

RESPONSE

The SG's Indefensible Advantage: A Comment on *The Loudest Voice at the Supreme Court*

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INTRODUCTION.....	97
I. THE TENTH JUSTICE.....	101
A. <i>The Special Relationship</i>	102
B. <i>Symbiosis</i>	105
II. UNDUE DEFERENCE.....	107
A. <i>Law and Politics, Indivisible</i>	109
B. <i>Favoring the Pamphleteer General</i>	112
CONCLUSION.....	123

INTRODUCTION

Early in 1985, I went to the library of the Justice Department, in Washington, D.C., to look for books about the Solicitor General of the United States (SG). In the card catalogue, there were no entries under Solicitor General, Office of the Solicitor General, or anything relevant. The same was true at the Supreme Court library, where I went to look soon after—though I found a thin folder in a back room with a few newspaper articles about recent SGs. The libraries' lack reflected that

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of the country: the SG was largely unrecognized as a subject worthy of study in American law—in scholarship, publishing, or journalism.¹

Close followers of the Supreme Court and the Justice Department knew a lot about the SG and the office, of course. These followers included many accomplished lawyers who were working or had worked in the SG's office and understood its rarefied docket and unusual role. They passed along lore about the achievements and foibles of past and present SGs and other lawyers in the office. But articles in law reviews about the office and the role were almost wholly after-dinner-type speeches by SGs, rather than scholarly lectures. I was then writing for the *New Yorker* in Washington and was considering reporting and writing a long article about the SG. This lack of scholarship stopped me short, however: how could I write without a scholarly guide to explain the history, practices, and significance of the office?

Soon, though, I realized I had a great opportunity—to interview all of the living former SGs² as well as the current one³ and others with expertise about the office, with the chance to help move the SG's office and role from a subject of interest to a tiny network to one fit for a wider public. That is what happened in the summer of 1987. In successive weeks, the *New Yorker* published the halves of my 40,000-word article, called “The Tenth Justice,”⁴ a few years before that magazine's format

1. I thank Darcy Covert and Annie J. Wang for sharing information from their research. I also thank Jordan Jefferson, Associate Director for Research and Instructional Services of the Yale Law School Library, for help in research for this article and for guiding my own research, and Professor Patrick C. Wohlfarth, Associate Professor and the Co-Director of Graduate Studies & Placement in the Department of Government and Politics at the University of Maryland, for his help, by providing data I rely on in this article and in previous writing. Finally, I thank Charlene W. Goodwin for providing data about the Office of the Solicitor General in 2018 for a previous article, which I draw on again in this response.

Collecting data about the legal practice of the SG's office requires making judgments about what to include in a particular category—when the United States is a petitioner or respondent, for example, or whether to count a case that the Justice Department lists more than once on the Supreme Court's merits docket as a single case or multiple cases. As a result, it is possible that a careful reader seeking to double-check numbers in this response will come up with different conclusions. A close student of the Court can find surprising discrepancies between numbers about the same outcome in the most authoritative sources. The best way for any researcher to develop a consistent database about the SG's office and its practice is to articulate consistent guidelines for data collection and then follow them carefully.

Still, because of my confidence in the care, capabilities, and sense of responsibility of the researchers who shared data with me, and my confirmation of some of the data they shared in spot checks I did, I am confident about the strength of support in the data for the general conclusions I have reached, even if some specific numbers are debatable.

2. Archibald Cox Jr., Thurgood Marshall, Erwin N. Griswold, Robert H. Bork, and Wade H. McCree Jr.

3. Rex E. Lee, followed by Charles Fried.

4. Lincoln Caplan, *I-The Tenth Justice*, NEW YORKER, Aug. 10, 1987, at 29; Lincoln Caplan, *II-The Tenth Justice*, NEW YORKER, Aug. 17, 1987, at 30.

changed and it largely stopped publishing multipart articles that long. That fall, Knopf published my book from which the parts had been excerpted, *The Tenth Justice: The Solicitor General and the Rule of Law*.⁵ In 1988, in response to my reporting, the *Loyola of Los Angeles Law Review* dedicated most of a volume to a multi-article symposium called “The Role and Function of the United States Solicitor General.”⁶ The symposium, about “the tension and conflicts imposed on the unique position,”⁷ marked the start of the SG’s role and office as a regular concern of American legal scholarship.⁸

With *The Loudest Voice at the Supreme Court*,⁹ Darcy Covert and Annie J. Wang have done something similar to what I lucked into doing almost three and a half decades ago: they have found, explored, and explained a key element of an important subject in American law that was in plain sight yet largely unrecognized in public affairs, as no one else had done—certainly, not with their intelligence, insight, and thoroughness.

As they write about the Supreme Court in their groundbreaking article, “While many litigants file amicus *briefs* at the Court, amicus *oral argument* is a rare occurrence for every litigant except the OSG”¹⁰—the Office of the Solicitor General. “Between the 2010 and 2019 Terms, the Court granted only fifteen of forty-three motions for amicus oral argument by litigants other than the OSG. During that time, it granted 306 amicus oral argument motions—all but one—by the OSG.”¹¹ Last April, the Court’s denial to the SG’s office of time to

5. LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (Knopf 1987).

6. Symposium, *The Role and Function of the United States Solicitor General*, 21 LOY. L.A. L. REV. 1047 (1988), <https://digitalcommons.lmu.edu/llr/vol21/iss4/> [<https://perma.cc/73A3-CNVB>]. It included articles by Rex E. Lee, who had been SG during the Reagan administration from 1981 to 1985; Michael W. McConnell, who had worked as an assistant to Lee from 1983 to 1985, was then a professor at the University of Chicago Law School and is now on the faculty of Stanford Law School, and in between was a judge on the U.S. Court of Appeals for the Tenth Circuit; Joshua I. Schwartz, who had worked as an assistant to SGs Wade McCree and Lee for five years until 1985 and was then, as he is now, a professor at George Washington University Law School; and a host of other distinguished lawyers, scholars, and current and former government officials, including Jimmy Carter, the former President of the United States.

7. *Id.*

8. *Id.*

9. Darcy Covert & Annie J. Wang, *The Loudest Voice at the Supreme Court: The Solicitor General’s Dominance of Amicus Oral Argument*, 74 VAND. L. REV. 681 (2021).

10. *Id.* at 683.

11. *Id.*

argue as an amicus in a case argued in October of 2020¹² was the first in eight and a half years.¹³

That extreme disparity about something of such influence and importance prompts serious questions, for followers of the Supreme Court and the SG's office and, more widely, for students of the U.S. Constitution and the American constitutional system.

Why does the Court treat advocates for other litigants and the SG's office so differently?

How does the Court justify such extreme and valuable favoritism for the SG's office?

Covert and Wang ground their article in an irrefutable set of transparent facts. In 1998, when Seth P. Waxman was SG in the Clinton administration, he observed that the history of the SG's office was "not well documented" and that much of "the collected history of the office consists of anecdotal accounts of discrete events and individuals."¹⁴ That is still so, although his essay gathers illuminating history. The combination of this anecdotal, incomplete, and largely hidden story and the complex nature of the SG's role makes it difficult to agree on the basis for assessing the SG's office in any administration and for holding it accountable. Covert and Wang have provided a basis that is vivid and powerful, as well as transparent and concrete, for assessing a crucial aspect of the SG's practice before the Supreme Court and, in addition, for reassessing the SG's role in general.

Modestly, they write, "We do not challenge the Tenth Justice concept, nor do we argue that the SG's capacity to conform to it has eroded. Instead, our claim is that he has strayed from this role over time with the Court's effective permission."¹⁵ However, the part of the SG's story that they focus on, particularly in the last decade, calls attention to how significantly the SG's role has changed in the past 44 years, since the 1977 Office of Legal Counsel "Memorandum Opinion for the Attorney General: Role of the Solicitor General" by John M. Harmon presented the accepted framing of that role.¹⁶

Straying off a path even just a few degrees can leave a great distance between the strayer and the path after enough time passes:

12. *Ford Motor Co. v. Bandemer*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/ford-motor-company-v-bandemer/> [<https://perma.cc/7CQV-4W2V>].

