

IN MEMORY OF REX E. LEE (1937–1996)

Not long after former Solicitor General Rex E. Lee died, the Committee of the National Association of Attorneys General held its annual meeting in Washington, D.C. All fifty state attorneys general attended the meeting, which was held at the Supreme Court. During a question and answer period, Justice David Souter was asked how advocacy before the high court had changed in recent times. Justice Souter paused for a moment and answered, “Well, I can tell you that the biggest change by far is that Rex Lee is gone. Rex Lee was the best Solicitor General this nation has ever had, and he is the best lawyer this Justice ever heard plead a case in this Court. Rex Lee was born to argue tough cases of immense importance to this nation. He set new standards of excellence for generations of lawyers and justices. No one thing has happened to change the nature of advocacy of this Court which has had as much impact as the loss of that one player.”*

* Quoted by Utah Attorney General Jan Graham, Address at the J. Reuben Clark Law School (Feb. 28, 1998).

Rex E. Lee Conference on the Office of the
Solicitor General of the United States*

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* On September 12–13, 2002, on the campus of Brigham Young University, an unprecedented number of past and present solicitors general of the United States assembled: the Honorable Theodore B. Olson, Seth P. Waxman, Walter E. Dellinger III, Drew S. Days III, Kenneth W. Starr, and Charles Fried. The solicitors general were joined by a number of distinguished attorneys who worked in the office, including Donald B. Ayer, Michael R. Dreeben, Andrew L. Frey, Judge Daniel M. Friedman, Judge Frank H. Easterbrook, Kenneth S. Geller, John H. Garvey, Keith Jones, Michael W. McConnell, Maureen Mahoney, Thomas W. Merrill, Carter Phillips, John G. Roberts, Richard G. Wilkins and Barbara D. Underwood.

For two days these outstanding lawyers and public servants participated in a groundbreaking series of panel discussions on the key cases and major issues they confronted during their terms and the history and purpose of the Office of the Solicitor General.

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Solicitor General Conference

The Advocate as Friend: The Solicitor General's Stewardship
Through the Example of Rex E. Lee

*Theodore B. Olson**

I am honored to be a part of the first Rex E. Lee Conference on the Office of the Solicitor General. I feel this way not merely because I presently occupy the position whose role Rex exemplified in so many ways, but also because Rex was my friend—indeed, he was *our* friend. Rex had what his son Tom has called “a sort of ‘gift’ for friendship,”¹ a gift that, in addition to his extensive and diverse legal talents and experiences, served him well as solicitor general. It was a gift that infused him with civility and respect, that made him a colleague and friend not only to those who shared his views on questions of law and politics but also to those who did not.²

I was fortunate to have served with Rex in the Department of Justice when he was solicitor general. As the head of the Office of Legal Counsel, I worked closely with Rex in formulating the Reagan administration's positions on a number of important, complex legal issues. More importantly, we sat next to one another virtually every morning for four years at Attorney General William French Smith's daily senior staff meetings (just across the table, I might add, from General Smith's chief of staff and future judge and solicitor-general-to-be, Kenneth Starr). I soon came to marvel at Rex's extraordinary combination of legal talent and human goodness. Now that I have the privilege to serve in the position he filled so well, I appreciate him even more. Tonight, based principally on Rex's example, I want to share with you some thoughts on the place of the solicitor general in the life of our Republic.

* Solicitor General of the United States. This article was the Keynote Address given at the Rex E. Lee Conference on the Office of the Solicitor General at Brigham Young University, in Provo, Utah, on September 12, 2002.

1. Thomas Rex Lee, *Tribute to the Honorable Rex E. Lee: Solicitor General of the United States 1981-85*, 3 J. APP. PRAC. & PROCESS 557, 560 (2001).

2. See Rodney K. Smith, *Tribute to the Honorable Rex E. Lee: Solicitor General of the United States 1981-85*, 3 J. APP. PRAC. & PROCESS 557, 580-82 (2001) (describing Rex Lee's interactions with Justice Blackmun and Walter Dellinger).

I.

Americans have never spent much time thinking about the solicitor general. When a neighbor once asked Rex's wife, Janet, what her husband did for a living, she replied, "He's the solicitor general." "Gee," said the neighbor, "it must be great being married to a military man!"³ The relative obscurity to the public of the solicitor general is a recurring theme throughout the history of the office. After his first day on the job, William Howard Taft attended a dinner party held by a friend of his father's and

was seated between two ladies who, he learned by glancing at their place-cards, were Mrs. Henry Cabot Lodge and Mrs. John Hay. They likewise had glanced at his place-card but all they read there was "The Solicitor General." It was not until the end of the evening that it dawned on Taft that the reason why they had addressed him throughout the dinner as "Mr. Solicitor General" was that neither of them had the slightest idea [who he was].⁴

Things have not changed very much over the past 112 years. Judge Bork claims that people still mistake him, to his relief, he asserts, with former Surgeon General Everett Koop. Of course, in that case, the beards might have something to do with it.

However, while perhaps obscure to the public, the solicitor general is certainly familiar to the Supreme Court and to those who follow its work. Indeed, he is best known for his role as the government's advocate in the Supreme Court. At the petition stage, he must decide, in cases in which the United States is a party, whether the government will petition for certiorari, oppose certiorari, acquiesce in certiorari, or confess error. Where the United States is not a party, he must decide whether the government will file a brief *amicus curiae*, and he must file an *amicus* brief when the Court invites him to express his views on a case. At the merits stage, the solicitor general is responsible for handling the government's briefing and argument if the United States is a party, and for deciding whether the government will participate as *amicus curiae* in cases in which it is not. And this role represents a major portion of the Court's docket. Last term, for example, the United States

3. John A. Jenkins, *The Solicitor General's Winning Ways*, 69 A.B.A. J. 734, 736 (1983).

4. Theodore B. Olson, *William Howard Taft: Solicitor General of the United States*, Founder's Day Speech (Feb. 16, 2002), at 4.

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participated as a party or amicus in sixty-five of the Court's seventy-eight arguments—a full eighty-three percent of the Court's argument docket.

As nearly everyone here knows, the solicitor general also performs a function that the Court does not see, nor does anyone outside the Justice Department for that matter, except indirectly. He supervises the government's litigation in the lower courts. He ultimately decides whether the United States will appeal a case it has lost, seek rehearing en banc, seek an issuance of an extraordinary writ, file a brief amicus curiae, or intervene to defend the constitutionality of an act of Congress.

In sum, by representing the government in the Supreme Court and by supervising the government's appellate litigation in the lower courts, the solicitor general endeavors to ensure that when the United States speaks in court, it does so with one voice. In doing so, he has important responsibilities to all three branches of the federal government.

II.

Rex Lee discharged these responsibilities superbly across the broad expanse of cases he handled as solicitor general. First and foremost, as the president's advocate before the Supreme Court, the solicitor general owes a duty to defend vigorously the core powers of the executive. Rex was called upon to fulfill this important role at the very beginning of his tenure in the Office of the Solicitor General, in helping the president bring an end to an international crisis.

On November 4, 1979, the American embassy in Tehran was seized, and our diplomatic personnel there were taken hostage. In response, President Carter declared a national emergency. And to apply leverage in order to assist in obtaining the release of the hostages, he issued executive orders freezing Iranian assets and otherwise affecting the claims of American creditors against Iran. After President Reagan took office, and as a part of the settlement with Iran, he ratified some of those orders suspending contractual claims then pending against Iran in U.S. courts. The claims would be arbitrated by an international claims tribunal. It was the president's claim suspension that posed an important constitutional question in *Dames & Moore v. Regan*.⁵

5. 453 U.S. 654 (1981).

Rex had not yet been confirmed by the Senate as solicitor general at the time oral argument was set in the summer of 1981 pursuant to an expedited schedule after the Supreme Court granted certiorari before judgment in several of the Iranian claims cases. Judge Wade McCree, the outgoing solicitor general, assigned to Rex the responsibility to argue the case on behalf of the United States—just five days after Rex’s confirmation hearings. Judge McCree thought it would be beneficial to have the new president’s solicitor general appear before the Justices for that purpose.

Rex naturally rose to the occasion, ably defending the exercise of executive power in foreign affairs, and the Court unanimously held that the claims suspension at issue was within the president’s legal views and constitutional authority.⁶ In representing the president’s legal views and constitutional authority of the Supreme Court, Rex did what every solicitor general regards as one of his highest callings: acting as the executive branch officer under the attorney general who serves the president, in whom Article II vests the entire executive power, in expressing the president’s constitutional position in the nation’s highest court.⁷

Dames & Moore also demonstrates how important it is for the solicitor general to defend the president’s exercise of core Article II powers during a period of national crisis. It is a responsibility crucial to the effective functioning of our Republic, for it is triggered at a time when, in Alexander Hamilton’s words in *Federalist No. 70*, “energy in the executive” is needed the most.⁸

At a very emotional time in American history, when United States soil had effectively been invaded, Rex’s discourse before the Justices was measured, dispassionate, reasoned, and reassuring. He exemplified the standard of excellence to which the solicitor general’s advocacy must always aspire. Rex was acting not merely as the president’s representative but also as a friend and officer of the Court, a trusted counselor who could be relied upon to deal fairly with questions of great legal, political, and emotional moment.

6. *Dames & Moore*, 453 U.S. at 688 (so holding because “the settlement of claims ha[d] been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another” and because “Congress [had] acquiesced in the President’s action”).

7. See U.S. CONST. art. II, § 1.

8. THE FEDERALIST NO. 70, at 355 (Alexander Hamilton) (Gary Wills ed., 1982).

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I will return to that theme, but before I do, I want to address the solicitor general's duty to Congress. Article II mandates that the president "shall take Care that the Laws be faithfully executed,"⁹ and the president delegates an important aspect of that executive duty to the solicitor general. He has thus long been responsible for defending the constitutionality of congressional statutes, so long as a defense can reasonably be made.

Rex discharged the solicitor general's role as an advocate for Congress, for example, in *Equal Employment Opportunity Commission v. Wyoming*.¹⁰ In that case, he successfully argued that the extension of the Age Discrimination in Employment Act to state and local governments was a valid exercise of Congress's Commerce Clause powers and thus was not precluded by the Tenth Amendment under *National League of Cities v. Usery*.¹¹ And two years later, in *Garcia v. San Antonio Metropolitan Transit Authority*,¹² Rex argued on behalf of the Department of Labor that San Antonio's Transit Authority was not immune from the minimum-wage and overtime provisions of the Fair Labor Standards Act under *National League of Cities*. The Court agreed, overruling *National League of Cities*. Rex had not asked the Court to overrule *National League of Cities*, which he had hoped the Court would leave in place, but the Court did so anyway.

(I have a keen memory with respect to *Garcia* because Rex permitted me to argue that case when it first came before the Court. When the Court set it for reargument with specific instructions to address whether *National League of Cities* should be reversed, I tried to no avail to convince Rex to let me argue the case again. He knew then, as I did not appreciate then, but do now, that when the Supreme Court is considering overruling itself on an important constitutional issue, it expects to see before it the solicitor general, not the assistant attorney general for the Office of Legal Counsel.)

In *Garcia*, Rex thus defended the validity of agency action implementing a congressional enactment against the states under the Commerce Clause, despite his deeply held Madisonian concern that the regulations might pose a serious threat, as he would later express,

9. U.S. CONST. art. II, § 3.

10. 460 U.S. 226 (1983).

11. 426 U.S. 833 (1976).

12. 469 U.S. 528 (1985).

to the “double security [which protects] the rights of the people” under a federalist structure of government.¹³ Rex felt that the *Garcia* Court “abdicate[d] its duty to interpret the Constitution” and transferred some of its interpretative powers to Congress, thereby “radically alter[ing] the state of separation of powers and federalism in America.”¹⁴ As solicitor general, however, he understood his role, and he faithfully exercised the responsibilities of his office. Sometimes the solicitor general is obligated by his office to defend causes to which he does not personally subscribe. Some people regard that as remarkable, but as Rex well understood, the solicitor general’s client is the government, and it matters considerably less what the individual solicitor general believes than what the interests of his clients require.

But Rex also argued a case that stands as a classic example of one of those relatively rare instances in which it is appropriate for the solicitor general to challenge rather than defend the constitutionality of an act of Congress—*Immigration and Naturalization Service v. Chadha*.¹⁵

In the Immigration and Nationality Act, Congress delegated to the attorney general the authority to suspend the deportation of aliens in certain situations. But in order to retain control over the exercise of that power, Congress reserved to itself a one-house legislative veto over each decision by the attorney general to suspend deportation, so that the vote of one house of Congress could reverse the attorney general’s decision. *Chadha*, the plaintiff, was one of several aliens with respect to whom the House of Representatives had exercised that veto.

Chadha came along in an interesting context. Presidents going back as far as Franklin Roosevelt had acquiesced in various manifestations of the legislative veto device. In fact, President Carter and his attorney general had supported their constitutionality and had even proposed a legislative veto as a part of a bill authorizing a presidential reorganization of government. Later in the Carter administration, however, he and his Department of Justice had perceived how invasive of presidential authority legislative vetoes had become and had changed their position to one challenging their

13. Rex E. Lee, *Federalism, Separation of Powers, and the Legacy of Garcia*, 1996 BYU L. REV. 329, 330 (quoting THE FEDERALIST NO. 51 (James Madison)).

14. *Id.* at 341–42.

15. 462 U.S. 919 (1983).

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constitutionality. But Rex found himself serving a president who had supported legislative vetoes during his campaign, and powerful Republican senators strongly supported them. But after much internal debate and strife, and considerable pressure to reverse course, the Reagan administration endorsed the Carter administration's legal position that legislative vetoes were unconstitutional. Faced with the serious encroachment on the authority of the executive branch that legislative vetoes represented, Rex argued in the Supreme Court that the legislative veto violated the Presentment Clause of Article I, Section 7, Clause 2, which requires that every bill be presented to the president for his signature so that he may decide whether to veto it. Further, because the particular veto provision at issue could be exercised by one house, Rex contended that it contravened the bicameralism requirement of Article I, Sections 1 and 7, according to which both houses of Congress must pass a bill before it can become law, or, at least, that is how the story goes in that famous Schoolhouse Rock cartoon about how a bill becomes a law.¹⁶

The Supreme Court agreed that the House had exercised legislative power in exercising the veto and thus had violated the Constitution's presentment and bicameralism requirements. Its decision was sweeping in its effects, essentially striking down virtually every type of more than 200 legislative veto provisions Congress had enacted over a fifty-year period, many, as I said, with the approval and occasional outright complicity of past presidents.¹⁷ The Court thus effectively invalidated more federal statutory provisions in that one decision than it had over its entire previous history since first declaring an act of Congress unconstitutional in *Marbury v. Madison*.¹⁸

Looking back more than a decade later, Rex considered *Chadha*

one of the dozen most important cases ever decided by the Supreme Court. It would be difficult to imagine a more important issue than the one decided by *Chadha*: how legislation is to be enacted in this country, and particularly, whether the constitutionally authorized presidential veto—which effectively

16. The sad bill sang, "I'm just a bill, yeah I'm only a bill, and I'm sitting here on Capitol Hill."

17. See BARBARA HINKSON CRAIG, *CHADHA: THE STORY OF AN EPIC CONSTITUTIONAL STRUGGLE* vii (1988).

18. See *id.*

gives the President one-sixth of the votes in each house of Congress—can be taken away by majority vote of both houses of Congress.¹⁹

Rex's experience with *Chadha* teaches us that, as an executive officer, the solicitor general's constitutional duty to the president is paramount to his duty to Congress where core executive power is threatened.

In addition to his responsibilities to the political branches, the solicitor general has an important responsibility to the Supreme Court. Though all lawyers are officers of the court in which they appear, the solicitor general is an officer of the Supreme Court in a more special sense. Both the Office of the Solicitor General and the Supreme Court are steeped in tradition, and the solicitor general has a duty to uphold the long tradition of fidelity to the best interests of the Court as an institution.

That duty is even evident in the sartorial correctness that a solicitor general is expected to exhibit. Rex once recalled:

I remember seeing [Chief Justice Burger] one night at a social event . . . And he told me, very seriously, "Some of your lawyers have been appearing in button-down shirts. That's not appropriate. They should not wear button-down collars with their black frock coats." I told him I'd get someone on it right away. But I didn't know of anyone other than me who had ever appeared in a button-down shirt! I got the message.

Well, the next time I was supposed to appear in court, it was to move an admission, and I'd forgotten about it until I got to the office. I had worn a yellow button-down shirt! And I had to look all over the department for someone who was wearing a white shirt my size with the right collar, so that I could trade! Now, I keep an extra shirt in the office at all times.²⁰

I remember that day well. Rex approached me at our early morning attorney general senior staff meeting and said: "Ted, we're good friends right? We're such good friends that we'd give each other the shirts off our backs, right?" I found this behavior a bit strange because Rex was not the insecure type, and we obviously

19. Rex E. Lee, *The Advocate's Role in First Amendment Jurisprudence*, 31 GONZ. L. REV. 265, 267 (1996).

20. Jenkins, *supra* note 3, at 736.

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were close friends. “Of course, Rex,” I assured him. “What’s on your mind?” “Well,” he replied, “I need the shirt off your back!” Rex and I have always had a lot in common, and Rex had sized me up, so to speak, and calculated that my shirt would be just about right to him. As I recall he wound up getting a shirt from a lawyer in his office, but I’m proud of the fact that he asked me first.

Of course, Chief Justice Burger would have agreed that the solicitor general has other, more essential obligations to the Court besides his costume. He must be extraordinarily meticulous about the accuracy and fairness of every legal and factual representation he makes to the Justices. As Rex once put it:

[T]here is a widely held, and I believe substantially accurate, impression that the Solicitor General’s Office provides the Court from one administration to another—and largely without regard to either the political party or the personality of the particular Solicitor General—with advocacy which is more objective, more dispassionate, more competent, and more respectful of the Court as an institution than it gets from any other lawyer or group of lawyers.²¹

Rex identified “[t]he advantage to the Court” that such advocacy confers. “[I]n more than half of its cases,” he wrote, “it has a highly-skilled lawyer on whom it can count consistently for dependable analysis rendered against the background of an unusual understanding and respect for the Court as an institution.”²²

The government now participates in a greater percentage of cases than it did when Rex was solicitor general. As I mentioned earlier, the Justices heard argument seventy-eight times in eighty-eight cases last term (some of the cases were consolidated), and the United States participated as a party or amicus in eighty-three percent of the docket. In the 1983 term, by contrast, the Court heard argument in 184 cases, and the government participated in 118 of them, or sixty-four percent of the docket. That was the term in which Rex guided the government to a remarkable eighty-three percent winning percentage. By comparison, the average winning percentage from 1943 through 1983 was sixty-nine.²³ (I am proud to say that last

21. Rex E. Lee, *Lawyering for the Government: Politics, Polemics, & Principle*, 47 OHIO ST. L.J. 595, 597 (1986).

22. *Id.*

23. LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 299 n.19 (1987).

term the government matched Rex's outstanding October 1983 term, prevailing in fifty-four of sixty-five arguments or 83.3%.) That is a tribute to the skilled career lawyers who work in the Office of the Solicitor General. Imagine, 65 arguments, 130 moot courts, scores of briefs, several hundred op certs, 2000 or so appeals, interventions, other decisions, and other cases occasionally assigned to the solicitor general by the attorney general, all handled by about twenty lawyers, virtually all career professionals, dedicated lawyers who must be protected from political pressures. Rex was extremely proud of his career staff and invariably demonstrated a willingness to take the heat for tough decisions.

In that regard, the government's increased rate of participation makes it all the more important that the solicitor general make responsible use of his role as the government's litigation gatekeeper. He must reconcile the positions of the components within the Department of Justice, the U.S. attorneys, the other executive departments, and the administrative agencies, and he must exercise restraint in seeking to invoke the Court's jurisdiction to ensure that only the most important cases in which the government has an interest will receive the Court's close scrutiny. He thus conveys important information to the Court that would be obscured if he were too aggressive in seeking Supreme Court review. He also helps them to maintain control over a caseload that remains daunting.

But determining which of the government's cases deserve further review is not easy. The problem the solicitor general faces is that most entities within the executive branch will want to appeal cases that the government has lost. In those circumstances, the solicitor general must judiciously exercise several different skills, all of which Rex possessed in abundance. Indeed, even in the relatively few cases in which the solicitor general agrees that review is warranted, agencies with different mandates and constituencies will often disagree about the government's position on appeal.

During his tenure as solicitor general, Rex described how he would handle those recurring situations:

I'm called upon to mediate. I have to do it; it's part of my job. When it happens, I function very much like a judge. We get memos from both sides—they're like briefs—and frequently they ask for a conference, and I sit and listen to both sides. It's like an oral argument But the startling consequence of my making a

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decision in these circumstances is that the side that I rule against doesn't get represented at all.²⁴

At those times, Carter Phillips recounts, Rex's "extraordinary people skills" were on display.²⁵ Carter, who later became Rex's law partner, served under Rex in the Office of the Solicitor General. He recalls being "fascinated" by "how genuinely attentive [Rex] was to the arguments that each participant offered" and by his ability to "ensure that everyone felt that he or she had been fully heard."²⁶

But Rex's commitment to due process in his dealings with government lawyers did not render him any less a faithful servant of the Supreme Court. As all solicitors general must, he respected the principle of *stare decisis*, resisting calls that he ask the Court to move too far too fast when his highly informed legal judgment counseled him that the Court was not prepared to be so moved. As Rex memorably explained in responding to a question regarding whether the solicitor general should make arguments he knows the Court will reject, "He is not the Pamphleteer General."²⁷

Indeed, one of Rex's special contributions as solicitor general was his remarkable ability to resolve the paradox of the solicitor general's role in situations where he experienced pressure to advocate positions that he believed would jeopardize his special relationship with the Supreme Court. I use the word "paradox," and not "contradiction," because of the depth of Rex's appreciation of the nature of the problem and its solution: although certain goals of the administration might be in tension with his duty to the Court in a particular case, he understood that success in realizing the president's overall litigation objectives ultimately depended on his preserving the solicitor general's special relationship with the Court. As Rex put it, "[A] wholesale departure from the role whose performance has led to the special status that the Solicitor General enjoys would unduly impair that status itself. In the process, the ability of the Solicitor General to serve any of the President's objectives would suffer."²⁸

24. Jenkins, *supra* note 3, at 738.

25. Carter G. Phillips, *Tribute to the Honorable Rex E. Lee: Solicitor General of the United States 1981-85*, 3 J. APP. PRAC. & PROCESS 557, 564 (2001).

26. *Id.* at 565.

27. Lee, *supra* note 21, at 600.

28. *Id.*

For example, Rex recounts in *Wallace v. Jaffree*,²⁹ “It was seriously urged that [the government] advance—as one argument in support of the constitutionality of Alabama’s moment of silence statute—that the first amendment generally and the establishment clause in particular were not binding on the states.”³⁰ Rex declined to do so, and he later explained why:

If, as the Solicitor General of the United States, I had advocated that the first amendment was not binding on Alabama, I would have destroyed—with one single filing—the special status that I enjoyed by virtue of my office. I would have also acquired a new status, equally special. The Court would have written me off as someone not to be taken seriously.³¹

As Professor Wilkins later explained, Rex appreciated, as some others did not, that “the law moves in careful modulations rather than great leaps.”³²

In cases such as *Wallace*, Rex was effective in serving not only the Supreme Court, but also his president over the long run by exercising lawyerly restraint in a given case. He would later reveal the historical perspective that informed his judgment:

There has been built up, over 115 years since this office was first created in 1870, a reservoir of credibility on which the incumbent Solicitor General may draw to his immediate adversarial advantage. But if he draws too deeply, too greedily, or too indiscriminately, then he jeopardizes not only that advantage in that particular case, but also an important institution of government. The preservation of both—and striking just the right balance between their sometimes competing demands—lies at the heart of the Solicitor General’s stewardship.³³

“One of the most important jobs I have,” Rex said while he was solicitor general, “is protecting the tradition of John W. Davis, Robert H. Jackson, Charles Fahy, and Thurgood Marshall.”³⁴

29. 472 U.S. 38 (1985).

30. Lee, *supra* note 21, at 600.

31. *Id.* at 600–01.

32. CAPLAN, *supra* note 23, at 105.

33. Lee, *supra* note 21, at 601.

34. CAPLAN, *supra* note 23, at 76.

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III.

Finally, I would like to focus on a special quality of Rex Lee that contributed greatly to his skill as an appellate advocate and as an exemplar of the standard of advocacy appropriate to a solicitor general speaking before the Supreme Court on behalf of the United States. Tom Lee has recalled a pertinent discussion with his father:

I remember him drawing an analogy between oral argument and a conversation about an important topic with a friend—not just any friend, but one that is respected and looked up to. When this model is followed, he explained, an advocate’s persuasiveness is enhanced because he naturally incorporates some basic guidelines of oral advocacy—to maintain eye contact, speak conversationally and candidly, and listen to and answer questions that are raised. These were some of the hallmarks of a Rex Lee argument³⁵

Just as Benjamin Bristow, the nation’s first solicitor general, argued with “an absence of all attempt at display,”³⁶ so too did Rex. And so must all Solicitors General if they are to be effective advocates for the United States.

Of course, that is not as easy to accomplish as Rex made it appear. Tom has noted that the idea of oral argument as a talk with a respected and reliable friend came naturally to Rex because “he saw the guidelines . . . not merely as rules for appellate argument, but as principles to live by.”³⁷ For example, Carolyn Brammer, still the executive officer at the Office of the Solicitor General, was hired by Rex Lee, and she worked closely with him first at the Civil Division and later at the Office of the Solicitor General. Carolyn’s face lights up at the mere mention of Rex’s name. With an admiration, enthusiasm, and joy that is infectious, she remembers him as perhaps the kindest, wisest, funniest, and most truly respectful person she has ever known.

Thus, Rex was so successful as a Supreme Court advocate not merely because he had the benefits of a fine legal education at the University of Chicago, a clerkship with Justice Byron White, and formative experiences in public service, private practice, and legal

35. Lee, *supra* note 1, at 559–60.

36. Seth P. Waxman, “Presenting the Case of the United States as It Should Be”: The Solicitor General in Historical Context, Address to the Supreme Court Historical Society (June 1, 1998), *at* <http://www.usdoj.gov/osg/aboutosg/sgarticle.html> (last visited Jan. 28, 2003).

37. Lee, *supra* note 1, at 560.

academia. His work in those contexts certainly helped him become a lawyer's lawyer. But Rex also was such an outstanding advocate for our country because he was so skilled at being a trustworthy friend.

Rex Lee set an example for the rest of us during his tenure as solicitor general. It was a stewardship forged by the unusually sound judgment he developed through varied experiences in the law as well as by the deep understanding of human beings he brought to the sincere friendships with which he enriched the lives of so many. I feel very fortunate to have been Rex's friend, and I am often inspired by his rare qualities as I exercise my responsibilities as solicitor general. It is fitting that we should honor his memory by gathering at his home university to discuss the office whose mission he so nobly advanced.

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Pre-Reagan Panel

Judge Daniel M. Friedman: Deputy Solicitor General, 1969–1978;
Acting Solicitor General, January–March 1977.

Judge Frank H. Easterbrook: Deputy Solicitor General, 1978–1979;
Assistant to the Solicitor General, 1974–1977.

Keith A. Jones: Assistant to the Solicitor General, 1972–1975;
Deputy Solicitor General, 1975–1978.

Andrew L. Frey: Deputy Solicitor General, 1973–1986.

Dean Reese Hansen: We have two days of what promises to be very, very interesting conversation, questions, and discussion. Today is the day that we have looked forward to with great anticipation for many months at the law school at BYU. The idea for this conference was Tom Griffith's. I am grateful to him for his active imagination and for the force that he has put behind the organization of this historic conference. Tom is well known to many of you already, and you will hear from him in just a moment. In addition to Tom and his ideas and good work, I want to thank everyone from the university and from the law school who have worked so hard to make this event possible today. That our participants would come to BYU today is a wonderful tribute to Rex Lee, whose memory we honor with this conference.

At the side of the table over there is a bronze casting of Rex and his favorite dress. He is in his morning coat and arguing a case at the United States Supreme Court, which was maybe his second most favorite place in all the world to be. And so we honor him here today and your coming honors him. We thank you, participants, for the honor you pay us by being here also. Of course, your coming together today also honors the Office of the Solicitor General of the United States. The Office of the Solicitor General embodies all that is the very best in our great nation and in the legal profession.

