

Attorney for the Government:

The Work of the Solicitor General's Office

by Simon E. Sobeloff • *The Solicitor General of the United States*

■ "The Solicitor General, though an advocate, must not forget that his client is the United States Government. . . . Under our system he has a special relation to the courts and in particular to the Supreme Court." These words from Mr. Sobeloff's article account for many of the perplexities that our nation's second-highest legal officer must face. This excellent discussion of the work of the Solicitor General is taken from an address delivered before the Judicial Conference of the Fourth Circuit last summer.

■ One can hardly cross the threshold of the Solicitor General's Office without instantly sensing the wide range and entrancing interest of its business. A lawyer could spend a lifetime in active practice in Baltimore and never have occasion to think about the so-called aboriginal land rights of the Alaska Indians or the conflicting water claims of cities and states. He might never be called upon to decide whether the marriage of a fourteen-year old girl in Arkansas is void or only voidable, or to consider a railroad's liability for burning a national forest, or what type of evidence is sufficient to prove the paternity of a Chinese claiming American citizenship; or whether giving away calves involves realization of taxable income. Hardly would he find it necessary to consider whether the Government is liable for the killing of Indian ponies and driving the Indians off certain grazing lands in Utah, or whether a forced sale of radar equipment to the American Army in the Philippines involves a condemnation for

which just compensation is due. He might never give thought to what practices are appropriate in weighing cattle arriving at the Chicago stockyards, or whether the waters between the Island of Catalina and the mainland are a part of California, or what is the authority of the Federal Power Commission over natural gas production, or whether Congress has admitted liability of the United States to the State of California for recruiting expenses in the Civil War.

Nor is he likely to be called upon to try his hand at drawing a decree in anything resembling the Segregation cases.

Yet these exemplify the typical nature of matters that arise in the Department. They also illustrate the vast expanse and diversity of our country and its operations throughout the world. The number of requests made to the Solicitor General to petition for or to oppose certiorari runs to more than a thousand a year, and the number to permit review in the Courts of Appeals is even greater.

Naturally there is a shift in perspective when one changes his position. The work in the Solicitor General's Office is different from that on the Bench or at the Bar in private practice.

Judges will perhaps agree that one of the chief joys of their office is to be able to witness a good stiff fight, sometimes even to participate tangentially, while decorously maintaining strict neutrality with no partisan anxiety over the outcome.

The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory, but to establish justice. We are constantly reminded of the now classic words penned by one of my illustrious predecessors, Frederick William Lehmann, that the Government wins its point when justice is done in its courts.

When a lawyer in private practice advances an argument, he feels free to drive as far as he can. He is out to win that case. He has, it is true, his professional ethics, but he has no responsibility for the future of the law. He is not fashioning a rule for later cases. Provided only that his contention is not so extreme as to arouse resistance, he is free to go as far as he will. But the judge writing the opinion must, as you know,

be more wary. He must proceed with greater moderation and circumspection, realizing that what he says today will have to be faced tomorrow. He is aware that a rule declared in one case may be cited in the next. Unlike the lawyer, the judge is confined by his sense of responsibility for the symmetry of the law and by his obligation to maintain its continuity and conformity to basic principles and traditions.

The Solicitor General . . . *Attorney for the Government*

The Solicitor General, too, though an advocate, must not forget that his client is the United States Government, which is dedicated to the same principles. Under our system he has a special relation to the courts and in particular to the Supreme Court. It is out of this multiple relationship that the Solicitor General's perplexities arise.

A chief problem is how to reconcile legality with decency and justice. He has a delicate and not easily definable function in the development of the law. He must be mindful of all of these things in deciding which cases shall be appealed from District Courts to the Courts of Appeals and which merit presentation to the Supreme Court.

I do not have the exact statistics and they are not necessary: It is sufficient to point out that only a small fraction of the cases lost by the Government are appealed. In the first place, government lawyers, like those in general practice, may experience that marvelous adjustment of perspective which often comes to the most ardent advocate when he loses—that is, the realization that he really should have lost. Sometimes the realization comes with the suddenness of revelation. Sometimes, when the trial judge or the Court of Appeals seems to have deviated from the law, and it is nevertheless apparent that this was done in an understandable human effort to square what is legal with what is just, the Solicitor General, finding no great importance in the case as a precedent, may well look the other

way and say "no appeal" or "no certiorari".

