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TWO PERSPECTIVES ON THE SOLICITOR GENERAL'S INDEPENDENCE

Joshua I. Schwartz*

The Office of the Solicitor General is chartered by law to conduct virtually all litigation in the Supreme Court on behalf of the United States and federal agencies and officials. There is a second less public and less glamorous side to the Solicitor General's duties: the Solicitor General is authorized to determine, in most government cases, whether an appeal should be taken from an adverse decision of a lower court to an appellate court. Finally, when jurisdiction to review further an adverse decision of a lower court lies in the Supreme Court of the United States, these two kinds of authority, to conduct Supreme Court litigation and to govern the flow of appeals, merge. In many respects this is the most critical function of all that is vested by law in the Solicitor General: the authority and the responsibility to determine whether the government should seek further review of an adverse decision in the Supreme Court. Although all of these functions are carried out pursuant to authority delegated by the Attorney General of the United States, they have generally been carried out in modern times by the Solicitor General with very little intervention by the Attorney General or his personal staff.¹

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1. As is recounted in more detail in a 1977 Office of Legal Counsel Memorandum for the Attorney General, the position of Solicitor General was created by the Judiciary Act of 1870, ch. 150, § 2, 16 Stat. 162 (1870). Memorandum Opinion for the Attorney General: Role of the Solicitor General, 1 Op. OFF. LEGAL COUNSEL 228 (1977), reprinted in 21 LOY. L.A.L. REV. 1089, 1089-97 (1988) [hereinafter 1977 Memorandum]. The modern version of this provision is found at 28 U.S.C. § 518 (1982 & Supp. 1987). That provision assigns responsibility for the conduct of Supreme Court litigation on behalf of the United States jointly to the Attorney General and to the Solicitor General. The statutory language makes it clear that the authority of the Solicitor General is subordinate to that of the Attorney General. The Attorney General has the authority to conduct Supreme Court litigation himself or herself, or to direct that an officer of the United States Department of Justice other than the Solicitor General fulfill this responsibility in a particular case.

The preeminence of the Solicitor General is better reflected in the Department of Justice regulations that govern the structure and organization of the Department. 28 C.F.R. § 0.20
In his recent book, *The Tenth Justice: The Solicitor General and the Rule of Law,* Lincoln Caplan examines in detail the history and the role of the Solicitor General's Office. He argues that the Solicitor General has traditionally enjoyed a striking—albeit bounded—measure of independence from control by his immediate superior, the Attorney General of the United States, and from his ultimate executive branch superior, the President of the United States, in carrying out his Supreme Court litigation and appeal-regulation responsibilities. Caplan further argues that this measure of independence has been substantially reduced during the presidency of Ronald Reagan. This erosion resulted, according to the author's account, from unremitting pressure from ideological partisans within the Reagan administration to make the Office of the Solicitor General serve as an advocate before the courts for these partisans' own political and social agenda. *The Tenth Justice* reports that the effort to "politicize" the Solicitor General's function was captained by Attorney General Edwin Meese, III and Assistant Attorney General—"for the Civil

(1987) provides for the Solicitor General to carry out the functions described in the text. With respect to the conduct of Supreme Court litigation, these regulations are simply the vehicle by which the Attorney General records how he has exercised the authority granted him by 28 U.S.C. § 518. In vesting the authority to approve or disapprove government appeals from adverse decisions of the lower courts in the Solicitor General, the regulations draw on authority granted the Attorney General by other statutes, such as 28 U.S.C. §§ 516 and 519, to conduct litigation on behalf of the United States, federal agencies, and federal officials.

Of course the authority of the Solicitor General to regulate the flow of federal government appellate litigation is limited by the existence of "independent litigating authority"—the power to conduct litigation without recourse to the Department of Justice that is granted to certain federal agencies by statute. The subject of such independent litigating authority is an important one that lies beyond the perimeter of this Article. See generally J. Mashaw & R. Merrill, *Administrative Law: The American Public Law System* 163-72 (2d ed. 1985), and sources cited therein. Generally speaking, however, 28 U.S.C. §§ 516 and 519 codify the rule that all federal government litigation is to be carried out under the auspices of the Department of Justice and the Attorney General, except when express provision to the contrary is made by statute. Such statutory exceptions are fairly common, but they almost never extend to authorizing independent conduct of litigation at the Supreme Court level. The upshot is that with rare exceptions, such as the Federal Elections Commission, which is authorized to conduct its own Supreme Court litigation, the Solicitor General's monopoly on the conduct and authorization of federal government Supreme Court litigation is complete. By contrast, the Solicitor General's authority to govern government appeals from adverse trial court decisions has significant exceptions. Whenever the agency involved has independent litigating authority as far as the court of appeals, it can take an appeal without the Solicitor General's approval.


Rights Division—William Bradford Reynolds. Caplan argues that the effort was made to use the Solicitor General’s Office as a “bully pulpit” not only to press for particular changes in legal doctrine on issues of particular concern to ideologists within the Reagan Administration, but also systematically to seek to reduce the role of the courts in our government, in favor of the authority of the “political branches,” especially the Executive. In this process, Caplan asserts, the “special relationship” of confidence that has traditionally existed between the Supreme Court and the Solicitor General’s Office has suffered significantly. The Tenth Justice asserts that the change reduced the efficacy of government advocacy before the Supreme Court, both in “politically sensitive” cases and more routine ones. More than that, however, Caplan argues forcefully that these developments were aimed at undermining the “rule of law” itself.

Predictably, exception has been taken to Caplan’s thesis by supporters of the Reagan Administration and defenders of the activities of the Reagan Justice Department. Although the publication of The Tenth Justice undoubtedly prompted the development of this symposium, the purpose of this Article is neither to enter directly into the debate stirred by Caplan’s reporting, nor to offer an account of the functioning of the Office of the Solicitor General in earlier eras or administrations. I do propose to offer here a normative argument about the role of the Solicitor General, focusing on the question of independence. In approaching this problem, I try to answer two questions. First, what does the Supreme Court expect from the Solicitor General? Second, what obligations, if any, does the Solicitor General owe to the legislative branch of government—the Congress?

A more conventional approach might focus on the problem of the independence of the Solicitor General from the perspective of the executive branch. Such an analysis would examine the tension between the independence of the Solicitor General and the authority of the President over the executive branch as a whole, as well as the relationship of the Solicitor General to the Attorney General. That analysis will be left to other contributors to this symposium. In addition, this symposium issue

4. Id. at 81-135.
5. Id. at 65-80.
6. Id. at 255-67.
7. Id. at 235-67.
8. Id. at 65-80, 268-77.
9. See, e.g., Lauber, An Exchange of Views: Has the Solicitor’s Office Become Politicized?, Legal Times, Nov. 2, 1987, at 22, col. 1. (Albert G. Lauber, Jr. served as a Deputy Solicitor General in 1986 and 1987 and earlier served as an Assistant to the Solicitor General for several years.) See also Caplan’s response to Lauber, id. at 22, col. 3.
of the Loyola Law Review reproduces a memorandum prepared for Attorney General Griffin Bell, at the start of the Carter Administration, that addresses the issue from the perspective of the executive branch.\textsuperscript{10} That memorandum, prepared in the Justice Department's Office of Legal Counsel, provides a useful statement of the rationale for independence of the Solicitor General from the perspective of the executive branch.\textsuperscript{11} The heart of that argument is that the independence of the Solicitor General serves as a useful internal check or balance that will help to steer the more politically inclined Attorney General, and the President, in fulfilling their constitutional responsibility to take care that the laws are faithfully executed.\textsuperscript{12}

As indicated, I will explore here the distinctive perspectives of the judicial and legislative branches on the appropriate conduct of the Solicitor General. Specifically, I will argue that a tradition of limited independence of the Solicitor General serves an invaluable function for the judicial branch. Adherence to this tradition makes it possible for the courts to delegate to the executive control over a large and critical share of their dockets. Significant benefits for both the executive and the judicial branches result from this arrangement. Second, I will argue that the independence of the Solicitor General enables him to discharge impor-

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  \item \textsuperscript{11} Four justifications for the independence of the Solicitor General are discussed: (1) the need to ensure that the government speaks with a single unified voice in the Supreme Court; (2) the assistance provided to the Supreme Court by the Solicitor General in screening the Court's docket, providing objective accounts of factual records in cases before the Court, and providing expertise bearing on the legal issues before the Court; (3) the desirability of promoting the orderly development of the law by presentation of appropriate issues in appropriate cases; and (4) the desire to prevent improper considerations, whether political or otherwise, from entering into the government's Supreme Court advocacy. 1977 Memorandum, \textit{supra} note 1, at 230-31, \textit{reprinted} in 21 \textit{Loy. L.A.L. Rev.} 1089, 1092-93 (1988). Some of these justifications are stated in terms that do not directly address the executive branch's distinctive interests. The Memorandum also asserts that the Attorney General cannot, as a practical matter, be expected to fulfill these functions, because of his dual role "as a policy and legal adviser to the President." \textit{Id.} at 232, \textit{reprinted} in 21 \textit{Loy. L.A.L. Rev.} 1089, 1094 (1988). Moreover, the Memorandum advises that the Solicitor General's independence permits him to play a unique role in assisting the President and Attorney General to fulfill their constitutional responsibility for the faithful execution of the laws. \textit{Id.} at 232, 234 \textit{reprinted} in 21 \textit{Loy. L.A.L. Rev.} 1089, 1093-94, 1096 (1988). The Memorandum treats the independence of the Solicitor General as a useful sub-constitutional device, a kind of internal check and balance, that offers a safeguard against adoption of unsound legal positions by the executive branch. The Office of Legal Counsel Memorandum clearly insists, however, that the President and Attorney General retain the ultimate responsibility for the litigating position of the United States—a responsibility that is to be exercised only in the most unusual case. \textit{Id.}, \textit{reprinted} in 21 \textit{Loy. L.A.L. Rev.} 1089, 1094-94, 1096 (1988).
  \item \textsuperscript{12} U.S. CONST. art. II, § 3. \textit{See} \textit{supra} note 11.
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tant obligations that run to the Congress concerning the process of government litigation. The tradition of independence of the Solicitor General serves an important role in limiting the tensions that result from executive responsibility for government litigation that vitally affects legislative interests. I do not suggest that some measure of independence of the Solicitor General from either presidential control or the supervision of the Attorney General is constitutionally mandated; nor is it required by any statutory authority. Indeed, a powerful argument could be made that any such statutory requirement would itself be unconstitutional. But I do suggest that the operation of the Office of the Solicitor General in the independent mode described as the traditional one by The Tenth Justice serves a significant role in maintaining equilibrium and comity between the political branches and between those branches and the judicial branch. It is, in short, an extra-constitutional safeguard for separation of powers. As such, this tradition is a good and valuable one that ought to be preserved. Although the safeguards for such a tradition are, under my analysis, exclusively political, a fuller understanding of the reasons for fostering it may facilitate its defense.

I. United States v. Mendoza: The Supreme Court's View of the Solicitor General

What has the Supreme Court had to say about the Solicitor General and the function that he or she performs? One might think that the Court would be circumspect on this sensitive matter, and in general that is so—at least in respect to on-the-record statements. In fact, however, although little appreciated as such, the Court has recently spoken quite distinctly—and "officially"—about the function of the Solicitor General. I suggest that these comments, lodged in a 1984 opinion for a unanimous

13. See supra note 1 for the statutory basis establishing the position of Solicitor General.
15. In a book review of The Tenth Justice for the Washington Post, Michael Gartner suggested that all candidates for President be asked these questions:
   "1. If you're elected, who will be solicitor general in your administration?
2. And precisely how do you view the role of the solicitor general?"

It plainly is part of the purpose of Caplan's book to draw the attention of the public to the significance of the activities of a heretofore obscure government bureau and thereby to raise the level of political debate about the administration of justice in our federal government. It is probably unrealistic, of course, to expect the functioning of the Solicitor General's Office to become a campaign issue. It may be much more realistic to expect the Congress, in discharging its oversight and confirmation functions, to monitor the manner in which the Solicitor General discharges his or her duties.
Court in United States v. Mendoza, are richly suggestive of the value of, and the reasons for, a considerable measure of independence in the performance of the Solicitor General's function. At the same time, they do not reflect a simplistic or absolute view of this independence. Some of the implications of Mendoza for the subject of this symposium are readily apparent on the face of the Court's opinion; others are more subtly stated; and some are to be discerned only from what the Court did not say, rather than what it did.

The question in Mendoza was whether collateral estoppel precluded the United States or one of its agencies from relitigating a question of law, previously decided adversely to the government, in a separate proceeding against different parties. In short, the issue was whether the old rule of "mutuality"—the demise of which is made known to every first year law student in Civil Procedure—remains alive and in force when the issue is one of law and the party seeking to relitigate is an instrumentality of the United States government. In Mendoza, the Court held that nonmutual collateral estoppel does not apply so as to preclude relitigation by the government in this situation. The Supreme Court gave two kinds of reasons for adopting this rule. The first constellation of factors was pragmatic in nature and focused on judicial administration. The second rationale, by contrast, was rooted in an appraisal of the political nature of the process of government. It is the interaction of the twin rationales offered by the Court that ultimately provides the strongest support for the tradition of "independence" of the Solicitor General.