I visited with Rex in his office in Washington, D.C., while he was serving as solicitor general. As usual, on that day Rex was animated, gracious and kind. He enjoyed showing off the office. He spoke glowingly of all of the attorneys in the office and of the importance

of the cases to our country. He told me how interesting and how complicated they were, sometimes in great detail. He spoke of the political pressures he was subjected to. And then he said to me, and this is a quote, “Reese, this is without any question the best job in the world. I love every minute of it.” And I knew that he really meant it.

All of the participants in the conference have personally experienced the things Rex so loved about the Office of the Solicitor General. We are looking forward to hearing from you. On behalf of the students and the faculty of the law school, I extend a warm welcome to you each to BYU. We look forward to hearing from you.

I am pleased now to introduce Merrill J. Bateman, president of Brigham Young University. After President Bateman welcomes you, Tom Griffith, general counsel of the university, will introduce the conference. President Bateman has served as president of BYU since 1996. He earned his bachelor’s degree at the University of Utah and his Ph.D. at MIT in economics. He has been a Danforth Fellow, a Woodrow Wilson Fellow, a lecturer in Ghana, a professor at the Air Force Academy, a professor at BYU, and dean of the business school at BYU. He is a General Authority of the [the Church of Jesus Christ of Latter-Day Saints] and a great leader of our university. President Bateman, we will be delighted to hear from you.

Tom Griffith—let me just introduce Tom before he gets up and then I will not have to get up again. Tom is assistant to the president and general counsel of BYU. He was a partner at Wiley Rein & Fielding. He was Senate legal counsel of the United States from 1995 to 1999, practiced law in North Carolina, got his law degree at the University of Virginia, and has been a great addition to BYU since August of 2000, when he joined us as general counsel.

President Bateman.

BYU President Merrill Bateman: I would like to add my welcome to you for being here at Brigham Young University in the Rex E. Lee Conference on the Office of the Solicitor General. It is really an historic occasion and an unprecedented gathering of some of the finest lawyers in the history of the United States, all of whom have had the distinction of serving in the most prestigious legal office, that of the Office of the Solicitor General. Your presence at this conference also honors Rex E. Lee, the thirty-seventh solicitor general of the United States, who was not only my next-door

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neighbor when he lived in Provo, but who was also my immediate predecessor as president of Brigham Young University.

Your presence also honors us as a university community. We are pleased to have you here. Some of you have been here before, and we welcome you upon your return. For others, this is your first visit. We hope that you enjoy not just the unmatched physical setting of this university, but the special atmosphere that prevails here on campus. As you may know, Brigham Young University is a part of and affiliated with the Church of Jesus Christ of Latter-day Saints. Because of that, we are dedicated to a particular proposition here. That proposition is that the life of the mind and the life of the spirit can be joined in a way to produce lives of service. I know of no better exemplar of that aspiration than Rex E. Lee.

You know Rex Lee and are well acquainted with his significant public service. You know the love and respect he felt for the Office of the Solicitor General. We are very proud of his accomplishments in that capacity. Not long after Rex passed away, there was a meeting of the committee of the National Association of Attorneys General held in the Supreme Court Building in Washington, D.C. During a question and answer period, the Associate Justice David Souter was asked how advocacy before the Supreme Court had changed in recent times. His answer was very interesting. He paused for a moment and then said, "Well, I can tell you the biggest change by far is that Rex Lee is gone. Rex Lee was born to argue tough cases of immense importance to this nation. He set new standards of excellence for generations of lawyers and justices. No one thing has happened to change the nature of advocacy before this Court more than his passing." He also noted there were at least four other things that Rex valued in his life. First was his family, his faith, the university, and his country.

For a moment, let me just tell you something about this remarkable institution that he so loved. We have more than 30,000 students. They come from all 50 states and from 110 countries across the world. We speak about 80 languages on campus in addition to English. We teach about 66 languages. We believe Stanford and Yale vie for second with 24. More than 14,000 of our sophomores through graduates have taken two years out of their academic experience to serve at their own expense as missionaries for the Church all over the world. So, you can imagine the rich milieu that occurs when they come back, having had two years of another

culture, learning another language. More than that, also coming back with them are people from those countries themselves. So, it is a very interesting cosmopolitan group of students that we have on campus. We also anticipate that half of every freshman class will also serve missions, that they will do the same. That service comes between the freshman and the sophomore year. Our students are involved in more extracurricular activity and community service than any other college or university from the data that we have. Academically, our incoming freshman class matches up well in terms of SAT and ACT scores with most classes in the nation. In fact, we have a very large freshman class, given most universities, of about 5,500. If we took the top 1,500, it turns [out] they would match those at Harvard or Yale or Princeton or Stanford. I mention these things so that you will appreciate why Rex loved this university. It is a special place.

Finally, we are honored by your presence here. Seeing you and knowing something about the role you played in shaping our nation's legal history, I am reminded of the story told about President Kennedy. While welcoming a group of Nobel laureates to the White House, he reportedly said, "This is the greatest assembly of minds in the White House since Thomas Jefferson dined alone." This conference may very well be the greatest collection of lawyers gathered together to discuss the history and workings of the Office of the Solicitor General. We are looking forward to listening in on the conversations, and we thank you for allowing us to share this remarkable moment. Thank you very much.

Thomas Griffith: Well, it is my pleasure to officially begin the conference. After my remarks, I will ask John Fee to come up and be the session leader for our first session. But I want to echo President Bateman's remarks and thank the participants for being here. We are truly honored by your presence.

It is my personal view, although I have never worked in the Office of the Solicitor General, that the workings of that office present the most interesting issues in terms of the interplay between law and policy that exists. And I am looking forward, over the course of the next two days, to listening in as well on the conversation amongst these excellent lawyers who have practiced the legal profession in its highest form by representing the interest of the United States before the Supreme Court and other courts.

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But I just want to second what President Bateman [said] in terms of thank you for those participants who have come and hope that you enjoy your time here. If there is anything we can do to make this experience more pleasant for you, please let us know. We are just very grateful to have you here.

Andrew Frey: Let me say first a word about Rex, who some but not all of us served with. In addition to all the other qualities that were referred to, he was just the nicest guy that you would ever want to meet, a truly decent human being, and it was a pleasure as well as an honor to serve with him.

Now, I have tried to identify certain themes that I think would occur, that are issues for how the Solicitor General's Office functions, what its role is. And they, I hope, will be topics that will be touched upon to some extent in the various panels that you will hear about because they are institutional issues. I thought I would mention some of them at the outset and then turn it over for discussion among the other panelists.

One question is: Who is the solicitor general's client? Is it the Supreme Court? Is it the United States government? Is it the president, by whom the solicitor general was appointed? Is it the public at large? The conception of who the client is can play a significant role in deciding how to handle difficult, publicly important matters. In that connection, of course, how does the role of the solicitor general differ from that of other lawyers for other types of clients?

A second question is—and these are in no particular order: To what extent should the positions taken by a solicitor general be guided by previous positions taken by the department and by the Solicitor General's Office? What are the justifiable bases for abandonment of previous positions? When do the political views of the current incumbent administration justify change of positions? You may have read recently about the change in position with regards to the interpretation of the Second Amendment. That is an example of this issue that Ted [Olson] had to wrestle with.

A third question is: What is the nature and extent of the responsibility of the solicitor general to defend the constitutionality of federal statutes? What should a solicitor general do who personally believes that a statute or portions of the statute are unconstitutional but who also concludes that a non-frivolous defense can be made of

the statute? What should the solicitor general personally do? What should the Office of the Solicitor General do? Maybe we will talk a little bit about that in a few minutes.

Another issue concerns the amicus curiae policy of the office. When should the office participate in cases that involve private parties or the states, to which the federal government is not a party? What are the standards for determining that there is a sufficient governmental interest to justify participation in the case presentation of views as those of the United States? This issue, which came up a lot during Rex's solicitor generalship, and we will talk about it some, I imagine, in the Reagan panel. Examples included cases about school prayer or abortion or other things that do not directly involve federal government activities but are nationally important questions on which different administrations may have radically different views. Ought the solicitor general and the United States government be participating before the Supreme Court in these cases or ought it to stay its hand?

Another very important function of the Solicitor General's Office is to arbitrate disputes among various constituents of the Justice Department and various agencies of the federal government as to what position to take in government appellate litigation. So, the question is: How does the solicitor general function in that capacity? To what extent should the solicitor general be deferring to the views of constituent governmental agencies with which he does not necessarily personally agree? For example, when Bob Bork was solicitor general, the department took some of the most liberal positions in civil rights cases that were taken at any time. And it did so, even though I do not think Bob personally agreed with many of them, because his conception of his role was not as a policymaker in the area of civil rights, but rather to defend the policies that others in the government, the Civil Rights Division, for example, wanted to pursue if those policies were defensible. Other people might have different views about how that should be handled.

Another example is a case in which I was personally involved, called *Bell v. Wolfish*,³⁸ which concerned prisoners' rights. At the time, this was in the mid-70s, the Civil Rights Division—and Solicitor General Days was then head of the Civil Rights Division—was actively involved in bringing litigation to reform state prison

38. 441 U.S. 520 (1979).

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systems, some of which had quite deplorable conditions. At the same time, one of the constituent components within the Justice Department was the Bureau of Prisons. The Bureau of Prisons ran prisons. It desired minimal judicial interference in its operations. And it became clear that the government was in danger of taking conflicting positions, depending on who was the proponent of the position. So, it was saying one thing on behalf of the Bureau of Prisons and the opposite on behalf of the Civil Rights Division—not a very satisfactory way for the federal government to act, it seemed to us. And this particular case brought it to a head because the legal issues were ones that were important to both entities. And it fell to Solicitor General McCree to decide which position would be taken and then to really make sure the means were adopted to coordinate the competing concerns because there was legitimate room for each party to operate, but the areas of conflict had to be resolved one way or the other.

Another question that you may have heard about, if you have read anything about the Solicitor General's Office, is the confession of error. And there were a number of historic cases of special interest: the Pentagon Papers³⁹ case was one where I think a lot of people in the Office—and Dan was there; I was not yet there—did not necessarily believe in the position, but they felt it their duty to rally around under very difficult conditions to defend the administration's positions. And there were a number of other such cases. Now, those are some of the recurring kinds of problems—as well as unique but historic cases—that the solicitor general wrestled with.

At this point, what I would like to do is have a little bit of historical reminiscence about some of the interesting things that happened. And the person who has the greatest institutional memory in this regard is Judge Friedman who—I guess Tom neglected to mention this—actually joined the Department of Justice in 1951 and joined the Solicitor General's Office as an assistant in 1959. There are few people alive today who served in the Solicitor General's Office prior to Dan. So, let me turn the floor over to Dan with some comments about the early history of the office.

39. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

Judge Daniel Friedman: Thank you, Andy. I would like to go back a ways. I would like to go back to the mid-1930s. The first solicitor general who served under President Roosevelt was a man named James Crawford Biggs. Mr. Biggs was a lawyer in a small town in the South. I do not know how he got that position, but I think he was overwhelmed by it. There is a story, which I will tell you a little bit about. How authentic it is, we do not know. The story is that after Mr. Biggs had appeared on behalf of the government a number of times in the Supreme Court, sometime in 1935, Chief Justice Hughes went to visit President Roosevelt. And what the Chief Justice reputedly told the president was that there were going to be a number of major New Deal cases coming before the Court in the next few years and that if President Roosevelt had any hope of prevailing in all or some of them, the first thing he should better do is get a new solicitor general because Mr. Biggs was clearly not up to the task. That was 1935 it happened. Mr. Biggs departed from the office in 1935. The story carries on that some people with some influence obtained for Mr. Biggs another position, not in the government, that paid twice what the solicitor general should pay and Mr. Biggs was unable to resist that temptation. Now, this story has been reported in a number of places. Nobody apparently has ever been able to check it out. There does not seem to be any documentation that supports it. Erwin Griswold, who had been a lawyer as a young man in the Solicitor General's Office and who had served under Mr. Biggs, told me that he had repeatedly tried to check that story out and could not do it. So, I cannot swear by the story, but it was told to me by a number of people and the frequency with which the story is repeated makes me suspect that at least there is some basis for it.

Well, the next story that I have to tell you is about the successor to Mr. Biggs, Stanley Reed, who went on to become a distinguished Supreme Court Justice. Solicitor General Reed was arguing very early in his career in the Supreme Court, trying to defend some New Deal legislation and apparently was subject to an incredible barrage of questioning. Those of you who have never been in the Supreme Court have no idea what the questioning can be like when it comes from nine different justices. They do not even let you finish sometimes answering the question—or sometimes before you have a chance to even start to answer the question, another justice will jump on you. Well, anyhow, poor Mr. Reed was subject to this barrage,

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and it was too much for him and he fainted right in the Court. People asked, “What happened?” I understand that the case was being submitted on the basis of the arguments that were made up to that point. Justice Reed, however, in his subsequent arguments did not seem to have any such problems.

The Solicitor General’s Office, like I suppose all institutions, can sometimes get some characters in it. When I came to the office, there was a man in his—I would say his 60s—a very genial, friendly fellow. It was difficult to find out exactly what he did there. He never seemed to work on most of the cases that came in, and I was told that he was a real expert on customs law and that whenever there was a customs case; he handled it and argued it to the Supreme Court. Well, of course, the number of customs cases that the Supreme Court hears is probably about three every twenty years. I do not know what he did in between.

There was also a sad story—this was again, I think, in the 1930s—of a lawyer in the Solicitor General’s Office who committed suicide by jumping down the stairwell on the stairs on Ninth Street between Constitution Avenue and Pennsylvania Avenue. Those of you who know the building will know where that is. I was told that he was in despair, that he was a very good lawyer, but unfortunately he had come not from a very good law school, and he felt inferior with all of these relatively young hotshot people in the Solicitor General’s Office and felt that he would not carry his weight. Although they told me [he] was very good and did an excellent job, it was too much for him and he plunged down the stairs.

Now, Andy had mentioned something about the problem of what does the solicitor general do when different parts of the government are in conflict and they cannot agree on what position to take in a case. That is obviously a difficult situation. But let me tell you of an unusual solution that Solicitor General Archibald Cox had to this dilemma, at least two cases that I remember. What he did was he first filed a brief arguing both sides of the case. It was fifty pages. The first twenty-five pages argued for the petitioner; the next twenty-five pages argued for the respondent. And then at the end of the brief, he indicated how it should come out. But, that was not the end of it. The solicitor general decided to argue this case himself. And yes, that is what he did. He presented both sides of the argument. He first argued on behalf of one party and then on behalf of the other party. Now, that may not be quite what one would

expect to happen under an adversary system of appellate jurisdiction, but that is what he did. Well, there was an unhappy sequel from the point of view of the office to that.

After Solicitor General Cox left, the office was run by Ralph Spritzer, who was then the acting solicitor general under the procedures that have been mentioned because the solicitor general was not there. There was a case which presented an interesting legal issue. It was a tax case.⁴⁰ And the question was whether a broker who had been charged with tax fraud and acquitted could deduct as a business expense the legal fees he had incurred in that defense. The Internal Revenue Service, of course, following its practice that it always rejects any claim that is going to cost them money said, "Absolutely not."

The Securities and Exchange Commission, however, which controls broker dealers, had a different view of the matter. They said, "yes, you should be allowed to deduct it because if he had been convicted of stock fraud, then the next step would have been [that] we would have revoked his registration as a broker. That would have put him out of the brokerage business. Therefore, his legal fees incurred in defending his criminal prosecution for stock fraud were a necessary business expense."

Well, the acting solicitor general filed a brief and argued both sides of the case. And then one of the assistants to the solicitor general was sent up to argue the case, and he argued both sides of the case and after he had been doing this for a while, Chief Justice Warren interrupted him rather annoyed and said to him, "Well, what are you asking us to do in this case? You say on the one hand that this could be said on one side and on the other hand there is this that could be said on the other side. What is your position?" So, the assistant said, "Well, it depends. If I am wearing my SEC hat, I think they are entitled to claim the deduction, but if I am wearing my Internal Revenue Service hat, I think they are not entitled to the deduction." So, Chief Justice Warren looked at him very annoyed and said, "Well, what kind of an answer is that? That is no help to us." He said, "We have got a case here. We have to do something with it. We have to either affirm the judgment of the court of appeals or reverse it. Now, you are here on behalf of the government. What are you asking us to do in this case?" Glaring like that, "What are

40. *Comm'r v. Tellier*, 383 U.S. 687 (1966).

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you asking us to do in this case? Are you asking us to affirm or are you asking us to reverse?”

There was a long pause while the assistant kind of looked uncomfortable and finally, he said in a weak voice, “Well,” he said, “if I have to make a choice, I think you should affirm.” And that is what happened. I think, Andy, now it is time to get on. This is enough history. Let’s get on with some more actual [substance]. Although, by the way, the last one is actual history.

Andrew Frey: Well, what about *TVA v. Hill*,⁴¹ which is another example—the infamous snail darter case, where there was a question of the interpretation of the Endangered Species Act⁴² and at stake was the survival of this species, the snail darter, in which there were half a dozen specimens or so left? And the Interior Department fervently supported the strict enforcement of the Endangered Species Act, while the Tennessee Valley Authority, which was the petitioner in the case, fervently took the opposite position. And I guess that was under Solicitor General McCree?

Judge Daniel Friedman: He was—well, unfortunately, I found myself the acting solicitor general in that case because Judge McCree had been a member of the panel of the Sixth Circuit that had decided the case. Then he came in as solicitor general and obviously could not participate in the case. So, this took place just as the Carter administration was taking over. And the TVA had authority to represent itself in the Supreme Court, but it preferred to have the solicitor general represent it. So, the case began with the petition stage, and we filed a petition for certiorari on behalf of the TVA. The case is captioned *TVA against Hill* and the Supreme Court granted the petition.⁴³ And during the preparation of the brief and also at the petition stage, I checked with the Interior Department to find out what positions they recommended we take in the case, but all of the people from the old administration had left and the people from the new administration had not come in yet. So, I spoke to some “acting” somebody—I was acting myself—and they said they had no problem with the solicitor general supporting TVA’s position that

41. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

42. 16 U.S.C. § 1531 (2000).

43. *Tenn. Valley Auth. v. Hill*, 434 U.S. 954 (1977).

this dam that was being built down in Tennessee should be allowed to be completed despite the woe it would impact on the poor snail darter.

Well, after the Carter administration was in office, there was a lot of opposition to that position in the White House. The White House filed its own brief taking the other position. And then the question came, who was going to argue this case? And the solution was Solicitor General McCree was out of it. I was willing to do it and prepared to do it, but Attorney General Bell decided he was the only one who could answer some of the questions that the Court might raise about it. So, Attorney General Bell argued the case and in response to questions about what is going on here, what is the government's position, he could just stand up there and say, "Well, I am the attorney general and I am presenting the government's position and the government's position which I am presenting to you is that this dam should be allowed to go ahead and that the Endangered Species Act should not be read to block its completion." The end result of the case was a six to three win for the snail darter, a loss for the TVA, [and] a loss of about a hundred million dollars in government funds that were used to build the dam but it had not been completed yet. That is one way that these cases are sometimes resolved.

Judge Frank Easterbrook: And can I interject? This was also one of the more colorful oral arguments. Attorney General Bell went there with a snail darter in formaldehyde, to show the Justices that this was really an insignificant little fish. This led to the question: "General Bell, did you kill that member of an endangered species just for us?" And then, of course, it turned out the snail darter was not endangered after all. There are snail darters in abundance everywhere.

Judge Daniel Friedman: But they did not know that at the time.

Andrew Frey: Actually, the way the briefing problem was solved was that there was a brief for TVA and then there was an appendix, which was a brief for the Secretary of the Interior taking the opposite position.

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Now, another case that had the solicitor general personally and the attorney general having their doubts about the constitutionality of an important federal statute was *Buckley v. Valeo*,⁴⁴ which involved the Campaign Finance Act.⁴⁵ Maybe Frank would like to say a few words about how that was handled.

Judge Frank Easterbrook: Well, I would love to talk about *Buckley*, but first I would like to step back and talk about this general problem and the question whether the solicitor general is obliged to defend the constitutionality of statutes. And before I do that, I would like to say one thing about Rex Lee. Like Andy, I found him a wonderfully personable and gifted lawyer as well, but one thing the four members of this panel had in common is that we were all in the Solicitor General's Office during the Ford administration when Rex Lee was the assistant attorney general for the Civil Division. Keith was the deputy for the Civil Division, so Keith can say even more about that. I think all of us had legal dealings with Rex at the time and personal legal dealings and can vouch for the many wonderful things that have been said before today and will continue to be said.

Anyway, I would like to come back to this constitutionality problem. The president of the United States is charged by the Constitution to take care that the laws be faithfully executed,⁴⁶ but of course the laws to be faithfully executed include the other provisions of the Constitution. This can create a very substantial question for the solicitor general, for whether a particular statute of dubious constitutional standing can be defended is itself a matter of faithful execution of the full set of laws. It is also a delicate question because many of these problems involve fights among the branches of the government. *Buckley* was one of those. And also they are the kind of cases that are apt to create very high political heat for a solicitor general.

The office long has valued its independence and its ability to make a reasoned decision, but yet as in cases like *Buckley v. Valeo*, dealing with the Federal Election Campaign Act, the political forces are very strong on all possible sides of the question. As the name suggests, *Buckley v. Valeo* involved two politicians. The plaintiff was

44. 424 U.S. 1 (1976).

45. Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-442 (1971).

46. U.S. CONST. art. II, § 2.

Senator James Buckley; Valeo was the clerk of the House of Representatives. So there was no way to avoid a very heavy dose of politics.

If you go back in history, it turns out the very first time a solicitor general refused to defend the constitutionality of an act of Congress was in 1926. The case was *Myers v. United States*,⁴⁷ involving principles behind the Tenure of Office Act. Ever since *Myers*, solicitors general have felt themselves to have an independent power, but one to be exercised only sparingly in three categories of cases, two of them less controversial than the third. One category is abandoning statutes that are incompatible with recent decisions of the Supreme Court. That has been very important in civil rights cases. After the Supreme Court decided *Brown*,⁴⁸ the solicitor general could have gone statute by statute trying to defend every law but did not.⁴⁹

In the 1970s, during the Ford and Carter administrations, there were a long series of cases involving sex discrimination and illegitimacy discrimination in the social welfare programs like social security. Many of them were defended with some tenacity. Keith can talk to that. They were not defended to the very last. There were hundreds of these provisions, and by the time Solicitor General McCree came to office, it was common not to defend one or another of these things—provisions essentially identical to something that had been held unconstitutional. The Congress required a report to the Secretary of the House and Senate and when the solicitor general was willing to leave a statute in the lurch. So even though I had characterized this as a noncontroversial use of their power, it has political consequences.

The second category is clashes between Congress and the executive. A good example of that is the history of the one-house veto litigation, which finally came before the Supreme Court when Rex Lee was solicitor general but had been kicking around ever since FDR's time in the White House, when he concluded that statutes of this kind were unconstitutional. When Bob Bork was solicitor general, there were several occasions in which one-house veto provisions were challenged in the Supreme Court. It turned out

47. 272 U.S. 52 (1926).

48. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

49. See Frank H. Easterbrook, *Presidential Review*, 1990 CASE W. RES. L. REV. 905.

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Buckley v. Valeo was one of them.⁵⁰ There was a one-house veto provision in the Federal Election Campaign Act. The solicitor general, as I will tell you shortly, filed three briefs in *Buckley v. Valeo*. These three briefs covered every conceivable position and its opposite. There is a footnote in one of those saying, “Well, this is a one-house veto provision. This is plainly unconstitutional.” Stop. No elaboration. It turned out it did not have to be reached in *Valeo*.

The dispositive case—what became *Chadha*⁵¹—came to the Supreme Court as a result of cooperative work between Solicitor General McCree and the Office of Legal Counsel [“OLC”]. There was basically a war council formed between the OLC and SG’s Office during the Carter administration to get that case on the fast track. As an example of the operation of the Solicitor General’s Office, the brief and argument in the Ninth Circuit were done by Dick Allen, who was an assistant to the solicitor general at the time. The Ninth Circuit, which had expedited the briefing, then waited approximately four years to decide the case, which explains why it was briefed in 1978 by the previous solicitor general and decided by the Supreme Court in 1983. The category to which *Chadha* belongs—in which the president through the solicitor general defends his own turf—is a central set. The cases are individually controversial, but it is not controversial that the solicitor general should play this role.

Now, I am going to give you the third and most difficult category, both for the solicitor general trying to figure out what best to do and for those who must ask what is politically astute. These entail statutes that do not involve recent Supreme Court decisions, do not directly involve the powers of the executive branch, and yet the solicitor general is in grave doubt that the laws should be viewed as constitutional. One stream of argument some solicitors general have accepted is that statutes should be defended if you can make an argument in their favor without breaking out laughing. It is the risibility test for a constitutional defense. If trying to state the defense of the statute does not have you rolling in the aisles, you should defend the statute. That has been the position of some solicitors general.

50. 424 U.S. 1 (1976).

51. *INS v. Chadha*, 462 U.S. 919 (1983).

I do not think it is the correct decision because it turns the solicitor general into a parrot. Whatever strands of argument the solicitor general can get from the Supreme Court's opinions, he is supposed to parrot back to the Supreme Court. But the solicitor general is in fact the spokesman for the executive branch of government. Just as the judicial branch and legislative branch can have a view about the constitutionality of statutes, so can the executive branch. Now having teased you, I arrive at *Buckley* where this question comes up front and center.

Congress passed the Federal Election Campaign Act.⁵² It has in it several things: it has a one-house veto clause that managed not to get reviewed; it has a clause providing that the appointment of members of the Federal Election Commission bypasses the president—two members are to be appointed by the president; two members are to be appointed by the Senate directly; two members are to be appointed by the House directly. That falls within the clash of branches the president and the SG believe violates Article II. And it was uncontroversial to file a brief saying that in the president's view vesting appointment in the Congress is unconstitutional. The other things in this law regulated campaign finance, both contributions and expenditures. It also created the federal system underwriting presidential campaigns.

Senator Buckley, who attacked it, and Ralph Winter, then on the Yale faculty, who was Senator Buckley's lawyer, did not have any difficulty persuading Solicitor General Bork that that statute was unconstitutional root and branch. In fact, Bob Bork kept referring to the issue involved in this case, the constitutionality of the FECA, as the "fecal matter." He was not in favor of this statute. Defenders insisted that the law represented a "narrow" regulation of politics. And his reaction was, "Yeah, it has been narrowed right to the core of the First Amendment." What to do? Well, in the end he authorized the filing of three briefs; he came to the bold conclusion to do everything.

One brief was titled "Brief for the Attorney General as a Party and the United States as Amicus Curiae." This brief attacked, on Article II grounds, the appointment the FEC by Congress and then offered the Supreme Court a lot of gratuitous advice about the rest of the law—suggesting things to think about. The solicitor general

52. 2 U.S.C. §§ 431–442 (1971).

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concluded that it would not be acceptable directly to challenge the Act's constitutionality. But this brief did imply that independent thought might raise a lot of deep questions, and by defending some parts of the Act, the brief conveyed a signal about the rest. That is brief number one, signed by—to give you an indicator of the importance of the case—Attorney General Levi, Solicitor General Bork, Deputy Solicitor General Randolph, and an insignificant assistant to the solicitor general, me.

Brief number two is styled “Brief for the Federal Election Commission as a Party and the United States as Appellee” (implying: Except to the Extent that the United States Has Already Filed the Other Brief). It vigorously defended the constitutionality of the Federal Election Campaign Act except with respect to the Article II issue. It was signed by Attorney General Levi, Solicitor General Bork, Deputy Solicitor General Friedman, and Louis Clayborn who was a once and future deputy solicitor general. Last, Solicitor General Bork authorized the FEC to file its own brief on behalf of itself defending the constitutionality of the appointments matter.

This was all quite extraordinary. Three briefs in one case is well beyond stating two sides in a single brief or filing a brief urging an outcome (with an appendix). Both the attorney general and the solicitor general signed separate briefs on (effectively) different sides of the same proposition.

Why did this occur? It is a shame that Bob Bork is not here to tell you himself. I was not privy to that final decision. It obviously entailed an assessment of what the Ford administration, given the politics of the time, thought was tolerable. It shows that if the political heat is high enough, then even if the solicitor general is very much convinced that an important act of Congress is unconstitutional, that argument still cannot be made.

There are a number of other wonderful examples of two-headed government presentation, but our time is short and I will spare you some of the examples. Maybe some of them will come up in discussion later, cases like *Personnel Administrator of Massachusetts v. Feeney*,⁵³ a two-and-a-half-headed case.

