

The Role of the Solicitor General in Church-State Cases within the Clinton and Bush Administrations: A Study Supporting the Politicization of the Solicitor General

Andrew R. Lewis

As a case study of church-state cases before the Supreme Court during the William J. Clinton and George W. Bush presidential administrations, this paper shows that the solicitor general is a politicized position and uses evidence to describe several ways that politicization occurred during these two administrations. In recent decades, many scholars have argued that the executive branch has become politicized through presidential appointments and the centralization of executive offices under direct control of the president. However, since Reagan, there have been very few studies describing the politicization of the solicitor general. This study fills that gap and provides insightful information about the politicization of the solicitor general. The conclusions of this case study are that the solicitors general under both President Clinton and President Bush were politicized, following the presidential agenda of each administration on church-state issues. This politicization resulted in Bush's solicitors general being more active in church-state cases, making arguments and filing briefs in controversial cases such as public displays of the Ten Commandments, public funding for religious education, and public funding of religious community initiatives. The politicization of the solicitor general also resulted in Clinton's solicitors general taking more moderate and "safe" positions on church-state cases.

The public perception of the increasing politicization of the judiciary is growing within America. Judicial appointments from the Supreme Court to the lower federal courts have received media attention, prompted Congressional hearings, and almost resulted in the "nuclear option" where the Republican led Senate threatened to alter the rules to override the filibuster of Senate Democrats surrounding judicial appointments. On the campaign trail, Republicans lambast "activist judges," and both conservatives and liberals see the judiciary as a political institution of untapped potential for enacting policy changes concurrent with their ideologies (Epstein 1985; Lowery and Brasher 2004; Teles 2008; Rosenberg 1991). Because of the power of the modern judicial branch and the salience of judicial issues, evidence in the political science literature shows that recent presidents have sought to politicize the judiciary, seeking to use judicial powers to carry out their

political agenda (Caplan 1987; Salokar 1992; Teles 2008).¹ At the same time presidents have politicized actors such as the solicitor general who directly impact the judiciary (Caplan 1987; Johnson 2003; Salokar 1992). And yet, the potential power wielded by the solicitor general has been neglected by scholars, the media, and the general public. This paper seeks to further expose the influence of the solicitor general and provide evidence of its politicization through a case study on church-state litigation.

The solicitor general can play a powerful role in American politics, as the solicitor can influence the agenda and decisions of the Supreme Court. The solicitor general is at the fulcrum of the separation of powers, having the ability to use executive power to influence the judiciary. If the administration uses the solicitor general to achieve its policy objectives before the Supreme Court, then the activities taken by the solicitor general and the influence the solicitor general has is extremely consequential for presidential politics and American democratic theory. Thus, it warrants further scrutiny and contemporary analysis

In this study, I expect to find that the solicitor general has been politicized, in congruence with scholarship on the solicitor general and the executive branch. Building upon this expectation, I seek to add to the knowledge of the solicitor general by updating the existing literature on the solicitor general to include the recent Bill Clinton and George W. Bush presidencies. Using church-state constitutional law as a framework, I show what actions the solicitors general take to influence judicial outcomes. I find that the solicitor general has become politicized along with much of the executive branch. This paper also shows how the solicitors general in the Clinton and Bush

¹ For this paper, the term politicized is used to describe actions taken by the solicitor general. A politicized solicitor general is a solicitor general that seeks to promote the policy and agenda positions of the administration before the Court. The solicitor general is a political operative instead of an independent agent of the government.

Administrations have taken politicized actions on church-state cases, helping the administrations achieve their church-state objectives.

The Clinton and Bush administrations provide strong cases to study and compare solicitors general, because both administrations served for two terms, both operated in the politicized executive era after Ronald Reagan, and both took office after a previous president who was of the opposition party. In addition, Clinton and Bush, while similar ideologically on many issues, differ on the emphasis they take on church-state issues. Bush has much stronger conviction views about the role of religion in society, as this appears to be a strongly held personal belief (Campbell 2007; Layman and Hussey 2007; Wilcox and Larson 2006), and this appears to impact how the administration used the solicitor general in church-state cases. Thus, their presidencies are similar enough to provide necessary controls, and they differ on their church-state objectives enough to expect and find differences.

