

6-1-1988

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Recommended Citation

Robert L. Stern, *The Solicitor General's Office and Administrative Agency Litigation*, 21 Loy. L.A. L. Rev. 1073 (1988).
Available at: <https://digitalcommons.lmu.edu/llr/vol21/iss4/8>

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The Lawyer's Magazine.

THE SOLICITOR GENERAL'S OFFICE AND ADMINISTRATIVE AGENCY LITIGATION*

Robert L. Stern

Mr. Stern discusses the work of the Office of the Solicitor General of the United States and his function in determining what cases shall be appealed by the Federal Government. He also explains the Solicitor General's relationship to the independent regulatory commissions which may wish to carry cases to the Supreme Court. This paper is based upon a talk before the Administrative Law Institute of the Administrative Law Section of the American Bar Association.

The practices and policies of the Solicitor General's Office in dealing with administrative agency cases are, with one or two differences, the same as in handling other cases. This paper will, therefore, consist mainly of a description of how the Office operates, with some reference to problems which concern the agencies particularly.

Congress has provided that there shall be an Attorney General who shall be the head of the Department of Justice,¹ and that there shall be a Solicitor General who shall be "learned in the law".² The Attorney General is the chief law officer of the Government, but he is primarily an administrator, policy maker and Presidential adviser.

The Solicitor General, on the other hand, may not unfairly be described as the highest Government official who acts primarily as a lawyer. He has few administrative responsibilities; he can devote his time to studying the legal problems which come before him. Moreover, he must stand on his own feet when he is presenting the most important Government cases to the Supreme Court.

The Solicitor General's staff of from seven to nine lawyers, two of whom act as First and Second Assistants, is almost always chosen on the basis of merit after a search within and without the Government for the best possible man who can be attracted, usually regardless of politics. Many have come from other parts of the Department of Justice or the

* Reprinted from 46 ABA J., Feb. 1960, at 154.

1. 5 U.S.C. § 291.

2. 5 U.S.C. § 293.

Government where they have proved their competence in working with the Solicitor General's Office. Many have been Supreme Court law clerks who have been chosen by the Justices on the basis of their outstanding ability.

A HIGH STANDARD AND A HIGH ESPRIT

In part because of the standard of selection and in part because of the job it has to do, the Office has had a high *esprit de corps* and a traditional standard of performance of "nothing but the best". This is recognized and respected by those both within and without the Government who deal with the Office, and the Supreme Court has come to expect it.

I will be speaking interchangeably of the Solicitor General and the Solicitor General's Office—really of the Solicitor General as an institution rather than as an individual. The Office, experience proves, molds the Solicitor General, who usually comes from an entirely different background from that of his staff, but almost invariably prides himself on conforming to the standards of the Office. The consequence is that the Office operates pretty much the same way no matter who is Solicitor General.

This does not mean that the Solicitor General merely rubber stamps what his staff recommends. Far from it, as would be obvious to anyone who knows the present Solicitor General, his immediate predecessors from Baltimore, or such distinguished earlier occupants of the Office as John W. Davis, William D. Mitchell, Charles E. Hughes, Jr., and Judges Reed, Jackson, Biddle and Fahy. The Solicitor General makes all important decisions himself. And his personality, of course, makes a difference. But he voluntarily adheres to the standards which the Office has long maintained.

1. Probably most of the time of the staff is spent reviewing briefs. All briefs, and this includes petitions for certiorari, jurisdictional statements in direct appeals, and briefs in opposition, are drafted originally by one of the other Divisions of the Department of Justice or one of the independent agencies such as the Labor Board, SEC, etc. There have been as many as 750 per year.³ The briefs are then reviewed by one of the Solicitor General's lawyers, as well as by the First or Second Assistant, if one of them hasn't reviewed it in the first place. This review may result in anything from a complete rewriting of the brief, down to sending it to the printer without change, which is something the reviewer much prefers to do since it is much easier. For most briefs the work lies

3. Statistics in this paper are taken from the Annual Report of the Solicitor General.

between these two extremes, and consists of revisions and modifications often made in collaboration with the original writer.

Whether and to what extent the Solicitor General personally reviews the briefs varies with the individual. He will, of course, scrutinize the briefs in important cases and the cases he argues. Some Solicitors General have insisted on reading all the briefs before they go back for final printing. Others have relied on the staff to call their attention to the important ones or those which present special problems.

