court and (2) that the muting of conflict also avoids overburdening the Court with an excessive number of petitions or arguments.²⁴⁵

The Comment argued that "[t]he bias in favor of resolving conflicts within the Executive, especially where the regulatory agencies are concerned, seems ill-considered. . . . [W]here the Solicitor General's disagreement with an agency . . . stems from policy disputes, the agency should be allowed access . . . [to the Court]."²⁴⁶

In 1973, Solicitor General Griswold, testifying in opposition to proposals to permit the SEC to handle its own cases in the Supreme Court, advised the Congress that there was a "customary practice of permitting the agency to file its own *amicus* brief when there was a disagreement between it and the Department of Justice"²⁴⁷ Three years later, however, when the EEOC sought to file just such an *amicus* brief in

244. Stern I, *supra* note 10, at 157, col. 1.

245. Comment, *supra* note 10, at 1466.

246. *Id.*

247. 1973 House Hearings, *supra* note 74, at 284; see also *id.* at 290.

DeFunis v. Odegaard,²⁴⁸ Solicitor General Bork not only refused to authorize the Commission to do so, but successfully urged the Supreme Court to return unfiled an amicus brief which the EEOC had submitted to the Court clerk.²⁴⁹ In 1977 the OLC Memorandum of that year asserted:

[I]t has been thought to be desirable, generally, for the Government to adopt a single, coherent position with respect to legal questions that are presented to the Supreme Court. Because it is not uncommon for there to be conflicting views among the various offices and agencies within the executive branch, the Solicitor General, having the responsibility for presenting the views of the Government to the Court, must have power to reconcile differences among his clients, to accept the views of some and to reject others, and, in proper cases, to formulate views of his own.²⁵⁰

The Memorandum contained no hint that the exercise of such a power was any less appropriate or, indeed, desirable, when the client whose views the Solicitor General chose to reject was an independent agency.

The significance of this difference in approach may for a while have been masked by the lack of sharp recurring differences within past administrations, by a reluctance on the part of earlier Solicitors General to actually override and silence an independent agency whose policies and practices might be at issue in the Supreme Court, and by the success of the Solicitor General's office in hammering out positions acceptable both to those agencies and to executive departments. During the Reagan Administration, however, when the Justice Department, and particularly Assistant Attorney General Reynolds, were frequently at loggerheads with the EEOC, the Solicitor General repeatedly advanced only the views of the Department, declining either to authorize the filing of separate EEOC briefs or to disclose to the Supreme Court the existence or nature of those interagency disputes.²⁵¹ In 1985, the Court was treated to the spectacle of a government brief in *Sheet Metal Workers v.*

248. 416 U.S. 312 (1974).

249. N.Y. Times, Feb. 25, 1974, at 13, col. 6-7; see 415 U.S. 908 (1974) (order denying EEOC motion). The controversy was somewhat unusual in that Solicitor General Bork had chosen, not to file on behalf of the administration a brief expressing a different position than that of the EEOC, but to file no brief at all, possibly because of unresolved differences within the administration. The EEOC, although not within any of the executive departments subject to supervision and control by the President, does not have the quasi-legislative and adjudicatory powers of agencies such as the Federal Trade Commission.

250. 1977 Memorandum, *supra* note 10, at 230.

251. Compare *Riverside v. Rivera*, 477 U.S. 561 (1986) with *EEOC Memo*, *supra* note 64, at E-1 (EEOC taking position contrary to Solicitor General).

*EEOC*²⁵² which denounced as illegal and unconstitutional the very affirmative action remedy which the EEOC had litigated for years to win in that case—a change of position which occasioned comment in the Court's opinion.²⁵³ It is entirely understandable that an administration which sees itself embroiled in a series of apocalyptic ideological battles would no more want to afford the EEOC access to the Supreme Court than the regime in Managua would want to give *La Prensa* paper and ink. But agencies like the EEOC have statutory charters which guarantee their independence, and it would be more consistent with that legislation if the Solicitor General were to adhere to the philosophy expressed by Stern a generation ago.

VII. CONCLUSION

At first blush the dilemma of the Solicitor General seems very much like that of Becket himself, rewarded with an exalted position one of whose very functions was to resist overreaching claims by the man who gave him the job. In the short term the Solicitor General may well find himself forced to make painful choices between his obligations to the Supreme Court and his loyalties to the administration in which he serves. But in the long run—or more likely the middle run, since a single Term would probably suffice to make the point—those conflicts, although real, are equally, if not primarily, conflicts in the demands placed on the Solicitor General by the various agencies, officials and factions within the administration. A Solicitor General who devoted himself with abandon to an administration's causes would soon discover that his zeal, however popular in the Executive Office Building or other ruling circles, had quickly and seriously impaired his effectiveness as an appellate litigator. The tradition respected by past Solicitors General of seeking to serve the Court as well as the administration has a pragmatic as well as an idealistic basis; the Solicitor General's office adheres to that tradition not—or at least, not only—because its staff is unusually principled, or because the Court makes special demands on those lawyers, but because the large volume of government litigation in the Supreme Court compels the Solicitor General to husband his or her credibility with the Justices. That is a lesson which, if initially ignored by a new Solicitor General, will inevitably be relearned, at considerable cost to the Solicitor General, to his clients, and to the Court. Extremism in pursuit of any of the President's programs is not simply a vice, it is bad lawyering.