Judge Daniel Friedman: I would just like to add one thing to what Frank has said and that is when the case got to the oral

53. 442 U.S. 256 (1979).

argument of the Supreme Court, the government dropped one of its heads. There was only one argument presented and that was an argument in defense of the statute. And obviously neither the solicitor general nor the attorney general in light of what they had filed were prepared to defend the statute, so it was left to me to defend it, and I defended it, I would say—what would you say—with 75 percent success?

Judge Frank Easterbrook: Seventy-two percent. Seventy-five is an overstatement.

Judge Daniel Friedman: The Court rejected some of our arguments, but, at least I like to think, it accepted the major ones.

Judge Frank Easterbrook: The bottom line for those of you who do not know the opinion is that they held the composition of the FEC unconstitutional on Article II grounds. The Justices held that a number of challenges were unripe. They upheld the federal financing of presidential campaigns, something that even Solicitor General Bork thought was defensible. They held the independent-expenditure limitations unconstitutional but the contribution provision constitutional. Some of the justices said later—some to Bob Bork, some to me, and I would not be surprised if some to Dan—that although they were annoyed by this Cerberus-headed presentation, by the time they were done reading these things, they found the arguments very helpful in drafting a decision. But I think it was cases like this that led the Court in 1979 to set a 50-page limitation on briefs. Brief number one, the one I was involved in, was 122 pages long. Brief number two, the one Dan was involved in, was I believe 84 pages long. Brief number three, the FEC's brief, was fairly short. (I will say in slight defense that my brief had larger type.)

Andrew Frey: Do you have anything to say on these topics? [Acknowledging Keith Jones]

Keith Jones: When I heard the composition of this panel, I knew I was in trouble. Here I am with three close-mouthed shrinking violets. I knew I would have to carry most of the panel discussion on my own.

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I would like to follow up on what Frank said about the time when Rex Lee was assistant attorney general for the Civil Division. Rex became the assistant attorney general in 1975. That was about the same time that I was made deputy solicitor general in charge of cases arising out of the Civil Division. This threw me and Rex together on a number of occasions; we worked together on appeal recommendations, certiorari matters, and merits briefs.

Working with Rex was a real pleasure. He was a delightful gentleman, and I enjoyed it very much. By my calculations, Rex and I together jointly signed nine briefs on the merits in the Supreme Court over a period of about eighteen months. Our success ratio was seven wins and two losses, which for a baseball team would be pretty good. There were no blockbusters among these cases. Most of the cases, quite frankly, were eminently forgettable even to those of us who briefed and argued them.

One case that does stick in my mind was called *Alfred Dunhill of London, Inc. v. Republic of Cuba*.⁵⁴ This case involved the act of state doctrine. If you do not know what that is, I am no longer in a position to help you. But at the time the custom of the solicitor general was to assign each assistant attorney general one case to argue, and this normally would be a case arising from his division. In the *Alfred Dunhill* case, I took a young inexperienced assistant attorney general under my wing and coached him for his very first Supreme Court argument. The act of state doctrine was a little tricky; we had to spend quite a bit of time preparing for the argument. But it is not what you think. The neophyte with whom I was dealing was not Rex Lee. It was Antonin Scalia. And I can assure you that he was a very fast learner.

Rex did argue at least one case on which he and I had worked together. The case was *Matthews v. de Castro*,⁵⁵ and the issue there was whether, under the Social Security Act, Congress could constitutionally award death benefits to the widow of a deceased wage-earner while denying benefits to a divorcee of a deceased wage-earner. It may have been an uphill struggle, but Rex was able to persuade the Supreme Court that Congress could constitutionally make that distinction. This was fairly typical of the kind of case that the Civil Division had in the Supreme Court back when Rex was the

54. 425 U.S. 682 (1976).

55. 429 U.S. 181 (1976).

assistant attorney general. We also had, as Frank intimated, a number of cases involving sex discrimination. We fought those out valiantly, but ultimately to no avail.

Let me turn to one other interesting case during my time in the office. You almost always think of the Solicitor General's Office as dealing with Supreme Court matters, but actually one of the most interesting and important cases that I had was at the trial court level. It is hard to conceive now, but there was a brief period of time back in 1973 when Spiro Agnew looked like a pillar of integrity in an administration that otherwise had lost its moral compass. President Nixon was struggling day by day to put out one Watergate fire after another. Spiro Agnew was sitting back in dignified silence, not exercising his penchant for bombastic alliteration—and then, of course, the bribery scandal erupted. It turned out that the U.S. Attorney for the District of Maryland was investigating Agnew's conduct while governor, investigating allegations that Agnew had demanded and received bribes while governor and indeed had continued to receive bribes in the White House as vice president. In response, Agnew's lawyers decided to play a game of political chicken. They knew that President Nixon was quite concerned, to put it mildly, about the possibility of an indictment arising out of the Watergate investigation. And so, Agnew's lawyers filed an action in Maryland seeking to enjoin the grand jury from proceeding on the bribery matter, hoping that President Nixon's administration could be maneuvered into taking the position that the Constitution protects both a sitting vice president and a sitting president from prosecution and that both are immune from federal indictment.

Elliot Richardson was the attorney general at the time and responsible for the litigation. He asked Bob Bork as the solicitor general to handle the government's briefing of the case. Bob turned to me and Ed Kitch, who was then on leave from the University of Chicago, to help with the briefing. This is a matter that was politically quite important. It was a time of tension in public affairs and we agreed with the court that we would file a brief, I think, within three days. My memory may play tricks on me. Perhaps we had five days, but it was a very short and intense period of time within which the brief had to be filed. I was assigned the easy task of explaining why the sitting vice president is not constitutionally immune from prosecution. Bob Bork and Ed Kitch took the more difficult portion of the brief that explained why the president is

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different. We put this brief together, submitted it to the attorney general and the president, who approved it, and then filed it. I think it may have been the only brief in the history of the Office of the Solicitor General that was reprinted in full in the Washington Post and the New York Times.

I think that the brief had substantial legal force, but much more important to Agnew and his lawyers was the political will it manifested. Within four days the vice president had entered into a plea agreement and had resigned from office, not giving the trial judge any opportunity to rule on the novel constitutional issues addressed in our brief.

Andrew Frey: Speaking of people not giving opportunities to rule on pleadings, there is a Utah-related story. There was a famous, or perhaps notorious, judge here in Utah name Willis Ritter, who was quite an old curmudgeon and would hold in contempt people who made noise outside his courtroom and do various other things. He took a substantial dislike to the federal government, and he gave virtually every federal lawyer, unless it happened to be an attractive young woman—and there were a lot fewer of those in those days than there are today—a very, very difficult time. And it got to be such a problem that we were besieged by the Criminal Division and the Civil Division and so on with pleas to figure out something to do about Judge Ritter. Frank worked with me on this matter. Of course, it is difficult, given the Article III protections that federal judges enjoy, to think of what to do. There had been a previous problem with a judge named Chandler in Oklahoma and I think it was probably that precedent that we relied on. Anyway, the strategy that we hit upon was to make an application to judicial council for the Tenth Circuit and ask them to order that Judge Ritter not be permitted to sit on any federal government cases. Obviously this was a novel suggestion, the validity of which was debatable. They did ask for Judge Ritter to respond; however, he departed the globe rather than doing so and the case became moot. But it was an interesting incident.

Judge Frank Easterbrook: Could I add a few words about that? It is actually a very interesting example of the collaborative effort of the Solicitor General's Office. Solicitors general do not do things on their own. There is an elaborate process of getting views from

elsewhere within the government—from agencies, from divisions of the department, and exchanging views and drafts among all concerned. The Ritter case is an example of that process over an extended period because Bob Bork concluded that it would be wholly inappropriate for the solicitor general on his own to ask for what amounted to the removal of the powers of an Article III judge, even though what was technically asked for was only the removal of the federal cases. (This led, by the way, to panic in the state of Utah, because the state saw that if all federal cases were removed from Judge Ritter, what would be left on his docket? Well, all the state cases from the other judges would have to be assigned to Judge Ritter, so there was a “me too” petition from the state of Utah. That led to panic in the private bar about what would be left for Ritter.) Anyway, Ritter was a case in which the solicitor general walked down the hall to Attorney General Levi and initiated a process with him about whether it was appropriate for the executive branch of government to ask for the de facto removal of a judge’s powers. The deputy attorney general at the time, Harold Tyler, had been an Article III judge in New York before he had come in as deputy attorney general. So again, a fairly large war council within the Department of Justice worked through this process in a leisurely, almost academic way. Research memos were written—I remember having written some of them myself—and thoughts were exchanged. At this point, a change in political administration occurred. Before the document was filed, Griffin Bell became attorney general. Ben Civiletti became deputy attorney general and Wade McCree became solicitor general. The process was gone through again and the document that was filed was signed by—to indicate the significance—Griffin Bell and Wade McCree, although you would never ordinarily expect a document filed in the District of Utah to be signed by the attorney general of the United States. A cover sheet told the Tenth Circuit that the filing of this has been approved by both Attorney General Bell and Attorney General Levi, Solicitor General Bork and Solicitor General McCree, Deputy Attorney General Tyler and Deputy Attorney General Civiletti, and we want you to take notice that three of these people have been Article III judges. This increased the force, not only of the collaborative process, but also of the presentation that the collaboration produced and the degree of harmony that had been achieved was evident.

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Andrew Frey: Let me come back to something that Frank said and also something that Dan said. Frank was talking about the legitimacy of the solicitor general [in taking certain positions]. By and large the solicitor general's development of legal positions that he, or maybe someday she, will adopt asks the question, "What are the institutional interests of the United States?" The United States as an institution is only temporarily in the custody of any given political party, any given administration. It has certain institutional interests. And I am going to pause here for a minute to say that I think probably the person here who is the strongest proponent of a different view was probably Charles Fried. I know he and I have had many discussions about this question of "who the client is." I have come to think of Charles's view—and something Dan said about the way that Solicitor General Cox handled problems, who was also a Harvard law professor confirms this metaphor—as the Harvard law professor model of the solicitor general. And that model is that naturally Harvard law professors know what is right and what is wrong in the law. Their role is to help guide the Supreme Court to reach a correct decision. And then there is the humble lawyer model where you have this client that may have institutional interests, and you ask yourself, "Well, what are their interests?"—not what do I personally think. But now, I am not saying that—

Judge Frank Easterbrook: The Yale law professor law model espoused by Robert Bork and Drew Days.

Andrew Frey: It certainly was Wade McCree's view, it was Bob Bork's view, and I think it was Rex's view. I am not saying it is the only legitimate view because there is genuine room for debate, and we may talk a little bit in the next panel about the *Garcia*⁵⁶ case and the *National League of Cities*⁵⁷ and the whole problem about the power of Congress to regulate state minimum wages, and the Tenth Amendment issues that arose, and the tremendous problems that Rex had between his sense of duty to defend these federal statutes and his genuine belief that they trespassed upon state rights under the Tenth Amendment. These are not easy problems to resolve. By the way, I would like to say that the other participants in the

56. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

57. *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976).

conference—I am sure have views on some of the things we are saying—if they want to raise their hands and butt in on any part of this, I think that would enrich the discussion. So, I do hope that people will feel free if we say something that provokes a thought. Yes, Dan [points to Judge Daniel Friedman].

Judge Daniel Friedman: Well, part of it, I think, depends basically on the concept of the individual who holds the solicitor generalship. That is, does he think his job is to try to take positions that he believes are right or is his job somewhat other than that? Let me give an example under Solicitor General Bork. One of my jobs as a deputy was to be in charge of the antitrust cases. Practically every antitrust case that came through the office from the Antitrust Division took what Bob Bork believed to be an absolutely ridiculous position and quite wrong. But, he told me on several times that his job as solicitor general was not to make antitrust policy. That was the job of the assistant attorney general in charge of the Antitrust Division. He said, “As solicitor general, as long as you can write a brief that seems within its own terms reasonably convincing, I have no basis to refuse to sign it.” But he said, “I am not going to get up in the Supreme Court on my two hind legs and try to defend that position.” From my point of view it was splendid because it gave me a chance to argue a large number of antitrust cases that I probably would not have gotten to argue under some other solicitors general. But part of it, I think a very important part, is what philosophy the individual has with respect to the job. It would be an interesting study to figure out to what extent were solicitors general who had served in the office as a young lawyer influenced by that service in their attitude toward the office.

Judge Frank Easterbrook: If I could throw in a few words on this client question. I think Andy and I may have a disagreement. It may go to the same issue that Andy raised with Charles Fried. My inclination is to say that the client of the solicitor general is the executive branch of the United States government. Not to say that the solicitor general is an independent agent, but he is litigating on behalf of the executive branch. The president’s job is to take care that the laws be faithfully executed, and he is representing that part of the government that takes care that the laws be faithfully executed. I think Bob Bork had that same sense. That was why he

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took the position in the antitrust cases and civil rights cases that have been mentioned. The executive branch of the United States government, acting through the people appointed for that purpose, had settled on a particular antitrust policy and civil rights policy. Given that the executive branch had taken that view, his job was to defend it.

Many of the great difficulties for a solicitor general arise when you have that conception of who the client is and the executive branch will not take a position or cannot take a position or is internally conflicted. One of the cases that arose while I was deputy solicitor general had to do with OSHA's regulation of benzene.⁵⁸ The OSHA adopted a regulation that most people thought would save on average one to two lives a year and cost three or four billion dollars a year to implement. Alfred Khan, the president's chief regulation officer at the White House, thought that was terrible. The EPA, it turns out, also thought that it was terrible. They were not against saving lives, but their fear was that the OSHA benzene regulation would divert so much money into reducing the amount of benzene that industry would not have the resources left to implement other regulations that EPA thought would be more productive. But F. Ray Marshall, the Secretary of Labor, refused to recede from OSHA's view about the significance of benzene. That led to a series of impassioned pleas by these different actors within the executive branch, each asking the solicitor general to represent his side. The solicitor general very much wanted the president to resolve that problem—to resolve this fight among his advisors. President Carter refused. What does the solicitor general do in that case?

What Solicitor General McCree did was to say, "Okay, the designated decision maker for OSHA regulations is the Secretary of Labor. The Secretary of Labor refuses to recede. We will defend the benzene regulations as best we can (and the next year the cotton dust regulations, posing some of the same problems)." But this was still a very hard decision for Wade McCree. It was hard for Griffin Bell to fend off the political pressure from the EPA who wanted Wade McCree to sandbag the Department of Labor. It seems to me

58. *See* Am. Petroleum Inst. v. Occupational Safety & Health Admin., 581 F.2d 493 (5th Cir. 1978), *aff'd sub. nom.*, Indus. Union Dept. v. Am. Petroleum Inst., 448 U.S. 607 (1980).

very difficult for a solicitor general to operate if you think you know who your client is, but your client will not make the hard decision.

Andrew Frey: We have one or two minutes left and I wonder whether, Dan, you would like to comment on the question of personnel and politics in the Solicitor General's Office and how it was then, and maybe we will hear later about changes.

Judge Daniel Friedman: Well, how it was then—back then when I first joined the office, as far as I could tell, people were appointed to the staff of the office solely on the basis of their abilities. Politics never seemed to enter into it. In fact, a lot of people I did not know what their politics were. Now, of course, I do not know what the solicitor general said to some of these applicants. I heard one story on one occasion in which a Republican solicitor general decided that it was time to appoint some Republicans to the office. So, he found a couple of people who were Republican and seemed very well qualified for the office. He interviewed them and checked out that they were Republicans. Then he kind of smiled and said, "Well, that is not the final question because I would like to know what kind of a Republican are you. There are different kinds of Republicans. There are conservative Republicans; there are more liberal Republicans. What kind are you?"

The other tradition in the office used to be that the supervisory people, now called the deputies who used to be called first and second assistant, were all selected from the staff. People worked there for a number of years and then eventually some of them were selected to the supervisory positions. Again, as far as I could tell, they were selected solely because it was considered that they were the best qualified professionally to handle the job.

We did not have in those days the position that is now known as the political deputy. People objected that the political deputy is really an unfortunate politicalization of the office. I am not so sure. I would be interested to hear from the solicitors general who have had a political deputy if they thought that worked out well. There is an advantage to it on the other side, which is if you have someone who is a deputy and is also considered to have some political significance, it prevents the unfortunate situation that I found myself in the

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famous snail darter case⁵⁹ of being a career person who suddenly is subjected to all sorts of political pressures. Those [career] people may not be in a position to withstand and may not know how to deal with [political pressure]. After all, part of being a political person, I suppose, is knowing how to deal with political pressures—what you can or what you cannot do—and that may not be so clear to people who have not had that kind of background.

Andrew Frey: We have just about run out of time. So, thank you all for your patience in listening.

59. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

Reagan I Panel

Kenneth S. Geller: Deputy Solicitor General, 1979–1986.

Andrew L. Frey: Deputy Solicitor General, 1973–1986.

Michael W. McConnell: Assistant to the Solicitor General, 1983–1985.

Richard G. Wilkins: Assistant to the Solicitor General, 1981–1984.

John H. Garvey: Assistant to the Solicitor General, 1981–1984.

Andrew Frey: Thank you. Let me start off with a few words about the organization of the office which I don't think we discussed before. This is, I think, the last panel, which will not have the "horse" but only the "straw and the stable boys," because I think we have actual solicitors general for each of the ensuing panels.

The solicitor general is, of course, a presidential appointee. The office is one that is closely scrutinized by the Senate when a nomination is made. At the time that I joined the office in 1972, the solicitor general himself was the only politically appointed person. As Judge Friedman said, everybody else was a career person. When I joined the office, it was the end of the first Nixon administration. I personally was no particular fan of President Nixon even before his troubles, but Solicitor General [Erwin] Griswold credibly assured me that I would be acting as a lawyer for the people of the United States in a professional and nonpolitical capacity. And I certainly do not regret having made the decision to serve in the office, which was a wonderful experience.

Now, the way the office is organized is you have the solicitor general. You then have—it at one time was two, then three when I joined the office, now, four, maybe up to five, I am not sure—deputy solicitors general. Now, each deputy solicitor general has an area of responsibility—certain agencies, certain divisions of the department that he or she is responsible for overseeing and handling the cases that come from there. My area as a deputy was the Criminal Division. From that vantage point, I missed a lot of the exciting action because the Criminal Division was an area where there was

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not that much controversy. The United States government was a prosecutor. Our job basically was to take the prosecutor's position. Even in Democratic administrations, the differences in emphasis were very minor and we were rarely caught up in the highly political, highly controversial cases, as compared to the people who were responsible for cases from the Civil Rights Division, let's say—that is a particularly contentious one—sometimes the Civil Division, [and] the Antitrust Division, which is responsible for a heavily policy-laden area. So, as I think I said in the last panel, Rex Lee's solicitor generalship was in some ways a transitional period in the office and it was a period of some intense pressures and controversy at a heightened level over what certainly I had previously experienced.

I will say that when the Carter administration came in, the career people in the Solicitor General's Office were viewed as Nixon/Ford holdovers and distrusted. When Reagan became president and his people came into the political offices in the Justice Department, I can assure you that the same views prevailed: we were Carter holdovers now and still, of course, not to be trusted and viewed as obstructionists trying to block some of the new administration's policies. There was no area where this was more strongly felt than in the civil rights area. Those of you who are old will recall that in the 1980 presidential election affirmative action and busing were significant issues in President Reagan's campaign. He was opposed to both of them. When he took office, he appointed Brad Reynolds as assistant attorney general for civil rights. Brad conceived it, perhaps appropriately, as his role to implement those policies, which were politically, of course, highly controversial policies and which sometimes ran into conflict with regulations that government agencies had adopted in the Carter administration or the Nixon or Ford administration for their own hiring practices, their own contracting practices, and so on.

A very important feature of Rex's solicitor generalship was dealing with the pressure that was coming from the Civil Rights Division to take very aggressive positions on these highly controversial issues—often positions that the career lawyers in the Solicitor General's Office felt, regardless of their personal views about their merits, were tactically unwise. That is, I think the feeling—and none of us really had a lot to do with the civil rights cases who are on this panel, but I will give people a chance to comment—but my perception from a slight remove was that the

career people in the SG's Office were saying, "This is not the way to persuade the Supreme Court to adopt any of the legal principles that you are so anxious to get them to adopt. You are pushing too fast; you are pushing in the wrong ways." This was viewed by people in the Civil Rights Division, however, perhaps understandably enough, as obstructionism and as attempts by the people in the SG's Office to implement their personal preferences. Rex was caught in the middle on these issues. I do not know if anybody has any comment, but I will stop now to see and then we can talk for a minute about the *Bob Jones* case,⁶⁰ which was one of the most interesting things that happened during that period. Richard [acknowledges Richard G Wilkins].

Richard Wilkins: Well, I think you have highlighted one of the things that happened to the Solicitor General's Office, at least publicly during Rex's administration, and that is that the nature of the role of the solicitor general became a matter of public discourse with people who perceived themselves as very conservative, loudly claiming that Rex was not sufficiently protecting the president's interests or the interests of the political party then in power. While more liberal politicians were arguing that Rex was busily trouncing the office and was squandering the goodwill of the great tradition of the Solicitor General's Office.

I wrote a little law review article—I wrote two papers actually. I wrote one that was published in 1988 defending Rex against the liberal critics.⁶¹ I wrote one earlier in 1985 that was never actually published, but Caplan in his book *The Tenth Justice*⁶² quotes a lot from this little piece where I responded to the conservative critics. I put copies of them out so those of you who want to get a whipsaw, you can read them and say, you know, one of them says, "No, he really is conservative" and one of them says, "No, he hasn't trashed the constitution. He really is presenting reasoned arguments." But one thing that my research did at the time that I was preparing both of these is the Solicitor General's Office has always had this debate. It is nothing new. What happened was it came to the public attention for the first time during Rex's administration, but the

60. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

61. Richard G. Wilkins, *An Officer and an Advocate: The Role of the Solicitor General*, 21 *LOY. L. REV.* 1167 (1988).

62. CAPLAN, *supra* note 23.

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pressures on the solicitor general to follow executive direction have always been there. In this *Loyola* article, I trace it back as far as it can be traced.⁶³ There is a lot of high rhetoric by people. I cannot remember the name of the solicitor general in the early 1940s—Francis Biddle, I think—who said, “I am servant to no one. I do not answer to the man who appointed me. I serve only justice.”⁶⁴ But when you look at what Biddle did, it’s nonsense. He did what President Roosevelt wanted done. Every single solicitor general, as far back as you can trace it in the papers, has followed the political predilections of the person in office.

With that said, you have to balance the fact that as solicitor general, you do have a unique role in that you are speaking for the executive branch. There are conflicts that have been noted within the political branches of the executive branch. Not everyone within the executive branch has the same view. Also, as the chief advocate for the United States of America you have to be very careful and present reasoned arguments. You cannot just dash off on a horse because you want to reverse case *X* and make arguments *A*, *B*, *C* that are so far removed from case *X*, which is now at the end of the alphabet. You cannot begin arguing *A*, *B*, *C*. You have got to start arguing something closer to *X*, a little further down, if you are going to push it back to *A*. Rex knew that.

So, when it would come to cases, and I was involved in one of the busing cases, and I will just mention it briefly without naming any names. One of the briefs came up and it had a sentence that said, “This court has never ordered busing as a remedy for racial discrimination.” I knew that was not right. *Swann v. Charlotte-Mecklenburg*⁶⁵ said that busing was a remedy, and I knew I could not put that in the brief. Rex knew that it could not go in the brief. So, the brief was rewritten. It still argued against the extension of busing, but it did not make arguments that simply flew in the face of legal reality at the time. Now when you did that, you made people who were, you know, really true believers very, very mad. That is what prompted this first little piece in 1985 because to listen to the true conservatives, Rex was a card-carrying communist or at least a member of the ACLU, and it just was not true. I guess my

63. See Wilkins, *supra* note 61.

64. FRANCIS BIDDLE, IN BRIEF AUTHORITY 98 (1962).

65. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

observation, and I have gone on too long, is simply the kinds of tensions that Andy has highlighted, and I think maybe the focus of this panel's discussion, were not new. They have always been there. They only began to get public attention when Rex became solicitor general. I am not sure that the appointment of even the political deputy changed things all that much. It just simply made apparent what was already de facto there in the office. It just simply made it more apparent, which I am not sure is a bad thing either.

Finally, and it is my personal judgment on Rex Lee—and you know, I cannot be unbiased, I named my eleven-year old after him. But I think Rex did a very good job of representing the political will of the executive branch that appointed him in a reasoned manner that could be well supported by the law as it stood. And as witness of that fact, you had the editorial pages of the *New York Times* screaming that he was splashing blood on the pillars of the Court at the same time that you had the conservative press screaming that he was not really a true believer.

Kenneth Geller: I would like to respond to that, but before I do so I think it would be appropriate for me just to say a few words about Rex as some of the panelists in the prior panel did because I had a long association with Rex as did many of us. I was in the Solicitor General's Office in 1975 and 1976 when Rex was the head of the Civil Division. The very first brief I ever wrote in the office, a totally inconsequential case *Chandler v. Roudebush*⁶⁶ was argued by Rex. I had the pleasure of working with him in preparation for that argument when he was an assistant attorney general. If your record, Keith [Jones], with Rex was seven and two, this was one of the two.

When Rex became solicitor general from 1981 to 1985, I served as his deputy during that entire period of time and handled cases out of the Civil Division and a number of the independent agencies, which was a heavy workload in the office and gave me many opportunities to work closely with Rex. It was an invaluable and irreplaceable experience. I can remember just one quick anecdote. I was in the office one weekend day working and decided to take a break to watch a football game for a few minutes. For those of you who know the Solicitor General's Office, the solicitor general has a suite. When the building was built, the solicitor general was the

66. 425 U.S. 840 (1976).

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second highest official in the Justice Department and he got the second best office. He has a large office with a suite, which includes not only a back room, but a bedroom upstairs and it had a TV in the suite. I walked in there and turned on the TV and started to watch the football game. I did not realize it but Rex was in the office preparing for an argument. I was embarrassed and apologized. I believe he said, "No, no, no. Watch the football game. I have got so many kids at home, I can work through anything." He was a remarkable, remarkable person and it is my pleasure to be here today, partly in his honor.

I think the problem I had with the discussion in the prior panel and to a certain extent Richard's comments; I think we have to distinguish—there are really two types of cases that the Solicitor General's Office handles. The overwhelming majority of the cases involve purely legal issues in which there is very little doubt about what the government's position is, there is a long-held institutional interest. On the other hand, there is a small segment of cases that really does not involve so much law as policy. I think that many of the civil rights cases fall into that category as do some other cases involving antitrust policy. It is clearly the case that the government's position in those cases varies from administration to administration. I think that the Supreme Court appreciates that when it gets a brief in one of those cases, it's getting the position of the current administration rather than the institutional interest of the United States. That, as Richard said, has been the history of the Solicitor General's Office for a very long time. I do not think there is anything wrong with that. I don't think there is anything wrong with presenting the president's position on those issues. If the president can give a speech on busing or abortion or some other issue of great public concern, it is not clear to me why his solicitor general cannot present views to the Supreme Court on those issues when a case arises.

I do think, though, that when those cases arise the Court appreciates, as I said, that it is hearing from the administration rather than the institutional interests of the United States. It is incumbent on the solicitor general to present those positions in a way that is faithful to precedent and completely professional. It is a mistake to ask the Supreme Court to do things that it is simply not going to do, based on precedent or the predilections of the justices. I think the problem that arose in the first Reagan administration was not that

the solicitor general weighed in on many of those cases but that there was a perception that the people in the Justice Department wanted the government not simply to weigh in but to go over the boundaries that I discussed a minute ago, involving fair use of precedent, asking the Court to do things that it was simply not going to do. The result was a loss of credibility for the government that spilled over to the more traditional cases where the government's winning percentage in the Supreme Court is so high in part because of the credibility of its representations. I think that was a concern during that period of time.

Let me say as to the first category of cases [that] there were many cases that arose during those four years, and I worked on several of them, where it was clear to me that the government had a consistent, long-held, and important position to present to the Supreme Court but it was clearly inconsistent, I think, with Rex's personal views. I never saw in my time that there was any wavering on his part in terms of what his role should be in those types of cases. One case [in] which certiorari was never granted, so it never became a published decision but took up a lot of time when I was there, was a case involving right-to-work laws.⁶⁷ The issue arose of whether state right-to-work laws applied on federal enclaves within a state where the state has ceded its legislative jurisdiction to the federal government. One circuit had held that state right-to-work laws did not apply, and the employee sought Supreme Court review, and the Court asked for our views.

