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LAWYERING IN THE SUPREME COURT: THE ROLE OF THE SOLICITOR GENERAL*

Rex E. Lee

The history of the Office of Solicitor General of the United States actually begins at least eight decades before that office came into existence. It begins with the solicitor general's boss, the attorney general. The attorney general was one of the first four cabinet offices established by the first Congress. But the attorney general differed from the other three cabinet officers in several respects that are germane to this discussion. First, his office was created by the Judiciary Act of 1789. Thus, while the attorney general is beyond question a member of the executive branch of government, from the very beginning, the closeness of his office and his function to the Article III branch have been reflected in our statutes. A second difference, of lesser relevance, but nonetheless interesting, is that the attorney general's annual salary, \$1500, was half that of the other cabinet officers. The assumption was that this was appropriate because he would continue to carry on a private practice.

The Judiciary Act of 1789 required that the attorney general be "[a] meet person, learned in the law," whose statutory duties were: "(1) to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and (2) to give his advice and opinion upon questions of law when required by the president of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments." [1 Stat. 93.]

Thus, from the beginning, the attorney general's first responsibility, identified by statute, was to represent the United States in the Supreme Court. In those early years that was not quite the demanding task that it is today. *Hayburn's Case*, 2 Dall. 409 (1792) appears to be only the second substantive decision by the Court.

"The very first case of very great importance to come before the Supreme Court"¹ was *Chisolm v. Georgia*, 2 Dall. 419 (1793). That case, appropriately enough, was argued by the very first Attorney General, Edmund Randolph. But he argued it in his private capacity, and not as Attorney General. Indeed, he represented the non-governmental client,

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1. Easby-Smith, "Edmund Randolph Trail Blazer," 12 *Journal of the Bar Association of the District of Columbia*, 415, 426 (1945).

Chisolm, and “helped convince the Justices the states could be sued in the federal courts—a point which the people reversed by the Eleventh Amendment to the Constitution.² Easby-Smith, in *Edmund Randolph, Trail Blazer, supra*, at 426 wrote that:

Randolph made a brilliant argument in support of his motion [to enter a default judgment against Georgia, which did not appear] and the Supreme Court sustained all his contentions, holding that under the second section of Article III of the Constitution a State might be sued by an individual citizen of any other State, and in such suit judgment might be entered in default of an appearance. The argument of Randolph and the decision of the court brought down upon both a shower of abuse from the anti-federalists throughout the country, and in answer to popular clamor the Congress, on December 2nd, 1793, adopted the Eleventh Amendment to the Constitution, which was subsequently ratified.³

Perhaps the foremost government case from the early years is *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). That case, argued by Attorney General William Wirt,⁴ with assistance from Daniel Webster, established the fundamental proposition that the powers of Congress are not to be construed narrowly. Chief Justice Marshall wrote for the Court that “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly

2. Cummings & McFarland, *Federal Justice: Chapters in the History of Justice and the Federal Executive*, 31 (1937). Another landmark early case argued by an Attorney General in his private capacity was *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), in which William Wirt appeared for the College along with Daniel Webster. The Court in that case, again by Chief Justice Marshall, held that an act of the New Hampshire legislature purporting to make the College a state institution materially changed the charter of the College, impaired the obligation of the charter and thus was unconstitutional and void.

3. Easby-Smith, in “Edmund Randolph, Trail Blazer,” *supra*, at 416 wrote that Randolph “ignored personal abuse and quietly accepted an amendment to the Constitution which was aimed at him and nullified one of his greatest victories in the Supreme Court.”

4. Wirt, himself a Marylander by birth, was “[p]robably the most active of the early Attorneys General, one who held the office for a longer period than any other in the history of the Government.” “Origin and Development of the Office of the Attorney General,” *H. Doc.* 510, 70th Cong., 2d Sess. 14 (1929). He was our ninth Attorney General, appointed by President Monroe in 1817 and served until 1829. See Easby-Smith, *The Department of Justice: Its History and Functions* 45 (1904). It was Wirt who first began the practice of keeping a record of the Attorney General’s opinions and who decided that the Attorney General’s opinions should not be given to all who asked, but only to the President and other Cabinet-level officers. See *id.* at 10-11; Cummings & McFarland, *Federal Justice: Chapters in the History of Justice and the Federal Executive*, 78-92 (1937). After Wirt’s death, John Quincy Adams remarked that the duties of the Attorney General of the United States . . . were never more ably or more faithfully discharged than by Mr. Wirt.” *Federal Justice, supra*, at 78.

