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Recommended Citation
Michael W. McConnell, "Rule of Law and the Role of the Solicitor General, The ," 21 Loyola of Los Angeles Law Review 1105 (1987).

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THE RULE OF LAW AND THE ROLE OF THE SOLICITOR GENERAL

*Michael W. McConnell**

I. THREE APPROACHES TO THE SOLICITOR GENERAL'S FUNCTION

Let us grant the attractive premise that the Solicitor General, more than the ordinary advocate, must comply with and promote the rule of law in his representation of the United States in the Supreme Court. The President is charged to "take Care that the Laws be faithfully executed";[1] the Solicitor General, as the executive officer entrusted with Supreme Court litigating authority, exercises the "take Care" responsibility in that sphere. But what does the rule of law mean in this context?

There are three prominent approaches to the Solicitor General's responsibility: (1) he must make only those arguments to the Court that he believes to be substantively valid, even if the interests of his client would be better served by other plausible legal arguments; (2) he must make only those arguments to the Court that are consistent with the Court's interpretation of legal requirements; and (3) he must make the arguments with the best prospect of serving his clients' interests, that is, upholding government action.[2]

Generally, the first approach—the "independence" approach—is invoked to criticize the Solicitor General when he allows the interests of the client agencies, the views of the President, or the opinions of other lawyers in and out of the Department of Justice to influence what arguments he will make to the Court. Generally, the second approach—the "precedent" approach—is invoked to criticize the Solicitor General for asking the Court to modify its precedents or for making an argument

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* Assistant Professor of Law, University of Chicago Law School. Formerly Assistant to the Solicitor General (1983-85). B.A. 1976, Michigan State University; J.D. 1979, University of Chicago Law School. Thanks are due Gerhard Casper, Frank Easterbrook, Andrew Frey, Kenneth Geller, Larry Kramer, Geoffrey Miller, David Strauss, and Cass Sunstein for helpful comments on an earlier draft, and to Rex Lee and Charles Fried, whose stewardship of the Office of Solicitor General during my service there contributed greatly to my understanding and respect for the Office.

1. U.S. CONST. art. II, § 3.

2. For present purposes, I disregard the thorny problem of defining who is the Solicitor General's "client." *See* Lawry, *Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 FED. B.J., Fall 1978, at 61; *see also* Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987).

that the present nine Justices are unlikely to adopt. Generally, the third approach—the "government interests" approach—is invoked to criticize the Solicitor General for failing to defend federal statutes or government action, or for filing briefs not directly related to that end.

The "independence" and "precedent" approaches emphasize the distinction between the role of the Solicitor General and that of other advocates. They seem, at first blush, to have more to do with the rule of law than the "government interests" approach. The Solicitor General, it is said, has responsibilities to the rule of law that so far exceed the ordinary advocate that he can almost be called a "Tenth Justice." This title captures the view that the Solicitor General properly exercises a judicial-type function, accepting and rejecting legal arguments on the basis of his best understanding of what the Constitution and laws require rather than the interests of the client agencies. As expressed in an official memorandum on the role of the Solicitor General issued under Attorney General Griffin Bell, "the Solicitor General . . . must protect the Court by presenting meritorious claims in a straightforward and professional manner and by screening out unmeritorious ones[.]"[3] The same memorandum states that "[t]he Nation values the Solicitor General's independence for the same reason that it values an independent judiciary," and endorses former Solicitor General Francis Biddle's formulation that the Solicitor General's "only guide" should be " 'the ethic of his law profession framed in the ambience of his judgment and experience.' "[4]

Alternatively, the Solicitor General is said to be like a "Tenth Justice" because his arguments are designed principally to be of service to the Court rather than to advance the interests of the executive or legislative branches. His name appears below those of the Justices in the front of each issue of U.S. Reports. He is not an outsider or a critic of the Court, but their partner in a common effort to uphold the Constitution and laws. To be useful, his arguments ought to proceed from the Court's recent precedents and help the Court to fit the current case into a settled framework of existing decisions. Just as continuity and stability are desirable features of the law, they are desirable features of the Solicitor General's argumentation.

