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INTRODUCTION

Wade McCree was the thirty-sixth Solicitor General of the United States, serving from 1977 to 1981. This Article examines his tenure as Solicitor General (SG). It begins with background material, in Part I on McCree himself, and in Part II on the political and legal context in which he operated. In Part III, McCree's performance as Solicitor General is analyzed, using statistics and a series of cases to illuminate the ways in which McCree dealt with the major issues facing modern Solicitors General.

McCree was indisputably one of the greatest legal minds of his day. Unfortunately, his contributions have been under-appreciated. An additional purpose of this Article is to remedy that neglect, and give proper attention and credit to this giant of Michigan legal history.

I. BIOGRAPHICAL BACKGROUND

Wade Hampton McCree, Jr., was born on July 3, 1920, in Des Moines, Iowa, the second of four children. His father was a pharmacist and became a federal narcotics inspector, a job which took the McCree family to Hawaii, Chicago, and Boston. McCree graduated from the famous Boston Latin School and attended Nashville's Fisk University, his parents' alma mater, from which he graduated summa cum laude and Phi Beta Kappa in 1941. He then began studies at Harvard Law School, but World War II intervened and McCree was inducted into the U.S. Army. He spent four years on active duty, including two years in combat. There, he rose to the rank of Captain and earned a Bronze Star.

Returning to civilian life, McCree married Dores McCrary in 1946. He graduated from Harvard in 1948, but was given a degree, nunc pro tunc, as a...
member of the class of 1944, in which he ranked twelfth. The McCrees moved to Detroit, where Wade entered private practice.

Not long after, in 1952, McCree’s skills were recognized by Michigan Governor G. Mennen Williams, who appointed McCree to the state’s Workers’ Compensation Commission. Two years later, Williams gave McCree an appointment as a trial judge on the Wayne County Circuit Court, a move which raised some eyebrows and seemed politically risky for the governor, given McCree’s race. The next year, McCree won a retention election, surprising more than a few observers, and making him Michigan’s first elected black judge. His barrier-breaking rise through the ranks of the judiciary continued, first with his appointment to the United States District Court for the Eastern District of Michigan in 1961, and then with his elevation to the Court of Appeals for the Sixth Circuit in 1966.

In his decades on the bench, McCree was known as a careful craftsman of opinions and a master wordsmith, “often taking hours to make sure that the language was perfect.” While he strongly favored protecting individual rights against encroachment from the government, and had a pro-civil rights record on issues such as defendants’ rights and busing, “he would never bend the law.” Indeed, he was generally classified as a “lawyer, not a civil rights activist.” Most of all, he was known for “practicing a rigorous self-discipline” to be objective, both personally and jurisprudentially. In other words, he possessed an eminently judicial temperament, a characteristic which was to serve him well as Solicitor General.

An example of McCree’s commitment to fairness appears in a story he often retold, about a racist lawyer he faced when he was a trial judge. The opposing party was black, and so the lawyer demanded that McCree recuse himself. This request deeply angered McCree, who resented the implication that blacks, but not whites, were incapable of making decisions uninfluenced

7. See Williams, supra note 2, at 2.
8. See id.
10. See id.
12. Id.
14. Pierce Lively, Wade H. McCree, Jr.: Born to Be a Judge, 86 Mich. L. Rev. 249, 250 (1987) (“His colleagues and friends did not only admire his objectivity; they were amazed and frequently put to shame by it.”). Of course, not all of his acquaintances were as forgiving when, as Solicitor General, McCree adopted even-handed legal positions that put him at odds with their liberal policy preferences.
by race. He half-seriously agreed to recuse himself on the condition that he be replaced by a judge of mixed race.\textsuperscript{15}

McCree was personally committed to civil rights, to be sure, but he was committed foremost to the pursuit of excellence. Coming of age in an era of intense discrimination,\textsuperscript{16} McCree was of the firm belief that he could not count on getting any breaks; racial politics rarely if ever worked to the advantage of a black man in his day.\textsuperscript{17} He served the cause of civil rights by doing his jobs well\textsuperscript{18} and by being an outstanding role model,\textsuperscript{19} as well as through specific participation in the movement.\textsuperscript{20} No agitator, his strategy was to keep his head

\begin{itemize}
\item \textsuperscript{15} This story is retold in several sources. See, e.g., Footlick \& Camper, \textit{supra} note 6, at 97; William K. Stevens, \textit{ Solicitor General-Designate, Wade Hampton McCree Jr.}, N.Y. \textit{TIMES}, Jan. 12, 1977, at A14.
\item \textsuperscript{16} As there would surely be for anyone in his position during those years, there are innumerable stories of the indignities McCree faced as a black man, and the calm reserve with which he handled them. Two appeared in a newspaper article written soon after his appointment as SG and suffice as examples. \textit{See Two Turning Points Help Chart Wade McCree’s Judicial Career}, \textit{TOL. BLADE}, Jan. 23, 1977.
\item \textsuperscript{17} This characterization of McCree’s belief was made by Professor (and former SG) Drew Days, in an interview at Yale Law School on May 5, 1997, and is amply supported by my research.
\item \textsuperscript{18} Answering a questionnaire sent to him about black leadership many years later, McCree listed obtaining his three judicial posts as his “most outstanding accomplishments as a leader.” He attributed his success to, respectively, being qualified, having political support, and being lucky. Questionnaire from Wade McCree (Wade McCree Papers, Box 68) (on file with Walter Reuther Library at Wayne State University) [hereinafter McCree Papers].
\item \textsuperscript{20} Among other things, McCree worked as a research attorney on the \textit{Brown v. Board of Education} project while he was a workers’ compensation referee. \textit{See} Wade H. McCree, Jr., \textit{Family Photo Captures a Key Time in History of Civil Rights Struggle}, \textit{DET. FREE PRESS}, Feb. 25, 1993, at 8D (“My father viewed his small contribution to the \textit{Brown v. Board} brief as a labor
down, work harder, achieve better results, and be resigned to inevitable skepticism. Even as racial conditions improved, sympathetic articles still felt the need to point out immediately that he was black.\(^21\)

McCree’s quiet, hardworking nature contrasted with a friendly, jovial side to his personality. On the one hand, he was something of a quiet loner within the vibrant black community in Detroit.\(^22\) On the other hand, he was legendary for his personal kindness, impressive memory bank, and storytelling ability. The New York Times described him upon his appointment:

> Although he is loquacious and discursive in conversation, he is known as something of a calm, reserved loner. It has been suggested that this is natural for a man who has had to keep control of himself during a lifetime of scrutiny by those who are suspicious of barrier-breakers.\(^23\)

McCree was also known as the “poet laureate of the Sixth Circuit,”\(^24\) a reference both to the command of language evidenced in his opinions, and to his impressive facility for writing impromptu limericks, which he used to break “the tension at combative . . . conferences.”\(^25\) One would not exaggerate to say that he was beloved by those who worked with him, and that he was one of, if not the most, distinguished judges on the Sixth Circuit.\(^26\) He served on the Sixth Circuit for over ten years, until his appointment as SG in 1977, and was called “Judge” for the rest of his (non-judicial) career. McCree recounted that accepting the post of SG was difficult, meaning as it did a reduction in salary and the sacrifice of his lifetime judicial appointment.\(^27\)

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\(^21\) See, e.g., *Uncle Sam’s Attorney*, supra note 13, at 109 (introducing McCree as “a gentle-looking black lawyer”). The New York Times made McCree’s race the focus of its article about him after his nomination. See Stevens, supra note 15, at A14. While McCree’s race was no doubt an important aspect of his life, it was far from the most significant thing about his work as a circuit court judge or SG.


\(^23\) Stevens, supra note 15, at A14.

\(^24\) Footlick & Camper, supra note 6, at 97.

\(^25\) Remer Tyson, *Acquaintances Remember Wade McCree as Trailblazer*, DET. FREE PRESS, Sep. 4, 1987, at 14A (citing then-Chief Judge of the Sixth Circuit Pierce Lively and Deputy SG Larry Wallace).

\(^26\) It is easy to marshal evidence for this proposition, including, somewhat sadly, the outpouring of tributes, honors, scholarships, endowments, and memorials that followed McCree’s premature death in 1987. A concentrated source appears in the November, 1987 issue of the *Michigan Law Review*, in which ten touching tributes appear. Fond memories of McCree still abound, and a current Sixth Circuit judge notes that “Wade McCree[’s] . . . legacy is still around the court here.” E-mail from Judge Danny J. Boggs to author, Feb. 6, 1997.

\(^27\) See Gilmore, supra note 11, at 243 n.41; *Uncle Sam’s Attorney*, supra note 13, at 109.
though, to have relished the challenge of the job of SG,28 and to have felt a patriotic duty to serve,29 and while he clearly loved being a judge, there is some evidence that he was ready for a change.30

After ending his service as SG in 1981, McCree refused numerous offers of employment from prestigious law firms (including many that would never have considered even interviewing him thirty-three years earlier) and decided to teach at the University of Michigan Law School.31 While a professor, he served three times as a Special Master for the United States Supreme Court.32 It is unclear if McCree had an offer to return to the federal bench,33 or if he would have accepted such an offer, though it is reported that he did decline the chance to serve on the Michigan Supreme Court.34

On August 30, 1987, McCree died of a heart attack, a complication of his treatment for bone cancer. He was 67.35

28. See Gilmore, supra note 11, at 243 n.41.
29. See Portrait Presentation, supra note 1, at CVII; Charles R. Babcock, Ex-Judge’s Advice Tipped the Balance for Webster, WASH. POST, Mar. 5, 1979, at A2.
30. See Address at 1977 Judicial Conference of the Ninth Circuit [hereinafter 1977 Ninth Circuit Address], reprinted in 76 F.R.D. 547, 549 (“I had been a judge for more than 20 years, and I secretly yearned to get out in front of the bench.”). McCree later wrote an article suggesting that judges take periodic sabbaticals to refresh their minds. Wade H. McCree, Jr., Sabbatical Rejuvenation: ‘A Cure for Judicial Blahs’?, LEGAL TIMES OF WASH., Nov. 3, 1980, at 10. McCree may also have yearned for the intellectual stimulation of the SG’s office, though it is doubtful he would have said so. See Edwards, supra note 19, at 228 (“Judge McCree was far smarter and more accomplished than most people with whom he came into contact. But he never sought to use his intellect as a club in human dealings. And he never flaunted power or posed as a celebrity . . . .”)
31. See Portrait Presentation, supra note 1, at CVII; Eric Freedman, ‘Judge’s Judge’ Wade McCree Helped Mold Law, History, DET. NEWS, Sept. 1, 1987, at 1B, 5B.
32. The most famous of the three cases was an interstate dispute over the taxation of Howard Hughes’ estate. McCree’s former boss, Attorney General Griffin Bell, had recommended him for the job in that case, writing that he hoped it would be “stimulating and financially rewarding.” Letter from Griffin Bell to Wade McCree (Jan. 17, 1983) (McCree Papers, Box 62-3).
33. It was widely believed that if a spot or two had opened up on the United States Supreme Court during the Carter presidency, McCree would have been nominated. See, e.g., Uncle Sam’s Attorney, supra note 13, at 109. It is also reported that when Justice Thurgood Marshall’s health began to fail, he was urged to step down so that McCree could take his seat. See Ernest Holsendolph, End of an Era: Thurgood Marshall Resigns, ATLANTA J. & CONST., June 28, 1991, at A8.
34. See, e.g., Chris Parks, Blanchard: After 100 Days, the Jury Is Still Out, U.P.I., Apr. 7, 1983.
35. A sonnet that McCree penned upon the death of his mentor, Harold Bledsoe, was a fitting epitaph for McCree as well, given all that he meant to so many people:
   When a tall tree falls, it makes a thund’rous sound
   To tell the forest that a giant is dead,

A. Political Background

Jimmy Carter’s Presidency saw a return to liberal government after eight years of Republican presidential rule. Carter did not, however, simply pick up where Lyndon Johnson had left off; the United States had changed drastically during the eight-year interregnum. Vietnam and Watergate had intensified Americans’ distrust of government. The relative economic prosperity of the Sixties, which had allowed for the bold liberal social experiments of the Great Society, had given way to the “stagflation” of the Seventies, which was less conducive to progressive policy. Additionally, after George McGovern’s crushing defeat in 1972, it seemed that only a relative moderate like Carter could hope to win the presidency as a Democrat.

Still, Nixon had had a somewhat liberal domestic policy agenda; if Johnson had been the father of the Great Society, Nixon proved to be a surprisingly generous foster parent. What this meant for Carter was that the battles he had to fight were largely symbolic, not structural. The question of the Johnson era—whether to have a social democratic, progressive welfare state—had been answered in the affirmative, and Nixon and Ford had generally accepted this result. The new questions were narrower. What would this liberal state look like? Who would benefit or suffer at the margins? What would be the rank of priorities? Carter had been elected with the understanding that he would answer these questions more “liberally” than Nixon and Ford, but less so than McGovern.

