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## Rex E. Lee Conference on the Office of the Solicitor General of the United States: Panel for Former Solicitors General

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# GEORGETOWN LAW

## Faculty Publications



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### Rex E. Lee Conference on the Office of the Solicitor General of the United States: Panel for Former Solicitors General

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Walter E. Dellinger III

Acting Solicitor General, 1996-1997

Kenneth W. Starr

Solicitor General, 1989-1993

Charles Fried

Solicitor General, 1985-1989

Drew S. Days, III

Solicitor General, 1993-1996

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Panel of Former Solicitors General

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Charles Fried: Solicitor General, 1985–1989.

Kenneth W. Starr: Solicitor General, 1989–1993.

Drew S. Days, III: Solicitor General, 1993–1996.

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

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

**Professor Thomas R. Lee**<sup>245</sup>: I have been asked to moderate this final session. What I would like to do is, in the first instance, direct a question to one member of the panel and then ask for maybe two or three others to respond to the comments that have been made or give some other further response to my question. Many of these issues have been covered to some degree in earlier sessions, and I think one of the opportunities we will have here is for some discussion and debate, comparing and contrasting the views of the solicitors general who are here with us today.

Let me start by reading from the Judiciary Act of 1870,<sup>246</sup> and let me start by directing this question to General Starr. I was going to start with General Fried, but he asked me to direct a different question to him that he is also interested in answering. So, General Starr, let me start with you. The statute says: “There shall be an officer learned in the law to assist the Attorney General.”<sup>247</sup> An oversimplified organizational structure might tell us, then, that the hierarchal relationship here runs from the president to the attorney general and down to the solicitor general. I would like you to talk about that relationship, the relationship that the solicitor general has to the attorney general and also to the president, and specifically discuss, if you would, the obligations, the responsibilities, that the solicitor general has to communicate with the attorney general and

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245. Associate Professor of Law, J. Reuben Clark Law School, Brigham Young University.

246. Judiciary Act of 1870, ch. 150, 16 Stat. 162 (1870).

247. 28 U.S.C. § 505 (2000).

with the president. And then I will ask other members of the panel to respond.

**Kenneth Starr:** I think the statute is wonderfully straightforward and simple: “to assist the Attorney General.” I found in my own experience that that meant when the phone rang and it was—“Would you please cover a moot court for me in the following wonderful law school in some remote hamlet?” (not Provo!)—the answer was always “Yes,” unfailingly “Yes.” One simply tried to assist the attorney general in a variety of ways.

I found in my own experience, in contrast to that of Solicitor General Lee, whose memory we honor in the course of this gathering, that I was not being summoned about substantive matters with any regularity, and I have been struck by the comments thus far by my colleagues as to the collaborative and collegial kind of arrangement that included consultations with the president. The only time I was consulted by or, I should say, directed by the president, was to overrule me on a particular matter. It was a narrow matter, but obviously of importance to the president. So, I found in my own experience—and I think this is consistent within the traditions of the office—growing out of that simple statute, that the solicitor general is expected to carry on the duties of the office and to report, to provide information about those issues that the attorney general should know about, as well as the deputy attorney general, and for the last generation, in the main, the associate attorney general, given the division of responsibility in the department.

That [was] in contrast to General Lee’s experience, which was so wonderfully explained by Solicitor General Olson last evening at the marvelous banquet. Rex would be with us, as John Roberts will recall, literally daily for the attorney general’s staff meeting. I do not know this, but I think there may have been [some] in the Office of the Solicitor General that questioned whether that was really appropriate. Is the appearance of the solicitor general literally daily going down the halls of the fifth floor and joining in the attorney general’s senior leadership daily meeting appropriate? I felt it was, for similar reasons that I thought it was appropriate that the attorney general saw fit to summon the FBI Director with regularity, and also, if he so chose, to literally have an office in the FBI. We were all part of one organized whole. And Rex was not there to have his judgment overridden. He was there to provide timely information as

well as to provide his excellent judgment on a wide range of matters. And again, I thought that was an entirely appropriate role.

But in my experience serving under Attorney General [Richard] Thornburgh and Attorney General [William] Barr, there was less day-to-day engagement. We did have a weekly meeting with the solicitor general alone, and John [Roberts] would handle that in my absence, where we would really just give a report. It was typically a one-way report: “Here is in fact what is going on.” The sense I had, and I guess the lesson that I draw from that, is that there really is overwhelmingly a culture of deference that obtains among the various senior officers of the Justice Department and that, I think, goes as well with respect to the White House. Our colleagues from the Clinton administration will comment, I hope, before this larger audience in terms of relationships with the president and perhaps with senior White House staff. My own experience was [that] we had very limited contact. I am not suggesting it as a virtue, but it simply is a fact that it was viewed as unwise for the White House Counsel’s Office to be weighing in with the solicitor general. If there was an expression of concern, it would come to the attorney general or the deputy attorney general.

Not that the culture of independence was being vaunted—far from it. We viewed ourselves as an integral part of the Justice Department, to assist in ways that might be entirely unexpected. There was also a cultural outlook that we were an organization presented from time to time with very challenging missions. Maureen Mahoney made some of these comments at yesterday afternoon’s session of the Bush panel—namely, that we would be called upon, as Ted Olson has been called upon, to handle a variety of sticky-wicket matters. She recalled, and I recall not entirely pleasantly, nocturnal PI hearings in the Southern District of Florida, and I found myself on the floor leading the team. I recall our beloved now-Judge Bill Bryson, a very distinguished deputy solicitor general during our watch, being summoned by the attorney general personally. The matter was the assertion by Manuel Antonio Noriega<sup>248</sup> that he was entitled to prisoner of war status under the Geneva Conventions. That, I am sure, was an issue the district

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248. Noriega, the former president of Panama, was captured by United States troops and brought to the United States, where he was tried and convicted in April 1992 on charges of racketeering, money laundering, and drug trafficking.

attorney's office in Miami had not handled with any regularity, nor had a lot of lawyers in the Justice Department. Frankly, neither had Bill Bryson, but the attorney general knew that in that cadre of lawyers, and especially among the career civil servants in that office, were people where the interest of the United States would be best protected. I found that kind of special assignment throughout the process. I did not hear a lot of grumbling about this, you know, but [occasionally someone] might say in the office or outside [the office], "Is this proper?" But of course it is [proper]; we simply exist statutorily to assist the attorney general and, through the attorney general, [to assist] the president and the causes that the executive branch calls upon the office to do.

The final thing I will say is that—and this was a very substantial expenditure of time—that I was asked, I think again consistently with the statute, to take on the responsibility for heading up a working group on civil justice reform, to have a very elaborate inter-agency and also outreach process to the legal community and then to fashion recommendations. Unusual, but again, I think, a tribute to the office and the expertise of the office in a wide variety of matters.

**Thomas Lee:** Thank you, General Starr. Responses to General Starr's comments or further thoughts about the relationship between the solicitor general and his bosses?

