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Office of the Solicitor General-Representing the Interests of the United States before the Supreme Court, The

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THE OFFICE OF THE SOLICITOR GENERAL—REPRESENTING THE INTERESTS OF THE UNITED STATES BEFORE THE SUPREME COURT*

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I. INTRODUCTION

A recent study of the Solicitor General's office—dealing with my predecessors over the past twenty-five years—objected that on too many issues the Solicitor General had seen his role as an advocate for the interests of the government and its agencies rather than as a "statesman."[1] Now, it is true that lawyers in the Office of the Solicitor General, like diplomats, do wear striped trousers when they appear in Court. Whether they should undertake otherwise to emulate statesmen is a question which must always concern the lawyer who holds the office of Solicitor General, and I propose to give some consideration to it in this lecture.

By way of introduction, I may say that statesmanship does not require complete detachment from loyalty to one's government, nor neutrality about the resolution of a dispute. Better indicia of statesmanship may be found, I think, in an ability and a willingness 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. While 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.

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

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*This speech was delivered by the honorable Erwin N. Griswold at the Earl F. Nelson Lecture on March 14, 1969.

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1. Werdegar, *The Solicitor General and Administrative Due Process: A Quarter-Century of Advocacy*, 36 GEO. WASH. L. REV. 481, 514 (1968).

this Nation, who have determined that they will live under a constitutional regime where the Rule of Law binds all. With this perspective, it sometimes develops that the particular case which is pending before the Supreme Court may have aspects or possible repercussions which must be fitted into a larger mosaic. As counsel for the United States before the Supreme Court, it is inevitably the Solicitor General's function to consider not only the immediate case, but also the collateral consequences of the position he may take in presenting it.

With rare exceptions, the conduct of litigation in which the United States, or any of its agencies or officials are involved is by law reserved to officers of the Department of Justice, under the direction of the Attorney General.[2] And subject to his general supervision, and pursuant to statutory provision,[3] the Attorney General has assigned to the Solicitor General the responsibility to handle all of the government's litigation before the Supreme Court.[4] Thus the Solicitor General has a steady grist of cases, and with them the responsibility to present them to the Court with the arguments and in the light which will best serve the overall interests of the United States, and the sound growth and development of the law insofar as it inevitably develops through judicial decisions.

In actual practice, there is rarely a conflict between the position sought to be advanced in a particular case and the larger interests of the government. Two propositions that are basic to our system serve to ensure that control over the government's litigation does not transform the Department of Justice into a super-agency ratifying or vetoing determinations made by other departments or agencies: the first is the recognition that Congress has committed elsewhere the primary responsibility for most of the policy decisions which steer the engine of government; and the second is the understanding that our judicial system presupposes that the clash of arguments presented by professional adversaries is the most reliable process for determining the legality of any activity. Although I might be challenged on this by the law officers of some of the administrative agencies or other executive departments, I think that Solicitors General have been careful as well as thoughtful in the exercise of their authority to make the critical determination of what the legal position of the United States government will be—even though it is occasionally exercised in its ultimate form in the confession of error.

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2. 28 U.S.C. § 516 (1964).
3. 28 U.S.C. § 518 (1964).
4. 28 C.F.R. § 0.20(a) (1969).

Any Solicitor General is inevitably aware that he is basically an advocate. Within wide limits it is not for him to decide the cases which are before the Court—that is for the Court. But he is also aware that the office involves some incidents of statesmanship. The origins of the Office, its official responsibilities, and the obvious differences from private law offices, all reflect this unusual status. It is to these factors that I would like to turn now.

II. History of the Office of the Solicitor General

One of the great—and often self-effacing—agencies of our government is the Department of Justice, staffed by hundreds of lawyers, with offices not only in Washington, but all over the country, to serve as the government's advisers and courtroom representatives. But it has not always been that way. Though the first Congress provided for an Attorney General in 1789, he was given no professional staff and the post lacked the luster of some of the other offices now regarded as cabinet positions. The government's legal problems in the early days of the Republic were neither extensive nor, often, challenging. Indeed, in 1801, Theophilus Parson of Massachusetts, nominated to be Attorney General and confirmed for the post by the Senate, declined to accept the office. And in 1864, Joseph Holt of Kentucky refused to accept President Lincoln's nomination to serve as Attorney General.

While the government's legal problems were expanding, however, the Attorney General had neither the authority nor the staff to manage them. The law officers of the various departments for the most part conducted their own legal affairs, and not until 1859 did Congress provide for an assistant to the Attorney General to aid in handling those matters within the Attorney General's jurisdiction.