And now, there seems an empty plot of ground
Where once a stalwart presence raised its head.
But if we look, the ground on which it stood
Brings forth green seedlings, reaching for the sun
To find their place as stalwarts in the wood
Beginning as their parent had begun.
And so, the great soul whom we mourn today
Has not left us without a legacy
A host of fledglings studied ’neath his sway
Each one may someday be a mighty tree.
Thus God, His will inexorable ordains
To make us mortals know that He still reigns.

Jim Fitzgerald, Wade McCree’s Sonnet Makes a Fitting Eulogy, DET. FREE PRESS, Sept. 4, 1987, at 16F.

Specifically, Carter appealed to the American desire for stability and honesty in government. Carter made promises and took them seriously, and his administration made progress in civil service reform, foreign policy, and the environment.\textsuperscript{37} At times, though, he took his promises too seriously–his inability to compromise, or at least to prioritize, meant that his administration was often unable to focus, and so failed to achieve many of its goals.\textsuperscript{38} For McCree, this more-than-usual desire to implement campaign promises caused more-than-usual tension between fidelity to the law (the internal goal of the SG’s office) and federal policy demands (the external pressure placed on the SG’s office).\textsuperscript{39}

Carter’s first Attorney General, Griffin Bell, was an unpopular choice among the left wing of the Democratic party. Bell, a judge on the United States Court of Appeals for the Fifth Circuit, was a member of Carter’s Georgia cabal, and was seen as unsympathetic to civil rights.\textsuperscript{40} Bell chose his colleague McCree as Solicitor General,\textsuperscript{41} and then tapped NAACP Legal Defense Fund litigator (and future Clinton SG) Drew Days, III, to head up the Civil Rights Division. Commentators characterized the appointments as designed solely to appease liberal critics.\textsuperscript{42} This charge may or may not have been true, but the fact that McCree and Days were black was noted by the media much more than the fact that both men combined clear qualifications with strong civil rights records, even though only the latter could have truly appeased liberal critics.\textsuperscript{43} Days recalls that Bell had wanted McCree to be his SG all along and had hesitated before announcing his choice, fearing the appearance of using his colleague as a shield.\textsuperscript{44} McCree also would not have

\begin{itemize}
\item \textsuperscript{37} See KAUFMAN, supra note 36, at 2.
\item \textsuperscript{38} See BELL & OSTROW, supra note 36, at 21-22 ("One of the greatest errors [President Carter] committed as President was attempting to carry out all his promises . . . . While trying to fulfill scores of promises, President Carter missed carrying out basic reforms.").
\item \textsuperscript{39} See infra Subsections III.D.1-3.
\item \textsuperscript{40} See KAUFMAN, supra note 36, at 27. Among other things, Bell belonged to restricted country clubs. Upon Bell’s retirement, McCree wrote one of his famous limericks, the first verse of which was: “When Judge Bell first came to this hall/his detractors predicted a fall/but they all stayed to cheer/as the parting draws near/and we’re sure going to miss his y’all.” Limerick by Wade McCree for Judge Bell (Aug. 14, 1979) (McCree Papers, Box 68-23).
\item \textsuperscript{41} Bell had met McCree in the 1960s when both men were federal appeals court judges. As judges, they worked together on various commissions and task forces. See Griffin Bell, Tribute to Wade McCree, 21 LOY. L.A. L. REV. 1053, 1053 (1988). McCree became the first black federal judge to serve in the Deep South when he filled in briefly for Bell in May of 1976. See Stevens, supra note 15, at A14.
\item \textsuperscript{42} See, e.g., John M. Gashko, NAACP Lawyer in Line for Justice Post, WASH. POST, Jan. 27, 1977, at A6.
\item \textsuperscript{43} See, e.g., id.
\item \textsuperscript{44} See Interview with Drew Days, supra note 17.
\end{itemize}
taken the job if he had felt used in that way, or if he had thought that he would have had intense disagreements with Bell about fundamental legal questions. Bell and McCree had an unusual, non-hierarchical relationship, examined in detail below, that looms large in any account of McCree's tenure as SG.

Much of the trouble President Carter had leading the nation stemmed from his poor relations with Congress, despite the fact that his party controlled both houses. Part of this difficulty was a result of Carter's own lack of focus. Another part resulted from his anti-Washington campaign (which, unsurprisingly, alienated many in Washington) and image of himself as a populist outsider. These factors do not explain everything, though. Another factor was that Congress was in a state of flux; the old system of seniority and all-powerful committee chairmen was unraveling. Another factor was political action committees, which were beginning to assert their control over lawmaking, preying on the newly decentralized power structure. For our purposes, the most important trend in these years, though hardly the most prominent one, was that Congress continued to resist efforts at increasing presidential power. This movement made the separation of powers an increasingly important issue in the courts during the Carter Administration.

B. The Supreme Court

One factor makes the Supreme Court relatively easy to assess for the four years of the Carter Administration—its membership did not change. To sum up the Court's membership preliminarily (and one-dimensionally): on the Right were Justice Rehnquist and Chief Justice Burger; in the Center were Justices White, Stewart, Powell, Blackmun, and Stevens; on the Left were Justices Brennan and Marshall. At the time, the overall balance of the Court seemed to have moved significantly to the Right, and the activist advances of the Warren Era were halted. Like the Nixon Presidency, though, the Burger Court preserved the legacy of its liberal predecessor, even if it did not extend

46. See KAUFMAN, supra note 36, at 20.
47. See id. at 20-21.
48. See CALIFANO, supra note 36, at 23 (discussing fragmentation of power in Congress and rise of special interest politics); KAUFMAN, supra note 36, at 21.
49. See KAUFMAN, supra note 36, at 21.
it.\textsuperscript{51} In hindsight, the Burger Court was something of a moderate bridge between the liberal Warren Court that preceded it and the more conservative Reagan/Rehnquist Court that followed it.

Two areas in which the Court did move noticeably to the Right were access to the federal courts and national security.\textsuperscript{52} The former manifested itself most prominently in a series of opinions rejecting constitutional claims by criminal defendants, which provided a stark contrast to the more generous precedents of the Warren Court.\textsuperscript{53} As for national security, this was less a result of the Court's change in personnel than of changing times; in its waning days, even the Warren Court had reacted conservatively to the crises of war, political assassination, and civil unrest.\textsuperscript{54} Whatever its cause, though, this trend toward security in the Court was important and, as seen below, was an issue for the SG.\textsuperscript{55}

Besides its preservation of most Warren Court precedents, the most notable trait of the Burger Court was its fractiousness. Due in part to the lack of strong leadership by Burger himself, the Court rarely spoke with one voice. In both high-profile and minor cases, the number of concurrences, dissents, and plurality opinions increased dramatically.\textsuperscript{56}

Combining this indirection with the change in momentum, away from liberal activism and toward moderate tinkering, conditions were prime for the conflicts that occurred between the legalistic SG's office and the left-leaning Carter Administration. In earlier times, when the Court was liberal and the administration conservative, the Court's rulings were at least based on transcendent principles, like desegregating schools and providing rights for criminal defendants. When the administrations became more liberal, conflict abated. After Carter and Burger, the Court moved into more conservative territory at the same time as the presidency, which allowed for ideological shifts without significant conflict.

By contrast, when President Carter entered office, the Supreme Court had begun to step back from bold precedents. Complicating matters, though, it did so with less stark cases, that involved defining boundaries and methods rather than establishing broad new categories of rights. To take just one example, instead of \textit{Brown v. Board of Education},\textsuperscript{57} and desegregation, there was the

\textsuperscript{51} See Anthony Lewis, \textit{Foreword} to \textit{BURGER COURT}, supra note 50, at vii-ix.
\textsuperscript{52} See \textit{BURGER YEARS}, supra note 50, at xii-xiii.
\textsuperscript{53} See id. at xvi.
\textsuperscript{54} See id.
\textsuperscript{55} See infra Subsection III.D.4.a.
\textsuperscript{56} See \textit{BURGER YEARS}, supra note 50, at 12; \textit{NEITHER CONSERVATIVE NOR LIBERAL}, supra note 50, at 9.
\textsuperscript{57} 349 U.S. 294 (1955).
cloudier issue of *Milliken v. Bradley*,58 and busing. When cases are less stark and the Court is a many-headed hydra, it is much easier for legal-realist policymakers in the administration to challenge the legal-formalist opinions of an SG, and to do so with a straight face.59

III. SOLICITOR GENERAL MCCREE

A. Introduction

Before turning to an examination of Wade McCree’s service as Solicitor General, it is important to summarize the typical issues associated with study of the office.

The Solicitor General of the United States is the nation’s top appellate litigator. His office has three main tasks: deciding which federal cases should be appealed to the Courts of Appeals and the Supreme Court; deciding which Supreme Court cases the federal government will participate in as an *amicus curiae*; and briefing and arguing Supreme Court cases in which the United States has an interest.

The SG is also a high-ranking official in the Justice Department, originally second in command, then third, and now fourth. A prestigious position, the office of the Solicitor General has been occupied by such men as William Howard Taft, John Davis, Robert Jackson, Thurgood Marshall, and Robert Bork.

Although the SG is a “political” appointee, selected by the President and leaving office when the administration changes hands, the Office of the Solicitor General has traditionally been isolated from the political hustle and bustle of other segments of the Justice Department. The reason is not necessarily respect for the law; rather, it is a functional consideration. The Supreme Court relies heavily on the SG to sift through thousands of potential government appeals and select only the most worthy to apply for certiorari. The Court also depends on the SG to reconcile the conflicting views of the federal government’s various branches, departments, and independent agencies, and to present a unified front. If the Court feels that the SG is motivated by politics or policy and is not providing dispassionate legal judgments, the Court cannot rely on the SG while preserving its own independence. Relatedly, the SG’s office would not win its cases nearly as

59. In general, McCree conformed to this model, and was not a legal realist—he would try in good faith to “find” the law. Only in the rare instances when the law was in equipoise would he overtly say that a case could go either way. See Interview with Drew Days, supra note 17.
often. In the long run, then, it behooves the executive branch to respect the independence of the SG’s office and maintain the government’s advantage as a litigant in the Supreme Court.

Interest in and study of the SG’s office increased dramatically in 1987 with the publication of The Tenth Justice by Lincoln Caplan. Caplan’s book is an inside look at what was then an unfamiliar institution. The theme of the book was change, specifically the change wrought in President Reagan’s second term when Charles Fried took over as SG, replacing Reagan’s first SG, Rex Lee. According to Caplan, Fried’s tenure saw a stunning evisceration of the traditions of the SG’s office, and a squandering of the valuable credibility that the SG had earned with the Supreme Court over the years.

As we will see, Caplan exaggerated the earlier independence of the SG, and he almost certainly overstated Fried’s “captivity” to political interests (as well as speaking too soon, since Caplan wrote the bulk of The Tenth Justice after Fried had only served for one Supreme Court term). Nevertheless, the book was engaging and sparked a wider interest in the office of the SG, with its glamorous caseload, proud traditions, and unique institutional position in the Justice Department. The year after the publication of The Tenth Justice, the Loyola of Los Angeles Law Review devoted an entire issue to articles on the SG (as well as tributes to the recently deceased McCree). 60

After this surge in scholarly attention, several themes emerged as consistent points of interest, and those themes provide the core around which the analysis of this Article is built. Most of them deal in some way with the SG’s independence from the rest of the Justice Department: the tension between independence and the duty to serve the client; the need for continuity with the legal positions taken by previous administrations’ Solicitors General; the practice of reversing positions taken in lower courts, known as confession of error; and issues of the independence of the SG’s office in general. Another group of issues concerns the procedure in which the SG performs his duties: defining the government’s interest as an amicus curiae; clashes between law and policy; and the SG’s other administrative duties. A final issue concerns structural concerns inherent in the office of the SG—namely, centralization of appellate litigating authority for the entire government (i.e. the executive branch, legislative branch, and independent agencies) under the SG’s auspices.

With hindsight, seeing the transformations wrought in the SG’s office during the Reagan Administration, Wade McCree’s tenure was a relatively stable period. As such, it provides a good glimpse of the questions typically confronting the SG’s office. The apoliticality and independence of the SG’s

60. See 21 LOY. L.A. L. REV. (June 1988).
office does not happen by accident, and McCree faced many obstacles in his (largely successful) efforts to maintain them.

This Part begins with a brief summary of General McCree's style as a litigator, manager, and oral advocate. It continues with an examination of statistics on the SG's office during McCree's tenure, using them to compare McCree with other SGs and assess the transitions before and after his term. The final and largest section is an analysis of several important cases from McCree's term, each of which is selected and presented so as to cast light on particular aspects of McCree's approach to the job of SG, in terms of the themes listed above.

