

Government Litigation in the Supreme Court: The Roles of the Solicitor General*

According to the original statutory authorization, "there shall be in said Department [of Justice] an officer learned in the law, to assist the Attorney-General in the performance of his duties, to be called the solicitor-general . . ."¹ Congress also empowered the Solicitor General to argue in the Attorney General's discretion "any case in which the government is interested" in the Court of Claims or upon appeal from that or any other court in the Supreme Court, and any case in which the United States was interested in any federal or state court.² Substantially the same statutory language describes the Solicitor General's functions a century later.³

These spare provisions and the Office's small size⁴ mask the actual scope of the Solicitor General's powers and his critical role in shaping the development of the law. Given the number and importance of the Supreme Court cases in which the government is involved,⁵ the Solicitor General is often called upon to argue before the Court, and his skill in advocacy shapes precedent in vital areas of the law. That possibility would exist for any lawyer with an active Supreme Court

* The research for this Note was made possible by a grant from the Walter E. Meyer Research Institute of Law. The *Journal* wishes to express its thanks to the staffs of the Office of the Solicitor General, the Yale Law Library, the Supreme Court Library, and the Office of the Clerk of the Supreme Court for their kind and helpful assistance. The *Journal* also thanks Solicitor General Griswold, former Solicitor General Cox, and the CAB, FCC, FPC, FTC, ICC, NLRB, and SEC for granting interviews.

1. Act of June 22, 1870, ch. 150, § 2, 16 Stat. 162.

2. *Id.*, § 5, 16 Stat. 162-63. These provisions were codified five years later as Rev. Stat. tit. VIII, §§ 347, 359, 367 (1875).

3. 28 U.S.C. §§ 505, 517, 518 (Supp. III, 1965-67).

4. The Office has not significantly changed in size or structure in the last thirty-five years. At the present time, there are eleven lawyers in the office, handling an estimated seventeen cases a day.

The term Solicitor General as used in this Note refers not only to the individual, but also to the entire Office.

5. The figures for the last five Supreme Court terms were:

	1963	1964	1965	1966	1967
Cases on docket	2779	2662	3284	3356	3586
Cases in which the government participated	910	1000	1116	1143	1274
Per cent of cases in which government participated	33	38	34	34	36
Cases argued on the merits	144	122	131	150	179
Government participating	83	70	76	77	115
Percentage	58	57	58	51	64

Source: 1968 ATT'Y GEN. ANN. REP. 98, 102.

Government Litigation in the Supreme Court

practice; the Solicitor General's influence stems, however, not only from his frequent appearances, but also from his other powers. In cases involving the Justice Department, the Solicitor General controls access to the circuit courts and to the Supreme Court.⁶ No unsuccessfully litigated Justice Department case may be disposed of internally without his approval.⁷ In cases involving the regulatory agencies, except the Interstate Commerce Commission,⁸ the Solicitor General grants or denies requests to petition the Supreme Court for certiorari. In cases where the government is respondent, he decides whether to contest or join an opposing party's petition. If the Solicitor General believes that the government's position is legally untenable, he may confess error, an action which is generally dispositive. In addition, the Solicitor General is often involved in inter-agency disputes before the Court. He also participates as *amicus curiae* on his own initiative or upon the Court's request, frequently in cases of major constitutional importance.⁹

The Solicitor General's relationship with the Court is multifaceted. The Court relies upon his ability to limit the number and guarantee the importance of the cases appealed by the government. It also depends upon him to present the views of the Executive and often to inform the Court, for example, as to the content of barely legible *in forma pauperis* petitions. The Court also assumes that the Solicitor General—as the lawyer for a special client, the United States—will not only attempt to win a case, but will aid the Court in finding the solution most conducive to the public interest.

As the bridge between the Executive and the Judiciary, the Solicitor General must often choose between incongruous roles and differing

6. 1967 ATT'Y GEN. ANN. REP. 15-16, 32-33.

7. 28 C.F.R. §§ 0.20, 0.163 (1969). The Solicitor General also controls agency litigation which originates in the district courts on appeal to the circuit courts.

8. The statutory authorization for the ICC is 28 U.S.C. § 2323 (1964); as to its special role, see Stern, "Inconsistency" in *Government Litigation*, 64 HARV. L. REV. 759, 760-64 (1951). The Federal Maritime Commission also appeals its own cases but this occurs an average of only once in four years.

9. The literature on the Solicitor General's Office consists almost entirely of articles written by past Solicitors General. See Cox, *The Government in the Supreme Court*, 44 CHI. B. RECORD 221 (1963); Fahy, *The Office of the Solicitor General*, 28 A.B.A.J. 20 (1942); Perlman, *The Work of the Office of the Solicitor General*, 54 TRANS. MD. ST. B. ASS'N 265 (1948); Sobeloff, *Attorney For the Government: the Work of the Solicitor General's Office*, 41 A.B.A.J. 229 (1955); Sobeloff, *The Law Business of the United States*, 34 ORE. L. REV. 145 (1955); Stern, "Inconsistency" in *Government Litigation*, 64 HARV. L. REV. 759 (1951); Stern, *The Solicitor General's Office and Administrative Agency Litigation*, 46 A.B.A.J. 154 (1960). See also Brigman, *The Office of the Solicitor General* (Ph.D. Dissertation, University of North Carolina, 1966); Krislov, *The Role of the Attorney General as Amicus Curiae*, in *THE ROLE OF THE ATTORNEY GENERAL OF THE UNITED STATES 71-113* (1968); Werdegar, *The Solicitor General and Administrative Due Process: A Quarter Century of Advocacy*, 36 GEO. WASH. L. REV. 481 (1968).

loyalties. He is still the government's lawyer, and he most frequently acts as an advocate. On the other hand, he also functions as a reviewer of government positions, an officer of the Court, and, as past Solicitors General have emphasized, a protector of the public interest. These conflicting roles highlight the Office of the Solicitor General viewed as an institution of government. This Note concentrates upon four of the Solicitor General's functions which illustrate problems of conflict: granting or denial of authorization to seek certiorari, participation in interagency conflicts, intervention as *amicus curiae*, and confession of error.¹⁰

An issue which underlies these conflicts is the degree of independence which the Solicitor General enjoys. As an officer of the Department of Justice and a member of the national administration, he lacks complete freedom to choose cases or positions. The Office operates, however, with an exceptional degree of autonomy within the Executive—a function of the stature of the men occupying the position, the advantage to the government of maintaining an advocate whom the Court can trust, and the Solicitor General's lack of involvement in the often politically charged decision to initiate litigation.

The Solicitor General does consult the Attorney General to learn the administration's position in politically sensitive cases. In rare instances, the Attorney General might dictate the Solicitor General's decision. The Solicitor General possesses, however, sufficient independence to resist presenting to the Court an argument which he finds disingenuous or unconscionable. In the great majority of cases, the Attorney General is not involved and the Solicitor General operates independently within the Justice Department.¹¹

10. Since it poses less dramatic problems of conflict, the Solicitor General's most frequent role, as the government's lawyer in the traditional adversary sense, is not considered. Other of the Solicitor General's roles are also not considered. Although he is responsible for authorizing appeals by the Justice Department to the circuit courts, the appellate sections of the Justice Department assume the primary responsibility in that process, the Solicitor General adopting their recommendations in 90% of the cases. The Solicitor General does exercise a clear supervisory role, however, as evidenced by the 10% of the cases in which he overruled the appellate section's recommendations. Brigman, *The Office of the Solicitor General* 37 (Ph.D. Dissertation, University of North Carolina, 1966). The reported cases and briefs of the Solicitor General were examined over the period of time, 1959-1969, covering the terms of four Solicitors General—Rankin, Cox, Marshall and Griswold—as well as two changes of party in the White House.

11. Francis Biddle, Solicitor General from 1940-1941, commented that his position was the ultimate professional satisfaction:

The work combines the best of private practice and of government service. He determines what cases to appeal, and the client has no say in the matter, he does what his lawyer tells him, the lawyer stands in his client's shoes, for the client is but an abstraction. He is responsible neither to the man who appointed him nor to his immediate superior in the hierarchy of administration. The total responsibility is his, and his guide is only the ethic of his law profession framed in the ambience of

Government Litigation in the Supreme Court

I. The Decision to Seek Certiorari

Although the Solicitor General's conduct of litigation once in the Supreme Court is the most visible responsibility of the office, his preliminary decision whether the government should petition the Supreme Court for certiorari, or acquiesce in or oppose the petitions filed by others, is equally critical.¹² The Solicitor General's imprimatur carries considerable weight, as suggested by the fact that approximately two thirds of the government's petitions for certiorari are granted. By contrast, the Court grants only one-tenth of all petitions for certiorari.¹³ At the present time the power of the Solicitor General to regu-

his experience and judgment. And he represents the most powerful client in the world.

... The Solicitor General has no master to serve except his country.

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

See the comments of Justice Frankfurter in ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928-1945, at 743 (M. Freedman ed. 1967).

12. The Solicitor General also decides whether the government will appeal a decision adverse to the government. The Solicitor General's decision to seek certiorari or appeal is based on similar considerations, reflecting the Court's discretionary treatment of appealed cases. See Douglas, *The Supreme Court and its Case Load*, 45 CORN. L. Q. 401, 411 (1960); Gressman, *Much Ado about Certiorari*, 52 GEO. L.J. 742, 754 (1964).

Requests for certiorari are preliminarily reviewed by the appellate sections of the Justice Department. The appellate sections of the Antitrust and Civil Divisions also review recommendations from regulatory agencies seeking certiorari. The recommendation of the appellate sections is then transferred to a member of the Solicitor General's staff, along with the trial and appellate record, lower court opinion(s), and, where an agency is involved, the agency's request. Each member of the Office has a field of specialization, and his recommendation is reviewed by one of the three Deputy (called, until recently, Assistant) Solicitors General and then by the Solicitor General himself.

13. The following figures cover the last five years for which statistics are available.

	1962	1963	1964	1965	1966
Total petitions acted upon by the Court	2048	2104	1929	2414	2549
Petitions filed or supported by government	33	34	46	33	37
Petitions granted total	207 (10%)	188 (9%)	137 (7%)	180 (7%)	185 (7%)
Government petitions granted	25	21	37	23	31
Percentage for government	76	62	80	70	84
Percentage for other litigants	9	8	5	7	6
No. of cases considered by the Solicitor General for certiorari	444	385	385	360	367
No. of authorizations	39	43	36	32	40
No. of cases considered by the Solicitor General for courts of appeal	1212	1149	1103	1089	965
No. authorized	388	308	268	208	195

late access to the Court extends to cases brought by all executive departments and the administrative agencies, with the exception of the ICC. Control over agency petitions is the most controversial and anomalous of the Solicitor General's functions.¹⁴ The regulatory agencies were intended to be relatively independent, responsible for the impartial administration and development of a body of law. Their orders were to be subject to review by the judiciary. The ability of an executive official, directly responsible to the Attorney General and the President, to exercise perhaps decisive control over the agencies' litigation is arguably inconsistent with the agencies' design. In addition, his decision not to seek certiorari removes the determination of "certworthiness" from the Court's hands.

A. *History and Legislative Intent*

The Solicitor General's position came into being seventeen years before the first independent agency and twenty-one years before Congress first established the discretionary writ of certiorari as a means of access to the Court. Congress obviously did not originally foresee the extent of the Solicitor General's present control. More recently, Congress has been on notice of the extent of the Solicitor General's powers, and with each agency it created could have indicated its disapproval of his control.

The evolution of the Solicitor General's powers occurred as a result of changes within the Justice Department and the creation of the regulatory agencies. In 1870, as part of a post-Civil War economy drive

1967 ATT'Y GEN. ANN. REP. 39; 1966 ATT'Y GEN. ANN. REP. 55.

The Solicitor General's high percentage can also be argued as consistent, it should be noted, with undue timidity in seeking certiorari in meritorious cases. See the comments of Solicitor General Jackson in 1938 ATT'Y GEN. ANN. REP. 37 and Solicitor General Biddle in 1940 ATT'Y GEN. ANN. REP. 44.

Comparisons between the government's and private parties' figures should be tempered by several considerations. A large number of private petitions are frivolous appeals of criminal convictions. Furthermore, the filing of a petition by private parties incurs little risk of judicial sanctions and leaves open the possibility of a reversal. By contrast, denial of a government petition can have severe effects on other litigation; see pp. 1456-58 *infra*.

14. Unlike the Solicitor General's other functions, his ability to deny authorization to seek certiorari prevents the Court or any other public forum from dealing with a case. While agency independence is not complete—the Bureau of the Budget exercises control over the agencies' budgetary and legislative requests and the President appoints agency members—these deviations were either accepted by Congress or do not represent complete outside control of an agency's activity. For example, an agency can request a Congressman to introduce legislation or make known its budgetary desires. The Solicitor General's control is more pervasive and relates to an agency's actual policy formulations and litigation activity. See Stern, *The Solicitor General's Office and Administrative Agency Litigation*, 46 A.B.A.J. 154, 155-56 (1960).

Government Litigation in the Supreme Court

to curb the cost of government litigation, the Justice Department, including the Solicitor General, was created to replace expensive outside counsel.¹⁵ The growing volume of government litigation and the commensurate increase in the Attorney General's administrative and political responsibilities in subsequent years caused a greater division of labor within the Justice Department than the original statute had contemplated,¹⁶ and the Solicitor General became almost solely responsible for the management of Supreme Court litigation.¹⁷ By 1895 Justice Department policy required the Solicitor General's authorization in order to appeal to the Court a department case involving Indian claims.¹⁸

The Solicitor General began to authorize Justice Department appeals to the circuit courts after the First World War.¹⁹ In 1933, he was relieved of his responsibilities for the preparation of the Attorney General's opinions and an Assistant Solicitor General was created to assume that task.²⁰ During the Second World War, the Solicitor General briefly assumed a number of other positions²¹ in his capacity as

15. The Government's business in the Supreme Court was originally handled by the Attorney General. Judiciary Act of 1789 ch. 20, § 35, 1 Stat. 93. He continued in this role until 1870, while practicing on the side. See H. B. LEARNED, *THE ATTORNEY-GENERAL AND THE CABINET* (1909); J. S. EASBY-SMITH, *THE DEPARTMENT OF JUSTICE; ITS HISTORY AND FUNCTIONS* 1-14 (1904). The involvement of the Attorney General in private suits did not end with the creation of the Justice Department; for a discussion of his role in litigating private land claims, see *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 303-08 (1888), and 1890 ATT'Y GEN. ANN. REP. xvi, announcing the end of that practice. As for Congress's purpose in the 1870 changes, see CONG. GLOBE, 40th Cong., 2d Sess. 1271-73 (1869), and S. Exec. Doc. No. 13, 40th Cong., 2d Sess. (1867).

