

Washington University Law Review

Volume 59 | Issue 1

January 1981

The Solicitor General and His Client

Wade H. McCree Jr.

United States Solicitor General

Follow this and additional works at: https://openscholarship.wustl.edu/law_lawreview

Recommended Citation

Wade H. McCree Jr., *The Solicitor General and His Client*, 59 WASH. U. L. Q. 337 (1981).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol59/iss1/20

This Tyrell Williams Memorial Lecture is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

THE TYRRELL WILLIAMS MEMORIAL LECTURE

Tyrrell Williams served as an outstanding member of the Washington University School of Law faculty from 1913 to 1946. The family and friends of Tyrrell Williams established a lecture series in his honor in 1948. The Lectureship has provided prominent judges, legal scholars, and practitioners with an opportunity to explore issues of the greatest significance to the legal community.

The Honorable Wade H. McCree, Jr., distinguished jurist and public servant, delivered the Tyrrell Williams Memorial Lecture on March 18, 1981, on the campus of Washington University in St. Louis, Missouri.

THE SOLICITOR GENERAL AND HIS CLIENT

WADE H. McCREE, JR.*

I. INTRODUCTION

It is a great pleasure to be with you today at Washington University, and to participate in this distinguished lecture series. As Mr. Donohue has explained to me, one of the purposes of the Tyrrell Williams lectures is to explore the process by which our legal system converts its general goals—such as preserving public order and promoting the welfare of the people—into concrete reality. That, of course, is a large topic. I would like to approach it cautiously, from the perspective of a single government office, the Office of the Solicitor General. To this end, I will share with you a few thoughts on how the Solicitor General discharges his general statutory duty to “attend to the interests of the United States”¹ in the federal courts. More specifically, I would like to discuss how the Solicitor General gets along with his client—the United States—and how he ascertains the “interests” of that client.

It is not uncommon, of course, for attorneys to encounter difficulties

* Solicitor General of the United States; A.B., 1941, Fisk University; LL.B., 1944 (1948), LL.D., 1969, Harvard University.

I want to acknowledge the considerable assistance of Stephen M. Shapiro, Esq., one of my assistants who assisted me with the draft and reviewed the manuscript.

1. 28 U.S.C. §§ 517-518 (1966).

in communicating with their clients and in identifying their interests. Corporate attorneys, for example, must contend with diverse personnel and viewpoints in counselling the modern business firm, which is made up of directors, officers, and employees, as well as individual and institutional stockholders. These problems are multiplied many fold when the client is the federal government. To state the obvious, we are a nation of more than 200 million people; our national government is made up of legislative, executive, and judicial branches; and the work of government is shared by a host of independent administrative agencies and departments within the executive branch. The personnel connected with these offices and agencies are responsible for administering different federal statutes, and, quite naturally, develop differing views on legal and policy issues.

Congress placed the Office of the Solicitor General near the hub of this complex scheme of government. It created the office in 1870, at the same time it created the Department of Justice, as part of an overall effort to centralize control over federal litigation. Congress had high ambitions for the Office and set a lofty standard for its future incumbents by stating in the Committee Report: "We propose to have a man of sufficient learning, ability, and experience that he can be sent . . . into any court wherever the Government has an interest in litigation, and there present the case of the United States as it should be presented."²

Before considering how the Solicitor General attempts to "present the case of the United States as it should be presented," I would like to give you a bird's eye view of the work load of the Office as it operates today.

The Solicitor General, with the assistance of a staff of 20 attorneys, is responsible for conducting and supervising all aspects of government litigation in the Supreme Court of the United States. If the government wins in the lower court, he normally defends that victory in the Supreme Court. If the government loses in the lower court, he must decide whether or not to seek Supreme Court review by petitioning for a writ of certiorari or taking an appeal. In either situation, he must decide how the government's position will be presented on the merits when the Supreme Court decides to hear the case. In addition, the Solicitor General must review each case in which a district court has ruled

2. CONG. GLOBE, 41st Cong., 2d Sess. 3035 (1870).

against the United States to determine whether the United States should take an appeal to the appropriate court of appeals. He performs the same role in the relatively few cases in which the United States or one of its officers is a party to litigation in the state courts. He also must decide whether the United States should file a brief as *amicus curiae* in any appellate court—state or federal—and must decide what position that brief will take. A significant part of the appellate work of the office involves government agencies that have conducted lower court litigation by themselves, such as the National Labor Relations Board and the Securities and Exchange Commission. Many cases also arise from the activities of executive departments of the government.