B. McCree

The most obvious characteristic of Wade McCree's style as SG was his judicial temperament. This will become more empirically apparent below with the examination of specific cases. Some preliminary facts, however, bear mention. First, McCree was initially offered the job of Deputy Attorney General, the number two post in the Justice Department. He turned down the offer, saying that the job would leave him mired in administrative duties; he preferred instead the more stimulating and contemplative job of SG.61

Second, McCree's decision-making style reflected his judicial methods. He liked to get input from concerned agencies and interested parties and then make his decisions. This is not unusual for an SG, obviously, but one can imagine a working environment (such as that described by Caplan) less conducive to such careful reflection, one in which deputies, assistants, and outside government lawyers knew that they would need to tailor their arguments to the personal leanings of the SG. With McCree, by contrast, players could rely on getting a fair hearing, and if the law was on their side, they could count on getting the SG's office on their side regardless of political or philosophical considerations.

McCree also went out of his way to include line attorneys in these meetings with concerned agencies.62 Even if such conduct is to be expected of any SG, McCree was particularly known for his "diplomatic skills," and his ability to make decisions without making enemies.63 One anecdote, from

61. See Footlick & Camper, supra note 6, at 97.
62. See Edwards, supra note 19, at 228. Judge Edwards remembers that his wife, then a lawyer in the Civil Rights Division, was one such line attorney, and that "the recognition and appreciation of the line attorneys' efforts demonstrated by Judge McCree's behavior at such meetings accomplished more for Justice Department morale than ever could have come from formal awards or commendations." Id.
McCree's days as a trial judge, sums up his talent in this regard. A friend recalled:

[A] lawyer left Judge McCree's courtroom and came to join me at the elevator. He was somewhat distraught and without waiting, he burst out: "Well, he beat me. he beat me."—then a pause—"But he made me like it." Throughout Judge McCree's career, his gift for administering the law helped people to understand—and accept it, even when losing.64

As we will see, McCree's judicial temperament made him a target of criticism from political higher-ups in the administration who grumbled about the SG's independence and McCree's seeming inability to overrule his allegedly conservative subordinates. As we will also see, such criticisms, while significant politically, reflected either a lack of understanding or a lack of respect for McCree's traditional and effective conduct of the SG's office. For his part, McCree had no desire to offend anyone, and seemed happiest when he could stake out a good faith legal position that satisfied everybody.65

McCree seemed to enjoy his role as a decision-maker and manager more than his role as oral advocate before the Supreme Court.66 Among other reasons, he must have been more used to being a judge, sitting on the other side of the bench. This contrast must have been much starker when McCree was arguing before the Supreme Court as an advocate than when he was back at the office, making decisions and writing briefs in the quasi-judicial mode in which the SG has the luxury of operating. Still, he was an effective (if low-key) oral advocate.67

McCree earned respect and deference from the Supreme Court, both because of his previous career as a respected judge, and because of the goodwill accumulated by previous SGs. One extraordinary measure of the

64. Portrait Presentation, supra note 1, at CIV.
65. This sentiment is evident in McCree's notes for a speech. See McCree Papers, Box 67-1. In another speech, McCree cited as an example of finding a successful middle ground the case of National Gerimedical Hosp. v. Blue Cross, 452 U.S. 378 (1981). See Wade McCree, Jr., The Solicitor General and His Client, Address for the Tyrell Williams Memorial Lecture (Mar. 18, 1981), in 59 WASH. U. L.Q. 337, 341-42 (1981). In that case, the SG's office filed an amicus brief that managed to satisfy the seemingly irreconcilable positions of the Antitrust Division of the Justice Department and the Department of Health and Human Services (HHS). See id. Antitrust felt that the lower court should be reversed. HHS disagreed. McCree wrote a brief that satisfied both parties—he called for reversal on the facts (supporting the Antitrust Division's position), but acknowledged that analogous cases with different facts could go the other way (supporting the Department of Health and Human Services' position). See id.
66. See Interview with Drew Days, supra note 17. Phone Interview with former McCree aide, Paul Levy (May 15, 1997).
esteem in which the Court held McCree is that when President Reagan took office, Chief Justice Burger is reported to have lobbied the President to allow McCree to stay on as SG until the end of that Supreme Court term, which he did.68

C. Statistics and Comparisons

An examination of the statistics from Wade McCree's tenure as SG show that it was fairly typical. Some departures from trends can be noted, but many of these are more easily attributable to external forces and to changes in the structure of Supreme Court litigation in general, and not to anything McCree did or did not do.69

The workload of the Court leveled off during McCree’s tenure, after a steady rise in the previous decades.70 The government's involvement, as a percentage of the Court's docket, actually declined slightly,71 but the SG’s office still churned out a “startling” mass of work.72 The success rate enjoyed by the SG was also unexceptionally high. The rate of successful certiorari applications is generally volatile from year to year, but is uniformly high, and for McCree it was not atypically high or low.73

One departure from long-term trends in these years was McCree’s success rate as an amicus curiae.74 For the SGs between Sobeloff (in the 50s) and Lee (in the 80s), the average victory rate for the SG-as-amicus was well over 70%, with some SGs enjoying rates over 80%. McCree’s rate of 67%, while high, was the lowest in this period. It is unclear what caused this decline. While the

68. See WASH. STAR, Feb. 6, 1981, at A3 (McCree Papers, Box 25-25). A related measure of the respect for McCree was that his successor Rex Lee kept two young Assistant SGs hired by McCree at the end of his tenure. The two men were Sam Alito, now a judge on the United States Court of Appeals for the Third Circuit, and Carter Phillips, managing partner of the Washington office of Sidley & Austin and a leading private Supreme Court litigator. Mr. Phillips related this fact to me when I was a summer associate at Sidley & Austin in 1997.

69. The analysis in this article concentrates on litigation before the Supreme Court. Besides a few scattered references to the other main task of the SG—approving government appeals to federal circuit courts—I did not gain from my research any sense of this side of the SG’s work.


71. See id. at 1089.

72. See McCree, supra note 65, at 339. With a staff of twenty attorneys, McCree's office handled 4,219 “substantive matters” in his last year as SG, including participating in argument or submitting a brief in 108 cases. See id. at 339-40.

73. See Norman-Major, supra note 70, at 1091, 1093.

74. The figures for amicus success that follow are from Norman-Major, supra note 70, at 1097.
number of McCree’s amicus filings was relatively high, it certainly seems that unlike Fried, who had a similarly low amicus success rate, McCree did not alienate the Court by filing too many adversarial, political, or contra-precedential amicus briefs.

To hazard a hypothesis, these years reflected the modern trend of the increased use of the amicus brief. The amicus brief has become a political lobbying tool over the decades, more a chance for the government to get its two cents in than for it to aid the Court in understanding the law (though this latter function is still important). As the amicus brief has become a more dominant and less neutral part of the SG’s palette, it has begun to resemble more the regular, more adversarial briefs that the government files as a party. As such, the success rate as amicus has declined to meet the lower success rate the government enjoys in regular cases.

The final category of statistics is for independent agency litigation. McCree accepted a higher percentage of independent agency cases than Robert Bork (Nixon and Ford’s SG), Rex Lee, or Charles Fried, both as a litigant and an amicus. McCree’s acceptance of independent agency cases has two likely explanations. First, the Reagan administration, and by extension its SGs, might have felt threatened by independent agencies, given the ideological force of Reagan’s programs and the unlikelihood that an agency that was truly independent would follow along. Second, these differences might reflect the different substantive law concerns represented by the cases emerging from independent agencies in these years, such as, an increase in court challenges to the NLRB during Republican administrations. This variation in the type of case emerging from the agencies might reflect historical forces, or it might stem from the extent of the lack of independence of these agencies.

Of the independent agency cases that made it to the Court, McCree allowed the agency itself to conduct the argument in two-thirds of the cases, about the same rate as Bork and much higher than Lee (29%) and Fried

77. This hypothesis is based on, and its data taken from, Lochner, supra note 75, at 561.
78. This leaves Reagan SG Rex Lee as the departure from the trend, not McCree; Lee enjoyed tremendous success as an amicus.
79. See Lochner, supra note 75, at 576.
80. See id.
81. See id. at 577.
As above, this might reflect greater trust of independent agencies by the administration during the Carter years compared to the Reagan years. Alternately, it might reflect different notions of trust, inclusion, or delegation in the management styles of these four SGs. McCree, for instance, was often happy to delegate responsibility for cases to agency lawyers from both independent agencies and regular agencies, if he felt that they were in the best position to handle it.

On the substantive level, to conclude this Subsection, it seems that McCree took more liberal positions that his two predecessors. Only about 16% of McCree’s amicus briefs concerned criminal-rights matters, for instance, compared to 44% for Bork. Of “rights-oriented cases,” McCree took a pro-rights position 79% of the time, compared to 62% for Johnson/Nixon SG Erwin Griswold and only 40.5% for Bork. These data partially refute the charges leveled against McCree that he too often relied on his more conservative deputies. But they suggest an opposite question—given McCree’s judicial temperament, how is it that he reached different results than his two predecessors?

Several non-exclusive explanations are available. First, it might be a matter of perspective: perhaps McCree was neutral, while Griswold and Bork were more conservative. Second, perhaps McCree was more liberal. As anyone working in the law realizes, though, few cases have only one objectively “right” answer. If the law is in equipoise, or at least susceptible to varying interpretations, people of different ideological stripes can adopt opposing positions with full intellectual honesty and legal rigor. Third, this disparity might simply reflect the different types of cases coming up to the Court. While the SG can choose which cases to pursue, he has no control over the cases from which it must choose. The source of appellate cases is trial-level cases, and the source of those is the Justice Department. Compared to the independent and relatively non-partisan SG’s office, the ideological

82. See id.
83. An example given by Drew Days is Days’ own handling of the high-profile affirmative-action case of Fullilove v. Klutznick, 448 U.S. 448 (1980). Since Days’ office had handled dozens of related cases at the trial level, and since Days himself had argued three essentially identical cases at the circuit court level, McCree let him handle this major case at the Supreme Court level. See Comments from Prof. Drew Days, Yale Law School (May 9, 1997).
85. See id.
86. See id. at 263.
87. See, e.g., CALIFANO, supra note 36, at 237; Tamar Lewin, The Solicitous General (article in unknown publication, written during McCree’s tenure as SG) (McCree Papers, Box 25-25). Lewin’s article is rare in its negative view of McCree.

perspective of the rest of the Justice Department varies significantly from administration to administration. Perhaps, then, the more liberal Carter Administration simply had more pro-rights cases percolating up to the SG's office than did the Republican administrations.

D. Cases

Less speculative than the statistics explored above, the actual cases handled by McCree and his office shed light directly on the practices and preferences of Wade McCree as SG. This Subsection looks at three of the most important cases, each of them highlighting one or more of the particular issues traditionally used to analyze the office of the Solicitor General. Following the analysis of these cases are brief discussions of the issues that are not covered by the first three cases, using other, less significant cases as examples.

1. *Tennessee Valley Authority v. Hill*

   a. Introduction

   The first case to examine is also in some ways the most atypical. The case of *Tennessee Valley Authority v. Hill* dealt with a dam and a fish. The dam was the Tellico Dam, a multi-million dollar project of the Tennessee Valley Authority (TVA), nearing completion on the Little Tennessee River. The fish was the snail darter, a three-inch long species of inedible perch that lived upstream from the dam and, apparently, nowhere else. The fish would not be able to survive in the immobile reservoir that would be produced if the dam were completed.

   Enter the Endangered Species Act of 1973 (ESA). The ESA authorizes the Secretary of the Interior to declare species endangered, and requires all federal departments and agencies to use their power in furtherance of the Act. This entails making sure that nothing they do threatens the existence of the species or changes a habitat that the Secretary denotes as critical. On November 10, 1975, President Ford's Secretary of the Interior designated the

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88. This issue/case presentation is somewhat artificial, since each case was about more than just one issue; each case is (hopefully) presented in a wide enough context to reflect this.
90. See id. at 156; see also BELL & OSTROW, supra note 36, at 42-44.
91. See Hill, 437 U.S. at 156-60.
93. See id. § 1531.
snail darter as an endangered species and declared the river upstream from the dam to be its critical habitat. 94

Despite the fact that this would obviously seem to preclude completion of the dam, the TVA continued its construction. Mr. Hill brought suit to enjoin construction under the Act’s broad standing provisions. 95 The district court refused to enjoin completion of the dam, noting that Congress, fully aware of the situation, nevertheless continued appropriations for the dam. 96 The court used its equitable discretion to allow the TVA to finish the project because it was so near completion and so many costs had already been sunk into it. 97

Hill appealed, and the circuit court reversed, 98 holding that even the final steps of a project were “actions” that could not be done if they would harm the species. It also held that Congress would have to specifically exempt the project; the indirect step of continuing appropriations was not sufficient. 99 The vote was 3-0, 100 with a concurrence written by none other than Judge Wade McCree, who later wrote one of his more famous limericks in response to the case:

Who can surpass the snail darter?
The fish that would not be a martyr.
It stymied the dam,
neat the place where it swam,
Can you think of a fish any smarter?101

b. Continuity with the Previous Administration

The TVA appealed to the Supreme Court, with the support of the SG’s office, and certiorari was granted in November, 1977. 102 McCree had to recuse himself from working on the case, since he had heard the case below. Normally, that would mean the case would be handled by a deputy. But, in keeping with an unofficial tradition in which the Attorney General argues one Supreme Court case per term, Griffin Bell took the case. In his memoirs, he explained that he took the case in order to assert the independence of the SG’s office and protect it from a powerful frontal assault by the President’s advisors:

94. See Hill, 437 U.S. at 162.
95. See id.
97. See id. at 760, 763.
98. See Hill v. TVA, 549 F.2d 1064, 1075 (6th Cir. 1977).
99. See id. at 1069-70.
100. See id.
101. CAPLAN, supra note 63, at 46.
The power centers, in this case Messrs. Eizenstat and Lipshutz, had persuaded President Carter to direct me to switch positions and argue against TVA’s position in the name of the environment.