A. The Judicial Administration Rationale

The Court observed in United States v. Mendoza that the federal
government stands in a unique position among litigants in the federal courts. Because of the functions of the federal government that give rise to a large volume of litigation, frequently of a repetitive nature, "the Government is more likely than any private party to be involved in lawsuits against different parties which nonetheless involve the same legal issues."19 Moreover, the recurring legal questions presented in this repetitive litigation are likely to be of unusual public importance, and are often issues that, by their nature, can only arise in litigation to which a federal agency or officer is a party.20 As a result of these factors, the Court concluded, application of nonmutual collateral estoppel against the government on issues of law "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue."21 Under such a regime, of course, such premature "freezing" into place of lower court precedents could be avoided only if the government were to routinely seek appellate review—up through the Supreme Court level—of every adverse decision rendered on a controlling question of law. This would have effected a radical change in the Solicitor General's existing practice, described in more detail below, of exercising a high degree of selectivity in seeking appellate review of lower court decisions adverse to the government. In addition, the Supreme Court would have to accommodate these additional govern-

19. Id. at 160.
20. Id. at 159-60.

The Court may also have relied on the fact that in government litigation—in contrast to much private litigation—the government effectively speaks for the interest of the many, and not merely for a private or parochial interest. Indeed, in this portion of its opinion the Court relied on Standefer v. United States, 447 U.S. 10 (1980) and INS v. Hibi, 414 U.S. 5 (1973) (per curiam). See Mendoza, 464 U.S. at 159. Standefer disapproved application of nonmutual collateral estoppel against the government in the setting of a criminal case. Hibi rejects the application of equitable estoppel against the United States. Each of these cases makes the point that because the federal government is representing a public interest rather than a private one, the balance between the importance of reaching a correct and lawful result in the particular case or proceeding, on the one hand, and the importance of judicial economy or consistency considerations, on the other, shifts in favor of the former. See Standefer, 447 U.S. at 24-25; Hibi, 414 U.S. at 8.

In invoking Standefer and Hibi, however, the Mendoza Court seemed to emphasize the volume of government litigation and the innate importance of the kind of issues of law litigated by the federal government, and to downplay to some extent the special importance of reaching a correct result that flows from the public nature of the interests asserted by the government. See Mendoza, 464 U.S. at 159. (Both kinds of arguments had been made in the government's brief to the Court. See Brief for the United States at 26-28, United States v. Mendoza, 464 U.S. 154 (1984) (No. 82-849)). Perhaps this choice of emphasis is deliberate, but it is scarcely clear in the Court's opinion. It may be reading too much into Justice Rehnquist's relatively compressed comments on this point to be sure whether he, or the Court, meant to embrace, reject or even comment on the latter rationale.

ment certiorari petitions on its crowded docket unless it were willing to allow the lower court decision to become binding in all future cases on the government. This alternative scenario for the conduct of government appellate litigation was distinctly unappealing to the Court.

Justice Rehnquist made clear that rejection of nonmutual collateral estoppel against the government was not dictated entirely by the needs or wants of its own deliberative process. The same considerations were applicable at the court of appeals level. In short, the Court concluded that to allow nonmutual collateral estoppel against the government on recurring questions of law would both "disserve the [judicial] economy interests in whose name estoppel is advanced," and produce less fully considered and less correct decision-making by the judicial system viewed as a whole.

Supporting the Court's pragmatic rationale was the Court's assessment of the manner in which the Solicitor General carried out appellate litigation on behalf of the federal government. The Solicitor General had taken for granted that nonmutual collateral estoppel would not be applied against the government on questions of law. The Court's decision

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22. Id. The Court complained that this would adversely affect both its docket management and its deliberation on the merits of the cases to which it gives plenary consideration. To allow nonmutual collateral estoppel against the federal government on questions of law would virtually rule out the creation of conflicts among the circuits in federal government litigation—a primary device used by the Court to regulate its discretionary docket. At the same time, in those cases selected for consideration on the merits, the Court would deprive itself of the benefit of what is often described as "marination" or "percolation"—"the benefit [the Supreme Court] receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." Id.; see, e.g., Strauss, One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action, 87 COLUM. L. REV. 1093, 1109 (1987).

23. *Mendoza* has been criticized on the ground that the Court's preference for "percolation" is satisfied at a high cost in terms of the time of lower courts. Effectively, these critics argue, *Mendoza* effects an allocation of labor between the Supreme Court and the lower federal courts that is satisfactory for agency litigants and for the Supreme Court, but onerous for the lower federal courts. See, Levin & Leeson, Issue Preclusion Against the United States Government, 70 IOWA L. REV. 113, 119-20 (1984) (citing Pharmadyne Laboratories, Inc. v. Kennedy, 466 F. Supp. 100, 108 n.16 (D.N.J. 1979)).

24. The Supreme Court stated:

The Solicitor General's policy for determining when to appeal an adverse decision would also require substantial revision. . . . The application of nonmutual estoppel against the Government would force the Solicitor General . . . to appeal every adverse decision in order to avoid foreclosing further review.

*Mendoza*, 464 U.S. at 160-61 (footnotes omitted).

25. Id. at 163.

26. Id. at 160, 163.

27. This plainly was the prevailing assumption prior to the Ninth Circuit's contrary decision in *Mendoza*, 672 F.2d 1320 (9th Cir. 1983), the decision ultimately reversed by the Supreme Court in *Mendoza*, 464 U.S. at 155. There had been isolated suggestions that such
preserved that assumption, relieving the federal government of the threat that an unappealed adverse decision would acquire issue-preclusive effect. It thereby removed an incentive uncritically to seek further review of adverse decisions of the lower federal courts. But the Court's preference for the existing regime would be justifiable only if lawyers representing the United States act in a manner that makes it possible to realize the advantages of "percolation" and sparing resort to appeal.

The Court understood as much. It responded with a roundly positive assessment of the role played by the Solicitor General in governing the flow of appellate litigation in government cases throughout the federal judicial system. Citing the government's own brief as the only pertinent authority, Justice Rehnquist described the government's policy, administered by the Solicitor General, of only selectively appealing from adverse decisions of lower federal courts:

[T]he Government's litigation conduct in a case is apt to differ from that of a private litigant. Unlike a private litigant who generally does not forgo an appeal if he believes that he can prevail, the Solicitor General considers a variety of factors, such as the limited resources of the Government and the crowded dockets of the courts, before authorizing an appeal.28

And the Court was plainly appreciative of the assistance rendered by the Solicitor General in screening its docket according to the traditional criteria for "certworthiness."29

In short, the first ground for the result in Mendoza was this: the

relitigation should not be permitted. See, e.g., Goodman's Furniture Co. v. United States Postal Serv., 561 F.2d 462, 463 (3d Cir. 1977); id. at 465 (Weis, J., concurring); May Dep't Stores Co. v. Williamson, 549 F.2d 1147, 1149 (8th Cir. 1977) (Lay, J., concurring). Such suggestions were also heard from the ranks of legal scholars. See Vestal, Relitigation by Federal Agencies: Conflict, Concurrence and Synthesis of Judicial Policies, 55 N.C.L. REV. 123 (1977). They were at least implied in muted fashion by a governmental commission considering the workload of the federal court system. See COMM'N ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975) A-135-36, A-158, reprinted in 67 F.R.D. 195, 349, 360-61 (1975). Yet these were no more than stray protests against the established practice.

The government's brief in Mendoza makes clear that the Solicitor General's Office had been operating under the assumption that its decision not to appeal an adverse decision, thereby allowing the judgment to become final, would not preclude relitigation of the same issue in other cases involving other parties. Brief for the United States, supra note 20, at 30-31, 33-34. The opinion of the Court accepts this assertion. Mendoza, 464 U.S. at 160-61.


29. See id. at 163. In describing Mendoza, Professor Strauss has commented that "the Court would certainly have been aware how responsive the executive branch had been, in exercising [control over the filing of certiorari petitions], to the Court's own limitations." Strauss, supra note 22, at 1109.
Court was persuaded that the existing system, in which the Solicitor General selectively scrutinizes candidates for appeal and certiorari, resorting to further review in sparing fashion, and is mindful of the special needs of the Supreme Court to regulate its docket, is more efficient and conducive to better decisions than the alternative model portended by applying nonmutual collateral estoppel against the government. We should pause to take note of just how extraordinary this conclusion is. The Court concluded that across-the-board application of nonmutual collateral estoppel against the United States on questions of law would be undesirable. But it also recognized that any selective application of nonmutual collateral estoppel would be unworkable because it would then be uncertain, when the time came for taking an appeal in the first case decided adversely to the government on a given legal issue, whether that decision would subsequently be given collateral estoppel effect. The Court thus concluded that the Solicitor General does a better job of governing the flow of government appellate litigation, including relitigation, than any doctrine that the courts could devise and administer themselves. Accordingly, the Court exempted the United States from the application of nonmutual collateral estoppel on questions of law, in effect delegating to the Solicitor General the responsibility to act in a manner that protects judicial economy values and fosters the smooth development of the law. Implicit in the Court's rationale there necessarily lies a blueprint for the conduct by the Solicitor General of his Office. Before moving on to the second, more political, line of reasoning offered by the Mendoza Court in support of its ruling, I will explore the implications of this initial judicial-management based rationale for the question of the independence of the Solicitor General. What traits then does this initial rationale require of the Solicitor General if he or she is to repay the confidence reflected in the Court's assessment in Mendoza? How may these traits be realized in the operations of the Solicitor General's Office?

B. The Implications of the Judicial Administration Rationale

The pragmatic rationale voiced by the Court in United States v. Mendoza requires that the Solicitor General acquire and consistently apply a special expertise, and a high level of self-restraint, in gauging adverse decisions and determining their suitability as candidates for appeal. There are several distinct but intertwined facets to this unique role.

The first is a highly refined ability to assess the prospects for success
on the merits of a particular case, as a matter of pure doctrinal soundness. In *Mendoza*, the Court distinguished the Solicitor General from private litigants and their counsel by highlighting the government's unusual willingness to forego appeal in cases in which it believes it might prevail.32 Closely intertwined with that behavior, however, is the Solicitor General's cultivation of a realistic sense of the likelihood of success in the cases submitted for authorization for appeal. This realistic vision is a key basis of the restraint displayed by the Solicitor General in authorizing appeal and the filing of petitions for a writ of certiorari. While the Solicitor General's skill as a prognosticator is thus an important qualification, the precise attribute I have in mind here is something different than pure predictive ability regarding what the courts would decide in a given case. Perhaps it is best described as the faculty for determining whether the government ought to prevail in a particular case given a correct application of existing relevant sources of law.33 This faculty is aptly described as quasi-judicial. In performing this function the Solicitor General plays the role of a judge, assessing the merits of the case. While the Solicitor General may at times take up a case that he or she personally adjudges nonmeritorious, and, more often, one unsupported by existing law, this analytic process is still a vital force for self-restraint in the flow of government litigation. The presumptive rule applied by the Solicitor General's staff is: if we cannot persuade ourselves that the government ought to prevail in the case, the case does not warrant the attention of the courts. To undertake this analysis and apply this rule of conduct, the Solicitor General needs both a discerning understanding of the applicable precedents, statutes and other sources of law, and a degree of detachment from the adversarial perspective.

The first of these objectives is pursued through familiar expedients. Staff lawyers, known as Assistants to the Solicitor General, numbering about fifteen at any given time in recent years, are hired on the strength of conventional criteria. These include strong law school records, often followed by competitive clerkships with noted judges, usually followed by a few years in a high-powered law firm, or less commonly by effective service as a lawyer elsewhere in the government. Most of the Assistants to the Solicitor General do not plan a career of service in the Office. They average three years or so in the position. Nevertheless, political views or affiliations traditionally have not been a criteria for hiring. Res-

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32. *Id.* at 161; *see supra* text accompanying note 28.
33. Other skills that contribute to the predictive ability of the Solicitor General, in addition to this one, are addressed separately in the ensuing discussion. *See infra* text accompanying notes 38-44.
ignations are not submitted upon a change of administrations. Moreover, many of the Deputy Solicitors General—the intermediate position between the Solicitor General and the assistants—have been hired from among the rank of the seasoned assistants. At this level, too, tradition dictates that service is not dependent on party affiliation and does not end upon a change of administrations. Indeed, the longer tenure of deputies is a critical means for maintaining institutional memory and continuity of policy when a presidential election brings a new Solicitor General into office.

This selection process is followed by a form of in-house continuing education. This educational process is built into the flow of the work itself through the Office hierarchy. The operation of this process of review differs in the context of appeal and certiorari screening from that employed in Supreme Court brief-writing. In the screening process each lawyer in the office studies the written recommendations received from the affected government agency and the lawyers who handled the case prior to the adverse decision. He or she adds his or her recommendations in written form to those received. A tradition of individual rather than collective responsibility applies to the memorandum prepared by the assistant. Although the assistant's memorandum will not constitute the final word on the matter, it reflects the assistant's final judgment. Thus, when one of the Deputy Solicitors General in turn receives the file, he or she will record his or her own written views, adding them to the file, but not editing or revising the recommendation of the assistant. The written and oral comments of the Deputy Solicitors General regarding cases within their jurisdiction constitute a key device for preserving and propagating the standards, values and assessment techniques of an Office whose staff turns over relatively rapidly.

More than these qualities of intellect and insight is required to be able to determine whether or not the government ought to prevail on an appeal of a particular adverse decision under prevailing precedents and authorities. The Solicitor General must, in addition, repress the familiar instinctive reaction of the losing advocate: "I was robbed." The need to do this provides a significant justification for the relatively unusual division of labor in control and conduct of federal government litigation that is reflected both in the Solicitor General's Office and more generally in the Department of Justice. As I noted at the outset of this Article, not only is all of the government's Supreme Court litigation performed by a specialized team of lawyers that has no hand in litigation in lower courts, but the government also separates the responsibility for authorizing appeals from adverse decisions of federal district courts to the courts of
appeals from the actual conduct of those appeals.  

