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## Rex E. Lee Conference on the Office of the Solicitor General of the United States: Clinton II Panel

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## Faculty Publications



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### Rex E. Lee Conference on the Office of the Solicitor General of the United States: Clinton II Panel

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Acting Solicitor General, 2001

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Clinton II Panel

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Seth P. Waxman: Solicitor General, 1997–2001.

Walter E. Dellinger III: Acting Solicitor General, 1996–1997.

Barbara D. Underwood: Acting Solicitor General, 2001; Principal Deputy Solicitor General, 1998–2001.

Michael R. Dreeben: Assistant to the Solicitor General, 1988–1994; Deputy Solicitor General, 1994–present.

**Seth Waxman:** I came up here and promptly put my papers down firmly between Michael Dreeben and [the statue of] Rex Lee, which is a wonderful place to situate oneself. I came back from the break to find my papers placed in the number one seat. That being now the case, I will use my prerogative to take the last fifteen minutes of this session. It makes sense for Walter to speak first, since he was the acting SG during the first seven months of Clinton II. I suggest we then hear from Barbara and Michael, and I will bat clean up—taking the unenviable position of being the only thing that stands—or speaks—between you and lunch. I am quite mindful of my own highly underdeveloped capacity for self-restraint when speaking without the Supreme Court’s red light. So it is partly to protect myself that I will go last.

**Walter Dellinger:** The last time I was here, I knew I was going to be taking over the SG’s Office and had a chance to meet with Rex Lee privately. After a wonderful lunch that we had—and no one else knew—I told him in confidence that I was going to be taking over that office. It was a truly wonderful experience.

I have here a surprising number of former students, for someone of my youth. On the faculty of Brigham Young University, Lynn Wardle and Jack Welch; and elder of the Church [of Jesus Christ of Latter-day Saints] Todd Christofferson, are all former students of mine, as well as Michael Dreeben and Ken Starr—an unusually large number that makes me particularly honored to be here.

Let me slow down and calm down a bit.

**Seth Waxman:** Don't slow down too much!

**Walter Dellinger:** I'll speak more slowly within the allotted time of this panel.

I think there have been eras in which the Solicitor General's Office in a sense tried to wall itself off from the administration and hoped that other people were not noticing what it was doing. If they read about it in the papers, that was fine, but it was too late to do anything. As I was beginning to describe [in the previous panel], I took almost the exact opposite tack—active confrontation—in order to make sure that my superiors, the attorney general and the president, understood the professional view of the long-range interest of the United States. I think probably I met more frequently with the president on legal issues that Ken was describing, and I gave this advice to Ted Olson when he and I had meetings before his confirmation hearings.

I thought it useful to go over to the White House before the term began to meet with the attorney general and the deputy attorney general and then to go meet at the White House with the president and the White House Counsel. I reviewed everything that was coming up and what position we would plan to take, and which ones we thought they might disagree with us on, and if they were inclined to disagree with us, why I thought they were wrong.

I had the advantage of longevity in the administration when I came in, which was a very useful fact. I had been head of the OLC [Office of Legal Counsel] for nearly four years, and I was accustomed to telling the administration “no,” which is something you do more often in the role of solicitor general. Particularly given some of the particularities of this administration, I had to say “no” perhaps more often than usual, but I was quite comfortable with that role and with fairly regular communications with the White House.

As I said, I tended to wind up pushing us in a somewhat more conservative direction just by the nature of the office. The short example is *Agostini v. Felton*,<sup>204</sup> where I did believe it was fully defensible that we could ask the Court to overrule *Aguilar v. Felton*.<sup>205</sup> [We believed] the use of Title I funds to provide remedial assistance to low-income, learning-disabled children wherever they

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204. 521 U.S. 203 (1997).

205. 473 U.S. 402 (1985).

can be found during the school day, including the public schools, was both constitutional and highly defensible, and we were not asking the Court to reconsider its 1970s precedent. And though we tried to be somewhat cautious, I did have to ignore some constraints from those that wanted us not to set a precedent that would lead to a bad outcome. It was inevitable that a decision overruling *Aguilar v. Felton* would be a step down that road, but I did meet early and often with the Secretary of Education to make sure that he understood the position we were going to be taking.

I think it is very important in certain cases to recognize that the president is your superior, and not some deputy White House Counsel. I much admired one solicitor general whom I heard say on the phone when he was asked, “Do you recognize that the president has the authority to overrule you?” He said, “I do recognize that. What I do not recognize is that I was speaking with the president of the United States.” As, of course, he was not. On one occasion when Jack Quinn spent some hours trying to persuade me that we wanted to be supporting referendum advocates in a case called *Arizonans for Official English v. Arizona*,<sup>206</sup> [because] the Ninth Circuit had taken a case that was jurisdictionally flawed in nine different ways and because we sort of believed in referendum people. I finally had to say, “If you want to take this to the president, take it to the president.” A great check is to tell people that you want the president personally involved. “If you think it is important enough to engage the president, then I am happy to be overruled. I am happy to be overruled. But I am not talking to the president.” I actually learned that from one of my predecessors. That, I think, is a very good stance to take, that an SG be overruled on a question like that only if the matter is of sufficient importance that it is taken to the president, and the president hears you out. And then I think you ought to carefully acknowledge who is elected by the electoral process of Article II of the Constitution and who is not, who is named in the Constitution and who is not, and who is entitled to make these decisions for the executive branch and who is not. That is the key.

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206. 520 U.S. 43 (1997).