I was in a slow burn. The President wanted me to change my position without any change in the law or facts. I wrote him a memorandum pointing out that he had not been shown an earlier memorandum in which I warned of the danger of reversing a legal position the [Ford] Justice Department had expressed to the court on behalf of the government. The government would be speaking with an unclear, inconsistent voice if it did an about-face in the midst of an appeal.

“A reversal of that position, coming at this juncture, would (sic) not but undermine the respect traditionally accorded the Department [of Justice] and the Office of the Solicitor General by the justices on the Court,” I said in the earlier memorandum.

“Second, a reversal of position on the case would well be publicly perceived as the administration imposing its policy views on the Justice Department despite the department’s contrary judgment of the law.”

When I met with the President, I told him that ethically I could not do it. He changed his mind and told me to stick with the original position. Nevertheless, I added: “Your staff is not serving you well.”

Bell’s vigorous defense of the principle that the position of a previous SG should generally bind subsequent SGs was effective. From the SG’s standpoint, Bell was the ideal AG: sensitive to the traditions of the SG’s office and their importance, and willing to use his own political capital to protect them.

c. Independence of the SG’s Office

The problem in TVA v. Hill was not that the SG had to decide whether or not to be consistent. That was a relatively easy decision. Rather, the problem was that the President was weighing in. As we will see, this was not the last time that the President’s advisors showed their preference for a politically flexible SG’s office. Coming as it did so early in Carter’s presidency, this attack on the SG’s autonomy was particularly crucial for Bell to derail.

Unfortunately, Bell’s account of the incident, quoted above, is incomplete. Bell was not completely successful in fending off the administration’s desire to change its position. Perhaps this mixed result explains why the President’s advisors were so persistent in their later efforts

103. Bell & Ostrow, supra note 36, at 43-44. Ordinarily, the selection of the AG’s annual case was not as strategic a process, or at least not as unilaterally the choice of the AG. See, e.g., Letter from Wade McCree to Benjamin Civiletti (Aug. 11, 1980) (McCree Papers, 31-9) (suggesting the Fedorenko case as an appropriate one for AG Civiletti to argue). But see Robert Pear, Civiletti Will Argue War-Crime Case at High Court, N.Y. Times, Oct. 1, 1980, at A24 (calling Civiletti’s handling of Fedorenko an election year political maneuver).
to control the SG’s office. Lack of success aside, Bell showed in all of these cases that he understood the need for an independent SG.

Bell’s incomplete victory was embodied in an appendix attached to the brief for the United States. Written by Interior Secretary Cecil Andrus, the appendix took the pro-fish position the Carter administration had asked Bell to adopt. Significantly, the appendix was authorized by the White House, and Bell approved of its inclusion. Bell claimed that while he had indeed approved the White House/Interior request, he had done so reluctantly, and cited the strength and sincerity of Secretary Andrus’ environmental views as a partial justification.104

While it is certainly reasonable for the SG to accommodate divergent views, and while this occasionally entails including a separate brief, part of the SG’s job is to take such heat; to absorb the assaults of those with strong but adverse opinions. The fact that it was not just Andrus’ views but Carter’s authorization that led to the inclusion of the appendix must have been troubling to anyone who valued the independence of the SG’s office. It was no doubt troubling to Bell, who must have concluded, reluctantly, that he had already spent enough political capital on the case. If it had been the lower-ranking McCree handling the case instead of his boss, it seems likely that the pressure on the SG’s office would have been stronger and would have done even more damage.

While presenting divergent views was not wholly unprecedented,105 such an appendix meant that the government was not presenting a unified argument. While Bell argued only the pro-dam side when he appeared before the Court, the Court did not let the internal administration split pass without notice. An annoyed Justice Powell asked why the administration had not worked this issue out at the Cabinet level. Bell was happy to agree with Powell, saying that he concurred that the government should speak with one voice before the Court.106 Nevertheless, Bell had allowed the appendix in,107 and so was in effect asking

104. See Charles Mohr, Bell Urges Court to Permit Dam to Open Despite Peril to Rare Fish, N.Y. TIMES, Apr. 19, 1978, at A19.
105. See infra Subsection III.D.3.c.
107. See BELL & OSTROW, supra note 36, at 44.
the Court to resolve the administration's internal disagreement.\textsuperscript{108} The Court, as evidenced by Powell's question, had no desire to act in that capacity.

At the very least, the incident belies one analyst's legal-realist contention that "[t]he solicitor general will be at least sympathetic to, if not totally supportive of, the president's policy agenda."\textsuperscript{109}

In any event, construction on the dam was enjoined, a victory for environmentalists.\textsuperscript{110} The victory was short-lived, however, because Congress took action and specifically exempted the dam from the ESA in 1979. The dam went into operation and the reservoir was formed. The next year, ironically, the Fish and Wildlife Service discovered living snail darters, quite non-extinct, in a creek eighty miles downstream from the dam.\textsuperscript{111}

In response to the internal wrangling over the position of the United States in the case, and given the complicated intermediate role of the AG, the Justice Department's Office of Legal Counsel prepared a memorandum laying out the bounds of the Solicitor General's traditional independence.\textsuperscript{112} Since it dealt in large degree with the classification of questions as law as opposed to policy, and since it was not finalized until after the controversy in the Bakke case, the memo is discussed at the end of the next Section.

\section*{2. The Regents of the University of California v. Bakke}

\subsection*{a. Introduction}

The \textit{Regents of the University of California v. Bakke}\textsuperscript{113} case was probably the most important one to pass through the SG's office during Wade McCree's service.\textsuperscript{114} Justice Powell called his opinion in the case his "most important,"

\begin{itemize}
\item \textsuperscript{108} This interpretation was also offered by Prof. Drew Days in his comments at Yale Law School on May 1, 1997. For his part, Bell cites this case as an example of the lack of coordination within the administration in general, which he blames in part for the lack of direction in the Carter presidency. \textit{See Bell & Ostrow, supra} note 36, at 44.
\item \textsuperscript{110} \textit{See Hill, 437 U.S. at 495}.
\item \textsuperscript{111} \textit{See Bell & Ostrow, supra} note 36, at 44.
\item \textsuperscript{113} 438 U.S. 265 (1978).
and said that the case "aroused more interest in the nation, the press and the bar than any I have seen in my [15 years] on the [C]ourt." It was certainly the one most often mentioned in connection with McCree's service as SG after his tenure ended.

_Bakke_ dealt with the struggles of Allan Bakke, a white, 38-year-old medical school applicant, who had been denied admission to the University of California at Davis Medical School. The school had a special admissions program under which a certain number of openings were reserved for Blacks, Chicanos, Asians, and American Indians. Bakke believed that he would have been admitted were it not for the special program; he argued that he was more qualified than some of the minority admittees, and that such a use of race in the admissions process violated equal protection. The California Supreme Court ruled in Bakke's favor, the university appealed, and the Supreme Court granted certiorari on February 22, 1977, just a month after President Carter took office.

b. Defining the Government's Interest as Amicus

On the same day that the Court granted certiorari, the appellate lawyers for the University—Paul Mishkin and former SG Archibald Cox—met with McCree and Civil Rights Division chief Drew Days. Mishkin and Cox sought the support of the United States as an amicus, but McCree and Days were not impressed with their arguments and were concerned about the poor state of the record in the case.

From there, the process continued typically enough. Days coordinated the effort to poll the concerned government agencies and departments (HEW,

_Carter's Brief_, THE NEW REPUBLIC, Oct. 15, 1977, at 13. In addition to these sources and the numerous newspaper and magazine accounts to be found on the case, the recollections of Drew Days were helpful. The Osborne article provides the best chronology of the main events in the production of the brief, but concludes too readily that the President influenced the content of the brief. McCree turned down Osborne's request for an interview in preparation of the article. See Memorandum from Wade McCree (Sept. 21, 1977) (McCree Papers, Box 28-8).


116. See _Bakke_, 438 U.S. at 276.
117. See _id._ at 272-75.
118. See _id._ at 277-78.
119. See _id._ at 280.
120. See DREYFUSS & LAWRENCE, _supra_ note 114, at 163; Interview with Drew Days, _supra_ note 17.
HUD, Labor, the EEOC, and the President's Commission on Civil Rights) to see if they supported the government's participation in the case. All of them did. In June, the typical preparatory meeting was held—with McCree, Days, and the representatives of the concerned agencies—yielding a consensus in favor of affirmative action, but against quotas.

Days recommended filing in favor of the university, in favor of affirmative action. The Assistant SG on the case, Frank Easterbrook, made a different recommendation. Easterbrook viewed the law as requiring color-blindness: it did not matter what Bakke's race was; if he had received unequal treatment because of it, he was entitled to a remedy. Such a split of opinion was not unusual, and if all else had gone normally, it probably would have been resolved in the typical way. As we have seen, McCree was a consensus builder, and was skilled at figuring out mutually acceptable solutions to such impasses. Perhaps he would have taken a middle ground, less race-blind than Easterbrook, but less race-conscious than Days.

Unfortunately, it soon became clear that the normal course was not an option. Because the case aroused such enormous interest all around the country, the Carter Administration had to start making statements on the case before the brief was finished. This is, of course, a typical problem facing the SG's office—legal niceties are inevitably overwhelmed, in the popular perception, by political and ideological considerations. Carter himself told reporters, inexplicably, that the brief would be prepared by Attorney General Bell and HEW Secretary Joe Califano (also a lawyer); he did not mention McCree.

It is unclear if Carter's statement emboldened Califano, or if the liberal Secretary would have spoken out anyway, but Califano, in a graduation speech in June, voiced support for "numerical goals" instead of "quotas." This subtle distinction was lost on many, and a flare-up erupted among anti-quota citizens' groups worried by Califano's statements. The administration responded by reaffirming its stance, between affirmative action and quotas, to the Right of Califano. Califano persisted, continuing to press vigorously for a strong defense of affirmative action, upsetting some in the SG's office who felt that

121. See Dreyfuss & Lawrence, supra note 114, at 163.
122. See id. at 164.
123. See Caplan, supra note 63, at 41.
124. See Dreyfuss & Lawrence, supra note 114, at 167.
125. See Transcript of the President's News Conference on Foreign & Domestic Policy Matters, N.Y. Times, July 29, 1977, at A8. While McCree himself was busy for the first part of the summer and came into the process in earnest relatively late, his office was certainly involved in writing the brief. See Caplan, supra note 63, at 42.
126. See Dreyfuss & Lawrence, supra note 114, at 164-65.
the Secretary was trying to “stampede the Administration into supporting” the University.\textsuperscript{127}

The brief-writing team met frequently with citizen groups on both sides. On one end were groups, like the Congressional Black Caucus, the National Conference of Black Lawyers, and the Institute for the Study of Educational Policy, urging firm support of affirmative action, and a soft line on quotas. On the other end were groups (most prominently Jewish ones) urging a firm anti-quota stance, and other groups opposed to affirmative action altogether.\textsuperscript{128} Representatives of the Asian-American community provided additional pressure.\textsuperscript{129} Following the customary process for the SG’s office, Days and two of his assistants, Brian Landsbergh and Jessica Silver, wrote a first draft of the brief, which then went on to Easterbrook and Deputy SG Lawrence Wallace.\textsuperscript{130}

In retrospect, the most striking thing about the entire brief-writing process is how little difference there was between Easterbrook and Days from a legal standpoint. This is not to say that they agreed, but rather that the final brief ended up between Days’ and Easterbrook’s positions, near the same place that the brief probably would have ended up without any pressure from outside groups. While there were, no doubt, some legal arguments presented by pressure groups inside and outside the government, most of the input the brief-writers received was policy-based noise.

Easterbrook revised the form of Days’ draft “substantially” but changed the legal argumentation relatively little.\textsuperscript{131} In his memorandum on the case to McCree, Easterbrook admitted that he “stood alone” in his support of Allan Bakke, but he downplayed the importance of that stance because his legal approach “would legitimate important aspects of color-conscious relief.”\textsuperscript{132} The main reason that Easterbrook and Days seemed so far apart, and the primary reason that public perception was so inaccurate, was that Easterbrook recommended supporting Bakke instead of the University, and he used

\begin{flushleft}
\textsuperscript{127} O’NEILL, supra note 114, at 182.
\textsuperscript{128} See id. at 183.
\textsuperscript{129} The main problem with the Bakke case for Asian-American leaders was that the university lumped all Asians together into one group. Doing so masked the diversity of Asians in the United States, in particular the vast divide between those groups that were thriving and those that warranted the same treatment given to other disadvantaged minorities. Box 27-3 of the McCree Papers contains a stack of letters an inch thick concerning the Asian issue. In addition, the issue took up a significant amount of McCree’s time during the oral argument of the case. See SCHWARTZ, supra note 114, at 52.
\textsuperscript{130} See Osborne, supra note 114, at 14.
\textsuperscript{131} See id.
\textsuperscript{132} Memorandum from Frank Easterbrook to Wade McCree at 1 (Jun. 9, 1977) (McCree Papers, Box 27-2).
\end{flushleft}
typically (and misleadingly) strong language in doing so. Since any headlines would only announce which side the government supported, it would obviously be lost on the public if even the pro-Bakke faction found some affirmative action constitutionally acceptable.