In addition to this appellate practice, the Solicitor General also is responsible for an unusual form of trial litigation—litigation on the Supreme Court's original docket. Original cases are cases commenced in the Supreme court; cases that have never been before a lower court. The most important of these are controversies between two or more states (in which the United States frequently intervenes), and controversies between the United States and one or more of the states. You may wonder how a busy appellate court such as the Supreme Court disposes of these original matters, many of which take several years, and some of which take several decades, to resolve. In the more leisurely days of the eighteenth century, original cases actually were tried before a jury in the Supreme Court. For example, in *Georgia v. Brailsford*³ the Supreme Court empanelled a special jury, counsel argued to the jury for four days, and Chief Justice Jay delivered the charge to the jury. Bowing to the practicalities of its present case load, the Supreme Court today delegates the resolution of factual issues in original cases to a special master, before whom the Solicitor General and his staff appear as if in a trial court.

The volume of work in the Solicitor General's Office is startling, even to attorneys accustomed to the rapid pace of private practice and judges who are accustomed to the crowded dockets of the federal courts. During the past Term of the Supreme Court (July 1979 to July 1980), the Solicitor General's 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

3. 3 U.S. (3 Dall.) 1 (1794).

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.

During this one year time period, the Solicitor General, with the help of a small staff of attorneys, was called on to handle a total of 4,219 substantive matters. The subjects, of course, were as varied as the activities of the federal government. The litigation ranged from Indian treaties to antitrust, from bank robberies to air pollution, and from job discrimination to endangered wildlife species.

In a substantial number of these cases the legal and policy issues cut across the jurisdictional lines of several different government offices. Attorneys in different government offices held diverse views on the importance of particular cases, the need to pursue further review, the position that should be taken, and the legal analysis that should be presented to the court of appeals or the Supreme Court.

II. THE OCCASIONS FOR DISAGREEMENT

Let me now turn to some of the specific situations in which the Solicitor General's Office is called upon to ascertain "the interests of the United States" and to resolve conflicting claims among different government offices.

A. *The Decision to Take an Appeal, Petition for Rehearing En Banc, or to Petition for Certiorari*

A perennial source of disagreement among government lawyers is the decision whether or not to pursue further review after the government suffers an adverse ruling in a lower court. The Solicitor General must decide whether it is appropriate to take an appeal from the district court, petition a court of appeals for rehearing en banc, or petition the Supreme Court for a writ of certiorari. Our standards in making these decisions are more stringent as cases reach the higher levels of the appellate system. A case ordinarily will be appealed if it has substantial importance to the government and if the government's legal position has a reasonable basis. We do not, however, petition the Supreme Court to review adverse decisions unless the case satisfies the stricter standards of exceptional importance applied by the Supreme Court itself. This usually means that we look for cases involving conflicts

among the circuits or cases involving constitutional or statutory issues of substantial and continuing importance to the enforcement of the law. In addition, we inquire to determine whether the factual record and procedural posture of the case are appropriate to test the legal question in a plenary hearing before the Supreme Court.

Naturally, a government agency or department that loses a case tends to view it as a matter of utmost urgency. But it is the duty of the Solicitor General to serve as a first-line gatekeeper for the Supreme Court and to say “no” to many government officials who present plausible claims of legal error in the lower courts. Our duty to the Court, and our need to preserve credibility when we advise the Court that a case is “cert. worthy,” requires rejection of many such proposals for certiorari.