13. On October 11, 2011, the Court denied time to argue as an amicus in *Rehberg v. Paulk*, 565 U.S. 445 (2011) (mem.). On April 20, 2020, the Court denied time to argue as an amicus in *Ford Motor Company v. Bandemer*, 140 S. Ct. 2665 (2020) (mem.).

14. Seth P. Waxman, Solic. Gen. of the U.S., "Presenting the Case of the United States As It Should Be": The Solicitor General in Historical Context, Address to the Supreme Court Historical Society (June 1, 1998).

15. Covert & Wang, *supra* note 9, at 734.

16. *Id.*

something of that sort has happened to the SG's office from the path marked out by the 1977 memo. Fundamental changes in that role over the past half century indicate that, in asking for time to take part in oral arguments as an amicus, the SG's office is asking for a major and indefensible advantage. Those changes also indicate that the Supreme Court is granting the advantage based on an outdated vision of the special relationship between them.

It is time for a fundamental reconsideration of the SG's role—by outstanding scholars like Richard Lazarus, Michael McConnell, Joshua Schwartz, David Strauss, and others who have practiced law in the SG's office and have studied and written about the role; by other scholars who have written about it like Covert and Wang and Stephen I. Vladeck; by former SGs like Waxman who have written about the SG's role; and by the Office of Legal Counsel. Perhaps, in addition, a law school with a particular stake in this issue—Harvard Law School, because nine of the 48 SGs so far in American history attended or have taught there;¹⁷ Yale Law School, because of Darcy Covert and Annie J. Wang's attendance there and because of the interest the *Yale Law Journal* has shown in the SG's office;¹⁸ the University of Chicago Law School, because it is home to the *Supreme Court Review*; or another law school, including Vanderbilt's—will take this opportunity by hosting a conference to address the issue. The SG's office and role are mysterious to the public yet have major, even urgent, consequences for all Americans. I am grateful to the *Vanderbilt Law Review* for giving me the chance to comment on the Covert and Wang article and explain why I think it warrants such a serious and prominent response.

I. THE TENTH JUSTICE

At Yale Law School's commencement in 2011, Drew S. Days III, a professor at the school who was the first SG in the Clinton administration, from 1993 to 1996, spoke about meeting President Bill Clinton when his administration was considering Days for the post. The president “asked pointedly, ‘What *is* the relationship between the Solicitor General and the President?’” Days said he answered, “Mr. President, *you* are in the Constitution and the Solicitor General is

17. HARVARD LAW TODAY, *HLS Solicitors General*, (March 5, 2009), <https://today.law.harvard.edu/hls-solicitors-general/> [<https://perma.cc/5575-A9MF>].

18. See, e.g., Michael R. Dreeben, *Stare Decisis in the Office of the Solicitor General*, 130 YALE L.J.F. 541 (2021); Adam D. Chandler, Comment, *The Solicitor General of the United States: Tenth Justice or Zealous Advocate?*, 121 YALE L.J. 725 (2011).

not.”¹⁹ The SG is a political appointee whom the president or the attorney general, as the leader of the Justice Department and the SG’s boss, can fire without cause. The Covert and Wang article and my response to it address a matter of norms, not the result of constitutional, statutory, or any other form of law.

Yet these norms are strong and significant. As the head of the office in the Justice Department that conducts government litigation in the Supreme Court²⁰—with “Office of the Solicitor General” spelled out in large bronze letters on the Justice Department’s building where the SG works and a second chamber a mile away at the Court—the SG has the distinction of being the only officer of the United States government with separate offices in two branches and who is required by federal statute to be “learned in the law.”²¹

A. *The Special Relationship*

Through most of the twentieth century, the SG and the SG’s office were, by tradition, considered to be generally above politics, enjoying a special relationship with the Court. In the words of Justice Lewis F. Powell Jr., the SG had “a dual responsibility”²²—to advocate for the interests of the president and the Executive Branch and, in addition, to be a counselor to the Court, advocating for the best interests of the law in its long-term development. That long-term perspective extended the SG’s responsibility to Congress as well, giving the office a duty to defend federal law unless there existed a very good reason not to.

No one has viewed the SG as a literal tenth justice. Everyone who has studied the post has recognized that the SG works in a different branch of the federal government from the Supreme Court. Yet the post earned that glittering, and confounding, title because of the SG’s special standing before the Justices and the office’s special relationship with the Court. That dual responsibility justified independence within the rest of the U.S. government, especially at the Justice Department. It was not true independence, in the sense, again, that a statute might have guaranteed independence to the SG, so the word was best put in

19. Drew S. Days III, Alfred M. Rankin Professor of Law, Yale University, Commencement Address at Yale Law School (May 23, 2011).

20. *About the Office*, U.S. DEP’T OF JUST., (last updated Oct. 27, 2014), https://www.justice.gov/osg/about-office-1_[<https://perma.cc/Q4UB-BBV4>].

21. Act to Establish the Department of Justice, ch. 150, § 2, 16 Stat. 162.

22. Letter from Lewis F. Powell Jr., Associate Justice of the Supreme Court of the United States, to Lincoln Caplan (July 2, 1986).

quotation marks. But the “independence” was clearly meaningful even if partial.

A venerable example is the deliberation within the Kennedy Justice Department in 1963 about what standard the government should advise the Supreme Court to adopt as the measure of reapportionment in state legislative districts that were unfairly imbalanced. (The number of voters in individual districts in Tennessee, for example, ranged from 2,340 to 42,298, so the power of a vote in the smallest district was eighteen times greater than one in the largest.²³) Attorney General Robert F. Kennedy believed the standard should be the one person-one vote measure that the Supreme Court adopted in the case in 1964—each person should have one vote and each district should have about the same number of voters.²⁴ Archibald Cox thought that standard was simplistic, because, among other problems, it would not prevent gerrymandering, making districts equal in population but unequal in the voters from each major party.²⁵ It was unthinkable that the Court would review gerrymandering.²⁶

Because of the tradition of independence, Kennedy did not order Cox to argue in favor of the one person-one vote standard. Instead, as I wrote in *The Tenth Justice*, though Kennedy “orchestrated a quiet campaign to change the Solicitor’s mind,” he didn’t accomplish that.²⁷ In an interview in 1985, Cox told me how he remembered the difference of opinion getting resolved, in a conversation between Cox and Burke Marshall, the head of the Justice Department’s Civil Rights Division from 1961 to 1964 who was known in the department as the “best lawyer, brightest human being.”²⁸

In our interview, Cox told me:

We were walking down the hall, and [Marshall] said, “We can’t let this come to a head. You ought to recognize that Bob”—the attorney general—“won’t file a brief in the Supreme Court that you won’t sign”—in SG lore, a sign of the SG’s stature because withholding his signature from a brief was another way an SG could express his independence. “You ought to recognize that he can’t get into a position of filing a brief against the groups that have been pressing for one person/one vote.” I said, “All right. I’ve got the germ of a solution, and I think I can work it out.” As I remember it, we filed a brief that didn’t press that standard, but suggested a close alternative. Our brief provided the

23. CAPLAN, *supra* note 5, at 190.

24. *Reynolds v. Sims*, 377 U.S. 533 (1964).

25. CAPLAN, *supra* note 5, at 191–92.

26. *Id.* at 192–93.

27. *Id.* at 192.