Easterbrook felt that the best approach to the case would be to avoid the merits altogether, but he felt that the issue was too squarely presented to take that path. He downplayed the importance of the case, pointing out that the Court had already made strong statements that race could be taken into account, and not just for remedial purposes. If Bakke could be limited to its facts, Easterbrook argued, the California Supreme Court could be affirmed without threatening the use elsewhere of criteria with racially-conscious impact, race-sensitive recruiting, or “ties-go-to-the-minority” rules.

Easterbrook urged McCree to make “a dispassionate and rounded presentation,” which “would be a welcome relief from the hysterical and hyperbolic briefs being filed by the parties and other amici.” This was ironic advice, given McCree’s solid reputation for cool, collected judicial reasoning, and Easterbrook’s reputation for legally sound but extreme, often harsh and inflammatory arguments.

Because of the importance of the case, and because Bell had mistakenly said at an early August press conference that the administration had decided to support the university, the White House began pressing to see a copy of

133. See id. at 2.
134. See Linmark Ass’n v. Willingboro, 431 U.S. 85 (1977). It is unclear why Easterbrook chose this case as an example, since it held that First Amendment commercial speech rights trump the goal (declared by the Court to be nevertheless significant) of integrated housing.
136. See generally Memorandum from Easterbrook, supra note 132.
137. See id. at 42.
138. Easterbrook seemed to cause more than his share of trouble for the SG, both in this case and in Bakke. As Drew Days remembers, Easterbrook was a “likeable kid” who had the unfortunate trait of overdoing his legal arguments. Comments from Drew Days, supra note 108. While, as we have seen, the stridency in his briefs often caused problems from a public relations standpoint, Easterbrook would not have risen to the rank of Deputy if his legal judgments were unsound. For his part, Easterbrook himself points out that regardless of what his critics said at the time, the important fact is that McCree always backed him up. Comments of Judge Frank Easterbrook, New York City (March 7, 1998). One insider remembers Easterbrook as uncompromising and pompous, but extremely bright and articulate, and potentially “demolishing” in arguments. McCree respected Easterbrook for the latter traits while clearly aware of the former. Although Easterbrook was something of an ideologue, the problems he caused were less because he was conservative than because he was often tactless.
139. See Dreyfuss & Lawrence, supra note 114, at 166; O’Neill, supra note 114, at 183.
the brief. At this stage, the brief was still undergoing substantial revision, which was typical for any brief in so important and complicated a case. Internal memoranda by McCree's special assistant criticized the quality of the brief, asserting that entire sections would need to be re-written. 140 Clearly, it would be some time before the brief reached its final form.

This part of the story continues, with details of the White House's involvement, in the next Subsection. For the purposes of the present Subsection, the important thing to note is that the White House did get a copy of the brief, and that it was leaked to the press. 141 Since at that stage in its preparation the brief was still pro-Bakke rather than pro-university, the press reports caused an explosion. 142 Concerned that the brief would oppose affirmative action (and, in some cases, assuming that it did), civil rights leaders and other interested parties flooded the White House and the Justice Department with letters and telegrams. Meetings were arranged in an attempt to unruffle some of the more prominent feathers, and soon it became clear that the disagreements were between the politicians' political objections and "McCree's intellectual approach to the law." 143

This was certainly true with regard to Secretary Califano. Toward the end of the process, Califano met with McCree, Easterbrook, and Wallace, and recalled "I was surprised at how angry I was becoming as the young lawyers spun their legalistic theories. McCree sat there, remarking simply that he had to follow the existing case law[.]" 144 Later, Califano wrote an angry memorandum to Bell, McCree, and Days, complaining (with un-self-conscious irony) that "[t]he brief is still, in my judgment, far too preoccupied with the Bakke case and not concerned enough with providing a ringing endorsement of affirmative action." 145

Although Califano made plenty of legal arguments, mostly concerning the proper standard of review to use in such cases, he seemed most concerned with getting McCree to treat the brief as more of a political document. He

140. See Memoranda from Paul Alan Levy to Wade McCree (Aug. 21 and 28, 1978) (McCree Papers, Box 28-5). Levy was one of McCree's judicial clerks when McCree was appointed SG. He accompanied McCree to Washington, where his responsibilities included writing speeches and occasionally reviewing draft briefs such as these to give McCree yet another viewpoint to consider. Levy's memoranda said that Easterbrook's drafts were "weak," and that Easterbrook was saving affirmative action at the expense of the strength of the strict scrutiny standard. See O'NEILL, supra note 114, at 184.

141. See O'NEILL, supra note 114, at 184.

142. See id.

143. DREYFUSS & LAWRENCE, supra note 114, at 167.

144. CALIFANO, supra note 36, at 237.

145. Letter from Joseph Califano to Griffin Bell (Sept. 10, 1977) (McCree Papers, Box 27-2).
suggested rewriting the brief in four sections. The first would declare the importance of affirmative action in the United States; the second would argue for weaker "rational basis" review in these cases instead of strict scrutiny; the third would assert the principles of a valid affirmative action program; the fourth, finally, would deal with Bakke itself, arguing that the case should be reversed and remanded. This, Califano wrote, would "put the emphasis where it belongs." As for the law itself, even Califano agreed that a pure quota would be unconstitutional.

Opposite to Califano's approach was an internal memo to McCree arguing that the brief of the United States should be "judicial" and should help the Court to sift through the thousands of pages of briefs from the parties and the unprecedented number of amici.

This divide reflected the tension between the "old" and "new" conceptions of the amicus brief. Under Califano's "new" view, the United States had an interest in the case. While it was not a party, it was submitting a brief. That brief should assert the interest of the United States, and do so vigorously. Under the "old" view, by contrast, the role of the SG was, quite literally, to be a friend of the court—to provide guidance, given its experience and inside knowledge of the federal government, regarding the effect the case would have on federal programs.

The final content of the brief was determined by McCree and Days. Spending all day, every day, for a week on the brief, McCree, Days, and an assistant from each of their offices hammered out the final form. Reminiscent of his years as a judge, McCree pored over the language of the brief, line by line and word by word, making sure that each detail was correct, each word appropriate. In retrospect, Days surmises that the form of the brief was not much different than it would have been had no outside pressure been placed on McCree. Some compromise between the Easterbrook and Days positions would have been reached eventually. As it happened, the final brief defended the legality of affirmative action, rejected that of quotas, and, in its main thrust, said that the record in the case was inadequate to determine the proper result for Bakke himself.

Because of this approach, the focus was taken off of Bakke and placed on affirmative action and quotas in a more abstract sense, just as Califano had wanted. But saying that the record was inadequate was not just a cop-out to allow McCree to split the difference between two incompatible positions, or

146. Id. at 4.
147. See id. at 2.
148. See Memoranda from Levy, supra note 140.
149. See supra text accompanying notes 77-78.
150. See Interview with Drew Days, supra note 17.
151. See O'NEILL, supra note 114, at 186-87.
to allow the brief to make a political statement. Days remembers that it had been obvious from the beginning that the record was poor.\textsuperscript{152} It was unclear why exactly Bakke had not been admitted, and the bounds of the university’s program were similarly fuzzy. Indeed, the one thing that Easterbrook and Days seemed to agree on was that the case was a “poor vehicle” for declaring an administration position on affirmative action.\textsuperscript{153} Furthermore, while Easterbrook had still recommended reaching the merits, even his draft evinced some legal support for affirmative action—McCree was not running away from the law either.

The oral argument in \textit{Bakke} was McCree’s most important as SG. All eyes were on him as the only black lawyer before the Court. McCree was not a dynamic oral advocate, but he was a solid and effective one. It often seems, upon reviewing the assessments of oral arguments by commentators, that most expect effective oral advocacy before the Supreme Court to be flashy. That was not McCree’s style, but neither is it the best way to deal seriously with the Court.

Though he was sidetracked for a long time on the question of how to classify Asian-Americans,\textsuperscript{154} McCree effectively challenged the California Supreme Court’s contention that race could not even be used as a factor in properly tailored affirmative action programs. He also contributed one powerful passage that even a critic complimented:

“\textit{M}any children born in 1954, when \textit{Brown} was decided, are today, 23 years later, the very persons knocking on the doors of professional schools, seeking admission about the country. They are persons who, in many instances, have been denied the fulfillment of the promise of that decision because of resistance to this Court’s decision . . . .” In such a situation, “to be blind to race today is to be blind to reality.”\textsuperscript{155}

The Court’s fragmented decision concurred with McCree’s assessment. While the Court did not agree that the record was insufficient for a determination (perhaps because it was, ironically, less politically able than McCree to make such a legalistic determination in so important a case), it did support the general formula of “affirmative action OK, quotas not OK” that had been the core of the government’s position from the beginning.

The case had been personally nerve-wracking for McCree. One friend called it “the most excruciating experience of his life.”\textsuperscript{156} He had worked all of his life to put race to one side and do his job as best he could. In his career,

\begin{itemize}
  \item[152.] See \textit{supra} text accompanying note 120.
  \item[153.] See \textit{CAPLAN}, \textit{supra} note 63, at 44 & n.53.
  \item[154.] See \textit{SCHWARTZ}, \textit{supra} note 114, at 52.
  \item[155.] \textit{Id.} at 52-53 (\textit{supra} note 6, footnoted omitted).
  \item[156.] Footlick & Camper, \textit{supra} note 6, at 97 (internal quotes omitted).
\end{itemize}
McCree had proven that he was not first and foremost a black judge, but just a judge, with the most appropriate modifier being "intellectual." In acquiring the job of Solicitor General, he found himself thrust onto center stage in a case that would not let him simply be the SG, but cast him instead as the black SG. Enormous pressure was put on McCree to take a strong, pro-university position because of his race, pressure which he resisted. "At one point in the discussions," one account reports, "McCree rejected the suggestion that he should be true to 'the black community.' 'I have to be true to myself,' he asserted."157

It did not make McCree feel any better that his race spared him criticism as well.158 In all likelihood, the most disappointing aspect of his treatment came from responses like that from Joe Califano. Califano recognized that "McCree had been an outstanding judge before becoming Solicitor General, and his temperament was to compensate for all personal biases in fulfilling the obligation to judge fairly. I was concerned that McCree was carrying so much personal freight on this issue that he could not decide it objectively."159

In contrast to the litigant who had accused Judge McCree of being unable to avoid favoring Blacks,160 Califano felt that SG McCree was being too fair. He was damned if he did and damned if he didn’t, but he bore this weight with his typical quiet dignity, and perseveredly performed his duties.161

c. Independence of the SG's Office

There is another entire chapter to the Bakke brief story—the extent to which the White House participated in its preparation. At one level, White House participation in brief-writing is no more exceptional than that of any other interested government agency. In extreme cases, though, White House involvement smacks of pulling rank. In addition, because the White House is the center of political accountability in the executive branch, it can introduce political considerations into the SG's briefs, and thereby damage the hard-fought credibility the SG's office has obtained with the Court. As Chief Justice Rehnquist wrote a decade later, "I don’t think the White House is well

157. DREYFUSS & LAWRENCE, supra note 114, at 171.
158. Benjamin Hooks, in criticizing President Carter for the brief, hesitated to criticize McCree because he was not sure what McCree's role was in the process. This is ironic, given that, as we will see, McCree resisted White House efforts to take a stronger pro-university position. Another black leader reported that McCree would have been "ripped to shreds by most of us" had he been white. Vernon Jarrett, When Skin Color Delays Criticism, CHI. TRIB., Sept. 16, 1977, § 3, at 4.
159. CALIFANO, supra note 36, at 237.
160. See supra text accompanying note 15.
161. See CALIFANO, supra note 36, at 237.
served by having a Solicitor General come to the Court and read the legal equivalent of a press release.\textsuperscript{162}

In \textit{Bakke}, this problem presented itself quite vividly. Administration officials showed little concern or respect for the traditional independence of the SG's office. Because \textit{Bakke} was a case with such important political ramifications, White House staffers recognized that the government's brief would be read very carefully as a policy statement by the administration on civil rights.\textsuperscript{163} They were correct in thinking this,\textsuperscript{164} but it was their first, and only, concern.