A government lawyer was telling me with a show of shock and dismay that in a certain case Judge John J. Parker declared from the Bench "Well, if that is the law, any Judge worth his salt will find some way to overcome it". I wasn't shocked, for if I must make a choice between a judge who is completely orthodox and applies without imagination or feeling a rigid rule and another judge who is perceptive of the justice and common sense of the case, even at the expense of some harmless departure from the strictness of the legal formula, I prefer the latter.

I know that you will not misunderstand my meaning. I am not counseling experienced federal judges to become anarchists: I merely say that if you find a way to do justice in a hard case, *sometimes*, not always, the Government may find a way not to appeal. I say "not always" for it often happens that despite our personal preferences in the instant case, we deem it necessary to appeal because of the harm apprehended from the operation of the prescribed rule in a wider orbit.

We can submit, in an appropriate case, without appealing or without seeking certiorari where the Government has *lost* below; but what do we do when we have *won* a bad case and the opponent carries the matter up on appeal or by petition to the Supreme Court? Do we resist, or do we confess error? In the nature of things we can not often confess error, for even the passion for justice would not overcome the annoyance of the lower courts if we too often confessed error in cases where they had ruled in our favor. One district judge, reversed on appeal, suggested, when the Solicitor General refused to seek certiorari, that he, the district judge, should have the right to personal vindication by applying for certiorari himself. District judges and appellate judges might view the matter differently.

There have been instances, and doubtless there will be more, where confession of error is not only in

order but is a moral necessity. In this connection I may relate the experience of a young lawyer on the Solicitor General's staff, who went into court and confessed error, but the court nevertheless gave him an unwelcome decision for the Government. He came back moaning and gloating simultaneously, and said "I can't lose a case even when I try."

What impresses me, and depresses me, is that so often neither Government counsel nor the court are given the necessary leeway to soften harshness and mitigate absurdities which are inexorably commanded by the law. What federal judge has not been torn in his heart by the inflexible minimum penalty prescribed in certain statutes? Recently I attended the Judicial Conference of the Fifth Circuit. Half of an entire session was devoted to the recital of instances of unconscionable penalties under the Boggs Anti-Narcotic Act. One judge told of a case where a highly respected pharmacist, with no prior record, violated the law by giving someone a small quantity of a narcotic drug to relieve acute suffering. He did it for no personal gain, but for humanitarian reasons, expecting that a doctor's prescription would follow. The evidence of the violation, however, was entirely clear and the jury was about to bring in a verdict of guilty. The judge related how he sent them back after explaining that if they convicted the defendant he would have no choice but to impose a minimum two-year sentence. The jury then considered the matter further and brought in a verdict of "not guilty", to the immense relief of the judge. Of course, this is not an edifying story; but who can fail to sympathize with a judge put in such a difficult position by a rigid law passed by men of good motives who fail to foresee and understand the consequences of their legislation?

Similarly, in some of the immigration and naturalization cases, both the law and its administration have, I fear, gone far beyond what would appear necessary to carry out policy, and needless hardships are being inflicted. Admittedly, the remedy can-

not be supplied by judges alone. The Congress has broad powers in this area. Insofar as administration plays a part, Attorney General Brownell is already moving to relieve the abuses in bail procedures and more will be done, I am sure, under the new Commissioner of Immigration and Naturalization, General Swing, who combines with his army discipline a warm and understanding heart.

This brings me to the more general, still unresolved problem of the role of the courts in the review of administrative action. This I see exemplified again and again in the steady stream of papers that flow across my desk.

It is a difficult dilemma: On the one hand is the obligation to respect the separation of powers, for the disregard of this principle would itself lead to tyranny. Personalized judgments to meet particular cases are, we know, fruitful sources of future trouble. We must take care that that which satisfies the felt need today shall not breed confusion tomorrow. On the other hand is the limited but still broad role of the judiciary in determining whether fundamental rights guaranteed by the Constitution have been violated by the arbitrary exercise of power.

It has been pointed out that the due process clauses of our fundamental law are unique among national constitutions, even in the English-speaking countries. Yet this is an established feature of our constitutional system. In appropriate cases the power must be exercised with firmness and vigor, albeit with discretion. Experience has shown what is likely to happen when a court declines to interfere, out of deference to the separation of powers, even though the administrator has acted harshly, cruelly and outrageously. These are not my characterizations; the Supreme Court used them in a recent case, where it castigated the action under review, but upheld its legality. In that case the action was mandatorily required by the statute, but sometimes administrators go to great extremes in what they think is

a proper exercise of discretion. Only too often the administrator's ears tune out these denunciations; he hears only that his conduct is *legal* and he feels that he has been granted a license to continue in his course and go even further till checked. Each branch of our Government is limited by the others, but each must on occasion check the others if justice is to be achieved. In deciding in a given case whether to appeal the action of the reviewing court, these are among the pertinent considerations.