B. *The Decision to Take a Particular Position as Amicus Curiae*

Disagreements among government officials also arise when the Solicitor General is called upon to participate as amicus curiae in a given case. The suggestion that an amicus brief be filed may come from one or more of the parties, or from one or more government agencies. Not infrequently, federal officials will urge differing, even opposite, positions. Sometimes, the solution is to file nothing. More often, however, the government’s interests in the outcome are too important to be left unspoken and a decision must be made to advocate a particular position. That is also the situation when the Supreme Court “invites” the Solicitor General to “state the views of the United States,” as happens several dozen times each Term. Then we have no choice except to decide which “views” should be put forward.

In *National Gerimedical Hospital v. Blue Cross of Kansas City*⁴ the Eighth Circuit held that the National Health Planning and Resources Development Act created an implied exemption from the federal antitrust laws. The Antitrust Division took the position that the case was wrongly decided and that it conflicted with a series of published business review letters. The Department of Health and Human Services, however, initially was of the view that the decision was correct and should be supported. Through a continuing course of meetings with both agencies, we were able to minimize the differences that existed and to arrive at a position that accommodates the concerns of both

4. 628 F.2d 1050 (1980).

interested parties. Our amicus curiae brief contends that an implied exemption is not called for by the facts of the particular case before the Court, but acknowledges that an implied exemption may be necessary in other situations to make the National Health Planning Act work as contemplated by Congress.

C. *The Decision to Confess Error in a Criminal Case*

One of the most difficult decisions for any Solicitor General is the decision whether or not to confess error in a case—almost always a criminal case—after the United States Attorney has obtained a favorable judgment and a federal court of appeals has affirmed that judgment. This issue arises in rare situations in which the Criminal Division of the Department of Justice, or a member of the Solicitor General's staff, discovers some fundamental error, or some departure from Department of Justice standards, which necessitates a reversal of the conviction. The Supreme Court has prompted the government in the following terms: "The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent."⁵ The Solicitor General has not hesitated to confess error when the method of jury selection was clearly unfair,⁶ when the jury instructions were plainly erroneous and prejudicial,⁷ when the conviction was unsupported by evidence,⁸ when an unlawful sentence was imposed,⁹ or when the defendant's conviction was sustained on a legal theory in conflict with a decision of the Supreme Court.¹⁰

I do not mean to suggest from these examples that the decision to confess error is one to be made lightly. To the contrary, such a decision requires much soul-searching and is to be rendered as a last resort since it is the obligation of the government's lawyer to urge all reasonable arguments in support of a favorable judgment. The United States At-

5. *Young v. United States*, 315 U.S. 257, 258 (1942).

6. *Leonard v. United States*, 378 U.S. 544 (1964). In *Leonard* the trial judge selected a panel of jurors from a group of people who had, only moments earlier, heard another jury pronounce the defendant guilty in a closely related case. The brief filed by the United States not only conceded error but also stated that jurors exposed to such a prejudicial event "should be automatically disqualified from serving at the second trial if an objection is raised at the outset." *Id.* at 545.

7. *Chaifetz v. United States*, 366 U.S. 209 (1961).

8. *Bates v. United States*, 323 U.S. 15 (1944).

9. *Grabina v. United States*, 369 U.S. 426 (1962).

10. *Mariscal v. United States*, 101 S. Ct. 909 (1981) (per curiam).