The original goal of centralizing all of the responsibility for government litigation in the Attorney General's hands has not, of course, been attained. See L. M. SHORT, *THE DEVELOPMENT OF NATIONAL ADMINISTRATIVE ORGANIZATION IN THE UNITED STATES* 330-32, 342-43 (1923), and the Hoover Commission Report, U.S. COMM'N ON ORGANIZATION OF THE EXECUTIVE BRANCH, REPORT ON LEGAL SERVICES AND PROCEDURE 7-17 (1955).

16. The original statute visualized the Solicitor General as primarily a courtroom lawyer and the Attorney General's assistant. The rapid growth in the number of government cases is suggested by the fact that in 1877 one thousand cases were on the Supreme Court docket, resulting in a two to three year lag before cases were heard. The government was involved in 175. 1877 ATT'Y GEN. ANN. REP. 11-13. In 1889, the Attorney General was already far behind in his work and requested a second Assistant Attorney General to aid in the preparation of opinions and to allow more attention to be given to Supreme Court cases. 1889 ATT'Y GEN. ANN. REP. 8-9.

17. Thacher, *Genesis and Present Duties of Office of Solicitor General*, 17 A.B.A.J. 519, 520-21 (1931).

18. 1895 ATT'Y GEN. ANN. REP. 53.

19. See A. G. LANGELUTTIG, *THE DEPARTMENT OF JUSTICE OF THE UNITED STATES* 33-36 (1927). The First World War also caused another spurt in the volume of cases, and the Solicitor General's role within the Justice Department had become sufficiently critical to justify his issuing an independent annual report. 1919 ATT'Y GEN. REP. 32-53.

20. Act of June 16, 1933, ch. 101, § 16, 48 Stat. 307-08. See also S. Doc. No. 25, 73rd Cong., 1st Sess. 4-5 (1933); Attorney General Cummings's Radio Address, *The National Government's Law Office*, delivered July 16, 1937 (reprinted 1938), at 4-5. This function is now performed by the Office of Legal Counsel.

21. He was first placed in charge of alien registration. 1940 ATT'Y GEN. ANN. REP. 49. During the War, he was director of the Department's War Division, Chairman of the

the number two man in the Justice Department. Creation of the Deputy Attorney General's post in 1953 relieved the Solicitor General of many of his administrative responsibilities.²²

The question of access to the Court by the independent agencies has been subsumed in the larger continuing battle between the Justice Department's conception of itself as lawyer for the entire government and the agencies' belief in the value of their independence. The issue was originally joined in the 1910 battle over the proposal to create a specialized Commerce Court to review ICC orders.²³ One strand of the controversy centered on the ICC's power to represent itself on appeal. Some, including President Taft, felt that this was an inappropriate function for a quasi-judicial body and a responsibility better left to the Attorney General;²⁴ others believed the ICC should continue to represent itself on appeal because the ICC's lawyers were more expert than Justice Department attorneys and because the Attorney General might, perhaps for political reasons, shape the agency's litigation.²⁵

A compromise finally emerged:²⁶ the Attorney General would have general charge and control of the litigation and the United States would be the statutory defendant, but the ICC and other interested parties could intervene of their own motion.²⁷ The statute further specified that the ICC could be represented by its own counsel, and, most importantly, that a case could not be discontinued without the ICC's consent. Two years later when Congress abolished the Commerce Court, it retained the provisions regarding the control of litiga-

Board of Legal Examiners, member of the Federal Board of Hospitalization, Chairman of the Justice Department Committee on Deferments, and the Attorney General's alternate on the Board of Economic Warfare. He was also placed on special assignments. 1948 *ATT'Y GEN. ANN. REP.* 49. See also F. BIDDLE, *IN BRIEF AUTHORITY* 106-49 (1962).

22. Reorganization Plan No. 4 of 1953, § 1, 67 Stat. 636.

23. See generally Tollefson, *Judicial Review of the Decisions of the Interstate Commerce Commission*, 11 *MINN. L. REV.* 389, 504 (1927).

24. H.R. Rep. No. 923, 61st Cong., 2d Sess. 3, 8 (1910); S. Rep. No. 355, pt. 1, 61st Cong., 2d Sess. 6 (1910).

25. "Thus the amazing spectacle would be constantly presented of a review of the orders of the commission not by a court, but by the Department of Justice," S. Rep. No. 355, pt. 2, 61st Cong., 2d Sess. 6 (1910). On the Senate floor, Senator Root, one of the Commerce Court's chief supporters, sought to quiet these fears by stating that the Attorney General's role would only be ministerial: "It is his business to defend. He is no judge; he is no legislator; he is no reviewing authority." 45 *CONG. REC.* 4104 (1910). The differing versions in the House and Senate appear in S. Doc. No. 606, 61st Cong., 2d Sess. 8-10 (1910).

26. This was still objectionable to a minority in the House-Senate conference who feared the Attorney General's political decision-making and the Justice Department's lack of expertise. S. Doc. No. 623, pt. 2, 61st Cong., 2d Sess. 2 (1910).

27. Act of March 3, 1911, ch. 231, § 212, 36 Stat. 1150.

tion²⁸ and provided that orders would be reviewed by three judge district courts and from there by appeal to the Supreme Court. No other agency has ever been granted the right to pursue its own litigation in such specific terms.²⁹

With the creation of the FTC in 1914,³⁰ Congress first established the now prevalent pattern of judicial review of agency orders—from the agency to the circuit courts to the Supreme Court by writ of certiorari.³¹ The switch from the ICC's procedure and from appeal to certiorari was made primarily because it was felt that using the relatively new circuit courts would speed review.³² Congress did not, however, incorporate the various provisions regarding representation into the Federal Trade Commission Act; in particular, the FTC was not given the right to continue a suit. The Act provided that the decision of the circuit court would be final except for review by the Supreme Court by certiorari,³³ but did not specify which governmental body would decide to file the petition. There was no congressional statement as to whether the FTC's Supreme Court litigation should be funneled through the Justice Department.³⁴ Congress continued to use the FTC model for every new regulatory agency it established, with the exception of certain matters within the jurisdiction of the FCC,³⁵ the Mari-

28. Act of October 22, 1913 (Urgent Deficiencies Act) ch. 32, 38 Stat. 219-21. In 1922 Congress also authorized the creation of an Assistant to the Solicitor General to help enforce the ICC's statute. Act of June 1, 1922, ch. 204, 42 Stat. 613-14.

29. See 28 U.S.C. §§ 2321-25 (1964).

30. Federal Trade Commission Act of 1914, ch. 311, 38 Stat. 717.

31. *Id.* § 5, 38 Stat. at 720.

32. H. R. Rep. No. 1142 (Conference Report) 63rd Cong., 2d Sess. 19 (1914); 51 CONG. REC. 14,768, 14,770, 14,925-27 (1914).

33. Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 720, now 15 U.S.C. § 45 (1964).

34. In other aspects of the FTC's litigation, Congress was not specific either. Subpoenas have posed a difficult problem of statutory interpretation; see *FTC v. Guignon*, 390 F.2d 323 (8th Cir. 1968). A writ of mandamus does require the Attorney General's consent. FTC Act, § 9, 38 Stat. 722, now 15 U.S.C. § 49 (1964).

It is arguable, though hardly dispositive, that given the fact that Congress's motive for creating the FTC was to supplement what it believed to be the Attorney General's lax enforcement of the antitrust laws, Congress really did not intend to authorize any Justice Department control over the FTC's litigation. Cf. 51 CONG. REC. 12,031, 12,623, 12,624-25, 12,647-48 (1914).

35. Act of June 19, 1934, ch. 652, § 402(a), 48 Stat. 1093, provides that FCC orders, except those relating to construction permits or station licenses, shall be reviewed in accordance with the ICC's procedure, and first heard in the district court. The commission itself is a party and there is no mention of independent standing. The commission, unlike the ICC, was not given the right to continue a suit without the Attorney General's consent. Section 402(b) states that other orders are appealed to the District of Columbia circuit court and from there, according to § 402(e), to the Supreme Court on certiorari. 48 Stat. 1093-94. Section 402(a) was amended by the Act of July 16, 1952, ch. 879, § 14, 66 Stat. 718-20, to conform to the Hobbs Act, discussed at pp. 1450-51 *infra*.

time Commission,³⁶ and the Secretary of Agriculture,³⁷ whose orders were reviewed in three judge district courts.

Despite twenty years of additional experience, Congress did not consider the problem of legal representation in the Court during the New Deal. As the NLRB legislative history illustrates,³⁸ most of the statutes consciously imitated the Federal Trade Commission Act and left open the issue of control over the filing of petitions. Congress's failure during this period to deal with the question is also suggested by the apparently haphazard collection of statutory provisions regarding agency counsel.³⁹

In 1947 the Judicial Conference of the United States proposed the total elimination of the three judge district court procedure of review in favor of the FTC model. Hearings were held in the Eightieth and Eighty-First Congresses,⁴⁰ and an extended battle began between the ICC and the Attorney General. The other agencies affected by the bill—the FCC, the FMC, and the Secretary of Agriculture—were less opposed to change.⁴¹ The bills, as drafted and adopted, provided that the United States would remain as the statutory defendant with the Attorney General in charge of the government's interests. The three agencies, however, could intervene as of right, continue the suit

36. Shipping Act of 1916, ch. 452, § 31, 39 Stat. 738; Intercoastal Shipping Act of 1933, ch. 199, § 5, 47 Stat. 1427.

37. Perishable Commodities Act of 1930, ch. 436, § 11, 46 Stat. 535; Packers and Stockyards Act of 1921, ch. 64, § 316, 42 Stat. 168.

38. The NLRB under the NRA had been crippled, in part because the court proceedings were brought by Justice Department lawyers who had no knowledge of what the Board had previously done in a case. As a result, the new Board was allowed to go to court itself though no specific mention was made of Supreme Court representation. National Labor Relations Act, ch. 372, § 4(a), 49 Stat. 451, as amended, 29 U.S.C. § 154(a) (1964) provides " * * * Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court." Appeals to the Supreme Court are described in the ambiguous language of the Federal Trade Commission Act, *id.*, §§ 10(e), (f), 49 Stat. 454, as amended, 29 U.S.C. § 160(e), (f) (1964).

On the deliberate imitation of the FTC, see S. Rep. No. 573, 74th Cong., 1st Sess. 14-15 (1935); H. R. Rep. No. 969, 74th Cong., 1st Sess. 5-6, 21 (1935); H. R. Rep. No. 1371 (Conference Report), 74th Cong., 1st Sess. 5 (1935); H. R. J. Res. No. 375, 48 Stat. 1183; 78 CONG. REC. 11,635, 12,016 (1934).

39. The FTC statute is faithfully followed in the Securities & Exchange Act of 1933, ch. 38, § 9(a), 48 Stat. 80-81, now 15 U.S.C. § 771(a) (1964); and the Bituminous Coal Commission statute, Act of April 26, 1937, ch. 127, § 6(b), 50 Stat. 85. But the CAB provision was inexplicably different. Act of June 23, 1938, ch. 601, §§ 1007(b), 1008, 52 Stat. 1025.

40. The bills are printed in *Hearings on H.R. 1468, H.R. 1470, and H.R. 2271 of the Eightieth Congress before Subcomm. No. 3 and No. 4 and on H.R. 2915 and H.R. 2916 before Subcomm. No. 2 of the House Comm. on the Judiciary*, 81st Cong., 1st Sess., ser. 2 (1949) [hereinafter cited as *1947-49 Hearings*]. The relevant parts are H.R. 1468, §§ 8, 10, at *id.*, 23-24; and H.R. 1470, §§ 8, 10, at *id.*, 25-26. The legislative history is summarized in the committee reports. H.R. Rep. No. 1619, 80th Cong., 2d Sess. 2-3 (1948).

41. *1947-1949 Hearings* at 51-53 (Agriculture), 71-76 (testimony of FCC Assistant General Counsel), 93 (letters from Secretary of Agriculture & FCC). The FMC was hostile to control by the Solicitor General. *Id.* at 144-47 (letter from FMC Chairman). Even the FCC was perturbed by the Justice Department's amendments, discussed in note 42 *infra*. *Id.* at 138-43.

Government Litigation in the Supreme Court

irrespective of the Attorney General's action,⁴² and file for certiorari.⁴³ The ICC alone was exempted from the new legislation—the Hobbs Act⁴⁴—and retained its old procedure.⁴⁵

By providing that the affected agencies as well as the United States could petition for certiorari, Congress added a degree of specificity to the Hobbs Act which did not appear in the previous statutes modeled after the FTC's. In point of fact, however, there has been no difference in the relationship of the FCC, for example, and the NLRB with the Solicitor General despite the differing statutory language;⁴⁶ both agencies clear their requests for petitions through him. On occasion agencies have threatened to petition the Court without any authorization, but none has ever done so.⁴⁷ At least one agency has sought to acquire by legislation the same degree of control over its own litigation as the ICC possesses,⁴⁸ though many agencies feel that the disadvantages of such a change might outweigh any gains.

42. Attorney General Clark and Solicitor General Perlman offered two amendments: one requiring that all briefs be filed by either the Attorney General or the Solicitor General who would be in charge of the litigation, and the other allowing an agency separate representation when the United States was a party. *Id.* at 127-28. Neither was incorporated into the bill or mentioned in the committee reports—S. Rep. No. 2618, 81st Cong., 2d Sess. (1950), and H.R. Rep. No. 2122, 81st Cong., 2d Sess. (1950).

43. H.R. 2915, 81st Cong., 1st Sess., §§ 8, 10, 1947-49 *Hearings*, at 105-06; H.R. 2916, 81st Cong., 1st Sess. §§ 8, 10, *id.*, at 108-09.

44. Act of December 29, 1950, ch. 1189, 64 Stat. 1129, *as amended*, 28 U.S.C. §§ 2341-50 (Supp. III, 1965-67).

45. 28 U.S.C. §§ 2321-25 (1964).

46. The FMC appeals, however, its own infrequent Supreme Court cases.

47. The FMC tried to file a brief opposing a petition for certiorari prior to the Hobbs Act, but it was sent by the Clerk of the Supreme Court to the Solicitor General for clearance. 1947-1949 *Hearings*, at 146.