28. Diane McWhorter, *Marshall’s Law*, LEGAL AFFS. (Sept.–Oct. 2003), https://www.legalaffairs.org/issues/September-October-2003/story_mcwhorter_sepoct03.msp [<https://perma.cc/G8PL-BH9B>].

basis for much of the Court's decision, but the Justices took the final leap, which my intellect wouldn't allow me to. Poor prophet.²⁹

The 1977 Office of Legal Counsel memo about “The Role of the Solicitor General” discussed questions at the heart of the Kennedy-Cox disagreement.³⁰ They had come up regularly in the decade and a half since that disagreement and led to the memo as the first and only official statement on the SG's role: “(1) the institutional relationship between the Attorney General and the Solicitor General, and (2) the role that each should play in formulating and presenting the Government's position in litigation before the Supreme Court.”³¹

As I wrote in *The Tenth Justice*:

The memo settled the first issue quickly. “The short of the matter,” it concluded, “is that under our law the Attorney General has the power and the right to ‘conduct and argue’ the Government's case in any court of the United States”—and the Solicitor General worked for the AG. But the answer to the second issue lurked in tradition as much as law, and it was harder to pin down. The SG enjoyed “independence” within the Justice Department and within the Executive Branch. He was not “bound” by the view of his “clients” within the government, and he was free to confess error, rewrite briefs, and turn down requests for petitions to the Supreme Court for four reasons: “The Solicitor General must coordinate conflicting views within the Executive Branch; he must protect the Court by presenting meritorious claims in a straightforward and professional manner and by screening out unmeritorious ones; he must assist in the orderly development of decisional law, and he must ‘do justice’—that is, he must discharge his office in accordance with law and ensure that improper means do not influence the presentation of the Government's case in the Supreme Court.”

Why couldn't the Attorney General do the same? Because his political responsibilities might “cloud a clear vision of what the law requires.” In the memo's words, “For this reason alone, the tradition of the ‘independent’ Solicitor General is a wise tradition. In the small number of cases that arose amidst political controversy, the Attorney General could strengthen the SG's independence by taking responsibility for the final judgment on the government's position and shielding the SG from political pressure. By preserving the SG's independence, the Attorney General enhanced the SG's ability to serve as “an officer learned in the law.”

The memo closed by addressing the most difficult question: “How does one identify the ‘rare instances’ in which intervention by the Attorney General may be justifiable?” According to the Attorney General's aides, it was not enough that the Attorney General disagreed with the SG over a question of law. If the SG made a mistake, the Supreme Court could correct him. If the Court upheld him, “then all the better, for his legal judgment and not that of his superiors was correct In either case,” the paper stated, “the potential benefit of intervention is usually outweighed, in our view, by the mischief inherent in it.”

About legal judgments, it was settled—the SG should be independent. “But if ‘law’ does not provide a clear answer to the question presented by the case before him, we think there is no reason to suppose that he, of all the officers in the Executive Branch, should

29. Interview with Archibald Cox, U.S. Solic. Gen. (April 11, 1985).

30. Memorandum Opinion for the Attorney General: Role of the Solicitor General, 1 OP. O.L.C. 228–235 (1977).

31. *Id.*

have the final responsibility for deciding what, as a matter of policy, the interests of the Government, the parties, or the Nation may require. To our knowledge, no Solicitor General has adopted a contrary view.” So decisions about policy should be made by the Attorney General. “But the Attorney General and the President should trust the judgment of the Solicitor General not only in determining questions of law but also in distinguishing between questions of law and questions of policy. If the independent legal advice of the Solicitor General is to be preserved, it should normally be the Solicitor General who decides when to seek the advice of the Attorney General or the President in a given case.”³²

The SG’s office has asserted its independence in a range of emphatic ways, although they are sometimes arcane. “Tying a tin can” is signing a government brief with the disclaimer that it represents the view of part of the government but not of the SG.³³ That seemingly minor communication, also called “dropping a footnote,” is not minor at all: it means that the office is telling the Supreme Court it thinks the argument in the brief is reasonable but wrong—wrong enough for the SG to withhold the endorsement of the office. “Confessing error” is recommending to a federal appeals court or even the Supreme Court that it should reverse a victory for the government in a lower federal court when the grounds strike the SG as unjust,³⁴ after a federal judge has ruled for the government and others in the government consider their argument sound and worthy of victory.

B. Symbiosis

Those departures from the basic tenet of zealous advocacy in the Anglo-American adversary system express an exalted and contrary ethos: in contrast, zealous advocacy means doing everything possible on a client’s behalf, as long as the law permits it;³⁵ SG advocacy meant putting the SG’s view about the law’s best interests ahead of the client’s interest in victory in a case. Put differently, the principle at stake sometimes mattered more than the outcome in the particular dispute.

SG advocacy also contradicts another tenet of zealous advocacy. It asserts that a zealous advocate can vigorously represent some clients only if the advocate is not held responsible for what society in general, and a judge and jury in particular, might find repugnant in alleged actions of a client the advocate is representing—what the legal scholar Murray L. Schwartz called the “Principle of Nonaccountability” at the

32. CAPLAN, *supra* note 5, at 48–50.

33. *Id.* at 9.

34. *Id.*

35. David Luban, *Fiduciary Legal Ethics, Zeal, and Moral Activism*, 33 GEO. J. LEGAL ETHICS 275, 279 (2020).

heart of the American adversary system.³⁶ In contrast, SGs have held themselves accountable for positions they advocate, especially when they have confessed error or withheld their name from a brief. They have regarded that sense of accountability as a core element of their duty as SGs.

Francis Biddle, SG from 1940 to 1941 and Attorney General from 1941 to 1945, put it well in his 1962 memoir: “The Solicitor General has no master to serve except his country.”³⁷ The SG has been permitted his independence largely because of the belief, Biddle wrote, that “the ethic of his law profession framed in the ambience of his judgment and experience” should be the SG’s only guide.³⁸ As Simon E. Sobeloff, SG from 1954 to 1956, wrote during his tenure, “My client’s chief business is not to achieve victory, but to establish justice.”³⁹ Waxman said, in 1998, “Ultimately, it is the responsibility of the Solicitor General to ensure that the United States speaks in court with a single voice—a voice that speaks on behalf of the rule of law.”⁴⁰

The SG’s independence and the responsibility it has rested on have been understood to justify notable deference from the Supreme Court, and the Court has shown that deference. It is not formal deference, amounting to a duty, as, for example, the Court has a duty under the United States Constitution’s Article III, Section 2, to “have original jurisdiction” in “all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party.”⁴¹ (In those cases, the Court functions as a trial, or fact-finding, court as well as an arbiter about the law’s application to the facts, as opposed to its usual role of hearing appeals in cases it chooses to hear.)⁴² But it has been significant because of the symbiosis between the SG and the Court—interaction between two different entities in close association, usually to the advantage of both. Independence has allowed the SG’s office to resist giving in to pressure from political appointees in the Justice Department by saying that, if the SG’s office took a politically motivated position those appointees pressed, the Court would criticize the office and undermine its credibility.

36. Murray L. Schwartz, *The Zeal of the Civil Advocate*, 8 AM. BAR FOUND. RSCH. J. 543, 544 (1983).

37. CAPLAN, *supra* note 5, at 18.

38. *Id.*

39. Simon E. Sobeloff, *Attorney for the Government: The Work of the Solicitor General’s Office*, 41 A.B.A. J. 229, 229 (1955).

40. Waxman, *supra* note 14.

41. U.S. CONST. art. III § 2.

42. CAPLAN, *supra* note 5, at 163, 164.

Based on that symbiosis—the view that the SG’s independence served the interests of the Court and the law—the Court has long treated the SG and lawyers in the office more favorably in general than any other advocates. For the past century, the SG and the SG’s office have been the most privileged lawyers in dealings with the Court, right up to the present day. As Covert and Wang explain, in 1957 the Supreme Court first made a “call for the views of the Solicitor General,”⁴³ known universally as “CVSG.” In the past ten terms of the Court, not counting the uncompleted current one, the Court has asked the SG’s office for its views an average of 20 times a term, ranging from 16 to 25 times, in cases where the government is not a party at the writ-of-certiorari stage, when the Court is considering whether to hear argument in a case.⁴⁴ It rarely asks other lawyers for their views.

In those and other written submissions the office makes, the Court allows the color of the covers of SG briefs to be different from those of all other parties, to make it easy for Justices and their law clerks to pick the “gray briefs” out of those submitted in a case and pay attention to them. When the SG and other lawyers from the Justice Department argue at the Court, they look strikingly different as well: they are the only lawyers who carry on the tradition once followed by all Court advocates of wearing formal attire—“morning coats” for men, a suitable equivalent for women.⁴⁵

II. UNDUE DEFERENCE

What is visible understates the closeness and the specialness of the connections between the Court and the SG’s office, which become clearer the more you learn about the behind-the-scenes dealings between them. As Vladeck wrote in the *Harvard Law Review* in 2019, “the Court’s rules and traditions both formally and informally privilege the Solicitor General as the de facto head of the Court’s bar—and show special solicitude to the Solicitor General across a constellation of considerations.”⁴⁶ With the SG and the SG’s office often functioning as counselors to the Court, the Court favors them.

