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## Safeguarding Judicial Integrity by Making the Executive Branch's Unfettered Amicus Gateway Transparent: An Argument for the Supreme Court to Exercise its Inherent Authority to Make Public the President's Tax and Investment Records

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# Safeguarding Judicial Integrity by Making the Executive Branch’s Unfettered Amicus Gateway Transparent: An Argument for the Supreme Court to Exercise its Inherent Authority to Make Public the President’s Tax and Investment Records

JOSHUA KASTENBERG<sup>1</sup>

*When the executive branch submits an amicus brief to the federal appellate courts, and most importantly, to the Supreme Court, it has the strength of being considered under a standard of “the best interest of the United States.” This enables a considerable advantage, but without the safeguards commensurate for ensuring that the standard is maintained. Other amicus actors must file a corporate interest statement of other type of disclosure that the Solicitor General is exempt from doing. The history of the Solicitor General should also provide skepticism that the federal courts are immune from being used for nefarious reasons. This article argues that a required public disclosure of presidential financial assets is needed to ensure that judicial integrity and fairness in the appellate process are safeguarded. The Court is able to quickly, through its rule-making authority, mandate such a safeguard.*

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Throughout the 2016 Presidential Campaign, which, for the purposes of this article, began after the 2013 inauguration, candidate Donald Trump promised that he would release his 2005 through 2016 federal tax returns.<sup>2</sup> Although Justice Antonin Scalia once observed campaign promises as “the least binding form of human commitment,” the fact remains that President Trump promised to provide his tax records to the public as matter of trust and transparency.<sup>3</sup> Since he assumed the presidency, commentators, politicians, and legal scholars have openly questioned his and his immediate family’s adherence to governmental ethics, as well as the commitment of his cabinet members and key advisors.<sup>4</sup> This article, while accepting the unfortunate reality of Justice Scalia’s observation on the ephemeral nature of political promises, is not premised on a theory of enforceability of such promises in the federal courts. Rather, Mr. Trump’s campaign and his ensuing presidency has brought to light the potential for the federal courts, and in particular the Supreme Court, to be used to advance the financial interests of a president, a president’s family, cabinet heads, key advisors, and/or the business and investment partners of such persons through the Office of the Solicitor General and certain other federal counsel. The current administration’s lack of transparency is evident in the solicitor general’s recent action in which the United States is a party. In a pending appeal titled *Murphy Oil USA, Inc. v. NLRB*, the solicitor general decided to reverse its arguments from a previous filing without, apparently, a formal “confession of error.”<sup>5</sup> The present solicitor general has asserted that the prior administra-

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2. See, e.g., Julie Hirschfeld Davis & Emily Baumgaertner, *As Tax Day Approaches, Protesters Demand to See Trump’s Returns*, N.Y. TIMES, Apr. 15, 2017; Jill Disis, *All the things Donald Trump has said about releasing his tax returns*, CNN MONEY (Apr. 17, 2017 9:49 PM ET) <http://money.cnn.com/2017/04/17/news/donald-trump-tax-returns/> [https://perma.cc/Z42S-KG4R].

3. *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002); See, e.g., Alan Rappeport, *Trump’s Unreleased Taxes Threaten Another Campaign Promise*, N.Y. TIMES, Apr. 17, 2017.

4. Editorial Board, *Mr. Trump Plays by His Own Rules (or No Rules)*, N.Y. TIMES, Apr. 18, 2017; Eric Lipton & Jesse Drucker, *Trump Couple, Now White House Employees, Can’t Escape Conflict Laws*, N.Y. TIMES, Apr. 1, 2017.

5. Amy Howe, *Murphy Oil’s Law: Solicitor General’s Office Reverses Course in Arbitration Cases, Supports Employers*, (June 19, 2017, 7:12 AM), <http://www.scotusblog.com/2017/06/murphy-oils-law-solicitor-generals-office-reverses-course-arbitration-cases-supports-employers/> [https://perma.cc/6DTX-PUR4].

tion's position that the National Labor Relations Board's (NLRB) decision that individual arbitration clauses could not be expanded to vitiate collective bargaining rights was wrong.<sup>6</sup> In essence, the solicitor general went from siding with a union to siding with a publicly traded corporation that possesses a political action committee that has contributed to various Republican political candidacies.<sup>7</sup> The solicitor general's brief has an amicus component to it in that they have sided with two other corporations in the consolidated appeal.<sup>8</sup>

Mirroring the solicitor general's conduct in *Murphy Oil*, the Justice Department recently filed an amicus brief in the United States Court of Appeals for the Second Circuit in opposition to the government's previous position that Title VII protects gays and lesbians from workplace discrimination.<sup>9</sup> Now, the Justice Department —under the direction of the attorney general— is arguing in an amicus brief that the Equal Employment Opportunity Commission's determination that an employee was wrongfully terminated from a private employer on the basis of discrimination was in error, and therefore, federal workplace protections do not apply to sexual orientation or identification.<sup>10</sup>

Because the ability to influence the federal appellate courts through the amicus process is not an inherently or even constitutionally-implied presidential power, the Court should exercise its inherent authority and im-

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6. See, e.g., Brief for the United States as Amicus Curiae Supporting Petitioners in Nos 16-285 and 16-300 and Supporting Respondents in No 3-16, *Epic Sys. Corp. v. Lewis*, — U.S. —, 137 S.Ct. 809 (2017) (Nos. 16-285, 16-300, 16-307), 2017 WL 2665007. *But see* Reply Brief for Petitioner, *Murphy Oil USA, INC. v. N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015) (No. 16-307), 2015 WL 7030498.

7. See, e.g., *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015); *Murphy Oil Corp., Investor Overview*, <http://ir.murphyoilcorp.com/phoenix.zhtml?c=61237&p=irol-irhome> [<https://perma.cc/UHT7-L3X3>]. According to the Federal Election Committee, *Murphy Oil* possesses a political action campaign which contributed monies during the 2016 election cycle by a division of 95% to Republican candidates. See *Murphy Oil Corporation Political Action Committee: Financial Summary*, (2015-2016), FED. ELECTION COMM'N, <https://www.fec.gov/data/committee/C00145722/?cycle=2016> [<https://perma.cc/PVJ4-GNH2>].

8. See, Brief for the United States as Amicus Curiae Supporting Petitioners in Nos. 16-285 and 16-300 and supporting respondents in No. 16-307, *Epic Sys. Corp., v. Lewis*, No. 16-285 (June 16, 2017), [http://www.scotusblog.com/wp-content/uploads/2017/09/revised\\_16-285\\_16-300\\_tsac\\_16-307\\_bsac\\_USA.pdf](http://www.scotusblog.com/wp-content/uploads/2017/09/revised_16-285_16-300_tsac_16-307_bsac_USA.pdf).

9. See, e.g., Alan Feuer, *Justice Department Says Rights Laws do not Protect Gays*, N.Y. TIMES, July 27, 2017; Fred Barbash, *Trump Administration Intervening in Major LGBT Case, Says Job Bias Law Does Not Cover Sexual Orientation*, WASH. POST, July 27, 2017. The decision, *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017) was issued on April 18, 2017, and the Justice Department's amicus brief regards an en banc rehearing scheduled for September 26, 2017. *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017).

10. Feuer, *supra* note 9.

pose a rule set requiring the President, his immediate family, cabinet members, and key advisors to open their tax and investment records to the fullest public scrutiny, if the executive branch desires its amicus practice to continue. This proposed rule is not simply targeted at the current administration. Any rule set created to constrain the executive branch's influence in shaping federal judicial appellate decisions through the amicus process will apply to all future Presidents, presidential families, cabinet officers, and key advisors, regardless of their wealth or party affiliation. This proposed rule set does not intrude on the separation of powers and would be an evolutionary and progressive step in a process which began as early as the nation's founding. In one regard, this proposed rule set is premised on Justice Samuel Freeman Miller's observation that because the judiciary is "the feeblest branch or department of the government," it has "to rely on the confidence and respect of the public for their weight and influence in the government."<sup>11</sup> It is noteworthy that according to a 2016 Gallup Poll, the public's confidence in the federal judiciary hovers at an abysmal 36%, ranking it far lower than the military, churches, and police.<sup>12</sup>

Notwithstanding representation of the executive branch when the United States is a named party, the solicitor general is uniquely situated to influence the Court in three fundamental ways when the United States is not a party to an appeal. The solicitor general can provide his or her opinion to the Court on the importance of granting or denying certiorari to a cause under consideration. This influence can be subdivided into two classes: invited petition stage amicus briefs and uninvited petition stage amicus briefs. The solicitor general also has the Court's permission to provide an amicus argument to the Court and lower federal courts of appeal without having to gain the agreement of the named parties, or motion the various courts to do so.<sup>13</sup> Other government counsel may provide the lower courts

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11. SAMUEL FREEMAN MILLER, *THE CONSTITUTION OF THE UNITED STATES: THREE LECTURES DELIVERED BEFORE THE UNIVERSITY LAW SCHOOL OF WASHINGTON, D.C.* 25 (1880). Miller was by no means the only justice to articulate such concerns. In 1908, George Shiras, a retired justice penned to Chief Justice Melville Weston Fuller that given the social upheaval of that time, "it is growing more and more apparent that the safety and welfare of the country depend largely on the integrity and fairness of the courts." Letter from Shiras to Fuller (1908) (on file with the Melville Fuller Papers, Library of Congress box 9).

12. Jim Norman, *Americans' Confidence in Institutions Stays Low*, GALLUP NEWS (June 13, 2016), <http://www.gallup.com/poll/192581/americans-confidence-institutions-stays-low.aspx> [<https://perma.cc/J6W7-9DLT>].

13. FED. R. APP. P. 29(2); *see also* SUP. CT. R. 37.4.

No motion for leave to file an amicus curiae brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative; on behalf of a State, Commonwealth, Territory, or Possession

of appeal amicus briefs without seeking approval or having to motion the appellate court, and this article's premise, though focused on the solicitor general, also applies to these federal attorneys. This unique amicus entry into the Court and lower federal appellate courts enables the solicitor general to pursue executive branch policy regardless of whether his or her espousal of the executive branch's position fits within a generic, yet malleable, *best interests of the United States* standard.<sup>14</sup> Decisions on whether to file amicus briefs to the Court are usually governed by "the best interest of the United States."<sup>15</sup> There is also a tangential means for the solicitor general to influence a future appeal. Congress granted to the Justice Department a right of intervention in federal trials where the constitutionality of a statute or significant government interest is challenged.<sup>16</sup> In theory, a limited governmental intervention at the district level would preserve an issue for appeal, and therefore, present an amicus filing opportunity.

In the majority of the solicitor general's amicus briefs, the *best interests of the United States* standard is implied rather than directly noted. In this light, it is important to recognize that the Court's use of solicitor general's amicus briefs has steadily risen since World War II, and that the party

when submitted by its Attorney General; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer.

SUP. CT. R. 37.4; *See also, e.g.*, Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1324-1325 (2010).

14. *See, e.g.*, *Solicitor General Oversight: Hearing Before the Comm. on the Judiciary U.S. S., One Hundred Fourth Congress, First Sess., on Examining the Operation and Activities of the Office of the Solicitor General of the Dep't of Justice*, 104th Cong. 4 (1997) (statement of Drew Days); *Reauthorization of the U.S. Dep't of Justice: Exec. Office for U.S. Attorneys, Civil Division, Env't and Nat. Resources Div., Exec. Office for U.S. Trustees, and Office of the Solicitor General: Hearing Before the Subcomm. on Commercial and Admin. Law of the Comm. on the Judiciary, H.R., One Hundred Ninth Congress, Second Sess.*, 109th Cong. 61-62 (2006) (statement of Paul D. Clement); *See also, e.g.*, Drew Days III, *The Solicitor General and the American Legal Ideal*, 49 SMU L. REV. 73, 78 (1996); Erwin Griswold, *Office of the Solicitor General-Representing the Interests of the United States Before the Supreme Court*, 34 MO. L. REV. 527, 536 (1969).

15. *See, e.g.*, OFFICE OF THE SOLICITOR GENERAL, *FY 2017 Performance Budget*, 4 (2016), <https://www.justice.gov/jmd/file/820906/download> [<https://perma.cc/PG4C-RW3V>].

The number of cases in which the Solicitor General petitions the Supreme Court for review, acquiesces in a petition for a writ of certiorari filed by an adverse party, or participates as an intervener or as amicus curiae is governed exclusively by the Solicitor General's determination that it is in the best interest of the United States to take such action.

*Id.* However, it must be noted that some former Deputy Solicitors General have argued that the office serves the interests of the President. *See, e.g.*, Margaret Graham Tebo, *Past, Present Solicitors General Face the Ultimate Question: Who is the Client?*, A.B.A. J., 89-Oct. 2003, at 83.