The staffing pattern employed within the Solicitor General’s Office also fosters this kind of detachment. The authority of the Solicitor General necessarily spans the entire spectrum of federal government litigation. Specialization and expertise in the Office are concentrated at its middle tier: the entire field of federal government litigation is parcelled out among the four or five Deputy Solicitors General. By contrast, the Assistants to the Solicitor General are consummate generalists. With the exception of the individual working on federal tax matters, each assistant works for each of the deputies, and therefore will be exposed over time to the entire field of government litigation, both civil and criminal. Moreover, hiring of assistants is generally carried out without seeking

34. See supra text accompanying note 1. In addition, each of the litigating divisions of the Department of Justice maintains a separate appellate section or staff with responsibility for conducting most, if not all of that division’s in-house appellate litigation.

Much of the Department of Justice’s litigation is executed outside of “Main Justice” by the 94 United States Attorney’s Offices. This is particularly true of criminal prosecution and relatively unspecialized civil litigation. A substantial proportion of federal litigation is, in addition, carried out by agencies that have their own litigating authority in the lower federal courts. See supra note 1. The use of specialized appellate staffs is apparently less characteristic of litigation carried out under any of these auspices. Nevertheless, the value of this pattern is not entirely unrecognized. Some of the United States Attorney’s Offices maintain an appellate staff or at least designate a chief of appeals. In the author’s experience, the virtue of adopting this approach was the subject of continuing proselytism by the Solicitor General’s Office directed at the United States Attorneys.

35. For instance, one of the deputies traditionally will be responsible for all criminal cases. A second may be responsible for several more or less broad areas of civil litigation: for example, labor law, antitrust, civil rights and federal taxation. A third may oversee litigation affecting federal property and natural resources, environmental law, litigation affecting and involving Native American Indians, and litigation within the original jurisdiction of the Supreme Court. A fourth may deal with the enormous and daunting category of all other federal civil litigation.

These apportionments of jurisdiction are not fixed; they have been adjusted over time in response to factors such as the differential growth in components of the federal caseload, the available expertise of the persons appointed to the position of deputy, and the number of deputies appointed at any given time. In The Tenth Justice, Caplan charges that in the Reagan Administration political considerations have resulted in reassignment of a deputy’s jurisdiction deemed politically sensitive or central to some aspect of the Reagan social agenda. For example, jurisdiction was reassigned from one long-term career deputy, Lawrence Wallace, who was deemed politically unreliable or unsympathetic. L. Caplan, supra note 2, at 60-61. During the Reagan Administration, the position of Counselor to the Solicitor General was invented to provide a position for a politically reliable second-in-command. Id. at 62. Previously, the only provision made for such a hierarchy within the Office, was the informal recognition, on the basis of seniority as deputy, of a “first deputy,” who would act in the Solicitor General’s stead when the Solicitor General was disqualified in a particular matter because of a conflict of interest, or was otherwise temporarily unavailable.

36. Lawyers serving elsewhere in the government whose recommendations are frequently rejected by the Solicitor General might label them “dilettantes.”
established expertise in particular areas of government litigation. On the other hand, a kind of informal subspecialization is fostered among assistants once they arrive in the Office. Within each deputy's jurisdiction, a newly received matter often will be assigned to an attorney who has previously worked on a problem within the same narrow subspecialty—if there is one. Each assistant develops, during his or her tenure in the Office, an array of such subspecialties, but these are rarely allowed to coalesce into a conventional form of subject matter specialization of practice. This system captures some of the advantages of expertise and specialization. But its primary effect, if not its conscious purpose, is to insulate the staff attorney responsible for handling a case from the needs, objectives and passions of the agency or governmental unit directly involved in the case, as well as the perspectives of the government's litigators in the lower courts.

Along with this quasi-judicial perspective, other traits are required of a Solicitor General fulfilling the screening function envisioned for the Office by the Supreme Court in *Mendoza*. In addition, the role requires the exercise of sound judgment as to the attractiveness of a potential vehicle for appeal—will the government's position seem particularly palatable on the facts and circumstances of a given case or will the government's position smack of overreaching or cleverness in the pursuit of injustice?

At first it might seem that this requirement responds only to the partisan interests of the government in winning cases and establishing favorable precedent, and has nothing to do with the judicial management objectives reflected in the *Mendoza* rule. Such a perception would be only partially accurate. It is widely believed by lawyers in the Solicitor General's Office that the art of selecting an appropriate "vehicle" for establishing a point the government wishes to make is of critical importance. Through the operation of the Solicitor General's Office, the government is able, to a degree unique among litigants, to coordinate its

37. Within each deputy's jurisdiction an assistant will have a number of areas of recognized expertise. Two assistants may share a subspecialty. Closely related subspecialties are frequently separated. For instance, during my tenure as an assistant, one assistant handled most of the cases arising under the Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1982), while a different assistant handled matters that arose under the speedy trial clause of the sixth amendment, U.S. CONST. amend. VI, cl. 1.

Another factor that militates against the development of any true pattern of specialization is the relatively rapid turnover of assistants within the Office. Although there are, at any given time, a handful of lawyers interested in making a career in the Solicitor General's Office, it is but a waystation for the majority, who typically stay about three years before moving on. Another factor discouraging specialization is that many cases that come to the Office will not fit into a particular established subspecialty.
litigation and to choose and groom favorable test cases on important issues of law. This ability plainly contributes to the long range success of the government's litigation program both in the Supreme Court and in the courts of appeals.

So it is plain that the government does not engage in this aspect of its screening activities out of a disinterested concern for efficient judicial management. At the same time, the two are not entirely unrelated. If one accepts Justice Holmes' notion that "hard cases" at least sometimes make "bad law," the connection becomes apparent—although it is bivalent. By careful selection of attractive "test cases" as vehicles for further review, the Solicitor General's screening tends to avoid or at least to reduce the judicial temptation to reach a result that seems appealing on the facts of a particular case, but which depends on a doctrine that would not or should not be embraced in light of the general complexion of the problems to which it would apply. In addition, if hard cases are not representative they simply are not an efficient use of the limited resources of the judicial system, especially at the Supreme Court level. Thus, by screening out cases that are "hard" from the government's perspective, the Solicitor General tends to forestall production of law that is either "bad," or that provides inadequate or misleading guidance to the lower courts.

At the same time, of course, the government's screening is likely at

38. The same point could be made concerning the Solicitor General's pursuit of detached, quasi-judicial expertise in assessing cases on the merits. The government has self-interested reasons for doing this, too. First, litigating cases that cannot and should not be won is rarely of any benefit to the government. Second, because the docket of the Supreme Court—and the appetite of the courts of appeals for rehearing en banc—is strictly limited, the Solicitor General must view every candidate for authorization for further review as vying with each of the government's other cases for a spot on the docket. This is especially so given the very large proportion of the Supreme Court's docket that is occupied by government cases. See infra note 46. Third, the Solicitor General builds up a fund of credibility, at least in the Supreme Court, which is aware of the Office's screening function, by consistently refusing to pursue nonmeritorious appeals. This may enhance the government's prospects on the cases that the Solicitor General deems meritorious. Conversely, while the reputation for strict screening will survive an occasional misjudgment, or even an isolated politically motivated pursuit of an untenable position, see infra text accompanying notes 50-53, such conduct becomes self-defeating if it is too regular.

The fact that the Solicitor General's litigating conduct serves the litigating interests of the United States does not contradict the Court's observation that it serves the interests of judicial management. Indeed, the real force of the Court's point is that the Solicitor General's pursuit of the government's "selfish" interests will typically cause him or her to act in a manner that serves the ends of judicial management and the development of the law. Because of this coincidence of self-interest and regard for judicial management interests, reliance on the conduct of the Solicitor General may be warranted.

39. See Northern Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) ("Great cases like hard cases make bad law.").
times to bring forward cases that are "easy" from the government's point of view. Moreover, there is no one—outside the Court itself—in a vantage point to exercise a countervailing influence. As Justice Thurgood Marshall has pointed out, easy cases may be equally conducive to the rendition of "bad" law. That the Solicitor General's screening is, in this respect, a two-edged sword does not mean that it is undesirable. The Court itself should be expected to be attentive to the skewing effects of the Solicitor General's screening, both when it considers whether a particular case should be granted review and in considering the merits. Moreover, while the Solicitor General can be expected to select "vehicles" that make possible presentation of the government's contentions in a favorable light, where possible, he or she must also be able to persuade the Court that a given case presents a sufficiently typical exemplar of an unresolved problem in the law that it warrants the Court's consideration. Thus, some built-in inhibitions exist in the screening process that limit excessive pursuit of partisan advantage.

The Court's consideration of the merits also inhibits the Solicitor General's case-selection conduct. What if the Solicitor General has secured review of an adverse decision below that presents atypical facts that make it a misleading vehicle for deciding some more general point of law? In many such cases the circumstances that make such a case unrep-

40. No party occupies a position to screen all of the cases put before the courts by the government from this point of view. In certain discrete areas of the law some of the Solicitor General's activities have been emulated, as for instance, by the State and Local Legal Center of the Academy for State and Local Government, which files amicus briefs in the Supreme Court of the United States in civil cases affecting the collective interests of the states. See Solomon, Federalism—Making the Case for State and Local Governments, 18 URB. LAW. 483 (1986). Groups such as the American Civil Liberties Union also play a somewhat similar role in monitoring the caseload of the Supreme Court with an eye toward protecting the interests promoted by their organizations. But these efforts necessarily lack the impact on the Supreme Court's docket that the Solicitor General achieves. Not only do these organizations lack the stature traditionally enjoyed in the eyes of the Court by the Solicitor General, they lack the resources and interest comprehensively to survey the cases put forward by the government. In any event, the screening function is most effectively played by a party, such as the United States, which is in a position either to seek or decline further review of adverse decisions or to oppose or acquiesce in the certiorari petitions filed by opposing counsel in cases the government has won below. Thus, it is hard to avoid the conclusion that the government's screening imparts a favorable cast to the Supreme Court's docket that is not counterbalanced by any equal and opposite factor.

representative should be apparent to an able Supreme Court advocate and thus can be pointed out. In others, these circumstances should be apparent to the Court itself. Finally, cases exist in which governmental officials are uniquely in a position to assess the representative character of the fact pattern of a particular case. It appears that the Court gives very substantial credence to the representations of the Solicitor General in a certiorari petition concerning the practical impact of decisions sought to be reviewed. This no doubt carries over to the consideration of the merits. As explained below, a special obligation of trust is imposed on the Solicitor General by the Supreme Court’s reliance on the candor and even-handedness of the Solicitor General’s representations to the Court. The ultimate sanction that enforces this obligation of trust is the implicit threat that reliance will not continue when reliability ceases. The Solicitor General need not discharge this portion of his or her role in a perfectly even-handed manner to make this portion of the screening role worthwhile. So long as the Solicitor General contributes, on balance, to the intelligent selection of cases for further review, the function performed will be beneficial.

In addition to the ability to perceive what the courts ought to do in light of the applicable law, and the ability to assess the attractiveness of a particular case as a vehicle for achieving that result, the Solicitor General should possess insight concerning the direction and pace of doctrinal development in the many fields of government litigation. Particularly when clarification or alteration of existing doctrine is sought from the courts, especially the Supreme Court, the Solicitor General must gauge the readiness of the courts to consider the particular problem, and their receptiveness, in light of cases that have come before and any indicia that reconsideration may be warranted, to the position the government proposes to put forward. This perspective on the state of the law is also

42. It is a familiar observation that too few of the lawyers who practice before the Court possess the ability we might expect to find in them. See, e.g., Burger, Conference on Supreme Court Advocacy, 33 CATH. U.L. REV. 525 (1984). Plainly, the bar as a whole and clients insufficiently appreciate the advantages of retaining a skilled practitioner with substantial Supreme Court litigation experience for the purpose of representing private litigants before the Court. Separate and apart from the benefit that accrues to the client out of securing such representation, we should recognize that there is a public interest served by such representation. Both at the certiorari stage and during consideration of a case on the merits, such counsel are better able to counterbalance any skewing that may be imparted by the efforts of the Solicitor General.

43. See infra text accompanying notes 55-56.
44. This imperative may at times conflict with other criteria for the conduct of the Solicitor General, with the result that commentators may express criticism of the Solicitor General’s performance. A nice illustration is suggested by the well-known commentary of then-Professor (now Justice) Scalia on the Supreme Court’s decision in Vermont Yankee Nuclear Power
required when the Solicitor General invokes Supreme Court supervision

Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978). Scalia, Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court, 1978 Sup. Cr. Rev. 345. In Vermont Yankee the Supreme Court held that the federal courts have no authority to impose extra-statutory procedural requirements on federal agencies engaged in rulemaking. 435 U.S. at 543-46. The Supreme Court utilized its decision in Vermont Yankee as the occasion to deliver a severe tongue-lashing to the D.C. Circuit which had rendered the decision below, Natural Resources Defense Council v. United States Nuclear Regulatory Comm'n, 547 F.2d 633 (D.C. Cir. 1976), and which had, over the course of several years, been pressing federal administrative agencies engaged in notice-and-comment rulemaking to utilize more formal procedures than those required by the Administrative Procedure Act (APA).