This research also focuses primarily on the impact of the solicitor general on church-state cases during these administrations. Church-state cases are among the most significant personal liberty cases that appear before the Court. Cases concerning establishment of religion, free exercise of religion, religious speech, and aid to religious organizations frequently are selected by the Court from the pool of potential cases because of the jurisprudential controversy that exists and the salience of church-state cases within American politics (Carter 1993; Jelen 2000; Witte 2005). The solicitor general's office often plays a role in these cases, and they are politically salient to the American public, especially since the rise of the Christian Right (Wilcox and Larson 2006; Hacker 2005). Therefore, they should provide a fruitful segment of Supreme Court cases to study the actions of the solicitor general.

This paper will analyze how solicitors general during the Clinton and Bush administrations have used their power regarding church-state cases. The legal and political characteristics of the solicitors general, the decision to take action, and the types of activity taken will be important, along with the success and consistency of their actions. Underlying the entire study will be the politicization of the solicitor general. The primary conclusion is that solicitors general in the Clinton and Bush Administrations were used to carry out the priorities of each administration. Solicitors general serve as rational extensions of the president by consistently following the executive's policy agendas. This paper finds that both Clinton and Bush generally supported religious involvement in the public sphere. However, Bush more fervently promotes an agenda of expanding the free exercise of religion and limiting establishment clause restrictions to religion, while Clinton strategically chose to evade many of the same establishment clause issues by not taking action. Additionally, because of the hierarchy of issues in each administration, the solicitors general under Bush are more active concerning church-state issues than the solicitors general under Clinton, making Bush's solicitors general more polarizing on church-state issues.

Background on the Solicitor General's Office and Its Politicization

The Judiciary Act of 1870 created the Solicitor General's Office. Under the Act, the Solicitor General became the centralized legal counsel for the government. Structurally, the solicitor general is the fourth highest position within the Department of Justice, but functionally the solicitor general reports directly to the attorney general. After the formation of the Office of the Solicitor General, only members of the Office of the Solicitor General and the Office of the Attorney General can argue on behalf of the United States before the Supreme Court.

The Office of the Solicitor General states that its responsibilities are to "supervise and conduct government litigation in the United States Supreme Court" (Office of the Solicitor General

2007). In doing so, the solicitor general prepares petitions, conducts oral arguments, reviews cases concerning the government decided in lower courts, deciding if the government will appeal a decision, and determines if the Office will participate in cases as *amicus curiae* or intervene in appellate court decisions (Salokar 1992).

The solicitor general is a frequent litigant, as well as a successful one. According to 2007 Office of the Solicitor General records the Office is involved in almost 66% of all Supreme Court cases decided on the merits each year. This percentage is significantly higher than a comprehensive study which analyzed the involvement of the solicitor general from 1959-1989, which found that the solicitor general participated in 48.5% of all cases decided on merits during that time span (Salokar 1992). Thus, it can be concluded that the solicitor general is far more active now than it has been previously. Solicitors general have recognized this trend. During the Reagan Administration, Solicitor General Robert Bork acknowledged that the caseload of the Office of the Solicitor General was getting so high that he may not be able to read “every word of every pleading that goes to the Supreme Court” (O’Connor 1983, 259). The regularity in which the solicitor general appears before the Court is ever increasing. This increased frequency improves the likelihood of victory for the solicitor general, because experience before the Court is a key factor in success (McGuire 1998).