48. For the last eleven years, the CAB has introduced legislation which would give it complete autonomy in the conduct of its litigation. Hearings were held nine years ago but no action has been taken. S. 957, 87th Cong., 1st Sess. (1961), is an example of the CAB's legislative idea. *See also Hearings on S. 576, S. 1542, S. 1544, S. 1545, and S. 1547 before the Aviation Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. (1960). The CAB has no independent standing in litigation and desires complete autonomy, arguing that its differences with the Justice Department are over policy and that Justice has consequently failed to provide adequate representation. *Id.* at 26, 31-32. The ICC has reversed its position and sought to come under what is in effect the Hobbs Act; its proposed legislation passed the Senate but was not acted upon by the House in the last Congress. S. 2687, 90th Cong., 1st Sess. (1967), *see* S. Rep. No. 1499, 90th Cong., 2d Sess. (1968). *See also* the proposal in *Report of the Special Subcommittee on Legislative Oversight of the House Comm. on Interstate and Foreign Commerce*, H. R. 2711, 87th Cong., 2d Sess. 10 (1959).

H. R. 12893, 91st Cong., 1st Sess. (1969), introduced this summer and referred to the Committee on Interstate and Foreign Commerce, is designed, as its title proclaims, "to restore the independence of the Federal regulatory agencies." Section 31 amends 28 U.S.C. § 518(a) (Supp. III, 1965-67), as follows:

Except when the Attorney General in a particular case directs otherwise and *except when an independent regulatory agency otherwise requests with respect to its representation in any proceeding to which it is a party*, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court . . . (proposed changes in italics.)

Though 28 U.S.C. § 519 (Supp. III, 1965-67), which grants the Attorney General super-

The legislative history, in sum, indicates that Congress's treatment of the problem of representation in the Supreme Court has been characterized largely by oversight, and the Solicitor General has assumed his powers by default.⁴⁹

The Solicitor General has not, however, completely controlled the agencies. He may petition for certiorari or present an argument which he believes the Court will reject, simply to preserve amicable relations with a regulatory agency or an executive department. Occasionally he has authorized, but refused to join, the petition of an insistent agency,⁵⁰ and in rare instances has joined in an agency's petition because of the importance of the issue but declined to support the agency on the merits.⁵¹

The statutory uncertainty has never been resolved by a confrontation between the Solicitor General and an independent agency. The Solicitor General is reluctant to force a showdown. The problem is said to be an internal government matter from which the Solicitor General has the duty to shield the Court. Moreover, if the Court ever faced the question and resolved it in favor of the independent agencies, the prestige and power of the Solicitor General would be severely impaired.⁵² Even if the Court refused to face the issue squarely, but

visory power over all government litigation, is left intact, the above quoted section, though it is subject to a narrow interpretation, seems directed toward eliminating the Solicitor General's control over petitions for certiorari as well as the question of who will argue a case before the Court.

The bill also provides in sections 32-35, that the affected agencies (CAB, FCC, FPC, FTC, ICC, and SEC) may have lawyers represent them "in any case in court," the same language as the NLRB's statute's. *See* note 38 *supra*. By contrast, the ICC's present statute permits intervention as of right with its own counsel and states that the Attorney General cannot dispose of an action without the ICC's consent. 28 U.S.C. § 2323 (1964).

49. The Solicitor General bases his power on 28 U.S.C. §§ 516 and 519 (Supp. III, 1965-67). Section 516 reads:

Except as is otherwise authorized by law, the conduct of litigation in which the United States, an agency, or an officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice under the direction of the Attorney General. (emphasis added)

50. *See, e.g.*, FTC Brief for Certiorari, *Exquisite Form Brassiere, Inc. v. FTC*, 301 F.2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962); SG Brief for Certiorari at 16, *American Oil Co. v. FTC*, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964) (Solicitor General filed petition with notation that he would not support the FTC's position if certiorari were granted).

51. *See, e.g.*, SG Brief for Certiorari 16, *American Oil Co. v. FTC*, 377 U.S. 954 (1964).

52. Aside from seizing on the ambiguities in statutory language, *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966), laid down a doctrine that would give the agencies a persuasive argument. The Seventh Circuit had held that the Commission, lacking specific statutory authority, could not petition a court of appeals for a preliminary injunction to enjoin a merger that was under investigation. The Supreme Court reversed the circuit court on the grounds that agency standing may be inferred if consistent with the exercise of the agency's function:

There is no explicit statutory authority for the Commission to appear in judicial review proceedings, but no one has contended it cannot appear in the courts of appeal to defend its order. Nor has it ever been asserted that the Commission could not

Government Litigation in the Supreme Court

merely granted certiorari as requested by the agency, the precedent would be damaging.

The independent agencies are similarly reluctant. Most anticipate that the Supreme Court would merely deny certiorari, and the fruitless effort would damage the continuing relationship between the agency and the Solicitor General. Furthermore, many independent agencies are satisfied with the status quo, since they recognize that the Solicitor General's endorsement of a petition or his support on the merits increases the likelihood of a favorable Supreme Court reaction.

In any event, an agency whose request for authorization has been denied can attempt to evade the Solicitor General's veto by trying the same argument in another case before a different circuit court. If the agency wins, the opposing party will file the petition for certiorari and, given a conflict among the circuits, certiorari is more likely to be granted. One agency confessed that it often attempts to persuade private parties to intervene so that, even if the agency loses in the circuit court, a petition can be filed without the Solicitor General's supervision.

B. *Current Practice*

Since 1925 the Supreme Court's selection of cases to be heard on the merits has been left almost entirely to the Court's discretion,⁵³ and the Court has increasingly attempted to limit its docket.⁵⁴ As the number of cases coming up for review has mushroomed in recent years,⁵⁵ the Solicitor General's role in the process of certiorari has aided the Su-

bring contempt actions in the appropriate court of appeals when the court's enforcement orders were violated, though it has no statutory authority in this respect. Such ancillary powers have always been treated as essential to the effective discharge of the Commission's responsibilities.

384 U.S. at 607. Contrast, however, the vigorous dissent written by Justice Fortas, joined by Justices Harlan, Stewart, and White, 384 U.S. at 612.

53. Judiciary Act of 1925, ch. 229, 43 Stat. 936.

54. When the Office of the Solicitor General originated in 1870, Supreme Court review was a matter of right, and a heavy stream of petty litigation continued to overburden the Court. Although attempts were made in 1891 and 1916 to restrict access to the Court by expanding the Court's discretionary jurisdiction, by 1925 the Court's docket was swamped. The Judiciary Act of 1925, enacted at the urging of the Justices, reduced the Court's obligatory jurisdiction from eighty per cent to ten per cent. It took the Court almost two years between docketing and oral argument in 1925, compared with the approximately six months that it now requires. See Douglas, *supra* note 12, at 403; Gressman, *supra* note 12, at 748; Vinson, *Work of the Federal Courts* (speech before the ABA, Sept. 7, 1949), 69 Ct. v (1949).

55. There were 1238 cases docketed during the 1948 Supreme Court Term, 1657 docketed during the 1957 Term, and 3133 docketed during the 1967 Term. 1968 ATT'Y GEN. ANN. REP. 98; 1959 ATT'Y GEN. ANN. REP. 38.

preme Court in maintaining its broad discretionary review over an extensive range of litigation. Most importantly he performs a filtering function. The government as respondent participates in approximately one third of all cases docketed each term,⁵⁶ and an even higher percentage of cases argued on the merits.⁵⁷ To limit the number of cases brought by the government, the Solicitor General, during the 1966 term, for example, authorized petitions for certiorari in only 40 of the 367 cases which the government lost below.⁵⁸

A better conception of this screening process emerges from an examination of the percentage of cases in which the Solicitor General authorized the various government bodies to seek review by the Supreme Court. A statistical study found that the Solicitor General authorized less than twenty per cent of the certiorari petitions requested by executive departments; less than sixty per cent of those requested by the appellate sections of the Justice Department; and less than sixty-five per cent of those requested by the regulatory agencies.⁵⁹

The standards which the Solicitor General applies in this filtering process reflect the vague criteria suggested by the Supreme Court. Rule 19 of the Supreme Court Rules⁶⁰ sets out several categories of

56. See figures cited in note 5 *supra*.

57. The government participated in 53% of the cases argued on the merits during the 1967 Term as petitioner or appellant or respondent or appellee. Percentages for the 1963-1966 Terms are 38%, 44%, 50% and 45%. 1968 ATT'Y GEN. REP. 102.

58. See note 13 *supra*.

59. Brigman, *supra* note 9, at 75, 77, 120. These figures correspond to the estimates suggested in interviews.

A statistical compilation prepared for the authors by the FTC indicated that the Solicitor General had granted 17 of the 33 requests for certiorari that the FTC had made between 1962 and 1969. The Court granted 14 of the 17 petitions approved by the Solicitor General, and rendered a decision favorable to the agency in all cases heard on the merits.

By way of contrast, during the same period 57 petitions for certiorari were filed by private parties with the FTC as respondent. Only 2 of the 57 petitions were granted.

60. Rule 19 states:

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
 - (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.
 - (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.
2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.

Government Litigation in the Supreme Court

cases where review is possible, but the only operative words—"special and important reasons"—are utterly devoid of any predictive or analytical content.⁶¹ In its opinions the Court has been equally imprecise, limiting its explanation for granting certiorari to recitals of "the importance of the question presented."⁶²

Unlike many private parties who seek in their petitions for certiorari to persuade the Court on the merits of their case, the Solicitor General's briefs focus on the policy reasons for review. He is reluctant to seek certiorari in cases where there is no conflict among the circuits or little likelihood that the question will recur.⁶³ He rarely files petitions in cases where the issue is essentially factual, *e.g.*, when an agency is reversed by a court of appeals for lack of substantial evidence.⁶⁴ Moreover, in his evaluation of a case's "importance," the

61. Harper & Pratt have caustically remarked of these criteria:

[T]his rule is not very helpful; in fact it is practically useless to the lawyer trying to evaluate his chances of getting his case before the Court or trying to understand why he failed in the attempt. The Court has succeeded in cloaking its certiorari behavior in such a shroud of mystery that any explanation of what happens is the sheerest guesswork.

Harper & Pratt, *What the Supreme Court Did Not Do during the 1951 Term*, 101 U. PA. L. REV. 439, 440 (1953).

62. *See, e.g.*, *Protective Comm. v. Anderson* 390 U.S. 414, 418 (1968); *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 5 (1968); *Lassen v. Arizona Highway Dept.*, 385 U.S. 458, 461 (1967).

The Court may also label a case with one of the other criteria of Rule 19. Conflicts among circuits are frequently mentioned. *See, e.g.*, *Cheng Fan Kwok v. Immigration & Naturalization Service*, 392 U.S. 206, 208 (1968); *United States v. O'Brien*, 391 U.S. 367, 372 (1968); *Northeastern Pennsylvania Nat'l Bank & Trust Co. v. United States*, 387 U.S. 213, 217 (1967); *Denver & Rio Grande R.R. v. Bhd. of Railroad Trainmen*, 387 U.S. 556, 558 (1967). At one time it was thought that a clear conflict would automatically warrant certiorari, but this is not the case now. *See The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959); Stern, *Denial of Certiorari despite a Conflict*, 65 HARV. L. REV. 465 (1953).

The Court's failure to explain its grounds for denying certiorari have subjected it to severe criticism. *See Harper & Fowler, What the Supreme Court Did Not Do in the 1949 Term—An Appraisal of Certiorari*, 99 U. PA. L. REV. 293 (1950); Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 91 (1968). *But see* Justice Frankfurter's discussion in *Maryland v. Baltimore Radio Show*, 338 U.S. 912 (1950).

63. The Solicitor General's criteria for filing certiorari petitions were obtained from interviews with the staff of the Office, and by an analysis of correspondence between the Solicitor General and an independent agency in more than a dozen cases where the agency's requests for authorization were denied. The correspondence covered a period of five years involving the tenures of three Solicitors General. *See also* Brigman, *supra* note 9, at 67-89; 1938 ATT'Y GEN. ANN. REP. 35-36.

64. By contrast, such evidentiary issues form a large number of the petitions from private litigants. *See Note, The Court, The Bar, and Certiorari at October Term, 1958*, 108 U. PA. L. REV. 1160, 1186 (1958).

The Court also depends on the Solicitor General for a concise and impartial statement of the facts and legal issues of a case. The brief amount of time the Court can devote to each petition increases this reliance. Chief Justice Hughes once estimated that an average of three minutes of discussion was spent in conference for each petition; the Court even then consumes an enormous amount of time in the certiorari procedure. McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 HARV. L. REV. 5, 14 (1948). Justice Frankfurter further noted that "the initial decision to grant a petition for certiorari must necessarily be based on a limited appreciation of the issue in a case, resting as it so largely does on the partisan claims in briefs of counsel." *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 527 (1957).

Solicitor General makes a judgment both on the factual and legal merits. He must decide which arguments he will present to the Court if he feels certiorari should be sought, and his continuing relationship with the Court dictates that he avoid presenting disingenuous arguments or legal positions that he finds insupportable. For example, one Solicitor General, in denying an agency's request that he seek certiorari, stated that although the case possessed sufficient national importance to merit certiorari, he found the lower court's opinion highly persuasive. He explained to the agency:

It is . . . in the long range interests of the government that the Supreme Court should be able to put confidence in the Solicitor General's exercising some independent judgment about the representations which he makes to the Court I could not in good conscience sign a petition for certiorari either expressly or impliedly representing that the court below had wrongly decided an important question of federal law.⁶⁵

The amount and variety of government litigation are sufficiently great to permit the Solicitor General's selection of test cases to expand, contract, or clarify Supreme Court precedents. Strategic considerations of ripeness and the nature of the Court's docket also play a part in the choice of cases to be appealed.⁶⁶

The agencies benefit from the Solicitor General's advice since, for them, far more than for private parties, denial of certiorari presents real hazards for their other litigation. Although the Supreme Court has repeatedly stated that a denial of certiorari indicates no opinion of the merits, lawyers and judges attach significance to the Court's action.⁶⁷ Federal courts, even if they deduce no Supreme Court view on the merits, can at least predict that there is less risk of a reversal if they adopt the position of the court whose opinion the Court

65. Correspondence between a Solicitor General and an agency.

66. Cf. P. FREUND, *THE SUPREME COURT OF THE UNITED STATES* 145-70 (1961).

67. For the Court's view, see, e.g., *Maryland v. Baltimore Radio Show*, 338 U.S. 912 (1950); *Atlantic Coast Line R.R. v. Powe*, 283 U.S. 401, 402-04 (1931).