In late August, impatient to see the brief, the White House\textsuperscript{165} arranged for a meeting between Easterbrook, Wallace, Stuart Eizenstat (chief domestic policy advisor to the President), and Robert Lipshutz (the President's counsel). The tone of the meeting was frosty. Easterbrook and Wallace told the men that while the President had the "right to make any contribution he wanted to make to the brief,"\textsuperscript{166} he would have to do so through Bell, not McCree.\textsuperscript{167} They added, strongly, that "they would deplore any substantial White House interference."\textsuperscript{168}

The next step is described by Bell, who in this passage from his memoirs saw clearly the root of the conflict:

After a good deal of writing and rewriting, McCree gave me the initial draft. I then made perhaps my greatest mistake with regard to the power centers at the White House. . . . [I took] a copy of the draft friend-of-the-court brief with me to the White House when I went to tell the President what position we were developing. . . . That started wide circulation of the brief.\textsuperscript{169}

The brief was quickly disseminated around Washington, including, according to one report, an anonymous, cloak-and-dagger transfer of a copy of the brief

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\textsuperscript{162} \textit{CAPLAN, supra} note 63, at 45 (internal quotes omitted).
\textsuperscript{163} \textit{See DREYFUSS \& LAWRENCE, supra} note 114, at 166.
\textsuperscript{164} \textit{The New York Times} wrote that the government's position in \textit{Bakke} is important for two reasons. First, its brief may have some influence on the Supreme Court in a case that some black leaders describe as the most significant civil rights case in 20 years. Second, \textit{and perhaps more important}, the brief will presumably clarify the Administration's overall civil rights policy.
\textsuperscript{166} The White House is mentioned instead of President because this was the work of the staff, not Carter himself. In the absence of knowing exactly which staffer was behind this arrangement, "White House" seems to be the most appropriate term.
\textsuperscript{167} \textit{Osborne, supra} note 114, at 15.
\textsuperscript{168} \textit{See id.}
\textsuperscript{169} \textit{BELL \& OSTROW, supra} note 36, at 29-30.
\end{flushright}
by leaving it in the back seat of a taxicab. As a result of the release of the unfinished brief, suggestions and irate criticism began flowing in from all over the government and private sector. Eizenstat, Lipshutz, and Vice President Mondale were particularly upset with what they perceived as the brief's weak policy advocacy, and Mondale led an effort within the administration to influence the content of the brief.

In an early September memo to Carter, Eizenstat and Lipshutz wrote the brief needed to be less "dispassionate," bolder in its defense of affirmative action, and more sensitive to the fact that it was a political document, not just a legal one. In his response to the memo, the President told Eizenstat and Lipshutz to "[j]ump into [the] drafting process." Eizenstat gave a copy of his memo to Bell's Special Assistant, Terry Adamson, who relayed a version of it to McCree without saying from where it came. At a meeting with Eizenstat, Lipshutz, Bell, and Adamson, Mondale declared that the President wanted the brief to be pro-affirmative action and anti-quota. Bell confirmed that the brief would have that viewpoint (as indeed, it would have had, in one form or another, anyway). Bell instructed Adamson, however, not to relay Mondale's comments to McCree, saying that there was enough pressure on the SG already.

As we have seen in the Hill case, Bell felt strongly about the independence of the SG's office. As Caplan puts it, Bell "believed the Justice

170. See DREYFUSS & LAWRENCE, supra note 114, at 167-68.
171. The Congressional Black Caucus was particularly vigorous in its lobbying efforts. See, e.g., William Claiborne, Hill Black Caucus Warns Carter on Stand on Quotas, WASH. POST, Sep. 13, 1977, at A1. At a CBC banquet a few days after the brief was filed, President Carter jokingly thanked the Congressional Black Caucus for its "gracious" assistance in preparing the brief. McCree sat unsmiling but said later that he had not heard Carter's comment. Jacqueline Trescott, The Caucus and the Comic, WASH. POST, Sept. 26, 1977, at B1.
172. Days recalls that the main pressure from within the administration came from Mondale and Eizenstat, who he remembers had no desire to allow the Justice Department to maintain its independence. See Interview with Drew Days, supra note 17.
173. See BELL & OSTROW, supra note 36, at 28-29. President Carter cited Mondale's strong role in the Bakke case to refute claims that Mondale was losing influence within the administration. See Osborne, supra note 114, at 15.
174. See CAPLAN, supra note 63, at 44; DREYFUSS & LAWRENCE, supra note 114, at 167-68; Osborne, supra note 114, at 15.
175. CAPLAN, supra note 63, at 44.
176. See Osborne, supra note 114, at 15. Osborne claims that Easterbrook and Wallace "were more familiar than they wished to be" with the memo, but that McCree did not see it. Id. No other sources report that McCree or anyone else received such detailed direct commands from the White House.
177. See BELL & OSTROW, supra note 36, at 31.
178. See id.
Department should be as free from political meddling as a courthouse,179 a sentiment that no doubt applied with even greater vigor when it came to the SG’s office. Adamson systematically filtered suggestions from the White House to the brief-writers, but removed any reference to their origin, so that the input was of the same type as the suggestions that regularly flowed into the SG’s office from concerned agencies and citizens. Some minor suggestions, unproblematic to McCree and Days, were relayed as being from the White House and were implemented. For instance, at the White House’s request, the term “race-conscious” was struck out of the brief and replaced with “race-sensitive.”

The pressure for presidential intervention continued to mount. Califano in particular agitated for it. A few days before the brief was filed, Califano wrote a confidential memo to the President. In a portion of the memo not reproduced in his memoirs, Califano told the President that while “it is, of course difficult, at this late hour, for you to get deeply involved in the Bakke brief even though the case presents issues of manifestly Presidential importance, . . . you may [nevertheless] want to hear the divergent views yourself.”

Califano had come away from his meeting with Easterbrook and Wallace upset that “two bright young white holdovers from the Nixon administration”183 were shaping the government’s position and McCree was letting them.184 The problem thus seems to have been that Califano saw the law and policy aspects of the case as inextricably linked. He also saw Wallace (who had been hired, incidentally, during the Johnson Administration) and Easterbrook as conservative ideologues with an agenda, and McCree as having had the wool pulled over his eyes. From such a viewpoint, there was no reason to insulate the SG’s office from the President. The problem was that Califano’s viewpoint was wrong, and gave inadequate credit to McCree’s legal judgment. And, while there were some policy issues for the SG to sort through in the brief, the White House’s heavy-handed rank-pulling made it difficult for McCree to do so effectively.

In the end, the only thing that prevented the White House from wresting total control of the brief-writing process from McCree was the fact that White House staffers eventually became satisfied with the government’s brief. When,

179. Caplan, supra note 63, at 45.
180. See id.
181. See Interview with Drew Days, supra note 17.
182. See Memorandum from Joseph Califano to Jimmy Carter (Sept. 9, 1977) (McCree Papers, Box 27-2). McCree apparently received a copy of this memo.
183. Califano, supra note 36, at 237.
184. See id.
as the filing deadline drew near, Eizenstat was still not satisfied with the brief, Adamson made a phone call on September 10 to McCree, who was in Detroit. McCree described the four main points that the brief would take in its final form: that affirmative action was constitutional; that quotas were not; that the case was an inadequate vehicle for determining the limits of affirmative action and should be remanded; and that the government was indifferent as to what happened to Mr. Bakke in particular.

A memo from Eizenstat and Lipshutz to Mondale approved these points but complained that the brief did not match that structure. Assured that the brief would be adjusted to fit the four-point framework, however, they were satisfied, as was the President. Califano disliked the decision to criticize the adequacy of the record rather than to make a strong defense of affirmative action. At this point, Califano said rather remorselessly, "the Justice Department was 'climbing the walls' about [his] involvement" in the brief, and even Lipshutz felt Califano was "meddling."

Everything came to a head at a Cabinet meeting on September 12. Califano and HUD Secretary Patricia Harris urged Carter to take a stronger position in favor of affirmative action in the brief. U.N. Ambassador Young and Labor Secretary Marshall agreed. But Bell stuck up for McCree and for the independence of the SG's office, and said that "he doubted he would 'circulate any more briefs in the future.'" Most significantly, the President did not change his mind. While work on the brief continued for the next couple of days, and while pressure from government agencies and private groups intensified, the White House no longer attempted to influence the content of the brief.

185. McCree maintained his residence in Detroit during his tenure, paying his taxes there and keeping his Michigan license plates. Wade McCree: His Life and Career Were Distinguished by Dignity, Integrity, DET. FREE PRESS, Aug. 31, 1987, at 8A.
186. See Memorandum from Stuart Eizenstat and Robert Lipshutz to Walter Mondale (Sept. 10, 1977) (McCree Papers, Box 27-2). It is unclear what this memo is doing in McCree's papers, given the great efforts taken by Bell to insulate McCree from the events at the White House. There is, however, no evidence to contradict McCree, Bell's, and Days' recollection of the successful insulation of the brief-writing process, or to suggest that this memo was sent to McCree before the brief was filed.
187. See BELL & OSTROW, supra note 36, at 32; O'NEILL, supra note 114, at 185; Osborne, supra note 114.
188. CALIFANO, supra note 36, at 240.
189. See id.
190. See generally CALIFANO, supra note 36, at 241; O'NEILL, supra note 114, at 185-86; Osborne, supra note 114.
191. CAPLAN, supra note 63, at 45.
Bakke represented a valiant effort by Bell to protect the independence of the SG's office. Ultimately, however, it was a failed effort. Most accounts of the episode conclude that the White House directed significant pressure at the SG in the brief-writing process,192 and that the administration had proven powerfully unsympathetic to the traditional independence of the SG's office.193 Even if the bulk of the intrusion was deflected from McCree, the White House's actions were weighty precedent. Even if the degree of intrusion was not as large as everyone thought, precedents are based on perceptions of facts, not facts in their pure form. Even the Supreme Court expressed its displeasure; Chief Justice Burger and Justice Blackmun complained to McCree about leaks of the government's briefs to the press, purportedly saying that "the entire court was offended and displeased."194 They were less concerned with the independence of the SG's office, it seems, than with the "improper public pressure" that such a media circus put on the Court.195

But people learn from mistakes. Bell continued to maintain that he and the President had not contributed a single word to the brief,196 and he came away from the Bakke debacle with a better understanding of his task as AG to keep the Justice Department and the SG's office independent.197 Furthermore, reaction to the episode, together with the Hill incident, engendered a strong statement of SG independence, the Office of Legal Counsel memorandum discussed next.

192. See, e.g., DREYFUSS & LAWRENCE, supra note 114, at 170; O'NEILL, supra note 114, at 186-87; SCHWARTZ, supra note 114, at 46. My own opinion largely parallels Drew Days', namely that the final content of the brief was not much affected by this political input. Days does, however, "attest to the general accuracy of published accounts of presidential involvement in that event." Drew S. Days, III, In Search of the Solicitor General's Clients: A Drama with Many Characters, 83 KY. L.J. 485, 490 (1995).

193. See, e.g., Nina Totenberg, For the U.S.: Griffin Bell, Esq., WASH. POST, July 1, 1979 (Magazine), at 10 (quoting "upper-level White House aide" as saying "The White House should have a role in determining what briefs the solicitor general files . . . . To say, for example, that the White House shouldn't get involved in the Bakke case, as Bell originally did, is just crazy!").

194. Osborne, supra note 114, at 15.

195. See id.

196. See id. Surely this is an exaggeration, given that even Days admits the White House changed the word "race-conscious." See supra text accompanying note 181.

197. See CAPLAN, supra note 63, at 45.
d. Law Versus Policy

In recounting his error in bringing his draft brief to the White House, Bell wrote:

Nowhere is the tug of war between the White House and a Cabinet Department more apparent than in a dispute between the Justice Department and the President's staff over what is law and what is policy. If the staff had its way, no doubt every major issue that naturally fell to the Justice Department would be considered policy rather than a legal matter. Then the White House would be making all the decisions, because it is the White House where policy is made.

The year after Bakke, in a press conference, Bell reflected on the case:

[We had a time about the Bakke brief. There was nothing improper about that. I've thought about the Bakke case for a long time. That was a case of law and policy. The President's got a policy where he wants to uphold affirmative action, and the President had very little to say about the Bakke brief.]

In response to the Hill incident earlier in the year, the Office of Legal Counsel (OLC) had begun preparing a statement on the bounds of the institutional relationship between the AG and SG, and more broadly, on the independence of the Solicitor General and his role in separating matters of law from matters of policy. The Bakke case made the memo even more timely, perhaps even urgent. When OLC attorney John Harmon, who signed the memo, presented it to McCree, he added in a note, "I would very much appreciate your reactions and suggestions. I felt this was a memorandum that you might be in a difficult position to write, but a memorandum which needed writing." Harmon was right that the memo had to come from the OLC, not the SG, in order to have legitimacy.

The memorandum's main points, for our purposes, were that: (1) the SG has a tradition of being given independence in formulating legal judgments, both within the Justice Department and the Executive Branch as a whole; (2) this independence serves important pragmatic purposes; (3) the AG's role, as both a policy and legal advisor to the President, increases the need for an independent SG; and (4) the best way to make sure that the boundaries between law and policy are defined appropriately is to have the SG, not the policymakers, perform that task.

