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AN OFFICER AND AN ADVOCATE: THE ROLE OF THE SOLICITOR GENERAL

Richard G. Wilkins*

The Solicitor General and his staff of twenty-three attorneys occupy offices located on the fifth floor of the Department of Justice Building in Washington, D.C. The post of the Solicitor General, created in 1870 when Congress established the Department of Justice,¹ has evolved from that of "a courtroom lawyer and the Attorney General's assistant"² to that of the chief appellate litigation officer "responsible for conducting and supervising all aspects of government litigation in the Supreme Court of the United States."³ For the most part, the Solicitor General and his staff have performed their duties in distinguished obscurity,⁴ receiving generally high praise for professional comportment⁵ and rarely prompting public comment or attention.⁶ All that has changed. In 1982, the editorial staff of the New York Times blasted Solicitor General Rex E. Lee for presenting the Supreme Court with "political tract[s]" rather

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¹ The Office of the Solicitor General was established by the Judiciary Act of 1870, ch. 150, § 2, 16 Stat. 162 (1870). The current statutory provisions defining the powers and duties of the Solicitor General are found in 28 U.S.C. §§ 505, 517, 518 (1982).


⁵ See generally supra note 3.

⁶ Indeed, until recently, few individuals were even aware of the Solicitor General or his government function. A neighbor of former Solicitor General Rex E. Lee once "asked Lee's wife what her husband did for a living. 'He's the solicitor general,' his wife said proudly. 'Gee,' the neighbor gushed, 'it must be great being married to a military man!' " Jenkins, The Solicitor General's Winning Ways, 69 A.B.A. J. 734, 736 (1983).
than “principled counsel.” More recently, Lincoln Caplan, author of The Tenth Justice, has charged that “the Reagan Administration has stripped the office of its traditional autonomy, debased its credibility and turned it into an ideological mouthpiece.”

Controversy regarding the role of the Solicitor General is hardly new. Twenty years ago a commentator chided Solicitor General Erwin Griswold for defining his “role as an advocate for the interests of the government and its agencies rather than as a ‘statesman.’” The vigor with which the current critics hurl that same charge, however, is new. Caplan, in particular, forcefully argues that the Reagan Administration has trashed the Office of the Solicitor General. Where the Solicitor General allegedly once had “no master to serve except his country,” he is now—in Caplan’s view—a mere administration sounding post. “For Mr. Caplan, the diminution of the traditions of independence in the Solicitor General’s office is ‘one of the great misdeeds of the Reagan Administration’ and indicates its attitude toward the rule of law.”

Although Caplan’s critique of the Solicitor General’s Office “is largely a polemic against the Reagan Administration,” it raises serious questions. Has the Office of the Solicitor General been subjected to unusual political pressure? A review of the available literature, including articles by past Solicitors General and a comparative statistical study, suggests that the office has always responded to the political inclinations of then-current administrations. Thus, the assertion that the Solicitor General has lost his “independence” is something of an overstatement; he has never been completely autonomous. Nevertheless, the recently perceived political sensitivity of the Solicitor General prompts a more difficult inquiry: How should the Solicitor General respond to ideological demands? Here, no ready solution exists. Those who see the Solicitor General primarily as an advocate of the administration that appointed him will give one answer. Those—like Caplan—who see the

11. F. BIDDLE, IN BRIEF AUTHORITY 97 (1962).
13. Id.
Solicitor General primarily as an officer of the Court and an independent moderating force within the administration will give another.

I believe that the Solicitor General's proper role lies between that of unquestioning advocate and independent officer of the Court. While the Solicitor General appropriately serves as an advocate, his advocacy must be tempered by the realization that he occupies a unique position of influence with the Supreme Court of the United States. Thus, Mr. Caplan notwithstanding, the Solicitor General should support the administration's views on sensitive legal issues. However, in the course of that advocacy, the Solicitor General must never sacrifice his credibility and reliability as a trusted officer of the Court. Maintaining a balance between the sometimes conflicting duties of advocate and officer of the Court is a difficult and often thankless task. The recent experience of Rex E. Lee suggests that a person who accomplishes the feat may have few friends in any quarter—the administration may find the Solicitor General's reasoned advocacy too tame, while political opponents may find any such advocacy outrageous. Achieving and maintaining that balance, however, is the fundamental mission of the Solicitor General.

I. PRESSURE AND POLITICS: THE INDEPENDENCE OF THE SOLICITOR GENERAL

"The volume of work in the Solicitor General's Office is startling . . ."14 The office reviews each case in which a district court has ruled against the United States to determine whether an appeal will be taken to the appropriate court of appeals.15 The office is also "responsible for an unusual form of trial litigation—litigation on the Supreme Court's original docket."16 The "most visible responsibility of the office," however, is the actual conduct of the government's appellate practice before the Supreme Court.17 That responsibility embraces several discrete steps, beginning with the decision "whether the government should petition the Supreme Court for certiorari, or acquiesce in or oppose the petitions filed

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15. Id. at 338-39. The authority of the Solicitor General over government appeals originally derived from Executive Order 6166, June 10, 1933, which transferred to the Department of Justice "the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense . . . ." Id.
16. Id. at 339. Although cases prosecuted originally in the Supreme Court are relatively rare, they are a regular element of the Solicitor General's workload. During the 1968 Term of the Court, for example, the Solicitor General participated in three such cases. Griswold, supra note 3, at 531. From 1980-1983, the Solicitor General participated in an average of 11 such cases each year. 1984 ATT'Y GEN. ANN. REP. 7.
17. Note, supra note 2, at 1445.
by others,” and concluding with the actual preparation and presentation of the government’s cases before the Court. The confluence of these duties imposes a ponderous decision-making burden upon the Solicitor General.