In *Piscataway*,<sup>207</sup> Sharon Taxman was dismissed [from her job as a high school teacher]. She would have been entitled, by virtue of winning a coin flip, to seniority to maintain a position when the school board reduced the number of positions in the business faculty.<sup>208</sup> I think there was no defense of diversity there that was at all tenable because the school system did not lack diversity—it was only a lack of diversity among ten teachers in the business curriculum—and there was no showing that any students had their curriculum dominated by courses in this one particular part of the high school curriculum. The Bush administration had joined Sharon Taxman to bring this lawsuit. During Clinton I, we had reversed positions and sided with the school board defending their policy. I had argued against that from my vantage point at OLC, and when the matter got to the Supreme Court, I found myself in the position of making the call in the Solicitor General’s Office.

I was told there was no way we could get the administration to do a double reverse and a double back flip, but I really thought the position we would be arguing was utterly untenable. It was wrong as a matter of law and terrible for a civil rights policy. To me it was as untenable as the position that Don [Ayer] was faced with in arguing that the right answer is zero—to argue why, in light of *Wygant*<sup>209</sup> and other cases, the right answer is that you do not need any justification, or you do not need to demonstrate a lack of diversity or not in this case. I thought the predicted reaction of the Court was to say that “if this is what they think they mean by affirmative action, we are going to have to say the only answer is zero.” And I do not happen to believe that the right answer is zero. I believe it is somewhere along the axis of where Justice Powell and Justice O’Connor would be.

But in that instance, knowing how difficult it would be to get the administration to suffer a reversal on the part of the civil rights

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207. *Taxman v. Bd. of Educ. of Piscataway*, 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117 (1997), *cert. dismissed*, 522 U.S. 1010 (1997).

208. When layoffs were necessary, state law required the school board to retain the teachers with the most seniority. In cases where teachers of equal seniority both had a claim to the last available position, the school board’s policy was to determine by a coin flip which teacher would be retained. Taxman (who is white) and a black teacher had equal seniority, but only one of them could be retained. Instead of following the coin-flip policy, the school board decided to lay off Taxman in the interest of creating a diverse faculty. *See Taxman*, 91 F.3d at 1550–52.

209. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

community, I scheduled meetings with the leadership of the civil rights community and explained what our position was going to be. I can say that I knew that they would disagree, but thoroughly ventilating it with them [was important] before I then asked for a meeting with the president, where I was accompanied by my deputy, Seth Waxman. I think that was one of the best meetings I had in the government, where we set out why we thought we needed to take the position that we thought that the school board was wrong and that Sharon Taxman should prevail, even though we thought the Third Circuit had gone too far in a scorched-earth, zero-is-the-answer opinion. The president agreed to let us do that, and I thought early engagement was the way to take that position.

Finally, let me just mention one other example. Not only is it proper for the solicitor general to enter into cases where he believes that the Court may have gone wrong, but he can also be useful even where the administration does not have a programmatic interest. Being an amicus is a real joy because you can sort of pick your position. You do not have a real client. That was true of the physician-assisted suicide cases, where I thought our office played its most useful role of any in my time.

The physician-assisted suicide debate came down, in that term, to a debate between what I thought were somewhat untenably extreme positions. One was the right-to-die position, argued by the advocates who had prevailed in the Ninth Circuit and in the Second Circuit, that there was a constitutional right to die. The argument by the states of New York and Washington was that there was no cognizable liberty interest involved here at all. Now, I was persuaded by talking to a number of people—by some very thoughtful reflections by career people at the SG's Office—that there really was a deeply cognizable liberty interest in ameliorating pain and suffering. But that ended there. You could not simply say there is no liberty interest here; *Cruzan's*<sup>210</sup> supposition that one has a right to resist unwanted medical treatment should really be the law—there should be a liberty interest in declining unwanted medical treatment, and that should be extended to those who wish to avoid the infliction of pain. But for the present, the states did have a quite legitimate and, indeed, compelling interest in preventing lethal medication, and there were not sufficient safeguards in place. The

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210. *Cruzan by Cruzan v. Mo. Dep't of Health*, 497 U.S. 261 (1990).

line they used at oral argument was to say that the problem that the states are concerned with is a legitimate one: in a managed care, cost-conscious system, lethal medication is the least expensive treatment for any illness. So the states have, at this time, a very serious reason for not unleashing cheap, inexpensive lethal medication in the cost-conscious medical care system, but you should not say that there is no liberty interest here of any substantiality at all.

So we were able to take the position that made the states somewhat unhappy, though our bottom line was that their statutes were constitutional, and that made the right-to-life philosophical commitment group unhappy. And I thought it made Justice O'Connor unhappy because she started questioning me about it before I could say, "May it please the court." But it is the position she came to. She already had come to it and was testing it out. That allowed Justice O'Connor to capture the Court, essentially adopting the position of the middle that we put forth. I think the two sides of the client interests did not have the flexibility to argue a more intermediate position, which really did appeal to the Court. I think that it is a very useful function to have a body who can sometimes take a position in between what the parties do. It does not have to be the solicitor general, but [the SG's Office has] the only people who have access to the Court, to come in in certain cases without a strong client agenda and to try and help the Court figure out what is the right resolution.

The single best decision I made as solicitor general was to select Seth Waxman as my deputy. And to save time for Seth, I will move this on to Barbara.

**Seth Waxman:** Thank you, Walter. When I said, "Don't go too slow," I hope you understood that—

**Walter Dellinger:** I did. You have said it to me many times! [Waxman and Dellinger laugh.]

**Seth Waxman:** Barbara was my "political" deputy—I guess that is what we are calling it for purposes of this conference. When I became SG I understood that I could pick pretty much anyone I wanted as a political deputy. I do not think I have ever had a "political" conversation with Barbara, and I do not consider myself



to be much of a political partisan. In fact, I am quite confident that this was the only time that the political deputy position has been filled by a career prosecutor. My prior professional involvement with Barbara was in the role of her student: Barbara taught me Criminal Law I and Criminal Law II at the Yale Law School. When I joined the administration of Janet Reno, I was amazed to discover that Barbara was the First Assistant U.S. Attorney in the Eastern District of New York. And when I became SG and thought hard about what I most wanted in terms of a deputy, it was the person who had made such an impression upon me as a young law student. And so my “political deputy” was in fact detailed from the Executive Office of United States Attorneys. So, for the views of my “political” deputy, here is Barbara.