**Charles Fried:** Just one word. And this comments more on the reports by the Clinton people, particularly Walter's frequent encounters with his president. I had none except our formal social events with the president. And the reason, I think, is very clear. Walter's president was a former law professor. My president was a former governor, but very far from a former law professor. And the same is true of Ken's president, and for that matter, Ted Olson's president.

**Walter Dellinger:** A second comment on that. I am surprised at the notion that was put about at the time of the *Bakke*<sup>249</sup> decision, which Drew Days was involved in as head of the Civil Rights Division. (There is a very famous book for those of you who do not

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249. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

know it, *The Tenth Justice*, by Lincoln Caplan.<sup>250</sup>) A couple of things about that are interesting. The administration had formulated a position to take on affirmative action. I believe, if I am correct, that Frank Easterbrook was the assistant to the solicitor general who did the first memorandum. The notion is, should the White House have interfered with what policy was being developed by the career people in the Solicitor General's Office? It does strike me as odd on a question like that, where I think the Constitution is open-ended, and certainly the precedents were open-ended, that there should be any question but that the president ought to have a say in where his administration is going to urge the Court to go. I will say that I am second to no one in my admiration for Judge Frank Easterbrook, but I do not understand why a Carter-Mondale administration would have its policy set by Frank Easterbrook. What you do want is his best thinking on the issue as part of the process. More at OLC, the Office of Legal Counsel, but also to some extent at the SG's Office, I never addressed a sensitive issue without involving career people from previous administrations. The great protection of a political appointee is to take career people who came in under different presidents and get their involvement. So, I think that is critically important.

But the other aspect of that is who talks to whom. There was a notion that Wade McCree was protecting Solicitor General Lee from White House pressure. I, for one, would not want anyone in the White House speaking to the attorney general or the deputy attorney general instead of speaking to me about a matter within the bailiwick of the Solicitor General's Office. Not that they are not free to do so, but I would want to be included in such a conversation and have it myself. By the same token, I would never want them speaking to career people without our direct permission. That is why you have political people who can stand up to that.

The reason for meeting with the president personally, though I do agree it is because [the president] would be involved, is so that the office, or the department, is not pushed around by more political functionaries in the White House political operation. By having direct access to the president, [I could say] as solicitor general, "They are wrong. Here is why it is not in the interest of the United States, and here is why their interest is short-sighted and political."

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250. CAPLAN, *supra* note 23.

In guarding the role of the office, it seems to me the issue should not be independence, because independence means independence for people who are elected by the people of the United States. So it is hard to maintain that as an ultimate virtue. What we seek from independence [for the SG's Office] is that the United States' positions reflect the long-range interest of the United States and are based on arguments that are made with professional responsibility and are respectful of the Court's precedents. You can achieve that, I think, more often by engaging at the highest levels of the administration rather than by trying to wall the office off. But in different administrations, there may be different styles on that point.

**Drew Days:** I think that is really the fact, that there are a number of different personal styles that vary from administration to administration and there are administrations where solicitors general met with presidents. I think of Archibald Cox and John F. Kennedy. The reason why they met was because they had a prior relationship. Archibald Cox was an advisor to Senator John Kennedy and, therefore, it was perfectly natural for the president to reach out to someone who had been his advisor for a number of years.

But in other circumstances, I think that is quite problematic. For one thing, unless one has a personal relationship with the president, it is not clear that one gets to the president very often. One is talking to surrogate presidents or self-declared mini-presidents. And I do not think that really is a productive use of one's time as a solicitor general. I found in the Clinton administration during the few times that I went over to the White House, that when I talked to lawyers there, I found myself suddenly surrounded by a group of munchkins who came in the door and proceeded to kibitz about legal issues they knew nothing of. And so I took to meeting with lawyers from the White House outside of the White House. We had very nice lunches together where we could talk law without the echo and the peanut gallery.

You mentioned the *Bakke* case. The situation there was that the president of the United States trusted the attorney general totally, and he basically said to the attorney general, "I trust you to make a decision. I am not trusting the vice president or the head of the domestic counsel to make these decisions. If they want to say things, listen to them, but you are the ultimate decision-maker in that matter, and if you decide that Wade McCree and Drew Days should



work this out without having calls from the vice president or some other people in the White House, that is fine with me.” So that is the dynamic of that situation.

But I agree with you; the notion that we should think of the solicitor general as independent of the president is terribly misguided. In fact, I have told this story before, so forgive me if you have heard me tell it. But what turned out to be my job interview with President Clinton was on the day that Janet Reno was confirmed as attorney general. I went into the Oval Office with President Clinton, and I was prepared for a linear interrogation: you know, question one, and then followed by question two, and so forth. But no; it was kind of an Arkansas get-acquainted meeting, a comfort-level type of conversation. And well into the meeting, the president looked at me in his inimitable fashion and said, “What is the relationship between the president and the solicitor general?” And I said, “Mr. President, you are in the Constitution and the solicitor general is not.” I somewhat regretted that after the fact, giving him that insight. But I really believe that.

I have worked in two Justice Departments and two administrations. And as I mentioned, President Carter was pretty much a delegator of his responsibility to the attorney general and fiercely protected people in the Justice Department from all kinds of interference, interventions, telephone calls, and so forth. That is one way to run a Justice Department. But upon reflection over the years, I am not sure that it is the most responsive to the constitutional framework. It worked, I think, for the Carter administration. But I think the notion that everybody understands that the president is the ultimate decision-maker under Article II is very healthy and helpful to the way that the process works.

Let me say one more thing about the attorney general. Again, this varies from administration to administration, but I saw my relationship with Janet Reno as a symbiotic one, that we were really reinforcing one another in a number of ways that were productive and constructive. I always realized that she could overrule me, but I think she always realized that I spent more time thinking about a lot of the issues that were confronting the Justice Department at the Supreme Court and the lower court levels than she did, and that that worked out very well.

But there are situations where the relationship can be very painful for one or the other of those officers. Robert Jackson was

solicitor general before he became attorney general. He never made the transition in terms of who should argue cases before the Supreme Court, as I understand it, and so he was continually muscling in and taking over matters that by rights should have been handled by the solicitor general.

**Seth Waxman:** I agree entirely that the chain of command is clear and that the Framers managed to make it all the way through all the articles of the Constitution without even conceiving of a solicitor general, let alone bothering to mention an attorney general. It is important nonetheless to distinguish between those things the solicitor general does pursuant to the longstanding notice-and-comment regulation, and the other things a solicitor general may do pursuant to his (and, someday, her!) statutory obligation to be of general assistance to the attorney general.

As to the former—representing the United States in the Supreme Court, deciding when the United States should appeal in any court, authorizing amicus participation in any appellate court, and authorizing intervention in defense of the constitutionality of an act of Congress—the solicitor general’s job is to make decisions. It is not to make recommendations. It is not to seek advice. It is to stop the buck on his desk, make a considered decision, and decide when the policy implications of the decision are of sufficient magnitude that the attorney general and, in some cases the president, should be advised.