The "government interests" approach to the Solicitor General's role is more modest. It treats the Solicitor General less like a "Tenth Justice" and more like an ordinary lawyer—more skilled, more distinguished, more responsible, perhaps, but still a lawyer for a client. Under this ap-

3. Memorandum Opinion for the Attorney General: The Role of the Solicitor General, 1 Op. Off. Legal Counsel 228, 231-32 (1977) [hereinafter 1977 Memorandum].

4. *Id.* at 231.

proach, it is the function of the adversary process, and ultimately of the Court, to uphold the rule of law. The Solicitor General best serves by making the best arguments he can for upholding government action, rather than by exercising independent opinions or by trying to "protect" the Court from arguments. Indeed, by failing to make the best possible case for the government's position—assuming the position is at least tenable—the Solicitor General makes the Court's job harder and vindication of the rule of law that much more difficult.

The "government interests" approach, like the others, recognizes the Solicitor General's responsibility to present the facts and legal background of a case with scrupulous accuracy and fairness. No responsible theory of the Solicitor General's function would tolerate shading or hiding the truth. Indeed, as the most common repeat player in the Supreme Court, the Solicitor General should feel these constraints more keenly than other lawyers, since his credibility in other cases will suffer if a brief is less than fully accurate. But this responsibility of full and fair appellate advocacy is shared, even if to a lesser degree, by all Supreme Court advocates.

The three approaches to the Solicitor General's function each contain a valuable insight. Unfortunately, they are in obvious conflict with one another. The first approach establishes the independent professional judgment of the Solicitor General as the criterion for fealty to the rule of law; the second establishes either judicial precedent or predictions about how the current nine Justices will decide a case as the criterion; the third leaves the rule of law to be achieved through the adversary process. Except in the happy event that the Solicitor General's own professional judgment on legal issues coincides perfectly with both the interests of the government and with precedent—or with his predictions about how the current Court would decide the question—he will be faced with a choice. Should he present the view he believes to be correct? Should he present the view that best accords with the Court's interpretations? Or should he present the view that most advances government authority?

Perhaps the three approaches should be viewed as tactical or strategic considerations—as part of a lawyerly prudence directed to winning cases. A Solicitor General is unlikely to win by tilting at precedents that command the support of a majority of the Justices. To put his argument in terms consistent with the Court's other recent decisions, rather than openly confronting the Court's recent errors, is plain good sense and good strategy. Similarly, for the Solicitor General to establish a reputation for presenting only "meritorious" arguments will increase his rhetorical effectiveness. If he can establish that he is more than a "hired

gun," his arguments will carry greater weight and conviction. And finally, when the Solicitor General confines his arguments to the specific practical needs of the client agencies, rather than wasting precious time and resources on mere matters of constitutional principle, he will be less likely to ruffle feathers and more likely to win cases of immediate interest to his "clients."

Perhaps the entire professional tradition of the Solicitor General's office can be explained in terms of these prudential considerations, without reference to controversial propositions like the "rule of law." One could predict that the Solicitor General, as the only lawyer who frequently appears before the Court, would develop a strong tradition of following predecent, would exercise strong independent judgment, and would emphasize the interests of the government agencies. Seen as prudential considerations, there is little or no contradiction between the three approaches. Each is subsumed in the lawyer's creed: win as many cases as you can.

And yet, the dictates of prudence do not seem to exhaust the responsibilities of the Solicitor General. Prudence is an instrumental virtue, just as winning cases is instrumental. Great Solicitors General have not hesitated, in appropriate cases, to criticize precedent—even recent precedent; to offer arguments that are likely to be rejected; to spurn arguments that would foster greater governmental power and discretion; even to take positions that they would not agree with in their individual capacities. Following the dictates of prudence will help the Solicitor General and his Office to accumulate reputational capital with the Court; but cases will arise when the Solicitor General will, and should, choose to spend that capital.