**Barbara Underwood:** In that vein, I think I probably had the distinction of being the only political deputy to be retained as the acting solicitor general by a new administration of a different political party. I took it as a tribute to the nonpolitical character of my work as the so-called political deputy. I suggest that “political” is not quite the right word. The person in that position is also, and more appropriately, known as the principal deputy. It’s a position that allows the head of the agency to appoint one new deputy to work with the career deputies who remain from one administration to the next. It makes a lot of sense, and not just “political” sense, that when somebody becomes the head of an office that person should be able to bring in one new principal assistant. Maybe I am particularly sympathetic to that view since I have gone from one government office to another in just that role—as first assistant, or right-hand person, to a series of state and federal agency heads.

Most of what I did in the Solicitor General’s Office was completely without political content, but it is true that the principal deputy can play a role in dealing with the White House, or with political people in other agencies, in a way that might be more difficult for career members of the solicitor general’s staff.

One case that required me to discuss sensitive political questions with people in the White House Counsel’s office was *Stenberg v. Carhart*,<sup>211</sup> the so-called “partial birth abortion” case, which involved a state statute that was, as the Supreme Court eventually

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211. 530 U.S. 914 (2000).

held, both hopelessly vague and an undue burden on women's health and abortion rights, but at the same time was aimed at a problem in which the states had a legitimate interest. Prior administrations had been criticized for filing *amicus curiae* briefs in abortion cases, on the ground that the federal government had no programmatic interest in the issue. But it seemed clear to, among others, the Department of Health and Human Services that we did have a strong programmatic interest, because the federal government provides or pays for health services, including abortions, to people who depend for health care on the Indian Health Service, the federal Bureau of Prisons, or Medicare or Medicaid, and thus the statute could affect the ability of the federal government to provide or pay for medically appropriate abortion services to those people. The Department of Health and Human Services was a very strong proponent of filing a brief *amicus curiae* in support of the doctor's challenge to the statute.

In addition, the president had taken a strong public stand on the issue. Congress had passed somewhat similar bills, and the president had vetoed them stating that these particular bills were vague and were an undue burden on the right to abortion, but that he would sign a suitably precise and tailored bill that allowed abortions of this type when necessary for a woman's health.

The question was whether we could and should file a brief that would (1) protect and advance the interest of the Department of Health and Human Services, (2) be consistent with what the president had said, and (3) be useful to the Court, or whether we should just stay out of the case. Some thought that it would be appropriate for the solicitor general to file such a brief, but that such a brief could not be written. That, of course, was a lawyer's challenge. We set out to meet the challenge by drafting a brief that met all three objectives, we persuaded the skeptics that we had done so and filed the brief, and the Supreme Court essentially adopted our views.

In the course of working out the government's position in that case, we served a function that is quite characteristic of the solicitor general's role as *amicus curiae*. It's a role that Walter was just describing in the right-to-die cases. We took a more moderate position than that favored by either of the parties in the case. The lawyers for the doctor wanted to argue that any attempt to regulate the method by which abortions are performed is unlawful, while the

state took the position that almost any regulation short of prohibition is lawful. We were saying something in between—that while there is room for lawful regulation of abortion, this statute had two fatal defects: first, it was so vague that doctors could not know whether they were complying with it or not, and second, it was too broad, in that it prohibited abortions that were necessary for the health and safety of some women.

That whole process of deciding whether to file and what to say in such a politically sensitive matter would have been very difficult for someone who did not have the political confidence of the White House Counsel's office as well as the professional respect of the lawyers in the Solicitor General's Office. Convincing the president's staff that the brief satisfied all the necessary interests required political—or perhaps diplomatic—skills. But writing the brief required only the traditional advocacy skills familiar to every member of the solicitor general's staff.

The work of the Solicitor General's Office calls on advocacy skills of a very special sort. I'd like to talk about one role of the solicitor general that is not often available to other litigants: the role of helping the Court to decide which of the many possible cases should be selected as the vehicle to bring an issue before the Court. The laws and legal theories that the solicitor general defends can arise in a wide variety of factual contexts, and the SG has a greater opportunity than most litigants to try to put the government's position before the Court in a case with favorable facts.

We tried very hard to do that in a series of cases that arose during my tenure involving the Disabilities Act.<sup>212</sup> One issue was whether the Disabilities Act protects people who have correctable disabilities. The [Justice Department's] Civil Rights Division and the EEOC [Equal Employment Opportunities Commission], who enforce the Disabilities Act, argued strongly that it does. We hoped to present that issue to the Court in a case involving diabetes or epilepsy—serious conditions that can be controlled with medication, but nevertheless often result in discrimination. Unfortunately, the case in which the Court decided the issue involved not people with epilepsy or diabetes, but people who were near-sighted and wore glasses.<sup>213</sup>

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212. Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12150 (1990).

213. *Sutton v. United Airlines*, 527 U.S. 471 (1999).

The Court had asked for the views of the solicitor general as to whether certiorari should be granted in the glasses case, and we urged the Court not to take the case. Unfortunately, they ignored our advice. Not surprisingly, on facts like that, the Court found that the Disabilities Act does not cover correctable disabilities.