The occasion chosen for this reprimand was less than perfect. The problem was that it was hardly clear that the D.C. Circuit was, on this occasion, guilty as charged. The opinion of the court of appeals setting aside agency action in the particular case could be understood to rest either on the inadequacy of the record to support the agency's conclusions, or on the inadequacy of the statutorily-prescribed procedures as a means of determining the particular issues before the agency. See Vermont Yankee, 547 F.2d at 653-54. As Scalia acknowledged, "[t]he essential meaning of the opinion below was" on this score simply "unclear." Scalia, supra, at 356. Indeed, he conceded that the court of appeals' offending doctrine was either "dictum" or at most an "alternative holding." Id. Even the Supreme Court confessed difficulty in discerning whether the court of appeals had imposed any additional procedures on the agency. Vermont Yankee, 435 U.S. at 539-42. While the Court ultimately concluded that the lower court had imposed additional procedures, it acknowledged, in closing, that this might have been an alternative basis for the judgment. Id. at 549.

When Vermont Yankee came before the Court on the petition for a writ of certiorari filed by the private party supporting the agency decision, the Solicitor General opposed certiorari, acting just as the pragmatic rationale dictates that he should. The brief in opposition filed by the Solicitor General urged: (1) that the court of appeals' decision could be based on the uncontroversial ground that the record lacked support for the agency's conclusions; (2) that the court of appeals' discussion of extra-statutory procedural obligations was "simply dictum"; and (3) that any question concerning such procedural requirements was not ripe for review. Brief for the Federal Respondents (On Petitions for Writs of Certiorari) at 9-10, Vermont Yankee, 435 U.S. 519. The contrary view of the agency directly involved in the case, the Nuclear Regulatory Commission, was presented in the brief submitted by the Solicitor General, but was rejected by him.

In his commentary, Scalia critized the Solicitor General's position. Scalia argued that the D.C. Circuit had produced a series of decisions endorsing the use of "hybrid rulemaking" procedures more elaborate than those prescribed by the APA. He also argued that the D.C. Circuit had deliberately insulated this line of cases from Supreme Court review by an artful use of a "pattern of dicta, alternate holdings, and confused holdings." Scalia, supra, at 372. Scalia faulted the Solicitor General's Office for failing to see the compelling need for Supreme Court review of this line of authority and for failing to recognize that, because of the court of appeals' skillful artifice, no better candidate for that review, under the conventionally applied criteria, was likely to emerge. He stated:

While the D.C. Circuit could profit from more attention to the art of being an inferior court, perhaps the Solicitor General's Office could do with a bit more attention to reality. There was probably no single controverted issue of administrative law as important—and as needful of early Supreme Court resolution—as the D.C. Circuit's approach to the APA, clearly exemplified in its Vermont Yankee opinion. Under the circumstances, the clouded question whether the actual holding turned on that issue was a relative detail.

Id. at 373-74. Scalia was quick to perceive that what he considered the Solicitor General's
over errant lower courts. Here, despite occasional lapses, the Solicitor General's vantage point atop the pyramid of federal litigation affords an unparalleled opportunity to acquire and apply this perspective. The balance provided by the leavening of the relatively expert submissions of the agency client and the lawyers who have handled a matter in the lower courts with the generalist perspective of the Assistant to the Solicitor General may be useful in this regard. This is particularly true when these contrasting viewpoints are then submitted for the consideration of a seasoned Deputy Solicitor General who has had the opportunity to develop a magisterial perspective concerning the long term development of the law in his or her area of jurisdiction.

Another trait that is necessary to realize the promise of Mendoza's pragmatic rationale is the Solicitor General's familiarity with the condition of the courts' dockets, and the criteria used by the courts for managing those dockets. This is particularly true at the Supreme Court level: the Solicitor General must be able to anticipate which cases will be deemed to meet the Court's standards for certiorari review. It appears that the Solicitor General has been highly successful in this respect in recent years. Moreover, the Solicitor General must internalize these

obtuseness in this instance sprung directly from the Solicitor General's performance of his usual role. He continued:

The Solicitor General's Office prides itself, and rightly so, upon fastidious attention to the technical aspects of the lawyer's craft; and surely that includes appreciation of the distinction between holding and dictum, and precise identification of the basis for a decision. One wonders, however, whether in the age of the legislative opinion, intentionally designed to say and to impose much more than it holds, a somewhat lesser attention to those factors in selecting cases for certiorari might not be justified. . . . One can only hope for an elevation of the standards of practice of the D.C. Circuit, and perhaps a lowering of standards by the Solicitor General to meet them halfway.

_Id._ at 374-75.

45. See _supra_ note 44.

46. Statistics reproduced by Caplan in _The Tenth Justice_ support this conclusion. For instance, in one recent term the Supreme Court granted 79% of the petitions for a writ of certiorari filed by the Solicitor General while it granted only 3% of all petitions filed in that year. Only 2% of nongovernment petitions were granted without the support of the Solicitor General. L. _CAPLAN, supra_ note 2, at 4. These figures appear to be representative. _See_ R. _STERN, E. GRESSMAN & S. SHAPIRO, SUPREME COURT PRACTICE_ 190, 192 (6th ed. 1986). Cases heard on the federal government's petition make up about one-fourth of the Court's docket in most years. _Id._ at 192.

These statistics need not be accepted uncritically as proving the point asserted. Plainly the Solicitor General's success rate is attributable to several different factors. First, the Solicitor General's Office has acquired, through its specialization and institutional memory, a particularly good sense of what the Supreme Court considers "certworthy." In addition, this high success rate undoubtedly reflects success in performing other aspects of the Solicitor General's role discussed in the text above: dispassionate assessment of the doctrinal merits of the cases in which adverse decisions have been rendered; sensitive appreciation of the visceral appeal or
criteria and identify with them, so that he or she can and will apply them to screen adverse decisions recommended for appeal by the affected agency clients and the federal government lawyers who have litigated them in the lower courts. It is not enough that the Solicitor General understand the factors that motivate the exercise of the Supreme Court's certiorari jurisdiction, so as to be able to identify the stronger and weaker certiorari candidates. The Solicitor General must in practice assume the primary responsibility for winnowing the large number of adverse decisions of the courts of appeals in government cases to a volume that fits within the very limited docket of the Supreme Court. In short, the Solicitor General must seek to impose these standards on the copious flow of government cases that are candidates for appeal so as to maintain both the reality and the appearance of selectivity in governing the flow of government appeals.

In addition to these factors, the Solicitor General's success likely reflects a general reserve of credibility earned from the Court over the years. Even when the usual criteria for certiorari review are not met, or where the significance of the issue is not apparent to the nongovernment observer, the Court has been unusually willing to accept the Solicitor General's assertions concerning the importance of the issue presented. See infra text accompanying notes 47-53.

47. It is instructive to compare the high proportion of government certiorari petitions that are granted, see supra note 46, with the low proportion of cases tendered to the Solicitor General for certiorari consideration in which a petition is actually filed, see infra note 48. Plainly the Solicitor General, rather than the Court, does the bulk of the screening work in government cases.

48. Statistics contained in the Solicitor General's brief in Mendoza provide some support for a conclusion that the Solicitor General has succeeded in maintaining the desired selective appeal policy. According to these statistics kept by the Office of the Solicitor General, in 1982 the Solicitor General authorized appeal from an adverse district court judgment in slightly more than half (621 out of 1118) of the cases submitted for consideration. In that same year, the Solicitor General approved the filing of a petition for a writ of certiorari in the Supreme Court in only about 11% (64 out of 579) of the cases in which formal consideration was given to seeking such review. Brief for the United States, supra note 20, at 30-31 n.24.

These statistics do not indicate the proportion of these cases in which other government agencies or other components of the Department of Justice had themselves recommended against seeking further review. In the author's own experience, this occurred quite often. Thus, these statistics arguably overstate the Solicitor General's selectivity in some respects. But it is also true that a decision sometimes is made not to seek the Solicitor General's authorization of an appeal of an adverse decision. This practice conflicts with the regulations defining the Solicitor General's authority, but it is sometimes tolerated under customs or understandings that have evolved between other government components and the Office of the Solicitor General. As a result, these statistics may understate the selectivity of the process as a whole. In any event, it is the selectivity of the process as a whole that matters. Government agencies
One other attribute must be added to this developing picture. The Solicitor General must enjoy sufficient stature and authority within the Department of Justice and the executive branch as a whole so that he or she can routinely and continually make numerous decisions against seeking further review, in the face of contrary recommendations from elsewhere in the government. (The statistics in the margin bear witness to the regularity with which this does and must occur.) Moreover, these decisions by the Solicitor General must not be reversed—at least not with any frequency—by the Attorney General, under whose authority the Solicitor General acts. And the Solicitor General’s decisions also must be insulated from any regular interference emanating from the President’s staff in the White House. Unless these last requirements are met, none of the attributes described above will ensure the success of the Solicitor General in playing the role scripted for him by the Court in Mendoza. As a practical matter then, the decisions of the Solicitor General must almost always constitute the last word within the federal government as to whether further review will be sought of an adverse decision.

Why is this kind of finality necessary to secure the objectives endorsed by the Court in Mendoza? This brings us directly to the question of the independence of the Solicitor General. Why cannot control over the flow of government litigation be decentralized—that is, placed in the hands of the agencies affected or the lawyers in the Department of Justice responsible for litigation in the lower courts? Alternatively, why cannot the performance of this task be subjected to oversight at the highest political levels of the executive branch without losing the guiding attitudes explored above?

and litigating divisions of the Department of Justice sometimes recommend against seeking further review of an adverse decision because those who would prefer to recommend appeal or filing of a petition for a writ of certiorari simply do not believe the case would pass the Solicitor General’s scrutiny. Sometimes a recommendation against further review is made because those involved have internalized the Solicitor General’s criteria for seeking such review. In either event, a selective policy of appeal has effectively been instituted under which only relatively meritorious cases are pursued on appeal.

49. See supra notes 46-48.

50. See 1977 Memorandum, supra note 1, at 234, reprinted in 21 Loy. L.A.L. Rev. 1089, 1096 (1988). In addition, the Solicitor General’s authority and influence must be sufficient to encourage client government agencies and lawyers elsewhere in the Justice Department to internalize the standards applied by the Solicitor General. To the extent this is done, the Solicitor General’s authority is not gratuitously sapped by repeated contests to uphold his or her judgment against the contrary recommendations of lawyers elsewhere in the government. See supra note 48. Even when the recommendations received by the Solicitor General favor further review, the expenditure of political capital entailed by the rejection of these recommendations is much less when agencies both understand the grounds for rejection and appreciate that appeal will almost always be futile.
With respect to the agencies and the other litigating arms of the Department of Justice, the answer rests on the leverage that centralization and expertise give to the Solicitor General. It would be very difficult indeed to try to replicate in a host of separate government offices the attitudes of detachment, rigor, and candor, and the feel for the desirability of a case as a vehicle and for the emerging direction of the law, that are desired attributes for a Solicitor General. Much more difficult still, however, would be to make agency lawyers and officials or other government litigators play the role of gatekeepers for the courts in the manner that role is played by the Solicitor General. Others obviously can be made to understand, in abstract terms, the need for selectivity in governing the flow of government appellate litigation. But only one who has oversight over the full spectrum of government appeals can be expected to rigorously enforce the appropriate criteria. What distinguishes the Solicitor General from private counsel, in the final analysis, when it comes to decisions as to whether to appeal or seek certiorari, is that private counsel and their clients ordinarily have little to lose—other than the expense of what may well be a futile legal effort—by seeking further review. By contrast, for the government, each certiorari petition authorized competes with every other government case for a spot on the Court's small and essentially fixed docket.\(^{51}\) If authority over government litigation is dispersed among several or many decision-makers, each will be subject to the same dilemma as private counsel. Each one, lacking any assurance that restraint can be enforced on the others, will have an incentive to act without restraint.\(^{52}\) Thus, only an officer with the centralized authority enjoyed by the Solicitor General can acquire and enforce the desired attitudes regarding the flow of government appellate litigation. Accordingly, the authority of the Solicitor General to override the rec-

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51. This is true to a lesser extent at the appeals authorization level. The courts of appeals generally are not courts of discretionary jurisdiction. Thus, the Solicitor General is not under as much pressure to apply as rigorous standards in governing the taking of appeals as he is at the Supreme Court level. It is true that the Solicitor General is supposed to consider the aggregate limitations on judicial resources at this level in screening potential appeals. See Mendoza, 464 U.S. at 161. Still, because these resources, unlike those of the Supreme Court, are not rigidly fixed, the screening process is less stringent at this level. As a result, the desire to maintain the credibility of the government as a litigant is probably of greater significance than docket limitations in enforcing selectivity upon the Solicitor General in the appeals authorization process. This factor, too, is diluted at the appeals authorization level, because of the absence of any direct, much less ongoing, relationship between the Solicitor General and the courts of appeals.

52. The dynamics of this situation parallel those of the classic game theory problem known as the Prisoner's Dilemma. See R. Luce & H. Raiffa, Games and Decisions 94-102 (1967); see also M. Olson, Jr., The Logic of Collective Action 9-16 (rev. ed. 1971); Hardin, The Tragedy of the Commons, 162 SCIENCE 1243-48 (1968).
ommendations of the many agencies and litigation groups within the government must be established.