The three commonly offered approaches to the Solicitor General's role thus do not offer a clear-cut basis for evaluating a particular decision, or even a particular Solicitor General. A Solicitor General's performance cannot be judged according to tidy criteria, for the available criteria are conflicting and require a different balance in different cases. One must understand the Solicitor General's function in light of his own assessment of what the times require. Substantive disagreement over the desirable direction of constitutional law should not be confused with transgression of the rule of law.

II. Illustrations of the Conflict

Any lawyer who has served in the Office of the Solicitor General could offer illustrations of cases in which these approaches conflict. I will describe three such cases during my tenure as Assistant to the Solici-

tor General, each of which presented a different combination of factors and in each of which the conflict was resolved in a different way.

In the October 1984 Term, the Supreme Court granted certiorari in *Tony and Susan Alamo Foundation v. Donovan*.[5] The case concerned application of federal minimum wage laws to a religious community in which all the members worked for the community and in return received housing, food, clothing, medical care, and other necessities of life. The members believed they were working for God and that acceptance of a wage would be an affront to God. They therefore sought an exemption under the free exercise clause. The Department of Labor defended the constitutionality of applying the minimum wage laws to the Alamo Foundation, and prevailed in the district court and the court of appeals.

My own assessment of the case was that the Alamo believers were right: they had an unquestionably strong and sincere belief that was frustrated by the government action, and the government's interest in forcing them to accept a wage was, in my judgment, far from compelling. Under the "independence" approach—assuming that the Solicitor General agreed with my assessment—the government should confess error. On the other hand, the Supreme Court had rejected every free exercise challenge to a neutral government action in the preceding fifteen years, except in the narrow context of unemployment compensation. If the question were how the Supreme Court would decide the case—the "precedent" approach—I thought that it was likely that the Court would uphold the government's action. Finally, the "government interest" was clear: Congress had passed the statute with no exceptions for religious accommodation, and the agency had enforced it.

After some agonizing, we filed a brief in defense of the Labor Department. So far as I can evaluate my own work, the brief was accurate and fair, and there was ample precedent for our position. I also continue to believe the brief was wrong on the merits. The Supreme Court decided the case unanimously in favor of the government, in an opinion that was singularly insensitive to the sincere religious interests of the petitioners. I took no pleasure in the victory; rather the opposite. The notion, fostered by the 1977 Memorandum to Griffin Bell, that when the Supreme Court accepts the Solicitor General's argument it proves "his legal judgment . . . was correct,"[6] obviously confuses winning with being right. The development of consitutional law would have been better served if the Alamo Foundation's legal position had been more forcefully

5. 471 U.S. 290 (1985).
6. 1977 Memorandum, *supra* note 3, at 234.

presented. Yet it did not seem then, nor does it seem now, that that was *our* responsibility.

Estate of Thornton v. Caldor, Inc.[7] presented a different twist. In *Thornton*, a state supreme court had struck down under the establishment clause a state statute allowing workers who observe a sabbath day to designate that day as their day off. In *Thornton*, unlike *Alamo Foundation*, the real question was whether to file a brief, rather than what position the brief should take, since the United States was not a party. In my independent judgment, the state law fully comported with the first amendment.[8] The federal government interest was that the reasoning of the lower court decision, if not reversed, could call into doubt the religious accommodation requirements of Title VII of the Civil Rights Act of 1964. Perhaps more important in our thinking, however, was that the case presented an attractive context for the "accommodation" theory the Department of Justice was urging in a variety of establishment clause cases.

The problem was that the lower court opinion was a straightforward application of the Supreme Court's usual test for establishment clause violations. If one had to predict on the basis of precedent, it was likely that the Supreme Court would agree with the lower court.[9] Should that factor be viewed, as it usually would, as a strong argument against participating in the case? Or should this be viewed as an opportunity to demonstrate to the Court, in an attractive context, why it should modify its approach to establishment clause cases?