200. Note from John Harmon to Wade McCree (Sept. 29, 1977) (McCree Papers, Box 25-14).
standpoint of the Office of the Solicitor General, this official policy statement was the most significant development of McCree’s tenure. It is unsurprising that this strong statement of the SG’s independence, and of the AG’s role in maintaining it, came from Bell’s Justice Department. Bell had worked hard, if not always successfully, to insulate McCree, and this memo helped nail down the precedential and policy basis for doing so.

The law and policy distinction is a crucial one, and the OLC memo provided a strong basis for a sustainable policy of handling it in the long term. Years later, McCree said that he had consulted with Bell on Bakke, but only to the extent that there were policy issues involved. Using familiar words, he praised Bell for “recogniz[ing] that the independent legal decision-making status of the Solicitor General will be preserved if it is the Solicitor General who normally decides when to seek the advice of the Attorney General or the President in a given case, not the other way around.”202

If a Supreme Court case can ever be as much about policy as law, Bakke was just that. Perhaps if a more diplomatic Assistant SG than Frank Easterbrook had written the SG’s first draft brief, there would not have been nearly as much controversy. It seems, however, that there was no way to satisfy everyone from a policy standpoint. If the brief-writing process had been more private and only the finished product had been made available to the press and pressure groups, there almost certainly would still have been controversy. There is probably no good way to write briefs that simultaneously play well to politicians and the Supreme Court. It is clear that the SG’s audience is the Court, and it is equally clear that Wade McCree understood this, even if that meant being criticized and pressured.

3. Massachusetts v. Feeney

a. Introduction

The next case that sheds light on McCree’s tenure as SG is Massachusetts v. Feeney.203 In Feeney, a female applicant for a Massachusetts civil service position sued the State.204 She claimed that the State’s veterans’ preference system, under which non-veterans could get a job only after all qualified veterans were hired, was unconstitutionally discriminatory against women.205 A three-judge district court agreed, finding the program discriminatory because

202. Notes from Lecture by McCree at LSU Law Center (Feb. 28, 1979) (McCree Papers, Box 65-70).
204. See id. at 259.
205. See id.
of its disparate impact. 206 The Supreme Court remanded in light of *Washington v. Davis*, 207 a case that required a showing of intent to discriminate rather than mere disparate impact. 208 The district court reaffirmed its ruling, holding that the disparity of impact of the Massachusetts program was too obvious and inevitable to be unintended. 209

b. Defining the Government's Interest as Amicus

The case initially seemed to follow a normal path. 210 The Supreme Court granted certiorari on October 10, 1978. The federal government had a clear interest in the case, since it administered a huge veterans' preference program of its own. McCree met with the various concerned agencies, which were split over which position to endorse. The Labor Department and the Civil Service Commission did not want McCree to file any brief, particularly not one in favor of the Massachusetts program. The Civil and Civil Rights Divisions of the Justice Department were unenthusiastic about defending the preferences, but did not object to a filing. The Veterans Administration supported filing a brief defending veterans' preferences. McCree decided to file a brief, to be written by now-Deputy SG Frank Easterbrook, that reflected the input of the concerned agencies. 211

The reason for the split within the administration was that, as part of his plans for civil service reform, President Carter had proposed eliminating much of the federal veterans' preference program, in large part because of its disparate impact on women. 212 The brief supported veterans' preferences in general, but not the Massachusetts plan in particular, and noted (and mooted) this political backdrop:

[T]he President wishes to modify the existing federal preference system .... We do not address policy issues here except to note the reasons why, in our view, the federal

207. 426 U.S. 229 (1976).
211. See Pickett, supra note 210.
212. At that time, the nation's veterans were 98 percent male. See Sawyer I, supra note 210, at A2.
veterans' preference is a rational and constitutionally permissible response to legitimate governmental concerns.\(^{213}\)

In other words, consistent with the Harmon memo, the SG's office had determined that this case was a matter of law, not policy, and as such it did not need to concern itself with the fact that Carter wanted, ideally, to eliminate the issue altogether. As Easterbrook put it in a newspaper report on the case, the brief did not argue that the President and Congress should not change the preference system, it argued that the Court should not change it, because the program was constitutionally permissible.\(^{214}\) While the brief steered clear of "endorsing" the Massachusetts or federal programs,\(^{215}\) it did read the intent standard of \textit{Davis} differently than the lower court had, and argued that "it is clear that the Massachusetts veterans' preference was intended to achieve legitimate objectives and not to discriminate against women."\(^{216}\)

The subtlety of Easterbrook's distinctions were lost on the agencies and women's groups who reacted angrily to the brief after its filing on December 4. Some felt that the brief should have staked out a narrower position, supporting the federal government's programs (which gave extra points to veterans in an elaborate civil service process) while affirmatively opposing the more extreme Massachusetts program (which gave jobs to non-veterans only after all veterans applying had been hired). Others apparently felt that neither program should be supported.

For our purposes, though, the most significant complaint was that McCree had taken a position that contradicted the President's. Judith Lichtman of the Women's Legal Defense Fund, for instance, said that it was "absurd to have these people in the solicitor general's office taking a position opposite to that of the president."\(^{217}\) Lichtman accused the SG's office of going "off on its own initiative to make policy[.]"\(^{218}\) The \textit{Washington Post} reported that "[s]ome sources suggested the solicitor general's office is developing a 'history of differing with the administration position,'"\(^{219}\) and cited the \textit{Hill} and \textit{Bakke} cases as examples. In the same story, Easterbrook downplayed such disagreements as "'happen[ing] all the time,' as part of standard operating


\(^{214}\) \textit{See} Sawyer II, \textit{supra} note 210, at A39.

\(^{215}\) \textit{See} Feeney Brief, \textit{supra} note 213, at 491.

\(^{216}\) \textit{Id.} at 490.

\(^{217}\) Sawyer I, \textit{supra} note 210, at A2 (internal quotes omitted).

\(^{218}\) Pickett, \textit{supra} note 210 (internal quotes omitted).

\(^{219}\) Sawyer I, \textit{supra} note 210, at A2.
procedures."220 Easterbrook was no doubt miscited for that proposition; he was probably referring to the fact that standard procedure allowed groups of varying opinions to provide input and criticism, not that it was standard procedure to disagree with the White House.221

For its part, the White House seemed aware of the law/policy distinction and was only actually concerned with the lack of communication between the SG and the White House. This relatively understanding position took some time to emerge; early reports indicated that Carter was "angry" and critical of Easterbrook's brief,222 and an unnamed "administration official"223 was reported as saying that "[t]here is a degree of independence in [the SG's office] that is of concern among White House aides[.]")224 Soon, however, Carter reported that he was only concerned that the brief would be "misinterpreted" as a change in the administration's position, and that Bell had advised him that the brief did not actually conflict with his opposition to veterans' preferences.225

The biggest problem that the White House seemed to have was that it had been caught unaware of the brief's contents when it was filed. Bell responded by asking McCree to give Bell "the same notice he gives to other agencies when requesting comments on any legal action,"226 at which point Bell would "bear the responsibility for any communication with the White House."227 It is unclear if this lack of communication reflected the insulation of the SG's office or the disorganization of the Carter White House. Bell's request did not represent new policy; McCree had always made a point of communicating with the AG's office.228 It is more likely that Bell just wanted to make a statement for appearance's sake, or at most that he wanted the SG's office to do a better job of highlighting important cases. For whatever reason, there were no more incidents like Hill, Bakke, or Feeney for the rest of McCree's tenure. Whether

220. Id.
221. Elsewhere in the same article, Easterbrook made another comment, which did not have to be misused to be inflammatory, and which certainly had less subtlety than his law/policy distinction. He said, "'I assume the President could have instructed us not to file the brief' . . . However, he noted also that one of the articles of impeachment against President Richard Nixon contained the argument that the president was 'trying to tell the Justice Department what to do.'" Id.
222. See Angry President Seeks Review on Vets' Status, WASH. POST, Dec. 6, 1978, at A16 (McCree Papers, Box 33-5).
223. See Sawyer II, supra note 210, at A39.
224. Id.
225. See id.
226. Id.
227. Id.; see also O'Connor, supra note 84, at 261 (internal quotes omitted).
228. See 1977 Ninth Circuit Address, supra note 30, at 552.
this was because of better communication or a lack of controversial cases is unclear, but to the extent that an SG’s job involves staying out of trouble and out of the newspaper, McCree performed well in his last three years.

Additionally, another important thing was clear: the administration had learned its lesson from Bakke. Despite the quotation from the administration official concerned about the independence of the SG’s office, “[o]fficials at both the White House and the Justice Department emphasized [to the media] their desire to ‘insulate’ the solicitor general’s office from undue political influence.” The problem was one of coordinating public relations; there seemed to be no question that the SG’s office would have the last word on this matter of law.

c. Centralization of Authority

The story of Feeney was not over, however. The pressure remained on McCree to soften his position. How he dealt with it gives us a glimpse into the way in which the SG must deal with competing desires from various agencies. As we will see, Feeney is an atypical case, both because of the sort of pressure put on McCree and the end result, the filing of a separate brief. Nevertheless, by showing us the limits of the centralization of authority under the SG, we can better understand the normal cases, in which McCree did allow himself to have the last word.

As usual for a controversial case, dozens of letters and telegrams flooded Carter and Bell’s offices, almost all urging them to intervene and overrule McCree. Privately, however, a more plausible and constructive effort was being made to adjust the SG’s position. Eleanor Holmes Norton, chair of the EEOC and a respected colleague of McCree’s, wrote him a confidential, personal letter. In it, she said that she was considering asking for a separate government brief to be filed, but that she did not want to publicly oppose the SG. She suggested that McCree file a reply brief narrowing and toning down the government’s support of veterans’ preference programs and distinguishing them from the Massachusetts program:

230. An interesting postscript comes in the form of a letter written to Bell from a veteran who was angry with what he perceived as the pressure being brought to bear on McCree to change his position. Letter from Leonard W. Pipkin to Griffin Bell (Feb. 3, 1979) (McCree Papers, Box 33-5). While it is likely that Pipkin was more concerned about veterans’ preferences than about the independence of the SG’s office, the broad, arguably defensive response by Bell’s assistant is telling. He wrote: “I assure you that no pressure has been exerted on the Solicitor General by the Attorney General over the question of veterans’ preferences or any other question.” Letter from J. Phillip Jordan to Pipkin (Feb. 27, 1979) (McCree Papers, Box 33-5).
[Women's groups] justifiably feel that the brief of the United States is in tone an advocate's brief for Massachusetts (contrary, as I understand it, to the consensus reached at the meeting of the various concerned agencies) . . . We strenuously urge this position as a reasonable accommodation that takes into account the interests of all concerned in a way that does not embarrass any of us. Above all we have tried to be sensitive to your special position.231

McCree wrote back to say that he agreed with Norton on the need to protect simultaneously the current legislation, the President's proposals, and the government's civil rights program. He said that he would wait for the appellee's response before deciding on his course of action.

McCree also included, on a confidential basis, Deputy SG Easterbrook's Dec. 8 analysis of a memorandum that criticized the SG's brief. The memorandum had been written by women's rights advocates Ruth Bader Ginsburg and Phyllis Segal, and had been sent to AG Bell at his invitation.232

In his analysis, Easterbrook deflected some of the more technical criticisms, and contended that "[t]he principal argument of the memorandum . . . is that the brief reads as if it had been written by an advocate. . . . [This is] not a legitimate ground of criticism. We should be advocates for the constitutional power of Congress and the President."233

The Easterbrook memo provoked an unhappy response by Norton. She wrote back to McCree, complaining that the memo

resurrects the controversy in the worst way, and should it become a basis for judging whether to file a reply brief, will almost certainly lead to another public flare-up over this issue. . . . I found [Easterbrook’s] comments to the press on the role of the Administration in this case inflammatory and unprofessional and I must tell you that this view is widely shared.234

She continued, explaining that she had personally been containing media flare-ups:

[T]his matter is under control only because of the most extensive efforts on my part. . . . [The EEOC, Civil Service Commission, and Labor Department] were prepared to formally petition you to file a separate brief. However, this course of action guaranteed further open controversy and needless criticism of you.235

231. Letter from Eleanor Holmes Norton to Wade McCree (Dec. 21, 1978) (McCree Papers, Box 33-5).
232. See Sawyer II, supra note 210, at A39. Interestingly, Ginsburg, then on the faculty of Columbia Law School, had been a finalist for the post of SG but lost out to McCree. See Al Kamen, An Increasingly Crowded Legal Ring, WASH. POST, Nov. 24, 1992, at A19.
233. Memorandum from Deputy Solicitor General Frank Easterbrook (Dec. 8, 1978) (McCree Papers, Box 33-5).
235. Id.
Her suggestion of a strategic SG reply brief was kept from the women’s groups, and Norton used the “strength of her reputation”\(^{236}\) to reassure the women’s groups that she would “find a satisfactory solution”\(^{237}\) with McCree, and to keep the groups from speaking out further in the press.

