

The Tenth Justice?

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another “five-minute bite of background about the Court and Constitution.”

The U.S. Senate recently confirmed President Trump’s choice to become Solicitor General of the United States. This reminded me of how important and interesting this position is to the Supreme Court and the adjudication of constitutional and other questions.

The U.S. Solicitor General is the 3rd-highest official in the Justice Department and is expected to a substantial extent to carry out the current Administration’s agenda. The SG is involved in high-level Departmental policy discussions; past Solicitors General have had to implement highly politically charged legal positions (for example, urging the Court to overturn the abortion-rights decision, *Roe v. Wade*) that may not have seemed optimal from a legal-strategy standpoint.

Rarely, Solicitors General have become prominently embroiled in political controversy. An extreme example is the 1973 “Saturday Night massacre,” when Solicitor General Robert Bork carried out President Nixon’s order to fire Special Watergate Prosecutor Archibald Cox, after the Attorney General and Deputy Attorney General resigned rather than comply. (Reportedly, the partisan divide in confirmation votes for President Trump’s Solicitor General nominee reflected awareness that the new SG would be in line to fire special counsel Robert Mueller!)

But in exercising their less dramatic daily duties, Solicitors General need – and in past often received – an unusual degree of insulation from the politics and policies of the presidents who appointed them. Solicitors General and their staffs – currently comprising 21 lawyers, many with tenures spanning multiple administrations – are primarily responsible for representing the Federal Government’s interests in court. This requires the SG’s office to have a keenly attuned longer view of the Government’s institutional needs.

The work of the Solicitor General’s office is particularly crucial to Supreme Court case selection, case deliberation, and ultimate decision-making.

The Court has virtually complete discretion to choose from among 7,000 to 8,000 petitions annually which 1% it will hear and decide. The Solicitor General’s office significantly influences case selection both by serving as a gatekeeper restricting federal-government entities from appealing cases they lose in lower courts and by filing briefs urging the Court to grant or not grant review to individual lawsuits. Although lots of other litigants give the justices advice over case selection, the Solicitor General’s high percentage of success in having its recommendations followed is unrivaled.

The Solicitor General's office also significantly impacts the Court and the shaping of the law through briefing and oral argument. The federal government is frequently a party in argued cases, so the SG's office is in a prime position to influence who wins and on what grounds. One graphic example is that, after opining in 2013 that the Obamacare "individual mandate" was not justified under Congress' Interstate-Commerce-regulation power, Chief Justice Roberts famously – or infamously, depending upon your point of view – accepted an alternative Taxing-power justification offered by the Solicitor General. The mandate survived.

Even when the federal government is not formally a party, the Court regularly "invites" the Solicitor General's office to file a brief or argue the federal government's position as an amicus" (or friend of the Court). Sidenote: I've always loved the Court calling this an "invitation." It's hard to imagine the "invitation" being declined!

With a frequent in-Court presence and a reputation for substantial independent judgment, the Solicitor General has an impact on the Court, the law, and American society that has led the SG to be called "the Tenth Justice" -- although one former Solicitor General joked at a panel discussion that he'd never heard any of the nine *real* justices use that characterization!

Still, this important, but less-well-known executive-branch operation has a major influence on the Court and the Constitution. It will be interesting to watch how the new SG discharges his duties in the face of the challenges and dynamics of the Office.