In performing these day-to-day tasks, the Solicitor General and his staff have achieved “an exceptional degree of autonomy.” Much of this autonomy derives from the simple fact that the bulk of the Solicitor General’s staff consists of civil service employees who are not subject to removal for political or ideological reasons. Moreover, the workload within the office is assigned without regard to the ideological leaning of particular attorneys. Additionally, in the vast majority of cases, questions regarding “politics” never arise—the majority of the litigation passing through the office involves matters that simply do not attract political attention. Indeed, freedom from constant political scrutiny is essential to both the efficient functioning of the office and the broader litigation

18. Id. The office, of course, also determines the propriety of filing appeals to the Supreme Court.


20. Former Solicitor General Wade H. McCree, Jr., reported that during the 1979 Term, his office:

handled 2,023 cases in the Supreme Court. We filed sixty-seven petitions for writs of certiorari, and participated in argument or filed briefs on the merits in 108 cases considered by the Court. During this same one year period, there were 426 cases in which the Solicitor General decided not to petition for certiorari, and 1,517 cases in which the Solicitor General was called upon to decide whether or not to take an appeal to one of the federal courts of appeals.


22. See Caplan I, supra note 4, at 43.

23. Several Deputy Solicitors aid the Solicitor General in managing and directing the flow of work within the office. The deputies assign the bulk of cases to the Assistants to the Solicitor General, who actually draft the briefs and pleadings. In my own experience, assignments were made on a relatively random basis, although some consideration was given to the specific areas of expertise or existing workload of a given assistant.

strategy of the government as a whole. The government loses "literally thousands" of cases in the lower courts each year, and the attorneys and officials involved often have strong opinions regarding the future course of those cases. Without a significant degree of independence from disappointed government officials, the Solicitor General would quickly lose the important ability to say "No."

Former Deputy Solicitor General Kenneth Geller once remarked that the Solicitor General "guard[s] the door to the Supreme Court, to make sure that only the most important cases are appealed." This guardianship not only protects the Court from a crushing onslaught of government cases, it also serves the ultimate interests of the executive and legislative branches. As Geller observed, "[w]e want the Court to hear those cases that are the most important to the government—and we think we can do a better job of picking the most important ones than the Court can."

The unanimous opinion of past Solicitors General, as well as the historically impressive success rate of the United States in the Supreme Court, suggest that the Solicitor General's renowned selectivity has indeed paid government-wide benefits.

The general independence so critical to the ongoing successful management of the government's Supreme Court litigation has always had

25. Bork, supra note 20, at 703-05.
26. Jenkins, supra note 6, at 737.
27. As former Solicitor General Erwin Griswold once remarked:
   If the district court in Oklahoma City makes a decision which the United States Attorney doesn't like, he may well tell the press, "I am going to appeal." When I see those statements in the press, I say to myself, "Yes, he is going to appeal if I say he can." But sometimes I don't.

28. Jenkins, supra note 6, at 737.
29. See Bork, supra note 20, at 704 ("We are also under an obligation, I think, to protect the Supreme Court against the filing of relatively trivial and frivolous appeals and petitions for certiorari because the Court's workload is bad enough.").
30. Jenkins, supra note 6, at 737. See also Note, supra note 2, at 1458 ("Without guidance from the Solicitor General and knowledge of the range of agency activities, the Court may . . . find selection of the most important government cases difficult, and petitions for cases of genuine importance might frequently be denied.").
31. See Bork, supra note 20, at 704-05; Griswold, supra note 3, at 534-35; Lee, Lawyering for the Government: Politics, Polemics & Principle, 47 Ohio St. L.J. 595, 598-99 (1986); McCree, supra note 3, at 345-46.
32. The United States is vastly more successful in persuading the Supreme Court to accept its cases, and ultimately decide in its favor, than ordinary litigants. See, e.g., Uelman, The influence of the Solicitor General upon Supreme Court disposition of federal circuit court decisions: a closer look at the Ninth Circuit record, 69 Judicature 361 (1986) ("The overall record compiled by the office of the Solicitor General in recent years can only be described as phenomenal."). See also O'Connor, The amicus curiae role of the U.S. solicitor general in Supreme Court litigation, 66 Judicature 256 (1983); Pugo, The United States as Amicus Curiae, in COURTS, LAW, AND JUDICIAL PROCESSES 220 (S. Ulmer ed. 1981).
limits, however. Despite the fact that Francis Biddle, Solicitor General from 1940 to 1941, once enthused that the Solicitor General “is responsible neither to the man who appointed him nor to his immediate superior” and “has no master to serve except his country,” 33 the “Solicitor General does consult the Attorney General to learn the administration’s position in politically sensitive cases.” 34 Indeed, no recent occupant of the Solicitor General's office has taken Biddle’s “total independence” hyperbole seriously. Former Solicitor General Erwin Griswold candidly observed that

[w]hile Solicitors General have, I think, sought with remarkable consistency to take statesman-like positions on legal matters within their sphere, it seems unwise to lose sight of the reality that a Solicitor General is not an ombudsman with a roving commission to do justice as he sees it. He is a lawyer, though with special responsibilities, who must render conscientious representation to his client’s interests. 35