torney, who has tried the case and has persuaded the court of appeals to uphold the conviction, understandably takes a dim view of confessions of error in the Supreme Court. Moreover the Justices ordinarily benefit from hearing the strongest argument that can be made on each side of a case. Confessions of error by the Solicitor General also generate tensions with lower court judges who have been persuaded by the government to affirm a conviction. Judge Simon Sobeloff, a former Solicitor General, is quoted as saying "When I was Solicitor General, I thought that confessing error was the noblest function of the office. Now that I am a circuit judge, I know it is the lowest trick one lawyer can play on another."¹¹ On this subject, Learned Hand commented with characteristic directness: "It is bad enough to have the Supreme court reverse you, but I will be damned if I will be reversed by some Solicitor General." As a former Circuit Judge who has had first hand experience with confessions of error in the Supreme Court, I naturally sympathize with these views. Nonetheless, a long tradition in the Solicitor General's Office supports confessions of error when required by the public interest. Robert Stern observed: "Every Solicitor General for years—I am told since at least 1890—has been willing to concede the government was wrong when he was convinced of that fact."¹² This practice is consistent with the words of Solicitor General Lehman, which today are inscribed on the rotunda near the Attorney General's Office: "The United States wins its point whenever justice is done its citizens in Court." Or, in the words of the Supreme Court itself, the "interest [of the national sovereign] is not that it shall win a case, but that justice shall be done."¹³

D. *The Decision Not to Defend the Constitutionality of a Statutory Provision*

Perhaps the most sensitive decision for a Solicitor General is the decision not to defend the constitutionality of a statute enacted by Congress and signed by the President, or to affirmatively contest the constitutionality of a statutory provision as an *amicus curiae* in the Supreme Court. In such cases, the Solicitor General's Office is called upon to give full faith and credit to the fundamental law embodied in

11. Cox, *The Government In The Supreme Court*, 44 CHI. B. REC. 221, 225 (1963).

12. Stern, *The Solicitor General's Office and Administrative Agency Litigation*, 46 A.B.A.J. 154, 158 (1960).

13. *Berger v. United States*, 295 U.S. 78, 88 (1935).

the Constitution, even at the expense of the federal statute. In *Cooper v. Califano*¹⁴ the district court enjoined discriminatory gender-based distribution of death and disability benefits to spouses of wage earners. The gist of the complaint in that case was that Section 202 of the Social Security Act provided benefits for female spouses, but denied those same benefits to male spouses in identical circumstances. The Supreme Court's recent unanimous decision in *Weinberger v. Wiesenfeld*¹⁵ held that such gender-based discriminations under the Social Security Act violated the Fifth Amendment. In light of that recent authoritative pronouncement from the Supreme Court, the Solicitor General decided to notify Congress that the district court's decision would not be appealed.

Congress has established a statutory mechanism¹⁶ that requires the Department of Justice to advise it of a decision not to defend the constitutionality of federal statutory provisions challenged in the courts. This procedure permits Congress to designate a representative, if it so chooses, to defend the statute. There is precedent for congressional participation in the Supreme Court to defend statutory provisions that the Solicitor General deems to be in contravention of the Constitution.¹⁷

III. THE QUEST FOR THE INTEREST OF THE UNITED STATES

Congress has charged the Solicitor General with the duty to "attend to the interests of the United States."¹⁸ In view of the large volume of litigation that he handles, and the many occasions for disagreement among interested government officials, how does the Solicitor General perform that task? As any sophisticated observer will quickly recognize, the task cannot be performed by trying to identify a particular official or office as "the client," for, as my predecessor Francis Biddle

14. 81 F.R.D. 57 (E.D. Pa. 1978).

15. 420 U.S. 636 (1975).

16. Department of Justice Appropriation Authorization Act, Fiscal Year 1979, Pub. L. No. 95-624, § 13, 92 Stat. 3459 (1979).

17. See, e.g., *Myers v. United States*, 272 U.S. 52, 65-77 (1926), in which Senator George Wharton Pepper argued the position of Congress at the bar of the Supreme Court and disagreed with the position of the Solicitor General. See also *Buckley v. Valeo*, 424 U.S. 1 (1976), in which several members of Congress submitted amicus curiae briefs supporting the constitutionality of a statutory provision challenged in the Solicitor General's amicus curiae brief.

18. See note 1 *supra*.

correctly stated: "The client is but an abstraction."¹⁹ Certainly not even the hardest platonist would hope to discover the "interest of the United States" by speculative effort alone. In fact, the "interest of the United States" is best understood in functional terms—as the end-product of a dynamic process of decision-making involving many participants. That process operates within the framework of a body of procedures and standards that have the sanction of long tradition in the Solicitor General's Office. It 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.