I know that this was an issue close to Rex's heart and he got lobbied very, very strongly and over a long period of time by people who wanted him to take the position that state right-to-work laws applied in those federal enclaves. It was clear, though, that there was a consistent federal government position to the contrary. The NLRB felt strongly about the issue. Rex not only filed briefs saying that certiorari should be denied because state right-to-work laws did not apply there, but also he wrote a letter, which I still have a copy of, to some people on the other side explaining what the proper role of the solicitor general should be.

Another case that arose during that period of time which took up a lot of our energies was a case involving whether the Fair Labor

67. *Lord v. Local Union No. 2088*, Int'l Bhd. of Elec. Workers, 646 F.2d 1057 (5th Cir. 1981), *cert. denied*, 458 U.S. 1106 (1982).

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Standards Act applied to states and municipalities. The case arose in the context of the San Antonio Municipal Transit Authority⁶⁸ and it involved very serious federalism issues. The Supreme Court had jumped back and forth on the question of whether laws like that were constitutional. One case, called *National League of Cities*,⁶⁹ had held that the federal government could not intrude into those areas of traditional state concern. The Court granted [certiorari in] the *Garcia* case. The issue was posed to us of whether the Court should overrule *National League of Cities* and hold that the federal government could regulate areas of state concern that did not go to core governmental instrumentalities. There again, I know that Rex had substantial concerns about what the proper balance of power should be between the state and federal governments, but there was again a federal statute to be defended and a strong federal interest on the part of the Labor Department to assert that authority in this context. Rex not only took that position but argued the case. I think it was argued by Ted Olson originally. It was set for reargument.

Those are just two examples of where I think Rex clearly understood that in the first category of cases, no matter how much pressure he might have gotten from within the Justice Department or elsewhere, he understood what his role was. I think we have to distinguish, though, between that category of cases and the second category of cases, which was really—although it got all the publicity during our four years—in many respects a small percentage of our daily workload.

Richard Wilkins: I would just add that I agree with everything that Ken said. My remarks were aimed more at the, what he calls, the category-two cases. I know for a fact that it was anguish for Rex to argue *Garcia* because he taught me constitutional law. I remember him enthusing about *National League of Cities v. Usery* in class—about how this was the best decision of the Supreme Court in fifty years. And then as solicitor general he was faced with the task of arguing to reverse *National League of Cities v. Usery*, and he did. He did so very, very well. And I remember being in his office late at night one night just talking about that case and he said, “You know, it’s kind of ironic, isn’t it, Richard?”

68. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

69. *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976).

Michael McConnell: Am I misremembering? I could have sworn that the resolution of this—one of the biggest federalism controversies of our time—is that the position that Rex argued was that the federal government should prevail but should prevail under the rule of *National League of Cities v. Usery*, rather than by overruling that decision. It was a position, by the way, which no member of the Supreme Court—not one justice—bought. They split five to four, with five of them overruling *National League of Cities v. Usery* and the other four dissenting and saying that the federal government should have lost. It was, I think, a very interesting case to think about in terms of both jurisprudence and lawyerly strategy because it presented such an array of possible positions. The heart of the problem, and I had not known what an enthusiast Rex may have been for *National League of Cities*, but the heart of the problem was that *National League of Cities* was itself a very ill-thought-through opinion. Even if you agree, as I do, with the fundamental federalism thrust of it, the actual doctrinal superstructure of the opinion made very little sense. It was indeed paradoxical. I do not mean from a left-right or federalism or anti-federalism point of view. I just mean it was not a very well constructed opinion. Nonetheless, *National League of Cities* was an icon, in a sense, of federalism, so you could not quite attack it. So, Rex was in a doubly difficult position.

The ideal thing would have been to be able to file a brief that would help the Court to reformulate the *National League of Cities* doctrine in a way which would have retained its solid core. Unfortunately, the facts of that particular case did not lend themselves very well to an intelligent reformulation, because if there was a case where the federal government should lose under *National League of Cities*, it was probably that case.

Kenneth Geller: I can remember a lot of meetings. You might have been involved in them, Mike. I know Ted Olson was involved in some of them as head of the OLC [Office of Legal Counsel], involving what position we should take. There seemed to be unanimity that we should not ask that *National League of Cities* be overruled. It was not so clear what position we should take that would defend the statute in the context of this transit authority. Rex had to decide between making an argument that Congress could not regulate core governmental functions, as I recall, or another

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argument that was being put forward, which went off on a government/proprietary distinction, which some people found much too slippery. But you are right. Ultimately, the Court concluded that it could not work its way out of that box without overruling *National League of Cities*. Rex, I think, to a large extent, submerged his personal views because he understood what the government's interest was there.

Michael McConnell: But I wanted also to put some of the comments here into a bit of an historical comparative perspective. All three of the speakers so far have commented on the phenomenon that the career lawyers were stigmatized as not loyal; that briefs that were being filed were tactically very ineffective, and that there was a heightened sense of politicization. I think, "Where have we heard this before?"

There is a wonderful, recent book by a legal historian named Barry Cushman, called *Rethinking the New Deal Court*.⁷⁰ As most of you probably know, there is a standard story about the changes in constitutional doctrine at the height of the New Deal. And the standard story goes something like this: You had a bad, old conservative Court. Franklin Delano Roosevelt was elected president. The Court strikes down a lot of New Deal legislation. Roosevelt proposes adding a bunch of new justices, instead of nine. Then one justice, Owen Roberts, switches his votes in order to avoid that: the famous switch in time that saved nine. And the rest is history. Well, Cushman argues that in almost every respect this was erroneous. This was a myth. This is simply not what happened.

An interesting part of the book from our point of view is that the author gives a detailed account of what was going on in the Solicitor General's Office, part of the story that we never ordinarily even talk about. In particular, he notes this phenomenon that the new Roosevelt people who came in did not pay much attention to the professional advice they were given from the lawyers who were holdovers. I am referring to the briefs filed under Solicitor General Homer Cummings, the first of the Roosevelt solicitors general. They filed a number of briefs which were in fact not very effective. What Cushman argues is that a major reason for the greater success of the

70. BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998).

Roosevelt legal strategy a few years into it is simply that they started writing tactically more effective briefs—briefs that got you to the same place but did it in a way which would enable the court to get there without, for example, having to confess error all the time. Now, eventually once Roosevelt and Truman named the entire court, the Justices were confessing error all over the place. But, for a few years there, it was important to be smart and not just to have the votes.

It just strikes me that this is much the process that was going on in the office during our time; there was a lot of suspicion about professional advice. And by the way, I sympathize a lot with the administration's stalwarts who felt suspicion. They come in and they talk to great lawyers like Andy and Ken. And Andy and Ken are so smart. They can give you—I don't care what the issue is—they can give you twelve reasons why you cannot do whatever it is you wanted to do. It is very difficult in the midst of serious legal struggle to tell the difference between tactical caution and irrelevant roadblocks. And to relate this to one institutional issue, we have touched upon the existence of a political deputy. I believe, correct me if I am wrong, that the first political deputy was under Rex and the first holder of that unfortunately named position was Professor Paul Bator of Harvard Law School, a person whose memory, I think, deserves perhaps as much credit and respect even as Rex's. Paul was a great man and a perfect person to fill this new and controversial role. One reason is that Paul was someone whom the stalwarts would view as one of their own. Paul could say to them, "Look, this is tactically stupid. We have got to do it in a different way. We cannot just ask the court to profess error all over the place. We have got to do things in a different way." When it comes from somebody that the stalwarts can trust, then things actually work relatively smoothly. And that is why I think the professionalism of the office was enhanced, not threatened by the addition of an expressly political deputy.

John Garvey: Let me try to shift the focus but not the question. Ken Geller said that in most of the cases that come before the office, what the government does is the same from one administration to the next. There are a few cases that are politically sensitive, and the government might want to shift positions from one administration to the next. The place where you see this a lot is in the filing of

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amicus briefs, which the Solicitor General's Office does often. But even there—let me give you the example of cases about religion. There were many in the first Reagan administration. I think we filed in more than a dozen cases involving the Free Exercise Clause or the Establishment Clause. Some of those were of Ken's type number one, the sort that are easy, roughly the same from one administration to the next: Should we excuse Amish from paying taxes? Should we enforce the unemployment insurance tax on religious schools? What about the Fair Labor Standards Act for religious workers? The government was a party in those cases. In another half dozen cases the government filed amicus briefs. Even in some of these it was pretty easy to decide what the government's position should be. One was about a legislative chaplain in Nebraska. Well, the Congress also has a chaplain, so if Nebraska went down, Congress would probably go down as well. We knew where we stood on that one. Another involved Title I aid to parochial schools. That was a case in which we were a party. It had a companion case from the state of Michigan involving parallel state aid programs for parochial schools. It was pretty clear that we ought to take the same position in both cases.

In the great majority of these cases, as Ken says, we either were parties taking the government's side or filed an amicus brief asserting a government position of long standing. But there were a few where this was not true. One was *Lynch v. Donnelly*,⁷¹ the first crèche case. School prayer was a big issue in the first Reagan administration. I want you to think about *Lynch* for a minute. When the government files an amicus brief, the earliest section in the brief is entitled "The Interest of the United States." It is a paragraph in which the Solicitor General's Office is obliged to state why the government is filing—what is our interest? This was a ticklish thing in the crèche case. What business does the government of the United States have filing about crèches or school prayer? This is an issue that Andy and I are divided on.

I am going to sound like an academic, but let me ask you to think about four different kinds of reasons. I think they sum up the positions people have taken. First, you might say, the solicitor general ought to stay out because there is not a federal statute and this is the business of the states. This is a federalism argument for the

71. 465 U.S. 668 (1984). These cases deal with the constitutionality of displaying crèches (a Nativity scene) in public Christmas displays.

SG's Office staying out. I think this is a mistake. The reason the question comes up is that the Constitution of the United States has been interpreted by the Supreme Court of the United States and other branches of the federal government to apply to school prayer in 1962.⁷² The federal government is *already* regulating the states in this regard. If there is a problem, it is not that intervention by the United States upsets the balance of federalism.

There is a second possible reason. Maybe—this is what Frank and Andy were talking about on the last panel—this is a separation of powers problem. Maybe the SG's Office ought to stay out because this is the business of another branch of the federal government, in this case the judicial branch (though sometimes it might be Congress that we are deferring to). I feel about that pretty much the way Judge Easterbrook does. I think it might actually be *good* for the Solicitor General's Office to get in. If the Court is already involved, as it is in interpreting the First Amendment, maybe they could use a little help. Maybe it would bring a little balance or separation to the various branches of the federal government. It might be good for the Solicitor General's Office to think of itself as an agent of the executive branch (It is a part of the attorney general's department, after all). But there are a couple of reasons why the office holds back. You have heard them from most of the lawyers who have been talking.

A third reason for holding back on amicus filings is that the office has some fidelity, not to the United States as its client (Andy's view), but to the Constitution and statutes of the United States. If you are not a devotee of critical legal studies, you will think that the Constitution and laws have a lot of meaning, and one of the things that ought to constrain the SG's Office from swerving from one position to the next, from one administration to the next, is that it is bound within certain limits by the law. This is the sort of thing that good lawyers do. Rex sometimes felt that he had to hold back in a particular case because there was a long-standing interpretation of the law. The office has an obligation of fidelity to what the Constitution or the statute is saying. You can only do so much within those limits. I do not want to overstate this. A lot of the positions we took on religion cases in 1985 that were slapped down by the Court, have changed now. The court now takes the position

72. Engel v. Vitale, 370 U.S. 421 (1962).

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that the Solicitor General's Office took in the 1984 term. So I do not want to overstate this argument. But that is one thing that constrains you.

The fourth, and last, constraint is that it may be tactically stupid. The Roosevelt administration did better when it started listening to its lawyers. You do not want to spend the office's capital by taking extreme positions that the Court is going to be angry with you because they are so dumb. You do not want to jeopardize the next brief you file because the Court will think you said something stupid the last time. I do think that there are reasons for restraint. But I am not above seeing the office take political positions from one administration to the next.

Andrew Frey: My views may be in the minority in this, but the question that I ask is, what is the legitimacy of government involvement when the question involves an issue like school prayer? I do not believe the fact that the First Amendment bears on that question means that it is the federal government's business. It seems to me whether or not there may permissibly be school prayer is between the students, the schools, and the Supreme Court. That is my personal view. Now, the issue is an important issue. It is an issue on which solicitors general and presidents and attorneys general may have strongly held views. And, as I think is obvious to everybody, the views will be very different from one administration to the next. In a case like *Wallace v. Jaffree*,⁷³ which was the Alabama school prayer case, it is perfectly clear that in the Carter administration if a brief had been filed, if this issue would have come up, it would have said that it violates the Establishment Clause. The Reagan administration, you know, would like to say that it is perfectly all right. The Clinton administration would go back. The question in my mind is: if there is not an anchor in the institutional interests, needs, and responsibilities of the federal government, then is it right to use the Solicitor General's Office as a bully pulpit for what, I view, is essentially the personal views of the people who happen to hold office at the time?

Now, it is true that in a democracy these are issues that are also politically important and they are among the issues that the voters think about and the candidates take positions on. One can well say, and I think maybe the majority of the people would say, that the

73. 472 U.S. 38 (1985).

president got elected on a platform. The platform, if it includes school prayer or whatever, it is his right to get up there before the Supreme Court and try to persuade them to adopt that position. That does not happen to be my view. Now, I don't know whether Michael will care to comment on this.

Michael McConnell: I do want to talk a little bit about *Wallace v. Jaffree* because I think it was a really interesting case to have gone through and one of the first of the series of religion cases in the court during that time that I worked on. I am a little bit unsure whether or not to agree with Andy on the propriety of filing a brief at all. I suppose one can construct an argument that the federal government, the Solicitor General's Office, should simply keep out of issues where there is not some sort of an institutional or agency involvement. I have been surprised, for example, in teaching *Baker v. Carr*,⁷⁴ certainly one of the most important cases in modern constitutional history, to find out that the solicitor general was not heard from in that case. That seems a little odd. Today we would fully expect that the solicitor general would be filing a brief in a case of that magnitude. It is also true that the United States has institutional interests in many issues that may sound as if they are just state matters. There is, after all, the District of Columbia, which has schools. There are military schools. All of these have to decide what their position is going to be on issues of school prayer. I do not find these overwhelming arguments but I think that it may be at least legitimate. Fundamentally, I guess, as the Supreme Court becomes a decision maker in more and more matters of practice as to which the people of the United States care deeply, well, of course the political branches are going to find a way to participate. Maybe Andy is right that they should not, but it would be very odd. It is not at all surprising that it has become the practice of the Department of Justice to express its views.

But I wanted to talk about *Jaffree* as an example of a case where I think that the office walked a very narrow line, almost successfully, in the presence of major league landmines. This is a case that involved three statutes that were passed by the Alabama legislature. One of them required the recitation of a particular prayer, which I gather was drafted by the governor's son. And a second statute—

74. 369 U.S. 186 (1962).

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actually I am forgetting now [what] the second statute is—and the third statute instituting a moment of silence. [The second statute] is a Biblical passage, Richard reminds me. There was already an old moment of silence law on the books in Alabama. This particular case involved a new one. Basically, they were running school prayer up the flagpole in every way that they possibly could and to the great political enjoyment of the good folks of Alabama. Anyway, the case then went before Judge Brevard Hand in Alabama. I cannot resist pointing out that in some circles he became known as Judge Unlearned Hand. But he wrote an opinion which was exceedingly inflammatory.⁷⁵ Namely, he held that the state of Alabama was entitled to have these statutes, not because school prayer comports with the First Amendment—that was not his argument. His argument was it is because the Bill of Rights does not apply to the states. Now, some people laugh at that. But this is in fact one of those hoary chestnuts of constitutional history, though it was decided by the Supreme Court fifty years ago. I never teach my constitutional law class without spending some time on the question of whether the Bill of Rights is in fact incorporated against the states. I am persuaded the other way, but there are serious and substantial arguments on Judge Hand's side. In fact, Judge Hand wrote an extraordinarily long, scholarly, interesting opinion. John Garvey and I have excerpted it in our *Religion and the Constitution* casebook.⁷⁶

The Eleventh Circuit reverses unanimously, summarily, and I believe even without opinion.⁷⁷ The state of Alabama then appeals. And at this point, it is an appeal (not certiorari) because we still have the jurisdictional statute authorizing an appeal when a state law was struck down as unconstitutional. Moreover, the case is coming up just when President Reagan has endorsed the school prayer amendment. So, this is a huge school prayer case about something where our president was taking a position that the Constitution needed to be amended. What do we lawyers do under the circumstance? Well, I will tell you what we did and you can judge for yourself the quality of our lawyering and loyalty to the Republic and so forth.

We filed a brief saying that the Supreme Court should summarily affirm the decision without argument on the two statutes, the Bible

75. *Jaffree v. Bd. of Sch. Comm'rs*, 554 F. Supp. 1104 (1983).

76. MICHAEL W. MCCONNELL ET AL., *RELIGION AND THE CONSTITUTION* (2002).

77. *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983).

passage and the spoken prayer, and thus not even hear argument on the question of the incorporation of the Bill of Rights. That was settled. But we latched onto the third statute and said that the Court should note probable jurisdiction and take full argument on the question of whether a moment of silence law is constitutional or not. This is called, in technical legal terms, “changing the subject” because we did not want to talk about incorporation, and we did not want to talk about school prayer, but we did not mind talking about moment of silence laws—as to which one could make a pretty substantial argument that they can be defended under First Amendment doctrine. Then we filed a brief arguing why they should be upheld.

The Supreme Court struck down the statute, although on very odd and somewhat difficult-to-understand grounds having to do with the earlier statute in Alabama. Essentially, the Court held that the existence of the earlier statute, along with some post-enactment testimony from the bill’s sponsor, proved that this statute had no secular purpose. But the opinion carried the strong implication that moment of silence laws in general might be constitutional if they do not have this peculiar Alabama context. I think what we were trying to do is not completely abandon a cause which the president had staked but also to do it in a way which could be legally responsible, and where we had some possibility that the Court would go along with us. We lost five to four—it was a close thing.

Kenneth Geller: Excuse me. There is a part of that story that I think you left out, Michael. My recollection is that there were people in the Justice Department who were arguing strongly that the government should file a brief in the Eleventh Circuit saying that Judge Hand was right.

Michael McConnell: Yes.

Kenneth Geller: Rex [Lee] had the good sense to argue that, whether he was right or wrong, if these Supreme Court decisions are going to be reconsidered, it should be done in the Supreme Court and not the Eleventh Circuit, but that decision was made ultimately by the attorney general, who agreed with Rex. I would say that there were probably more decisions about what position to take that were made in the Attorney General’s Office during that four-year period

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than in the prior history of the Solicitor General's Office. And that certainly was one of them.

Michael McConnell: May I talk about another one, which I think was rather an interesting case from another area of law and which presents the question of politics versus constitutional law. And when I say "politics," we have been talking about ideology so far—philosophy—but this was a case that actually involved politics, namely, political gerrymandering. A case had come up out of Indiana where the Republican Party had taken over all branches of government in Indiana and had gerrymandered the state legislature to its advantage. The constitutionality of political gerrymandering was thus teed up for a Supreme Court decision.⁷⁸ Everyone knew two things about this case. One is that if you looked nationwide, political gerrymandering tended to hurt the Republicans and help the Democrats. Thus, it was in the long-term political interest of the party in power to have the Supreme Court strike down political gerrymandering. The second thing that everybody knew is that because this was a case that came up in the context of a Republican gerrymander, there was nice cover. That is, it would look as though we were being against the narrow partisan interest of the Republican party. Wow! What a great setup, right?—to be able to advance your long-term interests while looking as though you're very statesmanlike and defending the rights of the other side. Well, to make a long story short, the ultimate decision was not to file a brief, because the case was too political. I think that was both the right and the wise thing to do.

78. *Bandemer v. Davis*, 603 F. Supp. 1479 (S.D. Ind. 1984), *rev'd by Davis v. Bandemer*, 478 U.S. 109 (1986).

Bush Panel

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

John G. Roberts: Deputy Solicitor General, 1989–1993.

Maureen Mahoney: Deputy Solicitor General, 1991–1993.

Kenneth Starr: Thank you very much. Let me join in paying tribute to the memory of Rex Lee, a dear friend to so many of us in the room and a treasured colleague. It was my privilege and honor to serve as two-term member of the board of visitors of the J. Reuben Clark School of Law as Rex took his leave from Washington, took his partnership at Sidley & Austin, [and] a chaired professorship here before ascending to the presidency of the university. Reese [Hansen], it is good to be back. So, thank you.

Well, it has been wisely observed that the great events of humanity, the great tide of human events, do not pass judges by. I think the prior panel discussion suggests as much with respect to not only judges, but also the Justice Department's, if I may say so, top lawyers in the Solicitor General's Office. And just as now, the Solicitor General's Office is being called upon—and perhaps we will hear about this in the fullness of time during these proceedings, to focus upon legal issues flowing out of the events of 9/11—so too, each new administration and each new solicitor general, even in an incumbent administration, has its own context shaped typically rather early in the administration's life. And so I think it has made good sense for the organizers of this conference to have the unifying principle, organizing principle, of “let's look at this administration by administration in four-year terms tied to presidential elections.” So I think it should be. And I think our comments this afternoon concerning the Bush administration, and I would say, “President Bush the Forty-first,” by way of clarification. Some say, “George the First”; I resent that and object to it. But concerning the Bush administration, I think we will mirror that context within which we found ourselves. I think this audience in particular already understands—many, of course, are grizzled veterans of the office—that the broad currents of the office's work continue without fanfare in the daily flow of work going without notice. The grist for the

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daily mill simply attracts no attention at all, and I hope we can focus a little bit of attention on that as well as some of the more electric issues that do arrest the attention of the *New York Times* and other publications.

But this reality of daily SG life was captured, and it was emblazoned firmly in my memory early on, in the Reagan administration, the first Reagan administration about which we have just heard. John [Roberts] and I were privileged to serve as lawyers on the personal staff of Attorney General William French Smith, my mentor and law partner for a brief period and law partner of Ted Olson, our solicitor general. Bill Smith, the attorney general, loved the attorney general's dining room, and he used that dining room essentially as what I suppose the management consultants would call a "management information device." A lot of business was conducted over lunch there quite informally. When Rex came on board, he was on board at first as a consultant, but then, after the confirmation process because Judge McCree remained in office by the decision of the attorney general to finish out the term of court, the attorney general invited Rex and his deputies, some of whom are in the room today, for a get-to-know-you gathering and everyone reported quite agreeably on items of interest. Then, we came to a slightly enigmatic deputy solicitor general, Lewis Claiborne. And I will remember always, I think, when it came his turn, Louie with a cigarette—one could smoke in those days, and Louie avidly did indulge in that habit or should say addiction, as some may say—[would say], "I have nothing." And he had an unusual way of speaking, "I have nothing that should arrest the attention of the attorney general." Well, I thought it was a pretty kind of odd way of talking, and I understood that at least at that time we were no longer in a crisis mode. President Reagan had in fact survived John Hinckley's assassination attempt. We were working quietly at the time on a Supreme Court nomination. But it was not that Louie's perception was that the attorney general is just too busy to hear what he had in mind. And in fact, I am sure Louie was an experienced veteran of the office at the time and was there for many years of total service and quite distinguished service. [He] knew full well that one of the joys of being a cabinet officer is that you more or less set your own schedule. It is not like being the SG. Being the AG is a lot of fun. You just kind of get to decide what you want to do unless—9/11 kind of ruined that. Otherwise, it is a lovely job. The point is

there was, in Louie's considered view, nothing on his very significant agenda that merited the focus of the attorney general of the United States. So there was no contempt citation; the conversation went on.

So, above all, even though we will, of course, naturally focus on those huge issues that get the attention. But it does need to be said for clarity of the record that the work of the office is overwhelmingly, satisfyingly, deeply professional and deliciously nonpolitical. It is lawyers' work at a law office. But we will be flagging some of the hot issues I am sure. So before turning the discussion over to my dear friends and former colleagues, Maureen [Mahoney] and John [Roberts], I do want to make, then, one brief contextual point to set the stage. We served in the wake of that last year of the Reagan administration and although we were to see on our watch the decidedly extra-legal developments of the fall of the Berlin Wall, the Panama invasion, Desert Storm, and the like—these great moments of enduring significance—the perception was that the presidency had been badly weakened during the last two years of the Reagan administration in 1987 and 1988 obviously beyond the compass of the Solicitor General's Office and the Justice Department. But in the great tide of events, and in the great and enduring struggle in our separated power system so wonderfully memorably chronicled by Mr. Madison and others (*Federalist 47* and the like),⁷⁹ the president had been on the losing end of the proposition, it was thought. Some reasons were obvious.

President Reagan's party lost control of the Senate. It is always nice, I am sure presidents think, to have control of both Houses, but especially the Senate. And it seemed that controversy was dogging the administration at just every turn. Iran Contra continued. There were hearings on the Hill. Judge Walsh's investigation—[and] we all know that independent counsel investigations spiral wildly out of control and last forever. There was also the failed nomination of Robert Bork. The Supreme Court's unfortunate, and many of us thought profoundly misguided, decision in *Morrison v. Olson*.⁸⁰ The statute had been struck down wisely by the D.C. Circuit but then overturned in a very odd opinion by Chief Judge Rehnquist, overruling in a very *ipse dixit* fashion *Humphrey's Executor*⁸¹ among

79. THE FEDERALIST NO. 47 (James Madison).

80. 487 U.S. 654 (1988).

81. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)

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other worthy cases. There were also continuing controversies surrounding the attorney general himself. On and on the list went, and so it was against this backdrop that my one and only trip to the White House during the Bush administration having to do with a purely legal issue [took place]. The concern was separation of powers and the diminution in the authority of the presidency in our system of separated powers.

I was invited over by Boyden Gray, whom I knew well, who had served with great distinction as counsel to Vice President George Bush for eight years and was now quite appropriately serving as counsel to the president. The conversation was fairly brief. It was pleasant. It was businesslike. Boyden made it absolutely clear that the president was deeply concerned about separation of powers issues and the erosion of presidential powers. Reference [was] made to the War Powers Act⁸² as being just an example, then, we needed to be mindful of that in the course of our daily labors in our stewardship in the Justice Department. And that was it. Pleasantries, but that was it. And other than a conversation almost four years later concerning the Boston Harbor case,⁸³ which Maureen will mention, my subsequent visits over to the White House, *and there were many*, had to do entirely with a non-case related project, which also yields up insights about what the Solicitor General's Office has to do, namely "other duties as they may be assigned."⁸⁴ Return to the statute creating the solicitor generalship itself and one will see that one's job is solely to assist the attorney general. There is a connection made at the founding in 1870 with the Attorney General's Office itself and the SG's Office. But my little project was the civil justice reform initiative led by Vice President Quail. So there had been no marching orders, no directives, just a sensible and very heartfelt statement of presidential concern—nothing else to "arrest the attention" of the solicitor general, so to speak, from the White House.

Maureen Mahoney: I served in the office from June of 1991 until May of 1993, which was a particularly interesting period of time because it spanned the presidential election and the change of administration. I stayed on when these guys left. So, I am going to

82. 50 U.S.C. §§ 1541–1548

83. *See* Building & Const. Trade Council of Metro. Dist. v. Associated Builders & Contractors, 507 U.S. 218 (1993).

84. An Act to Establish the Department of Justice, ch. 150, § 2, 16 Stat. 162 (1870).

relate the stories of two cases that became entangled in the election politics so you can see sort of how they played out and how the office works. The first one is the Haitian refugee litigation.⁸⁵ I think some of you were probably about ten when this was going on, so I will give you some background. But it really illustrates the issues that can arise when, as in that case, we had filed the briefs on the merits [and] the administration changed before the argument was to occur—what happens in those circumstances? But it is also an important case to talk about, or useful case to talk about, because it illustrates the tremendous breadth of responsibility that the Solicitor General's Office assumes in cases of very substantial national importance, and it was a crisis at the time.

In September of 1991, there was a military coup in Haiti. Over the course of the next six months more than 35,000 Haitians left Haiti to come to the United States, seeking to enter the country illegally by getting into really unseaworthy crafts and trying to cross the 600 miles of the ocean. The Coast Guard's most sacred mission is to save people in peril on the seas, but they were overwhelmed with the number of people who were coming from Haiti, and many people died during that period. The administration had to decide what it was going to do, and it made the choice that it needed to interdict the vessels and return them to Haiti—both the vessels and the people—in order to try to stop the outflow. Initially, what happened was they were doing asylum processing, and that is the process where you try to determine whether or not the person fleeing the country has reason to fear political persecution such that they might be eligible for asylum in the United States. They tried to do it on Coast Guard cutters. They tried to do it in Guantanamo, and it was not long before there were 12,500 Haitians at Guantanamo awaiting asylum processing, and they just kept coming and people were dying. So the administration made the judgment that it could no longer do the asylum processing on the cutters or in Guantanamo, that it would have to do this at the embassies or through the embassy in Haiti. So, they began to interdict these vessels [and] take them straight back to Haiti, and naturally litigation ensued.