In another case we had more success in getting a legal question before the Court on sympathetic facts. Many states were challenging the applicability of the Disabilities Act to state governments, as employers and as providers of public facilities. In defending against that challenge, we wanted to go to the Court in a case involving especially egregious discrimination. My personal favorite was one involving a state courthouse that was accessible only through large flights of steps. A person in a wheelchair was suing to compel the state to provide him with access to the courthouse by some means other than crawling up the steps. That case remained pending in the court of appeals, and was not ripe for review by the Supreme Court. But we found another case that also presented very sympathetic facts: a recovered breast cancer patient who had been removed from her job as a nursing supervisor in a state hospital.<sup>214</sup> Despite the favorable facts, and despite a really splendid legislative record of state discrimination on the basis of disability, the Court nevertheless rejected our position and found the states immune to suit. I suppose that shows that facts are not everything; sometimes there is simply a pure disagreement about the law.

In another case, though, the process of trying to engineer the facts may have made a difference. There was a split in the circuits about whether a law enforcement officer could invoke qualified immunity to a suit for the unconstitutional use of excessive force. Some courts had held that there could be no immunity in such cases, because immunity is only for reasonable mistakes, and excessive force is by definition unreasonable. Other courts had adopted our view, that because the law of excessive force evolves, an officer can make a reasonable mistake about actions a court later finds unreasonable.

The issue was before the Court in a state tort case in which a New Orleans police officer had shot a fleeing felon in the back, paralyzing him; the paralyzed man had sued the officer. While the officer claimed he saw a gun, there was no evidence to support that claim, or so the briefs said. The Fifth Circuit had ruled that although

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214. *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

the officer used excessive force, he was entitled to immunity from suit because his mistake was reasonable,<sup>215</sup> and the case was now before the Court on the victim's petition to the Supreme Court. We were quite concerned that this case was going to make bad law for the government, that the Court would conclude that there can be no immunity for use of excessive force, because an officer can never be reasonable in doing an unreasonable thing like shooting somebody in the back.

I asked the attorney who was working with me on the case to dig into the record to see what we could find. There had to be more to this story. We found two gems in the record. First, we found that these people were running through a swamp in waist-deep mud, so their failure to find the fleeing felon's gun did not show he didn't have one—if he had dropped it in the mud they would have been unable to find it.

**Seth Waxman:** That also gives new meaning to the word “fleeing.”

**Barbara Underwood:** Yes.

**Seth Waxman:** If they are waist-deep in the mud.

**Barbara Underwood:** And second, the trial court had given an instruction that was not right on anybody's theory of the law but favored the defendant, and he lost anyway. So it muddied the legal question. We filed an amicus brief urging the Court to dismiss the writ of certiorari as improvidently granted because the case did not really present the very important legal question that the Court had intended to decide. And that is just what the Court did. The result was good for the city and the officer, since they had won below. And it was good for us because we got to litigate the issue a year or so later, on much better facts.

The case that eventually led to a decision on the issue involved somebody who had been violating restrictions on demonstrations at a San Francisco military base and had caused some concern about the

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215. *Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1998), *cert. granted*, 525 U.S. 1098 (1999), *cert. dismissed*, 526 U.S. 1083 (1999).

welfare of the vice president, who was only a few feet away.<sup>216</sup> He claimed that when federal law enforcement officers arrested him, they shoved him too hard. In that case we successfully argued that the officers were immune, and that an officer can reasonably believe he is using appropriate force even if a court later finds the force was excessive. I think if the issue had gone up on the New Orleans shooting, instead of the California shove, we could well have had a different result.

**Seth Waxman:** Just to punctuate the presentations of my non-career and career deputies, I want to react to some of the things that have been said suggesting that one of the functions of the non-career appointees is to insulate and protect the career attorneys from the administration in power. I have a different view. I think one of the great strengths under our system of government is the wonderful dialectic and transparency between career people and non-career people: each has to accommodate the other, and the country is stronger for that. I strove to conduct the operations of my office, and its relations with the president and the attorney general and other non-career appointees, so as to make little or no distinction between my non-career deputy and my career deputies. Maybe I created facts on the ground by appointing a career political deputy. To some extent I was able to do this because of the perspective of the president and the attorney general I served. Janet Reno was insistent about learning first-hand the views of the career prosecutors and law enforcement officials; she did not want those views filtered through political appointees. The least important people in Janet Reno's legendary meetings about issues were the non-career people. And as a result, I did not distinguish in case assignments, or in the way people talked within the office, between Barbara and the other deputies. But Michael will speak for himself—and I'm confident will do so characteristically well.

**Michael Dreeben:** I want to pick up exactly where Seth left off because in late Clinton I and Clinton II, there were two cases that crossed the criminal docket that really put the Solicitor General's Office in the eye of a huge political storm. I want to describe how the office reacted to those cases in determining what position the

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216. *Saucier v. Katz*, 533 U.S. 194 (2001).

solicitor general would ultimately take. Of course, the solicitor general determined that himself, but he had help from the staff. I will use these stories to try to illustrate how the established traditional processes of the department helped to diffuse and prevent political pressures from obscuring the solicitor general's ability to choose what the legal rule is that he should support.

The first case is an indirect decedent of the *Morrison v. Olson*<sup>217</sup> case that was described earlier. As a result of the Supreme Court's having upheld the independent counsel statute, a former solicitor general, Ken Starr, was able to take on a second career as an independent counsel and that, of course, involved the Whitewater investigation. Now, our office really would have loved to stay as far away from anything to do with that investigation as absolutely possible. But as fate would have it, we found ourselves caught in the middle of a dispute that landed on the Supreme Court's docket with the following caption: *Office of the President, petitioner v. Office of the Independent Counsel*.<sup>218</sup> Now, these are two branches of the United States and normally one would think that they should not be on opposite sides. But as it developed, this case grew out of a subpoena that the independent counsel issued for notes that were taken of conversations between Hillary Rodham Clinton and White House attorneys in preparation for grand jury appearances and congressional appearances. The Office of the President asserted an attorney-client privilege. The District Court accepted [the assertion of privilege] in a kind of odd way, saying that Mrs. Clinton thought there was one at the time, and therefore she is entitled to rely on it.<sup>219</sup> The Eighth Circuit reversed<sup>220</sup> and said there is no attorney-client privilege for the First Lady or any other government official who consults with government counsel as opposed to private counsel.