16. *See* 28 U.S.C. 2403 (2012); *United Steelworkers of Am. v. Jones & Lamson Mach. Co.*, 854 F.2d 629 (2d Cir. 1988).

supported by the solicitor general's amicus brief has prevailed in over 80% of appeals.<sup>17</sup> One can perhaps assume that because a solicitor general's amicus position is based on the above-noted standard, the brief carries a moral weight not present in all other amici. The solicitor general's success can be better understood by recognizing that while the amicus curiae brief was originally designed as a means for bringing dispassionate advice to appellate judges, the modern amicus brief is often nothing more than advocacy by an interested non-party.<sup>18</sup> In 1997, in *Ryan v. Commodity Futures Trading Comm'n*, Judge Posner, on the Court of Appeals for the Seventh Circuit, noted "[t]he vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief."<sup>19</sup> Posner labeled the growing judicial acceptance of amicus briefs which sided with a litigating party, "an abuse" and recommended restrictions on the practice.<sup>20</sup>

There are two paths for the Court to promulgate greater transparency rules. The first is by the Court speedily issuing a new rule as part of the Supreme Court Rules of Practice (SCR). This is not a wholly novel concept. Within its own rules the Court dictates requirements for admission of counsel<sup>21</sup> as well as rules to initiate disbarment proceedings.<sup>22</sup> The second means would be through the lengthier process of modifying the Federal Rules of Appellate Procedure (FRAP). The FRAP apply to the lower federal appellate courts and not the Court itself.<sup>23</sup> For reasons noted below, both paths should be undertaken. The Court should enact a rule for itself and then use the rule as a "test bed" to prove to Congress the necessity, as well as a lack

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17. See, e.g., Joseph Kearney & Thomas Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 760 (2000) (explaining the increasing use of amicus briefs); Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 L. & SOC'Y REV. 807, 810-811, 825-26 (2004); See also Michael E. Solimine, *The Solicitor General Unbound: Amicus Curiae Activism and Deference in the Supreme Court*, 45 ARIZ. ST. L. J. 1183 (2011); REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 27 (1992) (explaining the solicitor general's success rates in amicus practice). But see, John Harrington, Note, *Amici Curiae in the Federal Courts of Appeal: How Friendly Are They?*, 55 CASE W. RES. L. REV. 667, 676-677 (2005). It should be noted that at least one study has concluded that while amicus briefs have influenced the Supreme Court, the influence of amicus briefs on the appellate courts is less certain. *Id.* at 675.

18. See, e.g., Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L. J. 694, 694-95 (1963).

19. *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997).

20. *Id.*

21. See, e.g., SUP. CT. R. 5 (admission to the bar); SUP. CT. R. 6 (permitting motion for *Pro Hac Vice*).

22. SUP. CT. R. 8.

23. FED. R. APP. P. 1.

of harm to the political branches, for an additional rule to the FRAP requiring greater transparency for the executive branch's amicus filings.

This article is constructed in three sections, with the caveat that it is focused on the Court's duties to protect the integrity of the federal judiciary rather than simply ensuring fairness to appellate litigants. To be sure, appellate litigants can use the same arguments contained in this article to motion the courts of appeal and the Court to provide access to the financial records of the key government officers noted above in order to counter the solicitor general's amicus arguments in an effort to provide fairness, in both fact and appearance, to the appellate litigation. And, fairness to the parties will also bolster confidence in the judiciary's impartiality. But, in an era of lessening confidence in the judiciary, a lack of transparency in the presidency, and presidential attacks on judges, there is a need for the Court to protect the judiciary's independence from the executive branch to the fullest degree that the Constitution expects of it. Thus, the transparency rule proposed herein is to inform the executive branch that in order to have the federal courts consider its amicus briefs, the tax and investment records of the President, his family, and key advisors and officers must be opened to the public rather than simply be made available to the named parties in an appeal.

The first section analyzes the inherent rule-making authority of the Supreme Court, as well as the Court's obligation to preserve the judicial branch's integrity. While Congress has statutorily defined the duties and authority of the solicitor general, the Court possesses the ability to create "rules of entry" for the solicitor general and other government attorneys, which do not impede or contradict the statutes defining the solicitor general's duties or those of agency counsel. The basic historic underpinnings of amicus practice are also analyzed for guidance into how a transparency rule can be viewed as a legitimate means for the judiciary to be insulated against the appearance of its subordination to the executive branch. The second section details the unique role and influence that the solicitor general possesses in judicial decision making, including cases where the United States is not a named party. It is partly because of the solicitor general's level of influence that the Court should exercise its discretionary authority to confine the executive branch to strict ethical standards in amicus practice through the imposition of a transparency rule. Although opponents of such a rule might argue that creating a fixed and defined *best interest of the United States* standard could alleviate the appearance of the judiciary being used for nefarious purposes, and thereby depoliticize the solicitor general's amicus decisional processes, this step would still leave the public and the judiciary being asked to trust the executive branch with no evidence to support such trust. For this reason, this article concludes with an observation that the less-publicly transparent a presidential administration is, the more the Court has a duty to limit the influence of the executive branch to those appeals in which the United States is a named party.



## I: SUPREME COURT: JUDICIAL INTEGRITY AND RULE MAKING AUTHORITY

In Article III, the United States Constitution explicitly establishes the Supreme Court and implicitly protects the independence of the Court as well as the lesser federal courts that are created by Congress.<sup>24</sup> The Constitution also delineates a vast expanse of judicial power over, *inter alia*, the “laws of the United States” and “controversies to which the United States shall be a party.”<sup>25</sup> When the framers drafted Article III, there was no intention that the Court’s authority would be wholly confined to a reactive role.<sup>26</sup> Indeed, there was a pre-constitutional desire for judicial independence as

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24. *See, e.g.*, *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1954) (in which Justice Black, in authoring the decision, noted “[t]he provisions of Article III were designed to give judges maximum freedom from the possible coercion or influence by the executive or legislative branches of the Government.”). U.S. CONST. art. III, § 1 reads,

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

U.S. CONST. art. III, § 1. Toth did not arise as a challenge to judicial integrity. Rather, it arose from an appeal against the Department of Air Force’s assertion of court-martial jurisdiction over a discharged service member. *Toth*, 350 U.S. at 16.

25. U.S. CONST. art. III, § 2 reads,

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

U.S. CONST. art. III, § 2.

26. *See, e.g.*, STANLEY ELKINS AND ERIC MCKITTRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800* 62-64 (1993). In this instance, the authority and wisdom of the Court to issue a transparency rule to the solicitor general may be derived from THE FEDERALIST NO. 78 which reads, in pertinent part:

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

THE FEDERALIST NO. 78 (Alexander Hamilton).

evidenced in various colonial grievances against judges in that they were too dependent on the Crown for their livelihood.<sup>27</sup>

The concept of a judiciary's inherent rule-making authority not only predates the Constitution, but it is part and parcel of the judiciary guarding its independence.<sup>28</sup> There is nothing in the Constitution's text that prohibits the federal courts from enforcing their authority through the contempt power. In *Anderson v. Dunn*, the Court in 1821 held that the judicial branch's contempt power is both statutory and implied as a means for vindicating offenses against the judiciary's authority.<sup>29</sup> In 1988, Judge Elbert Parr Tuttle, one of the noted pro-civil rights judicial scholars of the 1950s and 1960s, observed that historically, the contempt authority enabled a judge to "make, enforce, and interpret the law simultaneously."<sup>30</sup> Thus, an attorney who willfully disregards judicial rules, such as discovery orders, faces various sanction possibilities. Although the contempt authority is only one of many means for assessing the Court's power to enact a transparency rule, it may be the best starting point since the power exists to ensure the federal judiciary's integrity. Today, the Court possesses other rule-making authorities over civil procedure, evidence, and appellate procedure, and is influential over the shaping and maintenance of legal ethics. In 1983, the Court, in *United States v. Hasting*, recognized that federal courts possessed "supervisory powers" to formulate procedural rules not required by the Constitution or Congress as a means to preserve judicial integrity.<sup>31</sup> Numerous commentators have noted that the Court, as part of its status as an independent coordinate branch of government, possesses the authority to internally regulate itself, the federal judiciary as a whole, its participants, and the lawyers and parties who practice before it.<sup>32</sup>

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27. Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104, 1152-53 (1976).

28. A. Leo Levin & Anthony G. Amsterdam, *Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 3 (1958) (noting a concurrent authority to make judicial rules with the legislatures).

29. *Anderson v. Dunn*, 19 U.S. 204, 227-28 (1821). *Anderson* arose as a challenge to the legislative branch's authority to adjudge contempt, but the Court, in an opinion authored by Justice Johnson, must have believed it necessary to assert a commensurate basis for a judicial contempt authority. *Id.*

30. Elbert Parr Tuttle & Dean W. Russell, *Preserving Judicial Integrity: Some Comments on the Role of the Judiciary Under the "Blending of Powers,"* 37 EMORY L.J. 587, 591 (1988).

31. *United States v. Hasting*, 461 U.S. 499, 505 (1983).

32. See, Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1050-1158 (1982) (analyzing judicial rule-making authority); PETER GRAHAM FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 228-268 (1973) (describing the role of the Judicial Conference setting standards of ethics, procedural rules, and aspects of judicial efficiency).

## A. SUPREME COURT'S AUTHORITY TO MAINTAIN JUDICIAL INTEGRITY

As a general proposition, federal courts possess the authority to protect proceedings and judgments in the discharge of their judicial duties by constraining attorney conduct. It is important to understand that the Court polices the legal profession in a number of different ways that are applicable to this article's premise. The justices possess rule-making authority to require the parties to adhere to ethical standards of litigation. The Court has determined that bar applicants' political affiliations, alone, may not be a basis for denial into the practice of law.<sup>33</sup> The Court has also reviewed whether disbarment in the state courts requires disbarment in the federal courts.<sup>34</sup> In *In re Ruffalo*, the Court held, "admission to practice before a federal court is derivative from membership in a state bar, disbarment by the State does not result in automatic disbarment by the federal court. Though a state's act of disbarment is entitled to respect, it is not conclusively binding on the federal courts."<sup>35</sup> Moreover, the Court possesses contempt authority. In 1906, in *United States v. Shipp*, the Court unanimously held that it not only possessed the authority to determine the extent of its own jurisdiction to issue orders against a state activity, but it also determined that it possessed jurisdiction to hold individuals in contempt.<sup>36</sup> Although in

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33. See, e.g., *Schwartz v. Bd. of Bar Exam'rs of N.M.*, 353 U.S. 232 (1957); See also *Konigsberg v. State Bar of Cal.*, 353 U.S. 252 (1957).

34. *Theard v. United States*, 354 U.S. 278 (1957). *Theard* arose from a Louisiana disbarment action in which a state hospital had determined he was "suffering under an exceedingly abnormal mental condition, some degree of insanity." *Id.* at 279. This determination occurred in 1935, but, for reasons that are absent from the Court's analysis, Louisiana based its disbarment of *Theard* in 1953 on the psychiatric determination almost two decades earlier. *Theard* had also committed a forgery in 1935. The Court, in a decision authored by Justice Felix Frankfurter held, "We do not think that 'the principles of right and justice' require a federal court to enforce disbarment of a man eighteen years after he had uttered a forgery when concededly he 'was suffering under an exceedingly abnormal mental condition, some degree of insanity'." *Id.* at 282.

35. *In re Ruffalo*, 390 U.S. 544, 548 (1968).

36. *United States v. Shipp*, 203 U.S. 563 (1906). In February 1906, a Tennessee state criminal trial found "Johnson, a colored man," guilty of "rape upon a white woman" and sentenced him to death. *Id.* at 571. Johnson's attorneys appealed to the United States Court of Appeals for the Sixth Circuit for a writ of habeas corpus. Although the Court of Appeals denied a writ, Justice Harlan ordered the state to "stay" Johnson's execution until the Court could determine the merits of the habeas appeal. *Id.* at 571. Shortly after Harlan's order, a sheriff colluded with white citizens to enable a mob to murder Johnson. *Id.* at 571-72. In response, the justices unanimously agreed to hold a contempt trial against the sheriff, the jailer, and several other officials including the state trial judge. *Id.* at 572. These men appealed against the Court's assertion of its contempt jurisdiction. *Shipp*, 203 U.S. at 572-73. The Court resoundingly determined that it possessed jurisdiction to hold persons in contempt regarding any issue that it possessed jurisdiction over, and since the Court determined its own jurisdiction, the acts or omissions of the persons responsible for Johnson's murder

*Shipp*, the Court appeared to imply that it possessed unlimited contempt authority, in *Young v. United States ex rel Vuitton et Fils S.A.*, the justices mandated ethical standards for the prosecution of contempt in the United States district courts by prohibiting attorneys with an interest in the outcome of the contempt proceedings from serving as court-appointed prosecutors.<sup>37</sup>

Ensuring that attorneys understand their ethical duty to the federal courts is a more than a century old aspect of judicial governance. In *Bradley v Fisher*, the Court articulated that although attorneys have a duty to their respective clients, they are also required to “be obedient” to the Constitution and “maintain at all times the respect due to courts of justice and judicial officers.”<sup>38</sup> In essence, attorneys who practice before the federal courts not only have a responsibility to have candor in all matters before the court, but they also have a responsibility to conform their practice to the court’s rules.<sup>39</sup> Conformance to judicially created rules are not only related to the requirement to adhere to various ethics canons. The courts have the ability to sanction violations of both the canons and rules to enforce the integrity of the judicial process. On this point, the Court has determined that various sanctions contained within the Federal Rules of Civil Procedure facially comport with due process as a matter of preserving judicial power, and therefore a court’s integrity, during civil trials.<sup>40</sup> Moreover, the procedural rules are colorblind in that the executive branch is not immune from the same possible sanctions as private litigants.<sup>41</sup>

The Court has further determined that Article III of the Constitution guarantees to litigants the right to have claims decided before judges who are free from the potential domination of the other branches of government.<sup>42</sup> On rare occasions, this principle has placed the Court in an awkward position of de facto regulating a federal agency. In 1980, *United States v. Will* determined that although a challenged compensation scheme

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could be found contemptuous. *Id.* at 572-575. When read to its logical extent, one could find that the Court implied that it possessed almost unlimited contempt authority.

37. See *Young v. United States ex rel Vuitton et Fils S.A.*, 481 U.S. 787 (1987).

38. *Bradley v. Fisher*, 80 U.S. 335 (1871).

39. See *McCoy v. Court of Appeals, Dist. 1*, 486 U.S. 429, 430 (1988) (rule requiring appellate counsel for indigent client to inform court of appeals that appeal is frivolous); *Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306 (11th Cir. 2002) (court within sound discretion to reprimand attorney who disparaged opposing counsel in ad hominem attacks); *Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 230 (5th Cir. 1998) (Federal district courts are bound by the disciplinary rules they implement when proceeding against attorneys for violation of ethical standards).

40. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991).

41. See FED. R. CIV. P. 11 (permitting sanctions against government attorneys for failing to comply with the basic pleading requirements in federal civil trials).

42. *United States v. Will*, 449 U.S. 200, 218 (1980).

for federal employees would, by its very nature, effect the judiciary – and particularly so in this appeal since the appellants were a class of federal judges from the Northern District of Illinois – a rule of necessity could be constitutionally invoked for judges, including the Court, to determine the appeal in the federal courts.<sup>43</sup> The compensation scheme existed as a matter of statute, but Congress placed discretion in the executive branch to establish administrative commissions to determine federal pay.<sup>44</sup> After determining that *necessity* – the absence of any viable judicial alternative – required the Court to consider the appeal. The Court then determined that both the legislative and executive branches had violated the constitutional prohibition against reducing judicial salaries.<sup>45</sup> The Supreme Court case, *Will*, serves as an important demarcation for the Court to enact rules to protect judicial integrity in two basic areas.

First, in matters involving judicial integrity, the Court implied that the separation of powers between the legislative and judicial branches could not be used as a means for preventing the Court to ensure that it operated with the full constitutional authority demanded of it. Commensurately, the Court could command an executive branch agency to cease the operation of a government program that was harmful to the judiciary.

Secondly, the justices recognized that the doctrine of necessity, while ancient in scope, remained a viable means to ensure the Court could not be cabined from limiting the influence of either political branch on it. Indeed, six years after the Court issued *Will*, it reaffirmed the principles articulated in that decision in *Commodity Futures Trading Commission v. Schor*.<sup>46</sup>

Moreover, in *Schor*, the Court also noted that there are no “formalistic and unbending rules” to confront threats to the judicial branch’s integrity.<sup>47</sup> Taken together, *Will* and *Schor* provide evidence that the proposed transparency rule can overcome an argument that the separation of powers would be undermined by such a rule.

The classic means by which the Court maintains its own integrity is in its general oversight of the legal profession. As early as 1824, the Court determined that district court judges possessed the authority to control admission to practice and to discipline the attorneys who appeared in the lower federal courts.<sup>48</sup> Commensurately, the Court has, over time, limited the power of the lower courts in a manner that shapes the universality of standards of legal practice. In *Frazier v. Heebe*, the Court held that the district courts possess a limited authority to issue rules regulating the admission to

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43. *Id.* at 212-213.

44. *Id.*

45. *Id.* at 229-230.

46. *Commodity Futures Trading Comm’n v. Schor*, 478 US 833 (1986).

47. *Id.* at 851.

48. *Ex parte Burr*, 22 U.S. 529 (1824).

practice law within the district.<sup>49</sup> In this decision, an attorney challenged the United States District Court for the District of Louisiana's rule that all attorneys seeking admission to practice before the court either reside or maintain an office in that state. A Mississippi-based attorney who had been admitted to the Louisiana State Bar challenged the rule, and the Court, in a decision authored by Justice Brennan, held that the district court had arbitrarily exceeded its authority in doing so.<sup>50</sup> The Court recognized that a district court possessed the discretion to adopt local rules "that are necessary to the conduct of its business," but the justices had the duty to protect the integrity of the judicial system against arbitrary rules.<sup>51</sup>

Following the Civil War, the Court determined that an attorney's loyalty to the Confederacy could not be used to prevent him from practicing before the federal courts as an unconstitutional bill of attainder.<sup>52</sup> Despite this decision, the basic premise of using a person's gender, religious beliefs, or political affiliations as a prohibition from entering the Bar has a mixed history.<sup>53</sup> As early as 1931 the Court expressly determined that it possessed the power to inquire into the conduct of attorneys admitted to practice before it.<sup>54</sup> In *In re Snyder*, the Court, in reversing the disbarment of a North Dakota attorney, reaffirmed that it possessed supervisory authority over attorneys admitted to practice in the federal courts.<sup>55</sup> This appeal arose from an attorney's abrupt response to the Court of Appeals for the Eighth Circuit's denial of his claim for payments arising from the defense of an indigent defendant.<sup>56</sup>

In addition to the basic powers of contempt, admission, and disbarment, the Court has also regulated the practice of the legal profession outside of the federal courts. In *Bates v. State Bar of Arizona*, the Court struck

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49. *Frazier v. Heebe*, 482 U.S. 641 (1987).

50. *Id.* The Court recognized that the district court had arrived at its holding after consideration of testimonial evidence which indicated that "out of state" attorneys had slowed the business of the district court due to longer travel times for emergency or unscheduled hearings. *Id.*; *See also* *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (the Court determined that a state bar could prohibit direct advertising to potential clients because of the heightened possibility of fraud).

51. *Frazier*, 482 U.S. 645.

52. *Ex parte Garland*, 71 U.S. 333 (1866).

53. *See, In re Stolar*, 401 U.S. 23 (1971) (holding that a person's affiliation with a political organization is not enough to preclude entry into the bar); *In re Summers*, 325 U.S. 561 (1945) (upholding Illinois's discrimination against conscientious objectors from entering the bar as a state prerogative); *Bradwell v. Illinois*, 83 U.S. 130 (1872) (upholding Illinois's denial of entry into the bar of women, but reversed by implication in *United States v. Virginia*, 518 U.S. 515 (1996)).

54. *In re Baff*, 1931 LEXIS 909 (1931).

55. *In re Snyder*, 472 U.S. 634 (1985).

56. *Id.* at 643.

down Arizona's ban on attorney advertising.<sup>57</sup> Five years after *Bates*, the Court determined that an attorney could advertise his admission to the Supreme Court, even though Justice Lewis Powell, who authored the decision, opined that the attorney's emphasis on admission to practice before the nation's highest court was "in bad taste," because there is no testable requirement for admission to the Supreme Court.<sup>58</sup> Although the Court evolved toward a greater application of free speech to attorney advertising, it also accepted that attorney speech outside of the courtroom can be constrained by the Rules of Ethics. For instance, in *Gentile v. State Bar of Nevada*, it determined that reasonable restraints against public speech calculated or likely to effect a pending litigation were constitutional.<sup>59</sup>

Finally, the Court has an interest in the shaping of judicial ethics in regard to conflicts of interest. In *Caperton v. A.T. Massey Coal Co., Inc.*, the Court determined that a state supreme court justice could not fulfill his duty of judicial impartiality in adjudicating an appeal involving a party who had privately and independently raised thousands of dollars for the state justice's election.<sup>60</sup> Although the Court does not appear to have issued a decision limiting amicus briefs based on the monetary interests of corporate parties, the Court of Appeals for the Third Circuit, in a decision authored by then Judge Alito observed that there is no bar against erstwhile amici with pecuniary interests from filing briefs to an appellate court.<sup>61</sup> In other words, *friend of the court* does not equate to *disinterested party*, and judicial recusal coupled with the disclosure requirement is a safeguard for ensuring

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57. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 375 (1977) (the Court did not rule that attorney advertising could not be regulated but an outright ban was unconstitutional).

58. *In re R.M.J.*, 455 U.S. 191 (1982).

59. *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991).

60. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (essentially a continuation of *Tumey v. Ohio*, 273 U.S. 510 (1927), in which the Court determined that the Fourteenth Amendment was violated where a judge served on a trial in which some of the proceeds of an adjudged fine paid the judge's salary).

61. *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 131-32 (3d Cir. 2002). Writing for the court, then Judge Alito noted

The argument that an amicus cannot be a person who has "a pecuniary interest in the outcome" also flies in the face of current appellate practice. A quick look at Supreme Court opinions discloses that corporations, unions, trade and professional associations, and other parties with "pecuniary" interests appear regularly as amici. Some of the Supreme Court cases in which the greatest number of amici have filed illustrate this point.... Parties with pecuniary, as well as policy, interests also appear as amici in our court ... I thus reject the appellants' argument that an amicus must be an impartial person not motivated by pecuniary concerns.

*Id.* at 131-32.

impartial appellate judges. But, for reasons noted below, only non-government amici must disclose these interests to the courts.

#### B. STATUTORY BASED SUPREME COURT RULE MAKING: SCR AND FRAP

Although the 1789 Judiciary Act enabled the federal courts to craft rules to effectuate the conduct of judicial business,<sup>62</sup> Supreme Court rule making appears to date to 1822, when it issued uniform rules of equity.<sup>63</sup> In 1936, Charles Edward Clark, the dean of the Yale Law School and later a judge on the Court of Appeals for the Second Circuit, argued that since the nation's founding, the Court had a constitutional authority to enact rules of appellate procedure but had not done so.<sup>64</sup>

There is a fundamental difference in the timing of a rule enactment between SCR and FRAP. The Court may create rules of practice that are limited to causes that are presented before it. Under the applicable statutory construct, and unlike rules created for the judicial branch as a whole, the Court is under no statutory requirement to give the public notice and an opportunity to comment on a rule which solely regards practice before it.<sup>65</sup> As evidence of the speed in which the SCR may be promulgated, the current SCRs were issued on April 19, 2013, and became effective on July 1, 2013. The first rules for practice before the Court were promulgated in 1790, and were partly based on an expectation of professionalism.<sup>66</sup> Alt-

62. Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73 (1789). (this Act, in part, enabled the judiciary “to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States.”); See, THE STATES AND FEDERAL COURTS: A COMPLETE GUIDE TO HISTORY, POWERS, AND CONTROVERSY 166 (Christopher P. Banks ed., 2017) (discussing the 1789 Act).

63. See Kristin A. Collins, “A Considerable Surgical Operation:” Article III, Equity, and Judge-Made Law in the Federal Courts, 60 DUKE L.J. 249, 273 (2010) (discussing the 1822 rules).

64. Charles E. Clarke, *Power of the Supreme Court to Make Rules of Appellate Procedure*, 49 HARV. L. REV. 1303, 1312 (1936).

65. 28 U.S.C. § 2071(a) (2012). This rule states:

(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

*Id.*; See also 28 U.S.C. § 2071(b) (28 U.S.C. § 2071(a) must be read alongside 28 U.S.C. § 2071(b)) (“Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order.”).

66. Appointment, 2 U.S. 399 (1790). On February 5, 1790, the Court issued Rule 2 which read:

Ordered, That (until further orders) it shall be requisite to the admission of attornies and counsellors to practice in this court, that they shall have



though the first amicus brief appeared before the Court in 1823, it was not until 1939 when the Court issued its first rule on amicus briefs.<sup>67</sup> The 1939 SCR, like its current version, required prospective amici—except for the United States—to obtain the consent of the named parties.<sup>68</sup>

The creation of the FRAP and the length of time for amendments to take effect require a brief contextual history, beyond the fact that the FRAP is a much newer rule set than the SCR. In 1948, Congress codified the judiciary's rule making power, and in doing so, recognized, as evidenced by the statute's language, a broad sweep of judicial power.<sup>69</sup> Over time, Congress enabled the Court to craft rules for appellate procedure alongside its authority to enact rules of civil procedure and evidentiary rules.<sup>70</sup> The FRAP's immediate history began in 1958 when Congress authorized the Judicial Conference of the United States to perform "a continuous study of the rules of practice and Procedure in the United States Courts and to recommend to the Supreme Court from time to time such changes. . . as the Conference believes may improve the administration of justice."<sup>71</sup> The Judicial Conference was created by Congress in 1922, on the advice of Chief Justice William Howard Taft.<sup>72</sup> This act enabled a chief justice to call an annual conference of the senior appellate judges to propose legislation to Congress

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been such for three years past in the Supreme Courts of the State to which they respectively belong, and that their private and professional character shall appear to be fair.

*Id.*

67. See, e.g., *Green v. Biddle*, 21 U.S. 1 (1823).

68. SUP. CT. R. 27.9.

A brief of an amicus curiae may be filed when accompanied by the written consent of all parties to the case, except that consent need not be had when the brief is presented to the United States or an officer or agency thereof and sponsored by the Solicitor General, or by a State or a political subdivision thereof. Such a brief must bear the name of member of the bar of this Court.

*Id.*

69. See, 28 U.S.C. § 2071 (1948) (corresponds to Act of June 25, 1948, ch. 646, 62 Stat. 961 (1948)). This act reads, "Each court established pursuant to an Act of Congress, may, from time to time, prescribe rules for the conduct of its business. Such rules shall be consistent with Acts of Congress and rules prescribed by the Supreme Court." *Id.* The predecessor to this law was known as the Rules Enabling Act of 1934 in which Congress authorized the Court to create civil procedure rules. See, e.g., Act of June 19, 1934, ch. 651, 48 Stat. 1064; *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941).

70. 28 U.S.C. § 2072(a) (1988) (amended 1990).

71. Letter from Chief Justice Earl Warren to Robert L. Stern (Mar. 11, 1960) (on file with the Library of Congress).

72. PETER GRAHAM FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 30 (1973); Peter Graham Fish, *The Circuit Councils: Rusty Hinges of Federal Judicial Administration*, 37 U. CHI. L. REV. 203, 203-05 (1970); JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 115 (1950).

regarding the administration of the judiciary, and it also authorized the chief justice to temporarily reassign district court judges to districts that were inundated with large numbers of trials.<sup>73</sup> The Conference's duties have since been expanded to recommend the addition, rescission, or modification of rules, and then annually report to Congress the results of its meetings.<sup>74</sup>

In March 1960, Chief Justice Earl Warren convened an advisory committee and appointed Judge E. Barrett Prettyman on the Court of Appeals of the District of Columbia as its chair, as well as Judges Simon Sobeloff on the Fourth Circuit, Richard T. Rives on the Fifth Circuit, Henry Friendly on the Second Circuit, Stanley Barnes on the Ninth Circuit, Shackelford Miller on the Sixth Circuit, and J. Edgar Murdock, the Chief Judge of the U.S. Tax Court.<sup>75</sup> The advisory committee circulated its first draft of the proposed rules in 1964. Very little discussion appears to have been undertaken regarding amicus briefs and the contentious areas of the rules arose in terms of a proposed uniform system for assembling records of trial for appellate review because each circuit had developed different standards from the others, but there were also differences between civil and criminal trials.<sup>76</sup> On the other hand, there was an overriding consensus that the FRAP should align with the SCR where possible.<sup>77</sup>

On December 4, 1967, the Court issued the first rules of appellate procedure for Congressional review.<sup>78</sup> These rules were largely identical to the 1964 proposal. Congress did not oppose the federal appellate procedural

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73. Act of Sept. 14, 1922, ch. 306, 42 Stat. 837 (1922) (codified as amended 28 U.S.C. § 218 (1940)); *See also* J. Clifford Wallace, *Must We Have the Nunn Bill? The Alteration of Judicial Councils of the Circuits*, 51 IND. L. J. 297, 311 (1976).