The following is a summary of the procedures that we observe before formulating a legal position. The first, and perhaps most important, procedural rule is to give all interested government officials a fair hearing. We receive written submissions from them, permit them to challenge opposing views, and meet with them in person to iron out differences that can be resolved. As our court papers are drafted, we continue to consult with interested agencies and attempt to accommodate their concerns.

A second essential rule followed by the Solicitor General's Office is to avoid any appearance of formulating "policy" for the agencies. As former Solicitor General Erwin Griswold has observed, the Department of Justice is not "a super-agency ratifying or vetoing determinations made by other departments or agencies—Congress has committed elsewhere the primary responsibility for most of the policy decisions which steer the engine of government."²⁰ Our customary business is to ascertain the meaning of statutes, deferring to reasonable agency interpretations, and to assess the importance of particular cases with the help of our client agencies and departments.

A third principle is that we are equally exacting in dealing with all government offices that request extraordinary review through a petition for a writ of certiorari. All agencies of government share a long term interest in preserving the credibility of the Solicitor General's Office in the Supreme Court. We want the Justices to continue to assume that we will not seek their review unless the issues in the case are ready for,

19. F. BIDDLE, IN BRIEF AUTHORITY 97 (1962).

20. Griswold, *The Office of the Solicitor General—Representing the Interests of the United States before the Supreme Court*, 34 MO. L. REV. 527, 528 (1969).

and are worthy of, the Court's consideration. As Robert Stern pointed out:

[S]elf restraint in petitioning for certiorari [gives] the Court confidence in Government petitions. It is hoped and believed . . . that the Court will realize that the Solicitor General will not assert that an issue is of general importance unless it is—and that confidence in the Solicitor General's attempt to adhere to the Court's own standards will cause the Court to grant more government petitions.²¹

Our efforts in this direction have borne fruit. Although the Court granted only six percent of the private petitions for certiorari filed last Term, it granted eighty percent of the government's petitions.

A final procedural principle is that when the discussion process is over and well-grounded differences of opinion on the merits of a legal issue remain, the Solicitor General will attempt to convey both points of view to the Court. This may be done by filing a brief that sets forth both points of view, or, very rarely, by permitting an agency to file a brief or petition of its own that is authorized by the Solicitor General but not endorsed by him. This, I should stress, is a measure of last resort. The Supreme Court normally expects us to reconcile the disparate views of the government and to speak with one voice. That is, after all, why we have a Solicitor General.

In addition to adhering to these procedures, we attempt to abide by certain substantive requirements that have been part of the tradition of the Solicitor General's Office for many years. We guide our deliberations by fundamental legal mandates—the Constitution, statutes enacted by Congress, and decisions of the Supreme Court. Beyond this, we are guided by the practical requirements of uniformity in our presentations to the federal courts at all levels, regardless of our litigating role as plaintiff or defendant in a particular case. Finally, and perhaps most importantly, we try to fix our eye on the overall public interest when formulating the position of the United States in a particular case. This does not mean that the Solicitor General is an ombudsman with a roving commission to do justice as he sees it. It does mean, however, that he must try to place each case in context, viewing it as part of a continuing litigation process and recognizing its significance outside of the halls of government. My predecessor, Erwin Griswold, has well described the Solicitor General's focus on the public interest in the following terms:

21. Stern, *supra* note 12, at 156.

The unique opportunity to be statesman-like while, still being a lawyer, comes from the recognition that our immediate client, the United States government and its agencies, owes responsibility to all the people of this Nation who have determined that they will live under a constitutional regime where the Rule of Law binds all.²²

Statesmanship of this kind, as Dean Griswold notes, requires the government's advocate to "recognize the larger interests at stake, interests which may warrant conceding a momentary advantage that would ultimately distort or retard the achievement of a greater goal."²³

22. Griswold, *supra* note 20, at 527-28.

23. *Id.*

