

SCOTUS for students: What does the Solicitor General do?

By Stephen Wermiel – SCOTUSblog.com
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After the oral arguments in the health care cases in March, much attention was focused on the oral advocacy by Solicitor General Donald Verrilli. But who, exactly, is the Solicitor General and what does his office do?

In simplest terms, the Solicitor General is the federal government's lawyer in the Supreme Court. But there is much more to the role; in particular, the job requires the Solicitor General to strike a sometimes delicate balance between serving the legal interests of his superiors (the President and Attorney General), the long-term interests of the United States (as opposed to the present Administration), and his responsibility as a special officer of the Court itself. The Solicitor General also exercises substantial authority by deciding when the federal government will appeal cases that it loses – not only to the Supreme Court but even from the district courts to the courts of appeals – and when to file amicus briefs in cases on appeal. And the Solicitor General will often have to choose among competing views within the executive branch over what arguments to make in a case.

We'll examine each of these roles in turn. But first, a bit of history. Congress created the Office of the Solicitor General in 1870 to consolidate the handling of government litigation in one office instead of having solicitors spread out among different departments.

From a tiny office, the operation has grown to about twenty lawyers, still quite compact by government standards. The Solicitor General is appointed by the President and must be confirmed by the Senate. It is the only position in the entire federal bureaucracy, including the job of Supreme Court Justice, for which there is a statutory requirement that the appointee must be "learned in the law."

Don Verrilli is the forty-sixth Solicitor General. There are four Deputy Solicitors General, three of whom are usually career civil servants appointed on a non-partisan basis. The fourth is commonly referred to as the "political deputy" and (in addition to his/her other responsibilities as a Deputy) is responsible for making sure that the Solicitor General is aware of any legal disputes with significant political overtones and, if appropriate, the issues are brought to the attention of the Attorney General or the White House Counsel as well. There are also fifteen to seventeen Assistants to the Solicitor General who carry the workload of the office. (Because the job offers the rare opportunity to argue before the Supreme Court on a regular basis, competition for those positions is fierce; many Assistants are former Supreme Court clerks and law firm partners.)

Several alumni of the office have found their way on to the current Supreme Court. Chief Justice John Roberts was the "political deputy" under the first President Bush, while Justice Samuel Alito served as an Assistant to the Solicitor General for the first five years of President Ronald

Reagan's tenure. And of course Justice Elena Kagan was the Solicitor General for a little over a year under President Obama.

So what does the Solicitor General do? First and foremost, the Solicitor General serves the dual roles of advocate for the government and an officer of the Supreme Court. In the latter role, the Solicitor General is sometimes described as "the tenth Justice," and he actually has an office in the Supreme Court building.

As an advocate for the government, the Solicitor General and his staff handle government appeals to the Supreme Court, deciding when the government will file petitions for certiorari seeking the Court's review of a decision against it below and (far more often) filing briefs opposing review when it prevailed below. In cases that the Court has agreed to review on the merits, the government also makes arguments in briefs and participates in oral arguments in the vast majority of cases (eighty percent this Term). This sometimes requires the Solicitor General to navigate among different federal agencies and cabinet departments; in many cases, there will be different views from a variety of departments, with the Solicitor General having to decide what the final government position is. For example, the EEOC and the Civil Rights Division of the Department of Justice may want to read the civil rights laws expansively, while the Civil Division (which defends the United States against civil rights suits) may favor a narrower interpretation.

As gatekeeper for the Court, the Solicitor General plays a sometimes delicate and difficult role. The Court relies on the Solicitor General for an honest assessment of when a question of federal law or sometimes of constitutional rights really merits the Court's attention. When the Solicitor General suggests that the Court deny review in a particular case, the Court relies heavily on this recommendation – assuming that it means that the case is insufficiently important or meritorious, rather than that it simply is contrary to the views of the government.

In this gatekeeper role, the Court will sometimes ask what the Solicitor General thinks about an issue of federal law in a case in which the government is not a party. This process is known as calling for the views of the Solicitor General – "CVSG," for short – and requires the government to prepare an amicus curiae (friend-of-the-court) brief giving the government's view. The Court generally issues such an order more than ten times a Term.

Last June in *Countrywide Home Loans v. Rodriguez*, for example, the Court asked for the Solicitor General's views about the interplay of missed mortgage escrow payments and a federal personal bankruptcy filing. The Solicitor General filed an amicus brief last October, in which it recommended that the Court deny review; the Justices denied review the following month.

The influence of the Solicitor General is so substantial that private parties with cases in the Supreme Court that involve some arguable federal government interest will often ask to meet with the Solicitor General to try to persuade him to file a brief on their side. The current practice of the Office, however, is to almost never file "uninvited" amicus briefs at the certiorari stage. By contrast, if review is granted, the Solicitor General very frequently participates in the case (both in briefing and in oral argument), even when the government's interest in the case is relatively indirect.

A major part of the duty of the Solicitor General is to defend laws passed by Congress. The Office generally takes the position that it will defend any act of Congress for which there is a plausible argument to be made that a statute is constitutional. Sometimes, though, the Solicitor General will change positions or decline to defend a statute, and on those occasions the Supreme Court may appoint a private lawyer to defend a particular position. Thus, the Solicitor General has advised Congress that it will not defend the constitutionality of central provisions of the Defense of Marriage Act. When the constitutional challenges to that statute reach the Supreme Court, DOMA will be defended by Paul Clement, who was hired by Congress to serve that role.

Similarly, the Solicitor General will sometimes conclude that a ruling in its favor is incorrect. In a pair of cases argued on April 17, for example, the Justice Department changed its interpretation of the Fair Sentencing Act of 2010, which was designed to eliminate some of the wide disparity in criminal sentences between crack and powder cocaine crimes: although it had previously argued that the Act should not apply to defendants who were convicted of crack cocaine offenses before the law went into effect but were not sentenced until after the law was already in effect, when the issue made its way to the Court it agreed with the defendants that they should receive the benefit of the new sentencing law. Thus, in the cases of *Dorsey v. United States* and *Hill v. United States*, which were consolidated for one hour of oral argument, the Court appointed experienced Washington practitioner Miguel Estrada to argue for the position that the government had essentially scrapped.

There is one role the Solicitor General handles that is even lower visibility than his Supreme Court duties. When the federal government loses a case in a federal district court, it is the Solicitor General who must decide whether to appeal or instead to accept the loss. Every such case involves a memo prepared for the Solicitor General's review and decision. While this role is virtually invisible outside the government, it can be contentious within government circles. No government lawyer wants to be told that a lost case is over and will not be appealed, so the Solicitor General's decisions not to go forward may leave disgruntled feelings in other legal offices.

Much of what the Solicitor General does is not the subject of great public attention. It is only at times like the health care cases and the recent argument over the Arizona immigration law that the role of the Solicitor General is catapulted into the public spotlight and becomes the focus of controversy and debate. But the work of the Solicitor General plays a critical role for the executive branch and the Supreme Court, even when there are no cameras pointed in that direction.

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