43. Covert & Wang, *supra* note 9, at 735 n.352.

44. See *Supreme Court Briefs*, U.S. DEPT OF JUST., https://www.justice.gov/osg/supreme-court-briefs?text=&sc_term=2015&type=petition_stage_amicus_brief_invitation&subject=All [<https://perma.cc/T7G9-UAVD>].

45. *The Court and Its Traditions*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/traditions.aspx> (last visited Mar. 31, 2021) [<https://perma.cc/5U9R-RWUT>].

46. Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 123 (2019).

Still, those visible markings make clear how much the Court favors the SG and the SG's office. By every measure that matters—the percentage of petitions for writs of certiorari from the SG that the Court has accepted; the percentage of cases the SG has won as a party; the percentage of cases the SG has won as an amicus curiae, or friend of the Court; the percentage of the SG's requests to make oral arguments as an amicus that the Court has granted; the increase in success of parties other than the government when the SG is an amicus on behalf of those parties—the record of the SG's office, going back generations, is much better than any other advocate's.⁴⁷

In 2013, the political scientists Ryan C. Black and Ryan J. Owens published an article assessing why the SG's office “wins the vast majority of Supreme Court cases in which it participates.”⁴⁸ They concluded what the record shows: lawyers in the office “wield significant influence over the Court and enjoy a built-in advantage” based on “the office's longstanding relationship with the Court” as well as the skill, expertise, and experience of its lawyers—a quality the authors term “professionalism.”⁴⁹ Black and Owens questioned whether this advantage is warranted: “the findings suggest researchers should examine more fully the Office of the Solicitor General.”⁵⁰

Covert and Wang did just that. They reached three overarching conclusions: that the SG as an amicus asks for time in oral arguments at the Supreme Court many times more often than all other amici put together and, in the past ten terms, not including the current one, has almost always been granted time to argue; that there is no convincing justification for the extreme advantage the Court has given the office in granting almost all of its requests to argue as an amicus; and that the Court should substantially limit the number of those grants by defining more carefully the federal interest in a case in which the government is not a party, as the basis for assessing—and granting fewer—requests for argument time.⁵¹

What makes these conclusions so sound is that, during the past four and a half decades, a sea change has occurred in the thinking of SG and Supreme Court watchers about the premise of the 1977 memo on the “Role of the Solicitor General”—a premise that no longer holds.⁵²

47. See Covert & Wang, *supra* note 9, at 693–94.

48. Ryan C. Black & Ryan J. Owens, *A Built-In Advantage: The Office of the Solicitor General and the U.S. Supreme Court*, 66 POL. RSCH. Q. 454, 454 (2013).

49. *Id.* at 462.

50. *Id.* at 455.

51. Covert & Wang, *supra* note 9, at 683, 686.

52. Role of the Solicitor General, *supra* note 30.

A. Law and Politics, Indivisible

The premise of the 1977 memo, let's recall, was that "the Attorney General and the President should trust the judgment of the Solicitor General not only in determining questions of law but also in distinguishing between questions of law and questions of policy."⁵³ *Policy* was a synonym for *politics*, choices about allocations of resources and power reflecting underlying values. The premise of the premise was that, in all but a small share of cases, law was distinguishable from politics and it was crucial to insulate law from politics, such that politics did not "cloud a clear vision of what the law requires."⁵⁴

It is not too much to say that keeping politics from clouding a clear vision of "what the law requires" has been the central challenge in American constitutional law for much of the past century, and then some—and that lawyers have sometimes not just failed to meet that challenge, they have sometimes sought to stretch law to put their politics into practice. Court and constitutional scholars have sought to promote views to minimize connections between law and politics, and also to maximize them. William Howard Taft, President from 1909 to 1913, Chief Justice from 1921 to 1930, said that a constitutional lawyer "was someone who had abandoned the practice of the law and had gone into politics."⁵⁵

The ethos of the SG's office expressed in the 1977 memo⁵⁶ was the opposite of Taft's point: it presumed that, with rare exceptions, it *was* possible to distinguish law from politics. A corollary of that premise was that civil-servant lawyers in the office were especially adept at doing that, with the duty as well as the incentive of influencing the development of American law because of their special relationship with the Supreme Court.

The legal scholar and lawyer Henry M. Hart Jr. made a career of propounding and promoting that view. After serving as president of the *Harvard Law Review* and clerking for Justice Louis D. Brandeis, he joined the faculty of Harvard Law School in 1932. He was a legal mandarin as a professor there until he died in 1969 at age 64.⁵⁷ He took leaves to serve in the federal government, including when he was 33 as

53. *Id.* at 235.

54. *Id.* at 232.

55. 2 MERLO J. PUSEY, CHARLES EVANS HUGHES 625 (1951) (quoting Charles Evans Hughes).

56. Role of the Solicitor General, *supra* note 30.

57. *Henry M. Hart Jr., Harvard Teacher; Professor of Law, 64, Dead*, N.Y. TIMES (Mar. 25, 1969),

<https://timesmachine.nytimes.com/timesmachine/1969/03/25/78333673.html?pageNumber=56>
[<https://perma.cc/KXM7-PQEN>].

chief lawyer, or principal deputy, in the SG's office in 1937 and 1938. In 1953, with Herbert Wechsler, a mandarin on the faculty of Columbia Law School, Hart co-authored the most influential textbook on federal courts for generations, called *The Federal Courts and the Federal System*.⁵⁸ Now in its seventh edition, it was written by four outstanding Harvard Law School scholars. Five decades after Hart's death and two decades after Wechsler's, the volume remains prominent as "Hart and Wechsler."

Hart and Wechsler were not naïve about the influence of politics on lawmaking, including by courts. They knew that decisions of judges reflected their views on politics. As the legal scholar Akhil Reed Amar wrote about the co-authors, "Given that judges unavoidably made substantive law at times, what kinds of laws could they legitimately make, and when? What kinds of legal decisions were better left to other institutional and political actors?"⁵⁹ The question became how courts could minimize the influence of politics on their decisions. Hart and Wechsler focused on "what courts are good for—and are not good for,"⁶⁰ on which institution should make a legal decision and how.

As I wrote in the *Missouri Law Review*:

Hart, Wechsler, and other scholars sought, basically, to define what "law" is and to differentiate it from policy. They provided a way to think about significant disagreements as something other than politics. They provided a method for sorting through the many new legal conflicts that arose as a result of the dramatic expansion of federal power during the New Deal and the Second World War. The emphasis on thorough reasoning about a law's purpose, in a legal process that was open and transparent, was critical to the legitimacy of the law. In emphasizing close analysis and careful argument, the method also defined the essence of good lawyering. Especially in the 1950s when the American economy grew briskly, this approach reflected optimism about law as "a continuous striving to solve the basic problems of social living."⁶¹

Today, that last quotation would require an acknowledgment that fundamental political disputes dominate public debate about the best legal solutions. In other words, the law-politics divide is widely recognized as gone. The most prominent dissenter from that view is Chief Justice John G. Roberts Jr. At his 2005 confirmation hearing to be the chief, he testified, "Judges are not politicians who can promise to

58. HENRY M. HART JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (Foundation Press 1953).

59. Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 693 (1989) (reviewing PAUL M. BATOR, DANIEL J. MELTZER, PAUL J. MISHKIN, & DAVID L. SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1988)).

60. *Id.* at 691.

61. Lincoln Caplan, *Anthony Lewis: What He Learned at Harvard Law School*, 79 MO. L. REV. 871, 880–81 (2014).

do certain things in exchange for votes,” as candidates for Congress do.⁶² Yet that definition does not address what makes law an expression of politics. Judges do not need to promise to vote in specific ways: their votes are generally predictable because how they apply elements of law reflects their political beliefs, which shape how they understand the purposes of the elements and are an important basis for selecting them.