Wade McCree, Solicitor General under President Carter, has echoed Griswold’s remark, 36 and Rex E. Lee, President Reagan’s first Solicitor, has simply stated that representing administration policy in certain sensitive areas “is a part of [the] job.” 37

Any assertion that the Solicitor General should be free of political suasion ignores the reality that he is an official within the executive branch who serves at the pleasure of the President who appointed him. 38 An exhaustive student note, appearing eleven years ago in the Michigan Law Review, examined the statutory and constitutional foundations of the Solicitor General's power, 39 considered whether the Solicitor General could lay claim to any common law authority, 40 and balanced the respective values of autonomy and political accountability as applied to his office. 41 None of these bases was found to provide solid support for a

33. F. BIDDLE, supra note 11, at 97.
34. Note, supra note 2, at 1444.
35. Griswold, supra note 3, at 527.
36. McCree, supra note 3, at 346 (“This does not mean that the Solicitor General is an ombudsman with a roving commission to do justice as he sees it.”).
37. Lee, supra note 31, at 599.
38. The Department of Justice is part of the executive branch. 28 U.S.C. § 501 (1982). The Solicitor General is appointed by the President with the advice and consent of the Senate. Id. § 505. As a Presidential appointee, the Solicitor is subject to peremptory dismissal. Meyers v. United States, 272 U.S. 52 (1926) (Senate has no authority to check President’s constitutional power to remove any executive officer appointed with advice and consent of Senate).
39. Note, supra note 3, at 331-34.
40. Id. at 334-46.
41. Id. at 346-57.
totally independent Solicitor General. While applicable law may confer
an important policy-making role upon the Solicitor General, he is not an
elected official and "does not have the political legitimacy to advocate on
behalf of 'the United States' independent of Congress and the Presi-
dent." The Solicitor General similarly cannot claim "common-law
stature as advocate for the public interest" because he has no independ-
ent electoral mandate; he "serves as proponent of public interests only
where authorized by Congress and as directed by the President." Finally,"[d]espite the apparent desirability of allowing the Solicitor Gen-
eral a great degree of autonomy," he "has no institutional warrant to
oppose the President" and it is accordingly "difficult to support a
claimed prerogative to defy the President." Thus, the note concluded,
absent legislation designed to make the Solicitor "either truly autono-
mous or . . . accountable solely to Congress," the "Solicitor General op-
erates in an executive capacity" and is "ultimately responsible to the
President and must comply with his bidding." As Justice Sutherland
once noted, "[i]t is quite evident that one who holds his office only during
the pleasure of another, cannot be depended upon to maintain an attitude
of independence against the latter's will."

Of course, the foregoing is only a partial answer to recent claims
that the Reagan Administration has "turned the post of Solicitor General
from a position of independence into the job of a good-natured mouth-
piece." It establishes that the Solicitor General cannot legitimately
claim true independence from the President, but it does not refute the
submission that the Reagan Administration has been unusually heavy
handed in its dealings with its Solicitor Generals. The available evidence,
however, suggests that recent events at the Office of the Solicitor General
do not represent a radical departure from past practice. On the contrary,
past Solicitor Generals have consistently reflected the position of the pre-
siding administration in their presentations to the Court.

Erwin Griswold, who served as Solicitor General under Presidents
Lyndon Johnson and Richard Nixon, and who is generally highly re-

42. Id. at 356.
43. Id. at 344-45 (footnotes omitted).
44. Id. at 356.
45. Id. at 357. The Note expressed grave doubts regarding whether Congress could constitutionally free the Solicitor General from the control of the executive branch. Id. at 357-63. The Note observed that "by conferring the power to execute the laws upon the Executive, the Constitution impliedly bars Congress both from redistributing wholesale this power to nonexecutive agencies and from denying the Executive its prerogative to impart its policy choices upon the conduct of the government's litigation." Id. at 363 (footnote omitted).
47. Caplan II, supra note 8, at 41.
garded even by recent critics,48 "tried to keep the Republicans as happy with his advocacy as he had the Democrats." Indeed, one scholar has noted that Griswold took explicit cues from the Nixon Administration regarding what the Solicitor's position should be in politically sensitive cases.50 Even Caplan, who tries mightily to downplay any political influence upon Griswold's decisions while Solicitor General, reports that Griswold filed a brief in the Pentagon Papers case51 that was contrary to his own "judgments behind closed doors."52 Despite Griswold's own conclusion that "the government should stop objecting to publication of the history, because the only harm that would come of it was political embarrassment," he nevertheless filed a brief asserting that publication of the Pentagon Papers could cause "immediate and irreparable harm to the security of the United States."53 Moreover, while Griswold had consistently taken a strong pro-civil rights stand under President Johnson, he modified his views regarding appropriate civil rights remedies after President Nixon "publicly announced that his administration would no longer support forced busing to achieve integration."54

Robert Bork, who was appointed by Nixon to succeed Griswold, and who served under Nixon and Gerald Ford, was likewise willing to tune his advocacy to reflect administration views. Bork recognized that the Solicitor General "bears a special relationship to the Court" and "owes it complete intellectual candor."55 His tenure nevertheless reflected "the tension between legal principle and political expediency."56 Caplan summarized Bork's service as Solicitor as follows:

Bork regularly found means to carry the Administration's message to the Court. He was a more enthusiastic advocate of Nixon's legal notions than Griswold had been (and, in the process, drove away one assistant who believed that the former

48. The Tenth Justice, supra note 8, at 33-34. See also O'Connor, supra note 32, at 258.
49. The Tenth Justice, supra note 8, at 34 (footnote omitted).
52. The Tenth Justice, supra note 8, at 34.
53. Id.
55. Bork, supra note 20, at 705.
Yale professor had compromised the integrity of the Solicitor General’s judgment about the law), and he was equally forthright about making arguments favored by Ford.\textsuperscript{57}

Any given Solicitor General's enthusiastic sponsorship of administration goals, of course, may stem more from personal commitment to those goals than explicit pressure from the Oval Office. The President’s careful selection of a person committed to the administration’s agenda is, nevertheless, a plain example of political influence on the Office of the Solicitor General.