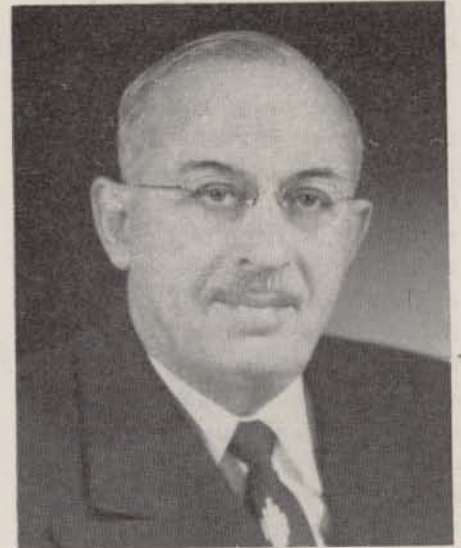
The *Southland Manufacturing Company* case (201 F. 2d 244) in the Fourth Circuit illustrates well that the Administrative Procedure Act failed to supply the hoped-for guiding test as to how the reviewing judge determines whether or not to substitute his judgment for determinations of fact by administrators. As you know, that case evoked sharply divergent views by two of our most respected jurists, Judge Parker and Judge Soper.

What Cases To Appeal . . . Dealing with the Agencies

A sometimes bothersome feature of the Solicitor General's duty of deciding what business to present to the Supreme Court is in dealing with the government agencies concerned. His is the task of resisting their tearful importunities to seek review of cases they have lost. The loss seems to them calamitous. Their preoccupation is with the immediate result, or at least their purview is likely limited to their particular work. The Solicitor General must seek a broad perspective of the total law business of the United States, not merely the program of any single agency.

A principal task of the Solicitor General is to determine when not to press for a victory in court, for sometimes a victory may prove more disastrous than a defeat. And what lawyer of experience has not noted that there are occasions when it is wiser to leave a point obscure than to obtain clarification?

Dealing with the agencies is, however, the less difficult part of the job.



Simon E. Sobeloff was appointed Solicitor General in February, 1954; before that time, he was Chief Judge of the Court of Appeals of Maryland. He has had considerable experience in public service since his graduation from the University of Maryland Law School in 1915.

After listening to them, we can "tell them". Our relation to the Supreme Court presents problems of greater complexity.

The Solicitor General decides in many instances finally what questions shall not come before the Supreme Court, and he must therefore address himself to the inquiry, "what kinds of legal problems does the Court wish to entertain?"

The Court, as you know, does not customarily declare its reasons for granting or denying certiorari. There are nine minds that have been known to disagree, and none has fully revealed itself. We know that different approaches are possible. One justice may vote to grant or deny certiorari for one reason, and another may agree with him for an entirely different reason. We are told on the highest authority that denial means nothing more than that four favorable votes were not available. Under these circumstances, how is the Solicitor General to divine the over-all plan of the Court in the selection of cases? There is no pat answer, for there are no clear criteria. What is a case for the Court is

not precisely measurable. It has to be felt; it cannot be demonstrated. There are many surprises.

At the beginning of the last term the Federal Power Commission joined with the Phillips Petroleum Company in petitioning for certiorari to settle an important question as to the jurisdiction of the Commission in the regulation of the natural gas industry. The petition was denied. Phillips then filed a motion for reconsideration. The Government declined to join in this motion out of deference for the rule which forbids motions for reconsideration except where new matter is to be presented. The Solicitor General's Office is perhaps more scrupulous in observing this rule than are some others. To the surprise of the profession, certiorari, though previously denied, was granted.

Again, a man convicted by the state courts of New York of murdering his parents sought to raise by certiorari the validity of his confession. He claimed that with the connivance of state officers a psychiatrist ostensibly called to treat him extracted the challenged confession. Certiorari was denied. Nevertheless, most unexpectedly the Supreme Court saw fit to review the same question when it was raised by the same defendant on habeas corpus in a federal court.

Shortly after coming to Washington I paid courtesy calls on each of the justices. No two seemed to have exactly the same standards for certiorari; most of them said frankly that the standards defy formulation. One justice told me that the sum involved had little weight with the Court, but that he personally was influenced by that factor. I asked him what was the dividing line, and he answered quite seriously that when he saw the Government lose 20 million dollars he thought the case might be worth looking at! He spoke this as one might confess a personal idiosyncrasy.