Since the Reagan administration, the increasing polarization in American politics has led to increasing emphasis on judicial appointments, especially to the Supreme Court, as an essential means of carrying out the competing agendas of the Republican and Democratic parties. This emphasis has not been symmetrical: the Republican party has become homogeneously conservative, with selection of federal judges in the Trump administration largely outsourced to the conservative Federalist Society.⁶³ But politics and political beliefs, or ideology, have increasingly mattered in judicial selection by Democrats as well, although their choices have been more heterogeneous and diverse. As I wrote in *Harvard Magazine*, “The justices are products of politics.”⁶⁴ In 2015, the Pew Research Center found: “Seven-in-ten Americans (70%) say that in deciding cases, the justices of the Supreme Court ‘are often influenced by their own political views.’ Just 24% say they ‘generally put their political views aside’ when deciding cases.” Pew emphasized, “The belief that justices are swayed by their own political views spans partisan and demographic groups.”⁶⁵

During the past ten terms of the Supreme Court, for the first time in American history, the Court issued the majority of its ideological 5-4 rulings along party lines—with Justices appointed by Republicans in the majority and those by Democrats in dissent.⁶⁶ The direction of the Court has been clear for half a century. The political scientist Lee Epstein and her colleagues have documented the Court’s rightward movement since 1969, when Warren E. Burger was confirmed as the first of three increasingly conservative Chief Justices, including

62. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005).

63. Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, *NEW YORKER* (Apr. 17, 2017), <https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court> [<https://perma.cc/5QKE-BUKX>].

64. Lincoln Caplan, *The Political Solicitor General*, *HARV. MAG.*, Sept.–Oct. 2018, at 49.

65. *Negative Views of Supreme Court at Record High, Driven by Republican Dissatisfaction*, PEW RSCH. CTR. (July 29, 2015), <https://www.pewresearch.org/politics/2015/07/29/negative-views-of-supreme-court-at-record-high-driven-by-republican-dissatisfaction/> [<https://perma.cc/83K3-NYG7>].

66. See *Final Stat Pack for October Term 2019*, SCOTUSBLOG (July 20, 2020), <https://www.scotusblog.com/wp-content/uploads/2020/07/Final-Statpack-7.20.2020.pdf> [<https://perma.cc/4BPS-GUCM>].

Roberts, picked by Republican presidents. Those Chief Justices have led what Epstein called “The Republican Court.”⁶⁷

Epstein and her colleagues analyzed about 2,000 Court decisions from 1946 to 2011. Among the 36 Justices who served in that period, for example, no Justice appointed by a Republican was less favorable to business than any Justice appointed by a Democrat. The subfield of judicial politics in political science has documented the important role that ideology plays in shaping decisions of judges and courts. In 2019, the Pew Research Center found that “three-quarters of Republicans and Republican-leaning independents have a favorable opinion of the Supreme Court, compared with only about half (49%) of Democrats and Democratic leaners.”⁶⁸ Pew observed: “The 26 percentage point difference between the two parties is among the widest it has been over the past two decades.”⁶⁹

B. Favoring the Pamphleteer General

As Covert and Wang explain, the regular and extensive filing of amicus briefs in Supreme Court cases is a modern phenomenon. Figure 1 of their article shows that it was not until the 1930s that friends of the Court, or amici, began to take part in oral arguments in more than a negligible percentage of cases argued, and it was not until the 1950s that the percentage began to climb to the high levels reached in the last generation.⁷⁰ In 1963, as Covert and Wang note, the political scientist Samuel Krislov addressed this change in the *Yale Law Journal*.⁷¹ He wrote that “the amicus is no longer a neutral amorphous embodiment of justice, but an active participant in the interest group struggle” and that it “has moved from neutrality to partisanship, from friendship to advocacy.”⁷²

Krislov’s article appeared during the tenure of Archibald Cox as SG from 1961 to 1965. Cox was the 32nd of the 48 SGs since 1870 when President Ulysses S. Grant appointed Benjamin Bristow as the first SG—two-thirds of the way along in the century-and-a-half history of

67. Caplan, *supra* note 64, at 49.

68. Claire Brockway & Bradley Jones, *Partisan Gap Widens in Views of the Supreme Court*, FACTANK (AUG. 7, 2019), <https://www.pewresearch.org/fact-tank/2019/08/07/partisan-gap-widens-in-views-of-the-supreme-court/> [<https://perma.cc/U96S-86S6>].

69. *Id.*

70. Covert & Wang, *supra* note 9, at 696.

71. *Id.* at 688 n.21.

72. Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 703, 704 (1963).

the post.⁷³ The government rarely filed amicus briefs before then. It began to regularly do so in the 1960s, with about 20 percent of the government's appearances at that Court between 1961 and 1966 as an amicus rather than as a party in a case, petitioner or respondent.⁷⁴ Notably, however, Cox's approach to amicus filings was cautious. In 1985, when I interviewed him for *The Tenth Justice*, he said, "We had the feeling when we filed an amicus brief that we had an even stricter responsibility to the guardians of the law than we normally did. We couldn't just take a strong position on behalf of a state, for example."⁷⁵ He concluded, "We had to be especially careful about what we said the law was or should be."⁷⁶

Cox's approach to amicus filings represented the traditional, now-outmoded ideal about maintaining the distinction between law and politics on which the 1977 memo rested. The role of the SG's office in the 1960s through the 1980s changed substantially as the Supreme Court expanded its power and reach. As I wrote in *Harvard Magazine*, "The amicus brief became a tool of political lobbying, for pursuing social and legal change as the Court increasingly sought to resolve in law major disputes in society."⁷⁷ Cox began a trend that continued and grew extensively under his successors, whether the administration was Democratic or Republican.

In 2009, in *The Journal of Politics*, the political scientist Patrick C. Wohlfarth published an article based on an analysis of "all voluntary amici curiae filed by the solicitor general's office during Supreme Court terms 1961–2003"—under every SG from Cox through Theodore B. Olson for President George W. Bush.⁷⁸ At my request, Wohlfarth updated those findings through SGs Elena Kagan and Donald Verrilli Jr. in the Obama administration. As I wrote about Wohlfarth's scholarship in *Harvard Magazine*, "He omitted amicus briefs the SG filed at the request of the Court, so the data reflect only cases where the SG chose to file and was especially likely to present a view favored by his administration—to make a political statement."⁷⁹

Voluntary amicus filings at the stage the Supreme Court was considering the merits of cases went from 7 percent of the cases decided

73. As of the completion of this response to Covert and Wang in mid-April of 2021, the Biden administration has not announced its selection for SG.

74. E-mail from Charlene W. Goodwin, Supervisory Case Management Specialist, U.S. Dep't of Just., to author (Aug. 1, 2016, 12:52 PM EDT) (on file with author).

75. CAPLAN, *supra* note 5, at 197.

76. *Id.*

77. Caplan, *supra* note 64, at 50.

78. See Patrick C. Wohlfarth, *The Tenth Justice? Consequences of Politicization in the Solicitor General's Office*, 71 J. POL. 224 (2009).