adapted to that end, and which are not prohibited . . . are constitutional.”⁵

To those of us whose personal acquaintance with the Justice Department is limited to this century, it is positively astounding to learn that for the first twenty-seven years, those early attorneys general performed their tasks with no help of any kind. Not even a clerk. Randolph described himself in 1790 as “a sort of mongrel between the State and U.S.; called an officer of some rank under the latter, and yet thrust out to get a livelihood in the former.”⁶ Apparently the first request for a clerk came from Randolph in a letter to President Washington dated December 26, 1791:

I might . . . add, that the opinions which the Attorney General gives are many in number and often lengthy. From this consideration, united with the foregoing, the reasonableness of allowing him a transcribing clerk will, I hope, be obvious.⁷

President Washington sent Randolph’s letter to Congress, but to no avail: “Congress took no action. Twenty-seven years elapsed before any allowance was made for a clerk.”⁷[sic] The difficulties faced by the early attorneys general have been summarized as follows:

No quarters were provided for the Attorney General, and he was expected to furnish his own quarters, fuel, stationery and clerk. For this reason the Attorneys General after [Charles] Lee [who succeeded William Bradford, Randolph’s successor who died in 1795] and until 1814 did not reside permanently in Washington, but remained at their homes and transmitted their advice and opinions by mail, going to Washington only when it became necessary to appear before the Supreme Court.⁸

Not quite so surprising—but nevertheless surprising—is the fact that it was not until 1853 that Congress finally established a salary for

5. 17 U.S. at 421.

6. Quoted in Learned, *The President’s Cabinet Studies in the Origin, Formation, and Structure of an American Institution*, 159 (1912). Randolph, it should be pointed out, after leaving the government (having served as both Attorney General and Secretary of State) was Aaron Burr’s chief defense counsel in Burr’s 1807 treason trial, over which Chief Justice Marshall presided as Circuit Justice. Easby-Smith, in “Edmund Randolph, Trail Blazer,” *supra*, at 429, wrote:

What a scene this trial presented, the most famous in the annals of American criminal jurisprudence! A former Vice President of the United States on trial for his life, charged with treason; the great Chief Justice presiding; and [Caesar A.] Rodney and [William] Wirt, present and future Attorneys General, pitted against Randolph, former Attorney General; all the chief actors including the defendant himself, who took part in the arguments, being among the greatest lawyers of their day.

7. Easby-Smith, *supra*, at 424.

8. *Supra*, at 7.

the Attorney General equivalent to that of the other cabinet officers, thereby bringing to an end the tradition of part-time attorneys general who kept up a private law practice.⁹

What is not surprising at all is that at the end of the Civil War, the nation's legal business, and consequently the demands of the Attorney General, increased manyfold. The aftermath of the Civil War marks the single point in our nation's history when the place of federal law vis-a-vis the laws of the states experienced its greatest expansion. Homer Cummings and Carl McFarland, in their book *Federal Justice*, describe the situation as follows:

As the war came to a close and reconstruction began, the legal business of the government increased. In April 1866, James Speed, who had been Attorney General less than year and a half, had written nearly as many opinions as his predecessor had written during three years. For many months the employees in his office worked more than double the official number of hours, and Sundays and holidays were unknown to them.¹⁰

In December 1867, Attorney General Stanberry was asked by the Senate to report on the affairs of his office, and he responded:

As to the mere administrative business of the office, the present force is sufficient, but as to the proper duties of the Attorney General, especially in the preparation and argument of cases before the Supreme Court of the United States and the preparation of opinions on questions of law referred to him some provision is absolutely necessary to enable him properly