Jimmy Carter appointed Wade McCree as Solicitor General. McCree, like his predecessors, gave distinguished service during his four years in office. He also glanced toward Pennsylvania Avenue when preparing briefs in politically sensitive matters. When a draft of the government’s brief in \textit{Regents of the University of California v. Bakke},\textsuperscript{58} which supported Bakke and argued against affirmative action, was leaked to the press, substantial pressure to reverse that position—from the White House on down—was brought to bear upon the Department of Justice and McCree in particular.\textsuperscript{59} The brief ultimately filed with the Supreme Court did not support Bakke, but instead urged the Court to remand the matter to the California Supreme Court for further proceedings.\textsuperscript{60} Caplan asserts that the change in position did not result from political pressure, but rather occurred because “the Solicitor General knew about and shared the President’s belief in affirmative action.”\textsuperscript{61} The fact that McCree “shared” the President’s beliefs, however, cannot avoid the pragmatic reality that he “knew about” them, too.\textsuperscript{62}

In any event, the \textit{Bakke} matter is not the only known instance during the Carter Presidency when administration policy exerted substantial influence over the Solicitor’s affairs. After heated public opposition

\begin{footnotes}

57. THE TENTH JUSTICE, supra note 8, at 38 (footnotes omitted).
59. O'Connor, supra note 32, at 261. McCree himself recounts a stormy meeting attended by Joseph Califano, then Secretary of Health, Education and Welfare, and Patricia Harris, Secretary of the Department of Housing and Urban Development, during which Califano and Harris urged him to reverse the stand taken in the draft brief. THE TENTH JUSTICE, supra note 8, at 42, 46.
61. THE TENTH JUSTICE, supra note 8, at 47.
62. \textit{Id.} Knowledge of presidential desires can be a potent political inducement for an appointed official. Indeed, Caplan lambasts attorneys in the Reagan Department of Justice for forming “legal opinions with the President’s political goals in mind.” \textit{Id.} at 84. Caplan’s willingness to absolve of any political effect McCree’s knowledge of President Carter’s desires is accordingly somewhat curious.
\end{footnotes}
greeted the government’s presentation in *Personnel Administrator of Massachusetts v. Feeney,* Attorney General Griffin Bell “instituted[d] a policy requiring the solicitor to give notice to Bell of all cases involving policy issues. This policy permitted Bell to examine the matter, and if necessary, consult with the President before the solicitor’s brief was written.”

In addition to the preceding anecdotal evidence, a statistical study of the amicus curiae presentations of Solicitors Griswold, Bork and McCree confirms that they were sensitive to the ideological viewpoints of their respective administrations. The study examined each case in which one of the three Solicitor Generals had participated as amicus curiae during the 1967 to 1979 Terms of the Court. The briefs were classified as "pro" or "anti" in each of three areas: personal liberties, civil equality and criminal rights. The study found that Griswold, under President Johnson, and McCree, under President Carter, "took decidedly more pronounced 'pro-rights' positions than did Bork" under Presidents Nixon and Ford. Moreover, during their tenure under President Nixon, both Griswold and Bork "adopted 'anti-rights' positions more frequently than McCree." McCree "advanced a pro-civil equalities claim in a slightly higher percentage of his amicus briefs than either solicitors Griswold or Bork." These results were explained, at least in part, by reference to the political agendas of the Johnson, Nixon, Ford and Carter presidencies. McCree's record on civil liberties, for example, "meshes with his philosophy as a jurist, as well as those of the Carter administration generally." The study also concluded that "Griswold and Bork's 'anti-rights' position was probably rooted in the Nixon ad-

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66. Id. at 261. An analysis of amicus curiae presentations has special significance to the question of whether past Solicitors have been mouthpieces for administration policy. At least in one commentator's view this is so because the "Solicitor General's claim to independence from the President is arguably stronger when he appears as an intervenor or amicus since he does so on behalf of himself as protector of the public interest, not on behalf of the President." Note, *supra* note 3, at 355 n.148.