As to all other things—the sort of free-floating assistance Ted Olson is performing for the president and the attorney general now in the context of the USA PATRIOT Act,<sup>251</sup> and which the rest of us did in other contexts, the scope of engagement and responsibility depends much more on the needs, practices, and proclivities of the president or the attorney general.

The precise contours of the relationship between the solicitor general, on the one hand, and the attorney general and the president, on the other, depends on both the background strengths and inclinations of the other two and the personalities of all three. During my tenure at the Department of Justice, I had the benefit of

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251. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001).

the opportunity personally to observe Drew Days' relationship with Attorney General Reno, and Walter Dellinger's relationship with both the attorney general and the president. That helped me enormously in navigating my own course between, and with, the two of them. I think this was especially important in my case because I had never worked with, or even known, either Janet Reno or Bill Clinton before I joined the government.

I think Charles Fried's observation—about the difference it made that President Clinton was both a lawyer and a former constitutional law professor—is a singular insight. I will give you one anecdotal example (about which I have previously spoken and written) just to give you an example of what a difference it makes.

The event occurred long before I became solicitor general. Indeed, I had been working for the United States for only three weeks, as an associate deputy attorney general. Bill Bryson, the acting associate attorney general (as well as a deputy solicitor general) invited me to accompany him to the White House where we were expected to explain to the counsel to the president why the United States had taken the position it did in a case called *Christians v. Crystal Evangelical Church*.<sup>252</sup> The case involved the constitutionality of the Religious Freedom Restoration Act ["RFRA"]<sup>253</sup> and the application of that Act to an attempt by Julia Christians, who was the trustee in bankruptcy, to recover for the church a \$40,000 tithe that parishioners had made en route to filing for personal bankruptcy. The bankruptcy trustee said, "Under the Bankruptcy Code, that is a fraudulent conveyance, and I would like the money back." The litigation concerned whether she could do that consistent with the Religious Freedom Restoration Act, and whether, in that application at least, the Religious Freedom Restoration Act was constitutional. The United States filed a brief in the case saying that the Act was constitutional and that a contribution to the church should be treated the same way as, say, a contribution to the Boy Scouts; this was not their money, this was their creditors' money.

I had not heard about the case but went with Bill Bryson to explain our position (I did a lot of reading in the space of an hour!).

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

253. Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (1996).

Apparently, the president had heard about this; he had a very, very strong interest in the Free Exercise Clause. It was my first trip to the White House. I asked Bill, "What's this going to be like?" And he (having worked for his entire career at the Department of Justice) said, "I have no idea: this is my first trip to the White House too." We went into the Counsel's office, and started explaining the case. And after several minutes, the president himself walked in. I had never met him. He asked what we were discussing, and his counsel explained. And he said, "Well, I'd like to hear about that." He sat down, listened, and then started peppering us with questions about *Sherbert v. Verner*<sup>254</sup> and other Religion Clause precedents—many of which I could not readily bring to mind. I remember being absolutely amazed that he could recall these cases and recall their holdings. My vivid memory is of thinking to myself, "This guy is the leader of the free world, and he's spending twenty minutes talking about First Amendment doctrine."

We heard nothing from the White House for two or three months. One day I received a call from the White House Counsel saying, "The president has been considering this *Christians* matter, and he has decided that the position the United States took is wrong. He has directed that the brief be withdrawn." I hung up the phone, called Bill Bryson, and said, "Look, I don't know how often this happens, but the president of the United States has directed that this brief be withdrawn. Has the court decided the case?" He said, "I don't know."

We made several calls. It turned out that the oral argument before the Eighth Circuit was scheduled for the very next day. The career lawyer from the Civil Division was already in the city at which the argument was to occur. We didn't reach him until the next morning—just as he was preparing to take a cab to the courthouse. Needless to say, he was a little stunned. So was the lawyer for trustee Christians, with whom he was dividing the argument. So was the Eighth Circuit.

That anecdote provides a useful context, I think, for the relationship I had with the president. We didn't meet or discuss cases very often. But I felt entirely free when something of the magnitude of *Dickerson*<sup>255</sup> or *Piscataway*<sup>256</sup> arose to ask for some of his time.

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254. 374 U.S. 398 (1963).

255. *Dickerson v. United States*, 530 U.S. 428 (2000).

The point was not to ask him what on earth the United States should do. That's a decision in the first instance for the solicitor general to make. The purpose of the meeting was to make sure, given how important the issues were, to make sure that he agreed that the position we proposed to take represented an appropriate exercise of his constitutional authority. It is, after all, *his* constitutional authority, not the solicitor general's or the attorney general's.

**Thomas Lee:** To move on to a different line of questioning, General Fried, let me ask you about the topic that you and I were discussing just before I stood up, which has to do with whether and under what circumstances the solicitor ought to urge the overruling of a decision of the United States Supreme Court. We were talking about the fact that during my father [Rex Lee]'s tenure as solicitor general, his approach to the abortion cases was to attempt to whittle away at them at the fringes but not to urge their overruling quite directly and that that was one of the first things that you did as solicitor general. So, maybe you can address that question specifically, and in general we will ask for other responses from the other members of the panel.

**Charles Fried:** Well, first of all, it is sometimes said—I think it was said a number of times in the course of this conference—that the solicitor general must always act with deference to the Supreme Court, and with courtesy—that goes without saying. But the implication, and sometimes the explicit implication, is that it also means that one must stay within the precedents of the Supreme Court. Now, the latter is plainly and manifestly wrong.

I think every solicitor general at some point has asked the Supreme Court to reconsider and overrule some of its prior decisions. Walter spoke about asking the Supreme Court to reconsider and overrule, which they did in the *Agostini*<sup>257</sup> case, the previous very wrong decisions in *Aguilar*<sup>258</sup> and *Grand Rapids*,<sup>259</sup> and that was a fine thing to do. One does not know how the law

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256. *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).

257. *Agostini v. Felton*, 521 U.S. 203 (1997).

258. *Aguilar v. Felton*, 473 U.S. 402 (1985).

259. *Sch. Dist. v. Ball*, 473 U.S. 373 (1985).

could possibly progress and develop if this were really an inhibition. I certainly did on a number of occasions. In a case having to do with the jurisdiction of military tribunals, I asked as an act of piety to my old boss John Harlan that they overrule a terrible decision by Justice Douglas, called *O'Callahan*,<sup>260</sup> in the case called *Solorio*,<sup>261</sup> and they did. That is how the law changes.