Solicitor General Lee decided to file amicus curiae briefs urging the Court to grant certiorari in the case and reverse the lower court. We concluded that the important legal principle presented in *Thornton*, coupled with the substantial—even if not compelling—client interest, justified this course of action even though federal government programs were not directly involved. The brief on the merits devoted most of its attention to showing why a rigid application of the usual establishment clause test would be inconsistent with the overall purposes of the religion

7. 472 U.S. 703 (1985).

8. For an explanation of my position, see McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 50-58.

9. Actually, the position was more complicated than this. In the three preceding relevant establishment clause cases, the Court had seemed to be moving toward a more accommodationist orientation to the establishment clause. Lynch v. Donnelly, 465 U.S. 668 (1984); Marsh v. Chambers, 463 U.S. 783 (1983); Mueller v. Allen, 463 U.S. 388 (1983). Precedent thus pointed one way while predictions about the Court's likely disposition of the case were more ambivalent.

clauses. While it was respectful in tone, the brief forthrightly urged a significant reformulation of constitutional doctrine.

In *Thornton* and several other decisions handed down at about the same time, the Court reaffirmed its establishment clause precedents and affirmed the lower court. Rather than advancing the "accommodation" theory, it was a setback. With the benefit of hindsight, does this mean that our brief was irresponsible or that it violated the rule of law? I think not. I continue to believe that the government was right in the case, and the Court wrong. The only way for the Court to profit by attorneys' arguments is for attorneys to offer theories that may depart from current precedent. If every brief urges the Court to do what it is likely to do anyway, then briefs will not be a source of growth for the Court. A harder question is whether the *Thornton* brief, and others filed on related issues at about the same time, were strategic errors. In the fall of 1984, when these briefs were written, the time had seemed ripe for reconsideration of first amendment doctrine. By late spring, 1985, the Court's temper had shifted. Some have suggested that our briefs "scared" moderates on the Court, notably Justice Powell, and thus were counterproductive. My guess is that the real stimulus for the Court's shift was the divisive religious squabbling in the 1984 Presidential election; the Court may have judged it an unpropitious time to reconsider its separationist approach to church-state relations. Since that time, the Court's decisions have moved somewhat closer to the position we urged in *Thornton*.[10] Without access to the Court's inner councils we will never know.

A final case from my years at the Solicitor General's Office, one in which I did not participate directly, rounds out the discussion. In *Garcia v. San Antonio Metropolitan Transit Authority*,[11] the question was whether application of federal wage and hour laws to a municipal transit authority was an unconstitutional infringement on state sovereignty under the doctrine of *National League of Cities v. Usery*.[12] Here the government interest was clear: to defend the statute. But the independent constitutional judgment of the Solicitor General was more sympathetic to state sovereignty. One of the central elements of the constitutional philosophy of the President and his chief lawyers was a return to more

10. *See* Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986) (establishment clause does not preclude state from paying tuition for ministry training under vocational education program for the blind); Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos, 107 S. Ct. 2862 (1987) (establishment clause does not preclude Congress from carving out exception from religious antidiscrimination laws for protection of religious organizations).

11. 469 U.S. 528 (1985).

12. 426 U.S. 833 (1976).

generous notions of federalism. Moreover, the precedents were equivocal: *Usery* stood for the principle of state sovereignty but subsequent decisions had eroded *Usery* in various contexts. The Court ordered reargument in the case on whether *Usery* should be overruled, which removed much of the usual prudential constraint against attacking precedents. Not surprisingly, the case generated strenuous debate and disagreement among lawyers in and out of the department.

The Solicitor General decided to file a brief defending the federal statute, but to do so on the basis of a strict reading of *Usery*. Other parties to the case urged that *Usery* be overruled—a position at once more radical and more consonant with the government's client interests. The brief made a persuasive case both that *Usery* was good law and that the San Antonio transit system could be subjected to federal regulation. The Court, however, overruled *Usery* in a sweeping five-four decision, with no Justice adopting the Solicitor General's approach to the case. Should this be seen as a rebuff? It seems to me the brief made a significant contribution: it provided the vehicle, had the Court wished it, to uphold the government's interests in the case without shutting off further doctrinal development of the *Usery* principle. It presented a plausible intermediate position. That the Justices did not adopt it does not mean that it was not the right position for the government to take.