68. Id. at 262.

69. Id.

70. Id. at 263.

71. Id. at 264.
administration's strong law and order stance.”72
The records of Griswold, Bork and McCree are hardly ones of staid independence from presidential politics. And, while nothing in the foregoing details detracts from the professional integrity of any former Solicitor General, their records demonstrate that they consistently advocated views in sensitive cases that were consistent with those of their particular administrations. Thus, nothing terribly surprising—or new—arises from the fact that the Solicitor Generals in the current administration have similarly advocated President Reagan’s views. The charge that President Reagan has “turned [the Solicitor] into an ideological mouthpiece”73 is decidedly overblown; the Solicitor General has always been a mouthpiece. The real question raised by the recent criticisms of the Office of the Solicitor General is not whether the Solicitor General should listen to the President or not. The evidence shows that he always has. The current debate, therefore, boils down to basic disagreement with the positions the Solicitor is advocating. Critics, such as Caplan, may couch their arguments in terms of “misuse” or “abuse” of the Solicitor General’s office, but they are essentially champing at the fact that the Court is being presented with substantive legal arguments they strongly dislike. 74

II. ADVOCATE AND OFFICER: THE CONFLICTING DUTIES OF THE SOLICITOR GENERAL

The preceding discussion shows that, contrary to the conclusions drawn by some critics of the Reagan Administration, one of the legitimate roles of the Solicitor General is that of advocate for the executive branch.75 But, even assuming that the Solicitor General may properly

72. Id.
73. Price, supra note 9, at 13.
74. As one reviewer of Caplan’s book has noted, whether or not Caplan’s “indictment is true depends in large part on a reading of constitutional history.” Id. For example, Price notes:
    if one thinks that fundamental errors have been imposed in constitutional analysis over the last 50 years, if one condemns the application of the Bill of Rights to states’ laws, if one is utterly dismayed by the Court’s views on affirmative action, or reapportionment or prayer in the schools, then the rule of law looks corroded and in need of repair. For Mr. Caplan—because the decisions of this period advancing civil rights, recognizing the right to abortion, correcting deep-seated deficiencies in the structure of state legislatures and confirming a wall of separation between church and state (all arrived at through active constitutional decision-making) are the right ones—the rule of law persists and the actions of the Reagan Administration are hostile to it.
Id.
75. The Solicitor General, of course, also serves as advocate of various government agencies and Congress. Note, supra note 3, at 346-57; Note, supra note 2, at 1459-67. Because of
advocate administration views, an exceedingly difficult question remains: How should that advocacy be performed? The answer to that query, I believe, lies in a proper balance of the potentially conflicting roles played by all attorneys—those of advocate and officer of the court.

Rex Lee has noted that every lawyer "plays two basic roles":

First, the lawyer is an advocate for a client whose objective is to achieve the most favorable result possible in that particular case. Second, he or she is also an officer of the court. In that role, the objective is to assure that the processes function as they should and that justice is done in that particular case and in the courtroom in general.\textsuperscript{76}

The tension between these roles presents all practicing attorneys with difficult questions.\textsuperscript{77} The Solicitor General in particular confronts this tension. Erwin Griswold noted that "essentially, we are advocates, doing our best to present the legal arguments for our great client before the [Court]."\textsuperscript{78} As noted below,\textsuperscript{79} however, the Solicitor General is more than an ordinary advocate and "should be more sensitive to his or her officer of the court responsibilities than a private sector attorney . . . ."\textsuperscript{80} As a result, while the Solicitor General may be an advocate, his advocacy must be tempered by proper respect for the Solicitor General's institutional relationship with the Court.

For many—perhaps most—attorneys, pure advocacy is their raison d'etre. Indeed, many members of the bar may question "whether [a] distinction between the lawyer as advocate for a client and the lawyer as officer of the court has any significance beyond the academic."\textsuperscript{81} Those who see an attorney primarily as an advocate argue that the "only way a lawyer in our system can truly serve justice as an officer of the court is to do the best job that he or she can in representing a particular client in a

\textsuperscript{76} Lee, supra note 31, at 595.

\textsuperscript{77} See Model Rules of Professional Conduct Rule 3.3 comment 1 (Proposed Draft 1987) ("The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal.").

\textsuperscript{78} Griswold, supra note 3, at 536.

\textsuperscript{79} See infra notes 83-88 and accompanying text.

\textsuperscript{80} Lee, supra note 31, at 596.

\textsuperscript{81} Id. at 595.
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particular case . . . ”82 But, whatever the merit of a pure advocacy model as applied to the average private practitioner, it fails to account for the unique relationship of the Solicitor General with the Supreme Court—a relationship so extraordinary that it is not entirely far-fetched to refer to the Solicitor as the “Tenth Justice.”

That unusual relationship between the Solicitor General and the Supreme Court results from several factors: the Solicitor General screens unimportant issues away from the Court and accordingly focuses and directs the development of the law;83 the number of times the Solicitor General appears before the Court far exceeds anything any other advocate is likely to experience;84 unlike other advocates, the Solicitor General develops a personal familiarity with individual Justices and the Court as a whole;85 and the Solicitor General confronts a large variety of prominent and important issues rarely encountered elsewhere.86 Perhaps

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82. Id.

83. See supra notes 29-32. Justice Potter Stewart allegedly once stated that the Justices “referred to the S.G. as a ‘traffic cop,’ who controls the flow of cases to the Court.” Caplan I, supra note 4, at 37. That “traffic cop” function can have a vital impact on the development of the law. Robert Bork, while commenting on the need to protect the Court “against the filing of relatively trivial and frivolous appeals and petitions for certiorari,” emphasized his efforts in “strategic management so that in the cases that make the turning points in the law, the factual record is developed with the complexities and the opportunities of Supreme Court litigation in mind.” Bork, supra note 20, at 704-05.

84. See Caplan I, supra note 4, at 36 (“Of the two hundred and sixty-two cases that the Justices considered on the merits [in 1983], the government took part in a hundred and fifty”); Lee, supra note 31, at 596 (“I know of no other court of general jurisdiction in the world in which one law firm [the Office of the Solicitor General] appears in more than half of its cases.’”). See generally Note, supra note 2, at 1445-46.