"The real meaning of a denial of certiorari is not what the justices say it is. It is to be found in the reactions of the public, the bar, and especially the judiciary." Harper & Pratt, *supra* note 61, at 445. See, e.g., *United States v. Camara*, 271 F.2d 787, 789 (7th Cir. 1959); *Schwegmann Bros. Giant Super Markets v. Hoffmann-LaRoche, Inc.*, 221 F.2d 326, 328 (5th Cir. 1955); *MacInnis v. United States*, 191 F.2d 157, 161 n.3 (9th Cir. 1951); *Chas. Pfizer & Co. v. Laboratori Pro-Ter Prodotti Terapeutici*, 278 F. Supp. 148, 154 (S.D.N.Y. 1967); and *Berger v. United States*, 170 F. Supp. 795, 796-97 (S.D.N.Y. 1959). See also Harper & Etherington, *What the Supreme Court Did Not Do During the 1950 Term*, 100 U. PA. L. REV. 354, 355 n.6 (1951); Note, *The Court, the Bar, and Certiorari at October Term 1958*, 108 U. PA. L. REV. 1160, 1204 (1958).

Government Litigation in the Supreme Court

failed to review. This view is bolstered by the fact that the majority of cases in which certiorari is granted are reversed.⁶⁸

The Solicitor General has, on occasion, advised an agency that its chances of winning similar cases in other circuits would be diminished by a denial of certiorari. The Solicitor General, because of his more intimate knowledge of the Court, can also counsel agencies on proper strategies for having a petition granted. The Solicitor General may decide, for example, not to authorize a petition because a case's factual situation raises the risk of not merely an affirmance of the lower court's adverse judgment, thus making a circuitwide rule national, but also of a harsher opinion. Conversely, where the Solicitor General estimates that an agency might prevail in a different factual setting in another circuit, he will so advise. If he is right, the resultant conflict among the circuits increases the likelihood of Supreme Court review.

C. Conclusion

The Solicitor General's power to deny authorization to petition for certiorari raises fundamental questions concerning his relationship to the regulatory agencies. His power over the agencies' litigation substitutes executive for judicial review, while his power to deny certiorari entails foreclosure of the Court's own examination. Against these concerns several considerations must be balanced. The Court needs guidance in its selection of cases, and removal of the Solicitor General's screening might create a danger of overloading the Court's docket. Furthermore, the government must establish priorities among its cases and avoid taking inconsistent positions in successive cases.

The effect of a more open avenue to the Court cannot be accurately assessed. As might be expected, the Solicitor General's Office and the agencies' staffs predict differing results. Members of the Office of the Solicitor General and the agencies' general counsels do agree, however, that thirty years of experience have taught the agencies to internalize the Solicitor General's standards for authorizing certiorari. Written memoranda to the agencies explaining his reasons for denying authorization and constant meetings with general counsel when controversy does develop have increased the agencies' sensitivity to the problems of the Court.

68. Harper & Pratt, *supra* note 61, at 446. A study by students at the University of Pennsylvania Law School of cases from 1948 to 1958 revealed that of all cases in which certiorari was granted approximately two-thirds were reversed. Note, *The Court, the Bar, and Certiorari at October Term, 1958*, 108 U. PA. L. REV. 1160, 1178 n.184 (1958).

The advisability of preserving the Solicitor General in some filtering capacity stems from the need to avoid overburdening the Court⁶⁹ and from the advantages to the government that selectivity brings. The elimination of the Solicitor General's control would probably produce only a small percentage increase in the number of petitions filed each term, but this increment does not accurately reflect the additional time the Court would consume in disposing of these government cases.⁷⁰ Without guidance from the Solicitor General and knowledge of the range of agency activities, the Court may, moreover, find selection of the most important government cases difficult, and petitions for cases of genuine importance might frequently be denied. The number of cases decided on the merits each term has remained fairly constant, and thus the government must establish priorities among the cases eligible for plenary review.⁷¹ Without a centralized decision-maker, that would probably be impossible. The real question, therefore, is how the power to set priorities should be allocated between the Solicitor General and the agencies.

There is an ambiguity in the Solicitor General's refusal to approve an agency's request for certiorari. It can reflect his belief that a case is of little or no precedential value, that the issue involved is unusual, that the decision below was correct on the merits, or that the policy that the agency is advancing in its litigation is wrong. If the basis of the Solicitor General's decision is founded on policy differences, the agency should be able to appeal on its own, since the Solicitor General is no longer protecting the Court from cases clearly unworthy of its consideration.⁷² The problem is that the grounds for disagreement may

69. Professor Henry Hart argued persuasively that the pressure of the Court's calendar has materially affected the quality of its decisions. *Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84 (1959). On the other hand, Justice Douglas remarked that the Court has fewer oral arguments, fewer opinions to write, and shorter work-weeks than they once had. *The Supreme Court and Its Case Load*, 45 CORNELL L.Q. 401 (1960). See also P. FREUND, *THE SUPREME COURT OF THE UNITED STATES* 183 (1961); Vinson, *Work of the Federal Courts* (Speech before the ABA, Sept. 7, 1949), 65 S. Ct. v, vi (1949); Gressman, *Much Ado About Certiorari*, 52 GEO. L. J. 742 (1964); Harlan, *Manning the Dikes*, RECORD OF N.Y.C.B. ASS'N 541, 547 (1958); cf. *Andres v. United States*, 333 U.S. 740, 746 n.9 (1948) (Frankfurter, J. concurring).

70. If the number of government petitions doubled, the increment would represent less than a 2% increase in the petitions now filed annually. Most of the cases appealed to the Court are clearly unworthy of plenary review and are speedily rejected. Harlan, *supra* note 69. The government's cases usually involve issues of some public importance, and the Court probably devotes considerably more time to a government petition.

71. The number of cases accepted for plenary review has remained fairly constant over four decades. In the 1938 Supreme Court Term there were 186 cases argued on the merits, compared with 161 in 1948, 154 in 1958, and 179 in 1967. 1968 ATT'Y GEN. ANN. REP. 102; 1959 ATT'Y GEN. ANN. REP. 42; 1941 ATT'Y GEN. ANN. REP. 50. See Douglas, *supra* note 12, at 405-10; Gressman, *supra* note 12, at 750-55.

72. Robert L. Stern, Acting Solicitor General 1952-54, expressed doubts about the feasibility of dividing the cases on this basis. See Stern, *supra* note 14, at 217-18.

Government Litigation in the Supreme Court

be difficult to isolate, and placing the power to decide the cause of the conflict in either the Solicitor General's or the agencies' hands may leave the other without leverage.

Allowing an agency to petition for certiorari in case of substantial disagreement, irrespective of its nature, poses the same problems and may open the door to complete agency autonomy.⁷³ Furthermore, this solution would place a premium, from the agencies' point of view, on conflict rather than compromise and settlement.

A policy statement by the Solicitor General as to the standards he employs could serve as a starting point for discussion within the government. The Solicitor General should experiment in allowing agencies freer access to the Court when, for example, their disagreement with him stems from a policy dispute so stated in their petition. With some information as to the effect of this change on the Court's workload and the government's appellate litigation, the proper balance could be discovered as a result of conscious choice rather than accident.

II. Intragovernmental Conflicts

The Solicitor General considers it his responsibility to present a unified government position to the Court. Though settlement of intragovernmental differences is not always possible, the Solicitor General is most successful in resolving disputes among the divisions of the Justice Department and among the executive departments. Consequently, the disputes which reach the Court generally involve independent agencies.⁷⁴

73. See, e.g., *FTC v. Guignon*, 390 F.2d 323 (8th Cir. 1968), in which the FTC asserted independent authority to seek district court orders enforcing subpoenas which it had issued. The Department of Justice claimed exclusive prerogative to seek enforcement of independent agency subpoenas, and the Attorney General submitted an amicus brief to that effect in the circuit court. The case was essentially an internal housekeeping dispute involving no substantive policy considerations. The FTC, however, inflated the issue, contending that the very independence of the agency and certainly its operational efficiency were at stake. The FTC lost in the circuit court of appeals, and the Solicitor General denied its request for independent authority to petition for certiorari on the grounds that the issue was not of sufficient general importance to warrant Supreme Court review. (The FTC assumed that the Solicitor General would not be able to support them on the merits in light of the Attorney General's public position.)

74. For two examples of rare intradepartmental conflicts, see SG's Brief 37-43, *Sullivan v. United States*, 395 U.S. 169 (1969), and SG's Brief, *Tellier v. Comm'r.*, 383 U.S. 687 (1966). Instead of referring to Brief for the United States, footnotes refer to SG's Brief whenever the Solicitor General signed the document. Other abbreviations include:

Pet. for Cert. for Petition for Certiorari,
Memo for Memorandum,
Supp for Supplemental.

An overt conflict may develop because an agency's or department's decision affecting one economic interest may adversely affect a group represented by another governmental body. The Secretary of Agriculture is, for example, empowered to intervene in ICC hearings to safeguard the interests of agricultural shippers.⁷⁵ As a result, the Court has been asked in several cases to determine whether an ICC ruling has been unduly favorable to carriers and unduly harsh on farmers.⁷⁶ Disputes may also arise out of differing interpretations of the same statute or the interrelationship of two competing statutory policies. The foremost example of the latter type of conflict is the continuing disagreement between the Justice Department and the independent agencies as to the role of the antitrust laws in regulated industries.⁷⁷

Open conflict appears in several forms, such as an opposing brief on a petition for certiorari,⁷⁸ intervention as *amicus curiae*, or a frank statement at oral argument. The following discussion focuses on the clearest example of such conflicts—participation by the Solicitor General as a party before the Court voicing the Justice Department's opposition on the merits to one or more of the independent agencies.⁷⁹

75. 7 U.S.C. § 1291(a)-(b) (1964).

76. See SG's Brief 14-31 and SG's Reply Brief 4-6, *Chicago, M., St. P. & P.R.R. v. United States*, 366 U.S. 745 (1961); SG's Brief 12-13, *Sec'y of Agriculture v. United States*, 350 U.S. 162 (1956); *Sec'y of Agriculture v. ICC*, 347 U.S. 645 (1954); *United States v. ICC*, 337 U.S. 426, 428-31 (1949).

77. On the general problem of the antitrust laws and regulated industries, see von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 HARV. L. REV. 929 (1954); Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436 (1954); and Jaffe, *Primary Jurisdiction Reconsidered. The Anti-trust Laws*, 102 U. PA. L. REV. 577 (1954).

Over the past decade, the ICC, because of its statutory prerogative to represent itself and because of the number of recent railroad mergers, has been involved in interagency disputes more often than any other agency. For an expression of one individual participant's views seen from the Justice Department, see Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1231-44 (1969). For a critical view of the ICC's performance in considering diverse economic interests, see Huntington, *The Marasmus of the ICC: The Commission, The Railroads, and the Public Interest*, 61 YALE L. J. 467, 488-505 (1952).

One former staff member candidly admitted:

When one of the competing interests can be represented only by Department of Justice attorneys or when the interest is one enforced by the Department itself, it is somewhat more difficult for the Solicitor General to be completely neutral; and I am not sure that he is.

Stern, *supra* note 14 at 157.

78. Alternatively the Solicitor General may authorize and join a petition for certiorari and then submit an opposing brief on the merits.

79. The Solicitor General may engage in interagency conflict in which the Justice Department was not involved below, or he may alter the Justice Department's position, change sides, and precipitate a conflict in the Supreme Court, as occasionally happens in suits in which the ICC and therefore the Attorney General are parties. See, e.g., SG's Memo on appeal 1-2, *ICC v. J-T Transport Co.*, 368 U.S. 83 (1961); *Railway Labor Executives' Ass'n v. United States*, 339 U.S. 142, 155-56 (1950) (Frankfurter, J. dissenting); *ICC v. Jersey City*, 322 U.S. 503 (1944).

The Solicitor General's participation may take the form of either a memorandum or

Government Litigation in the Supreme Court

In such cases, the Solicitor General also performs related functions in the Court's behalf: enforcing strict standards of administrative review, correcting for an agency's narrowness of focus in its assessment of the public interest, and mitigating or expanding the clash of competing statutory policies.

A. *Enforcing Standards of Administrative Review*

The Solicitor General openly disagrees with an agency in a case heard on the merits roughly six to ten times per term,⁸⁰ frequently in the belief that an agency's ruling was not reasoned with sufficient rigor or that its conclusions were not based upon substantial evidence. In this respect, the Solicitor General acts like any aggrieved party which seeks reversal of an agency decision.⁸¹ In *Florida East Coast Ry. v. United States*,⁸² for example, a case in which the ICC approved the merger of the Seaboard Air Line and Atlantic Coast Line Railroads, the Solicitor General successfully urged that the case be remanded to the ICC because it had failed to determine the extent of competition among motor carriers, or how many shippers depended upon rail transport, or the merger's effect upon the entire Southeast. The Solicitor General argued that

had the Commission made the proper analysis and found—as we think the record shows—that the adverse competitive effects of the Atlantic-Seaboard merger would be great, it might still have approved the merger. But it would have done so with its eyes open.⁸³

a brief, alone or with another agency and with or without oral argument. The difference between a memorandum and a brief is one of degree, not of kind. A brief is designed to persuade and is usually addressed to the merits of a case in its entirety. A memorandum consists of a short statement and discussion of only those facts relevant to the Solicitor General's arguments, and is intended to inform the Court of the position of the United States and of the case's implications for unrepresented parts of the federal government.

80. There have been approximately sixty-five such cases of open conflict in the past ten years, their frequency increasing since 1962.

81. He occasionally argues, however, against his client's financial interests. Compare, e.g., *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446 (1948), with *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948).

82. 386 U.S. 544 (1967).