2. Although oral arguments get most of the publicity, as in any law office they take the least amount of time. The Government is a party or *amicus* in about 60 per cent of the cases argued in the Supreme Court, and thus participates in sixty-five to ninety-five arguments per year. The Solicitor General assigns all Government arguments in the Supreme Court. He argues a number of the most important cases himself and distributes the rest among members of his staff and the attorneys in the Divisions of the Department or the independent agencies from which the cases came. When an agency is autonomous, like the ICC, the Solicitor General and its General Counsel agree on assignments, which means that the cases are divided between the Commission and the Department of Justice, as they probably would have been anyhow. About one half are argued by lawyers outside the Solicitor General's Office. On the whole, the agencies argue a larger proportion of their own cases than do the Divisions of the Department.

3. A principal function of the Solicitor General's Office is to decide what cases the Government can appeal. The Solicitor General's duties in this respect are not limited to Supreme Court cases. Whenever, in cases handled by the Department of Justice, the Government loses and the case is appealable, a recommendation for or against appeal or certiorari to the intermediate court or the Supreme Court must be made to the Solicitor General. There can thus be no appeal to any court, or for that matter no decision not to appeal, without his approval.

Since the administrative agencies generally handle their own cases in the lower courts, their litigation comes to the attention of the Solicitor General only when it approaches the Supreme Court. When the agency has lost a case, it decides whether it wants to petition for certiorari, or, when appropriate, take a direct appeal. If it decides to go ahead, it requests the Solicitor General to authorize the petition for certiorari or the appeal. Except for a few agencies like the ICC, which operates under special statutes which I'll refer to later, no agency can take a case to the Supreme Court without the Solicitor General's authorization.

All of these recommendations for or against appeals and petitions

for certiorari, whether from the Department of Justice or the agencies, are handled in the same way. The recommendation is reviewed by one of the lawyers on the Solicitor General's staff and also the First or Second Assistant, unless he reviews it in the first instance himself. They either note their approval on the recommendation or prepare their own memorandum for submission to the Solicitor General, who then makes the decision.

If there are differences of viewpoint or difficulties to be ironed out, conferences are held with the officials who have submitted the recommendation. Although the Solicitor General always carefully considers the views of the persons from whom the recommendations have come, he is more reluctant to overrule recommendations from the independent agencies than those from the Divisions of the Department. But the Solicitor General does not follow the agency recommendations if, in his best judgment as a lawyer, that would be clearly wrong.

THE STANDARDS FOR GRANTING CERTIORARI

Most cases go to the Supreme Court by way of certiorari. In determining whether to petition for certiorari the Solicitor General heeds the Supreme Court's frequent pronouncements, in its rules and elsewhere, that it will grant certiorari only when there is a conflict among the lower appellate courts, when the case is of general importance, or sometimes when there is gross error below—or perhaps when those factors are present in some combination. The Solicitor General attempts to apply the Supreme Court's standards. He will not take up every lower court decision which trial counsel in the Department, or the administrative agency, or the Solicitor General himself, believes to be wrong. Last term the Solicitor General petitioned for certiorari in thirty-two cases while the Government's opponents petitioned in 520.

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

The Solicitor General regards himself—and the Supreme Court regards him—not only as an officer of the Executive Branch but also as an officer of the Court. This is supposed to be true of all lawyers appearing before all courts, but the Solicitor General takes it seriously. As such he is aware of the necessity from the standpoint of the effective administration of the judicial system of restricting the number of cases taken to the Supreme Court to the number that the Court can hear. This alone permits the Court to give adequate consideration to the important matters which the highest tribunal of the land should decide. That is the policy

underlying the certiorari system which Congress and the Supreme Court found it necessary to establish to permit the Court to do its job.

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.

As Judge Thacher said, when he was speaking as Solicitor General before the American Law Institute in 1931:⁴

This duty brings with it 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.

The selfish reason for the Solicitor General's self-restraint in petitioning for certiorari is to give the Court confidence in Government petitions. 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.

Whatever the reason, from 50 per cent to 75 per cent of all Government petitions are granted, 67 per cent having been granted last term, as contrasted with no more than 10 per cent of other petitions.

The refusal of the Solicitor General to petition for certiorari provokes the most friction between his Office and the administrative agencies. I do not mean to suggest that disagreement is frequent or that there is conflict with all agencies. On the whole the agencies are aware of the Solicitor General's policies, as well as of the Supreme Court rules, and attempt to conform to them. Some agencies are so careful that there is seldom any difference of opinion.