At that point, the case resulted in a certiorari petition, and it came to the attention of Walter Dellinger and Seth Waxman that this may be an issue on which we have some interest in trying to decide whether the United States, through the Justice Department, has something to say. And it would not be enough to have just two gray

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217. 487 U.S. 654 (1988).

218. *Office of President v. Office of Indep. Counsel*, 521 U.S. 1105 (1997).

219. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 914 (8th Cir. 1997) (citing unpublished order of the District Court).

220. *Id.*

briefs in the case. We needed a third gray brief in the case that represented the institutional interests of government.<sup>221</sup>

We went about deciding what to do not as one might think would be conceivable, by calling up the White House and saying, “What do you want us to do? I mean, after all we work for you.” Instead, we processed this in the same way that we would handle any case that was high-profile enough and had an energetic counsel team involved. We had meetings first with—I think it was first, I am not sure of the order—first with Andy Frey, who was retained to represent the Office of the President in seeking certiorari to reverse the Eighth Circuit’s judgment and who wanted to either persuade us to stay out of the case or, better still, come in and support the Office of the President fully. We also had a meeting with the independent counsel, who wanted to persuade us that the Eighth Circuit was correct, that people who work for the government cannot consult government lawyers and then keep information from a federal grand jury. Those presentations to Acting Solicitor General Dellinger presented a very, very difficult case. And I would not suggest for a moment that Walter was either at a loss for words or at a loss for what to do in the case, but he promptly disqualified himself, and it fell to Seth as acting solicitor general to then determine the position of the United States.

What we typically do in a case like this is exactly what happened in this case. We received memos from all of the components of government. We had had excellent presentations from the parties, who were also components of government. And we were presented with two completely different views, which were in their own way rather absolute. Andy Frey argued that the attorney-client privilege is and always must be an absolute privilege, and, since it attaches to government officials who consult with attorneys, it must be retained inviolate. The independent counsel maintained, on the other hand, that you cannot have a privilege when everybody is part of the same client; he added many more sophisticated ideas, but the essential point was zero privilege.

What is interesting is that we ultimately did file a brief in support of the petition for a writ of certiorari, but we took a position, as

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221. The Supreme Court rules provide that “[a] document filed by the United States, or by any other federal party represented by the Solicitor General, shall have a gray cover.” S. CT. R. 33.1(e).



others have explained, that departed from either of the black-and-white positions that had been presented so far, and did so in a way that I think is quintessentially characteristic of the Solicitor General's Office. First of all, we spent a lot of time figuring out what the caption should be; on whose behalf are we filing this brief? You know, the president and the independent counsel were already out there, so we really could not say we were filing on behalf of the United States because both of these parties believed that they were the United States. The president had a pretty good claim. So did the independent counsel, since the statute appointed him to represent the United States. So we filed a brief, *amicus curiae* for the United States, acting through the attorney general, supporting certiorari. I am sure that is a first time for that caption. I hope it is the last.

But what is most interesting about what we did in this brief is that we laid out the positions that had been taken by the parties and then began our discussion section with a paragraph that started, "We see the matter from a different perspective." We are now talking about "we," the institutional government, the attorney general. And our perspective was this: Absent an independent counsel statute, any dispute like this—between a head of a government agency and a prosecutor seeking evidence—would not be resolved in court. It would be resolved within the executive branch, potentially with an appeal all the way up to the president, in which the competing parties could contend. The prosecutor could say, "I need the evidence for this prosecution." The agency head could say, "He does not need it enough to justify chilling my ability to consult with counsel in the performing of my governmental duties." We determined that this model of how the Justice Department would do things internally, in a nuanced, balanced way, should become the law of the land and that courts should attempt to replicate what we would do internally. We could not follow the process internally because the independent counsel represented prosecutorial interests but did not have access to institutional client interests, and the president, of course, had interests with respect to the investigation that would impede his ability to assess in an objective manner whether the grand jury really needed this information.

We crafted this intermediate position, which suggested that certiorari be granted and that the Court address it. Ultimately this was a completely unsuccessful proposal. The Court denied certiorari. The law has since moved very heavily in favor of the independent

counsel's position. I have not gone back and reassessed whether my own view of the law is still what we put between gray covers [when we wrote the brief]. On behalf of the attorney general, it is notable that we filed a brief that had input from Seth Waxman, acting solicitor general, the assistant attorney generals in both the Criminal and the Civil Divisions, and the deputies of civil and criminal matters, myself and Ed Kneedler, and a career assistant, Jim Feldman, and this brief was a product of SG policy formulation in a pristine fashion. At no point, at least that I am aware of, were we ever discussing this case in the kind of partisan political manner that the facts of the case and the circumstances of it could have led outsiders to think was going on.

The second case, and I will talk only briefly about this one—I'll let Seth finish the story if he chooses to, and it also involved Walter—was *Dickerson v. United States*.<sup>222</sup> This case presented the question about whether *Miranda v. Arizona*<sup>223</sup> should be overruled by the Supreme Court—or if you approached from a perspective of amicus curiae Paul Cassell, whether § 3501 of the United States Code<sup>224</sup> should be held to have superseded the non-constitutional rule of *Miranda*.