The key issues in the cases, which were filed both ultimately in Florida and later in New York, were whether or not this policy was

85. *See Sale v. Haitian Ctrs. Council Inc.*, 509 U.S. 155 (1993).

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lawful, whether or not the Immigration and Nationality Act⁸⁶ required asylum processing before you could return someone, or whether the United Nations Treaty on Refugees⁸⁷ required it. These were very, very hotly debated issues out in the public during that period of time.

The important thing about the office's role was that Judge Starr did not wait for the case to come up to the Supreme Court. He instead immediately assumed responsibility for the overall management of the litigation and supervised a team of lawyers that consisted of lawyers from the Office of the Solicitor General, from the Office of the Attorney General, from the Department of Transportation, Civil Appellate—across the administration. And the resources we expended over the next eighteen months were substantial. We handled the case just like you know the cases were handled in the district court. We literally interviewed witnesses. We prepared affidavits. We assisted in every phase of the case, and Judge Starr actually went to the district court in Miami, to the district court in New York, to the Court of Appeals for the Eleventh Circuit, [to] the Court of Appeals for the Second Circuit, and personally argued the issue every time that it arose. Essentially, the upshot of all of this was that he won in the Eleventh Circuit.⁸⁸ They found that the policy was lawful; but the Second Circuit disagreed: [they] found that it was unlawful.⁸⁹ The Supreme Court had actually granted several stays over the course of this time in order to allow the repatriations to continue, but in the fall of 1992 the Supreme Court then granted certiorari in the case arising out of the Second Circuit, where they had found the policy unlawful.⁹⁰ So, now comes the election. This is the fall of 1992.

As we were preparing our briefs for the Supreme Court, Bill Clinton was campaigning for president, and one of the things that he campaigned on was that this policy was illegal, a view that was shared by an editorial in the *New York Times*.⁹¹ So, this was very much an

86. 8 U.S.C. § 1253(h) (2000).

87. U.N. Convention Relating to the Status of Refugees, July, 28 1951; *A Protocol Relating to the Status of Refugees*, G.A. Res. 2198, U.N. GAOR, 21st Sess. (1966).

88. *See* Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498 (11th Cir. 1992).

89. *See* Sale v. Haitian Ctrs. Council, 969 F.2d 1350 (2d Cir. 1992).

90. *See* McNary v. Haitian Ctrs. Council, 506 U.S. 814 (1992).

91. *See, e.g., Backward Priorities on Haiti*, N.Y. TIMES, May 27, 1992, A1; *Brutality Escalates in Haiti Since Coup*, N.Y. TIMES, June 23, 1992.

election issue. As you all know, President Bush lost his job and so Ken Starr did too. And that left me in the office to begin preparation for an oral argument to defend a policy that had been condemned by the new president while he was campaigning. So, we were sitting there in the office and there was not a successor at the time. Drew Days did not arrive until, I think, May, after the argument in the case had occurred. And so there was a bit of a vacuum of leadership, and we were kind of waiting for instructions but nevertheless continued on. And the White House ultimately decided to simply go forward not to make any changes in the policy. There was nothing announced. It was all just—we waited. Nothing happened. I went into Court, argued the issue as if there had never been a change of administration, and the Court upheld the legality of the policy in an eight to one decision.⁹² As it turned out, the only real implications of the election was that there was this tremendous uncertainty during this period of time. But I also want to tell one other anecdote about this case because it is really a testimonial to just the tremendous talent that is in the Solicitor General's Office, and I am going to name Ed Kneedler by name because when I was preparing for the argument in this case, Ed, [who] was the deputy there now and has been there for many, many years, said to me, "Well, Maureen, do you think you should go to Haiti because Justice Blackmun is going to ask you if you have ever been there?" And I said, "Oh, Ed, I do not need to go to Haiti. I can handle the argument without going to Haiti." But sure enough, just as Ed predicted, Justice Blackmun asked me if I had ever been to Haiti. But even Ed is not omniscient because he did not tell me—he did not predict that Justice Blackmun would ask me whether or not I had read *The Comedians*,⁹³ a novel by Graham Greene that concerns Haiti. I had to confess ignorance and *Vanity Fair* essentially took me to task and said I ought to read it. So, the moral of the story—you thought it was about election politics—it is really that if you want to be really prepared for arguments in the Supreme Court, you have got to read a lot of fiction.

A second case that became entangled in election politics was the Boston Harbor case.⁹⁴ The issue there was whether or not the state

92. *See Sale v. Haitian Ctrs. Council Inc.*, 509 U.S. 155, 188 (1993) (J. Blackmun was the lone dissent).

93. GRAHAM GREENE, *THE COMEDIANS* (1966).

94. *See Building & Const. Trade Council of Metro. Dist. v. Associated Builders &*

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of Massachusetts had the authority to enter into contracts which provided for union only labor. This was a \$6.1 billion construction project to clean up the Boston Harbor. The issue landed in the SG's Office in the spring of 1992 because the Supreme Court asked for the views of the solicitor general. I do not know if you are all familiar with that process, but we were not volunteers on this issue in an election year. The Court asked for our views, and when the Court does that the solicitor general needs to respond.

And the case came in. We looked at the issues. Labor management relations' issues are obviously politically charged many times. It is certainly no secret that Republicans tend to be more allied with management interests than with unionist interests. In this case, the issues really looked to be pretty straightforward, pretty clear-cut. The state was acting in a proprietary capacity. They had determined that they really needed to prevent strikes over the course of this project, that they were getting a ten-year no strike clause, and that they could enter into this arrangement because after all private parties could enter this arrangement and they were not asserting any authority to regulate labor management relations. So, we filed a brief that said that the state's authority was not preempted; that it was acting lawfully. The Supreme Court then granted certiorari, and that is when the firestorm began.

According to an article published by the *Legal Times*,⁹⁵ the associated builders and contractors sent letters to the White House demanding that the brief be pulled. And in July of 1992, the Association of Builders and Contractors adopted a resolution that said they would not support the reelection campaign of President Bush "unless the administration position changes with regard to Boston Harbor."⁹⁶ The White House apparently told them that it would not pull the brief, but instead they did adopt an executive order, which provided that, at least at the federal level for federal contracts, such union-only clauses would be prohibited.⁹⁷ That then prompted the associated contractors to file a supplemental brief in the Supreme Court right before the argument saying that this executive order contradicted the position of the solicitor general. At

Contractors, 507 U.S. 218 (1993).

95. See Tony Mauro, *Builder's Lobbying Even Targeted SG's Brief*, LEGAL TIMES, Jan. 4, 1993, at 8.

96. *Id.*

97. See Exec. Order No. 12,800, 57 Fed. Reg. 12,985 (Apr. 14, 1992).

argument, Justice White asked this question, you know, “what did this mean?” and I was able to respond by saying that it really had no impact on the case because it did not purport to affect contracts that had been entered into by the states in the past, which was accurate. Fortunately the Court did rule unanimously that the state had acted lawfully. It was not a close question. There was not a single vote that went the other way.⁹⁸ And in the end, the election had no impact because the issue really was, I think, just too clear-cut. But I think that one of the things that was really interesting about this was that Judge Starr had managed these events in a way that caused him to earn the following praise from *The Legal Times* in its report of the case: “Starr held his ground while political events swirled around him—a final testimony to Starr’s integrity and to the independence of the Solicitor General’s Office.”⁹⁹ Amen. John’s turn.

Kenneth Starr: And, as John reminded me, we lost the election.

Maureen Mahoney: But we won the case. We are lawyers, and we won the case.

John Roberts: I would like to begin by echoing all the kind things that people have said about Rex Lee as a friend and as a colleague. He was both of those to me, if a young callow lawyer in the department can be presumptuous enough to call himself a colleague of the solicitor general. And Rex was particularly kind and gracious, I thought, in dealing with those of us who were young and inexperienced. But no one has yet talked about him as an adversary and I can do that.

In 1994, I argued a case in the Supreme Court against General Lee, as I always called him and as he liked to be called.¹⁰⁰ With the foresight that I might someday be speaking at a symposium in honor of Rex Lee, I had the graciousness to lose nine to nothing. But the argument was revealing. I was the petitioner. I got up first. It was immediately apparent from the questioning that there were three independent grounds on which the Court was going to rule against me unanimously, and they proceeded to beat me over the head for a

98. See *Building & Const. Trade Council*, 507 U.S. at 220.

99. Mauro, *supra* note 95, at 8.

100. See *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994).

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half hour. I staggered to my seat and then Rex got up. And early on into his argument, Justice O'Connor—in a very uncharacteristic burst of cruelty—asked Rex Lee why he had neglected to raise a fourth argument which would also be a winning argument. Rex turned and looked down at me, literally and figuratively, and, with a wink that I am sure was perceptible only to me, said something to the effect that he did not want to be accused of piling on. So Rex, among other things, was a very gracious winner. I would like to be able to tell a story about him being a gracious loser, but unfortunately I never did beat him in a case.

One thing you can perhaps discern from some of the presentations is that everyone who has served in the Office of the Solicitor General agrees that the office enjoyed a golden age roughly corresponding to the time that they were in the Office of the Solicitor General. One of the innovations that has attracted a lot of attention was the development of the so-called, and I emphasize “so-called,” position of the “political deputy.” Those of us who have held that position prefer its official title, which is “principal deputy solicitor general,” not “political deputy,” because “political” conveys, I think, a very inaccurate impression of what the job entails. I think Mike McConnell really did hit the nail on the head in describing the function of the office and the way in which it promotes rather than undermines the traditional institutional independence of the Office of the Solicitor General. The only respects in which my role as the principal or political deputy, that I was aware of performing that role, was in handling requests—inquiries from the Attorney General’s Office, through the Attorney General’s Office, from the White House, from other parts of the department to the effect of “what in the world are you people doing over there in this case?” It was my job, I thought, to explain to this person that although this particular position—for example Maureen mentioned the *Boston Harbor* case—may be causing you some political heartburn, here is why we have to do it: it is compelled by our obligation to represent long-standing institutional interests of the United States. It is being handled correctly and professionally. This is not a case in which holdovers from another administration are implementing their political agenda. And in every case of which I am aware, that was enough to calm down whoever had gotten sufficiently agitated to pick up the phone and call.

I viewed it as my function, in other words, to provide insulation from political pressure to the career people, and also to a certain degree to the solicitor general. These are people who would have been concerned that a call to the career lawyer in the office handling the case might be misperceived as political pressure. Asking the lawyer, “please explain why you are taking this position”—it is a call originating from the White House and from the Attorney General’s Office—and that can be readily misperceived by a career lawyer. I would like to think that as a result of the establishment of the office of principal deputy, which turns over with the solicitor general, that those types of inquiries that might be misperceived do not happen.

Those of you who are familiar with other agencies of the government might get the wrong idea when people talk about a political deputy. It was very important to the correct acceptance of that position, I think, that it not be what a political deputy is in many other agencies, which is sort of someone who is also supervising the entire work of the office and implementing priorities and policies across the board. As the principal deputy, I had a docket just like the other deputies and was expected to be responsible for it and did, you know, my share of all of the work of the office. I did not supervise, for example, the work of the other deputies. That was directly supervised by the solicitor general. I think that attributed to a large degree to the acceptance of the position in the office. And again, I agree with Michael’s earlier comments. The biggest challenge for those of us who have held office has been trying to live up to a standard set by Paul Bator as the first incumbent.

On the issue of the controversial cases that create some division in the office, what impressed me the most coming into the office was how controversial the “non-hot button” cases could be within the government, and how almost every one of the cases generated some degree of controversy. I was surprised about the degree of disagreement throughout the executive branch in a wide variety of cases. I remember a case coming across my desk that I recall as *Commodities Futures Trading Commission v. Securities and Exchange Commission*.¹⁰¹ I am looking at that and said, “Well, how can that be? They are on the same team. They cannot be against each other.”

101. The case was actually captioned *Chicago Mercantile Exchange v. SEC*, 883 F.2d 537 (7th Cir. 1989), *cert. denied*, 496 U.S. 936 (1990), but the CFTC and SEC had filed dueling briefs, taking opposing positions in the Court of Appeals.

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And, of course, both of them were knocking on our door and saying, “You are our lawyer now in the Supreme Court.” One is saying file a certiorari petition and the other is saying oppose a certiorari petition. That was resolved by holding, and this was typical, a series of interminable meetings with all interested parties that looked like nothing so much as Thanksgiving dinner at a dysfunctional family because—as you rapidly find out—these agencies have a long history of sort of squabbling with each other and now they are—it is wrong to view it this way, but—before their parents and the parents are going to decide which one gets punished and which one gets rewarded. I have always been a little surprised at the prominence of the office in resolving those types of decisions.

The president is the chief executive, but so many intra-executive branch disputes end up in the Solicitor General’s Office and were resolved by the solicitor general saying, “Well, this is the position we are going to take before the Supreme Court” and that became the executive branch position. And again, I think it is a surprising development that the office has that authority. I remember in particular—and by focusing on this case I do not want you to think that I lose all the cases that I argue in the Supreme Court—but there was a dispute that was captioned *Resolution Trust Corporation v. Internal Revenue Service*—again two players I thought were on the same team.¹⁰² It involved a very complicated thing called a mortgage swap deal that the regulatory agency had set up to allow failing S & Ls to take huge tax deductions without recognizing any loss on their books and thereby allow them to continue to exist. And the IRS was not buying it. They thought this was ridiculous, following Judge Friedman’s principle that they would reject any deduction and they were rejecting this. And this was a novel situation for me for a number of reasons. One, Ken [Starr] was recused. He had adopted a very aggressive recusal policy for cases coming out of the D.C. Circuit. Ken had been a judge on the court, of course, and remarkably to me after having reached that pinnacle of the legal profession had decided to resign to become solicitor general. He was recused from this case, so I was the acting solicitor general. And I basically got to decide which side of this case I wanted to be on. The people from the regulatory agency said, “You should take our side.”

102. See *United States v. Centennial Savs. Bank (Resolution Trust Corporation, Receiver)*, 499 U.S. 573 (1991); *Cottage Sav. Ass’n v. Comm’r*, 499 U.S. 544 (1991).

The people from the IRS came in and said, “You should take our side.” I sided with the IRS and lost ignominiously. So, it is one of those rare cases when you get to choose your side, and I still made the wrong decision. But I did what I had occasion to do on a couple of other occasions, which is I filed a brief for the Internal Revenue Service and then authorized the opposing regulatory agency to participate in the Supreme Court through their own attorneys, which they did. I did not know they were going to get such good attorneys, but that allowed the case to be presented to the Court. I did not feel that the exercise of an authority to say to the regulatory agency that you may not take your case to the Supreme Court was appropriate in this situation largely because, as you might imagine, on both sides of the case there were private interests involved and I thought it was best for that agency to present its view when I had decided to side with the other agency. That was a particularly dramatic example of the phenomenon, but it is, I thought, extraordinarily typical.

Somewhere earlier, I guess, Andy [Frey] had mentioned the prisoner cases. I did the argument in the case of *Hudson v. McMillian*,¹⁰³ which established that certain brutality by prison guards violated the Eighth Amendment. I went back just yesterday and read our “statement of interest.” It is remarkable. The first sentence says, “The United States is interested because it prosecutes cases of brutality in which the civil rights of the prisoner are violated.” The second sentence says, “The United States is interested because it defends federal officials who are sued for violating civil rights of prisoners.” There is a delicate dance that went on throughout. The writing of the brief in that case was an extraordinarily delicate dance because this is not a situation—and this, I think, is one of the key differences between the private sector and the Solicitor General’s Office—in the private sector, you want to win or lose and, yes, you know, your client is a little bit interested in what the reason is. The reasoning might affect him, but they want to win or lose. In the Solicitor General’s Office, you have got to call your shot. It is not enough to win. The Civil Division that defends federal prison officials would want to hear a lot more when you came from this case other than that we won because they are going to have to follow the rule of law on the other side in future cases. So you

103. 503 U.S. 1 (1992).

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have to get the rationale right. I know that results in instructions to the oral advocates that make the job much more difficult than in the typical private case. Quite often, the instruction is: “Okay. You can take this position on what the brief says, but whatever you do, do not get into this area because that is going to cause problems. You cannot take a position on that question, or if you get into that, you have got to take a position that undermines the result you are trying to reach in the particular case.” The care that goes into the crafting of a balanced brief that is acceptable to prosecutors bringing cases against prison guards and to government lawyers defending prison guards has to carry through to the oral argument as well, which is an extraordinary challenge for any advocate.

I just want to add one brief point because people have touched on it a number of times and Ken mentioned it as well—and that is the role of the office outside of the Supreme Court. Those who have worked in the office know that, I do not want to say that the bulk of the office’s work, but a big chunk of it does not involve the Supreme Court at all. It involves authorizing appeals to a higher court by government agencies and government officials who have lost in the lower courts. Ken, when he was solicitor general, adopted an initiative that I thought was very valuable, which was he went to a number of the courts of appeal to argue cases there. The purpose of that, as I understood it, was to symbolically remind the court of appeals’ judges that every time they are seeing an appeal from a United States agency it is not just the losing lawyer in the U.S. Attorney’s Office who says, “I am going to get a second opinion.” It has been carefully vetted by lawyers in the office and signed off on by the solicitor general. I was surprised as this initiative unfolded to learn how many of the sitting judges were unaware of that. I think it was very valuable for Ken to do that. Nowadays, I do not know if as a result of that initiative—I do not want to say it is a tradition—but it is not unusual these days to see lawyers from the Office of the Solicitor General in district courts, as in the Haitian case,¹⁰⁴ or in courts of appeal on matters of particular importance and interest, and I think it does send a message to those judges that this is a matter of particular concern to the federal government. It does sort of give a little bit of prominence to the work of the office which may be the part of the iceberg below the surface that is not as prominent.

104. *McNary v. Haitian Ctrs. Council*, 506 U.S. 814 (1992).

Kenneth Starr: Let me pick up with those comments from Maureen and John with observations that fall into sort of three pods, and very briefly on each. One, which I found to be one of the most rewarding aspects of service in the office, was having the weighty responsibility of mounting a defense when the constitutionality of an act of Congress was challenged and, obviously and in particular, compellingly if a statute had been actually invalidated by the court of appeals (presumably by a court of appeals—it could be by a three-judge court under certain circumstances, as you know).

The one example that I would offer up to show again the delicacy of the relationships between the branches and thus one of my recurring themes during my period of service in that wonderful office, [are], namely, separation of powers concerns and values which were so important to the Founding Generation, but by virtue of the constitutional rights revolution we have tended in the legal community to be much more focused on the Bill of Rights—and [it is] terribly important—but somewhat neglectful of the structural principles that were so important at the Founding. In this particular episode, quite familiar to most Americans, the Supreme Court of the United States had invalidated Texas's particular statute, a flag desecration statute in the case of *Texas v. Johnson*.¹⁰⁵ The upshot of that five to four decision was one understandably of public concern and dismay. Congress was deeply distressed that the flag could be desecrated without some sort of legal protection, and there were really thoughtful views given over to how, if at all, Congress could in fact pass a federal statute that would protect the flag. Hearings were held. The administration, and we were newly in office at that time in 1989, through the head of the Office of Legal Counsel, which provides, as I think everyone knows by now, constitutional advice among its other functions to the attorney general and to the president. And so through our colleague down the hall on the fifth floor, Bill Barr—destined to be deputy attorney general and then the attorney general during the Bush administration—the administration testified that a statutory amendment or a statutory solution would simply be inefficacious in light of the breadth of the *Texas v. Johnson* opinion. But in any event, Congress sought to pass, and it was duly enacted, the Flag Protection Act of 1989.¹⁰⁶ It was very promptly

105. 491 U.S. 397 (1989).

106. 18 U.S.C. § 700 (1990). The Act has not been repealed, but *United States v.*

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challenged and there was an expedited review proceeding to the Supreme Court, bypassing the court of appeals entirely in a particular mechanism passed by Congress.¹⁰⁷

So, with that backdrop, it was now teed up and the issue was, “Well, we have been enforcing the statute or seeking to enforce the statute. Now do we defend it in the Supreme Court in light of the testimony of Bill Barr down the hall?” And we did not struggle with the issue even though a very serious academic and a very respected First Amendment scholar thoughtfully suggested that we should simply do the equivalent of a confession of error. We had not secured a judgment. Both district courts had struck down the statute as unconstitutional, but we should essentially decline to defend it. We did not struggle at all in the office and there was no political dimension of it at all because of our understood duty to defend the Justice Department’s duty, and then it fell to us in the Supreme Court to defend the constitutionality of an act of Congress if it could in fact be defended and if it did not trench upon separation of powers concerns, especially as to the power of the presidency.

Pod number two. This returns or echoes my contextual point at the outset. A lot of the very visible work of the office during a particular administration will obviously be reflecting of the necessities at the time as they translate into litigation. As I reflected in advance of these proceedings on the cases that we were called upon to address, they fell very substantially into issues of race. The enduring issue in the American polity, the dilemma—the American dilemma as Gunnar Myrdal put it over a half century ago¹⁰⁸—that continuing dilemma translated into litigation, and indeed the first case I was privileged to argue, like John I lost the case, was the *City of Yonkers*¹⁰⁹ case about the enforcement power of federal courts. I do not want to burden you with a litany of specific examples, other than I must give a Rex Lee example. Although this did not relate quite so specifically to the enduring issue, it nonetheless was national origin discrimination. This was the case of the *University of*

Haggerty and *United States v. Eichman*, 496 U.S. 310 (1990) (consolidated before the Supreme Court), held that the Act was unconstitutional.

107. See *Eichman*, 496 U.S. 310.

108. See GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944).

109. See *Spallone v. United States*, 493 U.S. 265 (1990).

Pennsylvania v. Equal Employment Opportunity Commission.¹¹⁰ And there, as part of our duty, whether we felt in our heart of hearts that there should be a First Amendment academic privilege, which is what Rex was arguing for very ably on behalf of the University of Pennsylvania in his capacity as a partner at Sidley & Austin, or whether the EEOC could in fact in the course of a discrimination investigation secure the tenure files there at there at the Wharton school. Our success in the office was bright on that particular case and Rex argued valiantly but unsuccessfully. But a member of this very audience, Lynn Wardle of the Law School, was in the audience for that argument in his capacity as a senior litigation counsel of the Civil Division, a visiting scholar. And at the end of the argument, Lynn without the ability of a transcript had counted the number of questions that were asked—and this gives a sense of the dynamic of the arguments themselves that the Solicitor General’s Office is confronted with. And Lynn said, “Do you know how many questions you were asked during the course of your thirty-minute, bottom-side presentation in the EEOC [case]?” I had no idea. And he said, and Lynn is here, but as I recall, it was like sixty-two or sixty-three questions in the space of thirty minutes. When I recounted that to one of our colleagues in the office, I forget who, the person just said, “Well, perhaps, General, if you had answered some of the questions, they would not have asked quite so many.”

The third pod in addition to the large number of race-related or discrimination-related cases that came before us—the Mississippi higher education¹¹¹ case brings to mind. Another case in which I argued on Rex’s side (and we were successful) had to do with federal power over school districts that a district judge, Judge Bohanon in Oklahoma City, had determined were in fact unitary [and] had in fact dismantled the prior unconstitutional segregated system.¹¹²

I will close my remarks with the observations of the third pod, which are the electric issues, the social issues, and the like. And the one that I wanted to lift up—I could talk about *Planned Parenthood v. Casey*¹¹³ where we did argue that *Roe v. Wade*¹¹⁴ should simply be

110. 493 U.S. 182 (1990).

111. *See* United States v. Fordice, 505 U.S. 717 (1992).

112. Bd. of Educ. of Okla. v. Dowell, 498 U.S. 237 (1991).

113. 505 U.S. 803 (1992).

114. 410 U.S. 113 (1973).

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overruled—we viewed it as profoundly wrong. *Lee v. Wiseman*,¹¹⁵ a school prayer case in the context of the graduation prayer, and the like. But the one I wanted to say just a word about is the Nancy Beth Cruzan so-called “right to die” case.¹¹⁶ And I had not thought about these end of life issues seriously at all. Happily, my family had not been confronted at that time with any such issues. And so enjoying that blissful ignorance, I simply was not steeped in the area when it came up through the state system and the Court granted certiorari without CVSG-ing—“calling for the views of the solicitor general”—we were confronted with what do we do. Do we participate in like? The process, which perhaps has already been described, is when the Court grants certiorari there is a fanning out very professionally of the papers throughout the far-flung reaches of the executive branch. And I was quite astonished to get the feedback of how many agencies of government, departments and agencies of government, were very keenly interested in the issue of right to die. I thought HHS might be interested but there were a legion. I am not going to burden the discussion with it. So it became quite obvious quite apart from what the right to life community might be urging upon us at a political level that there was this programmatic interest that was very, very deep and very keen.

It became a very delicate process that John has so ably and brilliantly described of sorting out what the position would be. The brief writing itself was very delicate, as you can imagine, given the subject matter, given the novelty of the issue, the lack of case law. But our basic urging was, “Please, do not do what you did in *Roe v. Wade*,”¹¹⁷ which is constitutionalize this area of social policy. Happily, the Court has seen fit—*that in the main*—to say [that in] these burgeoning areas of morality ethics and the like of social policy we are going to allow the democratic process to work. But while that could be criticized as an agenda-type thing of “Why are you involved?” it just was quite striking to me throughout my tenure how programmatically interested the government is in so many different issues.

115. 505 U.S. 577 (1992).

116. *See Cruzan v. Mo. Dept. of Health*, 497 U.S. 261 (1990).

117. 410 U.S. 113 (1973).

We are on time, which gives us the opportunity to actually invite—we were hopeful of having audience comment and participation. We have ten minutes?

Moderator: Seven minutes.

Kenneth Starr: Seven minutes. All right. Professor McConnell.

Michael McConnell: This is a question for John about the case in which the Securities Exchange Commission—I forget the name of the other side. Did [the] agency that you were not siding with get to wear morning coats?

John Roberts: No. There was a case—I am not even sure they got argument time because, as I said, there were private parties on both sides. There was a case where I authorized—the United States had filed papers taking a position before an agency. The agency then ruled against that position. The case was brought to the Supreme Court and I decided we would adhere to the position the United States had taken and authorized the agency to defend its order and they did not wear morning coats. I think that is reserved for members of the Solicitor General's Office representing the interest of the United States.

Kenneth Starr: Recognizing General Fried, if I may. May I just be allowed the courtesy of saying, I want to second John's comment with respect to the institution of what I called the non-career deputy, the principal deputy. Charles succeeded Paul Bator, and so when you have this kind of remarkable academic distinction, for all of the reasons that were very ably stated by John, structurally, the office really needed this and it became quite apparent in the first Reagan administration that it was a keen need. The issue was find in fact the right kind of person, a Charles Fried, Paul Bator, Don Ayer, and there have been other wonderful persons to occupy that role.

The second thing I want to say is on the politics of it. At my own confirmation hearings, we were really roundly criticized, and I remember very vividly then-Chairman Bybee suggesting that this really should now be dismantled. You should not continue this. This was a Reagan administration initiative. You should not have a political deputy, and so forth. And I resisted. I said, "I respectfully

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disagree. I think it is very important. I was present at the creation down the hall on the fifth floor, and so on and so forth.” So I was pleased to hear, at least it is my understanding, that when General Days assumed office (and he will obviously speak to this), but I do not think it became an issue, a structural issue or a political issue any longer and has in fact now become part and I think a salutary part of the traditions for the office. With apologies, Professor Fried. General Fried.

Charles Fried: [My comment is prompted] in part by the discussion about wearing of morning coats. I must admit I have never seen anyone who was not a member of the Solicitor’s General Office [wearing a morning coat] except on one occasion in *Davis v. Bandemer*.¹¹⁸ I gather that Erwin Griswold always appeared in morning clothes irrespective of whom he was representing.

I actually toyed with the idea of taking the SG’s lawyers out of morning clothes because it seemed to me the SG’s Office enjoyed so many unfair advantages over other litigants. But the word came down from Chief Justice Burger that they [wanted the office to keep wearing morning coats].

Kenneth Starr: Tradition. Andy and then Tom.