79. CAPLAN, *supra* note 64, at 51.

in the terms the SG was in office under the Democrat-appointed Cox; to 10 percent under the Republican-appointed Robert Bork; to 13 percent under the Democrat-appointed Wade McCree; to 16, 18, and 20 percent, respectively, under the Republican-appointed Rex E. Lee, Charles Fried, and Kenneth Starr; to 22, 26, and 28 percent, respectively, under the Democrat-appointed Drew S. Days III, Walter E. Dellinger III, and Seth P. Waxman; to 33 percent under the Republican-appointed Theodore B. Olson; with fluctuations to 25 percent under the Republican-appointed Paul D. Clement, 29 percent under the Republican-appointed Gregory G. Garre, 24 percent under the Democrat-appointed Elena Kagan, and a jump to 32 percent under the Democrat-appointed Donald B. Verrilli Jr. By my estimate, they declined to 25 percent under the Republican-appointed Noel J. Francisco.⁸⁰ In the past half century, the share of voluntary amicus briefs has increased markedly—by the research I relied on, more than fourfold.⁸¹

That remarkable increase reflects similarly extensive changes in the work and outlook of the Supreme Court. A major one, as Covert and Wang note, is the size of the Court's docket.⁸² In the 1960s, the Court decided an average of 150 cases per term.⁸³ In the last decade, it was 74, not even half that.⁸⁴

As significant, from 1960 and for decades after, the Court relied on the SG's office to help set the Court's docket. In the last two decades, though, as the legal scholars Margaret Meriwether Cordray and Richard Cordray explained in their 2010 article *The Solicitor General's Changing Role in Supreme Court Litigation*, the SG's office has ceded "the federal government's once-substantial influence over the Court's agenda-setting to more aggressive litigants."⁸⁵ Harvard Law School professor and onetime assistant to the SG Richard Lazarus explained in 2008 that those litigants are often former SGs or lawyers in the SG's

80. See *Supreme Court Briefs*, U.S. DEP'T OF JUST., https://www.justice.gov/osg/supreme-court-briefs?text=&sc_term=2015&type=petition_stage_amicus_brief_invitation&subject=All [<https://perma.cc/T7G9-UAVD>] (for data 2016 and later); E-mail from Patrick Wohlfarth, Associate Professor, U. of Md., to author (June 26, 2018, 3:46 PM EDT) (on file with author) (for data before 2016).

81. *Id.*

82. Covert & Wang, *supra* note 9, at 721.

83. See Wohlfarth, *supra* note 80.

84. See *Final Stat Pack*, *supra* note 66; Wohlfarth, *supra* note 80.

85. Margaret M. Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1323 (2010).

office, practicing in private law firms with groups specializing in appeals to the Supreme Court and federal appeals courts.⁸⁶

The journalist Joan Biskupic and a team at Reuters, in 2014, documented the extraordinary influence of that private bar in setting the Supreme Court's docket.⁸⁷ Between 2004 and 2012, Reuters reported, just 66 of the almost 17,000 lawyers who petitioned the Justices to hear appeals were involved in a bit under half the cases that the high court decided to take.⁸⁸ In other words, their "appeals were at least six times more likely to be accepted by the court than were all others filed by private lawyers during that period."⁸⁹ The disparity, the authors wrote, "suggests that the justices essentially have added a new criterion to whether the court takes an appeal—one that goes beyond the merits of a case and extends to the merits of the lawyer who is bringing it," and that "the reliance on a small cluster of specialists, most working on behalf of businesses, has turned the Supreme Court into an echo chamber—a place where an elite group of jurists embraces an elite group of lawyers who reinforce narrow views of how the law should be construed."⁹⁰

As Covert and Wang emphasize and as the Cordrays wrote, the SG's use of the office's "significant influence" in the past three decades has "changed dramatically, moving away from the certiorari stage, where the Court sets its agenda, in favor of broader participation as amicus curiae at the merits stage."⁹¹ (The Cordrays were describing the SG's voluntary participation: at the petition stage, the SG's participation in response to invitations increased somewhat in the first two decades of this century—from an average of 17 times per term as an amicus in the first decade to an average of 20 in the second.)⁹² From the 1960s until now, the growth in the importance of voluntary amicus participation has been very large. From 1961 to 1966 until the Obama administration, through the end of the 2015 Term, according to the Office of the Solicitor General, the ratio of participation as an amicus and as a party to a case has gone from 20 percent/80 percent to 57 percent/43 percent.⁹³ Put differently, over three generations, looking at

86. Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J 1487, 1500–01 (2008).

87. Joan Biskupic, Janet Roberts & John Shiffman, *At America's Court of Last Resort, A Handful of Lawyers Now Dominates the Docket*, REUTERS (Dec. 8, 2014) <https://www.reuters.com/investigates/special-report/scotus/> [<https://perma.cc/69TX-RXSE>].

88. *Id.*

89. *Id.*

90. *Id.*

91. Cordray & Cordray, *supra* note 85, at 1324.

92. See *Supreme Court Briefs*, *supra* note 80.

93. See Goodwin, *supra* note 74.

the cases in which the government took part, the share in which it was a party fell by almost half (80 percent to 43 percent) while the share of cases in which the government was an amicus (20 percent to 57 percent) almost tripled.

Those amicus numbers include the total of filings made in response to a Supreme Court request (CVSG) and of filings the SG made voluntarily. In that period, again, voluntary filings grew from 7 percent in the first half of the 1960s to 32 percent in the Obama administration, tailing off to 25 percent in the Trump administration. The upshot in recent years has been that the SG's office, whether in a Democratic administration or a Republican one, has participated in 60 percent or more of the cases decided by the Court each term—and most of that participation has come as an amicus, not as a party.⁹⁴ Most of that participation, based on Krislov's understanding, has come as an advocate for a political position, expressed in legal terms.

As Covert and Wang indicate, during the years I reported full-time about the SG's office (1985–1987), aggressive filings of the SG's office in the Reagan administration drew my attention and that of other observers because the administration's use of the office and approach to the SG's role contrasted substantially with what the 1977 memo about the SG's role set out. The Reagan Justice Department sought changes in social policy through the SG's advocacy at the Court just as the administration used judicial appointments, especially to the Supreme Court, as an essential means of carrying out the Reagan agenda. In retrospect, students of the office can now see from the numbers what no one could then: while the memo reflected a traditional ideal, the Reagan administration's practices reflected a new political reality, one that intensified in those eight years and has become more pronounced in the decades since.

Rex E. Lee was the first SG in the Reagan administration, serving from 1981 to 1985. The administration pushed him out of the office for not pursuing aggressively enough at the Supreme Court the Reagan agenda in social policy. When he left office, he told me, “There has been this notion that my job is to press the administration's policies at every turn and announce true conservative principles through the pages of my briefs. It is not. I'm the Solicitor General, not the Pamphleteer General.”⁹⁵ But, as I wrote in *Harvard Magazine*, by the tenure of Lee's successor, Charles Fried, beginning in 1985, “in key cases, the S.G. had become the pamphleteer general—the chief

94. See *supra* note 84.

95. CAPLAN, *supra* note 5, at 107.

articulator of the administration's legal philosophy."⁹⁶ Fried used that term expressly in his 1991 book *Order and Law*.⁹⁷ The scholar Rebecca Mae Salokar, in her 1992 study of the SG's office (with the subtitle "The Politics of Law"), wrote, "The Solicitor General of the United States is an important political actor."⁹⁸

In 1985, when Joseph Biden was the ranking member of the Senate Judiciary Committee and Charles Fried was appearing before the committee as the nominee to become the second SG in the Reagan administration, Biden asked Fried a question then of concern to SG-watchers: As acting SG after Rex Lee was pushed out of office, had Fried "succumbed to any pressure" that reflected any loss of independence for the SG's office?⁹⁹ Fried replied, "The statutes and regulations which set out the Office of the Solicitor General plainly indicate that the Solicitor General is a subordinate official of the Attorney General."¹⁰⁰ If the SG gave the Attorney General "his own best independent judgment" about a case and the Attorney General chose to take a different position, "it would be peevish and inappropriate for the Solicitor General to be anything but cheerful in accepting the reversal."¹⁰¹

With that answer, Fried dispensed with the SG's dual responsibility and the traditional understanding of it at the Supreme Court and in the Justice Department. Fried has consistently emphasized the high quality of the lawyering done by the SG's office while he was there, as if the Biden question had missed the point and Fried was addressing what was crucially at issue. Fried's pushback anticipated by a generation the conversation that should be happening now. But shifting attention to quality and away from function had the effect of deemphasizing the SG's role as well. That role—and not the reliability, or integrity, of the lawyering—was then and should now be the focus. In *Order and Law*, Fried explained why. In commenting on what, as SG, he had observed about career lawyers in the office, he wrote: "What they consistently failed to see was the extent to which the traditions and precedents of the office had become clogged with commitments and assumptions that were in fact political."¹⁰²

96. Caplan, *supra* note 64, at 51.

97. CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* (1991).

98. REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 174 (1992).

99. *Testimony of Charles Fried, Nominated to Be Solicitor General of the United States Before the S. Comm. on the Judiciary*, 99th Cong. 493 (1985).