What about the authority of the Attorney General and the President? It might in theory be possible to inculcate in the Attorney General, or even in the President and his or her staff, the attitudes that ought to guide the conduct of government appellate litigation. The adverse consequences of fragmentation of authority that militate against agency control of Supreme Court litigation do not provide an objection in this context. But the practical objection from the point of view of the Mendoza Court to regular oversight of government appeals at this level of the executive branch is a similar one. The Solicitor General specializes in conducting federal Supreme Court litigation and governing the taking of federal government appeals. This specialization naturally fosters the development and internalization of the attitudes and special expertise that have been explored above. Particularly important in this connection is the rather intimate relationship between the Solicitor General and the Supreme Court. Not only does the Court depend on the Solicitor General to serve as the primary mechanism for the regulation of its docket, but the Court perceives that it and the Solicitor General share a long term community of interest. The Court knows the character of the Solicitor General's advocacy as well as the reliability of his or her screening. Inevitably, the Attorney General and the President will lack this intimate relationship. Accordingly, they will also lack the resulting strong sense of, and commitment to enforcing, the applicable screening criteria, standards of advocacy and docket limitations. In addition, because of the tradition that the Attorney General serve as a key political adviser to the President, it will be especially difficult for these officers to fulfill the quasi-judicial aspects of the role demanded by the Court of the Solicitor General. In consequence, if the government is to regulate its own appellate litigation in the manner posited by the Mendoza Court, responsibility for doing so must be vested in a Solicitor General enjoying sufficient independence to operate in the mode described above.

The limitations of this argument should also be made explicit. First, it provides no reason for concluding that the Attorney General or the President must never override a decision made by the Solicitor General. An isolated decision made at these top political levels of the executive branch will not destroy the operation of the system approved by the Court in Mendoza. Even if a case not meeting the standards usually

enforced for seeking further review is taken up as a result, the system does not immediately break down. However, if the ability of the courts, particularly the Supreme Court, to rely on the government’s judgment in identifying appropriate cases for its scarce docket is seriously compromised, the result would be quite different. Furthermore, if the willingness or ability of the government’s attorneys to screen cases so as to fit within the docket and resources of the judicial system is significantly undercut, the current willingness of the courts to allow self-regulation by the executive branch inevitably will change.

Second, this argument rests entirely on the needs of the courts, as characterized in *Mendoza*, respecting the operations of the Solicitor General. This is a perspective based on judicial needs, or at least a judicial perception of the public interest regarding the rules that govern the progress of cases through the courts. Of course it also contains an appeal to the self-interest of the executive branch of government: if self-regulation of government appeals in the mode envisioned by the Court breaks down, alternatives that are less deferential to executive branch prerogatives may take its place.

Third, this argument rests largely on the impact on the courts of one aspect of the Solicitor General’s work: the screening function, both at the court of appeals level and especially at the stage of seeking certiorari review in the Supreme Court of decisions of the courts of appeals adverse to the United States. It does not focus on the Solicitor General’s role in litigating government cases in the Supreme Court once they have been accepted for review. But this limitation does little to blunt the force of the argument made respecting the overall conduct of the Solicitor General in relationship to the courts, the agencies and the Solicitor General’s executive branch superiors. The Solicitor General ordinarily cannot alter the fundamental nature of his advocacy once cases are accepted for consideration on the merits. Plainly there is more room for a more conventional style of advocacy once this juncture is reached, but significant restraints remain. Cases before the Court on the merits are generally ones that have passed the screening process used by the Solicitor General, either in petitioning for certiorari or in framing the government’s response to petitions from opposing counsel in cases where the government has won in the courts of appeals. Moreover, in the filings made at the petition stage of the case, the Solicitor General casts the mold in which his or her advocacy may operate. It would be embarrassing, as well as ineffective advocacy, to recharacterize the precedents, statutes or doc-
trines that apply in a case once the certiorari petition has been granted.\textsuperscript{54} Furthermore, the effectiveness of the Solicitor General’s advocacy on the merits—as at the petition stage—depends upon the continued confidence of the Court in the accuracy of the government’s factual submissions and the candor of the government’s advocacy. For instance, the Supreme Court’s willingness to accept and to rely upon the extra-record factual assertions of the government, particularly as to the policy implications of the issues before the Court, is notorious among close observers of the Court.\textsuperscript{55} The factual information involved frequently will not have been assembled, or its relevance appreciated during litigation in the lower courts. In addition, the kind of information involved is often not particularly susceptible to rigorous proof in a traditional adjudicatory setting; it often involves what Kenneth Culp Davis has called “legislative facts.”\textsuperscript{56} Accordingly, it might be harsh to insist that the Court cannot have the benefit of such information, which may well enhance its deliberations. At the same time, the Court is plainly extending to the Solicitor General a unique privilege that reflects a high degree of confidence in the Office’s reliability in such matters. In this context, as at the stage of screening cases for hearing, a striking reciprocity of interest exists between the Court and the Solicitor General. Reliability earns reliance. Reliance promotes reliability.

Let me illustrate this special commonality of interest by making reference again to the litigation in \textit{Mendoza}. I have already mentioned the glowing portrayal of the conduct of the Solicitor General penned by Justice Rehnquist, which forms a linchpin of the Court’s judicial administration rationale.\textsuperscript{57} Here too, the Court placed its reliance squarely on the Solicitor General’s own account of the process he administers and the

\begin{itemize}
\item \textsuperscript{54} See \textit{Bob Jones Univ. v. United States}, 461 U.S. 574 (1983). In this celebrated case the Solicitor General switched sides on the key issue in the case following the granting of certiorari. The Court ultimately approved the position the Solicitor General had abandoned. See \textit{L. Caplan, supra} note 2, at 51-64.
\item \textsuperscript{56} \textit{See} K.C. \textit{Davis, Administrative Law Text} 160 (1972).
\item \textsuperscript{57} \textit{See supra} text accompanying note 28.
\end{itemize}
standards employed in the process. What is most striking about this reliance is not the fact that the Court was willing to accept this account, the effect of which was pointedly self-serving—though I believe it to be accurate, but the fact that reliance on this account was wholly unnecessary to achieve the result in the case. Such reliance was unnecessary because another theory, one not dependent in any respect on the special status of the Solicitor General, was available to the Court as a basis for the decision.

There is a rather remarkable footnote in Justice Rehnquist’s opinion in Mendoza. Omitting only citations, the footnote in question reads in its entirety:

The Government does not base its argument on the exception to the doctrine of collateral estoppel for “unmixed questions of law” arising in “successive actions involving unrelated subject matter.” Our holding in no way depends on that exception.59

The Court’s reference is to what is sometimes known as the Moser doctrine.60 Given the Court’s statement that the case did not involve the Moser doctrine, a reader who took the trouble to glance at the Brief for the United States filed in Mendoza would be quite surprised at what she would find. The lead argument made by the Solicitor General was not one based on the special prerogatives that ought to be attached to government relitigation under his or her auspices. Instead it was an argument based squarely on the Moser doctrine that “Collateral Estoppel is Inapplicable to an Unmixed Question of Law Arising upon the Successive Claims of Different Parties.”61 The argument that the Court endorsed in Mendoza, based on the special nature of government litigation, was offered as a fall-back argument.62 Why did the government frame its argument in this manner and why did the Court respond as it did? My

59. Id. at 162-63 n.7 (quoting Montana v. United States, 440 U.S. 147, 162 (1979)).
60. The Court cites this doctrine to United States v. Moser, 266 U.S. 236, 242 (1924) (doctrine was articulated in dictum but found inapplicable); Montana v. United States, 440 U.S. 147, 162 (1979) (“Moser doctrine” was acknowledged but found inapplicable); and United States v. Stauffer Chem. Co., 464 U.S. 165 (1964) (companion case to Mendoza where Moser doctrine was again found inapplicable and its very vitality questioned). See Mendoza, 464 U.S. at 162-63 n.7.
61. Brief for the United States, supra note 20, at 20. See also id. at 17, 20-25.
62. See id. at 25-36. Moreover, the argument based on the special dynamics of federal government litigation was introduced as a special corollary to the Moser doctrine, offered to remove “any ambiguity in the application of the Moser exception to the issue preclusion doctrine.” Id. at 25. Thus, the government’s brief did not purport to frame the argument on which the Court ultimately rested its decision as a wholly independent submission.
recollection is that the government’s brief led with the Moser doctrine argument simply because the other argument partook too heavily of special pleading. After all, it was an argument by the Solicitor General that he should be accorded a special privilege not accorded any other litigant, in large measure on the strength of the manner in which the Solicitor General conducted his work. Accordingly, a decision was made that the brief should attempt to resolve the issue on the basis of a principle that made no distinction—at least no explicit distinction—between government and non-government litigants: the Moser doctrine. The “special pleading” argument was placed second in the brief.

The Court’s opinion simply reverses the order of the arguments, reaching only the special pleading argument. In fact, it seems to represent that the government had not made the Moser doctrine argument at all. In a sense the ground on which the Court ruled is a “narrower ground” than that offered by the Moser doctrine. Whatever embarrassment the government felt about naked special pleading was not shared by the Court. The Court was not hesitant, indeed it was eager, to expressly exempt the Solicitor General from the rules applicable to private litigants

63. The effect of holding, as the government urged, that the Moser doctrine barred application of collateral estoppel to recurring questions of law in the absence of mutuality would have been to create an exception that primarily benefitted the government.

64. One could read the first sentence of Justice Rehnquist’s footnote to mean only that the argument raised by the government that the Court was treating in its opinion did not rest on the Moser doctrine. But I would be very surprised if anyone who had not read the briefs in Mendoza would so interpret it. This would especially be true of a reader interested in the Moser doctrine who had read the companion decision to Mendoza, United States v. Stauffer Chem. Co., 464 U.S. 165 (1984), in which the Court found the Moser doctrine inapplicable and questioned its continuing vitality.

My own view is that Justice Rehnquist used this misleading language in the footnote in an effort to complete the interment of the Moser doctrine. Justice Rehnquist joined the Court’s opinion in Montana v. United States, 440 U.S. 147 (1979), which markedly undercut the Moser dictum, suggesting that its application would be very narrow. Id. at 164. Justice Rehnquist went to great lengths in Stauffer Chemical to question whether the doctrine retained any vitality at all. See 464 U.S. at 170-73 & nn.3-5. But it was perfectly clear that if any exception to issue preclusion were to be recognized for issues of law that recur in unrelated cases, such an exception would apply a fortiori when there was no mutuality of estoppel. Thus, if the Court addressed the Moser doctrine in Mendoza, it would have been difficult to reject its application. Moreover, if the Court had simply stated that it was pretermitting the Moser issue because there was a narrower ground for decision, the deflating effect on the Moser doctrine would have been somewhat less.

By ignoring the government’s Moser doctrine argument, the Court avoided breathing any life into that doctrine, but still was able to reach the desired result. Moreover, by ruling for the government on the parochial ground chosen by the Court, the Court effectively ensured that the government would have little interest in the future in attempting to pump life into Moser.

65. If this is all that the first sentence of Justice Rehnquist’s footnote was intended to communicate, the choice of wording could scarcely have been less felicitous. See supra note 64 for a more cynical interpretation of this aspect of the opinion in Mendoza.
concerning issue preclusion. The Court was fully prepared to justify this exemption on the basis of the special function played by the Solicitor General in the management of appellate litigation in the federal court system. The medium here reiterates the message: the Court believed it could rely on the candor of the Solicitor General’s advocacy, even when the subject of that advocacy was the benefits provided to the federal court system by the Solicitor General’s traditional mode of operation. At the same time, the Court found it useful to explicitly premise the special prerogatives awarded the government on the Solicitor General’s good conduct.

A final limitation on this argument should be noted. The foregoing exegesis of the Supreme Court’s expectations concerning the independence of the Solicitor General is derived entirely from what I have called the pragmatic or judicial administration rationale for the ruling in *Mendoza*. As indicated previously, however, this is but one of two broad arguments embraced by the Court in support of its ruling. The alternate rationale adopted by the Court sheds a somewhat different light on the question of the Solicitor General’s independence. Only by integrating the two analyses will a complete image of the Court’s expectations of the Solicitor General emerge.

C. The Political Rationale for Mendoza

Although the judicial administration rationale would have been a sufficient basis for rejecting the application of issue preclusion against the government on issues of law in the absence of mutuality, in *United States v. Mendoza*, the Court did not rest its decision on this basis alone. Instead, the Court set forth an alternative rationale with a very different flavor, one based on the inescapable policy element in government litigation.

Government litigation, the Court observed, is an inherently political endeavor. Because of this policy-making element, it is predictable and quite proper for the government to change its position on the merits of questions of law from time to time, especially when there is a change of administrations. Yet collateral estoppel could prevent the executive
branch from completing such changes of position if a decision adverse to the government that goes unappealed for policy reasons is permitted to bind the government in a future case in which the same question of law arises. Thus, respect for the democratic character of the executive branch of government was thought to require that collateral estoppel be limited to prevent one administration from binding its successors on recurring questions of law that arise in litigation with multiple parties.

The impediment to policy flexibility would operate whenever the government changed from a restrictive view of the rights or entitlements of individuals or private entities in a particular context, to a more expansive or generous view, which leads it to acquiesce in an adverse judicial decision, and then seeks to switch back to the restrictive view. That was the situation that gave rise to Mendoza. See 464 U.S. at 156-57 & n.2, 161.

The same phenomenon would not operate when the zigzag course of government policy is the reverse unless there is a party that has standing to challenge the government's adoption of an expansive interpretation of private rights or entitlements. This, of course, often will not be the case. Cf. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) (limiting taxpayer standing); Sierra Club v. Morton, 405 U.S. 727 (1972) (requiring objective injury in fact as a prerequisite for standing). It may be the case, however, when the government's policy affects "private rights"—the rights of private parties inter se, as opposed to "public rights"—claims against the government. Cf. Crowell v. Benson, 285 U.S. 22, 50-51 (1932) (defining these terms). The Court does not explore this point in Mendoza. But if the effect on government policy-making of applying issue preclusion to the government on issues of law is not neutral with respect to the content of the policies involved, there may be all the more reason for concern.