83. SG's Brief at 8. The case had already been before the Supreme Court as *Seaboard Air Line R.R. v. United States*, 382 U.S. 154 (1963), in which the Solicitor General had taken issue with the Commission's analysis of the public interest. The case had been remanded. In another case, *Railway Labor Executives' Ass'n v. United States*, 379 U.S. 199 (1964), the Solicitor General successfully obtained a remand on the related ground that the ICC had failed to provide a comprehensive ruling which the parties and the courts could understand, *Id.*, SG's Brief 6-11. See also, e.g., SG's Brief 12-14, *American Commercial Lines, Inc. v. Louisville & N. R.R.*, 392 U.S. 571 (1963); SG's Brief 23-29, *Volkswagenwerk A.G. v. FMC*, 390 U.S. 261 (1963); SG's Reply Brief, *United*

In other cases, the Solicitor General has won a reversal by arguing that the agency's findings were internally inconsistent or that its procedure represented an abuse of discretion.⁸⁴

In enforcing these standards, the Solicitor General has sought to assure sufficiently well reasoned agency findings to permit informed judicial review.⁸⁵ Conversely the Solicitor General has also attempted to confine the scope of judicial review to its proper boundaries, recommending remand to the agency because the court below made improper findings of fact, policy determinations, or errors of law.⁸⁶ In making these arguments, the Solicitor General provides the Court with a concise and impartial summary of what is often a very lengthy factual record.⁸⁷

Like any aggrieved party, he has attempted to convince the Court of a statute's true construction from which an agency has strayed, either through a misinterpretation of congressional intent⁸⁸ or by ex-

States v. Third Nat'l Bank, 390 U.S. 171 (1968); SG's Brief 11-13, 16-21, 26-27, Udall v. FPC, 387 U.S. 428 (1967); SG's Brief 19, Baltimore & O. R.R. v. Boston & M. R.R., 373 U.S. 372 (1963) (affirmed by an equally divided Court); SG's Brief *passim*, Sec'y of Agriculture v. United States, 350 U.S. 162 (1956).

84. For example, in Baltimore & O. R.R. v. United States, 386 U.S. 372 (1967), the first Penn-Central merger case, the ICC was reversed after ruling that as a prerequisite of the merger three small railroads required protection but then omitting any safeguards in its approval. In ICC v. Jersey City, 322 U.S. 503 (1944), a conflict between the Price Administrator and the ICC, the Solicitor General filed a memorandum supporting the lower court's decision that the ICC had failed to consider adequately the inflationary effects of a wartime rate increase on the Hudson Tubes. SG's Memo 7-8. In A.L. Mechling Barge Lines, Inc. v. United States, 376 U.S. 375 (1964), the ICC authorized a waiver of the statutory requirement regarding short-haul rates and denied competing barge lines' requests to introduce evidence of discriminatory effect, arguing that the issue was remote and that it could be raised in a subsequent proceeding. The Court reversed unanimously, accepting the Solicitor General's argument that the ICC's procedure was irrational, wasteful, contrary to congressional intent, and likely to produce irreparable harm to competition.

85. See, e.g., SG's Brief 15, Railway Labor Executives' Ass'n v. United States, 379 U.S. 199 (1964); cf. SG's Brief 44-47, Baltimore & O. R.R. v. Boston & M. R.R., 373 U.S. 372 (1963). The requirement that ICC rulings be sufficiently comprehensible to allow judicial review was expressed by Justice Frankfurter in Sec'y of Agriculture v. United States, 350 U.S. 162, 175 (1956) (concurring opinion).

86. See, e.g., SG's Memo 8-9, 11-12, Arrow Transportation Co. v. Cincinnati, N.O. & T.P. Ry., 379 U.S. 642 (1965). In United States v. Third Nat'l Bank, 390 U.S. 171 (1968), the lower court erred because another case setting the legal standard in bank merger cases had been decided in the interim.

87. On occasion, he also recommends the precise directions to the agency which a remand order should contain. SG's Memo 9-12, Arrow Transportation Co. v. Cincinnati, N.O. & T.P. Ry., 379 U.S. 642 (1965); SG's Brief 37-38, A.L. Mechling Barge Lines, Inc. v. United States, 376 U.S. 375 (1964). In Seaboard Air Line R.R. v. United States, 382 U.S. 154 (1965), the Solicitor General included a policy discussion in his memorandum as to why the ICC should not be required to apply the Clayton Act § 7, 15 U.S.C. § 18 (1964) test to railroad mergers. He contended that the criterion of possible substantial lessening of competition tells little about the scope or magnitude of possible anti-competitive effects and is therefore not sufficiently refined for an agency which must balance the interests involved. SG's Brief 7-10.

88. ICC v. J-T Transport, Inc., 368 U.S. 83 (1961) is perhaps the clearest example since the case and the conflict hinged entirely upon the proper interpretation of the 1957 Amendments to the Motor Carrier Act of 1935, 49 U.S.C. §§ 301 *et seq.* (1964). A similar ap-

Government Litigation in the Supreme Court

ceeding its statutory authority,⁸⁹ often suggesting his own alternative reading. In *Western Pacific R.R. v. United States*,⁹⁰ for example, the Solicitor General argued that the ICC's ruling would lead to contradictory and capricious results which would derogate from the congressional policy of encouraging competition and discouraging discrimination.⁹¹

B. *Correcting an Agency's Narrowness of Focus*

The Solicitor General's policy recommendations extend beyond efforts at policing the agencies in their procedures and interpretations of statutes. One commentator has stated that a major cause of intra-governmental conflict is the fact that agencies' trial lawyers and specialized attorneys have a more constricted view of the public interest than do appellate lawyers.⁹² The Solicitor General often argues for either a more even-handed balancing of different policies within an agency's jurisdiction, or for greater agency sensitivity to the broader implications of its ruling. Thus, the Solicitor General has disagreed with the ICC on numerous occasions because he felt that a ruling, which might be justified by one part of a statute, was not in accord with the National Transportation Policy.⁹³ Such cases generally arise when the ICC sets rates which the Solicitor General feels will adversely affect intermodal competition.⁹⁴

proach was taken in *FMC v. Isbrandtsen Co.*, 356 U.S. 481 (1958) in which the petitioner was in conflict with the Secretary of Agriculture and the Solicitor General.

89. SG's Memo on Pet. for Cert. 4-7, *Miguel v. McCarl*, 291 U.S. 442 (1934) involved a simple matter of statutory authority. In *Harmon v. Brucker*, 355 U.S. 579 (1958), the Secretary of the Army and the Solicitor General filed a joint brief, but Mr. Justice Clark noted in dissent that the "Justice Department and the Army are at loggerheads over the proper disposition of this case on the merits," 355 U.S. at 586. The Solicitor General felt that if the Secretary's action in granting less than an honorable discharge was subject to judicial review, he had exceeded his authority.

90. 382 U.S. 237 (1965).

91. SG's Brief 15-21. The argument prevailed. Similar reasoning was employed in the SG's Brief in *American Commercial Lines, Inc. v. Louisville & N. R.R. Co.*, 392 U.S. 571 (1968), but the Court refused to follow the Solicitor General's suggestion. The SG's Brief noted at 17 n.6, the concurrence of the Department of Transportation. The Solicitor General prevailed in *Railway Labor Executives' Ass'n v. United States*, 339 U.S. 142 (1950) on grounds of congressional intent and logic.

92. Stern, "Inconsistency" in *Government Litigation*, 64 HARV. L. REV. 759, 760 (1951).

93. 49 U.S.C. preceding § 1 (1964).

94. For example, see the SG's Brief in the following cases: *American Commercial Lines, Inc. v. Louisville & N. R.R.*, 392 U.S. 571 (1968) (barge-railroad); *ICC v. New York, N.H. & H. R.R.*, 372 U.S. 744 (1963) (water carrier-railroad); *ICC v. J-T Transport Co.*, 368 U.S. 83 (1961) (contract v. common carrier); *American Trucking Ass'ns, Inc. v. United States*, 364 U.S. 1 (1960) (truck-railroad); *ICC v. Mechling*, 330 U.S. 567 (1947) (barge-railroad). See also SG's Brief 27-28, 39-42, *Volkswagenwerk A.G. v. FMC*, 390 U.S. 261 (1968); *FMC v. Isbrandtsen Co.*, 356 U.S. 481 (1958). For a case involving the Comptroller of the Currency see SG's Brief 54, *United States v. First City Nat'l Bank*, 386 U.S. 361 (1967).

C. *Mitigating or Expanding the Clash of Policies*

When the Solicitor General is unable to prevent a conflict from coming before the Court, he may attempt to provide a rationale to avoid a choice between differing statutory policies. In *Volkswagenwerk A.G. v. FMC*,⁹⁵ for instance, the Federal Maritime Commission approved a discriminatory rate structure designed to finance a collective bargaining agreement. The Solicitor General persuaded the Court that the employers' means of paying for the contract was of no direct concern to the union and that there was no conflict between the policies of the antitrust and labor laws.⁹⁶

When the Solicitor General engages in temporizing, he may recommend a remedy, like remanding for further findings of fact, which sidesteps the problem.⁹⁷ He may also suggest that the Court decide a case narrowly on the facts⁹⁸ to avoid creating an unworkable rule.

The Solicitor General may also present to the Court policy considerations which represent the interests of agencies not party to the suit. In two recent Supreme Court cases, for example, the Solicitor General presented the foreign policy implications of an agency decision. In *McCulloch v. Sociedad Nacional de Marineros de Honduras*,⁹⁹ the Solicitor General's brief indicated the concern of the State and Defense Departments about an NLRB decision extending its jurisdiction to include ships beneficially owned by Americans but flying foreign flags and carrying foreign crews.¹⁰⁰ Similar concern was voiced in *Canada Packers, Ltd. v. Atchison, T. & S.F. Ry.*,¹⁰¹ where the ICC claimed the power to set international through rates.¹⁰²

95. SG's Memo 1-2, 7-8, 390 U.S. 261 (1968).

96. SG's Brief 30-32. *But see* 390 U.S. at 307-12 (Douglas, J., dissenting in part). Justice Harlan was also concerned about the labor problem but joined the Court since he could see no rationale for the FMC's decision. *Id.* at 289-90. For a similar example, see SG's Memo 1-2, 7-8, ICC v. Jersey City, 322 U.S. 503 (1944).

97. SG's Brief 31-32, *Baltimore & O. R.R. v. United States*, 386 U.S. 372 (1967); SG's Brief 18-20, *Railway Labor Executives' Ass'n v. United States*, 379 U.S. 199, 200 (1964). In *California v. FPC*, 369 U.S. 482 (1962), the first El Paso case, the Justice Department allowed the FPC to rule on the El Paso-Pacific Northwest merger before suit was brought. Justices Harlan and Stewart noted in dissent that the Solicitor General, representing the public interest, had favored the attacked procedure and that his point of view would avoid the difficult problems of primary jurisdiction raised by the case. 369 U.S. at 492, 496 n.3. Similar trust in the Justice Department was expressed by the same Justices in dissent in the third El Paso case, *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 156-58 (1967).

98. Brief for Appellee 26 (SG's Note), *Communications Workers of America, AFL-CIO v. NLRB*, 362 U.S. 479 (1960). *See also* SG's Brief (with ICC against the Secretary of Agriculture) 56-69, *Chicago, M. St. P. & Pac. R.R. v. United States*, 366 U.S. 745 (1961).

99. 372 U.S. 10 (1963).

100. SG's Amicus Brief 3-14, 37-50; SG's Brief for Pet. for Cert. 11-12 in *McLeod v. Empresa Hondurena de Vapores* (consolidated with above, No. 858, 1961 Term).

101. 385 U.S. 182 (1966).

102. SG's Amicus Brief 11-13 (the ICC also filed an amicus brief).

Government Litigation in the Supreme Court

D. Conclusion

The Solicitor General has several strategies for handling intragovernmental conflicts. He may abstain from the controversy, either by authorizing and not joining a petition for certiorari or by stating his neutrality on the merits.¹⁰³ The disadvantage of this policy is that it leaves the Court uninformed as to his views; as a result, since 1961, the Solicitor General has rarely abstained in cases heard on the merits.¹⁰⁴

The Solicitor General may present both sides of the conflict to the Court and offer his own views as to the proper resolution. In the unusual case of *St. Regis Paper Co. v. FTC*,¹⁰⁵ a conflict developed between the Bureau of the Census, on the one side, and the FTC and the Antitrust Division on the other, as to whether copies of Census reports kept in company files were privileged documents. The Solicitor General argued both sides in his brief and at oral argument, and, though he voiced agreement with the Census Bureau's position that such files were privileged,¹⁰⁶ he failed to persuade the Court.

103. In *Local 60, United Bhd. of Carpenters v. NLRB*, 365 U.S. 651 (1961), the Solicitor General failed to oppose the petition for certiorari, in which position the NLRB joined. The Board filed its own brief on the merits which the Solicitor General authorized though he did not file a brief of his own. In *Public Service Comm'n of New York v. FPC*, 361 U.S. 195 (1959) (remanded per curiam), the FPC filed a petition opposing certiorari in which the Solicitor General failed to join though he indicated his authorization. In *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951), a Robinson-Patman case in which the FTC was reversed, the Solicitor General did not oppose granting certiorari. *Standard Oil Co. v. FTC*, cert. granted, 338 U.S. 865-66 (1951), and allowed the FTC to proceed independently because the Justice Department felt it had adequate representation, having expressed its views to Congress. See Stern, *supra* note 92, at 768. The Solicitor General also refused to participate in the government's case in *Peters v. Hobby*, 349 U.S. 331 (1955). Lewis, *Our Extraordinary Solicitor General*, THE REPORTER, May 5, 1955, at 27. Thomas Thacher, Solicitor General under President Hoover, used to tell the Court he had signed the brief but did not agree with the government's case. *Id.* at 31. In some cases the Solicitor General had mysteriously not participated at all. In *ICC v. Inland Waterways Corp.*, 319 U.S. 671, 683 (1943), the Court noted the lack of Justice Department participation, the reason being "the existence of a conflict in litigation between coordinate agencies of the government, the Agricultural Adjustment Administration and the Interstate Commerce Commission." And in *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944), a seminal ICC case, the United States confessed error below and did not participate in the Supreme Court. The case involved the relationship between the Transportation Act of 1940 and the antitrust laws.

104. Compare *Udall v. FPC*, 387 U.S. 428 (1967) with *United States ex rel. Chapman v. FPC*, 345 U.S. 153 (1953).

105. 368 U.S. 208 (1961).

106. The case arose out of a demand by the FTC for copies of census reports filed by *St. Regis*. Some were produced, but the company balked at revealing all of them, contending that since the originals were privileged, the copies ought to be as well. When the case arrived at the Supreme Court, it had become a conflict between the Antitrust Division and the FTC on the one side, and the Department of Commerce and the Bureau of the Census on the other. One brief was presented to the Court and the Solicitor General argued both sides of the case. The Solicitor General noted in his summary of argument:

Instead of burdening the Court with briefs from different agencies, we attempt here to set forth the competing arguments as effectively and objectively as possible. The

The relative impartiality that the Solicitor General demonstrated in *St. Regis* occurs infrequently. Where basic policy considerations involving competing statutory or economic interests are involved, the Solicitor General considers it his responsibility to resolve the conflict himself. Where his power over petitions for certiorari allows him to suppress the conflict, it may never reach the Court. Where departments or agencies are themselves the litigants, as in *Udall v. FPC*,¹⁰⁷ resolution has, however, often been left to the Court with the Solicitor General actively participating on one side.