But lawyers will not always agree on such matters, even lawyers representing the same client, and the Solicitor General and agency counsel do not always approach or evaluate a case in the same way. The latter also must follow the instructions of the agency itself.

Some of the agencies and their counsel—and I am sure that this is the case of other Department of Justice attorneys too—think that the Solicitor General holds too tight a rein in passing upon request for certiorari. They believe that he acts too much as an adjunct of the Supreme

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

Court and not enough as advocate for the United States or its agencies.⁵ Not infrequently, and not entirely jocularly, they remind the members of his staff, if not the Solicitor General, himself, that they are not members of the judiciary but are the part of the Executive Department which is supposed to act as lawyers for the remainder. On the other hand, I know that members of the Supreme Court frequently admonish a new Solicitor General not to be too liberal in authorizing certiorari.

A few agencies, by special statute, can take a case to the Supreme Court without permission from the Solicitor General. The Interstate Commerce Act makes the United States the principal defendant in suits to set aside ICC orders but allows the Commission to intervene separately and to appeal as a separate party.⁶ Some of the statutory provisions relating to the FCC, the Maritime Board and the Secretary of Agriculture were modeled on the Interstate Commerce Act, so that they also do not need the Solicitor General's authorization.⁷

The cases from these agencies are nevertheless submitted to the Solicitor General's Office in order to induce the Solicitor General to join in the petition or appeal on behalf of the United States, and usually the Office and the agencies work together in entire harmony. In case of initial disagreement each tries to persuade the other, and usually an accord is reached. When this is not possible, the agency can go ahead on its own, and the Solicitor General either stays out of the case or presents his own views independently.

The agency's autonomy works both ways. The fact that it may proceed without the Solicitor General's approval means that he does not have the entire responsibility for seeing that the agency's position is presented to the Supreme Court. This makes it easier for the Solicitor

5. In this connection Judge Sobeloff stated when Solicitor General:

The Solicitor General is not a neutral, he is an advocate: but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory, but to establish justice. We are constantly reminded of the now classic words penned by one of my illustrious predecessors, Frederick William Lehmann, that the Government wins its point when justice is done in its courts. [Sobeloff, *Attorney for the Government: The Work of the Solicitor Generals Office*, 41 A.B.A.J. 229 (1955).]

6. 28 U.S.C. §§ 2321-2325. It would seem more sensible for the agency to be the primary defendant, and for the Attorney General to have the right to intervene, since the agency is interested in all the cases and the Department of Justice in only a few. The present arrangement is the product of a history which need not be spelled out here. See H.R. Repts. 1619, 1620, 1621, 80th Cong., 2d Sess., especially "Additional Views".

7. 5 U.S.C. §§ 1031-1042, 64 Stat. 1129 (1950). In 1950 the statutory provisions for these agencies were revised so as to provide for review in courts of appeals instead of three-judge district courts and for going to the Supreme Court by certiorari instead of appeal. A similar proposal for the Interstate Commerce Commission failed to pass as a result of opposition by that Commission and its bar.

General to adhere to his own views. Whether this is the reason why it is the ICC which most often appears with the Solicitor General in opposition or not in support is not clear, but it may be a contributing factor.

WHICH SIDE SHALL HE SUPPORT?

The Solicitor General is faced in a small number of cases with a problem which seldom confronts a private practitioner—which side of a case should he support.

1. In a number of situations there are conflicting Government interests. There have been quite a few cases in which the Department of Agriculture, on behalf of farmer-shippers, opposed an order of the Interstate Commerce Commission. There have been disagreements between the OPA and the ICC, between the Wage and Hour Division and the Army, between the Federal Reserve Board and the Treasury, between the ICC and the SEC, between the Secretary of the Interior and the FPC, between the Railroad Retirement Board and the Social Security Board, between the CAB and the Post Office, and even between the CAB and the CAA.⁸

These intragovernmental disagreements cannot be settled internally by the Department of Justice. Many involved the independent agencies which are not bound to accept the Attorney General's opinion. In most of the cases private parties, such as shippers or railroads, employers or employees, who are not bound by any governmental opinion, are in a position to take the issue to court.

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.