The foregoing illustrations cast doubt on the notion that any single criterion can be substituted for the Solicitor General's admittedly subjective judgment of the needs and potentialities of a case. In *Alamo Foundation* the Solicitor General took the "government interest" approach where it conflicted with "independent" constitutional judgment; in *Thornton* he took the "independence" approach where it conflicted with precedent; and in *Garcia* he took the "precedent" approach where the other approaches tugged in opposite directions. In each of these cases the Solicitor General might be criticized, and probably has been. I suspect, however, that few fair observers—whatever their ideological persuasion—would consistently espouse any one of the three approaches across the full range of cases. Does this mean that the rule of law is an empty concept as applied to the role of the Solicitor General?

III. WHAT DOES THE RULE OF LAW HAVE TO SAY?

The fundamental premise of the rule of law is that the law, of course including the Constitution, has an existence and authoritative character quite apart from the will of the institutions that interpret and enforce it. This means that the Constitution is *not* merely "what the judges say it

is."[13] But it also means that the Constitution is not what the Solicitor General thinks it is, or what any other individual or body thinks it is. Opinions about the Constitution may differ; only the Constitution is authoritative.

An important feature of the rule of law in our constitutional system—a system characterized by a careful allocation of powers to separate and independent branches of government—is that each participant in the system should defer to the legitimate exercise of authority by other participants. For any branch or officer of government to pursue its own prerogatives without restraint would undermine the allocation of powers. This is true of the authority to make, enforce, and interpret law, no less than other functions of government. The functionally distinct roles of legislature, executive, and judiciary can be blurred if legislatures use their lawmaking power to invade the powers of law execution or the decision of cases; if executive officers use their law execution power to usurp the lawmaking or decisional functions; or if the courts use their power to decide cases as a means for making law or directing its enforcement. Under our system, the rule of law entails more than a substantively correct interpretation and enforcement; it requires scrupulous observation of the metes and bounds of authority.

To some extent, each branch of government is entitled to, indeed has a responsibility to, interpret the Constitution for itself and to act on that interpretation.[14] Few would question that a congressman should vote against, or the President should veto, legislation he believes to be unconstitutional even if the Court would uphold it. On the other hand, few would doubt, after *Marbury v. Madison*,[15] that government officials must comply with final judgments of the article III courts, even if they believe those judgments to be seriously wrong. The harder question comes when there has been no final judgment in the particular case, and where the good faith constitutional interpretations of the branches of government are inconsistent. One could argue that the President, for example, is authorized to comply with his own good faith understanding of the Constitution until there has been an authoritative judicial pronouncement to the contrary. After all, the judicial authority to construe the Constitution exists only in the context of a case or controversy; until that time it is the President's duty to "take Care" that the law, including the Consti-

13. The statement is taken from an extemporaneous speech by Charles Evans Hughes while Governor of New York. C. HUGHES, THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 143 (1973).

14. As applied to the issue of government lawyering, see Miller, *supra* note 2, at 1293-95.

15. 5 U.S. (1 Cranch) 137 (1803).

tution, is faithfully enforced. On the other hand, the rule of law can only suffer from a continuing clash of legitimate authorities, each taking a different view of the law. An equally strong argument can thus be made that the President should generally defer to the Court's interpretation of the law even outside the scope of a final judgment, just as he expects the Court to defer to his judgments within the scope of executive authority. Compliance with precedent may be the executive's equivalent to the judiciary's political question doctrine.

This more general problem of executive authority frames the question of the tension between the Solicitor General's own independent judgment on legal issues and his responsibility to litigate cases within the bounds set by the Court's interpretations. If the rule of law means fealty to the Constitution, and not merely to judicial interpretations, then the "precedent" approach deserves less weight, and the "independence" approach greater weight, than is commonly thought.