74. 28 U.S.C. § 331 (2008).

75. Letter from Judge E. Barrett Prettyman to Chief Justice Earl Warren (Mar. 21, 1960); Letter from Judge Albert Marris to Chief Justice Earl Warren (Jan. 30, 1961) (on file with the Library of Congress, Earl Warren Papers Box 744). Also serving on the committee were Willard Gatchell, the general counsel of the Federal Power Commission, Judge William Jameson on the United States District Court for Montana, and Joseph O'Meara, the dean of Notre Dame's law school. *See* Advisory Committee on Appellate Rules, Letter from Chief Justice Earl Warren to Judge Simon E. Sobeloff (Mar. 24, 1960) (on file with the Library of Congress).

76. COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT TO THE JUDICIAL CONF. OF THE U.S. (Comm. Print 1967) (Primarily the work of Albert B. Marris).

77. *See, e.g.*, Letter from Robert Stern to Chief Justice Earl Warren (Mar. 21, 1961) (on file with the Library of Congress, Earl Warren Papers Box 744).

78. Fed. R. App. P., 389 U.S. 1063 (1968); *See* Sherman L. Cohn, *The Proposed Federal Rules of Appellate Procedure*, 54 GEO. L. J. 431, 438-40 (1967) (discusses the judicial history of the creation of the FRAP, and a general consensus that appellate procedural rules garnered little interest in comparison to trial rules). Professor Cohn doubted that the Court possessed the authority to issue the appellate rules for civil verdicts, and did not, as evidenced in his article, have access to the judicial correspondences which are now available. Sherman L. Cohn, *The Proposed Federal Rules of Appellate Procedure*, 54 GEO. L. J. 431, 438-40 (1967).

rules, in all likelihood, because these rules were procedural rather than substantive, and the rules took effect on July 1, 1968.<sup>79</sup> In comparison, when, in 1972, the Court proposed the first federal evidentiary rules, Congress did not approve of the Court's proposal because many of the rules were determined to be substantive and therefore invasive of the legislative branch's authority.<sup>80</sup>

In terms of amicus practice, it is clear that the advisory committee believed in the importance of a uniform rule. The committee noted that as of 1964, only three of the eleven circuits regulated the filing of amicus briefs and those circuits which did not formally regulate amici required prospective amici to motion the court.<sup>81</sup> In instances where the United States was a named party and objected, the courts tended to deny the prospective amici.<sup>82</sup> The committee then recommended to the Judicial Conference that amicus rules should be amended to enable interested persons to educate the appellate courts against the government's position.<sup>83</sup>

If the Court were to create a generalized rule of appellate procedure within the FRAP, the process could take over a year.<sup>84</sup> In 1988, Congress modified the 1948 law by including language that the Supreme Court possessed authority to draft "rules for the conduct of its business."<sup>85</sup> The 1988 modification did not directly note appellate procedure as being in need of change, and it once more appears that Congress did not have any particular concern for appellate procedural rules. Should a new rule be proposed for a generalized appellate practice, the Court delegates its rule-making duties to the Judicial Conference.<sup>86</sup>

Currently, for changes to the FRAP, the Conference, under the direction of the Chief Justice, relies on an advisory committee.<sup>87</sup> The advisory

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79. See, e.g., STAFF OF H.R. COMM. ON THE JUDICIARY, 114th CONG. FEDERAL RULES OF APPELLATE PROCEDURE WITH FORMS 23 (Comm. Print 2015). In spite of Congressional silence, it should be noted that one federal court determined that the federal rules of appellate procedure lessened a burden of proof in a suit against the Interstate Commerce Commission, a federal agency. See, e.g., *Am. Paper Inst. v. Interstate Commerce Comm'n*, 607 F.2d 1011 (D.C. Cir. 1979).

80. See, e.g., Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1018 (1982); Arthur J. Goldberg, *The Supreme Court, Congress, and Rules of Evidence*, 5 SETON HALL L. REV. 667 (1974).

81. See Draft Rule 29 (1961) (on file with the Library of Congress, Earl Warren Papers Box 744).

82. *Id.*

83. *Id.*

84. See, e.g., 28 U.S.C. § 2074(a) (2012); See also, *About the Rulemaking Process*, UNITED STATES COURTS <http://www.uscourts.gov/rules-policies/about-rulemaking-process>

85. Act of Nov. 19, 1988, Pub. L. No. 100-702, 102 Stat. 4650 (codified at 28 U.S.C. § 2071(a) (1988)).

86. 28 U.S.C. § 2073(a)-(b) (1988).

87. 28 U.S.C. § 2074(c) (1988).

committee first accepts proposed changes to existing rules from a member of the interested public.<sup>88</sup> If the advisory committee finds a proposal meritorious, its members draft a proposed rule change and then seek comment from federal judges, state chief justices, state attorneys general, United States Attorneys, law schools, and law associations.<sup>89</sup> After a six month period for comment, the advisory committee then forwards a recommendation to the standing committee on appellate rules which, in turn, decides whether to recommend to the Judicial Conference the proposed rule change.<sup>90</sup> If the Conference recommends adopting the change, it must forward the proposed change to the Court and, in the event the Court adopts the change, it must transmit the proposal to Congress by May 1 of the year that the rule is to go into effect.<sup>91</sup> Congress then has seven months to either accept the rule by acquiescence or to override it by a vote.<sup>92</sup> In essence, through this construct, Congress recognizes the Court's inherent power in judicial rule making by placing into the language of the law the truism that the Court's rules, even when these contradict a law, replaces the law until Congress acts.<sup>93</sup>

C. AMICUS FILING IN THE FEDERAL COURTS: IMPOSITION OF ETHICS RULES ON PRIVATE LITIGANTS BUT EXEMPTIONS ON THE SOLICITOR GENERAL AND OTHER GOVERNMENT ATTORNEYS

The Supreme Court determines the procedural timelines and permissibility of amicus filing in its own hearings through the SCR. In the SCR's plain language, the Court has recognized not only the legitimacy but also the importance of amicus briefs.<sup>94</sup> With limited exception, persons or organizations filing amicus briefs must have the consent of the parties prior to the filing for the Court to accept the amicus arguments.<sup>95</sup> However, a par-

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88. *Id.*

89. *Id.*

90. 28 U.S.C. §331 (2012).

91. 28 U.S.C. § 2074(a) (2012).

92. 28 U.S.C. § 2072(b) (2012).

93. 28 U.S.C. § 2072(b) (2012). This statute reads: "Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." *Id.*

94. Sup. Ct. R. 37(1) states:

An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored. An amicus curiae brief may be filed only by an attorney admitted to practice before this Court as provided in Rule 5.

SUP. CT. R. 37(1).

95. Sup. Ct. R. 37(2)(a) states in pertinent part:

ty's denial of consent to the person or organization does not automatically disqualify the Court from considering the brief since, according to its own rules the Court permits the person or organization to motion the Court to consider the brief.<sup>96</sup> In such an event, the person or organization is required to "state the nature of the movant's interest."<sup>97</sup> The Court also has the inherent authority to invite a potentially interested person or organization to file an amicus brief, though when it has done so, the invitation is almost solely made to the solicitor general.<sup>98</sup> The Court's rules facially disfavor consideration of amicus briefs where the parties object to the filing.<sup>99</sup> While today the Court is generally welcoming of amicus briefs, this has not always been the case. In 1903 Chief Justice Fuller denied a private entity the ability to file a brief where no litigant approved of the brief and the entity did not appear to have an interest in the outcome.<sup>100</sup> In 1949 Justice Frankfurter echoed Fuller's view in a proposal to the Court to prevent having the Court "exploited as a soap box or as an advertising medium, or as [a] target. . . ."<sup>101</sup> But Frankfurter did not speak for the Court as a whole and Justice Black wanted to further open the Court to amici when the solicitor general had already presented an amicus.<sup>102</sup>

The modern Court's approach to accepting amicus briefs was, in part, formed as a result of cases in which the solicitor general opposed amicus briefs in appeals arising from the prosecutions of suspected communists as well as challenges to state and federal limitations placed on suspected "sub-

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An amicus curiae brief submitted before the Court's consideration of a petition for a writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ may be filed if accompanied by the written consent of all parties, or if the Court grants leave to file under subparagraph 2(b) of this Rule.

SUP. CT. R. 37(2)(a).

96. SUP. CT. R. 37(2)(b).

97. *Id.*

98. James L. Cooper, Note, *The Solicitor General and the Evolution of Activism*, 65 IND. L. J. 675, 690 (1990).

99. SUP. CT. R. 37(2)(b).

100. *N. Sec. Co. v. United States*, 191 U.S. 555 (1903).

101. Memorandum from Felix Frankfurter, Assoc. Supreme Court Justice, to the Supreme Court (Oct. 28, 1949) (on file with the Library of Congress, Earl Warren Papers). Concededly, Frankfurter presented an argument in this memorandum which could be used in opposition to a transparency rule when he wrote: "I am suggesting that we ought not to countenance belief in others that we are amenable, or the assumption that such pressure is legitimate. Even the best of laymen do not understand these things and we ought not unwittingly to countenance wrong popular notions." *Id.* However, as noted below, Frankfurter changed his opinion on this subject because of the Justice Department's conduct.

102. See Letter from Fred M. Vinson, Chief Justice of the Supreme Court, to William O Douglas, Assoc. Supreme Court Justice, (Oct. 17, 1949) (on file with the Library of Congress, William O Douglas Papers Box 380).

versive organizations.”<sup>103</sup> In 1952, Frankfurter, in a dissenting opinion in *On Lee v. United States*, and, in contrast to his earlier position, sought to liberalize the use of amicus briefs on the basis that well researched amici aided the Court.<sup>104</sup> But he also hinted that amicus practice ought to have something of a “level playing field.”<sup>105</sup> In Frankfurter’s first draft of his concurrence, he accused the solicitor general of flagrantly trying to ensure that the government’s position was not overcome by amici.<sup>106</sup> That same year, in *United States v. Lovknit*, which resulted in a denial of certiorari, Frankfurter insisted that while the solicitor general had refused consent for the Congress of Industrial Organizations to file an amicus brief, the refusal was “in no wise governed by a rule of this Court or the policy underlying it.”<sup>107</sup> In 1957, Frankfurter explained his change in opinion by noting that in both *On Lee* and in *Lance v. United States*, an appeal which the Court denied certiorari, the government had acted in disregard of the fairness principles underlying amicus practice.<sup>108</sup> The same year, the solicitor general op-

103. PAUL M. COLLINS JR., *FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING* 42-45 (2008)

104. *On Lee v. United States*, 343 U.S. 924 (1952) (Frankfurter memorandum). In his dissent, Frankfurter urged that the police methods employed—the use of a warrantless intrusion into a defendant’s place of business – was unconstitutional and would lead to slovenly police work. *On Lee v. United States*, 343 U.S. 747, 761 (1952) (Frankfurter, J., dissenting).

105. *On Lee v. United States*, 343 U.S. 924 (1952). Frankfurter’s statement: For the Solicitor General to withhold consent automatically in order to enable this Court to determine for itself the propriety of each application is to throw upon the Court a responsibility that the Court has put upon all litigants, including the Government, preserving to itself the right to accept an amicus brief in any case where it seems unreasonable for the litigants to have withheld consent. If all litigants were to take the position of the Solicitor General, either no amicus briefs (other than those that fall within the exceptions of Rule 27, 28 U.S.C.A.) would be allowed, or a fair sifting process for dealing with such applications would be nullified and an undue burden cast upon the Court. Neither alternative is conducive to the wise disposition of the Court’s business.

*Id.*

106. *See*, First Draft of Felix Frankfurter’s concurrence in *On Lee* (on file with Harvard University, Felix Frankfurter Papers, Reel 31 at 443). However, according to one study, Frankfurter shortly after sought to limit the numbers of amicus briefs to the Court. *See*, Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 *DUKE L. J.* 1, 36 (2011) (citing to Gregory A. Caldeira & John R. Wright, *Amicus Curiae Before the Supreme Court: Who Participates, When, and How Much?*, 52 *J. POL.* 782, 784 (1990)).

107. Memorandum from Felix Frankfurter, Assoc. Justice to the Supreme Court, (Jan. 14, 1952) (on file with Princeton University Special Collections, John Marshall Harlan Papers Box 594).

108. Frankfurter, Memorandum for the Conference (Oct. 15, 1957) (on file with the Library of Congress, Earl Warren Papers Box 656). Frankfurter noted to the justices that he “animadverted against this disregard by the United States of its responsibility under our Rule.” *Lance v. United States* arose from a trial in which the government prevailed in a case

posed Linus Pauling, a Nobel chemist accused of communist sympathies, filing an amicus brief on behalf of William Schneiderman, a former Communist Party member convicted of perjury. Although Justice Brennan had wanted the Court to consider the brief, he did not have enough support to overcome justices who sided with the government, even though other justices had found the solicitor general's opposition distasteful.<sup>109</sup> A rule placing the executive branch on a "level playing field," such as Frankfurter alluded to, can be achieved by requiring disclosure of the key officers' financial holdings.