The abortion situation was different because in that case it was rather unlikely that the Court would indeed overrule *Roe v. Wade*,<sup>262</sup> but here was the situation. At that time, I was not solicitor general; I was acting solicitor general. [Rex Lee] had left to go into private practice, and a permanent solicitor general had not yet been named. I had no expectation that it would be me. This was just where I was, and here was the job. I got, in the ordinary course, recommendations from relevant divisions in the department recommending that we ask for overruling. And here is what I knew. I knew that *Roe v. Wade*, decided in 1973, had been severely criticized not [only] on right-to-life grounds, but on the grounds that it was a very poorly reasoned decision and a very bad piece of constitutional law. People like Paul Freund, Archibald Cox, and John Ely were on record in writing as having said that, and the case, of course, had continued to be very controversial. The president, [Ronald Reagan], had been elected, in part in the face of this controversy, stating his view over and over again that this was a terribly wrong decision.

Now, at that point, the question came to me: should I not, in an appropriate brief, present that issue to the Supreme Court, even though they were unlikely to accept it? It had never been presented to them squarely before. I saw no excuse for not presenting that issue, and so I did. I presented it in terms of the jurisprudential defects of *Roe v. Wade* because that was the—how should I say—“professionally correct” defect in the case. I did not present it in terms of right to life. I did not present it, as some people were urging me to do, to say that the unborn were persons protected by the Due Process Clause and so on and so forth, that in fact it would be unconstitutional to allow abortion (which, by the way, is the position taken by the very excellent German constitutional court, so

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260. *O'Callahan v. Parker*, 395 U.S. 258 (1969).

261. *Solorio v. United States*, 483 U.S. 435 (1987).

262. 410 U.S. 113 (1973).

it is not a crazy position at all), but that was not the ground. The ground we presented seemed to be appropriate. A majority of the Court brushed it aside, although interestingly enough—*Roe v. Wade* had been seven to two—this decision was five to four.<sup>263</sup> So it is not as if it had not reached some minds.

It came up again at a very strange moment. As I said I would, I had left the office with the end of my president's term, and I was back at Harvard teaching. Ken had not yet been confirmed, and there was a brief in there from the Department of Justice saying *Roe v. Wade* should be overruled.<sup>264</sup> And the president asked me: would I come back to argue it? Now, I was a law professor at Harvard. I had no duty to anybody (except to meet my classes), but it seemed to me appropriate that somebody who had held that office present this argument to the Supreme Court. There had been a number of new Justices on the Court who had not ruled on it, and it seemed to me correct that this position about which the president felt very strongly, and the administration felt strongly, should be presented. I recall that I presented it in an argument which said that, of course, that does not mean that the states could do anything they wanted. For instance, they could not pass brutal, anti-abortion legislation. I expected to be questioned about that, and I was questioned, "What do you mean by that, Mr. Fried?" And I said, "For instance, legislation which allows you to disregard the health of the mother." And I suggested legislation which confused abortion and contraception to the point where perhaps even contraception might fall under a legislative cloud which would unravel things all the way back to *Griswold*.<sup>265</sup> And I said quite explicitly, "We are not asking for that. We do not ask to unravel the law that far."

Again, the *Webster* case resulted in a very confused opinion, one which indicated considerable sympathy, much more than in the previous instance, for the overruling position. So, it is not surprising to me—it seems to me exactly correct—that Ken in the *Casey*<sup>266</sup> case should forthrightly have put that position, as he did.

Now, I think, a further thing. If I were solicitor general tomorrow and were asked to do it again, I would not because I think

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263. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

264. *See Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

265. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

266. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

the *Casey* case has clearly given the Court the full opportunity to consider whether they want to overrule this decision. All the new members of the Court have now stood up and been heard from. To bring it up again would simply be harassment, and I would not do it. Indeed, I think for the time being, and perhaps really for a very long time, that issue is settled and I hope it is behind us.

**Kenneth Starr:** It seemed even to be settled at a political level in light of Attorney General Ashcroft's comments at his confirmation hearing.

I wanted to make a very brief comment, if I may, Tom, with respect to the broader issue. *Stare decisis* values have to be, it seems to me, assessed against the values of stability in the law. That is to say, is there really a sense of stability that the issue has truly been settled in a way that has been understood—has not seemed to sow seeds of confusion—and the precedent or the line of precedent does not stand as inimical, or as an obstacle, to the implementation of sensible public policies?

On this panel, Walter can probably most authoritatively speak to the Establishment Clause jurisprudence, in light of his success as acting solicitor general in guiding and shaping some very important doctrine—and I think that story richly deserves to be retold here. But I want to use the Establishment Clause as another example, because the Court just seemed not to be able to come to rest with respect to something very basic: what does the Establishment Clause mean? There was the *Lemon v. Kurtzman*<sup>267</sup> test, and then Justice O'Connor came up with the endorsement test in the context of a crèche,<sup>268</sup> but conclud[ed] that that was not an endorsement. So one tended to wonder: what does that mean, and what does that add to understanding? Then when it came time to assess very important questions of public policy, namely, Congress's actions and the president's actions in the 1960s in providing salutary programs to inner-city or needy children, doctrine was really standing in the way. And it seems to me under those circumstances that you can say, "*Lemon v. Kurtzman* was on the books for so long, but were there expressions of discontent?" And there were. With the example [of *Lemon*], five Justices had expressed dismay at that particular test and

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267. 403 U.S. 602 (1971).

268. *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O'Connor, J., concurring).



how unhelpful it was. So I think that part of the lawyering craft is to [ask] how stable is that body of precedent, and then what kind of deleterious effects is it having on issues that are very important to the president and, really, to the American people?

**Drew Days:** For me the most interesting part of what Charles said about seeking the overruling of a Supreme Court precedent is, “in an appropriate brief.” And for me, that means not only an appropriate piece of paper, but appropriate work that has been done in the lower courts to develop a record—to have some factual basis for suggesting to the Court that the terms that it had available to it to rule in the earlier case have in fact changed; the circumstances have changed in a way that it really makes adherence to that precedent untenable.

**Thomas Lee:** Let me ask General Days if he would respond to the next line of questions. It has to do with the change of administrations and what the solicitor general ought to do looking back at policies or positions that might have been taken by a prior administration. One way of thinking about this, I suppose, is what is the standard of review? Is it a *de novo* standard? Is it a clearly erroneous standard? Is it an abuse of discretion standard? Or is it maybe something even more deferential than that?

**Drew Days:** I am not sure what the right standard is, but I went into the office thinking that it was my responsibility to maintain continuity in the law to the greatest extent possible and not take office on the assumption that I could start from scratch and simply ignore what had been done by prior administrations. Let me give you an example of that.

Walter Dellinger mentioned earlier the *Barclays Bank* case.<sup>269</sup> It was true that the president had a position on the taxing of multinational corporations. And to follow up on Seth’s comment about the president, not only did he have views on this issue, but they were informed views, and they were probably correct views on this issue because as a former governor he had had experience with transfer pricing and the movement of money across country boundaries to avoid taxation in places with unfavorable provisions.

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269. *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994).

But Bill Clinton, the candidate, took the position during the campaign that if he were elected president, he would enter the *Barclays Bank* case on the side of California, which is the position that we ultimately took. So that is one set of circumstances: a president committed politically, law professor, lawyer. The message has been sent and received by the solicitor general.