Andrew Frey: What Charles just said, which is that by and large the United States was represented by people from the Solicitor General’s Office who are experienced Supreme Court advocates, people who have had several or many oral arguments before the Supreme Court who are no longer quaking with nervousness before [the Court]. The other parties normally are represented by people who have their once-in-a-lifetime chance to be there. It is hard to underestimate the advantages which the United States [government has going into Court]. It really does help.

Thomas Merrill: I had the great pleasure of serving both under Charles Fried and under you, [Kenneth Starr], for I believe it was fourteen months. And my recollection was that early in your tenure there were some major [storms] inside the department. But unquestionably the tone changed and level of tension that we heard

118. 478 U.S. 109 (1986).

about during Rex Lee's solicitor generalship and Charles' faded. I was wondering what any of the three of you thought was the cause of that.

Kenneth Starr: I am probably the least qualified to comment. Maureen?

Maureen Mahoney: Not me.

Kenneth Starr: John will probably choose not to comment because I think John has no views on any subject. But, John, would you care to comment?

John Roberts: No, but of course Tom—

Kenneth Starr: Charles.

Charles Fried: It is very simple. You had a much more sympathetic Court. We had to fight for every vote. You had a Court where Reagan and Bush had appointed a large number of justices, so the tension was not there.

Kenneth Starr: I do not know then why they asked us so many pesky questions. That is an interesting observation.

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Reagan II Panel

Charles Fried: Solicitor General, 1985–1989.

Thomas W. Merrill: Deputy Solicitor General, 1987–1990.

Donald B. Ayer: Deputy Solicitor General, 1986–1989.

Charles Fried: Well, we thought that we would be a bit more informal this time and speak more briefly and leave more time for your comments, which will provoke us, and that would give it a slightly different tempo.

I would like to begin by saying something which would make Tom Lee blush, and that is on the subject of the political deputy. I think that was, in my experience, one of the most salutary changes which Rex instituted and one of the important things about it was that it helped guarantee the independence and the tranquility of the professional staff. I had a wonderful professional staff. I have never worked with such marvelous people before or since. Some of them I hired to the office: for instance, Mike Dreeben, Louis Cohen, David Shapiro. And I give you those names so that you will see that politics had absolutely nothing to do with whom one picked. In order to allow that to be possible, it was necessary to have a political deputy who on one hand was on the same intellectual and professional level as the staff and on the other hand had impeccable political credentials because the staff interacts with the staff of other parts of the department. And there is no doubt that those staffs do try to use a little bit of muscle and a little bit of elbow on them. The political deputy is a marvelous device for insulating our staff from those pressures without wheeling in the heavy artillery of the head of the office. The two political deputies I had, Carolyn Kuhl and Don [Ayer], just made everything work. It was the dream arrangement.

Well, talking about the duties of the solicitor general and the standards by which he acts, what was said yesterday was very interesting but struck me—when I think back to my own experience—as a little bit over abstract and overly rigorous as if there is some kind of checklist: Was this in the government's interest? If not, was it in the interest of the executive branch? In my recollection, it was not quite like that. I had a much—I must admit

and perhaps I am admitting to a defect, but I won't apologize for it—looser notion. My notion was that the president had chosen me to do a particular kind of job because there was a particular sense of how things had developed and how they ought to develop. It is not as if I had been chosen to run the Bureau of Weights and Measures.

I was not at all shy about stating my conception of the job and had the advantage of having acted as deputy solicitor general, so the people who chose me knew exactly what I thought. They paid their money, and they took their choice. And what I thought was that on the whole, the legal system had gone a little bit off the rails. I would say in the direction of what one might call the Skelly Wright–William Brennan direction and that one of the things that it was important to do was to try to haul it back a little bit. If you can explain that in terms of the government's interests or the interests of the executive, okay, that is fine, but that is not exactly how I viewed it.

I had another sense and that is because I was hearing quite a lot about the solicitor general as the tenth justice. That kind of thought had two aspects to it. It denigrated the integrity of other government officials throughout the government. For instance, the head of the Commerce Department when he announces the consumer price index must do so with perfect accuracy. And if somebody asks him to fiddle with figures for political reasons, he has to say, "No. If you want somebody to do that, fire me and get somebody else to do it." The secretary of labor, the Bureau of Labor Statistics, and the unemployment figures, similarly. And the secretary of state has to be able to keep the word that he gives to foreign countries. So, I think there is a morality to doing these jobs throughout the government and that it is not particularly to the solicitor general.

Similarly, I think it denigrates a little bit the ideal of a lawyer altogether. I think of Tony Kronman's picture of the Lost Lawyer. I do not think that that Lawyer is all that lost and I think the solicitor general is Kronman's kind of lawyer. He is a person who believes that his duty to the courts and the system and his client generally is to speak the truth—to do so as accurately as possible, not to misstate the record, not to misstate the precedents, and not to do silly things. That is the duty of lots of lawyers. And let me give you an example of a lawyer that I very much admire and [whom] many of you know and have encountered in your work: Larry Gold, who for many years was general counsel to the AFL-CIO. Well, I do not think there is a

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great deal of difference between the integrity he showed and the integrity that is expected of the solicitor general. He would never make an argument that did not hold water or misstate a record. Of course, the court respected him. I remember a justice of the court saying, “Whenever I get a brief signed by Larry Gold, I read it—even if it is an amicus brief—with particular care.” Well, that, I think, is the regard any lawyer who appears before the Supreme Court regularly aspires to and, of course, it is what we all aspire to in the Solicitor General’s Office.

Well, let me tell you a story and then I will subside. Then you can help me figure out whether I followed the canons of being a solicitor general and what they were and what it is that moved me.

This is the story—I will take you back a little bit. There is something called Landrum-Griffin¹¹⁹ which was passed in 1959 as part of the redressing of the balance in our labor laws. But, those who have the feeling that it is the natural condition of man to belong to a union objected to a profession called “labor persuaders.” Labor persuaders are people who are hired by a company during a representational election to help the company make the case to the workers that maybe it is not the best idea to unionize. Well, this is thought to be a little bit like cigarette advertising.

In order to express this, the Congress and the Department of Labor [“department” or “DOL”] could not quite say, “You cannot do this” because that would violate the First Amendment. They said that anybody who is in this profession of labor persuader must register all his labor persuader clients and how much they pay them, and disclose that regularly with the department. With this exception: if what you do is you give *legal* advice to a company in a representational fight, then you do not need to disclose that. The usual concern about client privilege and so on is [recognized].

Well, this is the problem: there are some law firms that do both. Way back, I think in 1959, the Department of Labor adopted the position that if you are a law firm also doing persuader work, you must disclose not only your persuader clients but also your legal clients. And that was the position. It was a position that had been challenged but prevailed in many circuits until the Eighth Circuit got hold of it—Dick Arnold actually. He said, “This is crazy. That

119. Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), 29 U.S.C. §§ 401–531 (2000).

cannot be right. You must disclose your persuader clients, but not your legal clients. The DOL's interpretation is a terrible stretch, and I do not care how many circuits went the other way. It is not right." And that was his decision.

The solicitor of labor came to me and said, "Would you authorize rehearing en banc?" I said, "I am very uncomfortable about this because you are wrong. Dick Arnold is dead right. This is a terrible stretch. It is a distortion of the law. You know, you were named by Ronald Reagan just like me. And one of the things that he named us for was that the bureaucracy should stop stretching its authority well past any intended legislative purpose to try and cover the world. You should not be doing this." He said, "Hey, thanks for the lecture. Can I go for en banc?" I said, "All right. I will let you go en banc because I do not have to sign that, but you are not going to go any further." He lost en banc, and needless to say, he was back asking to go for certiorari. I said, "No. I am not going to sign my name to a piece of paper which defends an outrageous bureaucratic overstretch like that. And I do not care how many circuits have gone along with it. I am not going to do it."

Well, the Secretary of Labor got very upset about it, and he called for a meeting with the attorney general. He wanted to meet with the attorney general. This, by the way, is very typical of a much under-appreciated attorney general. So, he called for a meeting with Ed Meese. And Ed Meese said, "Fine. I would love to meet with you about it." He asked for a memo from me beforehand, which I prepared, and he had the meeting.

Well, the meeting was a very large meeting. It is what we used to call a "monster rally." Many people were present: the Secretary of Labor, and so was the attorney general, and so was I. He presented his position; I presented mine. And then the attorney general sat there taking notes, which he often did—copious notes. As I remember, the Secretary of Labor was talking all about politics and how the Senate "this" and how this committee "that," and one thing or another. And then the attorney general afterwards said to me, "You do what you want." And what I wanted to do was not to authorize that certiorari, which, by the way, put the DOL in an embarrassing position because it meant that Eighth Circuit labor persuaders had a different policy, and in the end the DOL changed the policy for the whole country. The Secretary of Labor did not

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take it to the president, which we did not expect he would, and there it rested.

Well, what model of the solicitor general's role did that exemplify? I am not at all sure. And what was there about my role as the government's lawyer or the tenth justice or any other thing like that that led me to that conclusion? I cannot possibly tell you, but I have no doubt that it was the right decision. And perhaps in the discussion, you can tell me why it was the right decision, or persuade me that it was wrong.

Donald Ayer: I want to begin just by joining what has been, so far at least, the unanimous endorsement of the principal deputy position, which I wish was not so commonly referred to as the political deputy. I think that everything that has been said does make a lot of sense. It is a very useful non-career position in an office that is principally a career office.

I am grateful that, as a result of scheduling happenstance, we are taking the administrations slightly out of chronological order, because it affords me the opportunity to fill a gap which I think was apparent in the discussions yesterday of the first Reagan administration and the first Bush administration. You will remember Andy Frey talking about the pressure on Rex [Lee], particularly in the civil rights area; and Professor Wilkins talking about how the debate, which really probably had been there all along, sort of came to the surface about the proper role for the SG; and Ken Geller talking about the concern within the office in the early eighties about the risk of the office destroying its credibility by taking positions too far out and essentially beyond the reasonable reach of existing precedent and existing positions the Government had taken. I think that concern is really the same concern that the current solicitor general talked about last night, and for which Rex Lee was really the premiere spokesman: the awareness that he was in a continuing conversation with the Court—a mutually respectful and candid conversation—and was not going to destroy that candor and trust by serving as a pamphleteer general. There were real tensions then that were talked about yesterday. But, when we come to the Bush administration, though I am not going to say there were no tensions, that was certainly not a substantial theme of what we heard and I think especially it was not an important theme in the civil rights area.

What I want to try to do today is provide a little bit of historical background, which I am sure will be generally familiar to many of you. It will be about what happened during the four years between these two administrations—particularly in one area, civil rights and affirmative action—to get us from the atmosphere of the first Reagan administration that was described by some of the folks yesterday, to a very different climate and atmosphere that existed in the Bush administration. I would like also to talk a little bit about takings law, which, like affirmative action, was an important issue in the campaign of 1980, when Reagan emphasized the theme of overweening government and the rights of individuals against their government. Out of that, I think, spun a concern about government doing things that impact people's property rights, which in turn gave rise to takings' arguments in the regulatory context. So, I want to start with civil rights and spend most the time I have on that and talk just briefly about takings law.

Yesterday you heard Andy [Frey], I think, briefly allude to the *Bob Jones*¹²⁰ decision, which was a case in the early 1980s that involved the issue of whether the IRS could deny tax exemptions to previously tax-exempt private universities that maintained racially discriminatory policies. There are people here who were involved in it, who can say a lot more about *Bob Jones* than I can. But the short of it is there was a pretty heated discussion within the department. Some of the folks here who were involved in that discussion disagreed with the position that was ultimately taken, which was to oppose the IRS policy denying tax-exempt status to discriminatory institutions. Rex Lee was recused in the case, and his absence created a rather spectacular hole in the office, such that there was no person of seniority who was willing and ready to forthrightly support the position that the administration wanted to take. The net result was that a brief was filed, signed by the senior career deputy, but containing a footnote saying he did not agree with the brief's position. The administration, of course, lost in the Supreme Court, and the whole thing was most unpleasant and a bad early step in the civil rights area.

Of course, *Bob Jones* also highlighted the fact that the office included only one non-career employee—the SG himself—and what grew out of that, as you heard yesterday, was the creation of the

120. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

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principal deputy position. But after this bad start, if you jump to the end of the Reagan administration in the context of civil rights, things ended up much better. The administration was, on the whole, fairly successful in pursuing the central tenets of its civil rights agenda, and the administration ended with the traditions and regular practices of the solicitor general pretty well intact. On the former point, I would offer you as the stopping point and, I think, an accurate stopping point in the affirmative action area, the decision in *Croson*.¹²¹ *Croson* involved government set-aside contracts, and in the spring of 1989 the Court there adopted what I think it fair to say remains today the analytical structure for government set-aside programs and voluntary affirmative action by governmental bodies. Then, as now, the Court said that, in order to rely on race, government must have a compelling interest and that compelling interest has got to have something rather specific to do with a history of discriminatory practices. And when you do rely on race, it has to be in a way that is narrowly tailored to the historical discrimination that you have identified. None of these are self-answering questions, but it is a very limiting process. I think the Court's approach is aptly summed up by a phrase that Charles used, actually back in 1986, well before *Croson* was decided. He saw where this both should be going and, in fact, was going, when he said, "the rule is not never, it is hardly ever." I think that is pretty much where we are today.

So, I think the story ended successfully from the standpoint of the administration's civil rights policies. Apart from affirmative action, the administration won important Supreme Court victories in a number of cases, including *Wards Cove*,¹²² and several others that were in the civil rights area, *Martin v. Wilks*,¹²³ and *Patterson*.¹²⁴ What ended up happening, in fact, was that the move in the conservative direction was so far that it ended up being politically unsustainable. Which is to say that in the Civil Rights Act of 1991,¹²⁵ was passed by a majority of the Congress and signed by President Bush the second time around. But that is getting ahead of the story.

121. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

122. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

123. 490 U.S. 755 (1989).

124. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

125. Civil Rights Act of 1991, Pub. L. No. 102-166 (codified as amended to the Civil Rights Act of 1964 in scattered sections of 42 U.S.C.).

What I want to describe here, because I found it to be a riveting story during the years I was involved in it, is the road that got us from *Bob Jones*¹²⁶ to *Croson*.¹²⁷ I will leave out most of the details because I do not know most of them but will talk about a few of them that I do know. It was a bumpy road, attended, as you heard yesterday, by a lot of gnashing of teeth in various circles about what the SG's position would be—a lot of heat, more heat than light a lot of the time, and a lot of pressure and criticism. This heated atmosphere took shape long before I arrived, stimulated by the purest notion that the government should be entirely colorblind, which found its judicial root in the dissent in *Plessy v. Ferguson*.¹²⁸ Colorblindness led, in turn, to the principle of victim specificity, which limited remedial actions for discrimination to those that benefit actual victims of discrimination. The remedy does not go beyond the actual victim. It simply goes to the person who was discriminated against, and that, of course, essentially rules out affirmative action except in the form of outreach, where you increase the applicant pool by encouraging people to apply for jobs or promotions. Victim specificity does not allow government to do things that are race conscious in making choices with regard to governmental benefits.

That was, I think it is fair to say, the keystone of the department's civil rights policy in the first Reagan administration. I think it took shape around the time of *Bob Jones* and was the dominant theme for several years. It was promoted with evangelical fervor, as government lawyers went into courts where consent decrees had been entered and asked to have them rolled back to be consistent with victim specificity. That caused, in turn, you can imagine, lots of uproar and lots of criticism in lots of circles.

The key Supreme Court development that gave victim specificity life and proved to be, as Charles has described it in his book, “a false dawn”¹²⁹ was the case of *Firefighters v. Stotts*,¹³⁰ which Rex [Lee] argued in [the] 1983 term and which was decided, I think, in the spring of 1984. It was argued and briefed by the government

126. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

127. *City of Richmond v. J.S. Croson Co.*, 488 U.S. 469 (1989).

128. 163 U.S. 537 (1896).

129. CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION: A FIRSTHAND ACCOUNT* 106–110 (1991).

130. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984).

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primarily on the principle of victim specificity, but on the facts it was a case about layoffs and it was a case under Title VII¹³¹ that involved seniority systems. All of which, for those of you who have thought about these issues, you understand is a very narrowing set of facts. The effect on someone who is laid off is much more severe than the effect where someone applies for a job in the first place and is one of fifty people that are simply never hired in the first place. If you have a job and you lose it, it is a much greater impact, and any consideration of race to reach that result will be scrutinized much more closely.

So, the language of the court in Justice White's opinion in *Stotts* was such as to give some support to the government's victim specificity argument. It was not sweeping. It did not announce an unlimited principle, but it did talk in terms of victim specificity, and the Civil Rights Division took *Stotts* as the symbol of its victory, in essence, and took it around the country again. The department took *Stotts* back to the lower courts and presented victim specificity again as a reason to undo a whole range of sweeping remedies. But, again, it was sorely disappointed in the reception that it got from those courts. In fact, I think it is true that they had no success at all in promoting that idea in the lower courts. And that failure to secure reversal of any pre-existing race-conscious remedies fueled, within DOJ among those really focused on these issues, a tremendous anger. It also fueled a strategy of looking for a case, or more than one case, to go back to the Supreme Court to nail down the victory that we had won in *Stotts* and to find the circumstance where the court would come out, pound the table, and say, "Yes, we mean it, and you must follow the law." Again, this is still all before I got there, so I am again subject to being corrected on the facts.

In the fall of 1985, after *Stotts* had been decided in the spring of 1984, and after a year of going unsuccessfully back to the lower courts, there were two cases that had been teed up which were good candidates. One case was *Wygant*¹³² and the other was *Sheetmetal Workers*.¹³³

131. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended in scattered sections of 42 U.S.C.). Title VII prohibits employment discrimination based on race, color, religion, sex, and national origin.

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

133. *Local 28 of Sheetmetal Workers Int'l Ass'n v. E.E.O.C.*, 478 U.S. 421 (1986).

Sheetmetal Workers was a case of egregious discrimination by a union where an exasperated trial court judge ended up ordering a rigid racial percent goal for union membership to be achieved by a certain date. I think it was 29.3% union membership to be black by a certain date. Well, that was a pretty stark quota and a pretty stark case in which to make an argument that says, “Look, only the victims get relief.”

Wygant was a case of a laid-off teacher in a public school who had been laid off essentially to maintain proportionality in the labor force, not to make room for a victim of discrimination, but in fact to allow adherence, in a time of shrinking budgets, to goals that had been set in prior court orders, just to meet these goals. So, here were two cases that seemed to offer a good opportunity, and my understanding is that they were primarily argued, and I think reasonably so, on the theory of victim specificity.

In the spring of 1986, those two cases were decided, and in them we won some important battles but lost the victim specificity war. In *Wygant*, the layoff was found to be invalid. Important things were said there. In *Sheetmetal Workers*, it was a five to four loss. *Sheetmetal Workers*, I think, is key here because not only did they uphold this fairly stark 29% numerical goal, but five justices specifically said that victim specificity as an across-the-board rule was not the law. These cases were made up of a remarkable array of opinions which, if read carefully and together, really did contain the kernel of what came out of *Croson*.¹³⁴ The requirement of a compelling state interest based on a specific history of discrimination was there, as was the idea of narrow tailoring to minimize the trammeling on individual rights based on racial considerations. In the SG’s Office, during the early summer of 1986—just after I arrived there—we spent a lot of time digesting these opinions and trying to figure out how to interpret them in the next round of cases, which were now teed up for the next year, for the fall of 1986.

One case called *Paradise*¹³⁵ involved the Alabama State Troopers, who had an egregious history of discrimination, again somewhat like *Sheetmetal Workers*. The federal court had, as a result, ordered a catch-up, one-for-one promotion quota to get the force more integrated with black troopers and increase their presence at higher

134. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

135. *United States v. Paradise*, 480 U.S. 149 (1987).

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levels. There was a clear history of deliberate racial discrimination, yet it was a case on which the United States had actually sought certiorari, again for the purpose of asserting its victim-specific theory, which, of course, had been rejected in *Sheetmetal Workers* about the time that certiorari was granted. So, here was this case with a fairly ugly set of facts and an extreme remedy, and our primary theoretical line of attack had been rejected.

The other case, which is the one that I worked on that summer, was *Johnson v. Santa Clara County Transportation Agency*,¹³⁶ which involved a voluntary affirmative action plan by a county government, which had only been challenged under Title VII, and not under the Equal Protection Clause. With regard to Title VII challenges to voluntary affirmative action plans, the leading precedent there, of course, at that time was the *Weber*¹³⁷ case, which had upheld voluntary affirmative action where it is flexibly designed and a voluntary effort to remedy a manifest imbalance in the workforce. *Weber* thus embodied a much less rigorous standard than the compelling interest-narrow tailoring formulation toward which the court seemed to be heading, where an equal protection challenge to governmental action is concerned.

From where I sat, what ensued that summer was a fairly severe test of the ideals and aspirations that have been discussed here about the way the solicitor general works and the way he tries to relate to the Court. Perhaps all of this was unavoidable. Several people had shed a lot of blood to pursue the victim-specificity argument, which I do not think you could say in the first instance was either foolish or unreasonable to argue, and yet it had now been rejected. What you now had was a much more nuanced set of views and opinions, which were coming together to look like *Croson*,¹³⁸ I think, but did not yet. And the question was: How do you deal with that and what do you do in the next case? And what ensued was a process in which those who had been at this a long time had a hard time letting go. Looking through some old papers, I found a characteristic quote from a memo written early on in that process which kind of summarizes it. One of the folks who was pushing most strongly to maintain our view as best we could wrote in a memo, "In our brief,

136. *Johnson v. Santa Clara County Transp. Agency*, 480 U.S. 616 (1987).

137. *Steelworkers v. Weber*, 443 U.S. 193 (1979).

138. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

we should allude to our rejected colorblind, victim-specific arguments and make clear as unprovocatively as we can that we still hold them.”

Well, there may be nothing wrong with doing that, but I doubt that such a statement can be very productive, where the Court has labored and sweat and come up with a set of views and you are now trying to go to the next step in the next case. In the office, we tried to come up with a brief initially that would kind of distill out what was in the Supreme Court opinions that had just come down, as well as what had come before. Our draft tried to work through those recent cases and articulate a standard that other courts could apply. What we argued for was something that was pretty close to the *Croson* standard, at least moving pretty far in that direction. And it ended up in the end, frankly, being a tentative brief in the sense that it said the Court should articulate the standard in this way and then send this *Johnson*¹³⁹ affirmative action case back, and let the lower court look at it against the standard and see if it meets the standard. Asking for a remand rather than a final decision on the merits striking down the plan did not go down well in the circles in the Civil Rights Division that wanted the brief to be more aggressive. That disagreement, among others, produced a series of, I would say, high decibel meetings in which loyalty was questioned and various other exchanges went on, which were fortunately somewhat unique. For somebody that had been there for two months, it was an interesting place to find myself as the principal deputy. Mostly, I just found myself getting mad and tuning out because we were trying to do a job which was hard enough to start with and which got very difficult when people were screaming in your ear and calling you names. And that is what was going on.

The brief we ended up filing—you can be the judge of it if you want to go back and read it—all I can say is we did the best we could, and it is what it is. I have one regret, and that is that, in sort of in a half-baked way, we went back and reargued *Weber*, as though the Court had invited reconsideration of that case. Of course it had not, and the result of that strategy was fairly predictable.

I reread the brief in *Paradise*¹⁴⁰ the other day. Deputy Solicitor General Al Lauber worked on that, and I think did probably a better

139. *Johnson v. Santa Clara County Transp. Agency*, 480 U.S. 616 (1987).

140. *United States v. Paradise*, 480 U.S. 149 (1987).

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job than I was able to do working toward a line of argument that was going to be where the Court would end up, which frankly was not a bad place from the standpoint of the administration's own agenda.

Well, as you might guess, both of these cases had an unhappy ending in the spring of 1987. Again, they were close. In *Paradise*, we lost five to four. In *Johnson*, we lost six to three. *Johnson* essentially just applied *Weber*¹⁴¹ and said that if suit is brought only under Title VII, it does not matter if the defendant is a government. If somebody had challenged this on equal protection grounds, it might be a different issue, but this is Title VII, and that is that. And so they upheld this program.

I think this was all an important turning point in terms of getting from where we were at the end of the first Reagan administration to where we were at the beginning of the Bush administration. As I recall, it was following *Johnson* and *Paradise* that the work of the office in the civil rights area got back closer to normal. Things got less confrontational, and we had many fewer of the intense sort of "so is your father" kind of discussions that we had in connection with these earlier briefs. We were able to return to a more regularized, deliberative way of addressing these issues.

Now, the *Croson*¹⁴² brief was really a special project of Charles's. The arguments were consciously built on things the Court had said, especially in *Wygant*, but in other cases as well. I think it is fair to say that the Court, in its opinion, said an awful lot of what we suggested in that brief. Again, I think *Croson* is not a bad place to have ended up in the affirmative action area.

At the end of the administration, the Court was moving ahead of us in the direction of more conservative views on these civil rights cases. One good example of that is the *Patterson*¹⁴³ case, which you all may remember, where the Court asked for supplemental briefing on whether § 1981¹⁴⁴ reaches private conduct. It was thought at first to apply only to governmental conduct, but *Jones v. Alfred H. Mayer*¹⁴⁵ and *Runyon v. McCrary*¹⁴⁶ made it applicable to private

141. *Weber*, 443 U.S. 193.

142. *J.A. Croson Co.*, 488 U.S. 469.

143. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

144. 42 U.S.C. § 1981 (2000).

145. 392 U.S. 409 (1968).

146. 447 U.S. 160 (1976).

conduct of certain kinds. *Patterson* presented the question of just exactly the limits of that applicability in the employment context, and the Court asked for supplemental briefing going back to square one, which was, should we reconsider *Runyon v. McCrary*?—i.e., should § 1981 ever apply to private conduct. And Charles, after much thought within our office and a lot of work by a bunch of people, thinking about whether we should or should not file a supplemental brief (we were *amicus* in the case) decided not to file a supplemental brief. Rather than go in and ask to reconsider *Runyon v. McCrary*, we simply filed no brief.

But then, on the merits, the Court ended up adopting a position more limiting of [§] 1981 than we had suggested. They essentially limited § 1981 to the hiring context only. And we in our brief had laid out a theory that it would cover hiring, but, in a state that had a covenant of good faith and fair dealing, it would also allow an action for, say, harassment under that state law governing good faith and fair dealing.

The same thing was true in some other cases. *Lorance v. AT&T Technologies*¹⁴⁷ was a case where the Court also went beyond where we were. In some of those other cases I think that I mentioned earlier, they pretty much accepted our position, but again as I said, politically, that turned out to be farther than the country collectively could go at that point, and led to legislation a few years later. That is really what I have to say on civil rights.

I want to just quickly touch on takings law because it has a little bit of the same flavor in that it really comes out of the 1980 election. It is an important issue: How are we going to limit overweening government? The focus, I think, to a great degree was coming out of California and out of zoning cases. We have known since 1922 when Justice Holmes said it, that regulation can be a taking if it “goes too far,”¹⁴⁸ but we did not know when it might go too far or how you deal with all these local governments which are telling people they could not do certain things with their land. And that was really something that came up in the election, so something needed to be done with this.

On the other side, we had to consider the government’s traditional role as a regulator. The federal government is a regulator

147. 490 U.S. 900 (1989).

148. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

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and arguably often taker of property. And so the question was: Is the U.S. Department of Justice really going to make a bunch of sharply stated arguments in favor of plaintiffs trying to sue governments for regulatory takings? Well, the long and the short of it is that before I got there, within the department, a useful compromise was worked out. The Takings Clause,¹⁴⁹ which says there shall be no taking without just compensation, could be read two ways. You can read it as saying that, if the government takes, the Constitution gives you a right to compensation. Or you can read it saying the government cannot take unless it pays you, so that a property owner's remedy is not damages but an injunction. State governments had taken the latter view, as, previously, had the federal government. Strong takings advocates wanted the opposite view and claimed a damage remedy under the Fifth Amendment itself, whenever regulation "goes too far." The compromise reached within the department was to deny that the Takings Clause embodies its own damage remedy, but to contend that § 1983¹⁵⁰ does provide a remedy against those pesky local regulators who were telling people what they could not do with their land, so that they could get damages even if it was only a temporary taking.

A lot of these cases—there are several that came along—broke their pick on the problem of ripeness. The Court kept telling claimants that they had not exhausted their state remedies. In the summer of 1986, we had a case called *First English Evangelical Church*.¹⁵¹ We essentially presented the view that § 1983 was the available remedy. The Supreme Court in its opinion by Chief Justice Rehnquist went right past us and said there is a self-contained damage remedy in the Fifth Amendment and decided that issue. There is another important case called *Nollan*,¹⁵² but I think I have probably run over my time and I will stop.