The problem is not unlike that confronting an individual Justice who disagrees with past decisions of the Court. Does the rule of law command each Justice to exercise his own independent view, or to comply with the view of the institution with final authority to render judgment in particular cases? Either approach, if taken to the extreme, seems unacceptable. To honor precedent above all is to make the Court, and not the Constitution, the supreme law of the land. But to proceed independently of precedent is to undermine the rule of law by perpetuating strife and disunion among those charged with enforcing it, and by disregarding that part of the law that allocates final legal interpretive authority to the Supreme Court—and not to individual Justices.

On the other hand, strict adherence to precedent conflicts with both of the major modern approaches to constitutional interpretation. Those adhering to "original intent" in some form necessarily evaluate precedents against the standard of a fixed set of constitutional principles. While they may be reluctant to overrule precedent for institutional reasons,[16] they must, in principle, be prepared in a case of sufficient importance to prefer the Constitution to the decision of mere judges. Similarly, those who believe that interpretations of the Constitution should adapt to modern conditions and mores must allow precedent to change. It makes no sense to espouse a "living Constitution" but a changeless set of precedents.

No dogmatic solution to the problem of precedent is possible. A

16. *See* Horowitz, *The Conservative Struggle for Legal Change: Alternatives to the "Fifth Vote,"* 11 HARV. J. L. & PUB. POL'Y 75 (1988).

conscientious Justice will give some weight to precedent, but there will be limits. How much weight and where are the limits are questions of degree that each Justice must decide.

The Solicitor General is less bound by precedent than is an individual Justice, though arguably more so than a lawyer with no "take Care" responsibility. For Justices to refuse to be bound by precedent will create, even in the extreme, a world of no final legal authority. For Solicitors General to file briefs that are not bound by precedent, in the extreme, leaves the authoritative character of the Court's precedents intact. On the contrary, sometimes exposing inconsistencies or weaknesses in precedent will contribute to the orderly evolution of the law. If lawyers had not criticized *Plessy v. Ferguson*,[17] we might never have seen *Brown v. Board of Education*.[18]

Still less weighty is the popular suggestion that the Solicitor General must make only those arguments he has reason to believe the Court will accept. This usually manifests itself in the notion that the Solicitor General has erred and been reprimanded when he loses a case. Of course it is good to win cases, and of course there are prudential limits to offering arguments that are doomed to fail. But it is not the Solicitor General's function to get out in front of the parade. If one could imagine a Solicitor General consistently making only those arguments he expects the Court to agree with, it would be a Solicitor General who has made himself and his Office irrelevant. The measure of a Solicitor General's advocacy is not how often the Court agrees with him, but how often he has persuaded the Court to take a position it would not have taken without his advocacy.

If precedent is an incomplete guide to the demands of the rule of law, the Solicitor General's independent judgment gains in importance. He can promote the rule of law by forthrightly speaking the truth as he sees it. His professional legal advocacy is an important part of the Constitution's allocation of powers, for his arguments are the only means by which the people as a whole—indirectly through the President—are represented in the Supreme Court. He is the only electorally accountable officer of government whose primary function is to assist in shaping the interpretation of law. Whether the Court agrees or disagrees with his arguments, it is useful for the Court to be exposed to them. That arguments change, from administration to administration, in cases where circumstances warrant it, should not be seen as an embarassment to the

17. 163 U.S. 537 (1896).
18. 347 U.S. 483 (1954).

professionalism of the Office, but as a reflection of the important role the Solicitor General plays in communicating between the people and an independent judiciary.

The other side of the Solicitor General's independence is that he should refuse to make arguments, however popular, that do not derive their persuasive force from legal authorities. It is not the Solicitor General's job to transmit majoritarian sentiments to the Court, but to make arguments based on law. The people are entitled to representation in the Court, but their role is circumscribed by the professionalism of the Solicitor General. It is his responsibility to distinguish between valid legal arguments that have popular support and popular arguments that lack legal support. No Solicitor General should make an argument to the Court that he is persuaded is not valid, merely because the argument is popular, or because the President wants it to be made.