When one of the competing interests can be represented only by Department of Justice attorneys or when the interest is one enforced by the Department itself, it is somewhat more difficult for the Solicitor General to be completely neutral, and I am not sure that he is. As an example, in reparations cases the Civil Division of the Department of Justice alone

8. See Stern, "Inconsistency" in *Government Litigation*, 64 HARV. L. REV. 759 (1951).

can represent the Government as shipper against the railroads.⁹

In cases under the Fair Labor Standards Act by employees against Government cost-plus contractors, the Civil Division customarily represents the defendant, although the Department of Justice also has an obligation to see that the Fair Labor Standards Act is complied with. The Solicitor General has supported both the Wage and Hour Division and the Army in such cases.¹⁰

It has been said that the administrative agencies fare badly when opposed to the antitrust policies of the Department of Justice itself. I believe there may be something to this, though perhaps more because of the instincts of the Solicitor General's Office than by design. But this occurs most often when the agency, like the ICC or Maritime Board, has authority to appear separately on its own behalf.

For example, in the recent *Isbrandtsen* case,¹¹ the Solicitor General opposed a Maritime Board order which sustained a rate structure discriminating against shippers who would not give all their business to a combination of shipping companies, thus upholding the antitrust viewpoint against that of the Maritime Board. I was in that litigation at an earlier stage, and I know the Solicitor General's Office then thought the Maritime Board's position wrong as a matter of law.

But the Solicitor General does not invariably support the Antitrust Division. In a recent Antitrust Division case involving trademark rights in imported perfume, he confessed error on the Antitrust Division, when its position conflicted with that of the Treasury Department.¹²

2. This leads to the second type of unusual problem confronting a Solicitor General. Whatever position the Government has taken in the lower courts, he will not support a contention which he believes completely untenable, even if he has to confess error. One of the reasons why the Solicitor General confesses error, instead of acting as the completely enthusiastic—and one-sided—advocate, is to keep his own and the Government's credit high in the Supreme Court. The more important reason is that as chief law officer of the United States in the Supreme Court he feels it is his duty to adhere to the law when he thinks a case can rightly

9. As in *United States v. Interstate Commerce Commission*, 337 U.S. 427 (1949).

10. *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446 (1948); *Powell v. United States Cartridge Co.*, 339 U.S. 497 (1950).

11. *Federal Maritime Board v. Isbrandtsen*, 356 U.S. 481 (1948).

12. In 1931 Solicitor General Thacher stated that: ". . . a tradition has grown to regard the interests of the Government as best served by an attitude toward litigation of absolute candor and fair dealing, which will not tolerate injustice whether the result be favorable or unfavorable to the United States." *Loc. cit. supra*, Note 4.

be decided only one way¹³—even though this may not be the way Government counsel argued in the court below. This doesn't happen often, of course. I don't want to encourage my brethren of the private Bar to become optimistic that they can convince the Solicitor General to confess error whenever they have lost to the Government in the lower courts.

If the Government has lost below, the Solicitor General can avoid taking a position he thinks is wrong by refusing permission to take the case higher. But sometimes the Government has won, and the Solicitor General will not even hear of the case until the other party has taken it to the Supreme Court. Most of these cases do not involve the administrative agencies, but have been handled through the lower courts by the United States Attorneys, who lack the time and facilities for legal research which a case receives when it reaches the Department of Justice in Washington for consideration at the Supreme Court level.

In one such case¹⁴ a sailor was refused entry to the United States on the ground that he had committed a crime within five years of the attempted entry. There was no question that he was coming in from Cuba, but the only reason he was in Cuba was that his American ship had been torpedoed en route from California to New York. Although the lower court had literally applied the statute, the Solicitor General thought this too raw and conceded that in such circumstances a sailor should not be deemed to have left the United States.

Occasionally an administrative agency is involved. If the Solicitor General is convinced that its position cannot be supported, he will normally authorize it to represent itself, and may or may not take an affirmative position in opposition.

An example is the well-known *Standard of Indiana* case¹⁵ under the Robinson Patman Act. When that case first reached the Supreme Court in 1950, the Solicitor General's Office thought the Federal Trade Commission wrong in holding that meeting the price of a competitor was not a defense. Prior to that time the head of the Antitrust Division had stated to a congressional committee that the Department of Justice disagreed with the Commission on the question in issue. The Solicitor General's staff made its own independent analysis before coming to the same conclusion. The Solicitor General authorized the Commission to handle the case in the Court on its own but filed nothing himself.