The solicitor general has become very successful at the certiorari stage, the agenda selection period where the Supreme Court decides which cases to hear. At this stage, participants in the case and “friends of the court” (*amici curiae*) can file briefs that give information to the Court about the relevance of the legal dispute in question. Research shows that the Court responds to these petitions and briefs, and the Court particularly responds to the solicitor general’s participation at this stage (Caldeira and Wright 1988; Hansford 2004). According to extensive research from 1959-1989, certiorari petitions, petitions that parties file to persuade the Court to hear their case, account for

92% of cases docketed before Court, but only 5% of petitions receive the writ of certiorari. The solicitor general was successful in certiorari petitions 69.78% of the time, while private groups were only successful 4.9% of the time (Salokar 1992). In fact, it has been noted consistently that the primary predictor of Supreme Court decision-making is government involvement, because the Court most frequently sides with the government (McGuire 1998; George and Epstein 1992; Segal and Reedy 1988).

The solicitor general has often been shown to have a significant impact on the agenda and decisions of the Supreme Court (Caldeira and Wright 1988; Caplan 1987; Salokar 1992; O'Connor 1983). As a frequent litigant, the solicitor general gets advance intelligence, expertise, and access to specialists through the Department of Justice. Additionally, the solicitor general is not as constrained by financial burdens as other litigants, because the solicitor general has the resources of the Department of Justice. Also, the solicitor general has a high degree of credibility before the Court, leading to improved success. This credibility comes from case selection and analysis performed by the Department of Justice and utilized by the solicitor general (Salokar 1992). However, recent evidence indicates that the only significant factor explaining executive success before the Court may be litigation experience (McGuire 1998). Nevertheless, the solicitor general is consistently successful in influencing the Court.

While the solicitor general is a frequent and successful participant in Supreme Court litigation, scholars have not always accepted that the solicitor general is a politicized office. In the middle to later part of the twentieth century, many scholars and solicitors general argued that the solicitor general was a presidential appointee that was primarily independent of the partisan nature of the president. In fact, Archibald Cox, solicitor general under President Kennedy stated that he had a good amount of independence from the administration, especially compared to many recent

solicitors general (Cox 1987). Those who held the traditional independence of the solicitor general claimed that the Office of the Solicitor General was traditionally run by an appointee who was independent from the administration, thus being insulated from partisan politics (Caplan 1987). Additionally, these arguments held that there is a special relationship between the solicitor general and the Supreme Court, providing a constraint on the executive's desire to politicize the office, because the solicitor general wants to be respected by the Court (Salokar 1992; McGuire 1998).

Recent scholarship has called into question the independence view the solicitor general, arguing that the solicitor general has always been partisan and aware of the president's agenda. People who subscribe to this view argue that presidential administrations select a solicitor general based on his ideological congruence with the executive and his legal capabilities. Solicitors general have limited independence and remain politicized, because of the political nature of the position. Candidates are nominated based on their ideology, legal training and expertise, and legal experiences (Salokar 1992). In fact, even the Supreme Court has acknowledged the partisan nature of the solicitor general, contradicting those who held that the Court provides a constraint that promotes neutrality (Salokar 1992).²

While some scholars have disagreed about the historical nature of the solicitor general, most hold that the Reagan administration made significant changes, increasing the politicization of the Office of the Solicitor General, which is similar to Reagan's actions with many executive institutions (Caplan 1987; Salokar 1992). Reagan's solicitors general and attorneys general made headlines during the 1980s for their partisan behavior and agenda setting. The Reagan administration coined a new term—"agenda cases"—within the Office of the Solicitor General. These were particular cases

² According to statements made during the cases of *United States v. Cox* in 1965, *Poni v. Fessenden* in 1922, and *United States v. San Jacinto Tin Company* in 1988, the Court views the solicitor General as an advocate for the president and administration, understanding that the solicitor general is a politicized position

to advance the administration's agenda, including abortion, prayer in schools, school busing, affirmative action, racial quotas, and rights of the accused (Caplan 1987). Even Solicitor General Cox, who argues for the historical independence of the solicitor general, states that there was a significant shift toward partisanship within the Department of Justice during the 1980s, and this shift involved the solicitor general (Cox 1987). The changes that the Reagan administration made to the Department of Justice and the Office of the Solicitor General increased the politicized nature of the office and also increased the public nature of the politicization. Reagan did not seek to politicize the Department of Justice behind the scenes. Rather, his administration made front page news with statements about how they were going to alter the agenda of the Supreme Court to promote Reagan's presidential agenda.