9. A major preoccupation of the attorneys general in the years leading up to the Civil War was "[t]he task of supervising appeals in public litigation over the three great bodies of private land claims, in the Louisiana Territory, the Floridas, and California." Cummings & McFarland, *supra*, at 120. Large parcels of land in these territories, which were acquired from France, Spain, and Mexico, respectively, were claimed by settlers under grants purportedly given by the French, Spanish and Mexican governments. Documentation was scarce and many extravagant and fraudulent claims were made. Among these were some eight claims filed by a Frenchman named Limantour covering a thousand square miles of California, including the entire city of San Francisco. Limantour's claims were later exposed as frauds through the combined efforts of Attorney General Jeremiah Sullivan Black and Edwin M. Stanton, a "[b]rilliant, industrious, painfully thorough and precise" lawyer, *id.* at 135-136, who was hired by Black as special counsel in the California case and later succeeded Black as Attorney General. These land cases, a number of which reached the Supreme Court, are described in detail in Cummings & McFarland, *supra*, at 120-141.

10. *Supra*, at 220. The *New York Tribune* and *Harper's Weekly* said of Jeremiah Black that "though you never meet the Attorney General at a ball or *soiree*, you can find him all day in the Supreme Court, and nearly all night at his office." Quoted in Cummings & McFarland, *supra*, at 159-160.

to discharge his duties. After much reflection, it seems to me that this want may best be supplied by the appointment of a Solicitor General. With such an assistant, the necessity of appointing special counsel in the argument of cases in the Supreme Court of the United States, would be, in a great measure, if not altogether dispensed with.¹¹

Stanberry's letter appears to contain the first mention of the term "solicitor general." The name, like so much else in our American system is of English origin. At first glance, that seems strange, given the well-known distinction between English barristers and solicitors, and the equally well-known fact that the dominant characteristic of the solicitor is that he is the fellow who does not appear in court. Further research discloses, however, that the phrase is of ancient origin, and that for at least two reasons, it fairly aptly describes the relationship that Stanberry envisioned the American solicitor general would bear to the attorney general.

In the early common law, the parties prosecuted their own suits and had to be present at all legal proceedings. "The idea that one man can represent another is foreign to early law. When first it is introduced it is regarded as an exceptional privilege, and the first representative must be solemnly appointed."¹² It was only gradually that agents were allowed to appear for the parties to represent their interests in litigation.¹³ These were "attorneys."

A "solicitor," as Holdsworth explains, was a legal practitioner, similar to an attorney, whose earliest function appears to have been to assist the attorney in the preparation of cases for litigation. "Solicitors" were defined in 1589 as persons who, "being learned in the Laws, and informed of their Masters Cause, do inform and instruct the Counsellors in the same."¹⁴ Originally nothing more than a servant or agent of the attorney or his client, the solicitor came into his own, professionally speaking, with the rise of non-common-law courts, especially the Court of Chancery where attorneys, who were authorized to practice only in common-law courts, could not appear.¹⁵ Given their humble origins as

11. Cummings & McFarland, *Federal Justice*, *supra*, at 222-223.

12. Holdsworth, *History of English Law VI*, 432.

13. See Bellot, *The Origin of the Attorney General*, 25 *Law Q. Rev.*, 400-401; Holdsworth, *supra*, at 432-433.

14. Quoted in Holdsworth, *supra*, at 449-450.

15. *Id.* at 449-451. (Attorneys eventually did gain access to the Court of Chancery as well. *See id.* at 455-456.) The other two courts where solicitors practiced were the Court of Requests and the Star Chamber. Holdsworth described how the solicitors came to prominence in the Court of Chancery, and noted that "[n]o doubt we should have seen a similar phenomenon

attorneys' assistants, solicitors were long regarded as " 'but ministerial persons and of an inferior nature.' "16 In 1750, solicitors were finally given admission as attorneys, and "[f]rom that time onwards we can say that this new class of practitioners has become substantially amalgamated with the attorneys."¹⁷

Similarly, the English solicitor general, both originally and also today, was and is one who assists the attorney general in the discharge of his responsibilities. In the English system, which is a Parliamentary system, both are members of Parliament and are "law officer" members of the Cabinet. Thus, while there are necessarily differences in their functions, owing principally to the differences between parliamentary and separation of powers systems of government, the significant similarity is that on both sides of the Atlantic, the attorney general was and is the nation's chief legal officer, and the Office of Solicitor General was created to assist him in that task.