Another example was a case decided in 1950¹⁶ which involved a

13. *Guerlain v. United States*, 115 F. Supp. 77 (S.D. N.Y.), *rev'd* 358 U.S. 915 (1958).

14. *Delgadillo v. Carmichael*, 332 U.S. 388 (1947).

15. *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1950).

16. *Railway Labor Executives Association v. United States*, 339 U.S. 142 (1950).

provision in the Interstate Commerce Act requiring the Commission to protect employees against displacement for four years following the effective date of a Commission's order authorizing a consolidation of terminal facilities. In the particular case, it was known that the construction of the New Orleans terminal would take five years, so that many employees would not lose their jobs until five years after the effective date of the order. The Commission held that it lacked authority to extend the employees protection beyond four years from the approval of the consolidation, although according protection during this period would have been meaningless. The Solicitor General was convinced that the Commission's literal construction of the Act was absurd and contrary to its purposes. Even though the Department of Justice had supported the Commission in the lower courts, he opposed the Commission in the Supreme Court. The Commission presented the argument in support of its own position, but unsuccessfully.

Whether or not error should be confessed or an agency not supported usually does not present a simple problem. The Solicitor General is aware that to confess error will not only infuriate the attorneys who have handled the case for the Government below, but also the judges who were persuaded to decide in the Government's favor. It is very embarrassing to meet these judges shortly after one has confessed error on them in the Supreme Court.

Thus, the Solicitor General must do considerable soul-searching before he reverses the Government's position. It cannot be enough that he thinks the Government may lose on appeal. He must believe that there is no respectable argument on the Government's side. There have been cases in which the Solicitor General's Office almost confessed error which the Government subsequently won in the Supreme Court, and this, of course, emphasizes the need for humility. Nevertheless, so far as I know, every Solicitor General for years—I am told at least since 1890—has been willing to concede that the Government was wrong when he was convinced of that fact.

You may ask what is gained by the intervention of the Solicitor General's Office into litigation which has been handled by other Government lawyers in the lower courts. Many of those lawyers in the Department and the agencies have asked the same question, and perhaps I did myself when I was in the Antitrust Division writing briefs for the Solicitor General's Office.

I think it is generally recognized, even by the lawyers for the agencies, that the Government benefits in four ways, which are interrelated.

(1) In the first place the quality of briefs and often of arguments is

greatly improved. This does not result from the fact that the lawyers on the Solicitor General's staff are necessarily more skilled than the persons whose work they are reviewing. Often they are—but sometimes they are not. As I have indicated, the reputation of the Office and the nature of its work enables the Solicitor General to attract very capable lawyers.

But even as between lawyers of equal competence the review in the Solicitor General's Office customarily improves the product. In part this is because any fresh mind is likely to have a fresh viewpoint. Two minds are better than one—and this is true irrespective of which does the drafting and which the reviewing. I know that whenever I wrote a brief *de novo* in the Solicitor General's Office, and that was sometimes done, I would send it to the appropriate division for review and improvement.

(2) The reviewer in the Solicitor General's Office is, however, more than merely a fresh mind. The nature of his job, as compared to that of the specialists who have drafted the brief he reviews, gives him a broader perspective and greater objectivity. He specializes in the Supreme Court, not in a particular subject. He is far enough from the trial of the case to be able to see its significance as a whole. He is better able than the lawyer who works only in one field to guess how a judge who is also not a specialist will react to a case, and to frame the presentation, written or oral, accordingly.

I remember reviewing a tax brief which started out by talking about Section 103(B)(1)(X), or something like that, as if every person of sound mind must have known what that was since the third grade—or at least the third year of law school. Specialists often cannot appreciate what other persons, even other lawyers—and perhaps even Supreme Court Justices—don't know.

A former General Counsel of an agency stated that he was sure that its "written presentations to the Supreme Court gained greatly in the course of processing by the Solicitor General's Office". In that connection, he said: "I believe that review by lawyers not having detailed familiarity with the law administered by particular agencies is more likely to be helpful than review by an agency alumnus who happens to be in the Solicitor General's Office".

(3) The third way in which the Solicitor General's Office affects the handling of litigation is through the attempt to comply with the Supreme Court's standards, to which I have already referred. This serves to keep the Government's credit high in the Court, and also is helpful to the public interest in the administration of justice, which the Solicitor General believes it is part of his function to serve.

