

ESSAYS

THE INTERESTS OF THE UNITED STATES, THE SOLICITOR GENERAL AND INDIVIDUAL RIGHTS

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I. INTRODUCTION

Dean Attanasio, the Millstone Family, distinguished guests, faculty, staff, students, ladies and gentlemen. It is truly an honor to be here tonight as this year's Millstone Lecturer. James Millstone's legacy to this community and to America is one of which his family and friends are deservedly proud.

Before I begin my address, I would like the record to reflect that Missouri has a connection to the Office of the Solicitor General. Frederick W. Lehman—the thirteenth of forty Solicitors General, including myself—was a native of this state. He served as President Taft's second Solicitor General from December 12, 1910 to July 15, 1912. Before becoming Solicitor General, Lehman was the general attorney of the Wabash Railway Company. There is a reminder of Frederick Lehman that one cannot miss in the rotunda just outside the Attorney General's inner office at the Department of Justice.

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Carved in the woodwork above one of the doors is the following Lehman quotation: "The United States wins its point whenever justice is done its citizens in the courts." For many Attorneys General and government lawyers, Lehman's statement is the best expression yet of what we ought to be about.

II.

Much of my legal career has been devoted to vindicating the rights of individuals against government encroachment or constraint. Those who founded this Nation—those who signed the Declaration of Independence, the Constitution, and those who drafted the Bill of Rights—were animated in significant part by a desire to ensure that individual rights were adequately protected against governmental abuse and overreaching, and that the enormous resources and power of government were not employed to deprive individuals of their fundamental freedoms. Similar concerns prompted ratification of the Civil War Amendments, various other amendments to the Constitution and federal civil rights laws enacted over the last thirty years. From my time as a law student working in Southwest Georgia with a veteran civil rights lawyer to my nearly ten years as a staff lawyer for the NAACP Legal Defense Fund, Thurgood Marshall's organization, my purpose in life was to see to it that rights guaranteed by the Constitution and federal law were respected by government officials. Given our adversarial system, lawyers in private practice, who owe a high degree of loyalty to their clients, are properly afforded significant latitude by the courts in pressing their cases. As a lawyer for the Legal Defense Fund, however, I never lost sight of the fact that I was an officer of the court and that my advocacy for my clients had to be tempered in certain respects as a consequence.

As Assistant Attorney General for Civil Rights in the Carter Administration, I found that my new responsibilities imposed additional constraints upon the nature and intensity of my advocacy that I had not experienced in private practice. In many respects, I was enforcing federal laws that I previously relied upon in litigation for the Legal Defense Fund. It became clear, however, that my responsibility for deploying the significant resources of the federal government in civil suits against states and localities, and criminal prosecutions against individuals demanded of me a degree of care and caution before wielding the power that, in my capacity as a private civil rights lawyer, would have been rather curious. Moreover, as a Legal Defense Fund lawyer, my experience had been that the power and resources were usually arrayed *against* me and my clients by state and local governments when I went to court.

The challenge posed by my new role as enforcer of federal civil rights laws, it struck me, was to resist the temptation to play the bully, to become the oppressor myself in the cause of some higher good. I think I was successful during my four years in office in avoiding that corrupting effect of power as a

matter of principle. But I also believed that such conduct would prove counterproductive to my efforts to increase federal government's involvement in protecting civil rights. As a government lawyer, speaking for the Justice Department and the United States of America, one was expected to approach litigation with a bit more reserve and to advance one's arguments in the knowledge that their impact would undoubtedly reach beyond one case and one court to the entire federal judicial system.

Since May of 1993, I have been the Solicitor General of the United States. As head of the Civil Rights Division, even with the constraints upon me that I just mentioned, I still knew each morning when I woke up that my principal job was to enforce federal civil rights laws and to serve as advocate to the outside world, as well as within the councils of government, for those entitled to federal protection. As Solicitor General, however, quite frankly, I get up every morning prepared for a day of complex calculations and calibrations required to establish the nature and scope of the legal representation expected of me. For in this job, I am responsible for advancing and protecting the interests of the United States within the federal judicial system, as well as in limited instances, state and foreign courts. My clients include the President, the Attorney General, Executive Branch Agencies and Departments, Independent Regulatory Agencies and the Congress. I am responsible for determining what cases and what arguments will be presented by the United States Government before the Supreme Court and for superintending federal government litigation in the lower courts.