The Solicitor General's staff suggested two rationales for shielding the Court from intragovernmental conflicts: (1) that the Executive has a positive obligation to present one position to the Court and (2) that the muting of conflict also avoids overburdening the Court with an excessive number of petitions or arguments.

The bias in favor of resolving conflicts within the Executive, especially where the regulatory agencies are concerned, seems ill-considered. As previously discussed, where the Solicitor General's disagreement with an agency as to the desirability of seeking certiorari stems from policy disputes, the agency should be allowed access. The fact that such policy disagreements involve intragovernmental conflict should not alter the appropriateness of the Court's assuming the responsibility for resolution. Furthermore, since Congress has entrusted different agencies with overlapping jurisdictions and sometimes opposing statutory responsibilities, placing the power to choose among them within the Executive further jeopardizes the regulatory agencies' independence.

Where an issue has reached the Court, the presentation of the conflict existing within the Executive, and certainly between the Executive and the regulatory commissions, may encourage more informed decision-making by the Court. The argument for allowing conflicting agencies and departments access to the Court is grounded in the fundamental axioms of the adversary process, presumptions which appear to be especially valid when the Court is confronted with important choices between statutory policies or possible holdings with differing

Solicitor General is of the view that if the Court reaches the question, the statutory privilege should extend to the retained copies but not to the underlying data in the company's books and records upon which the reports are based.

SG's Brief 15.

The Solicitor General argued that the question need not be reached since the privilege had been waived, *id.* at 16-25, but he felt very strongly that given the extent of disagreement and the presence of an independent agency as a party, confession of error was inappropriate and that the Court should settle the issue. *Id.* at 28.

107. 387 U.S. 428 (1967).

Government Litigation in the Supreme Court

and indeterminate effects. The more aware the Court is of the competing policies involved, the more informed its decision is likely to be. The disadvantages of denying free access were pointed out by Justice Harlan, who concurred in *United States v. El Paso Natural Gas Co.*¹⁰⁸ on a record which he noted was unsatisfactory because it did not include a brief from the FPC, one of the true defendants.¹⁰⁹ The Court may have been similarly deprived of the views of the Comptroller of the Currency in the Bank Merger Act cases.¹¹⁰

The Solicitor General's propensity to mitigate conflict also results, it was claimed in interviews, in a "watering down" of the agency's positions.¹¹¹ Authorization by the Solicitor General for an agency to file a brief when it felt its position was being modified would assure the Court that the government's position did not represent a lowest common denominator amalgam of views. Furthermore, allowing freer access to the Court in cases of conflict would increase the Solicitor General's latitude to express his own views of the public interest without risking foreclosure of the agency's presentation of its divergent position. The maintenance of a relatively impartial Solicitor General in that role is vital to the Court since it benefits from his trustworthy reading of the record and may often find unaided choice between two expert agencies or complex policies extremely difficult, especially if, as is often the case, there are no congressional guidelines and only the Court's policy views upon which to rely.

III. Confession of Error

In confessing error, the Solicitor General may agree completely with the petitioner and argue for the same outcome on the merits, or he may accept only one of the petitioner's contentions and urge that the Court remand the case for review by the court of appeals or, if the flaw is serious, a new trial. In rare cases, the Solicitor General may

108. 376 U.S. 651 (1964).

109. 376 U.S. at 663-64.

110. The Comptroller of the Currency did not file a brief in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963) or in *United States v. First City Nat'l Bank*, 386 U.S. 361 (1967). By the time he entered in his own defense in *United States v. Third Nat'l Bank*, 390 U.S. 171 (1968), most of the issues were settled.

111. In addition to disagreements over ordinary briefs, the following cases are illustrative. In *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), the Solicitor General, as amicus, argued a position between that of the Antitrust Division and the SEC. And in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), he held informal hearings to reach a compromise between the views of the FCC, the Copyright Office, and the Antitrust Division, none of which was happy with the end-result.

confess error and leave the determination of the remedy to the Court.¹¹² Generally, the Court's decision, no matter how comprehensive the confession, is a memorandum opinion and therefore of little precedential value.¹¹³

The cases in which the Solicitor General confesses error almost invariably involve appeals of criminal convictions,¹¹⁴ the errors constantly changing with the law and the area of the Court's concern. A substantial number of the confessions, however, reflect isolated and varied blunders by the trial court, the circuit court, or the prosecutor. Thus, the Solicitor General has confessed error where the method of jury selection was clearly unfair,¹¹⁵ where there was no (or only improperly admitted) evidence to support conviction,¹¹⁶ where the judge gave erroneous instructions to the jury,¹¹⁷ and where the sentence was incorrectly recorded¹¹⁸ or wrongly computed.¹¹⁹ In other cases, the trial court made no finding as to the constitutionality of a search,¹²⁰ or the circuit court committed an error of law, sometimes as a result

112. For examples of the Solicitor General's leaving the remedy to the Court, see SG's Brief Opposing Pet. for Cert. 50-51, *Pope v. United States*, 392 U.S. 651 (1968); SG's Motion to Remand 5-6, *Ferguson v. United States*, 375 U.S. 962 (1964); SG's Brief 31, *Saldana v. United States*, 365 U.S. 646 (1961).

113. See, R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* § 5-12 (3d ed. 1962); Note, *Individualized Criminal Justice in the Supreme Court: A Study of Dispositional Decision Making*, 81 HARV. L. REV. 1260 (1968).

114. Three exceptions over the last ten years are *Richmond Television Corp. v. United States*, 382 U.S. 68 (1965) (tax case, circuit court erred in interpreting record); *Crest Finance Co., Inc. v. United States*, 368 U.S. 347 (1961) (competing tax and creditor's lien, error of law in the circuit court's interpretation of the governing decision); and *Department of Revenue of Illinois v. United States*, 368 U.S. 30 (1961) (intergovernmental tax case, remanded to district court to reassess need for injunction as Solicitor General suggested).

115. In *Leonard v. United States*, 378 U.S. 544 (1964), the petitioner was tried on related offenses in two consecutive trials. The panel from which the second jury was chosen heard the first jury's general verdict and the polling of the jurors.

116. SG's Memo on Pet. for Cert., *Baxa v. United States*, 381 U.S. 353 (1965); SG's Memo on Pet. for Cert., *Rogers v. United States*, 376 U.S. 188 (1964); and the old and amusing case of *Bates v. United States*, 323 U.S. 15 (1944).

117. SG's Memo on Pet. for Cert. 382 U.S. 367 (1966); SG's Memo on Pet. for Cert., *Chaifetz v. United States*, 366 U.S. 209 (1961); SG's Memo on Pet. for Cert., *Davis v. United States*, 364 U.S. 505 (1960).

118. In *Bartone v. United States*, 375 U.S. 52 (1963), the oral sentence was for a year; the written judgment for a year and a day. The Solicitor General argued in his Memo in Opposition to the Pet. for Cert. that the government had never opposed correction of the sentence but felt it should be done in the district court. Three Justices agreed in dissent. In *Grabina v. United States*, 369 U.S. 426 (1962), the judge imposed sentence in the defendant's absence.

119. *Robison v. United States*, 390 U.S. 198 (1968); *Nagelberg v. United States*, 377 U.S. 266 (1964); *Saldana v. United States*, 365 U.S. 646 (1961), involved problems of attempted withdrawals of guilty pleas or related errors by the trial judge.

120. *Martinez v. United States*, 380 U.S. 260 (1965); *Murray v. United States*, 380 U.S. 527 (1965). For other trial court errors affecting constitutional rights, see *Wood v. United States*, 389 U.S. 20 (1967), and *Ferguson v. United States*, 375 U.S. 962 (1964).

Government Litigation in the Supreme Court

of an intervening Court decision, or ignored an important legal issue.¹²¹

Though confessing error in such cases places the interests of justice above the short-range goal of securing a conviction,¹²² this is only one of the purposes served. By confessing error, the Solicitor General often attempts to prevent premature or unguided decisions by the Court and to protect the Executive's freedom of action from intervention by the Court.

A. *Protecting the Court*

Upon confessing error, the Solicitor General will, on occasion, argue that the Court should not rule on the issue involved but rather remand to the lower court for a more adequate consideration. For example, in *Scott v. United States*¹²³ the petitioner had been denied even a partial trial transcript because the circuit court felt his legal claim was frivolous. The Solicitor General confessed error because two intervening decisions by the same circuit court had strengthened petitioner's argument on the merits and expanded his right to a record of the government's evidence. He added that he was not conceding a more general right than the lower court had permitted and that remanding the case would avoid the difficulty of determining the extent of a defendant's right to a transcript or the precision with which a claimed error must be alleged.¹²⁴

The Solicitor General has also urged the Court not to decide a case with a full opinion because a problem is unusual and unlikely to recur. To attempt to provide guidelines on the basis of a unique case might lead the Court into a quagmire, waste judicial energies, or raise unanticipated problems concerning related issues.¹²⁵ The Court

121. See, e.g., *Levine v. United States*, 383 U.S. 265 (1966); *Giova v. Rosenberg*, 379 U.S. 18 (1964); *Goodman v. United States*, 368 U.S. 14 (1961).

122. See Cox, *The Government in the Supreme Court*, 44 CHL. B. RECORD 223, 223-25 (1963); Stern, *The Solicitor General's Office and Administrative Agency Litigation*, 46 A.B.A.J. 154, 157-58 (1960); Perlman, *The Work of the Office of the Solicitor General of the United States*, 54 TRANS. MD. ST. B. ASS'N 265, 286-90 (1949).

123. 374 U.S. 502 (1963).

124. SG's Memo on Pet. for Cert. See also SG's Memo on Pet. for Cert. 6-7, *Millan-Garcia v. Immigration & Naturalization Service*, 382 U.S. 69 (1965); SG's Memo on Pet. for Cert. 9-12, *Milutin v. Bouchard*, 370 U.S. 292 (1962).

125. For example, the SG's Memo on Pet. for Cert. 5-6, *Leonard v. United States*, 378 U.S. 544 (1964) pointed out that the method of jury selection employed was obsolescent and that the case was sufficiently unimportant to warrant denying certiorari, but the Court might want to issue an opinion without plenary argument to guide the lower courts. In *Saldana v. United States*, 365 U.S. 646 (1961), the Solicitor General conceded

generally concurs, though there have been a few exceptions when the Court has decided to hear a case on the merits.¹²⁶ The related danger of completely disregarding the Solicitor General's advice, as the dissent pointed out in one case in which the Court laid down a broader rule than the Solicitor General had conceded,¹²⁷ is that the Court acts without the benefit of briefs and arguments on the relevant points.¹²⁸

B. *Protecting the Executive*

Confession of error is also a device for shielding the Executive, primarily the Department of Justice, from the Court. In order to persuade the Court that it need not decide a case on broad constitutional grounds, the Solicitor General has often presented the Court with a statement of existing Justice Department policy to establish that similar cases will not reappear before the Court or that the unexplored nature of the problem justifies a continuation of Executive discretion. By so doing, the Solicitor General can, as one member of his office stated in an interview, slow the development of the law.

In *Redmond v. United States*,¹²⁹ for example, the petitioners, a married couple, were prosecuted for sending nude photographs of themselves through the mails to be developed despite a Justice Department policy to prosecute private offenders only if they have repeatedly mailed obscene material.¹³⁰ The Solicitor General confessed error because of the violation of Department policy. The majority decided the case on this basis, but three Justices concurred separately on constitutional grounds.¹³¹

A similar tactic was used in several electronic eavesdropping cases. Acknowledging the Court's supervisory role, the Solicitor General confessed error, stating that the Justice Department was reviewing its past and present uses of electronic devices to prevent the introduction

that the unusual trial proceedings so departed from the appearance of evenhanded justice that extraordinary judicial relief might be proper, avoiding a disposition of the case on the petitioner's alleged trial errors. SG Brief at 29-31. See also SG's Motion to Vacate the Judgment and Dismiss the Indictment 3-6, *Petite v. United States*, 361 U.S. 529 (1960).

126. *E.g.*, *Bruton v. United States*, 391 U.S. 123 (1968); *Silber v. United States*, 370 U.S. 717 (1962).

127. *Black v. United States*, 385 U.S. 26, 29 (1965) (Harlan and Stewart, JJ., dissenting).

128. *Id.* at 30-31. See also Note, *Supreme Court Per Curiam Practice: A Critique*, 69 HARV. L. REV. 707, 721-22 (1956).

129. 384 U.S. 264 (1966).

130. SC's Memo on Pet. for Cert. 3-4.

131. 384 U.S. at 265.

Government Litigation in the Supreme Court

of tainted evidence.¹³² The Solicitor General may thereby have postponed introduction of stricter judicial standards.¹³³

The credibility of the Solicitor General's representations depends ultimately on the continued course of Executive behavior. Confessions of error demonstrate to the Court and the staff of the Justice Department that deviations from policy will not be permitted to succeed, and thus act as an internal control device. The eavesdropping cases¹³⁴ illustrate this well: in the cases since 1966, the Solicitor General has reported to the Court any cases where evidence was obtained illegally. To do this, he has had to ferret out data on the activities of FBI agents who were wont to give information to Justice Department attorneys without revealing its source or the means by which it was collected.¹³⁵ By acting as a watchdog, the Solicitor General may have restrained perhaps over-zealous FBI agents in their surveillance.¹³⁶ In

132. SG's Supp Memo 4-5, *Schipani v. United States*, 385 U.S. 372 (1966). The Court was first informed of the Department's policy in the SG's Supp Memo, *Black v. United States*, 385 U.S. 26 (1966).

133. Cf. *Taglianetti v. United States*, 394 U.S. 316 (1969); *Giordano v. United States*, 394 U.S. 310 (1969); *Alderman v. United States*, 394 U.S. 165 (1969).

The Solicitor General has been successful in preserving the government's practice of plea bargaining with informers and its policy on multiple federal prosecutions. SG's Memo on Pet. for Cert. 6-8, *Robison v. United States*, 390 U.S. 198 (1968); SG's Memo on Pet. for Cert. 6-9, *Nagelberg v. United States*, 377 U.S. 266 (1964).