(4) The fourth basis for centralizing control of Government

Supreme Court litigation in the Solicitor General's Office is the need for coordination. For the Government to take different positions in different cases as to the meaning of a provision of the Administrative Procedure Act, for example, would obviously weaken the effectiveness of the Government's presentation. Similar questions of procedure and evidence and even constitutional law may arise in cases under different statutes handled by different parts of the Government. And it would be improper for the Government to take a position on the law in order to win a particular case when it was taking a different position in other cases. A General Counsel of an important agency, who believes that on the whole the agency should not be subject to as much control by the Solicitor General as is exercised, says:

. . . it is, in my opinion, plainly necessary that there be some centralized control over both substantive and technical issues the agencies of Government desire to take to the Supreme Court. Without coordination of the efforts of the Government's many arms, departments and agencies, I feel that the Court might well be faced with conflicting or even diametrically opposed views of different branches of Government on specific questions, which would be intolerable.

The fact that in a very small number of cases, such as I have mentioned, agencies publicly take opposing positions does not mean that coordination is not generally beneficial.

Even when there is no possibility of conflict or disagreement, the knowledge which the Solicitor General's Office has gained in cases on behalf of one part of the Government may be extremely helpful in representing another part. The existence of one group of lawyers to some extent familiar with Government litigation generally and with the work of all agencies is particularly important in the field of administrative law.

The thought will doubtless occur to you that such coordination should exist before cases get to the Supreme Court. That sounds very simple and sensible. The difficulty is that the volume of Government litigation in the lower courts is so vast that no person could possibly become familiar with much of it. There aren't enough hours in the day, or perhaps enough cells in the brain. Lawyers who work steadily at tax law or antitrust law, or for the ICC, the SEC or the Labor Board just aren't able to—and don't—keep up with Government cases in other fields.

Apart from that, to require clearance of all cases through one central group of lawyers would create a bottleneck which would tend to delay everybody. The bottlenecks in the various divisions of the Depart-

ment of Justice resulting from the need for clearance of their business through the Assistant Attorney General—and to some extent in the Solicitor General's Office with respect to appeals to the Courts of Appeals—are often bad enough, and they operate on a much smaller scale. These difficulties and delays require giving the attorney handling a case in the lower courts considerable freedom from review in Washington, and certainly from review of all Government litigation in a single office. Even at the cost of an occasional confession of error in the Supreme Court, it is better to wait until coordination is practicable, as it is at the Supreme Court level, before attempting it.

I do not mean to suggest that the Solicitor General and his staff are the only attorneys in the Government who are extremely competent, objective or familiar with Supreme Court standards. We all know that this is true of many other lawyers in the Department of Justice and in the agencies, and particularly of those in the appellate sections with which the Solicitor General most often deals. This is the reason there is so little discord in the system.

The attorneys who deal frequently with the Solicitor General's Office usually try to apply Solicitor General's standards in their own bailiwicks. I suspect that they get away with this in part because the agency's recommendations must eventually secure the Solicitor General's approval.

The question may be asked whether the Solicitor General's authority over the Supreme Court litigation of the agencies does not impinge upon their independence. Such bodies as the ICC, the FTC, the SEC and the Labor Board were meant to be free from Executive control. They are often described as legislative agencies carrying out the policy of Congress, and the President is not supposed to control their decisions or to dismiss their members except for exceptionally good cause.

To subject the Supreme Court litigation of such agencies to the authority of an official who is not only under the President but also subordinate to the Attorney General and now the Deputy Attorney General seems inconsistent with the theory that the agency is not subject to Executive or political controls. For an agency's policies can be frustrated if it is prevented from defending its position in the Supreme Court.

Despite this possibility, in the over twenty years in which I have been familiar with the Solicitor General's Office, both from the inside and the outside, I have never heard it criticized on the ground that it was acting as a political arm of the Administration. On the contrary, an attorney in one of the other Departments has aptly characterized it as

probably more objective and free from political influences than any other office or agency in the Government.

Disagreements between the Solicitor General's Office and agency counsel are usually attributable to differences of opinion on questions of law, on whether the Supreme Court's standards for review have been satisfied, or on how the Supreme Court is likely to react to an issue.

To what extent do the Solicitor General's opinions as to policy, as distinct from politics, enter into his decisions in reviewing agency recommendations? Some agency representatives believe that since Congress committed questions of policy to the agency, the Solicitor General has no business substituting his own judgments on such matters.