But the solicitor general sits down and looks through the briefs that have been filed by his predecessors in the Solicitor General's Office, and they seem to point in the other direction. What is the right answer under those circumstances? Well, I will tell you. The right answer is to do what the president wants. (Since I had tenure at Yale Law School, I just told my staff that I might be gone, but they would be fine.) But I felt a responsibility to the Court in changing position on this issue, to explain how I arrived at that result, that it was not tossing darts at a board and just deciding that that was the right mark and going ahead. We spent a great deal of time—the White House, the Treasury Department, the State Department—essentially conducting an autopsy of how my predecessor, Ken Starr, and some of his people came to the conclusion that they did. And I felt by the time we filed our brief that I had lived up to my responsibility to the president, but also lived up to my responsibility to the Office of Solicitor General.

**Walter Dellinger:** Let me add that I do think that there is a very strong stare decisis weight to be given to positions taken by the United States and that one needs to persuade a president of that fact. But presidents, on the other hand, are elected. Sometimes they stand for something. No one has, I think, done that more clearly than President Reagan. Not everyone agreed with what he stood for, but few candidates in modern times, perhaps George McGovern, have made it clearer what they stood for than Ronald Reagan did. And he won. My defense of Charles Fried is that someone ought to be authorized to tell the Supreme Court that a new president thinks they are on the wrong course on a matter like *Roe v. Wade*, and that seems to me to be appropriate.

Let me compare it to OLC. OLC is the Office of Legal Counsel, the next ranking position in the department, actually carved out of the rib of the Solicitor General's Office, which used to do both functions of providing legal advice to the government. The argument that there ought to be independence in the solicitor

general is actually much more apt for the Office of Legal Counsel because the Office of Legal Counsel is making legal rulings binding on the executive branch. You are telling the executive officials, “No. You may not do something.” You are a lawmaker. You are at times telling the attorney general or the deputy attorney general, “I will not give you a legal opinion that you can undertake an extraordinary rendition by doing steps *A*, *B*, and *C* and omitting step *D*.” They will not overrule you on that, and you should make that [judgment] independently because they are the action officers. They need to get legal advice that what they are going to do is lawful, and they do not want to overrule that advice and then follow it. There is no protection there. Whereas the solicitor general is often an advocate. So there is more reason to suggest that the solicitor general should follow some policy direction than OLC, which is giving legal advice.

I can say that though I had interactions with the White House, not once in the more than a year that I was in the office was the position taken by the senior career people ever overruled during that time. And I think people have different styles for doing it. Mine was, because I think I had a more open communication than the attorney general, exactly the opposite of what would have been the case with Griffin Bell and President Carter. President Clinton and Attorney General Reno were not close and did not have an easy relationship. It was easier for me than for others to defend the position of the career people by going to the White House. And so I think it is very context-specific.

But the last footnote is on a president that knows the law. We had one case I argued for the United States, *William Jefferson Clinton v. Paula Corbin Jones*,<sup>270</sup> where I represented not President Clinton, but the United States. The difference was quite clear in my mind. If the president had called me the night before the argument and had given me cases that he had been reading that he thought I should cite that I did not think were in the interest of the United States, I would have decided not to cite those cases, and maybe the case would not have come out so well if I had, but that is my favorite example.

**Seth Waxman:** I think it is worth underscoring a point that is often obscured, and that is the almost infinitesimally minute extent

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270. *Clinton v. Jones*, 520 U.S. 681 (1997).

to which a change in administration will have a palpable consequence to the positions taken or the arguments made either by the solicitor general in the Supreme Court or in cases over which the solicitor general has authority in the lower courts. So long as the men and women who work in the Justice Department understand that what matters is the long-term institutional interest of the United States, the political leadership does not, cannot, and should not have that much sway. Michael Dreeben did as good a job this morning as anyone I've ever heard in setting forth the different ways to think about what it means to consider the interests of the United States. It means a very great deal more than following the political predilections of the person who happens to be president at the time.

I did not have the occasion to follow a solicitor general of another party. I never had to confront whether I was going to disavow a position taken by my predecessor. In the past year, of course, many people have asked me, "Is Ted Olson going to adhere to the position that you took before the Supreme Court in *X* or *Y* or *Z*?" My response always is, "I can't speak for the solicitor general, but the positions that we took were positions that represented the views of the United States." The merits brief filed by Solicitor General Olsen in the *Adarand*<sup>271</sup> case tracks to a micron the position Solicitor General Waxman took in the brief filed at the petition stage of that case.

We filed our brief in the *Palazzolo*<sup>272</sup> case, an important Just Compensation Clause case while I was SG, but the case was argued after President Bush had been inaugurated. It occurred to me while I was preparing the brief that the president and the person I assumed would be solicitor general might have personal views about the Just Compensation Clause that would not coincide with the position reflected in the brief. I strove to be extra certain that the position we were advocating was in fact consistent with what the United States had always said, and that that position was indeed in the government's best interest.

So the instances in which there has been an "overruling" are very few and far between. One thinks about the different views of the constitutionality of the must-carry provisions in the Cable Act<sup>273</sup> that

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271. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001).

272. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

273. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460. For the must-carry provisions, see 47 U.S.C. §§ 534-535 (2000).

existed between Ken Starr and Drew Days, or the First Amendment questions in the *Corporation for Public Broadcasting* case<sup>274</sup> that came up between the Carter and Reagan administrations. In both instances, the government changed positions. But these really are at the margins. I think the real testament is continuity.

**Charles Fried:** The place where you saw the greatest temptation, and in fact temptation properly yielded to, was not so much in positions taken by the solicitor general but [in those] taken elsewhere in the department. When the Reagan administration came in, they found that there were consent decrees literally littering the legal landscape which sought to tie the government down till the end of time to very dubious positions. The Reagan administration did undertake to challenge those consent decrees, and I think we have something of that happening again with what one might call midnight regulations and midnight consent decrees that were put in by the Clinton administration. I think those are perhaps going to find themselves reconsidered.

Earlier on there was some discussion of the Boston Harbor case.<sup>275</sup> Maureen [Mahoney] talked about how the Bush administration took a politically painful but principled decision in favor of the decision that finally came out. Completely correct. I argued that case on behalf of the labor unions. The president then, in an attempt to meet the objection of his constituency that pushed the other way, sought to establish more or less the same policy by executive order. And I will report that the first action of President Clinton was to rescind that executive order. And among the first actions of President Bush was to reinstate it. So, at these political levels, you get something quite different than continuity. But after all, that is what elections are for.

**Walter Dellinger:** But there is a point for continuity that I took one step further. When I met with President Clinton to discuss with him my need to return to private life, I came prepared to discuss who should be nominated to be solicitor general. I gave him a list of ten

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*See also* *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (upholding constitutionality of must-carry provisions).

274. *CBS, Inc. v. FCC*, 453 U.S. 367 (1981).