As Stanberry's letter suggests, the practice of hiring private counsel to argue the government's cases had been growing in the post-war years. In 1867 alone, the Attorney General reported, the government had spent more than \$6000 for such services.¹⁸ Thus, it was partly out of frugality,¹⁹ and not entirely out of concern for the effectiveness of the attorney general's operations that Congress in 1870 enacted legislation establishing the Department of Justice and creating the Office of Solicitor General. The Act provided in part that:

there shall be in said Department an officer learned in the law, to assist the Attorney General in the performance of his duties, to be called the Solicitor General, and who in case of a vacancy in the office of the Attorney General, or in his absence or disability, shall have power to exercise all the duties of that office.

My reading of what happened during the early years of the solicitor general's office leads me to conclude that the distinction between the responsibilities of the attorney general and the solicitor general was not as cleanly defined as it is today. The evidence is strong that the first two

in the case of the Court of Requests and the Star Chamber if those courts had survived. But they did not survive. Therefore the solicitor came to be associated mainly with the Court of Chancery." *Id.* at 455-456.

16. Quoted in Holdsworth, *supra*, at 440.

17. *Id.* at 457.

18. Cong. Globe, 40th Cong., 2d Sess. 3038 (April 27, 1870).

19. Congress' fiscal motivation is reflected in the fact that the legislation establishing the Department of Justice originated in the Committee on Retrenchment, "a joint committee of the two houses to find ways of reducing government expenditures." Cummings & McFarland, *Federal Justice, supra*, at 223.

solicitors general—Benjamin Bristow who served from 1870 to 1872, and Samuel Phillips, who served from 1872 to 1885 (longer than any other solicitor general)—probably functioned mainly as the attorney general's chief deputy, with no particular responsibility for any one phase of the attorney general's work. His duties were not narrowly defined, as they are today, as the chief, or indeed (acting under supervision of the attorney general) exclusive Supreme Court litigator for the United States. Several facts support this general conclusion.

First, far from having the near monopoly enjoyed by their modern counterparts over Supreme Court litigation, early solicitors general shared this responsibility in about equal portions with the attorneys general and with the assistant attorneys general.

These early trends—and the extent to which special counsel were displaced by regular government counsel after the creation of the Office of Solicitor General—can be seen, I think, from the following statistics. In the Supreme Court's unusually heavy December 1866 term (71 U.S. and 72 U.S.) (volumes 5 and 6 of Wallace's Reports), some 24 cases were argued by the attorney general, either alone or with the help of an assistant, and roughly five cases by the attorney general with the help of what appears to have been outside counsel. Another 16 cases were argued alone by assistants to the attorney general and two by special counsel, also arguing alone.²⁰ In the 1867 term [73 U.S. (7 Wall.)], there were about 13 cases argued by the attorney general, some with help from assistants; and, as it appears from the reports, another 4 with help from special counsel. Nine additional cases were argued by the attorney general's assistants, and two by special counsel arguing alone. The December 1868 term showed a similar pattern: 18 cases argued by the attorney general and/or his assistants, four by special counsel (two with the attorney general and two without). There was an apparent increase in the use of special counsel in the 1869 term [76 U.S. and part of 77 U.S. (9 and 10 Wall.)], when 18 cases were argued by the attorney general and/or his assistants, and 15 with some apparent involvement of outside counsel.

The picture begins to change a bit in the December 1870 term [the latter portion of 77 U.S. and all of 78 U.S. (11 Wall.)], when the solicitor general first appeared on the scene.

The nature of the change can be best understood against the background of a fundamental difference between 19th century oral arguments and today's experience. Today the sharing of arguments by several law-

20. These statistics are somewhat debatable because it is not always possible to tell from either the U.S. Reports or the Lawyers' Edition Reports whether certain individuals were arguing as special counsel or as assistants to the Attorney General.