Change has also occurred in the context of the politicization of the executive branch as a whole. Since Nixon expanded the institutional presidency—the use of the executive branch to facilitate presidential power—presidents have attempted and succeeded in making the executive branch more politicized and centralized. Institutional incentives and constraints are a primary reason that presidents have sought to politicized and centralize the institutional presidency (Moe 1985). This politicization of the executive branch increased throughout the administrations of Kennedy, Johnson, and Nixon, and for many, culminated with Ronald Reagan, who unabashedly politicized the executive branch, taking significant actions to infiltrate the bureaucracy with partisan appointments who supported his agendas (Moe 1985).

Recent research has shown that Supreme Court justices may also use the actions and statements of the president and the solicitor general during the decision-making process (Bailey, Kamoie, and Maltzman 2005; Epstein and Knight 1998; Johnson 2003). Thus, if the executive branch and the solicitor general are becoming more politicized and if the Court takes decision-

making cues from the solicitor general, to understand the actions of the solicitors general will further our knowledge of presidential politics, judicial politics, key public policy issues, and the relationship between the executive and judicial powers. Performing this case study about the role of the solicitors general in the Clinton and Bush Administrations regarding church-state cases provides valuable information about the nature of politicization of the solicitor general.

Method of Study

To analyze the role of the solicitor general in church-state cases during the Clinton and Bush Administrations and the level of politicization in the Office of the Solicitor General in regard to church-state policy, I evaluate each church-state case that the Supreme Court heard during the Clinton and Bush Administrations. I collected a comprehensive list of church-state cases argued between January 1993 and December 2008 from The First Amendment Center,³ The OYEZ Project,⁴ and the Supreme Court.⁵ These cases include all aspects of the church-state relationship in America, such as free exercise of religion, establishment of religion, religious expression and speech, government aid to parochial schools, and community regulation of religion. I also use these resources to gather general information about the nature of each church-state case.

I obtained documents pertaining to executive action in the church-state cases, including briefs on the petition for certiorari, merit briefs, amicus curiae briefs, and reply petitions were located from the Office of the Solicitor General, and information about oral arguments before the Court from the OYEZ Project. I evaluated this information qualitatively and systematically, determining if and when the solicitor general became involved in a church-state case and when the

³ <http://www.firstamendmentcenter.org>

⁴ <http://www.oyez.org>

⁵ <http://www.supremecourtus.gov>

solicitor general did not become involved with a case. Also, I located briefs for cases accepted by the Court and those where the Court denied the writ of certiorari, refusing to hear the case. These data were used to help determine the agenda setting impact of the solicitor general.

Additionally, I collected information about individual solicitors general from the Office of the Solicitor General, White House and Department of Justice press releases, and news articles. These documents helped provide background on who was appointed solicitor general, what their legal expertise was, and how closely aligned they were with the presidential agenda. Using this information about individual solicitors general, actions in church-state cases, and the background of the individual cases, I make an evaluation of the use of the solicitor general to promote presidential agendas on church-state issues. Also, this information and the background on the individual court cases, when combined with a general knowledge of the presidential agenda, provides information about the level of politicization and the strength of ideologies on particular issues within the Office of the Solicitor General.

When analyzing the data, politicization is the primary dependent variable, as I am seeking to understand how the solicitors general in these administrations are politicized. The independent variables include: the legal expertise of the solicitors general, the partisan history of the administrations' solicitors general, the frequency of church-state activities, the omission of church-state activities, the attempt to affect the Court's agenda through actions at the certiorari stage, the hierarchy of church-state activities within the Office of the Solicitor General, and the level of controversy inherent within case activities (or lack thereof).