Three weeks later, apparently still not satisfied with McCree’s response, Norton sent a suggested reply brief. McCree had three options at this point. He could give in to Norton and file a strategically worded reply/supplemental brief narrowing the government’s argument; he could allow Norton to file her own brief, an option he considered to be a “last resort,”\(^{238}\) or he could do neither. For all intents and purposes, the decision was McCree’s to make.

There were several factors to balance. First, the law. We may surmise that McCree knew better than Norton, Bell, or Carter’s staff what the Court was likely to do in the case. It was his job to know better. His confidence in Easterbrook reflected in part this legal judgment. On the other hand, the Massachusetts plan was extreme; why go out on a limb to defend it when the interest of the United States could be served by defending the federal program and ignoring Massachusetts’? Easterbrook had written, referring to his brief: “It is my hope that the first 10 pages of the argument section of the brief will show the Court how it can reverse without doing any damage to our civil rights programs.”\(^{239}\) But Ginsburg and Norton did not read his brief that way, and the Court had reason to not read it that way either, as shown by the other excerpts from Easterbrook’s brief reproduced above.

Second, even if McCree’s legal judgment was not superior to that of his critics, it was important for appearance’s sake—for his credibility with the Court, and for morale in the SG’s office—to maintain consistency and stick with his first argument. The Court’s displeasure with the bifurcated brief in the Hill case made this clear, and McCree was well aware of this. Toward the end of his tenure, he wrote: “The Supreme Court normally expects us to reconcile the disparate views of the government and to speak with one voice. That is, after all, why we have a Solicitor General.”\(^{240}\)

Consideration of appearances on the other side broke down into either the political considerations that any SG would prefer to avoid, or the public-relations issues that, while troublesome, would be fixed by better communication, not by loosening the SG’s reins on centralized appellate authority. If McCree gave into this pressure, it would only get worse, as

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236. *Id.*
237. *Id.*
emboldened agencies realized that if they fought hard enough, they could have the last word instead of the SG.

As mentioned above, this episode was atypical. In most cases, according to McCree, the SG's office followed a process with a

long tradition[,] . . . a process of sorting and sifting, listening and debating, compromising and holding firm--but always discussing . . . [W]hen the discussion process is over and well-grounded differences of opinion on the merits of a legal issue remain, the Solicitor General will attempt to convey both points of view to the Court. This may be done by filing a brief that sets forth both points of view, or, very rarely, by permitting an agency to file a brief or petition of its own that is authorized by the Solicitor General but not endorsed by him. This, I should stress, is a measure of last resort.241

This typical, traditional process fit well with McCree's collegial manner, and if it did not always leave every party satisfied, it at least seemed to minimize the inevitable alienation that always comes from choosing one side over another.242 Some of that conflict is also spawned by an unavoidable part of the SG's job--taking legal positions that have unpopular substantive effects. While there were solid legal arguments opposing the SG in the Hill, Bakke, and Feeney disagreements, the bulk of the pressure directed at the SG's office seems to have been based on policy predilections or, at best, legal realism. Drew Days remembers that, when working out the position of the United States, McCree would patiently hear out conferees arguing for policy outcomes. When they were done, he would ask, politely but pointedly, if they had any legal arguments to offer.243

In Feeney, for reasons that are not wholly clear, McCree allowed the dissenting agencies to file their own brief. Perhaps he felt that a separate brief would allow the SG to make its own, undiluted argument, something it had not been able to do in Hill. Perhaps he was sympathetic to Norton's position because he did not see the law as being as clear cut as Easterbrook had represented it. Whatever his reasons, McCree allowed the general counsels of the Office of Personnel Management, Department of Defense, and the EEOC, and the Solicitor of Labor (all of whom, coincidentally, were women) to file a brief on February 9, 1979. The brief was neutral on the constitutionality of the Massachusetts statute, and suggested differences between the

241. Id. at 345-46.
242. The Reagan Administration, by contrast, was more likely to have a centralized legal argument and to shut out the disagreeing agency's viewpoint. See Neal Devins, Unitariness and Independence: Solicitor General Control over Independent Agency Litigation, 82 CAL. L. REV. 255, 285-86 (1994).
243. See Comments from Drew Days, supra note 108.
Massachusetts and federal programs, differences which would allow the Court to preserve the latter while enjoining the former.

In the event, the Supreme Court upheld the Massachusetts statute despite its harshly disparate impact. The Court supported the more conservative view of the intent standard favored by McCree and Easterbrook, not the more liberal one propounded by the district court and Norton.

4. Serving the Client—Haig v. Agee, Bell v. Wolfish, Cooper v. Califano

Three relatively minor cases highlight the way in which being SG entailed serving a client—the government—in ways that, if not uncomfortable for McCree, at least required some adjustment from his former role as a judge.

a. Haig v. Agee

In many types of cases, SGs have the luxury of a quasi-judicial approach to the law, trying to figure out the direction of the Court and going with the flow. In national security cases, by contrast, SGs generally represent their client very vigorously, and press the Court to extend the government’s powers as far they will go. An example of such a case is Haig v. Agee.244

In Haig, the State Department wanted to revoke the passport of Philip Agee, an ex-CIA agent who had gone abroad in a campaign to blow the cover of CIA officers and agents around the world.245 Agee was causing serious damage to national security, but the district and circuit courts held that the Secretary of State had exceeded his statutory authority.246 It is unclear what McCree, known for his commitment to individual rights over government infringement, would have held as a judge. As SG, however, he pressed for as broad an interpretation of the Secretary’s power as possible, a position that disturbed some legal commentators.247

In one sense it was an easy call for McCree, since Agee was causing substantial damage to national security. On the other hand, the lower courts and two dissenters on the Supreme Court had had no trouble finding in Agee’s favor. In dissent, Justice Brennan quoted the expansive view of executive power for which McCree contended at oral argument:

244. 453 U.S. 280 (1981)
245. See id. at 280.
246. See id. at 287-88.
An excerpt from the petitioner’s portion of the oral argument is particularly revealing:

“QUESTION: General McCree, supposing a person right now were to apply for a passport to go to Salvador, and when asked the purpose of his journey, to say, to denounce the United States policy in Salvador in supporting the junta. And the Secretary of State says, I just will not issue a passport for that purpose. Do you think that he can consistently do that in the light of our previous cases?

“MR. McCREE: I would say, yes, he can. Because we have to vest these—The President of the United States and the Secretary of State working under him are charged with conducting the foreign policy of the Nation, and the freedom of speech that we enjoy domestically may be different from that that we can exercise in this context.” Tr. of Oral Arg. 20. The reach of the Secretary’s discretion is potentially staggering.248

McCree thus seemed to have adapted readily to his role as an advocate.249

b. **Bell v. Wolfish**

Perhaps the most striking example of a case that McCree probably would have treated differently as a judge than as SG is *Bell v. Wolfish.*250 In *Wolfish,* McCree was called on to defend the government against a suit by pre-trial detainees, who claimed that the conditions of their confinement violated the presumption of innocence and the Fourth Amendment.251 McCree disagreed, and the Court upheld the practices, which included prohibiting receipt of packages of food and personal items, and conducting visual body-cavity searches of inmates following contact visits. It is impossible to say for sure what McCree’s take on such a case would have been as a judge, but his anti-rights argument in this case does contrast with the pro-rights record he had built before becoming the government’s legal spokesman.

c. **Cooper v. Califano**

Congress is also a client of the Solicitor General, who will generally fight to affirm the constitutionality of congressional enactments, all other things being equal. McCree called the decision not to defend a duly enacted law, or to contest the constitutionality of a statute as an amicus, “[p]erhaps the most

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248. *Haig,* 453 U.S. at 319 n.9 (Brennan, J., dissenting).
249. Another, similar example is *Rostker v. Goldberg,* 453 U.S. 57 (1981). In that case, McCree argued that the exclusion of women from draft registration was constitutional, mainly because of the deference due to the government in military matters. See *Rostker,* 453 U.S. at 69. This case is mentioned here because it was one of the major ones of McCree’s tenure, but it does not shed additional light on the conduct of the SG’s office.
251. See id.
sensitive decision for a Solicitor General." 252 An example of such a decision was *Cooper v. Califano*. 253 In that case, the district court enjoined the discriminatory distribution, under the Social Security Act, of certain benefits to female spouses but not male ones. Since the Supreme Court had just decided in *Weinberger v. Wiesenfeld* 254 that such discrimination in the Social Security Act violated the Fifth Amendment, McCree decided not to appeal *Cooper*. 255

The reason that this entailed an adjustment for McCree from his role as judge is not that he had been free to ignore Supreme Court precedent as a circuit court judge. The opposite is true; what was a "most sensitive decision" 256 for McCree as SG would have been the simplest possible for McCree as a judge.

5. Independent Agency Litigation

There were no cases during McCree’s tenure that provide any exceptional insight on the relation between the SG and independent agencies. The statistics discussed above showed that, in general, McCree was more likely than most SGs to allow independent agencies to argue their own cases and to defer to their interpretations of the law. 257 We have also seen, however, that McCree was similarly generous in allowing other, non-independent government lawyers to argue cases. 258 Whatever one makes of these statistics, it seems that relations with independent agencies were harmonious during McCree’s tenure, and that there were no major departures from the long-term trends regarding independent agencies and the SG’s office.

It was Bell the political actor, not McCree, who was charged with protecting the centralized litigatory authority of the SG’s office, and Bell generally did a good job. During Bell’s first nine months as AG, there were six instances in which, after the SG’s office refused to pursue an independent agency’s case, Congress began attempts to intervene. All six were foiled by Bell and administration ally Senator Eastland of Mississippi. 259

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255. See McCree, *supra* note 65, at 344.
256. Id. at 343.
257. See *supra* Section III.C.
258. See *supra* text accompanying note 83.
6. Confession of Error

As with independent litigating authority, there were no major shifts regarding policy in confession of error during McCree's tenure. Other than one typical application of the Petite policy, there were two cases that shed minor light on the bounds of the practice. In Thompson v. United States, the government refused to confess error at the circuit court level, but reversed itself at the Supreme Court. As such, though the SG wanted the Court to remand the case all the way down to the district court with instructions to dismiss the charges, the Court refused and instead remanded to the circuit court for reconsideration in light of the government's new position.

A strategic use of the confession technique came in EPA v. Brown, in which the SG confessed error by saying that a case was moot because the government was going to change the regulations at issue. The SG's office apparently did this to avoid an adverse ruling by the Supreme Court, and to have the adverse rulings in the circuit courts vacated. Whatever the SG's intentions, however, the Court was willing to go along.

For his part, McCree offered a conventional view of confession of error. He reminisced that as a circuit court judge, his only reason to pay attention to the SG had been when it confessed error, which it did in two of his cases. McCree joked that he liked the practice in the case in which he was in dissent, but was less happy with it in the other case, for which he had written a unanimous opinion. Elsewhere, he wrote (in a typically conciliatory vein) that the decision to confess error "requires much soul-searching and is to be rendered as a last resort . . . . The United States Attorney, who has tried the case[,] . . . understandably takes a dim view of confessions of error [,] . . . [and the practice] generate[s] tensions with lower court judges . . . ."

7. The Billy Carter Case—Other Administrative Duties

One other duty of the SG is to act as the "honest broker" in the Justice Department. While the Justice Department is supposed to maintain a certain

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262. See id.
265. See 1977 Ninth Circuit Address, supra note 30, at 548.
266. McCree, supra note 65, at 342-43.
level of independence, most of its high-ranking officials are political appointees. The Solicitor General is a political appointee too, to be sure, but his traditional position of independence puts him in a unique position to lend credibility to the findings of internal investigations.

The most prominent example of this during McCree’s tenure was the Billy Carter case. Carter, the President’s brother, had registered as an agent for the Libyan government. It was alleged that President Carter and AG Civiletti (Bell’s successor) had interfered with the Justice Department investigation of Billy Carter. Civiletti had discussed the case with the President, but denied doing so later. The Justice Department investigators concluded, however, that the discussion had not been inappropriate and was consistent with the AG’s duty to keep the President informed on such matters. The whole matter had caused an uproar, but the investigation cleared the President and Attorney General of wrongdoing. The final report was submitted to McCree, who approved it.

It is a striking declaration of the respect for the independence of the SG’s office that a political appointee, the third-ranking official in the department, could put such a controversial matter to rest by accepting an internal report.

CONCLUSION

Wade McCree was an effective Solicitor General. The cases he handled provide good examples of the traditional conduct of the SG’s office. Although the long-standing independence of the SG was attacked by elements of the Carter administration, McCree and AG Bell successfully withstood the pressure. McCree’s judicial temperament and keen intellect served him well in his post, and he truly exemplified the highest standards of the office.


268. Another instance of McCree giving final approval to an internal investigation is his handling of the Marston affair, in which Carter and Bell were cleared of obstructing justice in the removal of Philadelphia U.S. Attorney Daniel Marston. See Questions Still Linger in the Marston Affair, U.S. NEWS & WORLD REP., Feb. 6, 1978, at 22 (noting that political and credibility problems remained for Carter even if the investigation ended his legal ones).