The Solicitor General recognizes that it is the agencies' function to determine how the statutory policies should be carried out. But in determining close questions of statutory interpretation, it is often difficult to disentangle a person's view as to what is sensible or right from his opinion as to how the law should be construed. And what one person will reasonably regard as a decision based on law, another will reasonably believe to have been based on policy, as must be clear to anyone who reads what Supreme Court Justices say about each other in majority and dissenting opinions. In my opinion, the Solicitor General seldom does substitute his opinion for that of the agencies on anything which would be describable as a clear-cut matter of policy. But I cannot say that he never does—although he would do so only in what he thought was a very clear case.

Despite the self-restraint which most Solicitors General exercise in their treatment of agency recommendations, the answer must be that when the Solicitor General has the last word on Supreme Court matters, the freedom of the agency is to some extent curtailed. The extent of this is lessened by the fact that in some cases of disagreement, the Solicitor General authorizes agencies to appear for themselves.

When an agency is permitted by law or by the Solicitor General to represent itself, the Solicitor General's failure to join with it in signing the brief indicates to the Court that he is not in accord with its position. Although not quite the kiss of death—agencies sometimes win in these circumstances—this kind of handicap certainly does not help them. But as long as the agency can take its case to the Court and state its position, its independence has not been impaired.

Have the effects of this control by the Solicitor General been good or bad? Should he have the complete authority he now exercises over many agencies, or none at all, or should both the Solicitor General and the agency be permitted to appear independently, as in the case of the ICC?

My judgment as to this can hardly be unbiased. When I was in the Solicitor General's Office, the Solicitor General's decisions, strangely enough, seemed very reasonable—to me.

Since I could not trust my own objectivity, I sought the views of distinguished lawyers who are or have been counsel for independent agencies. Almost all agree that the Solicitor General's Office improves the quality of the agencies' briefing, that its objectivity and broader perspective are generally helpful, and that some coordination in the handling of Supreme Court litigation is desirable.

But a number of them feel that the agencies should be free from the Solicitor General's control. At least two have recently recommended to Congress that this control be removed. In particular, they do not think that he should have the last word on whether the agencies can petition for certiorari or appeal. The recent report of the Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, H.R. 2711, 85th Cong., 2d Sess., January 3, 1959, page 10, contains the following recommendation:

Each commission should be allowed, as a matter of right, to participate and be represented in judicial proceedings involving the statute and regulations which it administers.

One agency counsel suggests that the Solicitor General should not override an agency's recommendation except when it is necessary to achieve harmony and consistency in the presentation of Government cases. Another urges that the Solicitor General may overrule an agency's recommendation for what may be called legal reasons, but not because of policy or philosophical considerations, a line which is not easy to draw. And some think he should not have power to override the agencies at all.

A number of persons from whom I heard stated, on the other hand, that although they may have disagreed with the Solicitor General's judgment in particular cases, the system as a whole has been beneficial, because of the quality of the lawmanship in the Solicitor General's Office and the advantage of unified control by attorneys with a broader viewpoint. They stress the great weight which the Solicitor General has always given to the agencies' recommendations, and on the whole feel that the present practice works well. And this was the view of most of the persons who in the past have been both counsel for the agencies and members of the Solicitor General's staff.

As you may probably have gathered, this would be my own opinion, for what it is worth. On the other hand, I can see the agencies' side of the case, which is both logical and quite sensible from their point of view. I don't believe that the world, even the judicial world, would come to an

end if other agencies were given the freedom which the ICC now possesses, or even more—though I suspect that the Supreme Court would not like it, and that the agencies would benefit extremely rarely by winning more cases than they do now.

The ultimate question is not whether the Solicitor General is invariably right when he overrules agency recommendations. Of course, he is not. Even the Supreme Court has been said to make mistakes. The point is whether, since the final decision must be made somewhere, the advantages of having it come from an institution with the tradition, standards and competence of the Solicitor General's Office outweigh any impingement upon the independence of the agencies. And the public interest in the effective operation of the Supreme Court, as well as the public interest in having the Government win cases, must be counted in the balance.

Even though the Solicitor General's authority is inconsistent with the theory of agency autonomy, in practice it has, I think, been helpful, not harmful, to the public and the Government as a whole, including the agencies. And that should continue to be true so long as the Office operates with the combination of competence and self-restraint which it has shown in the past.