The Solicitor General's exercise of independent legal judgment, however, must operate within the limiting context of his role as lawyer for the government. The rule of law means not only that his arguments be correct, but that they be legitimate, in the sense that they derive from a proper understanding of his position in the system's allocation of powers. The Solicitor General must not forget the reason for his office: to represent the United States government.

An exaggerated notion of the lawyer's independence creates the danger that government lawyers in general, and the Office of the Solicitor General in particular, will make policy in the guise of legal judgments. It is all too easy for government lawyers to limit the policymaking discretion of responsible officials by drawing sharp legal judgments where the law, in fact, is uncertain. If the Constitution and laws vest policymaking discretion in certain electorally accountable officials, it is a perversion of law for lawyers to take it away.[19]

The "government interests" approach to the Solicitor General's function is a useful corrective to this exaggerated notion of independence. This approach commits the government's lawyers to defending government action and government discretion, so long as there are plausible legal arguments in its favor. The lawyer's role is reduced; that of policymakers is enhanced; the distinction between the two is kept reasonably clear.

This approach can be seen as contributing to the rule of law in two direct ways. First, the government interests the Solicitor General repre-

19. For elaboration of this position in another context, see McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295.

sents are themselves "laws." They are not merely "interests" in the usual sense of a client's interests. They include statutes enacted by Congress, regulations, and other legal actions undertaken by the executive through the forms of law. Government interests should not be confused with the political convictions of the administration. The President may be vehemently opposed to a statute or regulation, and so may be the Solicitor General, but unless the opposition is based on a good faith conviction of unconstitutionality this is irrelevant to the Solicitor General's responsibility to defend it in court. While the dividing line between policy and law is admittedly thin, the government lawyer abuses his position if he employs law as an instrument of mere policy.

Second, adherence to the "government interests" approach preserves the adversary posture necessary for proper resolution of a case by the judiciary. Even when the Solicitor General is convinced, as a matter of his own independent judgment, that government action is unlawful, he has some responsibility, subject always to considerations of professional integrity and responsibility to the law, to defend it. If the Solicitor General declines to defend the government interest—if he confesses error or concedes the case—the case will be lost by default, unless private parties to the case have standing to defend the government's exercise of power or the Court intervenes. In effect, the Solicitor General becomes the final arbiter of what the Constitution means. This is especially troublesome where the question is the constitutionality of an Act of Congress; in that context, the Solicitor General's failure to defend will unilaterally affect the scope of authority of a separate and independent branch of government.[20]

A conscientious Solicitor General will wish to avoid this result. While he has the authority to present his best independent judgment of the law, this authority derives its legitimacy from the adversary process. The Solicitor General's exercise of independent judgment is far more problematic if it displaces the adversary process, and in so doing ties the hands of another branch of government, the Congress, as well as of future executives.

A special case is where the reason for doubts about the constitutionality of a statute are that it infringes the constitutional authority of the executive. In such a case, there is no single "government interest"; there are two, at odds with each other. I agree with the practice of the Solici-

20. I am less concerned if the effect is only upon a one-time executive action, as where the Solicitor General confesses error in a criminal case or where he declines to seek review, leaving the issue open to his successors.

tors General in this situation that their loyalty in these separation of powers cases is to the branch of which they are a part, the executive.

This characterization of the Solicitor General's function will provide little solace for those who wish to claim that this or that submission was in violation of the rule of law. Such claims are, in any event, more often a product of partisan heat than objective judgment. The rule of law, understood as a caution of humility, tells the Solicitor General that he must not neglect his function as "mere lawyer" for the government of the United States. I am not persuaded that it is helpful for the Solicitor General to see himself as a "Tenth Justice," rather than as an executive officer playing a part in the adversarial process. A more modest understanding of his role may, paradoxically, free the Solicitor General to make a more valuable contribution to the law as lawyer.