yers representing the same client is virtually non-existent. I cannot recall a single occasion when that ever happened during my four years as solicitor general. A hundred years ago, however, arguments lasted for many hours, sometimes days, and dividing the oral presentation for a single client was common. (The Court still hears divided arguments, but the oral advocates represent different clients.) I count only two cases during the 1870 term where special counsel assisted, as compared with 13 cases argued by the new solicitor general, Mr. Bristow (three by Bristow alone, five shared with Attorney General Ackerman, and five shared with Assistant Attorneys General). Another seven cases were argued by the Attorney General and/or the assistant attorneys general without the solicitor general's involvement. In the December 1871 term [80-81 U.S. (13-14 Wall.)], Mr. Bristow came more into his own, arguing some 26 cases [7 solo, 5 with the attorney general and 15 with the assistant attorneys general]. Special counsel was used only once that term. In the December 1872 term [82 through part of 84 U.S. (15-17 Wall.)], (the last of the December term, 1873 being the first of the October terms), there is no trace of special counsel in the reports, but Bristow, too, was gone, and his successor, Samuel F. Phillips had been in office only long enough to argue some 7 cases. The attorney general and his assistants carried the load that term, with some 30 arguments among them.

These numbers seem to show that at least in these very early days the solicitor general, while an actor of some importance in the Supreme Court, shared the honors to a greater degree than we have come to expect today with the attorney general and the assistant attorneys general. Moreover, a quick spot-check of the records of the government's briefs and motions in the Supreme Court in the late 1800's and early 1900's reveals a surprising number of submissions bearing the names of attorneys general or assistant attorneys general and *not* the Solicitors General. It appears not to have been standard practice to stamp the imprimatur of the solicitor general on all submissions until roughly the 1920's, judging by a very unscientific survey of the old, dusty books in the Justice Department's attic.

The different relationship of attorney general to Solicitor General is also reflected, I believe, in the \$7500 salary. During the term immediately preceding Bristow's appointment, the government paid \$6000 for outside counsel. Thus, it is fair to infer a congressional anticipation that this new man at the Justice Department would have responsibilities other than Supreme Court litigation. And thus it came to pass. In 1871, Bristow went to Oxford, Mississippi, to help prosecute Klu Klux Klan mem-

bers under the Enforcement Act of 1870.²¹ These prosecutions were apparently very important in combating the terrorism of the Klan at a time when state authorities in the South were powerless to do so, as is reflected by the fact that the task was vested personally in the Justice Department's second ranking law officer.

Today, the distinction between the attorney general and the solicitor general is much more cleanly defined. It has been defined by 115 years of history, and also by formal Department of Justice regulation. Neither in 1870, nor in any subsequent enactment, has Congress ever specified any Supreme Court litigation responsibilities—nor any other responsibilities—for the solicitor general. Then as now, he is required to be learned in the law²² and has the general responsibility to assist the attorney general but is given no statutory responsibility.

One hundred and fifteen years of history have pretty well taken the attorney general out of the business of arguing cases for the United States in the Supreme Court, and have vested that responsibility exclusively in the solicitor general, subject to whatever supervision the attorney general wants to assert. But those same 115 years have also preserved the original basic relationship between the two. The solicitor general does what he does in the context of assisting the attorney general, who has the statutory responsibility for all litigation on behalf of the United States, and who was arguing cases in the Supreme Court eight decades before there was a solicitor general of the United States.

21. See Cummings & McFarland, *Federal Justice, supra*, at 235-236. Bristow apparently undertook this task at some personal risk. Drawing upon his experience there, he later advised the United States Attorney in North Carolina that "[t]he higher the social standing and character of the convicted party, the more important is a vigorous prosecution and prompt execution of judgment." *Id.* at 237.

22. "You will note that the Solicitor General is required by statute to be learned in the law. This was true of the Attorney General as well under the Act of 1789 creating that office; but curiously enough when the Solicitor General came into being in 1870, the requirement of legal learning on the part of the Attorney General was dispensed with, and no longer appeared in the statutes. It is reassuring, however, that the impetus of earlier statutory law has prevailed and the Attorneys General have remained learned in the law regardless of statute." Fahy, "The Office of the Solicitor General," 28 *American Bar Assn. Journal* 20 (1942).

Judge Fahy, who was the Solicitor General from 1941-45, also remarked that the great variety of legal questions that come to the Solicitor General "should insure that, regardless of his legal learning at the time of entry upon his duties, a reasonably attentive Solicitor General should be 'learned in the law' if he remains very long in office." *Id.* at 22.