Solicitors General in the Clinton and Bush Presidencies

While Reagan may have been masterful at politicizing the executive branch through partisan appointments and centralized control, the politicization of the executive is a continually progressive

process, with no incentives to recede the partisan nature of executive power (see Moe 1985). Thus, while presidents following Reagan may not have been as original, bold, or deft in politicizing the policy output and staffing decisions in their executive branch as Reagan, presidents since appear to understand the importance of using presidential appointments to promote their agenda. Therefore, the politicization that was seen with Reagan is apparent in the administrations of Clinton and Bush, and this is evident in their appointments to solicitor general. I assume that presidents appoint solicitors general who will achieve their agenda priorities, as presidents are aware that the office can be effectively politicized. (See Tables 1 and 2 for complete lists of the solicitors general, their characteristics, legal backgrounds, and cases argued).

This section will briefly describe the Clinton and Bush appointments to the solicitor general's office, making connections between the appointments and the goals the administration likely had for the office. While each candidate has impeccable legal qualifications, many also have legal and political qualifications which give support to the politicization theory of the Office of the Solicitor General over the independence theory.

Clinton's Solicitors General

The solicitor general of President George H. W. Bush was Kenneth Starr, an individual who would later become known for his partisanship, serving as the independent counsel who investigated Clinton concerning Whitewater and Monica Lewinsky. After Clinton's administration transitioned, he appointed the less recognizably partisan Drew S. Days, III to solicitor general. Days had previously been the Assistant Attorney General for Civil Rights during the Carter administration as well as serving on the staff of the NAACP's Legal Defense fund from 1969-1977. From 1981, when Days left the Carter administration, to 1993, Days served as a faculty member of Yale Law School.

Days' legal and political characteristics seem to make him a strong fit with some of Clinton's political objectives. Days' expertise in antidiscrimination law, civil procedure, and international human rights fit well with the Clinton and Democratic agenda of 1992, which in part was to support civil and equal rights, the Democratic Party boldly declared in their 1992 platform (Democratic Party Platform 1992). Days' focus on civil rights also fulfilled one of Clinton's campaign promises made during his speech accepting the nomination for president, where he said:

Tonight every one of you knows deep in your heart that we are too divided. It is time to heal America. And so we must say to every American: Look beyond the stereotypes that blind us. We need each other—all of us—we need each other. We don't have a person to waste, and yet for too long politicians have told the most of us that are doing all right that what's really wrong with America is the rest of us—them. Them, the minorities. Them, the liberals. Them, the poor. Them, the homeless. Them, the people with disabilities. Them, the gays (Clinton 1992).

Days made 17 appearances before the Supreme Court in oral arguments as the solicitor general, but he did not appear before the Court in any church-state cases (OYEZ 2007). In fact, during Days' term as solicitor general, the Department of Justice only appeared before the Court in one church-state case, *Zobrest CHECK v. Catalina Foothills School District* in 1993, and in that case William C. Bryson, the Acting Associate Attorney General, argued on behalf of United States, as *amicus curiae*, supporting the petitioners (OYEZ 2007). But, Solicitor General Days did appear before the Court several times in civil rights cases (i.e. *Seminole Tribe v. Florida* (1996); *Miller v. Johnson* (1995); *Adarand Constructors v. Pena* (1995)).

Walter E. Dellinger III replaced Days as acting solicitor general after Days resigned in July 1996. Like Days, Dellinger was a Yale educated lawyer, who had significant public and private experience before joining the Clinton administration. As with Days, Dellinger also possessed expertise in affirmative action, the separation of powers, and international affairs. Dellinger originally served as an advisor to President Clinton on constitutional issues, and was then nominated

to be Assistant Attorney General and head of the Office of Legal Counsel. While Assistant Attorney General, Dellinger advised the Attorney General and the president on a wide variety of issues, including church-state issues, and after Days resigned from the solicitor general post in July 1996, Dellinger served as the Acting Solicitor General until October 1997 (Office of the Solicitor General 2007). Dellinger argued before the Court nine times as solicitor general, advocating the government's position on numerous occasions, including physician assisted suicide, the line item veto, the Brady Act, and the cable television act (Office of the Solicitor General 2007; OYEZ 2007). Dellinger also argued before the Court on two church-state cases, *Agostini v. Felton* and *City of Boerne v. Flores*, both in 1997. In *Agostini v. Felton*, Dellinger argued for the use of government aid to parochial schools, and in the *City of Boerne v. Flores*, he argued for a broad interpretation of the Religious Freedom Restoration Act which would override local laws and give religious groups more freedom from opposition in local communities.