Absent some version of the zigzag repeated change in policy direction, application of collateral estoppel would not appear to restrain changes in government policy. If the government's initial position on an issue is sustained by the courts, collateral estoppel would not preclude a change in policy because the lawfulness of the opposite or different policy would not have been fully and fairly litigated adversely to the government. See Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074, 1078-81 (D.C. Cir. 1987) (en bane), cert. denied, 58 U.S.L.W. 3591 (1988). Of course, if the government's initial position is rejected by the courts, nothing prevents the government from reversing that position.

Accordingly, the political flexibility problem discussed by the Court appears to relate primarily, if not exclusively, to the situation such as that in Mendoza, where the government's initial policy position is rejected, the government—motivated in whole or in part by a change of policy perspective—seeks no further review, and then later on wishes to return to its original position. Viewed in this light, the political rationale for Mendoza appears simply to address a special case that falls within the general problem of regulating the flow of government appellate litigation through application of collateral estoppel on issues of law. The legitimacy of policy change is simply an additional reason why the government should not lose the ability to litigate an issue of law simply because it has once before suffered an adverse decision on the point, and took no appeal.

Mendoza, 464 U.S. at 161-62. See supra note 68 for the practical limitations of this argument.
The pragmatic judicial administration rationale for the rule announced in *Mendoza* is founded on consideration of the interests of the judiciary, especially the Supreme Court, and the public interest—for which the Court assumes the role of spokesman—in the careful and deliberate development of public law doctrine. By contrast, the additional justification offered for the ruling made in *Mendoza* rests on separation of powers considerations and a regard for the healthy functioning of the democratic process in the political branches of government. The Court's concern seems to be that it would be anti-democratic for the application of issue preclusion to permanently bind the executive branch to a position previously taken in litigation and that it is inappropriate for a court to be the instrument that forces the executive branch into the maintenance of such a fixed position.

What does this political rationale add to our image of what the Supreme Court expects from the Solicitor General? The Court recognizes and accepts that litigation on behalf of the United States necessarily involves political considerations. The entry of such political considerations into the conduct of the government's litigation is not portrayed as a taint, but as a desirable concomitant of democratic governance. This assessment extends even to direct reversals of course dictated by the tides of political fortune. Although the Solicitor General's role in implementing policy changes that affect litigation is not explicitly addressed, it must have been obvious to the Court that such policy changes would be mediated through the Solicitor General's advocacy and screening activities on behalf of the government. In that process, the Court indicates, the Solicitor General is not expected or required to act as a passive mirror to the courts, simply reading back what they have said in the past. "While the Executive Branch must of course defer to the Judicial Branch for final resolution of questions of constitutional law," the former is free to request reconsideration of doctrines previously embraced. Similarly, the Court's opinion clearly rejects any notion that the Solicitor General

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70. In *Mendoza*, as in the more widely noted *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 864-66 (1984), the Court treats political flexibility and discretion, even in the hands of an unelected official, as a positive expression of democratic values. *As Chevron*, decided the same term as *Mendoza*, makes clear, the ultimate justification for this position is the accountability of subordinate executive branch officials to the President who is "directly accountable to the people." *Id.* at 865. *See also Motor Vehicle Mfr's. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part); *cf. id.* at 57 (majority opinion striking down agency change of position following change of administrations as arbitrary and capricious because of flaws in agency's reasoning justifying new policy).

should adhere reflexively to positions advocated by his or her predeces-
sors on behalf of the government in the past. "[T]he panoply of impor-
tant public issues raised in governmental litigation may quite properly
lead successive administrations of the Executive Branch to take differing
positions with respect to the resolution of a particular issue."72 It was
understood that, within the domain of policy, the Solicitor General will
ordinarily serve as an advocate in the courts for the positions supported
by the incumbent administration. In addition, nothing in the Court's
opinion suggests that the Solicitor General should serve as the ultimate
repository of policy wisdom or guidance. To the contrary, the Court's
failure to mention the Solicitor General directly in the portion of its opin-
ion that outlines the political rationale for its ruling—in pointed contrast
to the balance of that opinion—suggests that the Solicitor General will be
guided on such policy matters by the position taken by the President and
the heads of those agencies whose operations are affected by particular
litigation.73 Indeed, the Court's explicit reliance on the democratic pro-
cess values that justify allowing the executive branch to change its posi-
tion from time to time, strongly implies that responsiveness to such
guidance is appropriate. Surely the Court would not have made a virtue
out of the freedom of the executive branch to change its position if such
changes reflected nothing more than the Solicitor General's change of
heart or mind.

With the addition of the political rationale of the Mendoza decision,
our portrait of the Supreme Court's expectations of the Solicitor General
acquires a new dimension of complexity, and, it might seem, an element
of contradiction. The Solicitor General is at once to play the quasi-judici-
"al role, typified by detachment, rigorous analysis and candor, in screen-
ning cases and in placing its legal submissions on the merits in the context
of existing doctrine, and the role of a partisan for the incumbent adminis-
tration's policy views as they affect the law. One aspect of this role calls
for considerable independence from the policymaking officials of the ex-
ecutive branch, the other for responsiveness to these officials. Perfor-

73. The Court's position on this seems directly in line with that taken by the Department
of Justice Office of Legal Counsel in its 1977 Memorandum for Attorney General Griffin Bell.
While that Memorandum broadly supports the conception of an independent Solicitor Gen-
eral, it contains this qualification:

[W]e think there is no reason to suppose that . . . [the Solicitor General], of all the
officers in the executive branch, should have the final responsibility for deciding
what, as a matter of policy, the interests of the Government, the parties, or the Na-
tion may require.

See 1977 Memorandum, supra note 1, at 235, reprinted in 21 LOY. L.A.L. REV. 1089, 1097
(1988).
ance of this dual role is made possible, at least in part, by the elementary fact that the Solicitor General is appointed by the President—subject to Senate confirmation. The President thus has ample opportunity to inject his policy views into government litigation by his choice of Solicitor General. Once this choice has been made other mechanisms assist the Solicitor General in performing this complex role.

To meet the Court's expectations, the Solicitor General must attempt to perform his or her political responsibilities without abandoning the posture required by Mendoza's judicial administration rationale. Reconciliation of these two facets of the Solicitor General’s role can be achieved by adherence to two complementary guiding principles. First, these two agendas for the Solicitor General ordinarily are not irreconcilable. Support for administration policy, where it has a genuine bearing on litigation, can usually be achieved without abandoning the Solicitor General's rigorous analysis, detachment from excessive adversarial enthusiasms, forthright assessment of the state of the law, or commitment to self-regulation and restraint in exploiting the Court's resources.74

There are, however, instances when the two sets of obligations appear to collide. Consider, for instance, a situation in which an administration’s policy strongly dictates support for a particular outcome on a question of law with strong policy overtones, such as abortion, school busing for the purpose of desegregation or the availability of habeas corpus relief to a convicted criminal defendant who had been indicted by a grand jury from which all black persons intentionally have been excluded. Assume further that the government has legally respectable arguments to be made, but that all of these arguments have been made to the Court, and rejected, in previous cases. To add a bit more interest to the situation, assume further that the government had previously taken

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74. A good example is provided by the brief filed by the Solicitor General early in the Reagan Administration in a little-known case called Lord v. Local Union 2088, Int'l Bhd. of Elec. Workers, cert. denied, 458 U.S. 1106 (1982). The case involved right-to-work law issues and there was a strong feeling among political appointees at the agency level that the United States should support the grant of the certiorari petition. The Supreme Court had requested that the Solicitor General file a brief reflecting the views of the United States. The administration was thus sympathetic to the views of the petitioner on the merits, but the Solicitor General was simply unable to conclude that the case met any accepted criterion for “certworthiness.” The brief filed by the United States reflected this dual position explicitly. After meticulously reviewing the strengths and weaknesses of the legal contentions on both sides of the case, the brief concludes that Supreme Court review would not be justified, because none of the usual indicia for discretionary review were present. The administration's policy preference for enforcement of state right to work laws was duly stated. Brief for the United States as Amicus Curiae at 18, Lord v. Local Union No. 2088, Int'l Bhd. of Elec. Workers, cert. denied, 458 U.S. 1106 (1982). But the conclusion still read: “Applying this Court’s customary criteria for review on the merits, the petition for a writ of certiorari should be denied.” Id. at 19.
the opposite side of the particular question before the Court, and had been vindicated in that advocacy. Finally, assume that there is simply no reason to believe that the Court will deem the issue ripe for reconsideration in the particular case, and that the government has no argument for reconsideration other than its disagreement with the previous ruling. In these circumstances, is it appropriate for the Solicitor General to file a certiorari petition, or an amicus brief supporting reconsideration?

The key to discerning an answer—at least an answer from the perspective of the *Mendoza* Court—lies in recognizing the interdependence of the twin rationales of that case. *Mendoza* acknowledged that it was necessary and proper for the government, through the Solicitor General, to alter a previously adopted stance on an “important public issue[] raised in governmental litigation.” Indeed, the rule of law adopted in *Mendoza* was crafted in part to make sure that it remains possible for the government to do just this. At the same time, the dimensions of the Solicitor General’s freedom to alter a previously adopted stance cannot be understood without remembering the Court’s judicial administration rationale. The Supreme Court’s willingness to allow the Solicitor General this freedom depends on the Court’s conviction that the government exercises a high level of self-restraint in its dealings with the Court. It is therefore an abuse of the privileges accorded to the government, through its attorney, the Solicitor General, to make this kind of submission to the Court, in any but the most compelling circumstances. The desire of one administration to advise the Supreme Court that it disagrees with the position adopted by its predecessors is not a sufficient reason for doing so. In the situation described above, there is no sufficient justification for the Solicitor General to make the argument supported by administration policy. The Court’s recognition of a legitimately and inescapably political dimension to governmental advocacy does not free the Solicitor General from all restraints on his or her conduct. To the contrary, the privileges and the advantages extended to the government in Supreme Court litigation and in the conduct of its appellate litigation business generally underscore the responsibility that must channel and temper political advocacy.

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75. *Mendoza*, 464 U.S. at 161.
II. THE VIEW FROM CAPITOL HILL

In the first section of this Article I have attempted to look at the conduct of the Solicitor General and his or her staff from the perspective of the Supreme Court. In this section I look at the work of the Solicitor General from the viewpoint of the legislative branch of the United States government, the Congress. I shall argue that the Solicitor General, as the lawyer for the United States in the Supreme Court, has responsibilities that run not only to the executive branch, and the President as its head, but also to the Congress. I do not question that the Solicitor General serves an executive branch function, is properly located within that branch, and may only be appointed by the President—with the advice and consent of the Senate. Indeed, even assuming the continuing vitality of *Humphrey's Executor v. United States*, I very much doubt that the Congress could not constitutionally grant tenure or otherwise restrict the President's power to fire or direct the conduct of the Solicitor General. Instead, I shall argue that the independence of the Solicitor General, within the executive branch, permits him to act in a manner that reduces inter-branch conflict, by displaying due regard for the interests of the legislative branch. Recognition of these obligations to the Congress safeguards our system of separation of powers because it makes it unnecessary in all but extraordinary cases for the Congress to retain its own counsel and become embroiled in inter-branch litigation. At the same time, recognition of these obligations is required for the executive branch to respect the Congress' role as the primary lawmaking arm of our government. In short, precisely because the conduct of litigation on behalf of the United States belongs in the executive branch, but powerfully affects the interests of the legislative branch, the Solicitor General should operate with considerable independence from the top political officials of the Executive. This arrangement is not required by the text of the Constitution or the doctrine of separation of powers commonly understood to be lurking in the structure of text. But it is a powerful and valuable bulwark for separation of powers that should command our respect and our allegiance.

At least two aspects of government litigation vitally and directly affect the interests of the legislative branch. These are the interpretation of statutes and the defense of their constitutionality. It is the handiwork of the Congress that is up for definition whenever issues of statutory inter-

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77. 295 U.S. 602 (1935). *But cf.* Bowsher v. Synar, 106 S. Ct. 3181, 3188 n.4 (1986) (formally pretermitting the question, but sometimes read to cast a cloud on the continuing vitality of *Humphrey's Executor*).
interpretation arise in litigation. And the very vitality of the legislative work-product is obviously at stake when the constitutionality of an act of Congress is challenged in litigation. In his twin role as the government’s Supreme Court litigator and overseer of the pyramid of federal appellate litigation, the Solicitor General plays a critical role in both kinds of cases. It is the Solicitor General who decides whether an appeal should be taken to the Supreme Court when any lower federal court has held an act of Congress unconstitutional in a case to which the government is a party. It is likewise the Solicitor General who determines whether the United States should intervene—or file a brief amicus curiae—to defend the constitutionality of any act of Congress, when a constitutional challenge is raised in an action to which the government is not already a party. When issues of statutory interpretation arise, it is the Solicitor General who will have to address them on behalf of the United States in the Supreme Court. And the Solicitor General’s control over authorization of government appeals to the courts of appeals also gives him or her a substantial degree of control over the manner in which the government will approach statutory interpretation in the lower courts. This much is unremarkable. What happens, however, when the interests of the legislative branch and the policy preferences of the administration in the executive branch collide in this arena? Such clashes do occur. How should the Solicitor General conduct himself or herself in such a setting?