100. *Id.* at 494.

101. *Id.*

102. Caplan, *supra* note 64, at 51.

In 1998, David Strauss, a constitutional scholar at the University of Chicago Law School who, in the early 1980s, was an assistant to Rex E. Lee as SG, wrote an article called *The Solicitor General and the Interests of the United States*.¹⁰³ In it he addressed the competing views of the SG's role—on the one hand, as the advocate for the administration he serves, as Fried supported, and, on the other, as the advocate for what Strauss called “the institutional approach,” with the SG and this office exercising “responsibility” to “the federal government as an institution, not to the President or the Administration he serves.”¹⁰⁴

Strauss distinguished the institutional approach from a literal tenth-justice model with “special responsibilities to the Supreme Court,”¹⁰⁵ yet he recognized that some version of those responsibilities added a valuable dimension to the institutional approach. He acknowledged that “there is something to the tenth Justice idea”¹⁰⁶—for instance, confessions of error—yet wrote,

I would venture that no one who has worked in the Solicitor General's office, at least in recent times, has ever doubted that he was a lawyer representing a client . . . and his principal day-to-day concern is promoting his client's interests. His special responsibilities to the Court limit and qualify the pursuit of the client's interests, but advocacy on behalf of the client is the central task.¹⁰⁷

To Strauss, “the Administration approach to the Solicitor General's role is in a sense correct in principle”¹⁰⁸—the SG does, and should, help carry out “political aspects of the Executive Branch's mission that go beyond simply executing laws enacted by Congress.”¹⁰⁹ Nonetheless, he argued, “something like the institutional view should be followed in practice.”¹¹⁰

To explain why, Strauss focused on amicus filings of the SG's office, in high-profile abortion and civil-rights cases, where “the Administration . . . believes that it is imperative, as a matter of policy or morality, to take” a position.¹¹¹ Taking that kind of position was invariably costly to the SG: “When what the Court receives from the Solicitor General is instead an argument, or a judgment, that is motivated by political concerns—even political concerns of the highest

103. David A. Strauss, *The Solicitor General and the Interests of the United States*, 61 L. CONTEMP. PROBS. 165 (1998).

104. *Id.* at 166.

105. *Id.* at 168.

106. *Id.* at 169.

107. *Id.*

108. *Id.* at 170.

109. *Id.*

110. *Id.*

111. *Id.* at 171.

moral order—the Court is no longer getting the kind of material it most needs.”¹¹² He concluded that “the community of interest between the Office and the Court is eroded.”¹¹³

Strauss was careful to set out the limits of the institutional approach, including that the “line between the institutional interests of the government and the political agenda of a particular Administration is difficult to define.”¹¹⁴ Nonetheless, he concluded: “By and large—not in every imaginable circumstance, but by and large—” the SG’s office best serves the president and the executive branch “by pursuing an institutional interest.”¹¹⁵

In 1998, then-SG Waxman endorsed the institutional approach in a speech to the Supreme Court Historical Society, still posted 23 years later on the SG’s webpage of the Justice Department website. Charminglly acknowledging that he had been merely the SG, he said:

With respect to the Supreme Court, the Solicitor General has often been called “the Tenth Justice.” But alas, although I get to participate a lot, I do not get a vote (and in some important cases I could really use one). No, the Solicitor General’s special relationship to the Court is not one of privilege, but of duty—to respect and honor the principle of *stare decisis*, to exercise restraint in invoking the Court’s jurisdiction, and to be absolutely scrupulous in every representation made.¹¹⁶

Like Strauss, Waxman was clear about distinguishing the institutional approach from a literal tenth-justice model. He also defined the SG’s role in terms of duty rather than privilege because of his “special relationship to the Court.”¹¹⁷ But as Covert and Wang argue so valuably, “Between the 2010 and 2019 Terms, the Court granted only fifteen of forty-three motions for amicus oral argument by litigants other than the OSG. During that time, it granted 306 amicus oral argument motions—all but one—by the OSG.”¹¹⁸ Again, the Court’s denial to the SG’s office last April of time to argue as an amicus in a case was the first such instance in eight and a half years.¹¹⁹ Those numbers and that streak seem the result not of duty but of privilege.

This year, Michael R. Dreeben, a lawyer who worked in the SG’s office for 31 years, for 25 of them as the deputy SG supervising the criminal docket of the office,¹²⁰ published an article called *Stare Decisis*

112. *Id.* at 172.

113. *Id.*

114. *Id.* at 175.

115. *Id.* at 176–77.

116. Waxman, *supra* note 14.

117. *Id.*

118. Covert & Wang, *supra* note 9, at 683.

119. *See supra* note 13.

120. Michael Dreeben, GEO. L. <https://www.law.georgetown.edu/faculty/michael-dreeben> (last visited Mar. 23, 2021) [<https://perma.cc/QC9A-XR8S>].

in the Office of the Solicitor General.¹²¹ It addresses whether it is proper for the SG's office to change a legal position taken under a prior SG and administration when a new SG, especially in an administration of the other political party, concludes that the prior legal position was wrong.¹²² Dreeben says that it is proper to do that, that there should be a presumption in favor of it.¹²³ In the tradition of the SG's office, he also articulates risks of doing so and arguments against doing so often.¹²⁴ The framework for his discussion is the quasi-lawmaking role of the SG's office and the value to that role of the office's version of *stare decisis*. That means standing by legal positions the office has previously taken, even if the party that controls the White House has changed.¹²⁵

The article has the merits of an exemplary brief by the SG's office: it shows mastery of its subject and of the skills of legal reasoning, in measured, poised, and lucid prose. That is not surprising: when Dreeben retired from the office in 2019, former SG Donald B. Verrilli Jr. praised him for his "devotion to the craft of lawyering" and "to the profession's highest ideals."¹²⁶ Dreeben responded to praise from Verrilli and others by articulating the ideals for the SG's office: "Candor to the court, commitment to abiding governmental interests, recognition of the importance of precedent, and firm loyalty to the integrity of the law."¹²⁷ The exchange published by SCOTUSblog reminded me why, when I was immersed in reporting about the SG's office in the mid-1980s, it felt like I was reporting a love story—about very accomplished lawyers who loved the law with quiet intensity and were devoted to a rarefied legal practice.

Dreeben never addresses the choice Strauss did explicitly or Waxman did implicitly. Still, a core premise of the Dreeben article, as important and telling as the quality of the thinking and writing, might be signaled by the word "special": "Of course, by tradition and culture," Dreeben writes at one point, "the Solicitor General has a special relationship to the Court and a special obligation to the rule of law."¹²⁸

121. Michael R. Dreeben, *Stare Decisis in the Office of the Solicitor General*, 130 YALE L.J.F. 541 (2021).

122. *See id.* at 542.

123. *Id.*

124. *Id.* at 554–62.

125. *Id.* at 548–54.

126. Donald B. Verrilli, *Michael Dreeben: A True Public Servant*, SCOTUSBLOG (Aug. 2, 2019, 3:48 PM), <https://www.scotusblog.com/2019/08/michael-dreeben-a-true-public-servant/> [<https://perma.cc/P2BR-KDB8>].

127. Michael Dreeben, *Response of Michael Dreeben to Tributes Upon His Leaving the Office of the Solicitor General*, SCOTUSBLOG (Aug. 8, 2019, 3:13 PM), <https://www.scotusblog.com/2019/08/response-of-michael-dreeben-to-tributes-upon-his-leaving-the-office-of-the-solicitor-general/> [<https://perma.cc/K9LG-J7GV>].

128. Dreeben, *supra* note 121, at 557.

The footnote for that assertion is to a 1955 law review article by then-SG Simon E. Sobeloff,¹²⁹ who supported the concept of the special relationship defined by dual responsibility of the SG to the president and the Court. The note reflects scholarly practice in providing authority for that central point, yet it puts a spotlight on a key element missing from the Dreeben article. It does not address how much has changed in the workings of the SG's office in the two-thirds of a century since Sobeloff's words were published and how much has changed in the makeup and functioning of the Supreme Court. It does not address questions raised by those changes, about the nature of the special relationship and the justification for it—no matter how superb the lawyering by the SG's office.