Dellinger resigned to become a professor at Duke Law School, after serving one term as Acting Solicitor General and after Seth P. Waxman was officially confirmed as Clinton's third (second official) solicitor general. Like Days and Dellinger, Waxman graduated from Yale Law School, and, like the others, he was very qualified for the position. Waxman joined the administration in the Department of Justice in 1994, serving in numerous positions, including Acting Solicitor General, Acting Deputy Attorney General, Principal Deputy Solicitor General, and Associate Deputy General. Additionally, like Clinton's previous two solicitors general, Waxman also had significant experience in civil and human rights, doing much pro bono work for the Anti-Defamation League and other civil rights groups (Office of the Solicitor General 2007). Waxman argued 22 cases before the Court as solicitor general and five cases while serving in other positions within the Department of Justice (OYEZ 2007). During Waxman's tenure as Solicitor General, the Department of Justice argued one church-state case before the Court, *Mitchell v. Helms* in 2000, a

case concerning government aid to parochial schools, but Barbara D. Underwood, Principal Deputy Solicitor General, argued the case on behalf of the government instead of Solicitor General Waxman.

Bush's Solicitors General

When Bush was inaugurated in 2001, Barbara D. Underwood, the former Principal Deputy Solicitor General under President Clinton continued working in the Department of Justice as acting solicitor general until Bush's nominee was vetted and approved by Congress. While Underwood was serving as the Acting Solicitor General, the Court decided to hear one church-state case, *Good News Club v. Milford Central School*, but the Office of the Solicitor General was not involved in this case. The oral arguments for *Good News Club v. Milford Central School* occurred in February 2001, so it was most likely the Clinton administration, under the leadership of Solicitor General Waxman, which declined to take any action in the case.

President Bush's first appointee to be solicitor general was Theodore B. Olson, who was confirmed by the Senate on June 11, 2001. Olson graduated from the University of California at Berkeley, and had previously served as Assistant Attorney General for the Office of Legal Counsel for President Reagan from 1981 to 1984 (Office of the Solicitor General 2007). Olson's legal expertise is extensive, including criminal procedure, First Amendment law, separation of powers, and commerce and antitrust law. Olson famously represented President Bush in the *Bush v. Gore* Supreme Court case that ended the recount in Florida and finalized the 2000 election. During his tenure as solicitor general, Olson argued 25 cases before the Supreme Court. He argued for the administration's agenda on criminal procedure, property rights, separation of powers, and obscenity issues. Olson also argued several church-state cases before the Court. In fact, church-state cases were one of the more frequent types of cases on which Olson took action. During Olson's time as

solicitor general from 2001 to 2005, seven church-state cases appeared before the Court, and the Department of Justice was directly involved in six of them. Olson himself argued three of the cases, while Principal Deputy Solicitor General Paul D. Clement, Olson's eventual successor, argued the other three. The Court ruled in favor of the government in *Zelman v. Simmons-Harris* in 2002, supporting the school voucher program in Ohio, and in *Elk Grove Unified School District v. Newdow* in 2004, supporting the right to use "under God" in the Pledge of Allegiance. However, Olson lost in *Locke v. Davey* in 2004, where the Court ruled that if a state provides college scholarships for secular instruction, the state does not have to provide scholarships to fund religious instruction.