The question is presented in most dramatic form when the constitutionality of an act of Congress is at issue. What if the challenged statute is one that the President or the Attorney General considers unwise—perhaps one enacted over the President’s veto? What if the Attorney General or the President considers the challenged statute unconstitutional? Perhaps it is a statute restricting—or extending—the right to abortions or a statute that places intrusive requirements on state or local government. What is the obligation of the Solicitor General in such a situation? May he or she simply decline to take an appeal from a decision striking down such a statute on the ground that the administration disfavored the enactment of the statute, or because the President or At-

78. See 28 U.S.C. § 1252 (1982) (direct appeal jurisdiction of the Supreme Court); see also supra note 1 and accompanying text.

79. See 28 U.S.C. § 2403(a) (1982) (requiring certification of such cases to Attorney General by any court in which such case is pending); 28 C.F.R. §§ 0.20 (c), 0.21 (1987) (authority of Solicitor General to determine whether intervention or amicus participation shall take place).

80. The Solicitor General also has control over the government’s ability to intervene or file briefs amicus curiae in nongovernment cases, in the Supreme Court and in the lower courts, that present questions of federal law. See 28 C.F.R. § 0.20 (c) (1987).
torney General believes that the Supreme Court ought to disapprove the statute? Alternatively, does the Solicitor General have an obligation to take an appeal in such a case, but remain free to oppose the constitutionality of the statute on the merits in the Supreme Court? Or does the Solicitor General have an obligation to defend the constitutionality of an act of Congress regardless of the administration's view of the statute?

If the Solicitor General takes no appeal in such a case, or opposes the constitutionality of the statute on its merits, Congress can intervene through its own lawyers to defend the constitutionality of the statute. This practice appears to have increased in recent years. But where the Congress intervenes through its own lawyers, the United States may speak with more than one voice in the courts and the executive branch necessarily forfeits its natural monopoly on the function of litigating in the name of the United States. Moreover, the Solicitor General's fidelity to the constitutional command that the executive branch "take Care that the Laws be faithfully executed," is opened to question. This is especially so when the Executive's objection to the statute is purely political—i.e., motivated by considerations other than concern for the unconstitutionality of the statute. Such a refusal to defend the constitutionality of an act of Congress would detract doubly from the constitutional separation of powers. It tends to negate the supremacy of Congress as the lawmaking branch, as well as to countenance faithless execution of the laws. A cardinal virtue of the independence that has traditionally been extended to the Solicitor General is that it protects the nation from the inter-branch collision that would result from such conduct by lawyers purporting to represent the United States.

What if leaders of the executive branch entertain a genuine belief that the statute challenged is unconstitutional? The foregoing analysis remains applicable in most respects. To fail to defend the act of Congress is both to abandon the Executive's constitutional role and to undermine that of the Congress. There is, of course, one significant difference in this setting. If the statute is indeed unconstitutional, it is not entitled to enforcement. An obligation not to enforce it may exist. But the conventional response to this dilemma is to defer to the courts, which uniquely

81. Lawyers for the Congress intervened for this purpose in INS v. Chadha, 462 U.S. 919, 930 n.5, 939 (1983), and in Bowsher v. Synar, 106 S. Ct. 3181 (1986). As these examples illustrate, the increasing use of this practice results primarily from the increased incidence of litigation turning directly on separation of powers issues that pit the institutional interests of the executive branch directly against those of the Congress. See infra text accompanying notes 84-85.
82. U.S. Const. art. II, § 3.
83. Whether there can be any such obligation absent an authoritative judicial decision
possess the authority to decide the constitutionality question in a manner that commands the adherence of all other branches and of private individuals. Because unconstitutionality is rarely plain, statutes are to be treated as part of the law to be enforced and defended by the Executive until authoritatively condemned as extra-constitutional.

This, in fact, is the traditional position of the Solicitor General and the Department of Justice in such cases. The constitutionality of acts of Congress is to be defended in all cases, unless no professionally respectable argument can be made in defense of the statute.\textsuperscript{84} A single exception to this firm rule has been recognized: the Executive remains free to advocate its own interests in any case in which an act of Congress is challenged on the ground that legislative action unconstitutionally invades the prerogatives reserved to the executive branch.\textsuperscript{85} Under the general rule stated above, the Solicitor General fully recognizes and fulfills the obligation that runs to the branch responsible for making the laws, from the branch responsible for their execution. Statutes are defended before the courts unless their defense is futile. In this way, statutes receive recognition as part of the law that must be faithfully executed. Under this general rule the Solicitor General fully discharges the role of the lawyer for the United States, rather than lawyer for any one branch of government or for the President or Attorney General personally. The traditional independence of the Solicitor General from direct political control by the President and the Attorney General makes it possible for the Solicitor General to perform in this manner as the lawyer for the Nation.

When the Executive believes, however, that the Congress has unconstitutionally invaded the province of the Executive, the foregoing analysis breaks down. The relationship of the two branches in litigation becomes directly adversarial. The conflict then is one between the two political branches themselves and not simply between the views held by particular occupants of the two branches at some point in time. When the Executive believes that the constitutional rights or powers of the executive branch have been infringed by a challenged statute, resort must be had to the judicial branch, the only one that possesses the authority to resolve disapproving the statute seems much more doubtful. See Waas & Toobin, \textit{Meese's Power Grab}, The New Republic, May 19, 1986, at 15.

\textsuperscript{84} Whatever ambiguity may theoretically be lurking in the statement of this criterion, it has generally been comprehensible to those who administer it and its administration has rarely provoked controversy.

\textsuperscript{85} This exception has been resorted to in a number of important recent cases that raised separation of powers issues concerning legislative action arguably infringing on executive branch responsibilities. \textit{Chadha}, 462 U.S. 919, and \textit{Synar}, 106 S. Ct. 3181, both fall into this category. See supra note 81.
the inter-branch controversy. In such litigation, which historically has been rare, but which is of great constitutional import when it occurs, it has been thought preferable to allow the branches to litigate before the courts, each with its own counsel, in the conventional adversary fashion. In such exceptional cases the Solicitor General has served as counsel for the Executive.

Congress has enacted several statutes that reflect the expectation that the Solicitor General will defend the constitutionality of acts of Congress challenged on constitutional grounds. It has regularly inserted in Department of Justice Appropriations Acts language requiring the Attorney General to report to officers of the House and the Senate any occasion on which the Department of Justice does not defend the constitutionality of an act of Congress. In those relatively rare instances where the occasion for such a report has arisen, the Attorney General has forwarded a letter, drafted in the Office of the Solicitor General, to the proper congressional officials. At least prior to the advent of the Reagan Administration, the letter that was prepared and transmitted expressly acknowledged the "'oblig[ation] to defend the constitutionality of Acts of Congress in all but the most unusual circumstances.'"87

It is possible to argue for a somewhat broader role for the Solicitor General in deciding whether to defend the constitutionality of an act of Congress, where the incumbent administration considers the statute unconstitutional—in effect a policy of executive activism on constitutional issues.88 (By contrast, I find no plausible argument for permitting the
lawyer for the United States to decline to defend the constitutionality of an act of Congress simply because the administration has nonconstitutional objections to the statute.) Two objectives might conceivably be served by withholding the Solicitor General's support in the courts from a statute that the administration deems unconstitutional. One is instrumental: the incremental impact that the presentation—or withholding—of the Executive's views may have on the ultimate judicial judgment. The other is symbolic: the fulfillment of the felt imperative to "speak truth to power." I do not suggest that either justification for such executive constitutional activism is devoid of weight. However, the cost in terms of erosion of separation of powers is high. To allow or compel the Solicitor General to follow a strategy of executive constitutional activism by serving as an advocate for the incumbent administration's constitutional policy is to undermine our system of separation of powers. There are several dimensions, practical and theoretical, to this corrosive effect. All of them create unwanted tension in the operation of the constitutional plan of our federal government.

As already noted, any departure from the obligation to defend the constitutionality of acts of Congress would encourage the Congress to become regularly engaged in the business of litigation, claiming a share of the mantle of representation of the United States before the courts. This is a phenomenon that has become more common in recent years, in part because of increasingly frequent direct clashes between legislative enactments and executive branch prerogatives.¹⁸ No reason exists, however, to spur that development further. To do so diverts both the Congress and the Executive from the legitimate political means by which policy disagreements between the political branches, even those over issues of constitutional law, are ordinarily resolved. Further erosion of separation of powers would result if Congress were to respond by attempting to limit the President's control over the conduct of government litigation presenting such issues, or to assert direct control over the conduct of the Solicitor General.¹⁹ Ironically, such executive constitutional

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¹⁸ See Tulane Symposium, supra note 87. Even if one accepts the Attorney General's argument that the executive branch is entitled to maintain its own view on a question of constitutional law, subject only to the obligation to respect the judgments of the courts, see Meese, supra note 71, at 983, 985-86, it does not necessarily follow that the Solicitor General should not defend the constitutionality of statutes the administration considers unconstitutional. Attorney General Meese's argument takes no account of the obligation the lawyer for the United States has to the Congress to represent Congress' view that it has acted constitutionally.

¹⁹ See Greenhouse, Many Pitfalls on the Path From Congress to Court, N.Y. Times, Feb. 25, 1988, at B6, col. 2.

²⁰ See infra text accompanying notes 113-17.
activism forces the Supreme Court, in fulfilling its ordained role as final arbiter of constitutional interpretation, to play an undesirably expanded role as mediator of squabbles between the branches. This is hardly a strategy for those who wish to reduce the role of the courts as lawgivers in our society.

At the same time that the Congress is forced by executive constitutional activism to adopt an executive role, the Executive assumes a role that is either legislative or judicial: as a law-maker. If the Executive's constitutional scruples about a statute are borne out by the courts, this role is largely redundant of the judicial role. But if the courts would reject the executive position, the refusal to defend the constitutionality of a statute appears as a challenge to—or an attempt to share—legislative authority. In contrast to a strategy of executive constitutional activism, the traditional operations of the Solicitor General in this area represent the path toward fostering comity and respect between the branches. Edwin S. Kneedler, a senior Assistant to the Solicitor General, has explained the virtue of the latter approach elegantly:

"[T]here are few occasions when one branch of government speaks directly to the other: the State of the Union address; proposals for new laws; vetoes of legislation. There is a great deal of diplomacy about them. Our filings in the Supreme Court are on this short list, and our faith in separation of powers requires us to be respectful as well."\(^1\)

This is a salutary tradition, one of faith in the separation of powers, and respect by each branch of government for the prerogatives of the others. I would not see it discarded.

Similar role conflicts arise in less dramatic form in connection with questions of statutory interpretation. When federal legislation must be interpreted in litigation, what is the proper objective for the Solicitor General's advocacy? May he or she attempt to vindicate an interpretation of the statute that conforms to incumbent administration policy, or the position that the administration favored in the legislative process, even though the Congress may have intended to reject that position? Or must the Solicitor General seek out and urge upon the courts the interpretation that best conforms to congressional intent—even where that intent departs from administration policies? These questions about the Solicitor General's obligations to his client, raise concerns distinct from

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the Solicitor General's relationship with the Supreme Court, considered in the first section of this Article.

The problem presented by statutory interpretation litigation differs from that concerning constitutionality of statutes in several important respects. First, Congress retains the power to clarify its intentions through further legislation if the Executive successfully urges upon the courts a mistaken, unfaithful or distorted interpretation of existing legislation. The same is not true when the courts strike down legislation on constitutional grounds. While this attenuates the problem to some degree, it does not eliminate it, for the Congress ought not have to resort to this expedient to secure faithful adherence to its already-expressed intent. Moreover, the obligation of fidelity to congressional intent, if it is recognized, is owed not to the present incumbent Congress, but to the legislative branch as a whole and specifically to the Congress that enacted the statute in question. The latter may no longer be available to correct a judicial error encouraged by executive advocacy.

Second, problems of statutory interpretation most often present themselves today in an administrative law-making setting. Thus, the litigation in which such problems arise will typically be an action for judicial review of agency action in the form of regulations or an adjudicatory administrative decision. In such cases, the initial interpretation of the statute has been rendered by an administrative agency acting pursuant to authority delegated explicitly or implicitly.\(^{92}\) In such cases, one facet of the Solicitor General's duty to his or her client, the United States, is to defend the agency action. But this does not foreclose argument about the Solicitor General's duty in this situation; it merely complicates the situation further. In fact, there are three competing conceptions of the duty to client of the lawyer for the United States to be considered in this situation: (1) a duty to the Congress to determine, independently of the agency or administration policy, whether or not agency action conforms to Congress' intentions; (2) a duty to the President to frame a position that reflects the administration's view of the law and of appropriate policy; and (3) a duty to the agency itself to make all professionally required efforts to defend the agency's action. Moreover, the Solicitor General's duty to his or her client is also conditioned by the special relationship with the Supreme Court, described previously.

The traditional independence of the Solicitor General helps to reconcile and to balance these competing conceptions of the Solicitor Gen-

eral's responsibility in this situation. The centralization of Supreme Court litigation in the Solicitor General—together with the Solicitor General's jurisdiction to screen the appeals of many government agencies—necessarily restrains the representation of agency interests. This restraint ensures that the government speaks with a single consistent voice on legal issues. It also subjects the agencies to the self-restrained advocacy style I have examined in the first section of this Article, with its attendant long range benefits for the executive branch as a whole, as well as its limiting effects. The independence of the Solicitor General is, with respect to the agencies, a rejection of unqualified agency independence in litigation before the courts. At the same time, the Solicitor General is expected to carefully consult with each agency involved or affected by a pending case, and to give the legal and policy arguments advanced by the affected entity the most serious consideration. Insulation of the Solicitor General from the top political leaders of the executive branch enables the Solicitor General to give agency perspectives substantial weight without discounting broader governmental interests or the policy perspectives of the President and the Attorney General.