The argument Dreeben makes in his article responds to a controversy that Trump SG Noel J. Francisco stirred up in 2017 when the SG's office “made four major changes in position in high-profile cases.”¹³⁰ As Vladeck wrote in 2019, “Scholars from across the political spectrum have accused the government of ‘astounding’ conduct in changing its litigating position in a dizzying array of high profile cases (changes that the Solicitor General would, by tradition, have been involved in approving).”¹³¹ The accusations accompanied more personal criticisms about Francisco's advocacy before the Court, including “repeatedly misleading” the Justices in the oral argument about the Trump travel ban and making unfounded claims of unethical lawyering about an opponent in a high-profile case dealing with abortions for undocumented immigrants.¹³²

The focus of Vladeck's article, however, is on the

unprecedented number of requests for emergency or extraordinary relief from the Justices, asking the Court (1) to hear certain appeals before the lower courts have finished ruling; (2) to halt the effect of lower court rulings pending the Supreme Court's review; or (3) to jump over the courts of appeals and directly issue writs of mandamus to rein in perceived abuses by different district courts.¹³³

The SG's “special obligation to the rule of law,”¹³⁴ as Dreeben calls it, surely entails supporting the conventional and transparent judicial process, and not regularly seeking emergency or extraordinary relief through the so-called “shadow docket.”¹³⁵ Commitment to the rule of law

129. Simon E. Sobeloff, *The Law Business of the United States*, 34 OR. L. REV. 145, 148 (1955).

130. Dreeben, *supra* note 121, at 552.

131. Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 124 (2019).

132. *Id.*

133. *Id.*

134. Dreeben, *supra* note 121, at 557.

135. Vladeck, *supra* note 131.

entails commitment to the legal process—to litigating cases through the regular steps of judicial review.

Yet Vladeck writes that of the “veritable mountain of scholarship and popular commentary on the Solicitor General’s role and relationship with the Supreme Court,”¹³⁶ “virtually none of it has addressed this last phenomenon.”¹³⁷ Francisco was “*far* more aggressive in seeking to short-circuit the ordinary course of appellate litigation—on multiple occasions across a range of cases—than any of his immediate predecessors.”¹³⁸ He filed, on average, at least seven applications for stays by the Supreme Court in his three terms as SG, compared to an average of one every other term in the 16 years of the previous two administrations.¹³⁹

The Court did not always grant Francisco’s applications, but, as Vladeck writes, “the net *effect* of the Court’s actions in most of these cases has left the Solicitor General with most of what he has asked for, generally leaving the specific federal policy under challenge in place (or halting complained-of-discovery) pending the full course of appellate litigation.”¹⁴⁰ Vladeck concludes:

The Solicitor General has certainly not been a neutral bystander to these developments, but it is the Court, first and foremost, that is responsible for enabling (if not affirmatively encouraging) the Solicitor General’s unprecedented behavior. Second, it would behoove the Justices to reflect more holistically on their responsibility for this trend—and the longer-term consequences of abandoning the view that one of the Solicitor General’s foremost responsibilities is to “exercise restraint in invoking the Court’s jurisdiction.”¹⁴¹

The development of the “shadow docket” is the latest evidence of the extensive change in the SG’s role and of the Supreme Court’s apparent support for that change from the traditional workings of the special relationship.

As I wrote in *Harvard Magazine*, the “S.G.’s role is measurably more political” today than it was 44 years ago.¹⁴² In 2018, a former SG told me, “The change in expectations has been so great that the action that would raise eyebrows and create the risk of negative inferences that might be unwarranted is when the United States doesn’t participate” as an amicus in cases raising policy and political issues.¹⁴³ He went on, “This expectation on the part of the Court that this is a difficult, sensitive matter and we want to hear what the United States

136. *Id.* at 124–25.

137. *Id.* at 125.

138. *Id.*

139. *Id.*

140. *Id.* at 126.

141. *Id.* at 127–28.

142. Caplan, *supra* note 64, at 52.

143. *Id.*

has to say about it means that the S.G. is going to be in the middle of something that's highly politicized.”¹⁴⁴ If nothing else, Vladeck's comments confirm the striking increase in the political nature of the SG's role: “The Solicitor General has certainly not been a neutral bystander to these developments, but it is the Court, first and foremost, that is responsible for enabling (if not affirmatively encouraging) the Solicitor General's” behavior.¹⁴⁵

The Court is decidedly political: the premise of the 1977 memo about the SG's role no longer holds because law and politics are regularly indistinguishable in matters before the Court. In 2019, Adam Feldman, a close Court follower and analyst, attributed to “trust” between the Court and the SG the high level of agreement in the 2018 Term between Court decisions to hear cases and recommendations made by Trump SG Francisco about cases the Court should hear, in response to calls for the views of the SG.¹⁴⁶ It would have been as accurate to attribute that level of agreement to shared political and legal interests: the Court is a conservative, Republican Court, and it is more inclined to agree with a conservative, Republican SG.

CONCLUSION

The routine practice of the SG's filing of voluntary amicus briefs and of asking for time in oral argument, combined with the dominance of amicus cases in the SG's filings, suggests that the office no longer pauses much to contemplate whether an interest described as institutional is better called political or has incorporated, or perhaps discounted, the increasing overlap of law and politics at the Supreme Court into its own culture and practice. That is difficult for an outsider to assess—and perhaps Dreeben's praise for the “ordinary deliberative processes and professional culture”¹⁴⁷ of the SG's office today (“Here is where process matters”)¹⁴⁸ is not what it seems—pride and praise in traditional terms for the office but applied to notably different circumstances. It is possible that the SG's office and members of the Supreme Court regard the current version of the special relationship as the product of a sensible evolution of what the 1977 memo defined; that

144. *Id.*

145. Vladeck, *supra* note 131, at 127.

146. Kimberly Strawbridge Robinson, *Trump Solicitor General Has High Court's Ear as Ideologies Meet*, BLOOMBERG L. (June 12, 2019, 3:55 AM) <https://news.bloomberglaw.com/business-and-practice/trump-solicitor-general-has-high-courts-ear-as-ideologies-meet?context=article-related> [<https://perma.cc/2DQM-ZGLU>].

147. Dreeben, *supra* note 121, at 543.

148. *Id.*

they reject the idea that amicus briefs are political statements and the idea that the SG's docket is fundamentally different from what it was two-thirds of a century ago; and that they see no reason for concerns that Vladeck and other scholars have raised and that I raise here.

But the numbers that Covert and Wang report represent important evidence to the contrary. No matter how deliberative the process in the SG's office or professional the culture, no matter how Olympian the quality of the lawyering, when the object of the process is an amicus brief, that is different from the brief in a case where the government is a party and has a direct interest. The combination focused on above—the predominance of amicus briefs in the SG's filings and the routine practice of asking for and getting time in oral argument—suggests that the Supreme Court has contributed to stretching the meaning of the special relationship between the Court and the SG's office to provide more than “permission”: the almost uniform granting of oral argument time to the SG's office in the past decade represents an extreme and valuable form of favoritism. It has given an indefensible advantage to the SG and to the U.S. government. The gap between the framework for the SG's role in the 1977 memo and the reality underscored by the unfair favoritism that Covert and Wang describe is striking and considerable. It underscores the need for a fundamental reconsideration of the SG's role.

Some consequences of the current relationship are not in the interest of the American people or American law—even if the SG's office and members of the Court see that relationship as being in the interests of the entire federal government. The current special relationship has turned the SG into an ombudsman at the Court, elevating the voice and the influence of the executive branch there to an unprecedented and unjustified level. That has turned a modest-seeming but vigorous part of the checks and balances among the three branches of the federal government into a tool strongly favoring the executive branch before the Court. It throws off balance the checks and balances as the nation's founders shaped them. It puts the executive branch's interests ahead of all other organizations and individuals with cases before the Court. In terms well framed by Darcy Covert's and Annie J. Wang's *The Loudest Voice at the Supreme Court*, that advantage and expansion of power is based on a noble but dated conception of the SG's role. The conception no longer describes or justifies key aspects of what the SG's office does before the Court.