III.

In view of these competing demands upon my role as Solicitor General, I am required to address individual rights concerns in a way that differs *certainly* from the approach I took as a private civil rights attorney and even that as Assistant Attorney General for Civil Rights. But, since I am charged with "seeing to the interests of the United States" in the courts,¹ I have endeavored not to lose sight of the fact that those "interests" must include not only those of the federal government in its corporate capacity but of the American people as well. That is, I must make every effort to ensure that the positions of the United States in the courts are sensitive to the degree to which laws improperly enforced do a disservice to the government and to the Nation as a whole. Here are a few examples of what can be done.

A critical function of the federal government is criminal law enforcement. Congress has enacted increasingly tougher provisions with longer sentences, particularly in the areas of drugs and violent crime. It is my job to see that those laws are enforced firmly but fairly by the courts and that judicial

1. 28 U.S.C. §§ 517-18 (1994).

interpretations that improperly curtail the reach of those statutes are challenged vigorously. But that commitment does not require me to overlook miscarriages of justice or to tolerate what appear to be unduly aggressive readings of federal law or constitutional provisions in the criminal law area.

One tool available to me in this regard is called "confession of error." Where a Solicitor General is persuaded that a fundamental error has occurred with respect to a federal criminal conviction, for example, he may, indeed I think *must*, bring that fact to the attention of the courts so that it can be corrected. I did so as Solicitor General, among other times, where it became apparent that a person was sentenced to a prison term that was five years longer than the law allowed. The Supreme Court was so advised, it threw out the improper sentence and sent the case back to the lower court for corrective action.²

The federal government is also in a position in the Supreme Court and other federal and state courts to file friend of the court or *amicus* briefs that may serve to present those courts with a point of view that might not be put forth by the parties. We filed such a brief³ in a state criminal procedure case before the Supreme Court during the 1994-95 Term that involved the extent to which law enforcement officers were constitutionally required under the Fourth Amendment to "knock and announce" themselves before entering a building to execute a search warrant.⁴ Compelling claims were pitted against each other: on one side was the belief of law enforcement officers that surprise was a critical element in the carrying out searches in order to reduce the extent to which the subjects of the search might resort to lethal force to resist or to prevent the destruction of contraband such as drugs; on the other side were contentions that failure to knock and announce increased the chances of erroneous searches being launched or of injury to the occupants of the building who might well act in ignorance of the fact that police were responsible for the entry. Representing these competing views, the State of Arkansas urged the Court to hold that "knock and announce" was *never* required by the Constitution; the defendant argued that it was *always* required. Our brief, however, offered the Court an intermediate position that invoked the rule of reasonableness under Fourth Amendment search and seizure principles that we believed struck a respectful balance between individual rights and the legitimate demands of law enforcement. The Court eventually adopted this position.⁵

The Solicitor General's duty to assist the Attorney General and the

2. Reed v. United States, 510 U.S. 1188 (1994).

3. Brief of the United States for Respondent, Wilson v. Arkansas, 115 S. Ct. 1914 (1995) (No. 94-5707).

4. Wilson v. Arkansas, 115 S. Ct. 1914 (1995).

5. *Id.* at 1916.