85. Caplan notes that “[t]he relationship between the Supreme Court and the Solicitor General’s office has long been more intimate than anyone at either place likes to acknowledge.” THE TENTH JUSTICE, supra note 8, at 19. But, while the frequent interaction of the Justices with attorneys at the Solicitor General’s office could “make the hair stand up on the backs of the necks of private attorneys when they hear about it,” not all of that interaction is of grave moment. Id. (quoting a confidential interview with a Supreme Court Justice). As Rex Lee once related:

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

Jenkins, supra note 6, at 736.

86. See Griswold, supra note 3, at 532-33 (“The range of problems we confront is a vivid lesson in the breadth of activities which involve the government . . . . The contrasts in the nature and significance of the issues are striking. Considerable agility is required for shifting intellectual gears from, for example, a criminal case in which the issues are the lawfulness of a search and the admissibility of declarations against penal interest, to a Labor Board case probing the limits of a union’s power to discipline its members”); McCree, supra note 3, at 340.
the most important factor influencing the Solicitor General's relationship with the Court, however, is the tradition of mutual trust and respect that has pervaded their association. The Supreme Court relies upon the Solicitor General's discretion to represent the government only in those cases which involve critical issues of law or policy. And, in the presentation of those cases, the Solicitor General is expected to instruct the Court "with advocacy which is more objective, more dispassionate, more competent, and more respectful of the Court as an institution than it gets from any other lawyer or group of lawyers." 87

Because of his "special relationship to the Court," the Solicitor General "owes it complete intellectual candor even when that impairs his effectiveness as an advocate." 88 The Solicitor General must view any given case through a different lens than other advocates. When confronted with an administration policy that would require the Court to reexamine recent decisions, for example, the Solicitor General must consider a broader range of factors than immediate administration interests. As Erwin Griswold once noted:

The Solicitor General's client in a particular case cannot be properly represented before the Supreme Court except from a broad point of view, taking into account all of the factors which affect sound government and the proper formulation and development of the law. In providing for the Solicitor General, subject to the direction of the Attorney General, to attend to the "interests of the United States" in litigation, 89 the statutes have always been understood to mean the long-range interests of the United States, not simply in terms of its fisc, or its success in the particular litigation, but as a government, as a people. 90

When presenting a case for the United States, therefore, the Solicitor General must consider not only his client's narrow interests, but also "the values and principles that underlie and animate our system and

("The litigation ranged from Indian treaties to antitrust, from bank robberies to air pollution, and from job discrimination to endangered wildlife species.").

87. Lee, supra note 31, at 597. See also, Caplan I, supra note 4, at 32:

With his assistants and other lawyers for the government, the Solicitor General is among the last attorneys to carry on the custom of arguing at the Court in formal striped pants, dark vest, and tails. The Justices expect the substance of his remarks to be distinguished as well. They count on him to look beyond the government's narrow interests. They rely on him to help guide them to the right result in the case at hand, and to pay close attention to the impact of the case on the law itself.

Id.

88. Bork, supra note 20, at 705.
90. Griswold, supra note 3, at 535.
...the development of the law in general." 91

The Solicitor General’s balanced advocacy has yielded substantial benefits for both the Court and the Solicitor General. “The advantage to the Court is that in more than half of its cases it has a highly-skilled lawyer on whom it can count consistently for dependable analysis rendered against the background of an unusual understanding and respect for the Court as an institution.” 92 In turn, the Court’s respect and reliance upon the Solicitor General has been a substantial boon to the Solicitor General and his clients. “There has been built up, over . . . [the] years since . . . [the] office was first created . . . a reservoir of credibility on which the incumbent Solicitor General may draw to his immediate adversarial advantage.” 93 The Solicitor General’s careful resolution of the tension between his duties as advocate and his responsibilities as officer of the court, therefore, has created reciprocal advantages for both the government and the Court.

This mutual reciprocity of advantage, however, can be quickly undone if the Solicitor General fails to properly accommodate his duties as an advocate with those as officer of the Court. Should the Solicitor General abandon his commitment to “complete intellectual candor” 94 or fail to examine his submissions “from a broad point of view,” 95 the Court will quickly come to view him no differently from any other advocate that appears before it. This would pose grave difficulties, not only for the Court (which could no longer comfortably rely upon the Solicitor General as a “traffic cop”), 96 but also for the Solicitor General and his clients; the Court would not accord the Solicitor General’s presentations any special weight. Chief Justice Rehnquist reportedly has stated: “I don’t think the White House is well served by having a Solicitor General come to the Court and read the legal equivalent of a press release.” 97

The preceding principles are considerably easier to state than they are to put into practice. A government official (whether it be the President or agency administrator) who has just been refused the opportunity to press an issue in the Supreme Court is unlikely to feel that the Solicitor General’s decision is either balanced or fair. And, when the Solicitor General approves a given course, the opponents of that course will share

91. Id. at 534.
92. Lee, supra note 31, at 597.
93. Id. at 601.
94. Bork, supra note 20, at 705.
95. Griswold, supra note 3, at 535.
96. Caplan I, supra note 4, at 37.
97. THE TENTH JUSTICE, supra note 8, at 45 (quoting a letter from Chief Justice Rehnquist).
the same sentiments. As a result, the Solicitor General will always be faced by those who claim he has slipped too far toward one end of the scale, be it as advocate or officer of the Court. The historic solution to this dilemma has been for the Solicitor General to give all sides of a given dispute a fair hearing. As Wade McCree, Jr. once wrote, “[i]t is a process of sorting and sifting, listening and debating, compromising and holding firm—but always discussing. This is the crucible from which the position of the United States is distilled in controversial cases, and it contributes to a sound, critically examined presentation in the Supreme Court.”