A little background, and then I will go to what is really interesting about this case from the point of view of our Office. *Miranda v. Arizona* says that unwarned statements—statements in which the defendant is not advised of his right to counsel and right to remain silent, and has not waived those rights—may not be admitted into evidence in the government's case in chief. Two years after *Miranda*, in 1968, Congress passed a statute that can only be described as a direct legislative effort to overrule the Court's holding in *Miranda*. There was no mistaking that. The statute, § 3501, said that statements are admissible in a federal prosecution if the statements are voluntary under a multi-factor test. One of the factors was whether the defendant had been warned, but it was simply one factor, not the per se rule that the court crafted in *Miranda*. Generations of prosecutors ignored § 3501 because of its direct conflict with *Miranda* and because of the apparent inability of Congress to supersede a constitutional decision of the Supreme

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222. 530 U.S. 428 (2000).

223. 384 U.S. 436 (1966).

224. 18 U.S.C. § 3501 (2000).

Court. But there was always a faction who believed that *Miranda* was an illegitimate decision and should be attacked at the earliest possible moment. The Supreme Court gave some fuel to that by deciding a series of cases in which it distinguished between a true violation of the Fifth Amendment and a violation of the prophylactic rules surrounding the Fifth Amendment.

This came to a head for the first time in twenty years when acting Solicitor General Dellinger was in our office. We did not rely on 3501 as a matter of policy, but a prosecutor in the Eastern District of Virginia decided that he was going to rely on 3501 as a way to admit a statement that arguably was taken in violation of *Miranda*. Actually, as it turns out, we had some pretty good evidence that the *Miranda* warnings were given, but that evidence was not presented at the suppression hearing. As a result, you had this crazy case come up where we said *Miranda* warnings had been given, the judge found that they had not been given, the prosecutor said that it did not matter that they had not been given because of § 3501, and the department was in something of a mess.

When we found out about this, we recognized that this was a ticking time bomb, and Walter had the U.S. Attorney's Office withdraw the brief. The United States should not be filing briefs in district courts that are contrary to binding Supreme Court precedent, at least unless you are prepared to go all the way to the Supreme Court and encourage the overruling of *Miranda*. And that had not been, to say the least, vetted and cleared.

But our effort to keep this issue out of the courts was unsuccessful because the Fourth Circuit, on its own, decided that § 3501 did supersede *Miranda*, that *Miranda* was a non-constitutional rule, and that it, as a court of law rather than a court of politics, was obligated to apply § 3501 even though the Justice Department, which seemed [to the Fourth Circuit] to be a department of politics rather than law, is not relying on it.<sup>225</sup> Our position in the Fourth Circuit, articulated and defined by Walter, was very clear: As a lower federal court, you cannot say that *Miranda* is not a constitutional decision, and you cannot enforce a statute that does away with a constitutional decision of the Supreme Court. That position did not impress the Fourth Circuit, which considered en banc but rejected it.

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225. See *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999).

It left us with a very strange situation that obviously pits a lot of different competing interests in the government. Number one, this was our prosecution. We wanted to put Dickerson in jail. He was a bank robber. He robbed banks not too far from where I lived. We wanted to see this guy off the streets. It would help to have his sort of non-confession. Oh, the other thing I forgot to say is he did not really confess. What he did was tell a false exculpatory story that he was out getting bagels while his partner was in robbing the bank. We could not use this evidence. It would have been nice to use this evidence. As prosecutors, the government's interest is to get this stuff into evidence.

In the Solicitor General's Office, when somebody files a cert petition against us, as Dickerson did, our first instinct is to file a brief in opposition to keep the case out of the Court. But this one was obviously unique. The Fourth Circuit had invalidated a binding decision of the Supreme Court, and we saw no choice but to tell the Supreme Court that the case had to be heard. The question is: What should the Court do on the merits? And I am only going to touch on this and then turn it over to Seth to finish. Basically, we were dealing in an environment where there were not, at least as I am aware, precedents in the SG's Office that would guide us on how to handle it. It is standard SG lore—department lore that was articulated by Rex Lee, William French Smith, Theodore Olson, and many other people, that the solicitor general will defend the constitutionality of a statute unless it is plainly unconstitutional (which generally means no reasonable argument, no professionally respectable argument, is available for it—in other words, it flunks the “risibility standard” that was articulated earlier), or it impermissibly encroaches on executive branch functions.

Now, what was paradoxical here is this law is plainly unconstitutional under *Miranda*, but there were reasonable arguments that *Miranda* should be overruled. And the question is: What do you do then? Is the executive branch then obligated to go to the Supreme Court and urge the overruling of a constitutional precedent simply because there are reasonable arguments available for that purpose? If you succeed in that effort, you validate a federal law. Or do the executive branch and the solicitor general have some independent judgment in determining which should stand: a constitutional precedent or a statute that was passed in the teeth of that [precedent]? That dilemma implicated interests that go to all

aspects of the Solicitor General's Office: political, institutional, our criminal law enforcement interests, our role as the "tenth Justice" (using that [phrase] as just a symbol for our duty to the Court and to respect its precedents).

To determine what we should do, we instituted the most wide-ranging outreach that I have ever seen in the department to components of the government to see what their views were. All of the U.S. Attorneys were asked to express their views. Many of the divisions expressed their views. It culminated in a meeting in South Carolina in which there was oral debate on the issue and finally a meeting with the attorney general in which representatives, U.S. Attorneys, took different positions, presented their views. After all was heard and said and done, the solicitor general made a determination that the interests of stare decisis in this case were compelling and that the United States did not have a legal argument based on the needs of law enforcement that could justify overturning *Miranda v. Arizona*. Thus, we filed a brief that said, "Don't overturn *Miranda v. Arizona*." There was a firestorm of political criticism that ensued. We held fast, and ultimately, the Court, in a seven-to-two decision, agreed that *Miranda* should not be overruled.