The traditions of the Solicitor General's operation also help to ease the tension between executive interests and legislative interests in statutory interpretation cases. In this situation, to be sure, the attorney for the United States is subject to divergent interests somewhat akin to those arising when an act of Congress is challenged as an infringement of executive branch power. Thus, we cannot realistically expect the Solicitor General to be wholly neutral as between executive and legislative interests here. Yet the problems engendered are considerably less severe because the issues are nonconstitutional. Congress' weaponry for overcoming a judicial decision inconsistent with its intent in the area of statutory interpretation is considerably greater than when unconstitutionality is at stake. Perhaps for that reason, and because of partisan divisions within the Congress, Congress as a body is less likely to secure counsel and enter into litigation whenever lawyers for the executive

96. See supra text accompanying notes 84-85.
branch advance a statutory reading that does not comport with legisla-
tive intent.

Congress, however, can be provoked into action. If executive
branch lawyers were to dishonor expressed legislative intent in statutory
interpretation cases in clear-cut fashion, the inter-branch tensions dis-
cussed above would begin to well up. The commitment of the Executive
to the faithful execution of the laws would be placed in doubt and the
Congress prompted to join in litigation. 97 If the Executive made a regu-
lar practice of this it would begin to disrupt the key assumptions upon
which the federal government functions from day to day. The indepen-
dence of the Solicitor General provides a valuable bulwark against such
disruption, though it affords no guarantees. Indeed, if the Solicitor Gen-
eral behaves as the Supreme Court expects him to, the opportunity for
subversion of legislative intent is limited. Candid and rigorous assess-
ment of the merits of cases presented to the Court will sidetrack many of
the cases in which the agencies or the President have flouted the ex-
pressed will of Congress. The need to winnow the caseload to fit the
dockets of the courts will help as well. In other instances the case will go
forward, but the Solicitor General’s forthright advocacy will assist the
courts in vindicating legislative intent even while he or she may urge an
opposite result upon the Court. 98 In fulfilling the expectations of the
Supreme Court, the Solicitor General will simultaneously minimize fric-
tion between the Executive and the Congress as well. By employing his
independence to strike a balance among the competing conceptions of his
duty, the Solicitor General fosters a desirable regime of comity among
the branches of government.

Lest these observations appear entirely abstract or noncontroversial,
let me point out a contemporary context in which adherence to the
course of restraint advocated here seems to be very much in doubt—at
least in some quarters of the Justice Department and in the White House.
President Reagan recently issued Executive Order Number 12,612 on the

97. Caplan charges that this occurred in the formulation of the Solicitor General’s submit-
sion in Thornburg v. Gingles, 478 U.S. 30 (1986). In this instance a number of members of
Congress were prompted to file their own brief amicus curiae addressing the statutory inter-
pretation question in the Supreme Court. L. CAPLAN, supra note 2, at 240-44.
98. Based upon my experience as an Assistant to the Solicitor General, I believe that law-
yers in that Office have taken an expansive view of the lawyer’s obligation to cite opposing
“authority” to the courts in the special situation in which there is relatively obscure legislative
history that tends to conflict with the government’s position. I recall in particular one case in
which highly obscure legislative history divulged in the government’s brief formed a key link in
the opinion of the Supreme Court rejecting the government’s position. See United States v.
subject of federalism. The stated purpose of the Executive Order is to "restore the division of governmental responsibilities between the national government and the States that was intended by the Framers of the Constitution and to ensure that the principles of federalism established by the Framers guide the Executive departments and agencies in the formulation and implementation of policies." The Executive Order contains a ringing affirmation of states' rights and limitation of federal power, and imposes federalism policymaking criteria on federal agencies. In addition, the Executive Order attempts to breathe some life back into National League of Cities v. Usery, by prohibiting executive departments and agencies from submitting legislative proposals to Congress that violate the short-lived test for constitutional federalism that Justice Rehnquist announced in that case. Of greater concern for present purposes, however, are the provisions of the Executive Order governing preemption of state law by federal law, and by federal regulations. Section 4(a) requires federal agencies to take a narrow view of the preemptive reach of the statutes under which they operate.

100. Exec. Order No. 12,612, supra note 99, at 1230.
101. Section 2 of Exec. Order No. 12,612 enumerates "Fundamental Federalism Principles." These include:

(a) Federalism is rooted in the knowledge that our political liberties are best protected by limiting the size and scope of the national government.

(c) The constitutional relationship among sovereign governments, State and national, is formalized in and protected by the Tenth Amendment to the Constitution.

(j) In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual States. Uncertainties regarding the legitimate authority of national government should be resolved against regulation at the national level.

Id. at 1231. "To the extent permitted by law," executive departments and agencies are directed to adhere to a set of "Federalism Policymaking Criteria" listed in Section 3 of the Executive Order. Id. at 1231-32.
103. Section 5 of the Executive Order proscribes legislative proposals that would "(a) Directly regulate the States in ways that would interfere with functions essential to the States' separate and independent existence or operate to directly displace the States' freedom to structure integral operations in areas of traditional government functions . . . ." Exec. Order No. 12,612, supra note 99, at 1232. The quoted language is borrowed directly from the Court's now-overruled decision in National League of Cities. See 426 U.S. at 844, 852 (overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)).
104. Section 4(a) provides:

To the extent permitted by law, Executive departments and agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that Congress intended the preemption
tion, when a federal statute interpreted in this restrictive manner does not itself preempt state law, but does grant rulemaking authority to a federal agency, the Executive Order denies the agency the authority to make rules that preempt state law unless

the statute expressly authorizes issuance of preemptive regulations or there is some other firm and palpable evidence compelling the conclusion that the Congress intended to delegate to the ... agency the authority to issue regulations preempting State law.105

All executive departments and agencies are admonished to utilize this standard to "construe any authorization in . . . [a] statute for the issuance of regulations . . . ."106

The problem with this last provision is simple: the Supreme Court has only recently made clear that this is not the standard that governs whether an agency may, by its regulations, preempt state law. The opinion of the Court in Fidelity Federal Savings & Loan Association v. De La Cuesta107 is unambiguous on this score. The Court explained that the only issues in this setting are whether the agency intended to preempt state law and whether, apart from its preemptive effect, the agency had been delegated authority to adopt the regulation in question.108 By con-

of State law, or when the exercise of state authority directly conflicts with the exercise of Federal authority under the Federal statute.
Exe. Order No. 12,612, supra note 99, at 1232.
This formulation of a standard for determining the applicability of federal preemption appears to conflict with Supreme Court caselaw that allows implication of the intent to preempt upon a much more modest showing. See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).
106. Id.
107. 458 U.S. 141 (1982). This case was successfully litigated by the Solicitor General’s Office early in the Reagan Administration under Solicitor General Rex E. Lee.
108. Id. at 154. The Court explained the relevant principles as follows:
Federal regulations have no less pre-emptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily. When the administrator promulgates regulations intended to pre-empt state law, the court’s inquiry is similarly limited: "If [h]is choice represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."
Id. at 153-54 (citation omitted) (quoting United States v. Shimer, 367 U.S. 374, 383 (1961)). If the regulations are, apart from their preemptive character, within the federal administrator’s delegated authority, the burden was thus placed on the opponent of the regulations to show that Congress meant to preclude the promulgation of regulations with preemptive effect. The approach taken by Section 4(b) of Executive Order No. 12,612 is, in this respect, precisely the reverse.
trast, an analysis that "focus[ed] on Congress' intent to supersede state law" was labeled "misdirected."\textsuperscript{109}

To the extent that federal litigators are subject to these provisions, they create the kind of problem of conflicting loyalties that is discussed above. To put a fine point on the matter, if a case like \textit{De La Cuesta} were to arise again today, would the Solicitor General be bound by the Executive Order to decline to urge the validity of the preemptive regulations there involved?\textsuperscript{110} Whatever the lawful effect of the Executive Order may be,\textsuperscript{111} I would urge that its application to the conduct of the Solicitor General be resisted. For the President to revise the shape of the preemption doctrine, and then require the Solicitor General to apply this executive branch conception of the law, will result in unfair surprise to the Congress. Congress, guided by the prevailing Supreme Court caselaw, could properly have assumed that the authority of federal agencies to preempt state law by their regulations need not be expressly stated in federal statutes. The ethic of inter-branch comity advocated here would be violated if the Solicitor General acts on the President's idiosyncratic view of the applicable law.\textsuperscript{112}

\textsuperscript{109} Id.

\textsuperscript{110} To pose this question requires us to assume that preemptive regulations have been promulgated by a federal agency without the clear indication of congressional intent to authorize preemption that is required under the standard set forth in the Executive Order. There will be no such regulations in the future if agencies consider themselves bound by the Executive Order, although there may be litigation about existing regulations. (The Executive Order does not appear to require systematic reconsideration under its criteria of existing regulations.) Of course, there is a question, distinct from that proposed in the text, as to whether the President can lawfully restrict the authority of agencies to issue preemptive regulations that would, under the Supreme Court's view of the law, be permissible. This latter question turns partly on congressional intent, and partly on the extent of the inherent authority, if any, of the President to direct the exercise of discretionary authority conferred on executive branch entities. Compare Rosenberg, \textit{Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291}, 80 MICH. L. REV. 193 (1981) with Office of Legal Counsel, Memorandum for Honorable David Stockman Re: Proposed Executive Order on Federal Regulation, reprinted in J. Mashaw & R. Merrill, \textit{Administrative Law: The American Public Law System} 150-55 (2d ed. 1985).

\textsuperscript{111} See supra note 110.

\textsuperscript{112} Lawyers on the Solicitor General's staff have informed me that incumbent Solicitor General, Charles Fried, recognizing this difficulty, was responsible for the addition of moderating language to the Executive Order. Apparently the Executive Order as originally drafted allowed regulations to be given preemptive effect only when a statute expressly so authorizes. The present text allows as an alternative basis for such regulations "other firm and palpable evidence compelling the conclusion that the congress intended" to delegate preemptive rulemaking authority. Exec. Order No. 12,612, supra note 99, at 1232. The change, while in the right direction, does not appear to me sufficient to eliminate the difficulty.
III. CONCLUSION

The Solicitor General's relative independence from intrusive supervision by the political leaders of the executive branch has a salutary impact on the administration of our judicial system. Additionally, it promotes the orderly development of judge-made law in response to the most pressing needs of society for clarification or change in the law. This same tradition of independence provides a needed lubricant that eases tensions between the Executive and the Congress and helps to reconcile conflicting interests affecting the interpretation and enforcement of statutory law. Given these beneficial effects, it might be thought appropriate to consider what protection could be provided by law for the independence of the Solicitor General. In the past, when Congress has wished to insulate an executive function from the control of the President, it has used several expedients. Salient among these is the granting of tenure to an executive official by conditioning removal of that official upon a showing of good cause.\textsuperscript{113} Could Congress restrict the power of the President to remove the Solicitor General and at the same time designate the Solicitor General by statute as the Officer exclusively responsible for the functions that he now carries out? Could Congress go still further and reserve the power of appointment or removal of the Solicitor General to itself? Caselaw provides relatively clear negative answers to most of these questions. \textit{Bowsher v. Synar}\textsuperscript{114} precludes direct congressional control over removal of the Solicitor General. \textit{Buckley v. Valeo}\textsuperscript{115} precludes congressional control—beyond the constitutionally mandated “Advice and consent”—over appointment of the Solicitor General. Under \textit{Humphrey's Executor v. United States},\textsuperscript{116} Congress has been permitted to impose “cause” requirements for the removal of certain administrative officials exercising what have been described as quasi-judicial or quasi-legislative functions, while such requirements are impermissible as to “purely executive officers.”\textsuperscript{117} Whatever may ultimately be decided about the constitutionality of placing law enforcement authority in the hands of an “independent regulatory commission”—an issue that has not been conclusively resolved by the courts—the duties of the Solicitor Gen-

\textsuperscript{113} See, e.g., Humphrey's Ex'r v. United States, 295 U.S. 602, 620 (1935). Other devices include creation of multi-member collegially governed agencies, with staggered terms of office and bipartisan membership requirements. \textit{Id.} Wholly apart from any legal objections thereto, collegial governance does not appear feasible for the operations of the Office of the Solicitor General.

\textsuperscript{114} 106 S. Ct. 3181 (1986).

\textsuperscript{115} 424 U.S. 1 (1976).

\textsuperscript{116} 295 U.S. 602 (1935).

\textsuperscript{117} \textit{Id.} at 629-31.
eral must be classified as "purely executive" for this purpose. This is true notwithstanding the powerful congressional interest—and that of the courts—in the manner in which the Solicitor General conducts himself, or herself, as the lawyer for the United States. Viewed in conjunction, the authority to conduct Supreme Court litigation on behalf of the United States, and the broad power of the Solicitor General over most of the field of federal appellate litigation, lie close to the heart of the President's duty to supervise the faithful execution of the laws—too close, I submit, to admit of any legislative interposition.

If statutory tenure is impermissible, what then? I suggest that the answer does not lie in crafting ingenious—but constitutionally dubious—legal restraints on the authority of the President or the Attorney General over the conduct of the Solicitor General. Such devices are ordinarily unnecessary because of the shared interest of the Supreme Court and the Executive in maintaining the advantages that accrue to both from the relative independence of the Solicitor General. When such built-in safeguards prove insufficient, efforts by Congress to restrain executive control over the Solicitor General only compound the separation of powers difficulties that arise from excessive partisanship on the executive side. The preservation of the appropriate independence of the Solicitor General must instead be a task for political action and a test of political responsibility. What is at stake here is, indeed, our faith in the separation of powers.118

118. See supra text accompanying note 91.