Thomas Merrill: Yeah. I was going to start with some nice comments about how wonderful it was to work for Charles [Fried] and Don [Ayer]. But since they have eaten up all the time, I will have to cut that part out.

149. U.S. CONST. amend. V.

150. 42 U.S.C. § 1983 (2000).

151. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

152. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

I will speak briefly about separation of powers. In 1987, when I joined the office, there was a very high level of expectation, I think, within the Justice Department about separation of powers. There was a sense that we were on the cusp of a breakthrough in realizing a position that the executive branch had long sought, which was, roughly speaking, that the doctrine should be taken seriously, that under the Constitution executive functions are to be performed only by the executive branch, that the executive branch is headed by one president, and that every one who performs executive functions, therefore, must be accountable to the president. This expectation was created by decisions like *Chadha*,¹⁵³ which Rex Lee had successfully achieved in 1983, and by *Bowsher v. Synar*,¹⁵⁴ which Charles had successfully achieved in 1986.

In 1988, that expectation was dealt a severe and perhaps blatant fatal blow by *Morrison v. Olson*,¹⁵⁵ the case that upheld the constitutionality of the independent counsel statute. The independent counsel performs investigatory and prosecutorial functions, which we all assumed were executive, and the independent counsel was appointed by a court and is subject to its removal only for good cause. So the traditional measures of accountability to the president did not seem present. The Court nevertheless upheld it and that was a very severe setback to the position that the Justice Department had collectively been seeking and hoping to achieve during this period of time.

What I wanted to talk about briefly, if I can, are two episodes that occurred after *Morrison v. Olson*, in which I was involved and which illustrate how, I think, the solicitor general attempted to deal with the *Morrison* setback and to preserve as much as possible our sense of what separation of powers should look like. These episodes also illustrate certain functions of the Solicitor General's Office, which have not been given much attention so far and are worth putting out on the table because they give you a more well-rounded sense of the kinds of things that the office does.

The first was a case called *Ameron Inc. v. United States Army Corps of Engineers*.¹⁵⁶ I inherited this case when I showed up in

153. *INS v. Chadha*, 462 U.S. 919 (1983).

154. *Bowsher v. Synar*, 478 U.S. 714 (1986).

155. *Morrison v. Olson*, 487 U.S. 654 (1988).

156. *Ameron, Inc. v. U.S. Army Corps. of Eng'rs*, 787 F.2d 875 (3d Cir. 1986).

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1987. The Supreme Court had already granted certiorari pursuant to our petition. And for reasons I do not specifically recall right now, it was being held for *Morrison*. It was either our motion or the Court's own notion to hold off on briefing until *Morrison* had been decided. So in the summer of 1988, I turned for the first time to *Ameron* in preparation for supervising the briefing of that case. I became quite alarmed by what I found.

The issue in the case involved something called the Competition in Contracting Act,¹⁵⁷ which was a statute that Congress had passed in order to try to encourage greater use of competitive bidding in the procurement process that the government follows. In particular, one provision of the Act authorized the comptroller general, who is the head of the General Accounting Office and who *Bowsher*¹⁵⁸ had just said was a legislative officer, to issue a stay of any contract of the federal government that the executive branch had entered into in order to allow the comptroller to review a protest by a disappointed bidder who had not received the contract. The statute had provisions for an automatic stay and also for a discretionary stay that the comptroller general could issue in order to permit these protests to be reviewed. In addition, the statute allowed the executive to override the stay, but only for specific enumerated reasons like national security.

The Office of Legal Counsel ["OLC"], I believe it was, maybe in conjunction with the Civil Division, had identified the stay provisions as violating the Department's understanding of separation of powers. The argument was that deciding when to enter into or to implement a contract was an executive decision. Here was a legislative officer who was permitted to block or temporarily interfere with that decision. The comptroller was clearly not accountable to the president; therefore, this sort of strict separation principle is being violated. So, in the flush of anticipation after *Bowsher*, we had sought certiorari and the Court granted the case.

As I looked at it, I could see a number of serious problems with going forward with this case in 1988. One was that it was a sort of a test case. It had arisen when OLC convinced the Army to simply defy a stay issue by the comptroller general, thereby forcing the disappointed bidder to sue the federal government in court, raising

157. 41 U.S.C. § 253 (2000).

158. *Bowsher v. Synar*, 478 U.S. 714 (1986).

the constitutional issue. So, it still looked like we were being the aggressor—we were sort of picking fights rather than defending our prerogatives. Another problem was that the interference with executive functions seemed rather minor. It was just a timing question. There was no suggestion that Congress could decide whether we could enter into the contract or not, but was just delaying it. A third [problem] was that there was this override mechanism, so the argument could be made that the executive could protect its essential interests by overriding a stay if it had to. And finally, the issue involved the expenditure [of] money, which has traditionally been understood to be a sort of shared function of Congress and the executive—it was not like prosecuting crimes as in the *Morrison* case. Putting all of this together, to me it looked like a big loser. My fear was that if we went to the Court and went through with the argument, the decision of the case—well, we would lose on the merits. That would not be such a bad thing, but the court in writing an opinion justifying this might say things about executive power and how it is okay if a little bit is shared here and there, which would be a very damaging precedent coming on top of *Morrison* and would work to the long-term disadvantage of the separation of powers interest.

So I recommended, and Charles [Fried] readily agreed, that we should pull the plug on the case. We filed a motion with the Court asking to have our certiorari petition dismissed, which was granted as it routinely is. This was mildly embarrassing. We had asked the Court to take the case, and they had agreed; and now we were asking them to dismiss the case. We took a little bit of heat within the department from people that thought we were not being faithful to the true vision of separation of powers—but not an awful lot of heat. The case just quietly went away.

I think the *Ameron* episode illustrates a dramatic example of the solicitor general's prosecutorial discretion, if you will. One of the things the office does is to try to very carefully pick and choose which cases it takes before the Court, make sure the facts are right, [and] make sure that the government's position is likely to be one the justices find compelling. Sometimes you cannot avoid cases like *Morrison v. Olsen* going up, but, if at all possible, the office tries very carefully to cull and manage the caseload in a way that maximizes the chances of prevailing. *Ameron* was a little bit unusual but a clear

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example of doing this, in deciding that here was a separation of powers case we did not want to risk losing.

The second episode that I will briefly recount involved an appeal recommendation. The appeal authorization function of the solicitor general has been mentioned a couple of times, but it has not been given a lot of attention. This was a very unusual appeal recommendation because, as best I know, it is the only one that ever was resolved in the Oval Office of the White House. The president of the United States, in effect, was the person who finally decided whether or not we were going to appeal the case from the district court to the court of appeals.

The issue involved a statute that Congress had passed which required the Justice Department to seek to close the PLO observer mission of the United Nations in New York City. The statute and the issue, needless to say, were very political. The statute had been lobbied for vigorously by AIPAC, the American Israeli Political Action Committee. There was a lot of opposition to this in the State Department and also in the international community, but Congress had passed the statute and the Civil Division had gone into court in New York and sought an order closing the PLO observer mission.

The district judge, whose name I do not recall, had issued an opinion saying, and here I am paraphrasing, "I am not going to grant relief because even though the statute seems plain, the PLO mission enjoys a status under customary international law." There was no argument that the mission was protected by a treaty. But he said, "Protected by customary international law, and I think that Congress must specifically say that it intends to abrogate customary international law before it can do so by statute." Now, as the appeal recommendation came up to us from the Civil Division, two things were obvious. One was this was a political hot potato, and two, the legal reasoning was weak. Ordinarily you would think that this would lead to a rather routine "yes" authorization of appeal. But one thing bothered me, in particular, about the papers that came up to our office: there was no mention in the Civil Division's memo whatsoever of the president's prerogative in the field of foreign affairs, and in particular there was no mention of the fact that, in Article II of the Constitution, one of the relatively few enumerated powers given to the president is the right to receive ambassadors and other foreign ministers. And one can readily see how deciding whether or not there should be a PLO observer mission in the

United States would be within the scope of receiving or not receiving ambassadors or public ministers. And so I was concerned that if we aggressively appealed this decision and sought vindication of the statute, we would create a precedent that says that Congress has the power to legislatively control the president's constitutional authority to receive or not receive public ministers.

Well, in what Charles [Fried] would probably characterize as a standard mid-level bureaucratic response, I decided what was needed was more memos. I recommended to Charles that we deny an appeal until the Civil Division came up with a more complete analysis of how this recommendation was consistent with Article II and separation of powers.

Charles, being more imaginative and direct, instead issued what I think is the most unusual appeal authorization I ever saw, which was "Appeal—*comma*—Subject to the Condition that the President States Publicly that This Is Consistent with the Foreign Policy Interests of the United States." And this was very ingenious. I think what Charles was saying here, and he can speak to this himself if there is any time left, is that we were not getting involved in politics—the solicitor general has nothing to do with that. We were perfectly satisfied with the legal case for an appeal—there was no question about that, but we were deeply concerned that the separation of powers concern had to be addressed. If the president wanted this mission closed, then there was nothing inconsistent between his constitutional power and enforcement of the statute. But if he did not want the mission closed, then this was inconsistent with his constitutional prerogatives, and that needed to be faced head on. Well, needless to say, the Civil Division was unhappy with this resolution. They sought—what was the phrase—"monster meeting?"

Charles Fried: "Monster rally."

Thomas Merrill: . . . "Monster rally" in the Attorney General's Office. Abe Sofaer came over from the State Department. He was the legal advisor at that time. He made the argument in favor of not appealing. For Civil Division, John Bolton said, "Let's appeal." The attorney general, I believe it was Richard Thornburg at that time, agreed with the appeal recommendation. I think he stripped away, although the details escape me now, the Charles Fried qualification.

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That was the last I heard of it until I read the newspapers for the next several days to see what happened to my little appeal recommendation.

The first article in the *Washington Post* said that a meeting had been scheduled in the White House in which Secretary of State George Schultz was going to appeal directly to the president from Attorney General Richard Thornburg's appeal authorization. And then the next day there was an article reporting that the president of the United States had decided not to authorize an appeal; that the State Department won and the Justice Department lost.

Now, what did this say about the Solicitor General's Office? I am not really sure. I have no idea what was said in the Oval Office. Ronald Reagan probably did not read my memo or any of the other legal papers that were generated. I have often fantasized, however, that maybe, just maybe, because of what we did in the Solicitor General's Office, somebody in the White House mentioned Article II in the course of these discussions and thought about the constitutional implications rather than just thinking about the political and foreign policy implications. If in fact that did happen, then I think here is another illustration of how the Solicitor General's Office, by consistently attending to these issues, consistently can have the impact and protect the separation of powers.

Charles Fried: Was not AB Culvahouse the President's Legal Counsel? And I would have thought he definitely would have [looked at the office's work].

Thomas Merrill: I would hope so.

Donald Ayer: He was an excellent man, [Culvahouse].

Moderator: General Fried, do you have anything you would like to add to that?

Charles Fried: The idea was that we would defend the president's prerogative but only if he wants to exercise it. So, it is not a case of having him decide the legal issue, but having him decide whether this is something that he cares about.

Clinton I Panel

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

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

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

Drew Days: Good morning. I did not work for Rex Lee and I did not work with him in his law firm, but I felt that he was a friend and a colleague to whom I could turn. Our first encounter was when I served on a committee that Rex chaired. It had a very odd name: the ABA Reading Committee. It was kind of like having “sleepers” around the country who sprang into action when an event occurred, namely the nomination of a person to fill a vacancy on the Supreme Court, and to the extent that that person was a jurist, we were assigned to read portions of that person’s work—opinions. This was a very interesting assignment, and I really marveled at Rex’s ability to herd cats among the people on the committee and to provide guidance and to ask probing questions that really brought out the type of information that I think was helpful to the ABA in evaluating candidates for the Supreme Court. This was in the good old days, some people would call it, when the ABA had credibility in the process of selecting judges. It was not an outlier, at least in some circles. Rex in that setting was the Rex Lee that has been spoken of so often in the last day or so: kind, thoughtful, balanced, highly professional and always polite and respectful.

My second encounter with Rex, which followed on that first encounter, was when I became solicitor general. I cannot tell you how much I appreciated Rex reaching out to me and saying, “I’ve been there, I’ve done that, and I’d like to be of assistance. How can I be helpful?” It was not only at the initial part of my tenure, but later in my tenure, when I had several problems that I thought he might be helpful in terms of untangling things that I was confronting. Rex was a good listener on the other end of the telephone line, willing to take time out even from his arranging medical appointments and tests so that he could hear me out and provide the type of guidance that he thought I needed. And so I will

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never be able to thank Rex enough for what he was willing to do for me and, therefore I am particularly grateful to Brigham Young [University] and to others who are responsible for putting this conference together, for inviting me to be a participant in this dedication to the memory of Rex Lee.

Before I get into what life was like in the first Clinton administration, I would like to say a few words about some of the issues that have been discussed earlier. One, of course, is the so-called principal or political deputy.

I am not certain exactly what I had in terms of categories. I was told after I was confirmed as solicitor general that it was my decision—I could select anybody I wanted, within reason obviously—but I was also told that a group of eminently qualified lawyers would be sent over by the White House for me to interview them and consider them in my process of selecting a deputy who would be the principal deputy. I dutifully interviewed those people—they were indeed quite able, exceptional lawyers—but I decided to select someone I knew well, who was an experienced academic, an alumnus of the Solicitor General's Office, and someone I felt—to follow the characterization that Charles [Fried] used on several occasions—someone who would be worthy of the respect of the professional staff, someone who could hold his or her own in that very rarefied atmosphere in the Office of the Solicitor General.¹⁵⁹

There has been a lot of talk about the role of the principal deputy in serving as a buffer or an insulator against improper or perhaps inappropriate interference or contacts by the political people (as they were called in the Clinton administration) in the White House, with the professional staff. And that certainly is a function—one that I think is very important for a principal deputy to discharge. But I appreciated having a principal deputy because it gave me someone to talk to, someone I could talk to in confidence without fear of it going any farther than the conference room or my office, conversations about matters that really should not have been part of the considerations of the professional staff in carrying out their responsibilities. So, in addition to all the other very sophisticated ways in which people have thought about the principal deputy, or the political deputy, think about it as kind of a buddy system that

159. In 1993, Drew Days selected Paul Bender to serve as his Principal Deputy Solicitor General.

serves the interests of the country and the United States well in my estimation.

One of the things that has not been discussed to my recollection in the time that we have been here is something called an “agenda” in the Solicitor General’s Office. I know this only because I was hounded by members of the media, not Linda Greenhouse, of course, and other reputable members of that estate, but by others who kept asking me, “Well, what is your agenda? What are you going to do? What are your targets?” And, naive person that I was, I said, “Well, I have no agenda. I am just going to carry out the will of the people and make certain that the interests of the United States are well protected. What do you mean by an agenda?” For some time I have continued to regard myself as a purist in this regard. God forbid that a solicitor general should have an agenda. But the more I have thought about it, I have wondered whether the reason why I did not have an agenda was because for a person of my political and social leanings things looked pretty good.

Now, one of the things that Don [Ayer] did not cover in his description of what was going on in the eighties in terms of civil rights was what was happening in the Congress. And the story was that there was a pitched battle going on, if one can describe it that way, between the Court and Congress over civil rights legislation, such that whenever the Court entered a judgment or wrote an opinion that ruled in a way that appeared to cut back on civil rights laws, Congress was there with something, for example, called the Civil Rights Restoration Act, or the Civil Rights Act of 1991.¹⁶⁰ So from my perspective, the role that Congress had played in righting the balance, if you will, from what the Supreme Court had done on some of these issues may have caused me not to develop an agenda going into the office.

It was also true that for liberal folk like me, some of the items that would be put on an agenda, a hit list, like capital punishment, were clearly off the list because I was working for a president who was in favor of capital punishment. I had sworn to defend capital punishment in my confirmation hearings, and I certainly was not going to go back on that. But if one were to put that aside, the fact was that Lyle Deniston, a member of the corps that covers the

160. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amendments to the Civil Rights Act of 1964 in scattered sections of 42 U.S.C.).

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Supreme Court, described me as a liberal guy in a moderate administration. I think that was an accurate description, and I was sensitive to it, and it had an impact on the way that I functioned in my role as solicitor general.

Insofar as abortion was concerned, *Casey*¹⁶¹ had been decided and things seemed to be settled in that regard up to a point. On questions of affirmative action, although Don [Ayer] talked about the *Croson*¹⁶² case, Charles Fried knows well that there was another kind of pitched battle, a much more rarefied pitched battle, between professors at some law schools on the east coast over what *Croson* really meant. My gang would say, "No, it doesn't." And Charles's group would say, "Oh, yes it does." And we went back and forth in the *Yale Law Journal* for several issues in that particular debate. So, maybe that is why I did not have an agenda, but if things had been otherwise, perhaps I would have.

Certainly, political scientists and sociologists who have studied the Solicitor General's Office have come to a quite shocking conclusion looking at the data: that solicitors general in Democratic administrations tend to do things that look very Democratic, and solicitors general in Republican administrations tend to do things that look very Republican. How this happens remains a mystery, to be elucidated at a later stage, undoubtedly.

Well, I am pleased to say that for all the *sturm und drang* that has been described in detail by some of the people on the earlier panels, there really were no major controversies in the Department of Justice or between the White House and the Justice Department that touched significantly upon the work of the solicitor general or my work during my three-year tenure.

As others have said, by and large the solicitor general carries on the legal work of the United States in the Supreme Court and in lower courts from administration to administration, irrespective of the party in power, in criminal cases, in cases that have to do with the financial interests of the United States, the property interests of the United States, and so forth and so on.

What is notable, it seems to me, about the time I spent as solicitor general was not so much what I was doing, not about my agenda, but what was happening in the Supreme Court during the

161. Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992).

162. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

period from 1993 to 1996, because during that period the Supreme Court rendered a number of decisions, as I think most of you are well aware, that signaled a new departure with respect to issues of federalism and civil rights, voting rights in particular. And with the benefit of hindsight, we can now see that those decisions were just building blocks, if you will—the beginnings that have been built on in the intervening years into a major body of case law elaborating upon these earlier doctrines and earlier decisions. Let me mention a few of them.

The first is *United States v. Lopez*.¹⁶³ I was told in a very unkind fashion by some of my law professor friends when the Supreme Court handed down *Lopez*—and they were in the courtroom when that happened—they said to me, “Thank you. Thank you. It’s going to make Con Law I interesting once again. No longer will we have to say that the Court always defers to Congress with respect to its exercise of the commerce power.” As you will recall, the Supreme Court struck down something called the Gun-Free School Zones Act of 1990,¹⁶⁴ which forbade the possession of a firearm within a certain distance of a school. It declared that unconstitutional as exceeding Congress’s Commerce Clause power. This represented, as I just mentioned, a major shift from the Court’s sixty-year history of showing great deference to Congress’s exercise of its commerce power to regulate everything from home-grown wheat to loan sharking.

The second case that I want to mention is *Seminole Tribe v. Florida*,¹⁶⁵ a case that wags cannot resist calling the “Seminal” Tribe case, but I hope you will forebear. It held that Congress did not have power under the Indian Commerce Clause to abrogate the state’s Eleventh Amendment immunity under something called the Indian Gaming Regulatory Act.¹⁶⁶ It even precluded in that decision resort to what is known as the *Ex parte Young*¹⁶⁷ procedure, traditionally available to litigants seeking equitable relief against state officials for violation of federal law.

163. 514 U.S. 549 (1995).

164. Pub. L. No. 101-647, § 1702, 104 Stat. 4789 (repealed 1995).

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

166. 25 U.S.C. §§ 2701–2721 (2000).

167. *See Ex parte Young*, 209 U.S. 123 (1908).

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The next case, *Adarand v. Pena*,¹⁶⁸ begins what I refer to as my “deja vu all over again” experience. In the Carter administration I was assistant attorney general for civil rights, and I argued several civil rights cases. I found that the cases I argued were back on the block during my tenure as solicitor general. So, when I looked at *Adarand v. Pena*, I said, “I have already argued that case. It is called *Fullilove*.”¹⁶⁹ But the Supreme Court disagreed and concluded that a federal government contracting program, to the extent that it embodied any racial classifications, had to satisfy the highest level of review—strict scrutiny—in order to pass constitutional muster.

Don [Ayer] talked about the *Croson*¹⁷⁰ case, and as I indicated, there was some debate over that, but even for people who disagreed, I think there was the sense that there was more in *Croson* than met the eye. For one thing, it was focused on contract set-asides at the state and local level, and the question then presented in *Adarand* was, “What about the federal government?” And the intervening decision of the Supreme Court called *Metro Broadcasting*¹⁷¹ suggested that indeed that distinction was an important one. In fact, in *Croson*, Justice Scalia seemed to have gone out of his way to say, “I am talking about factions, those factions that Madison was fearful of. That is what I call the municipalities and states, but the federal government is an entirely different matter.”¹⁷² So, we have *Adarand* as an entirely different matter, and the Court said, “No. Everybody is going to have to play by one rule—our rule—which is that strict scrutiny will apply across the board.”¹⁷³

Now, although Walter [Dellinger] is going to chime in later, I have to introduce another part of his persona with respect to *Adarand v. Pena* because that did cause a bit of controversy and anxiety within the Clinton administration. This seemed to be a major blow not only to affirmative action, but to the ability of the federal government to do its work, to promote economic development in a way that it felt was appropriate. So, the bugle sounded, the alarms

168. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (applying strict scrutiny to race-based preferences in awards of federal agency construction subcontracts).

169. *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (applying intermediate scrutiny to race-based preferences in awards of federal agency construction subcontracts).

170. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

171. *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990).

172. *See Croson*, 488 U.S. at 522–23 (Scalia, J., concurring).

173. *See Adarand*, 515 U.S. at 227.

rang, and Walter Dellinger, assistant attorney general for the Office of Legal Counsel, came out on his charger to figure out how we could put together legal and factual arguments that would prop up a very endangered system of federal government contracting after *Adarand v. Peña*, and I think he was quite successful at doing that. As a consequence, lower courts felt that they were not completely bound by the language of *Adarand*, and indeed had some, to use a term of art, “wobble room” to allow for certain types of uses of racial and gender classifications in contracting.

The next case is *Missouri v. Jenkins*,¹⁷⁴ a further limit to the remedial powers of federal courts with respect to school desegregation. I had argued that case before also in two cases involving Ohio cities. *Dayton*¹⁷⁵ and *Columbus*¹⁷⁶ addressed the issues that were coming back in the context of the *Missouri v. Jenkins* case. And what the Supreme Court basically said was, “We are tired of this; this has gone on too long. School districts ought to be freed and district judges ought to be told to just stop, to go on and do other things that perhaps they can do more effectively.”

But the last group of cases that I want to talk about has to do with voting rights and the Voting Rights Act of 1965.¹⁷⁷ The situation with respect to the Voting Rights Act was not bad when I took office in 1993, but beginning just before I took office, there was a decision by the Supreme Court called *Shaw v. Reno*,¹⁷⁸ which essentially mystified everyone, including members of the Court, as to exactly what it meant. Most people focused on its vague desideratum, which was “bizarreness”—if a district was bizarre, whatever that meant, that was bad, and that was unconstitutional, and some way of “un-bizzarring” it had to be done as quickly as possible.

Well, the Justices set about, in a series of cases from Georgia,¹⁷⁹ Louisiana,¹⁸⁰ and Texas,¹⁸¹ making clearer what the *Shaw* claim was all about. And it turned out that bizarreness had something to do

174. 515 U.S. 70 (1995).

175. *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979).

176. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979).

177. 42 U.S.C. §§ 1971, 1973–1973bb (2000).

178. 509 U.S. 630 (1993).

179. *Miller v. Johnson*, 515 U.S. 900 (1995).

180. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000).

181. *Bush v. Vera*, 517 U.S. 952 (1996).

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with it, but it was not the total answer to the question, “Is this constitutional?” because we found that there were really a lot of bizarre districts around the country. In fact, bizarreness was apparently a craving for some legislative redistricting bodies; they kind of like those tentacles going out in very strange directions. But suffice it to say that the Supreme Court concluded that in the redistricting process, race may not be a predominant motivating factor. Other considerations (compactness and contiguity, protecting incumbents, and so forth) might well be adequate and would satisfy constitutional demands. But essentially those decisions left pretty much in disarray the status of redistricting under the Voting Rights Act and under the Constitution.

Walter had a subsequent case. Walter is from a state that has been the font of material for the Supreme Court with respect to redistricting. How many times has *Shaw* been before the Supreme Court? Five or six times, I think. It gets bizarrer and bizarrer every time.

Walter Dellinger: We have a Bermuda Triangle of redistricting litigation [in North Carolina].

Drew Days: Well, I rest my case in that regard.

The last thing, and I want to turn to Michael [Dreeben], but I want to bring up something that Charles [Fried] may have encountered and perhaps Bob Bork encountered and maybe Archie Cox as well, and that is the degree to which General Days did worse than Professor Days. I think it was with a perverse delight that some of the clerks enjoyed citing me against myself in cases that I lost. Justices would, with whatever is a written version of a straight face, cite me and say, “Professor Days said such and so about affirmative action or section 5 of the Voting Rights Act,” and then move on to devastate my argument in the rest of the opinion. Now that I am Professor Days again, it comes in really handy with students, but I was not amused, I have to tell you frankly, by that type of recognition on the part of the Court in some of these cases.

Now, let me leave off by saying that Charles Fried reacted to Ken Starr’s discussion yesterday of his office’s successful track record by arguing that Ken had a more sympathetic Court. I make the same rejoinder to Ted Olson’s comment last night about the phenomenal

success rate that his office has had this past term. Let me stop here. Thank you.

Michael Dreeben: As the only person on this panel that was in the office when Charles Fried was the solicitor general, continuing through Walter [Dellinger] and Seth [Waxman], and with Ken [Starr] also, it is a great honor for me to be on this panel today. Charles Fried hired me into the office in 1988. Drew Days promoted me to deputy solicitor general in 1994. Walter Dellinger was my criminal law professor at Duke. I am now the deputy with the principal responsibility for the criminal work.

I want to discuss the office from a slightly different perspective than you get from the solicitors general. Having worked on the career staff as an assistant for many years and now serving as a career deputy, I see some of the longer-range themes in the office and the work of the office as played out in some of the less high-profile cases, which is really the majority of the work that the office does. I think that the work in those cases can inform, in some respects, what the role of the office is more generally.

There have been several competing accounts of what the role of the solicitor general should be, or is, that have been offered by various panelists, and others have been voiced within the office from time to time.

One is that the solicitor general represents the United States, or sometimes, “the people of the United States.” This is a great phrase and it is certainly true, but it is so vague as to be of absolutely no help in resolving any particular controversy. And usually when someone says that they want to advocate a position that is in the interest of the people of the United States, you can be fairly confident that you are going to get *their* view of what is in the interest of the people of the United States. You are going to have to go further if you want to get significant guidance as to what to do.

Another theory is that the solicitor general is the lawyer for the executive branch. That is undoubtedly correct in a purely formal sense. The solicitor general works for an administration. He is appointed by a president. The executive power is lodged in that president. The solicitor general is not a free agent that can impose his own policy decisions on the rest of the government without accountability. But it still is not particularly helpful to make that observation because when the executive branch interests collide with

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acts of Congress that may be more or less clear, a parochial view that says, “Well, we just represent the president and the executive branch,” is a lot easier to put forward by those people who do not actually have to go before the Justices and argue a case. The Justices are going to expect lawyers from our office to be able to respond to problems in their [legal] positions by reasoning from precedent and along the lines that the Court is accustomed to hearing, and you have to be able to function in that kind of environment in order to represent the United States as a lawyer in court.

A third view is that the office really represents the institutional interest of the government, which is, I think as Andy Frey put it, distinct from whoever happens to be occupying the particular office at any one moment. It is undoubtedly true that that is a very valid consideration that often has a great bearing on what position the solicitor general will decide to take in a particular case. But even describing the office’s mission as representing institutional interests does not help you all that much when those institutional interests conflict. This can occur over very important matters, but as John Roberts indicated, it can also be over seemingly technical or unimportant matters. A lawyer who has recently announced that he is leaving our office and going back to private practice wrote an email that reported some of his strong memories of being in the office, and one of them was being in a meeting in which there was a shouting and screaming match between the Labor Department and the Federal Maritime Commission over the definition of a Jones Act¹⁸² seaman. I mean, you are working with people who can get excited enough to scream at each other over those things, and the solicitor general is going to have to make judgments about which institutional interests of the government he is going to represent.