Before turning it over to Seth, the only epilogue I want to give to this story is that after all of this happened, Dickerson was still a defendant. He went back down. The United States tried him without the ability to use his so-called "confession" in the case in chief. He decided to take the stand and testify. And as a result of that, he was impeached with his statements—[a use of the statements] which the court held was permissible and compatible with *Miranda*. So we got the statements in, he was convicted, and he is currently serving a fourteen-year sentence.

**Seth Waxman:** I will say a few words about *Dickerson*, both because Michael has made it impossible not to and also because in some ways it represents the very best about how all of the wonderful, tried-and-true processes of the SG's Office ought to work. *Dickerson* was very much like the other case that Michael talked about (which is one of, I think, two significant privilege controversies which the Independent Counsel laid on our doorstep). These cases may have appeared to the outside world as paradigmatically cases in which we would be hearing from the White House, or talking to the White

House, or thinking about things other than the long-term institutional interests of the United States. But absolutely nothing of the sort ever happened, nor was any effort made by any political person to intrude in our decision-making policy.

Michael served up very well the issue of the thumb that often appears on the scale of defending the constitutionality of acts of Congress. In the § 3501 context, as we saw it, the solicitor general could not credibly argue that *Miranda* had not been treated by the Supreme Court as constitutionally based: the Court, in almost three dozen cases since *Miranda* itself was decided (and indeed in *Miranda* itself) had required the states to comply with the so-called *Miranda* rules, yet the Court has no authority to dictate criminal rules and procedure to the states unless the Constitution so requires. On the other hand, I *did* view it as fully available to us to ask the Supreme Court to overrule *Miranda*. In his book, *Order and Law*,<sup>226</sup> Charles Fried recounts a similar decision he had to make together with the attorney general he served. Like Charles, I determined that I could not credibly make that argument. In my mind, any such request—after all the time that had passed and all the reliance that had been placed on *Miranda*—had to be built on an empirical showing that the *Miranda* regime was demonstrably detrimental to the long-term interests of the United States. We would have to tell the Supreme Court, “Look, it just does not work and in fact it has had a significant, documentable, adverse effect on law enforcement, public safety, and therefore, on individual liberties.” And not just tell the Justices, but show them.

So, as Michael says, we went out and systematically solicited the views of all ninety-four U.S. Attorneys, and of every federal police agency—the FBI, the Secret Service, Marshals Service, all of the Treasury and Justice Department agencies. We asked for data, anecdotal evidence, anything that they had to offer us as prosecutors or as police officers, about the efficacy or inefficacy of *Miranda*. There was much less than one would have imagined. We also invited all of those offices and agencies to express their views about whether *Miranda* should or should not be overruled. The “process” we provided was exhaustive and exhausting. And at the end, the question of what position to take was not really close at all. The

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226. CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION: A FIRSTHAND ACCOUNT* (Simon & Schuster 1991).

the Deputy Attorney General agreed with my conclusion. Because of the significance of the issue, though, I asked to speak directly with the President to make sure he agreed with the decision. Assisting law enforcement was a priority of Bill Clinton's presidency. The Attorney General, Deputy Attorney General, and I met with the President in the Cabinet Room. I laid out the issues and explained how I planned to approach the case. I set forth the case for and against asking the Court to overrule *Miranda* in order to save the statute. I told the President that I was firmly of the view that principles of stare decisis and the long-term interests of the United States counsel against asking the Court to overrule *Miranda*—but that, of course, he could direct the contrary position. He looked straight across the table and said, "How can I help you?"

*Dickerson* was a highly unusual exception to the rule that in almost all cases the solicitor general will defend the constitutionality of an Act of Congress. One of the signal features of my tenure as SG was the requirement for a full-throated application of this duty to defend Acts of Congress, because my tenure coincided with an extravagant rise in the incidents of declarations by the Supreme Court that Acts of Congress were unconstitutional. I delivered a lecture about this phenomenon just down the street from Walter Dellinger's house at the University of North Carolina. And I published an article called "Defending Congress,"<sup>227</sup> which grew out of an invitation that Judge Easterbrook gave me to speak about this before the Seventh Circuit.

In the first two hundred years of our republic, and this includes the New Deal, the Court declared acts or portions of acts of Congress unconstitutional 127 times. If you want the citation, you can find it, I think, in footnote seven of my article. A great number of those, of course, were early New Deal enactments that fell prey to the skeptical scrutiny of the Charles Evans Hughes Court. But in the years between 1995 and 2000, the Supreme Court struck down twenty-six acts of Congress. That represents an annualized rate that is in fact in excess of any block of years, including the early New Deal, of the republic.

One thinks about how detached and dispassionate the arguments that a solicitor general before the Supreme Court should make in terms of preserving the reputation and integrity of the Court. An

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227. Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073 (2001).

advocate for the United States should never have in mind win-loss records. That is particularly the case when the Court is considering either the constitutionality of an act of Congress or the federal-state balance. In those instances, the calculus is entirely different. And the process of trying to answer for myself, on behalf of the United States, which acts of Congress we would and would not defend, was really the defining characteristic of my tenure.

One of the very first cases that I argued in the Supreme Court was *Reno v. ACLU*,<sup>228</sup> the now (in)famous case involving the Communications Decency Act,<sup>229</sup> which, by the time it reached the Supreme Court, had been found unconstitutional in every particular by all six federal judges who had considered it. The Act had obvious constitutional vulnerabilities, but we thought a reasonable argument existed—aggressive to be sure, innovative to a fault—that the Act was constitutional. We wrote a brief I am very proud of. I remember getting up to argue the case and leaning over to my opponent, the late Bruce Ennis just before I started, to say, “Bruce, every organization I have ever even heard of is on your side in this case.” Even the Chicago Symphony had filed an amicus brief opposing the statute. As a result, when I stood up to argue, so few thought I had even the most remote chance to win the case that I felt almost weightless—evoking Cassius Clay’s description of what it felt like in the ring to “float like a butterfly, sting like a bee.” And yet, I fully believed in what I was doing. I was not up there telling the Justices that if I were in their shoes I would find the law constitutional in every respect; that’s not my function. The arguments we made were credible. They were serious. They deserved to be considered by the Court. We made them. And I received two votes for two of the three provisions of the statute. Litigators need to define “victory” flexibly.