The idea of the Court's desire to create a "level playing field," in amicus practice has not, in the past, been fully analyzed through available primary sources, but even a partial analysis supports a transparency rule. On November 4, 1952 Chief Justice Fredrick Vinson assigned Justices Stanley Reed, Frankfurter, William O. Douglas, and Robert Jackson to a committee for the revision of the SCR.<sup>110</sup> In turn, Reed, with the concurrence of the committee, appointed Charles Horsky to serve as its advisor. It is important to note that *On Lee* was argued on April 24, 1952 and decided on June 2, 1952. The committee issued its preliminary report on December 29, 1952.<sup>111</sup> Their report condemned the Department of Justice for refusing erstwhile amici consent to file, and recommended that such amici be permitted to file motions to overcome government opposition.<sup>112</sup> Most tellingly, the report hinted that the Justice Department did not have a right to have a greater influence on the Court by using tactics to stifle the arguments of interested persons.<sup>113</sup>

Beginning with the Warren Court, there was an increase in the submission of amicus briefs.<sup>114</sup> The Court appeared to recognize that a liberalization of amicus practice would occur as a result of its 1953 revision of the SCR.<sup>115</sup> In 1966, the Clerk of the Court, John Davis, suggested to Warren

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against a contractor but the district court determined that the interest awarded against the government accrued only after the court's judgment. The Court of Appeals for the Fourth Circuit agreed with the district court's determination on interest accrual. *See Lance, Inc. v. United States*, 190 F.2d 204 (4th Cir. 1951), *cert. denied*, 342 U.S. 915 (1952).

109. *See* Court Memorandum regarding *Yates v. United States* (Nov. 2, 1956) (on file with the Library of Congress, William Brennan Papers Box I-i).

110. Memorandum from Frederick Vinson, Chief Justice of the Supreme Court, to the Supreme Court (Nov. 4, 1952) (on file with the Library of Congress, Hugo Lafayette Black Papers Box 318).

111. Preliminary Report from Warner Gardner and Charles Horsky (Dec. 29, 1952) (on file with the Library of Congress, Hugo Lafayette Black Papers Box 318).

112. *Id.* at 21.

113. *Id.*

114. Ruben J. Garcia, *A Democratic Theory of Appellate Advocacy*, 35 FLA. ST. U. L. REV. 315, 316 (2008).

115. Letter of transmittal from the Supreme Court of the United States to the Committee on Revision of the Rules (Sept. 1, 1953) (on file with the Library of Congress, Hugo

that there was a need to modify the rules governing amicus because “in recent years the Court has almost, without exception, granted leave of interested parties to file such briefs, and the motion procedure is becoming almost a matter of form.”<sup>116</sup> Perhaps this was a result of Justice Black’s efforts during the 1953 rules revision. Although he did not serve on the committee, Black published a memorandum that explained his oppositions to restrictions against amici imposed by the Justice Department in more vigorous terms than the committee. In his earlier “pencil draft,” he accused the SCR and Justice Department of placing “insuperable obstacles” against persons from bringing legal arguments and facts to the Court that the litigating parties were unable to do.<sup>117</sup> In his later published memorandum Justice Black omitted his accusatory language but noted his reasons for an expanded amicus practice was twofold. First, because “most of the cases before the Court involve matters that effect more people than the immediate record parties,” and second, that a more open amicus practice would better serve “the public interest.”<sup>118</sup> In essence, Black sought to democratize amicus practice, but in doing so, like the committee, he wanted to ensure that the executive branch was not entitled to an advantageous position over other litigants.

The FRAP, in its current form, requires a person or organization seeking to file an amicus brief to obtain the permission of the litigating parties or by special motion to the appellate court.<sup>119</sup> Both the FRAP and SCR exempt the United States from having to obtain the permission of the litigating parties, or motion the respective Court to receive an amicus brief.<sup>120</sup> Both rules enable states, cities, and municipalities to file amicus briefs without the consent of the named parties.<sup>121</sup> The FRAP enable amicus filings before an appeal is heard on the merits, as well as in motions for re-

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Lafayette Black Papers Box 318). The report noted, “consent is now liberally given except to obvious propaganda groups and two subdivisions of groups otherwise represented; and it may be ventured that the Court can, by appropriate informal suggestion to the then Solicitor General prevent a future recurrence if it desires to do so.” *Id.*

116. Letter from John F. Davis, Clerk of the Supreme Court, to Earl Warren, Chief Justice of the Supreme Court (Sept. 27, 1966) (on file with the Library of Congress, Earl Warren Papers Box 656).

117. Personal notes from Hugo Black, Assoc. Justice of the Supreme Court (1953) (on file with the Library of Congress, Hugo Lafayette Black Papers Box 318).

118. Memorandum from Hugo Black, Assoc. Justice of the Supreme Court, to the Rules Conference (Apr. 4, 1954) (on file with the Library of Congress, Hugo Lafayette Black Papers Box 318).

119. FED. R. APP. P. 29.

120. *Id.* at (a)(2). The rule states: “When Permitted. The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.” *Id.*

121. *Id.*



consideration, and for *en banc* review.<sup>122</sup> In such instances, government attorneys do not have to obtain the consent of the named parties or motion the court to file.<sup>123</sup> Neither the SCR nor the FRAP provide a means for a litigating party to object to a court of appeals (or Supreme Court) review of an amicus brief.

There are other significant differences between private amici and the government. The FRAP imposes a transparency rule on corporate entities filing amicus briefs to disclose all investment holdings so that the presiding judges are able to determine whether recusal is necessary.<sup>124</sup> The statement must identify any parent corporation, as well as publicly held corporations that own more than ten percent of the amici's stock, or state that no corporation exists.<sup>125</sup> Similarly, the SCR places requirements on non-governmental amici such as a statement informing the Court on persons or entities who funded the research and writing of the brief, as well as any relationship between the named party and the amici.<sup>126</sup> The SCR also requires notification to the Court as to whether the attorneys representing a named party also assisted in the research or writing of the brief.<sup>127</sup> However, the SCR exempts the solicitor general from these requirements. Like the SCR, the FRAP requires a corporate disclosure statement for all parties named in a case heading or on the submission of a brief to the Court.<sup>128</sup> But, once more, the solicitor general and other federal agency counsel are exempted from having to divulge senior executive branch officers' potential interest in the outcome of an appeal.

In addition to the modern history of modern judicial appellate rule making, certain judicial statements support the enactment of a transparency rule. For instance, in *Northern Pipeline Construction Co. v. Marathon Pipeline*, the Court, in an opinion authored by Justice Brennan, reiterated that the federal judiciary was entrusted with the duty of ensuring impartial tri-

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122. FED. R. APP. P. 29(b).

123. *Id.*

124. FED. R. APP. P. 29(a)(4)(A).

125. FED. R. APP. P. 26.1; FED. R. APP. P. 29(a)(4)(A) (informs amici that compliance with Rule 26.1 is required).

126. SUP. CT. R. 37(6).

127. *Id.*

128. Sup. Ct. R. 29(6) reads:

Every document, except a joint appendix or amicus curiae brief, filed by or on behalf of a nongovernmental corporation shall contain a corporate disclosure statement identifying the parent corporations and listing any publicly held company that owns 10% or more of the corporation's stock. If there is no parent or publicly held company owning 10% or more of the corporation's stock, a notation to this effect shall be included in the document.

SUP. CT. R. 29(6).

bunals.<sup>129</sup> Justice Kennedy, in his dissent, in *Alaska Department of Environmental Conservation v. EPA* noted that “[t]he principle that judicial decisions cannot be reopened at the whim of the Executive or the Legislature is essential to preserving separation of powers and judicial independence free from coercive governmental pressures.”<sup>130</sup> Justice Kennedy, along with Justices Scalia, Thomas, and Chief Justice Rehnquist, objected to the EPA overturning a state judicial decision by fiat.<sup>131</sup> Applied more broadly, since a solicitor general is permitted to influence the Court by the Court’s own invitation for his/her views, or through an unrestrained amicus filing, the solicitor general could potentially assist in such a judicial fiat. Surely, the Court would desire to protect the judiciary from such a possibility.

## II: DUTIES AND INFLUENCE OF THE SOLICITOR GENERAL

The need for a transparency rule in amicus filings can also be understood in light of the solicitor general’s statutory construct and history, as well as in its institutional influence on the judiciary and the conflicting representational theories of the solicitor general’s office. The solicitor general of the United States is charged with the duty of representing the interests of the nation.<sup>132</sup> This is an amorphous standard, if, for no other reason than that the nation is diverse and there are diverse interests within it. The solicitor general possesses a unique influence on the judiciary, in part because of the Supreme Court’s historic allowance for the solicitor general to do so. In addition to representing the executive branch’s claimed interests of the United States, the office also serves as a “gatekeeper,” or “advisor,” as to

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129. *N. Pipeline Constr. Co. v. Marathon Pipe Line, Co.*, 458 U.S. 50, 58 (1982).

130. *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461, 512 (2004) (Kennedy J., dissenting).

131. *Id.* at 518.

132. 28 U.S.C.S. § 518 (LexisNexis 2017). This statute reads:

(a) Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the United States Court of Federal Claims or in the United States Court of Appeals for the Federal Circuit and in the Court of International Trade in which the United States is interested.

(b) When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so.

*Id.*

whether the Court should grant certiorari in specific cases.<sup>133</sup> Additionally, the solicitor general also has an authority to “confess error” to the Court. That is, she or he may inform the justices that the government’s argument before a lower court was flawed and now seeks the Court to reverse an earlier decision.<sup>134</sup> While, historically, the Court does not bind the government to its original position in the lower courts, there is no evidence that the Court is reticent to examine a solicitor general amicus brief for inconsistencies with the government’s past positions. Thus far, the Court has been silent on the solicitor general’s conduct in *Murphy Oil*.<sup>135</sup>

The executive branch’s role in enabling the solicitor general to influence the federal judiciary is evidenced in the Code of Federal Regulations. The solicitor general possesses both a decisional authority and a supervisory authority over federal attorneys. She or he not only conducts or assigns all appeals or arguments advocating the denial of certiorari before the Supreme Court, he or she also “supervises” federal attorneys involved these processes.<sup>136</sup> As an example, suppose that attorneys in the Food and Drug Administration believe that a government policy is necessary to safeguard the production of pharmaceuticals. Some of these attorneys may have even crafted the policy, but if the policy is challenged in the federal courts, the solicitor general may shape the arguments supporting the policy in a manner differing from the intent of the policy’s drafters, or may determine to concede that the policy is encumbered by legal impediments.<sup>137</sup> The Seventh Circuit Court of Appeals observed that the right of representing the United States on appeals is the solicitor general’s alone.<sup>138</sup> In 1994, the

133. See, e.g., 28 U.S.C.S. § 516 (LexisNexis 2016); Margaret H. Lemos, *The Solicitor General as a Mediator between Court and Agency*, 2009 MICH. ST. L. REV. 185 (2009); SALOKAR, *supra* note 17, at 1.

134. See generally LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 9 (1987); David M. Rosenzweig, Note, *Confession of Error in the Supreme Court by the Solicitor General*, 82 GEO. L. J. 2079 (1994).

135. At worst, the government may face a chiding by the Court. For instance, in *Orloff v. Willoughby*, 345 U.S. 83, 87 (1953), Justice Jackson, in recognizing that the government had changed its position from the lower court, noted it, along with the other party, “positions as nimbly as if dancing a quadrille.” *Orloff v. Willoughby*, 345 U.S. 83, 87 (1953).

136. 28 C.F.R. § 0.20(a) (2017). This section reads: “Conducting, or assigning and supervising, all Supreme Court cases, including appeals, petitions for and in opposition to certiorari, briefs and arguments, and, in accordance with § 0.163, settlement thereof.” *Id.* See also, e.g., RICHARD PACELLE, *BETWEEN LAW AND POLITICS: THE SOLICITOR GENERAL AND THE STRUCTURING OF RACE GENDER, AND REPRODUCTIVE RIGHTS* 5 (2005); Edward N. Beiser et al., *Perspectives on the Judiciary*, 39 AM. U. L. REV. 475, 480 (1990).

137. See, e.g., 28 C.F.R. § 0.20 (2017).

138. *United States v. Hare*, 269 F.3d 859, 861 (7th Cir. 2001).

Court favorably commented on the concentration of the solicitor general's authority over the individual agencies.<sup>139</sup>

The solicitor general determines whether to pursue appeals to the courts of appeal as well.<sup>140</sup> In cases in which the United States is not a named or direct party, the solicitor general has the sole decision whether to file an amicus brief to an appellate court, including the Supreme Court.<sup>141</sup> No settlement, compromise offer, or acceptance by a federal agency may be accomplished without the solicitor general's approval.<sup>142</sup> Finally, the solicitor general is charged with a duty of assisting the attorney general develop legal policies for government operations.<sup>143</sup>

#### A. HISTORY AND PURPOSE OF THE SOLICITOR GENERAL

Congress established the position of an attorney general in 1789, but this cabinet officer was not given a staff and his salary was less than that of the other cabinet officers.<sup>144</sup> Much of the government's litigation was sourced to private attorneys, including in cases where the United States was

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139. Fed. Election Comm'n v. NRA Political Victory Fund, 513 U.S. 88, 96 (1994) (Authored by Chief Justice Rehnquist, the Court's majority accepted the following commentary into the opinion:

But the practice also serves the Government well; an individual Government agency necessarily has a more parochial view of the interest of the Government in litigation than does the Solicitor General's office, with its broader view of litigation in which the Government is involved throughout the state and federal court systems. Whether review of a decision adverse to the Government in a court of appeals should be sought depends on a number of factors which do not lend themselves to easy categorization. The Government as a whole is apt to fare better if these decisions are concentrated in a single official.).