President in the “faithful execution of the laws” does not traditionally extend to his defending *all* federal statutes in the face of constitutional attack. One exception to the rule exists when the Solicitor General is persuaded that the law cannot reasonably be defended. In such circumstances, the Congress is free to represent itself. Although it is not a frequent occurrence, I have had several occasions since becoming Solicitor General to decline representation to Congress. In one case, a woman who spent all of her life in Canada visited a U.S. passport office in San Francisco in the late 1980s and demanded a United States citizen passport.⁶ She explained that she was entitled to the passport because her mother had been a United States citizen but had not been able to pass on the citizenship to her on account of a law in existence prior to 1934.⁷ That law dictated that the children of *male* United States citizens who married foreign nations abroad could pass on their U.S. citizenship to issue of that union; but *female* U.S. citizens marrying foreign nationals could not. She claimed that the law (which was changed in 1934 to remove the distinction) was unconstitutional.⁸ She was denied a passport, sued and won in the federal trial court;⁹ the government appealed (in the prior administration) and lost.¹⁰ She got her passport.¹¹ It fell to me once the Clinton Administration came into office to decide whether Supreme Court review would be sought. I decided against defending the statute further but agreeing instead to offer our cooperation to Congress in enacting a provision to remove the disability imposed upon a number of children of U.S. mothers because of the law’s gender discrimination. Congress agreed, an act was passed and the problem became history.¹²

IV.

Precedent and stability in the law are, on balance, important qualities. It is particularly important, in my estimation, for there to be continuity in legal positions from one national administration to the next to the greatest extent possible. Of course, both the electorate and the judiciary expect that some changes will occur after a presidential election where there is a switch in the party in power. But there is also a value to the law and society at large in not allowing government legal positions to appear purely the consequence of political philosophy readily adjusted to the prevailing views of the moment.

6. *Wauchope v. United States Department of State*, 985 F.2d 1407 (9th Cir. 1993).

7. *Id.* at 1409 (referring to Rev. Stat. of the U.S. tit. xxv, § 1993 (1874) *as amended* Pub. L. No. 73-250 (1934)).

8. *Wauchope*, 985 F.2d at 1409-1410.

9. *Id.*

10. *Id.*

11. *Id.*

12. Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 1, tit. I, 108 Stat. 4305, 4306 (1994).

On the other hand, great strides in the protection of individual rights in our society have been made by courageous assaults upon received legal wisdom. It is often a question of balance, timing and good lawyering. Remember *Brown v. Board of Education*.¹³

In the change from the Bush to Clinton Administrations, there were very few shifts in legal positions. One, however, that I was most proud of involved the question of whether the practice of removing prospective jurors from cases (so-called peremptory challenges) based upon their gender had to be constitutionally justified just as did removals appearing to be based upon race.¹⁴ The prior administration had argued that gender-based peremptories should be treated differently. We disagreed, argued that position in the Supreme Court as a friend of the Court, and prevailed.¹⁵

Developments both in the courts and in diplomacy have also caused Solicitors General to view the "interests of the United States" from an international perspective. During my stint in the Carter Justice Department, the State Department Legal Advisor (that Department's chief legal officer) and I filed a friend of the court brief¹⁶ for the administration in the federal court of appeals sitting in New York City supporting the proposition that a foreign national could sue another alien in federal court for human rights violations (torture) committed abroad under a 1789 United States law.¹⁷ The court adopted our position,¹⁸ and established a precedent that has opened federal courts to suits by victims of human rights abused at the hands of torturers in Guatemala,¹⁹ Haiti,²⁰ the Philippines²¹ and Argentina,²² among other countries. Last fall, the current Legal Advisor and I, as Solicitor General, filed another brief in the same federal court of appeals in New York arguing that the same principle and other doctrines of U.S. and international law required that suits against Radovan Karadzic of the former Yugoslavia be allowed to proceed on behalf of thousands of persons claiming to have been the victims of genocide campaigns against them.²³ We felt our participating in the case was imperative

13. 347 U.S. 483 (1954).

14. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

15. *Id.*

16. Brief of the United States for Petitioner, *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

17. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (as codified 28 U.S.C. § 1350 (1789)).

18. *Filartiga*, 630 F.2d at 877.

19. *See, e.g., Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995).

20. *See, e.g., Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994).

21. *See, e.g., In re Estate of Ferdinand Marcos Human Rights Litigation*, 94 F.3d 539 (9th Cir. 1996).

22. *See, e.g., In re Extradition of Suarez-Mason*, 694 F. Supp. 676 (N.D. Cal. 1988); *Siderman v. Argentina*, 965 F.2d 699 (9th Cir. 1992).