One case that came up during Solicitor General Days’s tenure was *Jaffee v. Redmond*,¹⁸³ which involved the question of whether the Court should recognize a psychotherapist/patient privilege for communications that would then be inadmissible in court proceedings. The *Jaffee* case actually came up when a city policewoman shot someone and felt that this traumatic experience required help. She was referred to a psychotherapist, spent many

182. Merchant Marine Act, 1920 (Jones Act (Merchant Marine)), 46 U.S.C. app. §§ 861–889 (2000).

183. 518 U.S. 1 (1996).

sessions with a psychotherapist reliving her experiences, and then ended up as the defendant in a 1983¹⁸⁴ case and asserted a psychotherapist/patient privilege in federal court to keep her statements out of court.

When this case was taken by the Supreme Court, the United States was not involved, but it was one that we had a clear interest in. We were looking at amicus participation. We got competing views of what the United States should do. On one hand, [we heard] from the Criminal Division, which is very hostile to evidentiary privileges and did not want to see the recognition of any new privilege by the Supreme Court. On the other hand, the law enforcement community felt fairly strongly that exactly what this officer had done, namely, seek psychotherapy after a traumatic incident, was what they counsel their officers to do, and they were very concerned about the effect on morale as well as the proper functioning of law enforcement.

When you have these kinds of competing objectives in the government, both of which are wholly institutional, the solicitor general is going to have to do some kind of a reconciliation of the various interests, maybe make a decision that accommodates both interests, maybe make a decision that simply chooses one over the other. In that particular case, the solicitor general eventually decided to support the recognition of a limited psychotherapist/patient privilege, which is not as hard a call as the Criminal Division made it seem to be, since all fifty states already had some version of the psychotherapist/patient privilege. We had already seen evidence that the criminal justice system could function even if the privilege were recognized. But it was important, and it was part of our brief, to advocate for various exceptions that might be applicable in cases of child abuse and in other circumstances, like spousal abuse, that have since taken on a sub-jurisprudence in the world as courts try to figure out what *Jaffee v. Redmond* means, since the Court did ultimately recognize privilege. That is the institutional interest model of our office.

A fourth model, which I do not think has been discussed, is one that comes from the Supreme Court itself in a case called *Providence*

184. See 42 U.S.C. § 1983 (2000) (creating a private cause of action against some public officials who violate a plaintiff's constitutional rights when acting under color of official authority).

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Journal,¹⁸⁵ which involved whether judges could petition for certiorari to obtain review of decisions that had rejected contempt findings that judges had imposed. The Court held that the judges could not file their own petition for certiorari. The solicitor general was the only officer in the government who had that power because the solicitor general represents the United States, and the Court concluded that “the United States,” within the meaning of the statute,¹⁸⁶ encompasses all three branches of government: the Congress, the executive, and the judicial branch. As a result of that interpretation, I think it is fair to say that we really have as clients the United States in all branches of government, and it would be difficult to say that we can exclude any one of them and single-mindedly pursue one particular branch’s interest. Ted Olson last night, I think, put that point in a somewhat different way, but it reflects what we actually do in the office, and that is that we have responsibilities to all three branches of government.

Any one of these accounts, which are not necessarily consistent with each other, could be favored by anyone at any particular time, but on the question of whether any one of them is completely right, I find myself more or less in agreement with Charles Fried’s initial reaction, which is they are fairly abstract, and they do not illuminate what really goes on in the office. But I would take what Charles Fried said one step further and not discard them altogether, because what I think they do is work in combination to create a very healthy ambiguity about exactly what the solicitor general’s job is when there are competing interests that are pressed upon him: political, institutional, his view of what the right analysis of the law is, and so on. By having a somewhat complex status with potentially different client interests to serve, the solicitor general is actually able to achieve a fair amount of independence. The SG can tell people in the government, who are urging a position on him that he is not particularly wild about taking, that that is not going to sell in front of the Supreme Court, and here is the legal interpretation that supports that conclusion.

The SG’s credibility in the interpretation of the law and in knowing what can be sold or what cannot be sold to the Supreme Court gives him a measure of independence as against institutional

185. *United States v. Providence Journal Co.*, 485 U.S. 693 (1988).

186. 28 U.S.C. § 518 (2000).

interests of the government and against political pressures that are put on him. At the same time, the institutional interests can sometimes be played off against each other or against political objectives to put the SG in a position to frame a brief which is characteristically, in my experience, more nuanced, less hard-edged than any of the more bright-line proponents of a particular theory are urging him to do. I wanted to talk about a couple of cases that illustrate that very briefly.

But before I go to the cases, it is important to say that part of how the SG is able to achieve some measure of independence by playing off his interpretations of the law with other policy objectives and institutional objectives is through the creation of very powerful traditions in the office that are passed down to new lawyers who join the office, usually in the form of stories about what happened. These stories may not always be accurate. Some of them may be wholly apocryphal. Some of them may be shaded. If you hear Larry Wallace's account of *Bob Jones*,¹⁸⁷ for example, you get a very different picture than I suppose you would get from Don Ayer or Tom Merrill. But the important thing is that these stories tend to reinforce a culture within the office that emphasizes technically excellent legal work, a real sense of obligation, and devotion to present to the Supreme Court an honest product. [That does not mean] a product that is not an advocate's brief; believe me, we are advocates, and as the alums who are in the audience know from opposing us, we play hard when we have decided what we want to do. We will definitely argue hard for our positions, but always with the sense that you just do not want to be standing up in front of the Supreme Court arguing a position that is untenable for any reason—because it is obviously political, because it is contrary to established doctrine that the Court is not going to overrule, or because it is contrary to the record.

The mythology in the office is built up by telling stories about people like Rex Lee, whom I only had the opportunity to meet once. The SG has an office at the Supreme Court, which makes him one of the two officers of government, I believe, who has offices in two branches of government, the other being the vice president. It is really not much of an office, but it is where we hang out before arguments and then go back and sort of cheer each other on

187. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

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afterwards. And any former member of the office can barge into our office at any moment. Rex was in court, having just argued a case, and he was ebullient and filled with vitality, and he bounded into the office. And instead of paying attention to all of the clients and other people who were around him, he started walking over to the people he had never seen before, like me, and introducing himself, shaking my hand, and asking me questions about myself. I was very impressed with the time that Rex Lee would take for a young and very inexperienced assistant, to get to know him.

I'll just talk briefly about a couple of cases that illustrate on a more mundane level, but I think perhaps a more characteristic level, how the SG moderates positions by virtue of being between the Court, the institutions of government that have their own agendas, and political actors.

One of them is *Wilson v. Arkansas*,¹⁸⁸ which was a case that came to the Supreme Court at least twenty years after anyone in the country really cared about the issue. It involved no-knock entries by police to execute a search warrant. This was a very hot issue during the Nixon administration when President Nixon secured legislation that authorized no-knock entries. And I can remember as a high school student reading editorials denouncing this. But as a legal matter it just simmered and went below the surface. Nothing ever happened about it until the early 1990s, when the Supreme Court of Arkansas decided to issue an opinion that held that there is no requirement that police knock and announce before entering to execute a search warrant. The Fourth Amendment prohibition against unreasonable searches and seizures does not incorporate that common law principle. The defendant, Wilson, then sought certiorari and obtained it, and we were looking at filing an amicus brief.

Normally the government does file amicus briefs in criminal cases if there is any possible way to support the state. We very rarely file amicus briefs in criminal cases that do not support the state. That is the dominant institutional pattern though, I think it is safe to say, all solicitors general that I am aware of. In *Wilson*, however, we had a little bit of a problem. After thorough research by an assistant in our office, it became clear that the Arkansas Supreme Court's position was entirely untenable. There was an incredible wealth of common

188. 514 U.S. 927 (1995).

law history that supported the notion that the knock-and-announce rule was embedded in the fabric of how searches and seizures were done. There was a lot of movement on the Supreme Court, at least among some Justices, toward adopting a view that referred back to the common law to determine what protections were incorporated into the Fourth Amendment, although not consistently.

So, we were facing the problem of having great difficulty seeing how we could support the state in the face of this case law. We ultimately determined that we could file a brief that supported the state, but it would not be a brief that said there is no knock-and-announce rule. It would be a brief that says there is one, but it is subject to exceptions, as for instance, when the police think that the suspect is about to destroy the evidence to be seized, like drugs, or the suspect will escape, or the suspect will resist violently. These were all common law exceptions that we wanted to get foursquare before the Court and, therefore, filed a brief that argued those.

This could be said to be somewhat contrary to the narrowly conceived institutional interest of the United States because certainly law enforcement would be better off if they did not have to justify knock-and-announce under any standard. They could just go in; the evidence would not be suppressed. And yet, we determined that this was an untenable position, and the solicitor general authorized the kind of brief that I described.

When we got to argument, the attorney general of Arkansas, General Bryant, was defending his position of the firm line in the sand—there is no knock-and-announce principle. He got a lot of rough sledding from Justices who were saying, “You mean, you can take a bulldozer and just knock somebody’s door down? Would that be okay?” He was nodding his head, and we were sort of shaking our heads. Finally, the Court had enough and Justice O’Connor asked a question, and this is a quote: “Well, what’s the matter with the proposal of the solicitor general? That would certainly take into account the long common law tradition. I, for one, can’t buy your proposal at all. You have no comment on what the solicitor general proposes?” She went on in that vein for a while and finally the attorney general of Arkansas conceded and said, “Well, you have described the U.S. government’s position, and that is the state’s fallback position,” at which point Justice Scalia leaned forward and said, “Time to fall back, General.”

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Another case that implicated similarly competing pressures but in a somewhat different way was *Felker v. Turpin*.¹⁸⁹ Last night Ted Olson described the speed with which something got back to the Supreme Court in *Bush v. Gore*.¹⁹⁰ In *Felker v. Turpin*, the Court looked at the Antiterrorism and Effective Death Penalty Act of 1996 [“AEDPA”],¹⁹¹ which was enacted and signed into law on April 24th and made major, sweeping changes in the law of habeas corpus—primarily in the direction that the Supreme Court had been moving, but tightening it up even further. The law was in effect for nine days when I got a call from Emily Spadoni, the docket person in our office, who said, “The Supreme Court has just granted certiorari in a case, and they have posed some questions. You might want to come down and see it—it looks criminal.” So I went down to her office and picked it up and the questions were all about the constitutionality of the AEDPA. I looked at her and said, “This has got to be a joke, right? This is a mistake. This law was signed into law nine days ago and the Supreme Court has granted certiorari and has specified three questions on its constitutionality?” Walter Dellinger’s comment on this was that he was “slack-jawed” that the Court would do it. But the Court did. It granted cert (it was entirely a state case—we were not involved in any phase of it and had never heard of it before), and invited the solicitor general to file a brief expressing the views of the United States.

There were really three questions that the Court had posed in *Felker*. One of them was the extent to which the AEDPA had left open the original writ of habeas corpus in the Supreme Court. The AEDPA had imposed massive restrictions on second or successive habeas petitions, which are ones that follow an earlier federal habeas petition, and had required that second or successive petitions go through a gatekeeper at the Court of Appeals which had to certify that the petitions met one of two very narrow circumstances, basically actual innocence or a newly discovered new rule of constitutional law that was made retroactive to the cases on collateral review. Absent that, there were not going to be any successor petitions. And Congress went further and also said, “There shall be no review of the gatekeeper decision by writ of certiorari.” *Felker*

189. 518 U.S. 651 (1996).

190. 531 U.S. 98 (2000).

191. Pub. L. No. 104-132, 110 Stat. 1214.

filed his application for a second habeas petition after the AEDPA [took effect]. The Eleventh Circuit said, “You do not qualify under the AEDPA standards. You say that the law is unconstitutional, but we say it is not because it is not all that different from prior habeas law.” Felker then petitioned for certiorari, which the statute said he could not do, and filed his own writ of habeas corpus in the Supreme Court itself. Now, the Supreme Court has historically, since the first Judiciary Act,¹⁹² had the authority to issue writs of habeas corpus, but it does not like to start out with anything in its court. The last thing that it wants to do is be the last guardian of habeas corpus; it wants everything to go through the lower courts. And the question was, “Did the AEDPA do away with the Court’s authority to hear original habeas [petitions] or not?”

The second question in the case was the constitutionality of the restrictions on the Supreme Court’s jurisdiction, and [the third question was] whether the law violated the Suspension Clause, which prohibits the suspension of habeas corpus. Now, in this case we took a very middle-line position. We did not follow the state’s hard-line position that there was no original habeas corpus jurisdiction in the Supreme Court. Again, we crafted a position that allowed the Court to avoid some of the real land mines in this area of the law. Because time is running out, I will not describe what happened in this case, but suffice it to say that we encountered pressures within the department both to be more friendly towards habeas petitioners and more restrictive of the habeas power. Again, the solicitor general was able to steer a middle-ground position, which the Court adopted almost totally in a unanimous opinion. That was in part a reflection of the ability of our office to take many different points of view and refract them into a single operating position.

Walter Dellinger: Over the course of the next three panels on which I will be participating, I want to set out an overview of the office with particular examples. Some may fall in this panel and some in the subsequent panels.

I begin with three propositions, all of which are important and each of which is in tension with the others. The first is that the solicitor general’s client is the United States. The second principle is that the solicitor general’s supervisor is the president of the United

192. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

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States (and the attorney general, under appropriate circumstances). And the third principle is that the president, when he steps into the shoes of the solicitor general, also has as his client the United States. If you think through all three of those propositions, I think it brings you to a working way to conceive of the office. By the last of those, I mean that the president must be—and those who work more directly for the president must be—convinced that even when the president steps in to take a position different than the solicitor general, he has the obligation to take into account the long-range interest of the United States and not just the interest of a particular president or particular administration.

I will talk about a series of cases which to me illustrate points about the importance of the solicitor general having a fairly complicated view of his role.

First, I think that the best way to maintain the independence of the office is by active engagement with the rest of the administration early and often. I think the solicitor general should be in the president's face on a number of issues to try to persuade the president of what is in the long-range interest of the United States, not to withdraw behind a moat and hope for lack of interference with the person who is elected by the people of the United States.

The Solicitor General's Office brings to bear, secondly, the view of the generalist and the ability to maintain technical accuracy and a position of integrity. And the SG, I think, will inevitably serve as a moderating influence. It was quite striking listening to Don Ayer, who was pushing in the Solicitor General's Office to take a position on the use of race in affirmative action. The SG was saying, "It is untenable to take the position that the right answer is zero outside the context of particular, individualized remediation." I found myself pushing the other way in my administration—that the right answer is not that you can do anything in the name of affirmative action and get away with it—and coming in the direction of the *Croson*¹⁹³ position that you articulated, [Don Ayer]. As you had moved from the right towards the center, I found the SG's Office in my time moving from the left towards the center against the forces of the administration. And it struck me as you were talking, Don, to look at the six cases that I thought I could discuss which were cases in which there was a controversy, or there were pressures, or there were issues

193. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

with which I had to deal. I realized that in these half-dozen cases, in every instance, not surprisingly, I was taking essentially the more “conservative” position, if you label that, than would be natural in a Democratic administration. Perhaps that will inevitably be the case when one is pushing more for long-term stability and the interest of the United States.

Let me [mention] one point about politics, which is that the Solicitor General’s Office is not always right. We have the model from Lincoln Caplan¹⁹⁴ that the Solicitor General’s Office is representing the rule of law and independence, and the White House is representing narrow partisan political interests and, therefore, will be urging the wrong position on the government. I just want to caution that that is not always the right model. The perfect example in my view was a case called *Barclays Bank*.¹⁹⁵

Now, I come at this from a different vantage point than anybody else here. During the four and one-half years I was in the government, I served first in the White House for three months while we waited for things to sort out at the Department of Justice. I was in the White House being one of the people that are sort of labeled the guys in the black hats at this conference, though I thought of myself as someone who could play a white-hat role in that context and help defend the solicitor general. Then, for more than three years I headed the Office of Legal Counsel [“OLC”] and saw the SG’s Office from that perspective. And then, while I continued technically as the head of OLC until the day I left the government, I spent more than a full term as acting solicitor general and saw the work from all of these vantage points.

Barclays Bank [involved] a tax dispute in which California was trying to tax foreign corporations, like Barclays Bank of England, in a way that is inconsistent with the international treaties and the right-thinking position of all people in the international community. The SG’s Office was inclined, through the career people, to support the position of Barclays Bank and the right-thinking internationalists. But the White House realized that the State of California, which was going to lose billions of dollars if it lost the capacity to continue its present taxing principles, had fifty-four more electoral votes than the Barclays Bank of England had. And the idea that the U.S. would

194. CAPLAN, *supra* note 23.

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

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weigh in to take billions away from the state seemed to set this up as an almost prototypical kind of dispute.

I wanted to weigh in to defend the prerogatives of the SG's Office. But I became convinced that actually the White House position was right as a matter of law and the SG's position was wrong. [I came to see] that, in fact, there is a politics in the SG's Office that does not recognize itself as politics. The problem was that the Senate simply had rejected a provision of a treaty that would apply this to sub-national levels. The State of California really did have this authority to tax in this way, no matter how unwise it was, and I thought the SG's Office was quite wrong. To some degree, it wrapped itself in the envelope that "we must be taking the high-minded position because it is the position contrary to California's fifty-four electoral votes." At the end of the day, the office agreed to support California's position, which was vindicated seven to two by the Supreme Court. It is not always the case that the SG's Office is right. There is a kind of politics that does not know its name.

Now, as to the role of the SG as a moderating influence. We use the term "politicization" as the most pejorative term that can be used at a conference of this kind. But in a country governed by majority rule, politics is a way in which we as a community of good will go about governing ourselves. Politics is not in itself an evil thing, and therefore, I think it appropriate for an administration who believes that the Court has gone off on the wrong track to speak in the name of the people of the United States and tell the Court that—even in cases in which there is not a more narrow programmatic or agency interest of the United States.

Judicial review, as Alexander Bickel said, is a variant institution in a political culture based on majority rule.¹⁹⁶ We tolerate judicial review and lifetime independence of the judiciary because we know it serves these enormously valuable functions. The Justices may not have their salary reduced. They may not be fired. They may not be displaced. They are protected by the great lifetime tenure standard, and all of that has inured to our benefit as a country. But when a president is elected, as Ronald Reagan was in 1980, who had the advantage of clearly standing for certain things, and on some of those things thought the Court was going in the wrong direction, it

196. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

seems to me perfectly appropriate for that president's solicitor general to appear before the Court and say why a newly elected president thinks on some of these issues the Court has got it wrong. Our sensitivity to the Court's independence should stop short of saying that the people, through the elected president and the solicitor general, should not even speak to the Court about where they think they have gone wrong on issues like school prayer and others.

In my view, Rex Lee got the school prayer issue exactly right by taking the position that although the United States has no really serious programmatic or agency interest as such in school prayer, of course the newly elected president wanted to speak to the Court on that issue in favor of opening up public areas to religion—but that through the solicitor general he should do so only to the extent that it is professionally responsible, coherent, and consistent with the Court's own precedents. So, while brooking the criticism of those who say, "You should not get in at all on those issues, you should stick to the knitting of agency issues," [Rex Lee] also rejected those who had pushed the SG all the way to accomplish what would be accomplished by a constitutional amendment supported by President Reagan but not supported by the existing law. And that seems to me to get it just right.

Now, by saying that I think the SG can operate best by a policy of engagement, not a policy of withdrawal or separation, I can give you several examples during my tenure of getting out front of an issue and engaging the administration.

A very simple example is the striker-replacement executive order.¹⁹⁷ The president, as contractor-in-chief, has some statutory authority to place restrictions on those who contract with the government to promote the efficiency and economy of government contracts. President Clinton, in a very controversial move, issued an executive order saying that you may not be a contractor with the United States government if you replace striking workers with permanent replacements. This was a major commitment of the administration, made by the vice president himself at the AFL-CIO's annual meeting. It was a huge political commitment to this executive order. One of the toughest decisions we had to make at OLC was whether we thought it was lawful. I agonized over this at OLC and

197. Exec. Order No. 12,954, 60 Fed. Reg. 13,023 (Mar. 8, 1995).

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insisted on the Labor Department's having more and more affidavits as to why it would promote efficiency to contract only with people that would not bring in replacements. I was barely persuaded that we could sign off on the authority of the executive order based on some Bush administration precedents about posting your right not to join a union as part of contracting executive orders.

The government got its ears pinned back in the D.C. Circuit in a very strong opinion by Judge Silberman,¹⁹⁸ three to zero, saying this was beyond the president's executive order capacity; the president does not have the authority to rule by decree, and this is beyond what is necessary for efficiency and improvement. There was an immediate announcement that we would defend this till the last dog died. And indeed, en banc review was authorized to the D.C. Circuit. En banc review was denied with only two dissents, from Judge Tatel and Judge Rogers.¹⁹⁹ To me, there was a silence that was enormous; Judge Harry Edwards, one of the best labor law scholars academia has ever known, did not dissent from the denial of en banc review. That sent to me a strong message.

I also believed that this was a very weak case in which to test before *this* Court the important authority of the president to issue executive orders to carry out his policies. If we were to take this to the Supreme Court, our basic argument would be: if this is beyond the president's authority, so would be 11,246,²⁰⁰ the major anti-discrimination executive order. And I was not about to put that on the table. I could see there were members of the court saying, "Oh, you mean if we invalidate this, it means we also have to invalidate 11,246, the foundational anti-discrimination executive order? Yes, keep talking." I did not think it defensible, in light of Judge Silberman's powerful opinion, but was told, "There is just no question but that you have to take this up. There is a commitment to this." What I did was go ask to see the Secretary of Labor, who fortunately in this instance began his legal career as an assistant in the Solicitor General's Office—Robert Reich. I sat down, and I said, "It is going to be very bad for the long-range interest of the United States and the executive branch to try to defend a not clearly defensible exercise of the president's authority." And he said, "I

198. *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996).

199. *See Chamber of Commerce v. Reich*, 83 F.3d 442 (D.C. Cir. 1996).

200. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965).

can't believe you are asking me to change the Labor Department's recommendation." I said, "No, I'm not. You are the Department of Labor. Your job is to urge us strongly to take this to the Supreme Court. My job is to say, 'No.' You owe it to the constituency of this department. I understand the dynamics of that. You have to urge that we take this to the Supreme Court, but I want you to understand fully why I am going to decline." What is interesting is by the time the matter came to the White House, I was told, of course, that the Secretary of Labor would go to the president to overrule me, and I said, "Well, you speak to the Secretary of Labor. I believe in getting out on these issues."

Let me give one more example of these three positions. I know we need to take a break. I will just mention the first part of the great controversy over obscene art, *National Endowment for the Arts v. Finley*,²⁰¹ to make the point that I do believe that the solicitor general's client is the United States and not the executive branch. The NEA gives money to people whose art it thinks passes professional review standards, and it includes giving it to people who do things like use government funds to buy chocolate with which to smear their naked bodies while they engage in screeds, as Karen Finley does. The NEA's position is that it does these on the merits—it does not take politics into account. Therefore, it was horrified when an amendment was passed that forbade the granting of funds for this kind of obscene use. Karen Finley and three others sued whose grants were targets of this act of Congress. [The District Court granted summary judgment for Finley,²⁰² and the Court of Appeals affirmed.²⁰³] There had never been an agency more delighted over losing a case than when the NEA lost the *Finley* case in the Ninth Circuit.

[So the question arose whether to ask the Supreme Court to hear the case. The NEA did not want to appeal.] They said, "We don't like that law and now we're free of it because we lost in the Ninth Circuit." I said, "Of course, we have to appeal. It is an act of Congress. It is wholly defensible, and it is probably constitutional. What you folks do not understand is that you also engage in censorship when you choose which art you are going to fund." I

201. 524 U.S. 569 (1998).

202. *Finley v. Nat'l Endowment for the Arts*, 795 F. Supp. 1457 (C.D. Cal. 1992).

203. *Finley v. Nat'l Endowment for the Arts*, 100 F.3d 671 (9th Cir. 1996).

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made too many enemies on this case. I said, "Are you telling me that if Karen Finley did exactly the same thing and if she smeared her naked body with chocolate and criticized the capital gains tax, that you would have thought it equally worthy of funding? No, you would not. You are making judgments yourself. It is a problem of saying that you can make judgments but the Philistines in the House of Representatives cannot. This is defensible, and we have to defend it and that is because, even though the administration in a large sense was happy with the invalidation of this act of Congress, we have a larger interest that it is a law of the United States that has to be defended."

I believe that given the amount of time we have, I want to save until the next Clinton panel the further nuances of why you have to recognize that the president is your superior and why you have to convince the president that his client is the United States and not yourself. Thank you.

Clinton II Panel

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.

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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*,²⁰⁴ where I did believe it was fully defensible that we could ask the Court to overrule *Aguilar v. Felton*.²⁰⁵ [We believed] the use of Title I funds to provide remedial assistance to low-income, learning-disabled children wherever they

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*,²⁰⁶ [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.

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

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In *Piscataway*,²⁰⁷ 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.²⁰⁸ 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*²⁰⁹ 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

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*²¹⁰ 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

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

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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*,²¹¹ the so-called “partial birth abortion” case, which involved a state statute that was, as the Supreme Court eventually

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

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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.²¹² 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.²¹³

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).

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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.²¹⁴ 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

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,²¹⁵ 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

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).

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welfare of the vice president, who was only a few feet away.²¹⁶ 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

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*²¹⁷ 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*.²¹⁸ 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.²¹⁹ The Eighth Circuit reversed²²⁰ 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

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.*

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

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

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

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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*.²²² This case presented the question about whether *Miranda v. Arizona*²²³ 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 Code²²⁴ 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

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.²²⁵ 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.

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

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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

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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*,²²⁶ 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 94 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 Attorney General and

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,"²²⁷ 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

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

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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*,²²⁸ the now (in)famous case involving the Communications Decency Act,²²⁹ 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.

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*.²³⁰ Drew Days, not to be outdone, promptly doubled that by losing both *Seminole Tribe*²³¹ and *Lopez*.²³² Although Walter Dellinger was only there for a year, he managed to tie Drew with *Printz*²³³ and *City of Boerne*.²³⁴ 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*,²³⁵ *Alden v. Maine*,²³⁶ *Kimel*,²³⁷ *Morrison*,²³⁸ *Garrett*²³⁹ have set a record that will be hard to exceed.

To be sure, I am perhaps the only SG over the past decade actually too win a federalism case—indeed, two: *Reno v. Condon*²⁴⁰ and *Crosby*.²⁴¹ 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

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).

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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 Act²⁴² 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*²⁴³ 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*,²⁴⁴ 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.

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.

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Panel of Former Solicitors General

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. Lee²⁴⁵: 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 1870,²⁴⁶ 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.”²⁴⁷ 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

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

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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 Noriega²⁴⁸ that he was entitled to prisoner of war status under the Geneva Conventions. That, I am sure, was an issue the district

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*²⁴⁹ 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

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

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know it, *The Tenth Justice*, by Lincoln Caplan.²⁵⁰) 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."

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

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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,²⁵¹ 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

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).

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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*.²⁵² The case involved the constitutionality of the Religious Freedom Restoration Act ["RFRA"]²⁵³ 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!).

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*²⁵⁴ 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*²⁵⁵ or *Piscataway*²⁵⁶ arose to ask for some of his time.

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

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

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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*²⁵⁷ case, the previous very wrong decisions in *Aguilar*²⁵⁸ and *Grand Rapids*,²⁵⁹ and that was a fine thing to do. One does not know how the law

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*,²⁶⁰ in the case called *Solorio*,²⁶¹ 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*,²⁶² 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

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).

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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.²⁶³ 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.²⁶⁴ 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*.²⁶⁵ 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*²⁶⁶ 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

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*²⁶⁷ test, and then Justice O'Connor came up with the endorsement test in the context of a crèche,²⁶⁸ 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

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

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

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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.²⁶⁹ 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.

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

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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*,²⁷⁰ 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

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*²⁷¹ 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*²⁷² 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 Act²⁷³ that

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).

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existed between Ken Starr and Drew Days, or the First Amendment questions in the *Corporation for Public Broadcasting* case²⁷⁴ 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.²⁷⁵ 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

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 Utah²⁷⁶ 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*²⁷⁷ case and three different briefs being filed. So there are some creative ways of resolving conflict. That is one issue that has come up.

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).

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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 Act²⁷⁸ 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.

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

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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 19th-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

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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.²⁷⁹ 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?

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.

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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 brief²⁸⁰ and also the brief in the *Wygant*²⁸¹ 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,

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

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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.²⁸² 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

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)).

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of *Nixon v. United States*.²⁸³ 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.

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