140. 28 C.F.R. § 0.20(b) (2017). This section reads:

Determining whether, and to what extent, appeals will be taken by the Government to all appellate courts (including petitions for rehearing *en banc* and petitions to such courts for the issuance of extraordinary writs) and, in accordance with § 0.163, advising on the approval of settlements of cases in which he had determined that an appeal would be taken.

*Id.*

141. 28 C.F.R. § 0.20(c) (2017) ("Determining whether a brief amicus curiae will be filed by the Government, or whether the Government will intervene, in any appellate court.").

142. 28 C.F.R. § 0.163 (2017). However, in instances where Congress has provided authority to a specific agency, the agency can settle suits without the Solicitor General's approval. *See, e.g.*, 42 U.S.C. § 2000e-5(f)(1) (2012) (EEOC has authority to settle cases).

143. 28 C.F.R. § 0.20(d) (2017). Assisting the Attorney General, the Deputy Attorney General and the Associate Attorney General in the development of broad Department program policy. *Id.*

144. Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 581 (1989).

a party to an appeal.<sup>145</sup> Caleb Cushing, while serving as attorney general during Franklin Pierce's presidency, opined that the President had the authority to direct the attorney general to undertake litigation on behalf of the United States.<sup>146</sup> Since that time, no attorney general or solicitor general has issued a formal statement in opposition to Cushing's opinion.

After the Civil War, Attorney General Henry Stanberry informed Congress that his office was unable to meet the demands of representing the United States Government in the federal courts.<sup>147</sup> The Office of the Solicitor General was created in 1870, during Ulysses S. Grant's presidency. The position was created as part of an overall governmental reorganization, which also created the Department of Justice.<sup>148</sup> Originally, Congress did not intend for the Office of the Solicitor General or the Department of Justice to be a partisan entity.<sup>149</sup>

Rather, Congress intended for the government to have consistent and centralized representation in the Court as well as centralized law enforcement over federal matters.<sup>150</sup> Grant nominated Benjamin Helm Bristow to serve as the first Solicitor General. In two years, he argued over forty cases to the Court, and developed a reputation for thoroughness and efficiency.<sup>151</sup> His personal writings while in office evidence that he viewed his office as having fidelity to the law over a transient government policy or for the political benefit of the administration. For instance, in response to a query from the acting Secretary of the Interior as to why a large sale of Kansas Native American land could not be sold in a single large bloc – and therefore bring a greater amount of money into the government – Bristow responded “when the language of a law is explicit and involved in no obscurity, there is no room for construction, and hence no occasion to look beyond the letter of the law itself for its meaning and purpose.”<sup>152</sup> In another letter,

145. See, e.g., Seth P. Waxman, *Presenting the Case of the United States as it should be*, *The Solicitor General in Historical Context*, *Address to the Supreme Court Historical Society*, U.S. DEP'T OF JUST. (June 1, 1998), [https://www.justice.gov/osg/about-office#N\\_7\\_](https://www.justice.gov/osg/about-office#N_7_) [<https://perma.cc/NK9Z-WDHV>].

146. See, e.g., Office and Duties of Att'y Gen., 6 Op. Att'y Gen. 326, 335 (1854).

147. RYAN C. BLACK & RYAN J. OWENS, *THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT: EXECUTIVE BRANCH INFLUENCE AND JUDICIAL DECISIONS* 13 (2012).

148. Act to Establish the Department of Justice, ch. 150, 16 Stat. 162, 162-63 (1870).

149. See, e.g., Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization without Civil Rights or Civil Service*, 66 *STAN. L. REV.* 121, 126 (2014).

150. *Id.*

151. David D. Frederick, *Advocacy Before the Supreme Court: 1791 to the Present*, in *THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE* 382, 386 (Christopher Tomlins ed., 2005).

152. Letter from B. H. Bristow, Solic. Gen., to B. R. Cowen, Acting Sec'y of the Interior 369 (Sept. 18, 1871) (on file with the Library of Congress).

Bristow noted that while he believed that the Fourteenth Amendment's provision prohibiting former confederate officers from serving in the government was a mistake, and that a liberal amnesty would aid Grant's reelection, he would have to argue for enforcement of the prohibition until its revocation.<sup>153</sup> When Bristow resigned as solicitor general, he did not give Grant any specific reason for his resignation. Bristow stated that "[I] trust that your administration for the next term may be free from many of the cares that I know have attended the first."<sup>154</sup>

Since its creation, the solicitor general has a unique distinction in United States law in that the office holder is the only government officer required to be "learned in the law."<sup>155</sup> Although governmental ethics was not the primary motivation for the creation of either the Department of Justice or the Office of the Solicitor General, there were expectations placed on the solicitor general that in representing the United States, the solicitor general would also be representing the "best interests" of the United States.<sup>156</sup> And, while the solicitor general can be viewed as a quasi-independent office in the sense that the attorney general does not shape the executive branch's appeals, the solicitor general has, at times, acted to protect the president. For instance, in 1971 Solicitor General Erwin Griswold opposed the government's conduct leading to the so-called *Pentagon Papers* case, but dutifully argued the case to the Supreme Court.<sup>157</sup>

Although the federal government's first amicus brief appears to have occurred in 1854, the solicitor general did not file an amicus brief until 1909 to protect the constitutionality of a statute.<sup>158</sup> The decision, the *Second Employers Liability Cases*, arose from two railroad corporations' challenges to the *Employer's Liability Act of 1908*.<sup>159</sup> Ora L. Babcock, a fireman employed by the Northern Pacific Railway, and Daniel Walsh, a brakeman employed by the New York, New Haven, and Hartford Railroad were killed

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153. Letter from B. H. Bristow, Solic. Gen., to E. H. Bristow 369 (May 27, 1872) (on file with the Library of Congress).

154. Letter from B. H. Bristow, Solic. Gen., to Ulysses S. Grant, President of the U.S. 86 (Nov. 8, 1872) (on file with the Library of Congress).

155. 28 U.S.C. § 505 (2017) ("The President shall appoint in the Department of Justice, by and with the advice and consent of the Senate, a Solicitor General, learned in the law, to assist the Attorney General in the performance of his duties.")

156. See Wade H. McCree Jr., *The Solicitor General and his Client*, 59 WASH. U. L. Q. 337 (1981).

157. See, e.g., Kristen A. Norman-Major, *The Solicitor General: Executive Policy Agendas and the Court*, 57 ALB. L. REV. 1081, 1086 (1994).

158. See Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 96 (1993); Omari Scott Simmons, *Picking Friends from the Crowd: Amicus Participation as Political Symbolism*, 42 CONN. L. REV. 185, 213 (2009); see also *Florida v. Georgia*, 58 U.S. 478 (1855) (the first appeal in which the United States filed an amicus brief). On the first Solicitor General amicus brief.

159. *Mondou v. N.Y.*, New Haven & Hartford R.R., 223 U.S. 1 (1912).

while working.<sup>160</sup> The trials and appeals, pitted the estates of the deceased workers against the railroads.<sup>161</sup> The United States was not a named party at any time during this process. The railroad corporations objected to a federal statute that required compensation to the families of the decedent and argued that traditional “master and servant law” was the sole province of the state legislatures.<sup>162</sup> Solicitor General Lloyd Bowers, with President Taft’s permission filed an amicus brief which argued that Congress possessed the authority to enact legislation governing workers’ compensation in interstate commerce.<sup>163</sup> The underlying purpose for the government’s amicus brief was to protect congressional authority to enact laws to govern aspects of interstate commerce.<sup>164</sup> President Woodrow Wilson’s first Solicitor General, John W. Davis, filed six amicus briefs to the Court during his tenure from 1913 to 1918, and later informed Robert Jackson that this ability made the position “not to be sneezed at from a lawyer’s standpoint.”<sup>165</sup> In con-

160. ALBERT EDWARD WILSON, WORKMEN’S COMPENSATION AND EMPLOYERS’ LIABILITY ACTS 8-10 (1917).

161. *Id.*

162. *Id.*

163. *See, e.g.*, WORKMEN’S COMPENSATION AND EMPLOYER’S LIABILITY: OPINIONS OF THE STATE SUPREME COURTS AND UNITED STATES SUPREME COURT S. Doc. No. 62-475, at 144 (2d Sess. 1912). “The foregoing brief was prepared by the late Solicitor General Lloyd W. Bowers, (who died in September, 1910) with his accustomed care and ability. In order that it may be properly before this Court, I adopt it and ask its consideration – Attorney General George Wickersham, December 1910.” *Id.*

163. *See, e.g.*, Letter from Mosely to Att’y Gen. Wickersham (Apr. 22, 1910)

164. *See, e.g.*, Letter from Mosely to Att’y Gen. Wickersham (Apr. 22, 1910) (on file with the Library of Congress, William Howard Taft Papers, Reel 325). In which Mosely lobbies the Justice Department to enforce railway safety rules in appealing four lower court decisions to the Supreme Court. “One of the vital questions pending before the Supreme Court is the question of the Constitutionality of the Interstate Railroad Employers Liability Act involved in several appeals now on the docket.” *Id.*; *see also* Letter from Mosely to Taft (Aug. 27, 1910) (on file with the Library of Congress, William Howard Taft Papers, Reel 325). He advises the President:

There are four Safety Appliance cases now pending on appeal in the Supreme Court of the United States. These cases are all important. Vital questions of the extent of federal power are involved in each of them....

Sovereignty over the regulation of interstate commerce exists only in the federal government. Where the necessity exists out of the complexity of the traffic, that one power should alone regulate both intra and interstate traffic, in order that any regulation of the latter may be effacious, the power is ample in the federal government.

*Id.*

165. Letter from Davis to Jackson (Jan. 18, 1940) (on file with the Library of Congress, Robert Jackson Papers Box 11). Jackson responded that “the work as Solicitor General was pleasant and stimulating, and compared to administrative work, is enduring.” Letter from Jackson to Davis (Feb. 6, 1940) (on file with the Library of Congress, Robert Jackson Papers Box 11).

trast, the solicitor general filed nine amicus briefs for appeals already granted certiorari in the 2016 term alone.

It is true that on a very small number of occasions the solicitor general has acted contrary to the executive branch's claimed interests. The most notable of these occurred in 1953 when Solicitor General Simon Sobeloff disagreed with the executive branch's assertion of national security necessity in *Peters v. Hobby* and recused himself from arguing the government's position.<sup>166</sup> An officer of the United States was a named party in this case. Warren Burger, who was then a Deputy Attorney General in charge of the Department of Justice's Civil Division, took Sobeloff's place.<sup>167</sup> Sobeloff's decision to recuse himself from the argument was not without its detractors. Burger opined that Sobeloff had a duty to resign from the government.<sup>168</sup> Sobeloff, in this instance, however, did nothing more than follow Bristow's example in refusing to argue for a position he viewed as contrary to law. In another instance, in *Bob Jones University v. United States*, the acting solicitor general did not approve of the executive branch's position in an appeal arising from the question of whether the Internal Revenue Service had to grant tax exempt status to private racially segregated schools.<sup>169</sup>

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166. Herman Schwartz, *Warren Earl Burger*, in *BIOGRAPHICAL ENCYCLOPEDIA OF THE SUPREME COURT: THE LIVES AND LEGAL PHILOSOPHIES OF THE JUSTICES* 92 (Melvin Urofsky ed., 2009).

167. *Peters v. Hobby*, 349 U.S. 331 (1955); EARL M. MALTZ, *THE CHIEF JUSTICESHIP OF WARREN BURGER: 1969-1986* 9 (2000); CORNELL CLAYTON, *THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY* 55 (2015); ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 300 (1987). *Peters* was a medical professor at Yale University and the government had employed him as a special consultant to the United States Public Health Service. The Secretary of the Department of Health, Education, and Welfare removed *Peters* from his consulting position after a loyalty review board determined, based on anonymous sources, that his loyalty to the United States was doubtful. Although *Peters* was permitted to appeal the decision, the administrative process afforded him only a limited right of confrontation. The Court, contrary to Burger's argument, found that the administrative process had denied *Peters* the due process required in adverse administrative hears. *Snyder v. Harris*, 394 U.S. 332, 348 (1969). Essentially, the Court's decision and Sobeloff's reasoning for refusing to argue for the government were in concert.

168. See e.g., BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* (1979).

169. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); See, e.g., Brief for the United States at 1, *Goldboro Christian Schools, Inc. v. United States*, 454 U.S. 892 (1981) (No. 81-1) and *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (No. 81-3). In the brief, the acting Solicitor General noted:

This brief sets forth the position of the United States on both questions presented. The Acting Solicitor General fully subscribes to the position set forth on question number two, only. His views on question one are set forth in the Brief for the United States filed in this Court in September 1981, in response to the petitions for certiorari in these cases. Those views are more fully developed in a draft brief on the merits which was ready to be printed for timely filing in early January 1982. Copies of that



Instead, the acting solicitor general merely referenced arguments made before the lower courts as dispositive of the government's position. However, just as in the case of *Peters v. Hobby*, the government was a party to this case. Both of these instances show that the solicitor general possesses limited institutional independence from the executive branch. However, neither instance is practicable for assessing whether the ethical standards regarding the solicitor general duties provide transparency and fairness for parties appealing to the federal courts, and in particular, the Supreme Court.