In the mid-19th century, there developed a great increase in the number of legal issues arising from the governance of a Nation with expanding frontiers and responsibilities. This burgeoning legal business outdistanced the capacity either of the Attorney General or of other government lawyers to handle, and it became necessary in many cases to appoint private counsel to conduct the government's litigation. Experience showed that this resulted in loss of control over the government's legal positions, and it also proved to be very expensive.

Or so Congress believed. Looking for ways to make the government more efficient in the post-Civil War period, the Joint Committee on Re-

trenchment concluded that great savings could be achieved, with the collateral advantage of securing uniformity of position, by creating a Department of Justice, to be headed by the Attorney General, and assigning to it the general responsibility for managing the government's litigation. It was at this time in 1870, nearly a hundred years ago, as part of that "measure of economy,"[5] that Congress determined that henceforth there should be "an officer learned in the law, to assist the Attorney General in the performance of his duties, to be called the solicitor general * * *."[6]

Needless to say, it is gratifying to me that Congress has retained the insistence that in selecting a Solicitor General, the President should choose a man "learned in the law."[7] This is not required even for judges, and there are few, if any, other federal offices which have such an accolade.

As originally conceived by Congress, the Solicitor General was to be capable of conducting the government's evolving legal affairs wherever they might have been in suit. The sponsor of the bill which created the office thus explained:

> We propose to have a man of sufficient learning, ability, and experience that he can be sent to New Orleans or to New York, or into every court wherever the Government has any interest in litigation, and there present the case of the United States as it should be presented.[8]

At least insofar as my thirty-three predecessors are concerned, I think remarkable care has been taken to achieve the Congressional goal that the "case of the United States" should be presented "as it should be presented." That, I suppose, can serve as the text for my remarks tonight.

III. Functions and Responsibilities

When I was just out of law school, I had the privilege of serving under three Solicitors General, and this has, I think, given me a perspective that I otherwise might not have had. Another consequence of this prior tour is the vivid realization of how disparate the government's legal interests have become, and how staggering is the volume and variety of questions the Supreme Court, in this era, is called upon to consider.

Before illustrating these points, I should say a word about the precise

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5. Cong. Globe, 41st Cong., 2d Sess. 3038 (1870); *see also, Id.* at 3065; *Id.* at 4490.
6. Act of June 22, 1870, § 2, 16 Stat. 162.
7. *See* 28 U.S.C. § 505 (1964).
8. Cong. Globe, 41st Cong., 2d Sess. 3035 (1870) (Cong. Jenckes).

functions now entrusted to the Solicitor General. The statute providing for the position states rather flatly that the Solicitor General is to assist the Attorney General in the performance of his duties.[9] As you are no doubt aware, the Attorney General has in turn assigned to the Solicitor General the responsibility for conducting and supervising "all Supreme Court cases" in which the government is interested.[10] Two other duties are specifically entrusted to the Solicitor General, duties whose import, surprisingly, the Bar in general, and even lawyers involved in government litigation, do not appreciate. The Solicitor General must pass upon every case in which a decision is rendered in *any* court against the government, to determine whether or not to authorize an appeal to some higher court.[11] While some of these matters involve the question whether to seek review in the Supreme Court—the phase of our work most generally recognized—by far the greater volume consists of cases which the government has lost in a district court; the Solicitor General must then decide whether the decision should be appealed to a court of appeals. In addition, the determination whether to file a brief *amicus curiae* in *any* appellate court, and if so what position to adopt, is committed to the Solicitor General.[12]

The Solicitor General's office is staffed by ten lawyers—three Deputy Solicitors General and seven Assistants to the Solicitor General. During the most recent full Term of the Supreme Court, the Office handled 1274 different Supreme Court cases, some 36 per cent of all those on the Court's docket for the October 1967 Term.[13] This number included 38 certiorari petitions filed by the government, and *amicus* support for 17 others; it also included 887 cases in which the government appeared as the respondent, either to oppose certiorari or to suggest some other disposition, and twelve in which we appeared as *amicus* to oppose certiorari.[14] The government in that period also filed eleven appeals to the Supreme Court, and supported four others, while in fifty cases we appeared either as appellee or as *amicus* on behalf of the appellee.[15] We also participated in three cases in that most unusual category, the Court's original docket.[16]

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9. 28 U.S.C. § 505 (1964).
10. 28 C.F.R. § 0.20(a) (1969).
11. 28 C.F.R. § 0.20(b) (1969).
12. 28 C.F.R. § 0.20(c) (1969).
13. 1968 ATT'Y GEN. ANN. REP., Table VIII 98.
14. *Id.*, Table IX 99.
15. *Id.* at 100.
16. *Id.* at 101. [The totals given in this specific breakdown do not coincide with the total number of cases on the docket in which the government participated, because the specific figures related only to cases actually *acted upon* by the Court during the Term.]