The second phenomenon I want to discuss is the challenge of defending acts of Congress in an environment in which the Court is broadly reconsidering the federal-state balance. It is judging against new constitutional standards laws that were enacted by Congress at a time when it had no reason to believe, for example, that legislation that was clearly justified under the Commerce Clause also had to be the subject of special fact-finding under the Fourteenth Amendment.

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228. 521 U.S. 844 (1997).

229. Communications Decency Act of 1996, 47 U.S.C. §§ 230, 560, 561 (1997).



It really was Ken Starr who got us started off on this, with the government's loss in *New York v. United States*.<sup>230</sup> Drew Days, not to be outdone, promptly doubled that by losing both *Seminole Tribe*<sup>231</sup> and *Lopez*.<sup>232</sup> Although Walter Dellinger was only there for a year, he managed to tie Drew with *Printz*<sup>233</sup> and *City of Boerne*.<sup>234</sup> But—not to be immodest—I certainly hold the record for having given up the most federal power—all, to be sure, in five-to-four decisions. Ted Olsen is free to swing for the fences, but *Florida Prepaid*,<sup>235</sup> *Alden v. Maine*,<sup>236</sup> *Kimel*,<sup>237</sup> *Morrison*,<sup>238</sup> *Garrett*<sup>239</sup> have set a record that will be hard to exceed.

To be sure, I am perhaps the only SG over the past decade actually to win a federalism case—indeed, two: *Reno v. Condon*<sup>240</sup> and *Crosby*.<sup>241</sup> But on balance, the greatest challenge of my tenure was adjusting the SG's institutional tradition to defend the constitutional judgments of the political branches to a Supreme Court environment characterized by a very different vision of the federal-state balance.

The federalism docket does impact on just about all the themes that my predecessors and colleagues have talked about during this conference. We know, for example, that to some degree, the institutional traditions of the office lead most SGs to consider themselves a bit more detached and “objective” than the full-throated partisans representing other litigants. But in the federalism debate, the solicitor general has got to be a partisan. He represents fully one-half of the entire debate about federal power and the prerogative of the national government under our federalist balance.

The progression of the Supreme Court's recent federalism jurisprudence has also significantly reduced the solicitor general's

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230. 505 U.S. 144 (1992).

231. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

232. *United States v. Lopez*, 514 U.S. 549 (1995).

233. *Printz v. United States*, 521 U.S. 898 (1997).

234. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

235. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999).

236. 527 U.S. 706 (1999).

237. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

238. *United States v. Morrison*, 529 U.S. 598 (2000).

239. *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

240. 528 U.S. 141 (2000).

241. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

ability (real or imagined) to influence the order or factual context in which the Court considers important issues. That is because, among other things, we live in an era in which private rights of action are now the norm, whereas for much of our history they were the exception. Nowadays, it is not only, or even primarily, the SG who has the ability to invoke federal law and federal civil rights law. Somebody who is near-sighted can invoke the Americans with Disabilities Act<sup>242</sup> without regard to the coherent development of the law: he only wants his own benefits.

Second, the New Deal model of the SG picking cases so that the law could be moved incrementally in the direction in which the United States wants it to move—looking at cases from *Virginian Railway*<sup>243</sup> on, or the way that Andy Frey, when he was in the Office, shepherded the Fourth Amendment cases—is no longer the exclusive prerogative of the solicitor general. The model that Thurgood Marshall appropriated to the public interest sector is now copied by public interest groups of every possible political and jurisprudential stripe.

Finally, the ultimate constraint in this area is that the whole premise of picking cases and moving the best one forward in an effort to move the law incrementally in a direction that the solicitor general, on behalf of the political branches, believes is correct is just that—it is a strategy incrementally to *move* the law. And yet in the federalism debate, at least since *Garcia*,<sup>244</sup> the solicitor general and the United States have been playing defense; it is the advocates on the other side, whether it is the states or people who believe in enhanced state power under the Eleventh Amendment or the Tenth Amendment or the like, who are trying to move the law. And they are doing so very effectively.

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242. Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12150 (1990).

243. *Virginian Ry. Co. v. Sys. Fed'n* Number 40, 300 U.S. 515 (1937).

244. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *see, e.g.*, Reply Memo in Opposition to Certification of Plaintiff's Action as a Class Action for Dow Chem. Co., *In re "Agent Orange" Product Liab. Litig.* (Sept. 26, 1979), 506 F. Supp. 737 (E.D.N.Y. 1979) (MDL No. 381) (arguing that interests of named plaintiffs might be antagonistic to interests of class); Transcript of Oral Argument before Judge Pratt (Jan. 30, 1981), 565 F. Supp. 1263 (E.D.N.Y. 1983) (MDL No. 381) (defense attorney expressing concern for representation of future claimants); Defendant's Supplemental Memo in Opposition to Class Certification (Nov. 17, 1982), 565 F. Supp. 1263 (arguing for direct mail notification to each of 2.4 million Vietnam veterans); Defendant's Reply Memo in Opposition to Class Certification (Jan. 15, 1983), 565 F. Supp. 1263.

Coming to understand how these dynamics play into the role and responsibilities of the solicitor general was for me the most profound of many learning experiences I had as SG.