Thus, the difficult accommodation of the Solicitor General’s conflicting roles as advocate and officer is made on a day-to-day, decision-by-decision basis.

If it is difficult to balance the duties of advocate and officer, it is even more difficult to ascertain, in the thick of the moment, whether any particular Solicitor General is guilty of upsetting that delicate equilibrium. Caplan and others who have criticized the Reagan Administration Solicitor Generals are convinced that the balance has been undone. Charles Fried, the current Solicitor General and the individual who has borne the brunt of Caplan’s critique, obviously believes otherwise. When asked whether he has, in fact, squandered the Solicitor General’s “special credibility before the highest court in the land,” he replied: “When a person states with vigor and maybe verve a position you don’t like, then you think he ought to say it in a more restrained fashion. On the other hand, if you agree with him, your answer is ‘Right on.’” Accordingly, whether a given Solicitor General has admirably or horrendously performed his official duties depends, in large measure, upon the personal philosophy of the individual making the determination.

What is clear, however, is that a Solicitor General who succeeds in striking a careful balance between his duties as advocate and his responsibilities as officer of the Court is unlikely to receive consistent accolades from any quarter. Those who view the Solicitor General’s role primarily as an advocate for government policy—whether the policy be that of an independent agency, Congress or the President—will chaff at the “broad

98. McCree, supra note 3, at 345.
99. See e.g., N.Y. Times, Aug. 4, 1982, at A22, col. 1 (Rex Lee has presented the Court with “political tract[s]” rather than “principled counsel”); Washington Post, Aug. 18, 1982, at A22, col. 1 (Lee’s brief in Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), is “a dangerous beast”); L.A. Times, Aug. 16, 1982, Part II at 4, col. 1 (“The Justice Department’s brief urging the Supreme Court to give ‘heavy deference’ to the desire of state and local officials to restrict access to abortion is another example of the Reagan Administration’s campaign to turn free choice into a political issue.”).
view” or “intellectual candor” that the Solicitor General brings to bear in his advocacy. On the other hand, those who oppose supporting a given substantive policy will scoff at any advocacy—however broad or intellectually sound. The recent experience of Rex Lee is a good example of this phenomenon.

Lee once told a reporter that “being in this job certainly takes me out of the running for the most popular man in Washington.”101 The observation was no understatement. Administration hardliners questioned Lee’s allegiance when he was less than dogmatic in advocating President Reagan’s social agenda, while opponents of that agenda were outraged when the Solicitor General did support the President. The government’s participation in Wallace v. Jaffree102 is an excellent example of the difficulties the Solicitor General encounters in balancing his responsibilities as an advocate with his duties as an officer of the Court. It also demonstrates why a Solicitor General who maintains that balance is likely to be controversial.

In Jaffree, the District Court for the Southern District of Alabama refused to follow binding Supreme Court precedent and upheld the constitutionality of state-sponsored prayer in the public schools.103 The decision involved the validity of several Alabama statutes. One statute expressly returned vocal prayer to the public schools.104 The second statute merely provided for a moment of silence at the start of the school day.105 The district court had concluded that both statutes were constitutional because, contrary to the Supreme Court’s decision in Engel v. Vitale,106 the first amendment was not binding upon the states.107 Because of President Reagan’s opposition to the school prayer decision, Lee encountered significant pressure to support the district court’s opinion in both the court of appeals and the Supreme Court. Political opponents of Engel viewed Jaffree as an exceptional opportunity to correct “bad” constitutional law.108 However, it was quite clear that the course pursued by the district court was antithetical to the broader interests of the govern-

104. Jaffree, 472 U.S. at 40.
105. Id.
108. As Lee later acknowledged, one can make “a respectable argument” that the first amendment religion clauses should not be binding on the states. Lee, supra note 31, at 600. See also McConnell, Neutrality Under the Religion Clauses, 81 NW. U.L. REV. 146 (1986); Wilkins, One Moment Please: Private Devotion in the Public School, 2 B.Y.U. J. Pub. L. 1 (1988).
ment, and a frontal attack on Engel would have gravely injured the credibility of the Solicitor General. Accordingly, the cases created serious tension between the Solicitor General's duties as advocate and officer. Lee resolved that tension by refusing to authorize government participation in the court of appeals and by limiting the government's presentation in the Supreme Court to support of the Alabama moment of silence statute.

Lee's decision was plainly defensible as an intelligent accommodation of his obligations to his client and the Court. Perhaps the best

109. Full governmental support of the district court's analysis, especially in the court of appeals, would have been highly detrimental to the rule of law. In most cases, where a lower court disagrees with the binding precedent of a higher court, the lower court nevertheless conforms its decision to that precedent—although it may point out difficulties or gaps in the higher court's reasoning and suggest reconsideration. The Alabama district court did not demonstrate such self-control. The Solicitor could not have supported the district court's decision without sending a signal that would have been destructive to the judicial system and injurious to the broader interests of the government. Lower federal courts cannot be encouraged to disregard binding precedent because they "disagree" with it; the judicial system depends for its smooth and orderly growth and operation on the fundamental concept of precedent and stare decisis. Moreover, the government—particularly the branch of government primarily charged with enforcement duties—should never encourage its courts to disregard established law.