On one occasion, a solicitor general authored an amicus brief where the government had an interest that was so attenuated that the solicitor general authored the brief in his private capacity. In 1938, Robert Hougwout Jackson, advised an organization preparing an amicus brief to the Ohio courts on behalf of Edward Lamb, an attorney facing disbarment.<sup>170</sup> Lamb was a member of the Lawyer's Guild, the Congress of International Organizations, and he represented a labor union. During a state trial, the judge accused him of disrespecting the state courts.<sup>171</sup> The trial judge appointed a committee to investigate Lamb's conduct and then adopted the committee's recommendation to disbar Lamb.<sup>172</sup> The *Chicago Tribune* reported public criticism against Jackson for filing an amicus as a solicitor general, as well as his response in which he believed that he had an obligation to ensure the judiciary's fairness to all litigants and attorneys.<sup>173</sup> In answering a citizen who criticized him, Jackson responded, "[w]e can have no worthy judicial system unless we protect the right of advocates to champion the cause of any person who becomes involved in the machinery of the law."<sup>174</sup>

Although one could point out Sobeloff's independence and Jackson's willingness to represent his position in an amicus brief to a state court, there are examples of a solicitor general advocating a presidential position, regardless of the fairness to the party in opposition. For much of World War II, Charles Fahy served as solicitor general. According to historian Peter Irons, Fahy suppressed countervailing evidence and argued that it was nec-

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draft brief were furnished by the Department of Justice in late January 1982, pursuant to request, to the Senate Finance Committee and the House Ways and Means Committee, along with other documents requested by those committees.

Eric Schnapper, *Becket at the Bar- The Conflicting Obligations of the Solicitor General*, 21 LOY. L.A. L. REV 1187, 1187-88 n.3 (1988).

170. Brief for Robert H. Jackson as Amici Curiae, In the Matter of Charges Against Edward Lamb (1938) (No. 29986) (on file with the Library of Congress).

171. See, Note, *The Lamb Disbarment Proceedings*, 47 YALE L. J. 1383 (1938).

172. *Id.*

173. Chesley Manley, *Jackson Fights Disbarment of C.I.O. Attorney: Solicitor General Backs Ohio Lawyer*, CHI. TRIB., June 23, 1938, at 11.

174. Letter from Jackson to William S. Daley (June 7, 1938) (on file with the Library of Congress, Robert H Jackson Papers Box 82).

essary to uphold President Franklin Roosevelt's order to intern United States citizens who were of Japanese descent.<sup>175</sup> That is, the Office of Naval Intelligence concluded that there was little to no threat to the United States from the class of persons interned.<sup>176</sup> Moreover, not only were the majority of persons imprisoned United States citizens, their imprisonment occurred as a result of an executive branch order.<sup>177</sup> In 1962, Fahy wrote to Attorney General Francis Biddle, "I thought the evacuation unnecessary and unwise but did think it would be upheld as constitutional if the military decided it was necessary."<sup>178</sup> Whether Fahy deliberately suppressed evidence from the Court or engaged in selective presentation of evidence is not the subject of this article, other than to point out that wholesale judicial deference to the President during crisis time has its dangers when the United States is a named party and that the proposed transparency rule could help prevent another occurrence.

Even if Fahy engaged in selective presentation, he is not the only solicitor general to do so in the national security context. In 1954, as Sobeloff prepared to argue the government's position in *United States ex rel Toth v. Quarles* on the constitutionality of a statute that enabled the military to assert court martial jurisdiction over discharged soldiers who had been accused of committing a crime while on active duty, he too kept important information from the Court.<sup>179</sup> *Toth* originated when a former service member was forced back into active duty to face a court martial. Historically, military jurisdiction was held to be unconstitutional when exercised over civilians and, unlike a retired service member, a discharged service member was (and is) by legal status, a civilian.<sup>180</sup> During Sobeloff's argument, he presented evidence to the Court that the United Kingdom, Australia, and Canada—three legal systems somewhat akin to the United States—also permitted extended military jurisdiction.<sup>181</sup> However, during his preparations

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175. See, e.g., PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES* 205-06 (1993).

176. *Id.*

177. See, *Korematsu v. United States*, 323 U.S. 214 (1944); *Ex parte Endo*, 323 U.S. 283 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943). On March 21, 1942 Congress confirmed the Executive Order. See, Act of Mar. 21, 1942, ch. 191, 56 Stat. 173 (1942).

178. Letter from Fahy to Biddle (Dec. 12, 1962) (on file with the Library of Congress, Charles Fahy Papers 2). Biddle answered Fahy, "I know that you argued the *Korematsu* case, and with some distaste." Letter from Biddle to Fahy (Dec. 19, 1962) (on file with the Library of Congress, Charles Fahy Papers 2).

179. *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

180. See, e.g., *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *Ex Parte Milligan*, 4 Wall. 2 (1866).

181. Simon Sobeloff, Notes, Draft Arguments, undated (1955) (on file with the Library of Congress, Simon Sobeloff Papers Box 26); BERNARD SCHWARTZ, *DECISION: HOW THE SUPREME COURT DECIDES CASES* 117 (1996).

he also learned that key legal officers in each of these countries expressed doubts on the legal efficacy of continuing the practice in their own legal systems, and in a short time the British, Australian, and Canadian governments would terminate their broad analogous extension of military jurisdiction.<sup>182</sup> Unlike *Korematsu*, the government did not prevail in *Toth* and the case was decided by a vote of six to three against the executive branch. Yet, this episode does provide evidence that a wholesale deference to the solicitor general can deprive the Court of important information and perhaps there might have been a unanimous opinion.

#### B. THEORIES OF REPRESENTATION

Who the solicitor general represents bears equally on the question of fairness to the named parties in an appeal when the United States is not a party, as it does on the Court's ability to protect its own integrity. More than one scholar has argued that the solicitor general represents the president.<sup>183</sup> Michael Solimine, in his study on the solicitor general concluded that the decision to file an amicus brief is a political process either in fact, or by perception.<sup>184</sup> Louis Fisher opined that the solicitor general's "impartial" objectives are frequently subordinated to the "particular and immediate needs of the president."<sup>185</sup> Professor Joshua Schwartz, a former assistant to the solicitor general, argued that a recognized "limited independence," while not constitutionally mandated, does provide the solicitor general a degree of moral authority in using the office to inform the Court that the national interests inherent in an appeal should be granted certiorari.<sup>186</sup>

If there is a scholarly debate as to whom a solicitor general represents, it may be because solicitor generals have hardly been uniform in their views as to whom they represent. In 1969, Erwin Griswold opined that the solicitor general's office had a two-fold duty to represent the executive branch,

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182. Letter from W.S. McKinnon to Kuhfeld (Sept. 9, 1955); Letter from C.E. Long to Kuhfeld (Aug. 13, 1955); Letter from Kuhfeld to Sobeloff (Sept. 11, 1955); *See also*, Simon Sobeloff, Brief to the Court (on file with the Library of Congress, Simon Sobeloff Papers Box 26). Although Sobeloff briefed the Court that Britain, Canada, Australia, and New Zealand had laws permitting continuing jurisdiction over former servicemen similar to that as had been used to justify *Toth*'s recall and court-martial, he failed to disclose that such courts-martial had never been held or the allied officers' opinions as to why this was so.

183. *See, e.g.*, CORNELL W. CLAYTON, *THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY* 58-61 (1992); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 411 (2002).

184. Solimine, *supra* note 17, at 1203.

185. LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS A POLITICAL PROCESS* 26 (1988).

186. Joshua Schwartz, *Two Perspectives on the Solicitor General's Independence*, 21 *LOY. L.A. L. REV.* 1119, 1123 (1988).

but also to aid the Court.<sup>187</sup> In 1955, Simon Sobeloff stated, “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.”<sup>188</sup> In his exposition on this subject, Sobeloff also distinguished the duty of representing the United States from representing a private litigant. Unlike a private litigant's attorney, he believed that the solicitor general had to be cognizant that a change in the law could affect a function of the United States Government for decades.<sup>189</sup>

A decade earlier, Francis Biddle, who served as solicitor general on the eve of the United States' entry into World War II before becoming attorney general, opined that the solicitor general is “responsible neither to the man who appointed him nor to his immediate superior. . . [and has] no master to serve except his country.”<sup>190</sup> Biddle's opinion is problematic for the simple reason that if it were cemented into law, the executive branch would be without its foremost appellate representative to defend it. Moreover, Biddle did not always shy from providing political advice on potential appeals to protect Roosevelt's New Deal majority in Congress. In 1940, Biddle and (then) Attorney General Robert Jackson advised Senator Richard Russell against enacting a bill to deport Harry Bridges, a foreign national leader of the nation's largest longshoreman's union who was accused of spreading communism, because such a bill would constitute a bill of attainder.<sup>191</sup> Biddle also implored Attorney General Jackson to issue a statement that Bridges remained under investigation because he feared that at least three congressional seats held by pro-New Deal Democrats would be lost in the general election that November.<sup>192</sup>

Biddle's opinion on a solicitor general's duties, moreover, hardly appears to be the prevailing view. Theodore Olson a solicitor general during George W. Bush's presidency, lauded former solicitor general Rex Lee for his performance in *Dames & Moore v. Regan* as an example of the importance in sustaining a president's Article II authority during times of national crisis.<sup>193</sup> The government's position and the Court's decision resulted

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187. Erwin 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)

188. Simon E. Sobeloff, *Attorney for the Government: The Work of the Solicitor General's Office*, 41 A.B.A. J. 229, 229 (Mar. 1955).

189. *Id.* at 230.

190. FRANCIS BIDDLE, IN BRIEF AUTHORITY 97-98 (1962).

191. Letter from Jackson to Richard Russell (June 18, 1940) (on file with the Library of Congress, Robert Jackson Papers Box 86).

192. Letter from Biddle to Jackson (Aug. 22, 1940) (on file with the Library of Congress, Robert Jackson Papers Box 86).

193. Transcript: In Memory of Rex E. Lee (1937-1996), Rex E. Lee Conference on the Office of the Solicitor General of the United States, *The Advocate as Friend: The Solici-*

in private litigation being terminated by judicial fiat to sustain the foreign policy authority of the executive branch.<sup>194</sup> While in this instance, the solicitor general represented the secretary of the treasury as a named party and not as an amicus, it does evidence that the advocacy was partly based on the protection of a policy rather than wholly as a sustainment of law.<sup>195</sup> Kenneth Starr opined that the solicitor general provides consistency in the government's litigation by controlling the appellate processes.<sup>196</sup>

William Howard Taft served as solicitor general for a two-year stint beginning in February 1890. His view on representation appears to be that he had a duty to align with the President. In one instance arising from a challenge against the government's taxation of a distillery, Taft informed his father that he had little confidence in the government's case, but the Court had the final authority to decide which side was in the right.<sup>197</sup> Implied in this comment is that Taft felt he had to advocate for President Benjamin Harrison even though he believed that the government would lose its appeal. After a year in the position, Taft described to his father that while he had some authority over which cases to appeal, he still consulted with the attorney general before filing a brief.<sup>198</sup> In perhaps the most telling instance on how Taft viewed his position, he determined that he would vigorously argue the McKinley Tariff Act's legal validity to the Court, even though it was an unpopular bill and he had previously advised President Harrison that it was an unwise law.<sup>199</sup>

Charles Fried, who served as solicitor general from 1985 to 1989, provides a key example of a solicitor general's loyalty to the policies of a president. In 1980, Ronald Reagan ran for office with a promise to end abortion.<sup>200</sup> Although in 1973, the Court had, in *Roe v. Wade*, accepted that

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*tor General's Stewardship Through the Example of Rex E. Lee*, 2003 B.Y.U. L. REV. 1, 7 (2003).

194. See, e.g., Joel S. Telpner, Note, *Dames & Moore v. Regan: Rethinking the Fifth Amendment Implications of the Iranian Hostage Agreement*, 68 IOWA L. REV. 123 (1982).

195. *Dames & Moore v. Regan*, 453 U.S. 654 (1981). On criticism of this decision see, e.g., Arthur S. Miller, *Dames & Moore v. Regan: A Political Decision by a Political Court*, 29 UCLA L. REV. 1104 (1981); J.R. Cooke, *Dames & Moore v. Regan, Rights in Conflict: The Fifth Amendment Held Hostage*, 31 AM. U. L. REV. 345 (1981).

196. Edward Beiser, *Remark: Perspectives on the Judiciary*, 39 AM. U. L. REV. 475, 480 (1990).

197. Letter from William Howard Taft to Alphonso Taft (Jan. 6, 1891) (on file with the Library of Congress, William Howard Taft Papers, Reel 17).

198. Letter from William Howard Taft to Alphonso Taft (Feb. 14, 1891) (on file with the Library of Congress, William Howard Taft Papers, Reel 17).

199. Letter from William Howard Taft to Alphonso Taft (Mar. 7, 1891) (on file with the Library of Congress, William Howard Taft Papers, Reel 17). The Tariff was addressed by the Court in *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892).

200. See, e.g., LAURA KALMAN, *RIGHT STAR RISING: A NEW POLITICS* 364 (2010). Kalman, however, correctly noted that abortion had become a national political issue in 1972

women had a lawful right to obtain abortions, both the Court and the continuance of abortions remained a politically charged issue which divided the nation.<sup>201</sup> In 1986, Fried argued in an amicus brief to the Court to overturn *Roe* in *Thornburgh v. American College of Obstetricians and Gynecologists*.<sup>202</sup> In other words, the United States was not a party to this appeal, yet the solicitor general filed a brief mirroring the President's election promises in both 1980 and 1984, leading to accusations that Fried had politicized his office.<sup>203</sup>

Justice Harry A. Blackmun, who authored *Roe*, wanted to publicly reproach Fried for his actions in *Thornburgh* by including the statement "for the solicitor general to ask us to discard a line of major constitutional rulings in a case where no party has made a similar request urges that we take occasion to overrule those cases, is, to say the least, unusual."<sup>204</sup> While Justice Lewis Powell agreed with Blackmun that Fried's conduct was overly political, he successfully lobbied Blackmun not to specifically criticize the solicitor general. Instead, Powell noted that the Court had already *rebuffed* the solicitor general by denying him an oral argument as well as by reaffirming *Roe v. Wade*.<sup>205</sup>

Fried was not the first solicitor general to file an amicus brief that represented a presidential policy. According to former Solicitor General Drew Days, when, in 1948, Solicitor General Philip Perlman filed an amicus brief with the Court to urge that racially restrictive covenants were unconstitutional, he did so with President Harry Truman's support.<sup>206</sup> The decision, *Shelley v. Kraemer*, did not involve the United States as a litigant, but clearly the United States had an interest in ensuring that housing discrimination was found to be unconstitutional, not only as a reflection of the promise of

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when President Nixon's campaign accused his opponent, Senator George McGovern of being a spokesman for "acid, amnesty, and abortion." The "amnesty" allegation had to do with McGovern's position on the Vietnam Conflict. *Id.*

201. *Roe v. Wade*, 410 U.S. 113 (1973).

202. LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1987).

203. See, e.g., *Solicitor General, Has the Office Been Politicized?* A.B.A. J., May 1, 1986, at 20; RAYMOND, *THE POLITICS OF ABORTION IN THE UNITED STATES AND CANADA: A COMPARATIVE STUDY* 172 (1997); SALOKAR, *supra* note 17, at 107; Solimine, *supra* note 17, at 1195.

204. First Draft of Decision No 84-495, *Thornburgh v. Am. Coll. of Obstetricians*, Harry Blackmun, Justice, U.S. Supreme Court (Feb. 3, 1986) (on file with the Library of Congress, Box 434).

205. Letter from Lewis Powell, Justice, U.S. Supreme Court, to Harry Blackmun, Justice, U.S. Supreme Court (Feb. 6, 1986) (on file with the Library of Congress, Box 434).

206. Drew Days III, *In Search of the Solicitor General's Clients: A Drama with Many Characters*, 83 KY. L. J. 485, 489-90 (1994).

equality under the law, but also because of critical foreign policy considerations.<sup>207</sup>

Likewise, in 1953, Sobeloff filed an amicus brief siding with the NAACP in *Brown v. Board of Education*, after he and Attorney General Herbert Brownell determined that it was in the interests of the nation to do so, because vast populations in other lands considered communism a viable alternative to democracy and also because segregation evidenced a failure in democracy.<sup>208</sup>

In contrast to the solicitor general's actions in *Shelley* and *Brown*, which were based on a position of *best interests of the United States*, in 1977, President James Earl ("Jimmy") Carter's White House Counsel shaped the government's amicus brief in *Board of Regents of the University of California v. Bakke* to prevent alienating Carter's key demographic support.<sup>209</sup> *Bakke* presented a challenge to a state affirmative action program where a rejected white applicant to a medical school believed that his objective application scores were higher than those of admitted minorities, and therefore the university had used an impermissible discrimination against him.<sup>210</sup> It is unsurprising that the solicitor general would have filed an amicus brief because the state medical school received federal money, and, by 1977, affirmative action had become a pronounced political issue.<sup>211</sup> The solicitor general's initial draft, however, denounced the university's affirmative action program as unconstitutional. Although, after Carter's counsel and advisors opposed the brief – and indeed contributed to its rewrite – the brief urged upholding affirmative action in general.<sup>212</sup> Whether or not one supports affirmative action or educational diversity programs in general, the fact that Carter instructed his personal counsel to *jump into the drafting process*, provides clear evidence that, as in the case of the solicitor general in *Thornberg*, amicus briefs have been shaped to promote political ends.<sup>213</sup>

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207. *Shelley v. Kraemer*, 334 U.S. 1 (1948). The moving force for the amicus action appears to have been based on foreign relations. It became increasingly difficult to convince foreign elites that American democracy was the better alternative to communism. See, e.g., MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 78-84 (2000).

208. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); Days III, *supra* note 206, at 489-90; DUDZIAK, *supra* note 207, at 79.

209. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); LAURA KALMAN, *RIGHT STAR RISING: A NEW POLITICS* 190-91 (2010) (Professor Kalman notes that Carter received over 86% of votes cast by African American citizens). See also, MICHAEL J. GREATZ AND LINDA GREENHOUSE, *THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT* 116-19 (2016).

210. KALMAN, *supra* note 209, at 190.

211. *Id.* at 195-96.

212. *Id.* at 197.

213. *Id.*

The varying representational approaches by the solicitor general makes it difficult to determine a singular model of representation. Certainly, the *best interest of the United States* standard has proven to be incredibly malleable. Professor David A. Strauss, a former assistant to the Solicitor General identified two possible approaches to defining the relationship between the solicitor general and the President.<sup>214</sup> The first of the approaches, the Institutional Approach, assumes that the solicitor general represents the actions and regulations of the government that have been legally crafted, shaped, and defended by government lawyers in various agencies.<sup>215</sup> This approach is not predicated on an assumption that only lawyers have been involved in the process of developing policies and regulations or in making enforcement decisions.<sup>216</sup> Rather, it considers that government lawyers have simply been involved in this process along with other *experts*, and the solicitor general is defending the legal basis of the executive branch's actions.<sup>217</sup> The second approach – titled as “the administrative approach” – is that the solicitor general has a duty to defend and advance the President's agenda, even when the agenda contradicts a government agency's earlier determinations, or when the executive branch's position may harm a government agency's ability to conduct the duties entrusted to it by Congress.<sup>218</sup> Although Professor Strauss does not label this approach as *unitary*, he does characterize it with the view that the President and the executive branch are one and the same, and in following Professor Strauss's characterization of the administrative approach, the solicitor general, as chief counselor of the branch must maintain a fidelity to the President.<sup>219</sup> In examining the solicitor general's approach to national security type appeals, it appears that the administrative approach tends to prevail.

### C. BEST INTERESTS OF THE UNITED STATES

Just as there is no uniform opinion as to whom the solicitor general represents, there is no uniform definition for *best interest of the United States*. There are categories of appeals in which the legal term best interests of the United States, is given definition, but these definitions are specific to the cause of action reviewed by the appellate court. Arguably, the best in-

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214. David Strauss, *The Solicitor General and Interests of the United States*, 61 L. & CONTEMP. PROBS. 166 (1998).

215. *Id.* at 167.

216. *Id.*

217. *Id.*

218. *Id.*

219. Strauss, *supra* note 214, at 167; *See also*, Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255, 256 (1994) (citing to Robert L. Stern, *The Solicitor General's Office and Administrative Agency Litigation*, 46 A.B.A. J. 154, 218 (1960)).



terests of the United States standard is most clear when there is a matter of necessity such as during a crisis of national security. In *Dames & Moore*, a negotiated agreement with Iran was at stake, and if the private litigation was permitted to proceed, the agreement which enabled the return of American hostages would have been nullified.<sup>220</sup> Further, as noted above, *Dames & Moore* involved an agency of the executive branch as a party, and it is unlikely that the executive branch would be in an amicus role in a national security based appeal since invariably the government is a named party in such appeals.

One problem with trying to define the standard of best interests begins with the Court itself. For example, in 1961 the Court deferred to the attorney general in determining whether, in the best interests of the United States, a political organization could be considered as “subversive,” and therefore must register with the Justice Department.<sup>221</sup> Even when the Court has informed the executive branch that the standard cannot be invoked wholesale to abridge the due process rights of citizens, in the national security context, it still shows a tendency to defer to the President by advising him to cooperate with Congress. For example, in *Green v. McElroy*, the Court held that a citizen denied a clearance to work in a defense industry after being accused of having communist ties still possessed the right to confront his accusers.<sup>222</sup> However, the Court also observed that either the President or Congress could narrow the right of confrontation in administrative hearings through an order or by statute.<sup>223</sup> In 1981, the Court accepted that the Secretary of State possessed the authority to determine whether, in the best interests of the United States, a citizen could be denied a passport to travel abroad if the person presented a threat to national security.<sup>224</sup> What can be gleaned from the Court is that in the few instances where the term “best interests of the United States” is considered, it occurs in the national security context and the Court is deferential to the executive branch. Yet, even if *Dames & Moore* had been correctly decided, the conduct of Fahy and Sobeloff should weigh against using the national security model as a reason to permit the executive branch to continue to file amicus briefs without the transparency sought in the suggested ruleset.

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220. See, e.g., 81 STATE DEP'T BULL. 1 (Feb. 1981); Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, reprinted in 1 Iran-U.S. C.T.R. 3-8 (1983).

221. *Communist Party of the U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 102 (1961).

222. *Greene v. McElroy*, 360 U.S. 474 (1959).

223. *Id.*

224. *Haig v. Agee*, 453 U.S. 280 (1981).

Outside of the national security context, the lower courts have presented a better and less deferential *best interest of the United States* standard. In federal contracting, the *best interests of the United States* does not preclude judicial review, particularly where there is an allegation that an agency engaged in bad faith or with impropriety.<sup>225</sup>

For instance, under the Administrative Procedures Act, an agency's administrative decisions are subject to judicial review if the agency appears to have acted in an arbitrary and capricious manner and if Congress has not altogether foreclosed judicial review.<sup>226</sup> Put another way, if there is evidence that a government agency's determination is arbitrary, capricious, or an abuse of discretion, a court may overturn it.<sup>227</sup> While the act itself has little applicability to the Court's ability to issue rules for its internal governance, the terms arbitrary, capricious, or an abuse of discretion, are helpful to developing the *best interests of the United States* standard in assessing the solicitor general's use of amicus briefs.

Under the Administrative Procedures Act scheme, if a rejected contractor files a protest against the government's award of a bid to a competitor, the awarded contract must be "stayed" and performance on the contract ceased until the dispute is resolved.<sup>228</sup> However, if the agency's chief officer determines that performance on the contract must commence in the best interests of the United States, the awarded contractor may begin work and be paid within the contours of the awarded contract.<sup>229</sup> There is a narrow window of opportunity for the rejected contractor to challenge the agency's determination of the best interests of the United States if there is evidence that the agency's officer abused his or her discretion by exceeding a statute or made the determination in clear ignorance of important facts.<sup>230</sup> Even recognizing the privacy interests involved in tax and investment records, because amicus filing is a voluntary activity with no constitutional basis, the proposed transparency rule is justifiable because the courts cannot assess whether the government's position in an amicus brief is based *on the*

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225. See, e.g., *SDS Int'l, Inc. v. United States*, 55 Fed. Cl. 363 (Fed. Cl. 2003); *Topgallant Grp., Inc. v. United States*, 704 F. Supp. 265, 266 (D.D.C. 1988) (quoting *Curran v. Laird*, 420 F.2d 122, 131 (D.C. Cir. 1969)).

226. *Abbott Labs. v. Gardner*, 387 U.S. 136, 139-41 (1967); *Heckler v. Chaney*, 470 U.S. 821 (1985). Both decisions arise from challenges under the Administrative Procedures Act at 5 U.S.C. § 701 (2011).

227. 5 U.S.C. §§701(a)(1)-706 (2011). However, in *Chong v. Dir., U.S. Info. Agency*, 821 F.2d 171 (3d Cir. 1987) the Court of Appeals for the Third Circuit determined that judicial review can be precluded when "there are no judicially manageable standards" to enable such review. *Chong*, 821 F.2d at 175.

228. See, e.g., *Universal Shipping Co. v. United States*, 652 F. Supp. 668 (D.D.C. 1987).

229. *Id.* at 673.

230. *Id.*

*best interest of the United States* standard or a personal—and therefore capricious—basis.

If judicial review exists for challenges to the best interests of the United States, where the United States is a named party, such review should also exist where the executive branch seeks to influence or inform the Court and the courts of appeals of governmental interest in the outcome of a case. Moreover, because in amicus practice the solicitor general is effectively siding with one of the named parties in litigation before the Court, the Court is not only entitled to inquire into the executive branch's motives, it should also enable the arguing parties to effectively counter the government's built-in advantage of claiming that its amicus brief is filed in best interests of the United States. Because the executive branch is far larger and more powerful than other amici, it is not enough to provide the named parties with access to the tax and investment records as defined in the introduction. Public scrutiny, as Justice Miller opined, is the best means to ensure that the judiciary is not used for a nefarious purpose.

### III: CONCLUSION

Benjamin Bristow's model of a non-partisan and transparent Solicitor General's office has not withstood the almost century and a half since he served in that position. Justice Alito's earlier observation on the nature of *interested amici* is noteworthy to the premise of this article, because it is a frank admission that the literal term *friend of the court* does not equate to a neutral party. This is clearly the case in regard to the current presidency, which has kept its tax and investment records sealed from the public's view in a manner not seen since 1974.<sup>231</sup> This lack of transparency is troubling for a myriad of reasons, including its potential to undermine two key tenants of the judicial branch: independence and impartiality. It is not only critical that the courts *are* impartial and independent, it is also important that the courts *appear* to be both.

A court rule requiring key executive branch personnel to provide their tax and investment records will shape how the President, through the solicitor general and other applicable government counsel, seeks to influence the judiciary by creating an ethics based transparency rule. That is, under the proposed ruleset, the executive branch can decide to forfeit a privilege of practice that it has enjoyed for over a century and a half, or it can operate on a *level playing field*.

As earlier noted, such a rule would apply to all future presidencies. In the event that there is an appearance that a president or the other key indi-

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231. See, e.g., George K. Yin, *Congressional Authority to Obtain and Release Tax Returns*, 154 TAX NOTES 1013 (2017).

viduals covered by such a rule will benefit from the outcome of a decision, the Court (and the lesser judiciary) can at least then issue a disclaimer that the enrichment did not calculate into the decision to accept the amicus brief. It will also give the solicitor general a decision as to whether to file the amicus brief in the first place. A new SCR followed by an FRAP analog rule will not only increase the public confidence in the judiciary, it will also strengthen the judiciary itself. Such rules are not radical. Rather, these suggested rules would be a progressive part of an evolutionary process that began a century ago.