23. Brief of the United States for Petitioner in *Doe v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

in light of the United States' ratification of the Covenant on Civil and Political Rights,²⁴ the Genocide Convention²⁵ and recent federal legislation specifically granting certain torture victims a right to redress in U.S. courts.²⁶

V.

I would be less than candid with you if I concluded without acknowledging that this Administration has also received criticism from civil rights and human rights groups for some of the positions we have taken, particularly with respect to what they see as a double standard regarding remedies against the federal government for civil rights violations, the treatment of aliens under the immigration laws and the rules governing open homosexuality in the military.

The double standard charge stems in part from the fact that the federal government, unlike states, localities and individuals, enjoys sovereign immunity against monetary relief for violations of individual rights except to the extent that Congress decides to waive that immunity.²⁷ Consequently, for example, punitive damages may be unavailable for injuries suffered by plaintiffs against the federal government but available against non-federal entities. The concern is understandable but the Supreme Court has so ruled and my job is to enforce that doctrine faithfully. Although harsh in some instances, it is founded upon the principle that Congress is in the best position to determine how the resources of the federal government, in view of the enormous demands upon it, should be allocated. Congress has moved, in fact, quite a distance in narrowing the gap between remedial schemes.

There have also been charges leveled against the enforcement of the immigration laws, particularly the treatment of aliens suspected of supporting foreign terrorist organizations that pose a threat to the United States or our allies.²⁸ This is a complex question that I believe properly should be resolved in the courts. On the one hand, there is a strong tradition of America as the beacon of freedom for persons from around the world who, upon being admitted into the country, should not be walled from American society or treated in ways that fall below our minimum levels of decency and respect. On the other hand, there is a well founded fear that the government must exert greater control over the terms and conditions under which non-citizens visit, remain and leave this country in order to ensure the safety and security of our communities. We think that the courts should continue to accord the political branches a great deal of deference in this regard in view of their broad

24. 6 I.L.M. 368 (1967).

25. 28 I.L.M. 754 (1989).

26. Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73. (1991).

27. *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992).

28. *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045 (9th Cir. 1995).

constitutional responsibility for foreign affairs.

The Clinton Administration also has been defending constitutional attacks on an Act of Congress embodying what is commonly known as the “Don’t Ask, Don’t Tell, Don’t Pursue” policy.²⁹ That policy limits the ability of openly gay and lesbian service members to remain in the Armed Forces.³⁰ The origin of this law is a complicated story too long to tell in this context. Suffice it to say that the Clinton Administration believes that the policy, although different from what it initially proposed, represents an improvement over the prior rules governing homosexuality. Moreover, outside of the military context, the Administration has moved to alter governmental rules and regulations that previously barred employment on advancement on the basis of sexual orientation. But the ultimate resolution of the debate over the constitutionality of a law supported by the Joint Chiefs of Staff, passed by Congress and signed by the President must occur in the courts. They will have to determine to what extent the unique circumstances of military life, which have caused courts in the past to resist attempts to apply constitutional principles as they would to the civilian context, warrant deference with respect to the policy on homosexuality as well.

VI.

As I said at the outset, my life is rather complicated. The late, former Solicitor General, Erwin Griswold captured the nature of this complex responsibility perfectly in observing:

The Solicitor General has a special obligation to aid the Court as well as serve his client In providing for the Solicitor General, subject to the direction of the Attorney General, to attend to the “interests of the United States” in litigation, the statutes have always been understood to mean the long-term interests of the United States, not simply in terms of its fisc, or its success in particular litigation, but as a government, as a people.³¹

I hope that I am faithful to that responsibility during my tenure as Solicitor General.

Thank you.

29. 10 U.S.C. § 654 (1994).

30. See, e.g., *Steffan v. Secretary of Defense*, 41 F.3d 677 (D.C. Cir. 1994).

31. Erwin N. Griswold, *The Office of the Solicitor General—Representing the Interests of the United States Before the Supreme Court*, 34 MO. L. REV. 527, 535 (1969).