One may say, without being charged with overstatement, that these figures are indeed formidable—exceeded only by the Court's own caseload, which, of course, includes the additional "non-government" cases.

Even these statistics, however, do not tell the full quantitative story of the Office's caseload. In addition to the cases in which we actually participated before the Supreme Court, it was necessary to consider 343 cases in which we determined *not* to petition for certiorari and 28 cases in which a direct appeal was *not* taken. And added to these are the 892 cases in which the Solicitor General was called upon to consider whether to authorize taking a case to one of the courts of appeals. It may surprise some members of the Bar to know that in less than one third of the cases lost by the government in the district court was an appeal to the courts of appeals authorized—264 cases out of 892.

If you total these various figures you will find that well over 2000 different matters were passed upon by the Office of the Solicitor General in the last fiscal year. Not all of them demand the same amount of deliberation, of course, and what would be a literally impossible task for me and my staff becomes practicable only as a result of the able and highly professional assistance we receive from the functional divisions of the Department of Justice and from the other departments and agencies involved. Because of the thorough work that is done by these offices and the careful review and rewriting by my own staff, which all these matters receive before being placed on my desk, I have been able to continue the important practice of my predecessors of personally passing upon every one of the 2000-plus substantive matters that must be resolved by my office. This is something like eight a day for every working day in the year, and it keeps a lawyer busy. Some of it is routine. Much of it is fascinatingly interesting.

The range of problems we confront is a vivid lesson in the breadth of activities which involve the government. A substantial portion of our work includes, of course, federal criminal prosecutions, many of which appear on the Court's Miscellaneous Docket, where indigents are granted leave to proceed without prepayment of costs. But every year we handle several major antitrust cases, a heavy volume of tort claims and federal employee grievance cases, scores of cases covering the federal tax code, and large numbers of administrative agencies cases.

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. The point may be illustrated in another way. While the dollars-and-cents amount in suit is not always a reliable index of the significance of a particular case—*Flast* v. *Cohen*,[17] last Term, could be cited for that proposition—a comparison of two very recent cases will mark the extremes. On the third of March, the Court decided *United States v. Louisiana*,[18] involving the question how and where the boundary should be drawn between off-shore lands owned by Louisiana in the Gulf of Mexico and those owned by the United States. Justice Black, in his dissent, stated that he was dismayed that the United States had insisted on claiming the disputed tracts, since a comparison of the acreage at issue with the federal government's other land holdings showed the controversy was over infinitesimal plots. But beneath those relatively small areas lies untold wealth in oil—whose value cannot accurately be predicted but is variously estimated at between several billion and one trillion dollars. There is already over a billion dollars held in the Federal Treasury awaiting the ultimate outcome of the case.

On February 24, one week before, the Court refused to grant certiorari in a case where we opposed further review, a case where the *ad damnum* clause claimed 3 cents—with no hidden millions lurking in the background.[19] The case involved an addressee who had been sent a special delivery letter on which there was insufficient postage. In order to obtain the letter, the addressee paid the 3 cents postage due, protesting that the letter had not received special delivery service because it was held at the post office on account of the postage due. He brought suit against the local postmaster, demanding a refund of three cents; he believed the principle involved—that's "* * *-p.l.e." not the principal, "* * * *-p.a.l."—to be so important that he carried the case to the Supreme Court. Though he proceeded *pro se* his pleadings were printed in accordance with the Rules, no doubt costing him hundreds of dollars, and he paid the $100 docketing fee to have the case placed on the Appellate Docket.

IV. Comparison with Non-Government Law Offices

Most lawyers work hard, and many have the good fortune to be exposed to a variety of legal problems. The Office of the Solicitor General is not unique in those regards, although I believe the range of issues we con-

17. 392 U.S. 83 (1968).
18. 394 U.S. 1 (1969).
19. Hughes v. Gengler, 393 U.S. 1085 (1969).

front far exceeds anything a private practitioner, or even another government lawyer, encounters. But I would like to turn now to some of the characteristics of our professional endeavors that may fairly be termed unique. The differences are several, but they all derive from the principal official responsibility of this office, which is the representation of the United States before the Supreme Court. Flowing from this high professional duty are several consequences. First, and most obvious, is that the Solicitor General and his staff appear with unrivaled frequency before the highest court in the land. Last Term, for example, the government appeared in 115 cases argued on the merits before the Supreme Court, which means that we were involved in nearly two-thirds (64 per cent) of all the cases the Court heard on the merits.[20]

One of the corollaries of this regular—but never routine—opportunity to appear before the Court is an institutional one which can never be overlooked. When the Solicitor General or a member of his staff stands before the Court, it is not as an individual lawyer representing a particular client whose immediate and personal interests are *sub judice*. He is there, rather, as a part of an institutional relationship of a continuing nature. In determining the legal position to be advanced and in framing his argument, his effort cannot focus simply on success in the particular case. Instead, he must make a rather difficult judgment: What *should* he ask the Court to decide; how much ought he to prevail upon; what will be the effect of a particular position or decision in this case, not only upon the government's interests, narrowly considered, but upon the values and principles that underlie and animate our system and upon the development of the law in general. These are considerations which rarely enter into the professional processes of private litigation, but they are factors which must always be carefully considered by the Office of the Solicitor General.