The Court may reject a case, not because the question is unimportant, but because it thinks the time not ripe for decision. In our system the

Supreme Court is not merely the adjudicator of controversies, but in the process of adjudication it is in many instances the final formulator of national policy. It should therefore occasion no wonder if the Court seeks the appropriate time to consider and decide important questions, just as Congress or any other policy-making body might. For example, for several years before taking the School Segregation cases the Court repeatedly turned away opportunities to decide questions in that area, *perhaps* because they deemed them premature. Lately it declined to review a ruling on segregation in public housing, *perhaps* because the Court thought it best, after deciding the School cases, not to say more on other aspects of segregation at this time. Or the Court may think the record in the case at hand not adequate or otherwise unsuitable to raise and decide the point. We can only speculate. In the decision of great constitutional questions, especially those which are in the realm of political controversy, timing can be of supreme importance.

One can hardly fail to be impressed with the growing finality of the Courts of Appeals of the several circuits in the disposition of ordinary litigation. The Supreme Court has in late years steadily decreased the number of cases it will consent to hear, limiting the volume of business within its discretionary jurisdiction under the Act of 1925. Last term it granted 88 certioraris, as compared with 193 in 1940. Only 8 per cent of the petitions filed were accepted as against 22 per cent in the earlier year. As to cases heard and submitted there were but 116, while in 1940 there were 204. Ten years earlier there were 267.

Of the 88 certioraris granted 52, or two thirds of the total, were brought by or against the Government. Of certioraris sought by the Solicitor General only 40 per cent were granted—a decline from 80 per cent of such petitions granted only a few years ago. It is significant that the Solicitor General himself had severely culled the cases and applied

for certiorari in substantially less than half of those in which some Government agency urged him to do so, in fact in about 12 per cent of the total cases lost. Still the mortality in the residue was more than half. Private lawyers were successful in only 6 per cent of their petitions for certiorari.

The Supreme Court's Task . . . Keep the Ship on an Even Keel

Plainly, the Supreme Court does not consider that it would make the best use of its time and energy if it were to serve merely as another appellate court. Almost a quarter of a century ago, Chief Justice Taft declared that a litigant is entitled to one appeal, not two. Even a conflict between the circuits is no infallible assurance of favorable action on a petition. Increasingly the justices seem to regard their function as that of a gyroscope to keep the ship on an even keel, confining themselves more so than in the past to the consideration of grave national issues.

Tax litigation, so prolific a decade ago, appears now almost dried up. One justice told me that the place to seek corrections in tax law is Congress, even when a Court of Appeals seems to have misinterpreted a statutory provision. Nevertheless, at the end of its October, 1953, term the Supreme Court unexpectedly granted a whole series of certioraris in criminal net-worth cases and reinstated a number of such cases previously declined.

The office of the Solicitor General is not exempt, for there is no exemption, from the anxieties which attend any serious undertaking. Intertwined with these, however, are deep satisfactions, as you must perceive from what I have already said.

Mr. Justice Jackson, when he was Solicitor General, once told of a letter addressed to "The Celestial General", Washington, D. C., and he rejoiced in the fact that the Post Office had no difficulty in determining that it should be delivered to him. I do not lay claim to "celestial" recognition, but there are solid com-

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pensations here; among these are the opportunities for association with able high-minded men in the office and elsewhere in the Department of Justice.

I prize a letter which I received from William Marshall Bullitt who was Solicitor General in President Taft's Administration—over forty years ago. This is what he wrote me:

If a lawyer desires only professional work, there is not an office in the country, state or national, that is to be compared with the Solicitor General, in the range of subjects to be considered and studied, and in the

rare opportunity to argue great cases before the Supreme Court under the most favorable conditions as the representative of the Government.

It will bring you into relation with that great Court and its Members in such a way as to color the rest of your professional life.

If the possibilities of this office are to be realized, the incumbent must strive to learn the meaning of the process he seeks to guide. He must try to discover the social tensions, the reverberations of strife and passion, the political issues, the clashes of interest that are dressed up in technical legal forms. With what wisdom he can muster he must endeavor to foresee the consequences of his

acts upon the future course of the law. What is the essence of it all? What spirit can be perceived that stirs this variegated mass of litigation? What does it signify and what does it portend, for good or ill? As the lawyer for the Government and as an officer of the court acting within the proper limits of his special function, his constant endeavor must be, without falling prey to his own fetishes but obedient to the legislative policy laid down by others, to channel this mighty stream so as to strengthen the foundations of our society, to make freedom more secure and to promote justice between man and man and between the Government and its citizens.