For other examples of avoidance see SG's Motion to Vacate Judgment and Dismiss the Indictment 3-6, and Memo on Pet. for Cert. 7-8, *Petite v. United States*, 361 U.S. 529 (1960); SG's Memo on Pet. for Cert. 6-7, *Millan-Garcia v. Immigration & Naturalization Service*, 382 U.S. 69 (1965); SG's Memo on Pet. for Cert., *Scott v. United States*, 374 U.S. 502 (1963). Another confession of error may have avoided a Court opinion on the definition of a conscientious objector: SG's Brief 9-14 for the combined cases of *Parker v. United States*, 372 U.S. 608 (1963), and *Harshman v. United States*, 372 U.S. 607 (1963). For an example of the failure of the Solicitor General to prevent the Court from acting, compare the SG's Memo and the Court's opinion in *Bruton v. United States*, 391 U.S. 123 (1968).

134. *E.g.*, *Roberts v. United States*, 389 U.S. 18 (1967); *Markis v. United States*, 387 U.S. 425 (1967); *Hoffa v. United States*, 387 U.S. 231 (1967); *O'Brien v. United States*, 386 U.S. 345 (1967); *Schipani v. United States*, 385 U.S. 372 (1966); *Black v. United States*, 385 U.S. 26 (1966).

135. In *Black v. United States*, 385 U.S. 26 (1966), the Court asked the Solicitor General for information as to the type of apparatus involved, the nature of the authorization for its installation, the statute or Executive Order relied upon, the existence of logs, the uses to which the information had been put, etc. The answer revealed no specific statutory provision other than the Attorney General's general powers and no procedure for authorizing the use of such devices other than wiretaps, prior to 1965 when presidential guidelines were issued. SG's Supp Memo 1-4.

136. In *Hoffa v. United States*, 387 U.S. 231 (1967), the FBI eavesdropped on one defendant in a conspiracy trial. The Solicitor General argued for an evidentiary hearing on the overheard defendant's conviction only. A new trial he argued, given the inadvertence of the incident, would not serve as a prophylactic. SG's Brief Opposing Cert. 70-73. The Court disagreed in one respect and allowed all of the defendants' evidentiary hearings. In SG's Memo on Pet. for Cert. 6-7, *Bennett v. United States*, 385 U.S. 4 (1966), the Solicitor General, similarly, reviewed the file and confessed error because information was withheld which could have aided petitioner's defense against charges of being a subversive.

less spectacular fashion confessions of error also operate to correct discrete blunders.¹³⁷ Even if confessions of error create no precedent for judges, the outcome of each case creates a precedent within the Justice Department.¹³⁸

The effectiveness of confessions of error is, however, sporadic and limited. The Solicitor General is far removed from the trial court and the decision to prosecute.¹³⁹ He has no control over United States attorneys other than to deny them the satisfaction of victory in those few cases which arrive in the Supreme Court. Even staff members in the Solicitor General's office had doubts about the extent to which Justice Department lawyers heed the lessons of confessions of error. The Solicitor General has argued,¹⁴⁰ however, that confessions of error are indispensable when a case arises which presents unanticipated policy problems for which there are either no relevant guidelines or only loopholes in the Attorney General's directives.

Confessions of error also permit the Solicitor General to resolve delicate problems of conflict between the Department of Justice and the agencies whose litigation it handles. In *Oestereich v. Local Bd. No. 11*,¹⁴¹ the interpretation of a crucial provision of the Selective Service Act of 1967 was at issue. The differing viewpoints of both the Justice Department and the Selective Service System were presented in the government's brief. By confessing error and suggesting a narrow rationale for decision, the Solicitor General enabled the Court and the recalcitrant Selective Service System to avoid a constitutional challenge to the draft system.¹⁴²

The success of the Solicitor General's confessions of error in such cases is only as effective as the Solicitor General's arguments.¹⁴³ The Solicitor General has felt that he should not foreclose the respondent

137. See, e.g., *Redmond v. United States*, 384 U.S. 264 (1966); *Nagelberg v. United States*, 377 U.S. 266 (1964) (U.S. attorney failed to communicate to trial court that purpose in acquiescing in motion to withdraw petitioner's guilty plea was to re prosecute for lesser charge).

138. Compare SG's Brief 37-39, *Saldana v. United States*, 365 U.S. 646 (1961), with SG's Memo in Response to Pet. for Cert., *Marakar v. United States*, 370 U.S. 723 (1962).

139. A confession of error may not prevent the government's lawyers from attempting to win on remand with an argument rejected in the Supreme Court. See *United States v. Crest Finance Co.*, 302 F.2d 568 (7th Cir. 1962), discussed in 2 G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 40.4 (1965), at 1058 n.8.

140. SG's Motion to Vacate Judgment and Dismiss the Indictment, *Petite v. United States*, 361 U.S. 529 (1960).

141. 393 U.S. 233 (1968).

142. See also *United States v. Lovett*, 328 U.S. 303 (1946) (conflict between Congress and the Executive; Congress appointed own counsel).

143. A lower court example involving the ICC is *Utah Poultry & Farmers Cooperative*, 119 F. Supp. 846 (D. Utah 1954), *rev'd on other grounds sub nom. Sec'y of Agriculture v. United States*, 350 U.S. 162 (1956).

Government Litigation in the Supreme Court

agency from presenting its point of view,¹⁴⁴ though the impact of the Solicitor General's belief that the agency's position is without merit will not be lost on the Court.

C. Conclusion

The danger created by confessions of error is the possibility that the case is being decided *de facto* by the Solicitor General. Burdened by a growing docket, the Court is naturally tempted to accept a confession of error, since it disposes of a case, often involving difficult issues, without plenary argument. On the other hand, the Court is jealous of its powers and concerned about its institutional responsibility to safeguard constitutional rights. Thus in almost every opinion the Court has stated ritualistically that its decision is based on both the Solicitor General's confession of error and its independent consideration of the record.¹⁴⁵

In several cases the tension between the competing values of avoiding constitutional questions and maintaining the Court's independence was obvious. In *Petite v. United States*,¹⁴⁶ for example, the Solicitor General confessed error after petitioner had been prosecuted in two different federal courts for related offenses arising from the same occurrence. This action, the Solicitor General argued, was inconsistent with the Attorney General's related guidelines for multiple prosecutions in federal and state courts. The majority went along with the Solicitor General, noting that it did not intimate any opinion on the

144. SG's Brief 28, *St. Regis Paper Co. v. United States*, 368 U.S. 203 (1961); and see SG's Brief 15, *Oestereich v. Local Bd. No. 11*, 393 U.S. 233 (1968).

145. On occasion, the Court has done more than examine the record. See, e.g., *Bruton v. United States*, 391 U.S. 123 (1968) (argument rejected); *Wood v. United States*, 389 U.S. 20 (1967) (remedy and argument); *O'Brien v. United States*, 386 U.S. 345 (1967) (remedy).

146. 361 U.S. 529 (1960). The classic and oft-quoted statement of the proper relationship between the Court and the government appears in *Young v. United States*, 315 U.S. 257, 258-59 (1942) (issue of statutory construction):

The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent. But such a confession does not relieve the Court of the performance of the judicial function. The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed. The public interest that a result be reached which promotes a well-ordered society is foremost in every criminal proceeding. That interest is entrusted to our consideration and protection as well as to that of the enforcing officers. Furthermore, our judgments are precedents and the proper administration of the criminal law cannot be left merely to the stipulations of the parties. (Citations omitted.)

Cf. *Sibron v. New York*, 392 U.S. 40, 58-59 (1968).

double jeopardy issue.¹⁴⁷ In an opinion which underscores the Court's dependence on the Solicitor General, Chief Justice Warren concurred, stating that the policy of avoidance must yield to the Court's responsibility for settling constitutional questions where the issue is squarely presented and the Solicitor General's only purpose is to avoid a damaging precedent. *Petite* was not such a case, the Chief Justice felt, since the government had brought the case inadvertently and did not intend to bring similar prosecutions in the future.¹⁴⁸ Three Justices, however, were not satisfied because, in the absence of a reversal on the merits and a written policy statement on precisely this point, the Justice Department would continue to possess wide discretion in the area.¹⁴⁹

In other cases, the dissent has expressed suspicion of the Solicitor General's purposes, suggesting that he might have been sacrificing one case to save another¹⁵⁰ or that his recommended remedy did not adequately resolve the constitutional issue or protect the petitioner.¹⁵¹ On occasion, the Court has taken a more active role, reversing on its own motion or prodding the Solicitor General into confessing error.¹⁵²

The Solicitor General also faces the difficult problem of conflicting interests. Since the Court is likely to accept his representations, the Solicitor General's decision to confess error poses a dilemma since it forces him to choose among his roles as lawyer for the government, protector of the public interest in justice to the individual, officer of the Court, and contributor to the orderly development of constitutional law.¹⁵³ The Court can exert some control by deciding a later case on the merits if a problem proves to be more pervasive than the Solicitor General had represented. The *post hoc* nature of this remedy suggests the extent of the Court's dependence on the Solicitor General and the importance of a good faith performance of his duties.

147. 361 U.S. at 530.

148. *Id.* at 532.

149. *Id.* at 533.

150. *Casey v. United States*, 343 U.S. 808, 811-12 (1952) (dissenting opinion).

151. *Granello v. United States*, 386 U.S. 1019 (1967) (*cert. denied*, Douglas, J., and Fortas, J., and Warren, C.J., dissenting in two separate opinions); *Redmond v. United States*, 384 U.S. 264 (1966) (Stewart, Black, and Douglas, JJ. concurring.)

152. *Cf.* SG's Memo and Supp Memo, *Black v. United States*, 385 U.S. 26 (1966); *Silber v. United States*, 370 U.S. 717 (1962); and cases cited in note 145 *supra*.

153. More mundane considerations of a personal nature may also be involved:

The Solicitor General is aware that to confess error will not only infuriate the attorneys who have handled the case for the Government below, but also the judges who were persuaded to decide in the Government's favor. It is very embarrassing to meet these judges shortly after one has confessed error on them in the Supreme Court.

Stern, *supra* note 14, at 158.

Government Litigation in the Supreme Court

IV. Participation as Amicus Curiae

The amicus device is admirably suited to and frequently utilized by the Solicitor General in his relationship to the Court.¹⁵⁴ Amicus participation usually involves none of the theoretical limitations of an adversary stance and allows the Solicitor General freer reign to point the Court in directions he deems desirable.

Procedurally, the Solicitor General's amicus participation is sharply differentiated from that of private parties. While nongovernmental interests require either the consent of all the parties to a case or the special permission of the Court to submit an amicus brief, the Solicitor General is permitted to file on his own.¹⁵⁵ Private amicus briefs prior to consideration of the jurisdictional statement or the petition for writ of certiorari are expressly "not favored,"¹⁵⁶ while the Solicitor General often intervenes at this early stage. And perhaps most significantly, the Supreme Court itself frequently invites the Solicitor General to submit his views either on the merits or prior to the Court's decision to grant or deny certiorari.

The Solicitor General as amicus performs several functions: protecting the Government, which may be a real party in interest or whose statutory policies may be at stake; providing the Court with otherwise unavailable information; providing a flexible strategy in dealing with independent agencies; and presenting his own views on important constitutional issues.

A. *Representing the Government's Interests*

In some instances of amicus participation, the government may be the real party in interest, and the Solicitor General appears in an

154. Amicus curiae participation was conceived of at common law as a partial solution to one of the most serious shortcomings of the adversary process. Although traditionally defined as a detached servant of the court—"he acts for no one but simply seeks to give information to the court"—the courts have never given extended consideration or imposed confining restrictions on the role that amicus may play. Krislov, *The Amicus Curiae Brief, From Friendship to Advocacy*, 72 YALE L.J. 694 (1963). One of the early common law justifications was the possibility of collusion among the private litigants. A similar spectre was raised during the 1930's when derivative suits by stockholders against their corporations challenging the constitutionality of New Deal taxes and social reform programs were at issue. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). The Judiciary Act of 1937, ch. 754, § 1, 50 Stat. 751, 28 U.S.C.A. § 2403 (1964), gave the government the right to participate as a direct party in litigation involving the constitutionality of federal legislation. The Solicitor General is in charge of authorizing such intervention. 28 C.F.R. § 0.21 (1969). See 1967 ATT'Y GEN. ANN. REP. 33.

155. Sup. Ct. R. 42.

156. *Id.* Rule 44 also warns that motions for permission from the Court to participate in oral argument where one of the parties refuses to release a part of his time is not favored unless made on behalf of the United States or a state or territorial government.

adversary posture. For example, in *American Oil Co. v. Neill*,¹⁵⁷ although the suit was nominally by a taxpayer contesting the validity of an Idaho tax on out-of-state transactions, the taxpayer was a government contractor under an agreement whereby the United States agreed to pay any state tax imposed. And in *Humble Pipe Line Co. v. Waggoner*,¹⁵⁸ another suit by a taxpayer against a state, the Solicitor General appeared to protect the exclusivity of federal jurisdiction over government land.

More often, the Solicitor General appears as *amicus curiae*, on his own or the Court's initiative, because the interests of an important statutory policy are at stake. For example, *Minnesota Mining v. New Jersey Wood Co.*¹⁵⁹ involved the question whether the time for bringing a private Clayton Act Section 7 action was extended while the Federal Trade Commission was investigating the merger.¹⁶⁰ In *Nash v. Florida Industrial Comm'n*,¹⁶¹ Florida refused an employee unemployment compensation because he filed an unfair labor practice charge with the National Labor Relations Board.¹⁶²

B. *Providing the Court with Information*

The issues presented may require the Solicitor General to furnish the Court with information which, though unavailable to the litigants, may be the crux of the dispute. In *J. I. Case Co. v. Borak*,¹⁶³ involving the judicial remedies of a stockholder allegedly victimized by misleading proxy statements, the Solicitor General informed the Court of the methods and problems of the Securities Exchange Commission

157. 380 U.S. 451 (1965).

158. 376 U.S. 369 (1964).

159. 381 U.S. 311 (1965).

160. The Solicitor General maintained that the same policy that tolls the statute of limitations while an antitrust action in Federal courts was pending should govern, allowing the private suitor to wait and take advantage of the evidence discovered by the government, SG's Amicus Brief, 8-10.

161. 389 U.S. 235 (1967).

162. The Solicitor General argued that the state action seriously impeded freedom of access to the Board, subverting the policy of the National Labor Relations Act, and could not be justified by any state interest of compelling importance. SG's Memo 12. *See also*, e.g., *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392 (1968) (construction of federal treaty with Indians); *Vaca v. Sipes*, 386 U.S. 171 (1967) (the exclusive jurisdiction of the NLRB over arbitrary and discriminatory conduct by unions towards individual employees was at issue); *Snapp v. Neal*, 382 U.S. 397 (1966) (interpretation of federal exemption to servicemen from state property tax); *Calhoon v. Harvey*, 379 U.S. 134 (1964) (power of Secretary of Labor to protect rights of employees under the Labor Management Relations Act); *Brulotte v. Thys Co.*, 379 U.S. 29 (1964) (the Solicitor General voiced the antitrust considerations involved in a suit by a patent owner against a licensee).