275. *Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218 (1993).

people in several different categories. At the end of the day, I told him he should promptly nominate Seth Waxman. I told him that I thought the Senator from Utah<sup>276</sup> would see that he was promptly confirmed, and that would be good for the office. [I told him] why Seth was the best choice. But I wanted to give the president a range of choices.

I think I shocked him a bit. First I said, “An easy category is, you ought to consider one of the senior chief [circuit court] judges, the people who have the status of chief judges whom the Court would see as a peer. That is one way to look at this. But another category,” I said, “I want you to think about is, given the difficulty the United States has in defending its positions on federalism, etcetera, I think there is something to be said to consider naming a Republican as solicitor general.” And I reviewed several Republicans who I thought would meet the criteria. This was not working particularly well with the president.

At the end of the day, I made my final recommendation to him, but it gave him comfort that I had discussed a number of people before making the argument for why it should be Seth. But I do think there is something to be said [for appointing a solicitor general of the other party]. A person would have to be particularly comfortable in that role, and sometimes there are positions that you might have other people argue. It may be a point that we have passed in our politics, but I thought at that moment in time it was at least worth the president considering.

**Thomas Lee:** I want to make sure and leave plenty of time for audience questions. But before we do that, we have about a half-hour left. In that time, let me suggest a couple of topics. Who is the solicitor general’s client? How does the solicitor general go about resolving conflict among various departments or agencies of the federal government or the executive branch? We have heard lots of fun war stories about briefs that take two contrary positions. Judge Easterbrook told us about the *Buckley*<sup>277</sup> case and three different briefs being filed. So there are some creative ways of resolving conflict. That is one issue that has come up.

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276. Senator Orrin Hatch, of Utah, was chairman of the Senate Judiciary Committee at the time.

277. *Buckley v. Valeo*, 424 U.S. 1 (1976).

Another related one has to do with the potential tension between the solicitor general's role as advocate to the executive branch pursuing the broad policy vision of the administration versus the solicitor general's role as an officer of the court.

General Dellinger or General Waxman, would either of you like to address either of those? I know they have come up repeatedly, but I thought that now that we have got all of you here, maybe we could follow up since those seem to have been two important themes.

**Seth Waxman:** I will be happy to do the first one. In many ways, for me the most exciting aspect of being solicitor general was having the responsibility for making the kinds of decisions that I adverted to before. In a country of 280 million souls, how does one ascertain what the interests of the United States *are* in litigation? That is the solicitor general's most challenging and exciting mission.

The legislative history of the 1870 Judiciary Act<sup>278</sup> is utterly clear that that responsibility is to decide and advocate positions that are in the interests of the United States. How does one decide that? We are, if nothing else, a diverse and opinionated country. The way that these decisions get made in the SG's Office—and as I understand it this process has been relatively unchanged for decades at least—is for the SG to consider the views of all components of the government before formulating a position. The Solicitor General's Office does not go around trying to find intriguing policy issues to attack, righteous positions to take, or great cases to bring. It is an entirely reactive office.

Let's say a prosecutor loses a suppression motion, or there is an important case the Environment Division wants to intervene in, or the Civil Rights Division wants to file an amicus brief, or a Treasury ruling is struck down, or the Consumer Products Safety Commission loses an important consent decree request, or anything of the sort. No appeal is permitted unless the solicitor general approves, in writing. The protocol is that the affected (losing) component of the government must submit to the SG an analytic memorandum that attaches all the relevant papers, explains the context, the legal issues, the reasons why it is in the interest of the United States to take it to the next step, and why the position that they advocate is correct.

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278. Judiciary Act of 1870, ch. 150, 16 Stat. 162 (1870).

The solicitor general does not just review that memo and agree or disagree. It is immediately forwarded to all components of the executive branch, whether within the Justice Department or outside, with either a policy or a law enforcement interest in that issue. These components are given the opportunity to express their own institutional views on the recommendation. The idea here is that the executive branch, with all of its hundreds of different offices and departments, serves as a surrogate for the country as a whole. When all the memos arrive, the case is assigned to a staff lawyer in the SG's Office, who writes his or her own analytic memo making a recommendation. The package then goes to one of the four deputies who adds his or her own recommendation. About half a dozen of these little (or big) bundles land in the solicitor general's in-box every day.

Sometimes, there is a significant difference of opinion about what the United States should do. When that occurs, either one of my deputies or I would meet with representatives of all of the interested components. People would come together, having considered each other's institutional positions, to try and see if there was a way to hammer out a consensus view, or at least to understand each other's views. It's amazing how men and women of great intelligence and dedication can see things differently depending on the institutional perspective they bring to an issue. The entire process of trying to arrive at the position that best reflects the position of the United States is tremendously edifying; it's a shame more people cannot observe this function of government. It is essentially through this cooperative, collaborative effort that the SG receives the information and insight necessary to make the decision. That is the most thrilling part of the job.

**Walter Dellinger:** As a footnote to that, even if there were only one department or agency involved, it is critically important, I think, and a point that we have gone a day and a half without mentioning, that the Solicitor General's Office is made up of generalists, including the solicitor general. You could imagine a system with some provision resolving conflicts among agencies where each of our great cabinet departments and agencies has general counsels, men and women of generally a great ability, who would advance their own arguments in court, or the ninety-three U.S. Attorney's Offices could carry both, but the fact that generalists bring their judgment



to bear upon questions often makes an enormous difference. For people who work in a single area for a single agency, it is very difficult from that perspective to have the broader interest of the United States in mind. Even if you were not resolving conflicts, the fact that you are reviewing judgments of particularized agencies, you are familiar with the Court and where its sentiments are, and you are taking into account a larger base of non-specialized information, I think, is altogether salutary for the positive development of the law.

**Charles Fried:** It is particularly appropriate because, unlike the countries in which the Health and Human Services [Department] would bring social security matters to a social security court, and Department of Labor [matters would go] to a labor board, not only is the Solicitor General's Office an office of generalists, so is the Supreme Court. So it is generalists talking to generalists, and that is a very important translation function.

**Seth Waxman:** It is very important, I think, to bear in mind that the world Walter just posited—where each U.S. attorney and each agency head is free to argue his or her own view of the interest of the United States to the Court—is precisely, and I mean exactly, what produced the position of solicitor general in the first place, and with very strong institutional impetus from the Supreme Court. In a series of nineteenth century cases, the Court had made rather clear that it had just about had it with different people standing up in different cases and saying, “The position of the United States on this law or this legal principle is *X*,”—that is, whatever was necessary in order to win the case in that particular instance—and then have somebody else later stand up in another case and say, “Well, in this case, you know, the position of the United States is *Y*.” The conference report that accompanies the 1870 Judiciary Act explains Congress's vision about the role of the solicitor general. It says something very close to these exact words: “We propose to appoint a man of sufficient learning and intelligence and ability that he may appear in any court in the land from New Orleans to New York”—which apparently were the known limits of the civilized world at the time—“and there present the interest of the United States as it should be presented.” That unifying theme—that the United States has to speak with one voice and provide the same interpretation of law whether it is in a state court in Maine or a federal court in San Diego—was the

animating principle behind creation of the position, and it remains the animating principle of the office to this very day.