Perhaps a few figures from last Term will mark the quantitative consequences of the special screening—I could almost say "objectivity"—that a case is subjected to before the Solicitor General expresses the government's view on it before the Court. During the 1967 Term, only nine per cent of the petitions for writs of certiorari not filed or supported by the government were granted; but where the United States either filed the petition, or supported it as *amicus curiae*, the petition was granted in 65 per cent of the cases.[21] And in those cases involving the government which

20. 1968 ATT'Y GEN. ANN. REP., Table X 102.
21. 1968 ATT'Y GEN. ANN. REP., Table IX 99.

were decided by the Court on the merits—brought there either on our initiative or over our opposition—nearly twice as often the Court decided in favor of the government's position as it did against us.[22]

These figures are not cited to show any special prowess on the part of the Solicitor General in presenting cases to the Court. They illustrate, rather, the success of our policy of pruning from the cases lost in the courts of appeals the decisions that properly went against us or that, even if believed in error, are not of general significance. Less than one case in ten lost in the court of appeals becomes the subject of a government certiorari petition (36 out of 379 last term). Whether the Court consciously considers that the Solicitor General has himself "discounted" the case before determining to seek review is a matter some commentators might speculate about. I prefer to believe that our record in having certiorari granted comes from the objective soundness of our assessment that the case is, in the jargon of our highly specialized trade, "certworthy."

Premised on the same foundation as this screening process is the peculiar ambivalence of the function we must fill as lawyers. We are lawyers, representing a client; we are also, in a special sense, officers of the Court. The Solicitor General has a special obligation to aid the Court as well as to serve his client. Moreover, since his client is always the United States government or its officers or agencies, the loyalties are not as easily defined as they generally are in private practice. 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,[23] 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. Occasionally, the Solicitor General finds it necessary to "confess error," when he concludes that he cannot defend a judgment in favor of the government. His authority to do this derives from the statutes to which I have referred, coupled with the traditions which have been established for the office by a long line of distinguished Solicitors General.

This authority is, of course, sparingly exercised. Confessing error is a little bit like taking medicine: its basic purpose and ultimate effect are

22. *Id.*, Table X 102.
23. *See* 28 U.S.C. §§ 517, 518 (1966 Supp).

highly salubrious, but it may have a bitter taste for a moment going down. Judge Simon Sobeloff, who is a former Solicitor General, and now a distinguished circuit judge, 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.[24]

Other circuit judges who, at the urging of the government in their court, have delivered an opinion which the Solicitor General refused to defend, sometimes react somewhat more vigorously, I may add.

I would like to point out just one more area in which the Solicitor General's Office diverges from private practice in a meaningful way, and that is in our occasional appearance as *amicus curiae*. I have tried to hold down the number of these briefs—but it is not easy. There are a considerable number of cases in which the Court requests the government's views, and there are other cases in which the government has a vital interest in the outcome—such as the "stop and frisk" cases of last year, for example. This is, perhaps, the situation where the Solicitor General's role most differs from a private lawyer's—when the issue is one of such public importance that his "client," the United States, should present the best legal argument it can muster. Over the years, the United States has played an active part as *amicus curiae* on such vital public issues as civil rights, reapportionment, aid to education, and standards of criminal justice. Last Term, for example, the United States appeared *amicus curiae* in 19 cases argued on the merits in the Supreme Court.[25] I think we contributed something to the balanced and informed adjudication of those cases.

V. Conclusion

This discussion has, of necessity, given only a superficial view of the practice of the Solicitor General's office. There is room for statesmanship and we try to exercise that role in appropriate cases. But essentially, we are advocates, doing our best to present the legal arguments for our great client before the judicial tribunal which our Constitution has put first in the land. We do not decide the cases, but we do have to exercise a lawyer's choice and judgment as to the arguments we make. That, as I see it, is lawyering. If it occasionally involves a little statesmanship, that, too, is sometimes the proper function of a lawyer.

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24. Quoted by Cox, *The Government in the Supreme Court*, 44 Chi. B. Rec. 221, 225 (1963).

25. 1968 Att'y Gen. Ann. Rep., Table X 102.