252. 474 U.S. 815 (1986).

253. 106 S. Ct. 3019, 3034 n.24 (1986). *See also id.* at 3049 n.46.

A Solicitor General's enthusiastic desire to represent the administration which appointed him may initially blind him to the conflicts within that administration. Zealotry on behalf of a given cause may impair the accuracy and balance of the Solicitor General's description of the law and facts, cloud the Solicitor General's assessment as to the limits of plausible argument, or skew his judgment as to the correct balance of justice and advocacy, errors which over time will impair the Solicitor General's stature with the Court and thus his ability to represent other causes. The allocation of essentially limited resources, the forty or so certiorari petitions to be filed each year, or the modest number of amicus briefs that can plausibly be submitted in nongovernment cases, requires a choice among administration goals and interests. At times there will be fierce internal disagreements regarding which policies the Solicitor General ought give priority to in the Supreme Court.

The traditional procedural independence of the Solicitor General is essential precisely because the Solicitor General is so often the focal point of these interagency, intra-administration conflicts. When the Solicitor General takes a position on the merits of an issue there will often, perhaps ordinarily, be someone in the administration who disagrees with the Solicitor General's conclusions. If an appeal of right were available to the Attorney General, or to the White House, it might be the unusual case indeed in which no administration official demanded that reconsideration. Higher level officials must resist entertaining such appeals, not because they are confident the Solicitor General is always right, but because they can be certain that someone else will almost always think the Solicitor General is wrong. Some exceptions are doubtless possible, but they must be handled in a way which will avoid precipitating an avalanche of appeals, or undermining the confidence of the Solicitor General and others that the Solicitor General's decisions will ordinarily be final.

The delicate balancing role which the Solicitor General's office so often plays makes it essential to protect that office from the various ideological fevers that occasionally rage through an administration. The Solicitor General's views, of course, must be reasonably compatible with those of the administration if he or she is to be able to sleep at night. But the Solicitor General cannot protect the Court, and the administration, from errors of judgment induced by ideological passions if he or she is among the impassioned. A Solicitor General who boasts of his enthusiastic personal support for the goals of an administration may well not understand that those goals invariably conflict, and that his enthusiasm may be not for the policies of the administration as a whole, but for those of a particular faction. The Solicitor General's staff must be chosen with

similar considerations in mind. The existence during the Reagan years of a "political" deputy, approved by and accountable to the White House, has been criticized as tending to impair the office's willingness to meet its obligations to the Court;²⁵⁴ it is no less serious an objection to this practice that the political deputy may have represented, not the diverse policy concerns of the administration as a whole, but the priorities of a particular circle of White House advisers. Precisely because of the need to understand the differing perspectives from which the justices will view a case, the Solicitor General needs on his or her staff lawyers with a variety of views and preconceptions. In 1983, the *National Review* complained about the number of "Carter holdovers swarm[ing] all over [the Solicitor General's Office];"²⁵⁵ but an office of lawyers who all agreed with Chief Justice Rehnquist would be likely to write briefs with which only Chief Justice Rehnquist could agree. "Holdovers" should be regarded, not as the detritus of an ideologically corrupt *ancien regime*, but as a welcome source of diversity and a guarantee of intellectual honesty. The next Solicitor General, particularly under a Democratic administration, ought to understand the value of retaining some of those much reviled Reaganites.

Independence is critical to the functioning of the Solicitor General's office, but the Solicitor General must wield that independence with judicious restraint. Living and working in the midst of an extraordinary swirl of social, political and public controversies, any Solicitor General with a modicum of intellectual curiosity would be tempted to join in the fray, to assume that the priorities of the faction with which the Solicitor General happened to agree represented the views of the administration or the policies of the President, to see in the law a mandate for whatever policies he or she chanced to favor. Even a Solicitor General who is able to resist those temptations will, under the best of circumstances, be caught in the middle of contentious colleagues from the White House, the Justice Department and other agencies, between competing obligations to various administration camps, to Congress, and to the Supreme Court, but in the middle is precisely the place where the Solicitor General ought to be.

254. McLaughlin, *supra* note 21, at 611.

255. L. CAPLAN, *supra* note 9, at 62-64, 135, 220; *Office Politicized*, *supra* note 10.

Note: After this Article went to the printer, a May 2, 1988 United States Supreme Court decision discussed at length the role of the Solicitor General. See *United States v. Providence Journal Co.*, 56 U.S.L.W. 4366 (1988).