**Kenneth Starr:** Let me add a point that I think reinforces the structural and process points that are being made. What you have heard in the last few minutes in terms of structure and process, I think, is quite powerfully true. I think it rings true with anyone who is privileged to serve in the office, whether as solicitor general or in a career position. There are those issues, however, where the lens through which one looks at the world will give rise to certain questions. Certainly the discussion thus far brings to mind the lens of concern about judicial power. When one is in the executive branch, frequently it is a *Federalist Nos. 47 and 51* concern on the part of the executive about the legislative power seeking to bring everything into its vortex, but obviously it depends upon the context. I do recall quite vividly that when I came into the office (ironically after I had served in the judiciary), one of the recurring areas of concern—and the lens [through which] we examined the world caused us to be concerned—was about the exercise of the judicial power in ways that seemed to trench upon, or at least compromise, institutions of self-government. And so Charles referred to consent decrees and so forth. We found continually in my four years in the office issues with respect to: Have the judges gone too far? Has judicial power, even if appropriately exercised at the outset, been extended overmuch? Has there been a displacement of institutions of representative government? And that lens may vary somewhat. I doubt if it is a dramatic variance, but I think there will be subtle variances in the way that one looks at the world, and that may, at times, frankly, trump the very considered process-type points that have been made.

**Drew Days:** I think the question, “who is the client?” is really a riddle. When I was the head of the Civil Rights Division and I woke up in the morning, I knew who my client was. I was my client. And the head of the Antitrust Division knew that he or she was a client because these are the policymaking institutions within the Justice Department. As solicitor general, when I woke up I had no clue who my client was or was going to be during the day. I think it is more a process of ruling out than ruling in. We know who are not our clients: states, municipalities, private parties for the most part. But when it comes down to the question of who is the client, it really is a

matter of analyzing the situation and reasoning through a situation to determine: Are there federal laws involved? Are there federal interests at issue? And so forth and so on. For purposes of conversation, I guess that entity becomes one's client. But it could be that by the end of the day, a better client will have come down the pike.

**Question from Audience:** Because of the intensity of the work of the solicitor general, are we moving towards a tradition and expectation that the solicitor general would serve four years despite the political fortunes of the president, and is it the kind of job, given its intensity, in which somebody could serve eight years?

**Charles Fried:** There has only been one solicitor general in recent times who approached that, and that is Erwin Griswold. He served Lyndon Johnson and then he served Nixon in the first Nixon administration, but that is the last time that happened. I would think it very unfortunate—not a good idea—for two reasons. First, you lose freshness. You think you own the office. You think it is yours, and you begin to be a bureaucrat in it rather than a fresh intelligence. That is the first thing. And the second, as everybody has in various degrees and in various ways acknowledged or even emphasized, is the fact that at the end of the day the solicitor general speaks as the appointee of the president. Well, that is much attenuated if you are just routinely kept on. It is the reason, quite frankly, why I made clear a year before the end of the Reagan administration that at the end of that administration I would move on.

**Question from Audience:** What is the process by which a president appoints a solicitor general, and do you see common threads that run through that process?

**Drew Days:** Ken told me I should answer this, and I am not sure quite how to answer it. I think it is often like a bolt of lightning. It is somewhat fickle. Let's put it this way: it does not hurt to be the lawyer who argues the case before the Supreme Court that results in a person being named the president of the United States. We can start there. Someone said to me, "Well, do you think he's going to name Ted Olson as solicitor general?" I said, "Well, that's a pretty

good possibility.” He said, “Well, don’t you think it would be seen as a quid pro quo?” I said, “If not now, when?”

It varies. The people who have occupied the SG’s Office have been academics, lawyers, judges, and for the most part, they have been very close to the presidents from a political standpoint, a family standpoint. They are politically connected. So there is no one process. It really changes from administration to administration.

I wanted very much to be solicitor general, but there continued to be a problem of finding an attorney general for the Clinton administration. I found that to be a real impediment to my making my case to the attorney general. First it was Zoe Baird, and then Judge Kimba Wood, and then finally Janet Reno.<sup>279</sup> All the while I was waiting to be discovered. And it happened.

**Kenneth Starr:** I think in the first Bush administration—and I am sure Charles can speak with more authority to this, even though he was not part of the administration—but I think there was a concentrated effort to find a judge. I think those who were seriously considered were, in the main, judges. But if you go back over the last generation, I think Drew’s answer is exactly right. They are drawn from the professorial ranks or the judicial ranks or some combination thereof, or then, logically, those who have served in the Justice Department—and Seth is a beautiful example of a distinguished lawyer in private practice who then proved his mettle in the Justice Department. But I think that is a tougher route. At least, it is certainly tougher at the outset of the administration, where there will be a tendency, I think, to go to the academy, a Professor Bork, a Judge McCree, a Dean Griswold, and the like—and Professor [Rex] Lee.

**Walter Dellinger:** I know that Drew and Seth and I, none of us knew the president before going into the Justice Department. I did not. Did you, Ken?

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279. In 1993, President Clinton nominated Zoe Baird, then Kimba Wood, to serve as attorney general, but both withdrew their nominations. Janet Reno was ultimately nominated and confirmed as President Clinton’s attorney general.

**Kenneth Starr:** I knew the president, but not all that terribly well, and [our acquaintance] was rather ancient. I knew him when he was in Congress in Texas.

**Walter Dellinger:** And Charles, you did not know President Reagan?

**Charles Fried:** I did not know the president. My situation was special and rather like Seth's in a way. I had been the principal deputy in the office and the office was vacant from, I think it was March or so, until I was named. So, I was acting in the office and doing all these things and they had a chance to get a really good look at me. There was the abortion brief<sup>280</sup> and also the brief in the *Wygant*<sup>281</sup> case. I had a big hand in writing it, and so did Sam Alito, who had this marvelous phrase saying that a particular African American baseball player would not have served as a great role model if the fences had been pulled in every time he was up at bat, a point which some people were greatly offended by because they thought it to be pamphleteering. I thought it was entirely appropriate. If it had been made in the other direction, it would have been applauded rather than deplored by the *New York Times*. But I was able to bring those briefs to the senators upon my courtesy calls and say, "Now, this is what you will get. Take it or leave it." So, I had been in the job. That is unusual.

On the question of judges, you are quite right. I had a conversation with the attorney general before I left. He asked for my suggestion, and I gave him a list of three names, all three of whom were judges. [About] one of them I said, "The situation may develop where you may want to name a Democrat." So there were two Republicans and one Democrat.

**Question from Audience:** General Days made a comment about the Carter administration and delegation skills, and referred to quite different leadership traits. General Waxman made a comment about the decisive nature of the office and how to make the calls. General Starr [emphasized] the opposite—represent the president,

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280. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

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

more or less. From what you have seen, [which approach] would you say was more effective?