163. 377 U.S. 426 (1964).

Government Litigation in the Supreme Court

in processing proxy statements.¹⁶⁴ In *Zschernig v. Miller*,¹⁶⁵ the appellant's main argument was that an Oregon escheat statute interfered with the foreign relations and foreign policy of the United States,¹⁶⁶ but the Solicitor General informed the Court that the Department of State considered such escheat statutes of little effect on foreign relations.¹⁶⁷

Amicus participation is valued for the expertise and resources the government can bring to bear on a problem and the greater likelihood of its taking a more impartial view. The necessity for government participation is most apparent where the optimal resolution of the legal issues at stake would benefit none of the litigants in the case and therefore may never be presented to the Court. In *Fortnightly Corp. v. United Artists Television, Inc.*,¹⁶⁸ a copyright infringement action, the future viability of CATV and local broadcasting stations was at stake, involving complex considerations of federal communications and antitrust policy. The Solicitor General presented the Court with a "compromise" solution unfavorable to either of the litigants. He also asked the Court to "stay its hand", because definitive resolution of the matter was not possible in judicial proceedings which might delay and prejudice an ultimate legislative solution.¹⁶⁹

C. Dealing with the Independent Agencies

Participation as amicus also gives the Solicitor General flexibility in litigation strategy. Thus, where an independent agency is the respondent, but the Solicitor General supports all or part of the petitioner's position, allowing the agency to represent itself while participating

164. SG's Amicus Brief 12.

165. 389 U.S. 429 (1968).

166. And that its enforcement "must be a source of the deepest embarrassment to the State Department and add gravely to its conduct of the relations with [involved] countries." Jurisdictional Statement of Appellants 17.

167. SG's Memo 5. See also, e.g., *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968) (the Solicitor General informed the Court as to the position and problems of the Bureau of Indian Affairs in protecting lease rights of Indians); *King v. Smith*, 88 S. Ct. 842, 19 L. Ed. 971 (1968) (Justice Black asked the Solicitor General to inform him as to the interpretation that the Department of Health, Education and Welfare would give to a congressional amendment freezing certain welfare payments); *Radio Union v. Broadcast Service*, 380 U.S. 255 (1965) (the Solicitor General informed the Court of the jurisdictional boundaries of the NLRB).

168. 392 U.S. 390 (1968).

169. SG's Memo 2 (December 1967). The Solicitor General at first urged the Court to hold the case on the docket and delay argument pending legislative developments. A month later, however, he submitted a Memo (January 1968) suggesting that although a public performance of copyrighted works results from CATV carriage of television signals, a limited license implied in law should result in light of policy considerations. See the comments of Justice Fortas on the Solicitor General's proposal, 392 U.S. at 404.

himself as amicus is used occasionally to resolve such delicate situations.¹⁷⁰ While the Solicitor General might deny an agency's request to petition for certiorari where such disagreements arose, the position of the agency as respondent usually entails that a perfunctory opposition brief be filed. If he did not opt for the amicus route in cases of disagreement, the Solicitor General would be forced to confess error or to abstain from the case.

Another example of the versatility of the amicus role appears in *Atlantic Refining Company v. Public Service Commission*,¹⁷¹ a case dealing with the early efforts of the Federal Power Commission to regulate the field price of natural gas. The FPC lost in the circuit court but did not (or was not permitted to) seek certiorari. The Solicitor General allowed the FPC to file an amicus brief in the Supreme Court where the contest was pursued by the other parties involved. The Federal Power Commission urged that the lower court's decision was a damaging precedent and that if the Supreme Court affirmed, it should do so on an alternative ground.¹⁷²

Independent agencies, with the exception of the ICC, traditionally may not file amicus briefs on their own. Nor does the Supreme Court invite them to participate, except indirectly by requesting the Solicitor General to express the views of the United States on a matter committed to an agency's jurisdiction. The Solicitor General's presentation of interagency and interdepartmental conflicts would be facilitated, however, by allowing an agency to make its own representation as amicus to the Court. The necessity of obtaining the Solicitor General's consent may often dissuade an agency from attempting to make its views known to the Court.¹⁷³ In light of the frequent appearances of private parties as amici curiae, the centralization of the amicus function does not seem necessary to avoid overburdening the Court.

D. *Participating in Constitutional Litigation*

The Solicitor General's frequent appearance as amicus curiae in cases involving fundamental issues of constitutional law seems his most

170. In *Purolator Products, Inc. v. FTC*, 389 U.S. 1045 (1968), the Solicitor General authorized the FTC to file a brief in opposition to the granting of certiorari while participating himself as amicus urging a reversal of the FTC's interpretation of the Robinson-Patman Act. In *Monroe Auto Equipment Co. v. FTC*, 382 U.S. 1009 (1966), also a Robinson-Patman price discrimination case, the Solicitor General authorized the FTC to file a brief opposing certiorari while filing an amicus brief disagreeing with the FTC on the legal question raised but conceding that this was not an appropriate case for review.

171. 360 U.S. 378 (1959).

172. FPC Amicus Brief 16-32.

173. See pp. 1466-67 *supra*.

Government Litigation in the Supreme Court

independent role. Although the Department of Justice and the Department of Health, Education and Welfare have specific statutory obligations in civil rights and school desegregation, the Solicitor General's interest antedates and extends beyond congressional efforts in these fields.¹⁷⁴

The Solicitor General's participation in the civil disobedience cases¹⁷⁵ has no statutory basis, and his activism in the reapportionment cases¹⁷⁶ is founded entirely on his belief in the wisdom of the Court's intervention in the area. The Solicitor General's role in these cases has hardly been limited to an impartial analysis of the arguments of the litigants; rather, he often was a partisan advocate of a particular constitutional argument. In the reapportionment cases, the Solicitor General functioned as the plaintiff's chief advocate and formulated a rationale which he has consistently presented to the Court, often advocating the extension of the one man, one vote rule beyond the Court's willingness to go.¹⁷⁷

174. In SG's Amicus Memos, *Green v. School Board of Va.*, 391 U.S. 430 (1968), *Raney v. Board of Education*, 391 U.S. 443 (1968), and *Monroe v. Board of Commissioners of Jackson*, 391 U.S. 450 (1968), the Solicitor General argued against the freedom of choice plans which had been permitted by the Department of Health, Education and Welfare. The Solicitor General participated in the cases leading up to *Brown v. Board of Education*, 347 U.S. 483 (1954) and 349 U.S. 29 (1955). See, e.g., SG's Amicus Memo in *Sweatt v. Painter*, 339 U.S. 629 (1950) and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950). See also, e.g., SG's Amicus Briefs, *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Warden v. Hayden*, 387 U.S. 294 (1967); *Goss v. Board of Education*, 373 U.S. 683 (1963); *Boynton v. Virginia*, 364 U.S. 454 (1960).

175. See, e.g., SG's Amicus Briefs in *Griffin v. Maryland*, 378 U.S. 130 (1964); *Barr v. City of Columbia*, 378 U.S. 146 (1964); *Robinson v. Florida*, 378 U.S. 153 (1964); *Bell v. Maryland*, 378 U.S. 226 (1964); and *Bowie v. City of Columbia*, 378 U.S. 347 (1964). The Solicitor General argued in the above cases that the arrest of Negroes seeking service at privately owned business establishments violated due process because the trespass statutes on which the arrests were made was unconstitutionally vague; and in a Supplemental Brief filed at the Court's request, 375 U.S. 918 (1963), he argued that the discrimination constituted state action. In *Walker v. Birmingham*, 388 U.S. 307 (1967), the Solicitor General argued on First Amendment grounds that civil rights leaders could challenge the validity of an unappealed state court injunction in a criminal contempt proceeding for violations of that injunction.

176. See the SG's Amicus Briefs in *Avery v. Midland County*, 390 U.S. 474 (1968); *Dusch v. Davis*, 387 U.S. 112 (1967); *Sailors v. Board of Education*, 387 U.S. 105 (1967); *Moody v. Flowers*, 387 U.S. 97 (1967); *Reynolds v. Sims*, 377 U.S. 533 (1964); and *Baker v. Carr*, 369 U.S. 186 (1962).

177. The Solicitor General consistently argued that the one man, one vote principle of *Reynolds v. Sims*, 377 U.S. 533 (1964), be applied to all local governmental bodies whose members are determined through the elective process. In *Sailors v. Board of Education*, 387 U.S. 105 (1967), the Court rejected the Solicitor General's argument, holding that the challenged area school board performed functions of an administrative nature, and that the members were appointed not elected. In *Dusch v. Davis*, 387 U.S. 112 (1967), the Court permitted Virginia Beach to choose its legislative body by a scheme that included at-large voting for candidates, some of whom had to be residents of particular districts, even though the residence districts varied widely in population. The Solicitor General maintained that not only would the voters' selectivity among candidates be substantially reduced under the scheme, but that it was a fair assumption that those members residing in sparsely populated districts would not adequately represent those persons living in the more populous areas. See R. DIXON, JR., *DEMOCRATIC REPRESENTATION* 250-260 (1968).

The Supreme Court's frequent invitation to the Solicitor General to participate as amicus in constitutional cases is one indication of his useful role.¹⁷⁸ The Solicitor General and his staff have unparalleled experience in constitutional litigation. Their access to and knowledge of the government apparatus not only enable them to inform the Court of factors unknown to private parties, but also to proffer statutory grounds for a decision avoiding the constitutional issues raised.¹⁷⁹ The Solicitor General may indicate the relationship of the case to others pending on the docket,¹⁸⁰ or the particular infirmities or strengths of the case for resolving constitutional or statutory issues.¹⁸¹ Knowing the Justices' proclivities, the Solicitor General may be able to offer a compromise solution that can gain a majority vote of the Court.¹⁸² The Supreme Court, lacking an extensive staff of its own, often benefits from the Solicitor General's impartial and sophisticated analysis of such constitutional cases.

The threat that the Solicitor General's participation in such cases might run contrary to the more partisan interests of the government has occasionally been raised—"The King's champion [would] raise his lance against the King." One recent Solicitor General voiced particular concern about the possibility of such a conflict, and candidly admitted

178. *See, e.g.*, Orders of the Supreme Court inviting the Solicitor General to file a brief: Oct. 14, 1968, 393 U.S. 813, in *Snell v. Wyman*, 393 U.S. 323 (1969) (the constitutionality of state welfare regulations regarding recovery of welfare benefits from recipients); Dec. 4, 1967, 389 U.S. 966, in *Allen v. State Board of Elections*, 393 U.S. 544 (1969) (constitutionality of Virginia voting provisions for illiterates); Nov. 18, 1963, 375 U.S. 918, in *Griffin v. Maryland*, 378 U.S. 130 (1964) (whether discrimination in sit-in cases was state action); March 18, 1963, 372 U.S. 940, in *Fields v. Fairfield*, 375 U.S. 248 (1963) (whether one may test by disobedience the validity of an injunction issued by a court of competent jurisdiction).

179. *See, e.g.*, SG's Amicus Memo, *Allen v. State Board of Elections*, 393 U.S. 544 (1969) (the Solicitor General in response to the Court's invitation suggested that the equal protection argument of appellants need not be reached since the Virginia voting test under challenge violated the Voting Rights Act of 1965); SG's Amicus Brief, *Fields v. City of Fairfield*, 375 U.S. 248 (1963) (the Solicitor General suggested that the Court need not reach the constitutional question of whether one may test by disobedience the validity of an injunction issued by a court of competent jurisdiction since petitioners had never violated the injunction); SG's Amicus Brief, *Head v. New Mexico Board of Examiners*, 374 U.S. 424 (1963) (the Solicitor General argued that the Federal Communications Act preempted the state from enjoining broadcasting deemed contrary to the public interests, and thus avoided the commerce clause claims of appellants).

180. *See, e.g.*, SG's Amicus Brief 12-13, *Snell v. Wyman*, 393 U.S. 323 (1969); SG's Amicus Brief 3, *Greenwood v. Peacock*, 384 U.S. 808 (1966).

181. *See, e.g.*, SG's Amicus Memo, *Continental Casualty Co. v. Robertson Lumber Co.*, 394 U.S. 714 (1969) where the Solicitor General suggested that although the case was erroneously decided below the federal question raised did not have prospective importance; SG's Amicus Brief, *Greenwood v. Peacock*, 384 U.S. 808 (1966), where the interpretation of the federal removal statute was at issue; SG's Amicus Brief, *Monroe Auto Equipment Co. v. FTC*, 382 U.S. 1009 (1966), where the Solicitor General, though disagreeing with the FTC on the legal issue involved, felt there was not sufficient information in the record to warrant review.

182. *See R. DIXON, JR., DEMOCRATIC REPRESENTATION* 257 (1968).

Government Litigation in the Supreme Court

his uncertainty over its resolution. The general absence of executive interference in the Solicitor General's determination of his position on these constitutional issues decreases the risk of such conflicts. Although the Attorney General often is actively involved in these cases,¹⁸³ unusual deference is afforded the Solicitor General and his staff.

The conflicting loyalties of the Solicitor General are not, however, solely a function of his appearance as amicus in constitutional cases. The most celebrated recent case where the Solicitor General's integrity and his loyalty to the Court resulted in his refusal to defend the government was not an amicus case.¹⁸⁴ The Solicitor General's need for a degree of independence is not based on the formal label attached to his representation in a case, but the role necessitated by prolonged exposure to and regular participation before the Supreme Court.

183. Attorney General Ramsey Clark argued *Jones v. Mayer*, 392 U.S. 409 (1968) in the Supreme Court. Attorney General Katzenbach argued *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), and joined with Solicitor General Marshall on brief in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

184. *Peters v. Hobby*, 349 U.S. 331 (1955). The Solicitor General refused to defend the action of the Loyalty Review Board of the Civil Service Commission in suspending petitioner from federal employment. For somewhat differing interpretations of the Supreme Court's decision in *Peters*, compare Solicitor General Sobeloff's reading with that of then Assistant Attorney General—now Chief Justice—Warren Burger, who argued the Government's position, in 1955 ATT'Y GEN. ANN. REP. 16, 221. See Lewis, *Our Extraordinary Solicitor-General*, THE REPORTER, May 5, 1955, at 27; Rauh, *Nonconfrontation in Security Cases: The Greene Decision*, 45 VA. L. REV. 1175, 1178 (1960).