110. Despite the plausible historical argument that the drafters of the first amendment never intended to bind state governments, see supra note 108, the fact remains that a lot of water has passed under the bridge since the Supreme Court turned its back on Barron v. Baltimore, 32 U.S. (1 Pet.) 243 (1833), and began applying the Bill of Rights to the states. The founding fathers may not have intended that the states would be bound by the religion clauses, but the contrary is now so widely accepted that it is questioned only by theoreticians and scholars. Whatever the historical validity of Engel, American society is well past the day when the Maryland legislature may establish Roman Catholicism as a state institution while Utah solons select the Church of Jesus Christ of Latter-Day Saints. Moreover, there has been no indication that any current member of the Court is willing to return to supposed "original understandings" by restricting the scope of the first amendment to the federal government alone. Thus, Lee's full support of the district court's opinion in Jaffree would have been the legal equivalent of spitting into the wind; the only sure result would have been a messy face. After leaving his post as Solicitor General, Lee described how the Court would have viewed full support of the district court:

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

Lee, supra note 31, at 600-01.

111. Compelling arguments can be made in support of the constitutionality of a moment of silence provision. See McConnell, supra note 108, at 161-67; Wilkins, supra note 108. Indeed, the Supreme Court's opinion in Jaffree, while invalidating the Alabama moment of silence statute, strongly suggests that a neutral moment of silence provision will pass constitutional muster. Jaffree, 472 U.S. at 57-61; id. at 83 (O'Connor, J., concurring). See also, Karcher v. May, 108 S. Ct. 388 (1987) (Supreme Court dismissed case involving validity of New Jersey moment of silence statute on standing grounds). By arguing in support of a moment of silence
evidence of this is the fact that his actions prompted harsh criticism from both sides of the political spectrum. One conservative critic, who praised the "compelling" and "unassailable" analysis of the only district judge "who has ever openly denied the supremacy of the Supreme Court’s interpretations of the Constitution," depicted Lee as a traitor to fundamental principles for his decision to support the constitutionality of the moment of silence statute rather than "defend [the district court’s] opinion" in the Supreme Court. Critics of the opposite ilk, by contrast, mocked Lee’s "‘strategic use of [his office]’ in pursuing the political goals of the administration." By supporting a moment of silence, they charged, Lee had engaged in "partisan activism in support of conservative ideology" and had "ignore[d] Thomas Jefferson and James Madison."

Similar contrasting views greeted Lee’s performance in other sensitive areas. To “true believers,” Lee was not an advocate but a traitor; to “true opponents,” he was not an officer but a panderer. The truth, of course, lies somewhere in between. I believe that Lee admirably accommodated his obligation to advocate the President’s views with his duties as an officer of the Court. As The Los Angeles Daily Journal noted upon his resignation from office, “by Reagan standards, Lee served his president well while guarding the independence and professionalism that have

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112. McClellan, A Lawyer Looks at Rex Lee, BENCHMARK, Mar.-Apr. 1984, at 1, 5-6.
114. Id. at 8, 9.
115. Lee, for example, filed an amicus brief in City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983), and Planned Parenthood Ass’n v. Ashcroft, 462 U.S. 476 (1983), which argued that state regulation of the abortion decision should be upheld unless it “unduly burdens” the abortion decision. Brief for United States as Amicus Curiae in Support of Petitioners at 4-8, City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) [hereinafter Akron Amicus Brief]. The brief, however, did not explicitly argue that Roe v. Wade, 410 U.S. 113 (1973), should be reversed. Akron Amicus Brief, supra, at 5 n.1. Thus, while the brief advocated the administration’s views on abortion, it did not urge the wholesale transformation of the constitutional law of privacy. As a result, conservative critics blasted the brief for exhibiting "servile deference to recent judicial precedents," McClellan, supra note 112, at 3, while the major liberal newspapers around the country railed against Lee on their editorial pages for weeks. See, e.g., N.Y. Times, Aug. 4, 1982, at A22, col. 1 (“The [brief] goes out of its way to disparage the Court’s famous 1973 abortion decision, Roe v. Wade.”); L.A. Times, Aug. 16, 1982, Part II at 4, col. 1 (“The Justice Department’s brief . . . is another example of the Reagan Administration’s campaign to turn free choice into a political issue and, even more seriously, to remove the Supreme Court from the business of protecting constitutional rights.”).
made the solicitor general’s office one of the government’s special institutions."\(^{116}\)

III. CONCLUSION

The Solicitor General is both an advocate and an officer. Recent assertions that the Solicitor should remain independent and aloof from the administration that appointed him ignore both political reality and history. The Solicitor General has always been an administration advocate. His advocacy, however, has traditionally been framed with a broader view than is ordinarily taken by most advocates. The Solicitor General, moreover, has recognized that his unique relationship with the Court mandates complete intellectual candor.

The foregoing principles, while long recognized and easily stated, are difficult to effectuate. Indeed, as the recent flurry of publications discussing the matter demonstrates,\(^{117}\) Solicitor Generals who balance their respective duties of officer and advocate may prompt controversy. But, despite appearances, that controversy is not new.\(^{118}\) And, as the distinguished tradition of the Office of the Solicitor General attests, the individuals who have held the office have effectuated that balance, and endured any resulting controversy, admirably well. One can only hope, therefore, that the controversy will continue.


\(^{117}\) See, e.g., supra notes 6-9.