**Seth Waxman:** I will take a crack at it just because I came down sort of emphatically in favor of the decisive role. The year in which I worked as Walter Dellinger's deputy really was the most wondrous professional period I have ever had. For both Walter and me, it was our first time in the Solicitor General's Office. Walter came to the job from a distinguished career in the academy. I think Walter had handled one or two complex cases as a consultant, otherwise his background was purely of the academy. By contrast, I had spent almost two decades as a litigator—trying and arguing cases in state and federal courts (including one case in the Supreme Court). We had offices in close proximity, and on the weekends, we would inevitably be there on Saturdays and Sundays working in our quiet and majestic offices. We used to go back and forth in our socks to talk about the cases we were handling. At one point several months into the job, I recall Walter saying, "You know, I'm wrestling with twenty-odd fascinating issues right now. Back in my old job, I would have spent two years arriving at my concluded views. First, I'd arrange a research seminar where I would have a bunch of students thinking, writing papers about it. Then I would get a grant to think about it myself. Then I would give some talks. Maybe I would take a semester visiting at another institution and then teach a full course on the subject. After two years, I would publish a full-blown article setting forth my concluded views. But here, in this office, we have to make decisions in these cases in a week or two week's time. The time compression is just amazing." My response to Walter was, "You know, I have exactly the opposite reaction. In my prior life, everything was like this. [Waxman repeatedly snaps his fingers.] We were constantly under pressure to make decisions and present them to courts—in briefs, in arguments, and through witnesses and documents." In the world I inhabited before joining the SG's Office, we'd receive an order from court giving us twenty-four hours to submit a brief on some emergency matter. Or, a client needed to know right away whether we are going to go in and seek a temporary restraining order. I told Walter that, in my new position, I felt the tremendous luxury of having several whole weeks to decide important issues. Those are two perspectives of it. Thank goodness the SG has weeks to decide important things; but thank goodness

too that at the end of that fixed period a decision has to be made. Otherwise, there are a raft of issues we'd still be puzzling over.

**Walter Dellinger:** Let me just add this, to go back to the previous question [about selecting a solicitor general]. There are many different kinds of backgrounds. All things being equal, I would prefer having a very senior judge of the United States Court of Appeals, even though only one of this distinguished group meets that description. And even though none of this distinguished group were close to the president, I think on balance the country and the department are going to be very well served by the fact that Solicitor General Olson is close to and does have the complete confidence of the president. I do not think that means he brings politics to the Justice Department. I think that means that when he listens to the career deputies, to the Ed Needlers and to the Michael Dreebens, when he hears from the career people in all of the departments and he reaches a decision about what is in the long-range interests, no one is going to second-guess Ted Olson at the White House. I think all things being equal, that is very, very good for the department. He will be situated in the department; he will be hearing from these people; he will be formulating his judgments with that in mind; and there will be no one in this administration that can possibly second-guess or backdoor Ted Olson. I think everything else being equal, that is a good thing to have as solicitor general.

**Question from Audience:** We have heard a lot about the representation by the Solicitor General's Office of the executive branch and advocating for the president. I would like to know, just to broaden the discussion to the legislative branch, how were the interactions [with the legislative branch]? Were there any interactions or attempts to influence from the legislative branch? We have heard about the executive input. But we have heard several times that you represent the whole government. Should the legislature have its own solicitor general?

**Charles Fried:** The very most sufficient reason why the solicitor general so assiduously defends the constitutionality of acts of Congress is that if he did not, there would not be such an office. Now, there may be other reasons. Indeed, there are. But, as I say, that is a sufficient reason.

**Drew Days:** Indeed, there is an office in the Senate and one that rotates in the House of Representatives as a result of the 1978 Ethics in Government Act.<sup>282</sup> It is a very interesting statute because it authorizes lawyers from the Congress to represent the Congress in the Supreme Court on matters that have to do with the power of the Congress. That, however, does not respond to Charles's point, which is a major one: to the extent that the solicitor general allows cases to be handled by the lawyers in the Congress, he loses control over the matters, loses the very thing that he cherishes most, and that is being able to control the movement of cases to the Supreme Court and engaging in what we like to call the orderly development of the law.

But [consider] a situation that we discussed in another context: what happens when the solicitor general does not want to or does not feel capable of defending an act of Congress that has been challenged as unconstitutional? Perhaps others on the panel have had this experience as well. But I had a couple of situations where I found that I could not in good conscience represent the position of the Congress with respect to a statute. One of the cases had to do with a statute that was passed in 1935, I believe, and it was so out of touch with modern understandings of gender equality that quite frankly I did not feel that I wanted to be the one in the Clinton administration taking a position that upheld discriminatory treatment of women as compared to men with respect to immigration and citizenship. What happened in that case was as required by the statute: the attorney general is required to notify the leaders of the Congress if she is not going to defend the statute, which then triggers the power of the lawyers in the Congress to provide the defense. But I think this had a happy ending. We told Congress that we would not defend, but we then worked with a committee of Congress to prepare a fixer amendment to the statute which tended to remove the constitutional problem and allow life to go on without any headaches—or almost no headaches.

**Kenneth Starr:** Let me add a brief footnote in terms of the collaborative process that was evident during my tenure in the case

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282. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 5 U.S.C. app. §§ 101-505 (2000)).



of *Nixon v. United States*.<sup>283</sup> Walter Nixon [was] a district judge who was impeached. Then in his trial in the Senate [he] was subjected to what he viewed as an unconstitutional process, namely a fact-finding or fact-gathering, I should say, by a committee of the Senate, some ten Senators, five from each party. The matter wended its way to the Supreme Court. And even though the constitutionality of the procedures of the United States Senate was at issue in the case, it still fell, with absolutely no rancor whatsoever, to the solicitor general to defend the constitutionality [of the Senate procedures] if it could be done, and it obviously was easy for us to in fact do that. The Supreme Court eventually upheld the power of the Senate to engage in such fact-gathering by a committee as long as there was a trial before the full body of the Senate. But in that process we worked very collaboratively with the very distinguished counsel to the senate, Mike Davidson, and his staff. Mike, I believe, served for about twenty years, and was a wonderful repository of information as well as guidance. And so we had any number of meetings as well as the receiving of information from the historical materials that Mike and his staff had very assiduously gathered. And we viewed that as simply our function. That was our role: to defend in that context the prerogatives of the Senate.

**Thomas Lee:** That is about all the time we have. I do not know that you will find five people whose time is more in demand than these five gentlemen. I want them to know on behalf of all of us how grateful we are for their giving us of their time today.

**Dean Reese Hansen:** I think that brings us to the moment of conclusion of the conference. We wish all of our participants Godspeed and best wishes as you travel home. May the skies be smooth and sailing clear and passage safe. We hope to have you each back sometime soon for another occasion.

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283. 506 U.S. 224 (1993).