Olson resigned as Solicitor General in June 2005, and Paul D. Clement, who had served as Principal Deputy Solicitor General to Olson since 2001, was appointed Solicitor General. Clement graduated from Harvard Law School and clerked for Justice Antonin Scalia. Clement's legal expertise is in the separation of powers and criminal procedure, which were sought-after qualifications for a solicitor general in the Bush White House during the Iraq War. Before being appointed to the Department of Justice in 2001, Clement had worked for Senator John Ashcroft, in private practice, and as an adjunct law professor at Georgetown (Office of Solicitor General 2007). As Principal Deputy Solicitor General and Solicitor General, Clement handled a variety of cases, including defense of the war on terror policies, campaign finance reform, executive power, and criminal procedure. Clement argued before the Court 18 times as Solicitor General and 31 times as Principal Deputy Solicitor.

Clement argued one church-state case as Solicitor General and three cases as Principal Deputy Solicitor General. As principal deputy solicitor general, Clement argued *Cutter v. Wilkinson*, *McCreary County v. ACLU* and *Van Orden CHECK v. Perry* in 2005. In *Cutter v. Wilkinson*, the

Court sided with Clement's argument that prisons could not discriminate against an individual's right to practice religion. Both *McCreary County v. ACLU* and *Van Orden v. Perry* involved government displays of the Ten Commandments, and in both cases the government supported the displays. Each case resulted in a 5-4 decision, with the government losing in *McCreary County v. ACLU* and the government winning in *Van Oren v. Perry*. As Solicitor General, Clement argued the *Hein v. Freedom from Religion* church-state case in 2006 regarding the constitutionality of Bush's faith-based and community-based initiatives programs case, winning in a 5-4 decision. Also, during Clement's tenure as Solicitor General, the Department of Justice was involved in one church-state case where Clement did not argue before the Court. In the 2005 case *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, Attorney General Alberto Gonzales was a petitioner in a case trying to prevent a religious group from being allowed to import illegal drugs for religious purposes. In this particular case, Deputy Solicitor General Edwin S. Kneidler argued for Attorney General Gonzales. The government lost in an 8-0 decision.

Clement resigned from his post in June 2008, joining the staff of Georgetown University Law Center. Gregory G. Garre replaced Clement and was officially sworn in on October 2, 2008. Garre previously served as the Principal Deputy Solicitor General since 2005 and the Assistant to the Solicitor General from 2000-2004. Thus, Garre's appointment supported continuity within the Office of the Solicitor General at the end of Bush's final term in office. Like the other solicitor general appointees, Garre has strong legal qualifications. He graduated from George Washington Law School, served as editor-in-chief of the law review, and clerked for Chief Justice William Rehnquist (Office of the Solicitor General 2009). Besides clerking for a conservative justice and being a constitutional scholar, Garre has no obvious Republican Party connections or expertise in church-state cases.

During his time in the Office, Garre made 12 arguments before the Supreme Court, though he did not make any arguments while serving as Solicitor General. He also never appeared before the Court in a church-state case. While Garre served as Solicitor General, the Court did hear one church-state case, *Pleasant Grove City v. Summum*, a public display of religion case that involved both establishment clause and free speech concerns.⁶ However, Garre did not participate in the oral argument. Instead, Deputy Solicitor General Daryl Joseffer argued the cases for the administration as amicus.

Similarities and Differences between the Bush and Clinton Administrations

During the Clinton and Bush administrations from 1993 to 2008 the Supreme Court has heard 21 church-state cases. In the 21 decisions, the Court has ruled in favor of religious freedom, free exercise, religious expression, and/or government funding for religious displays, schools, or institutions 15 times. Only in six cases did the Court render decisions claiming that the cases violated the establishment clause of the First Amendment. (Table 3 provides a comprehensive list of all the cases and the decisions made by the Court). In analyzing the church-state cases that appeared before the Court, there are some significant similarities and differences between how the Clinton Administration and the Bush Administration handled church-state cases.

The data show that the three main differences are the quantity of activities, the hierarchy of attention, and the level of controversy. First, while each administration used the solicitor general to promote the cause of religious freedom and oppose restrictions on religion based on establishment clause grounds, the Bush administration clearly filed more briefs and made more arguments, while

⁶ *Pleasant Grove City v. Summum* (2009) dealt with a privately donated Ten Commandments monument in a public park and whether the park was an “open forum” (under free speech doctrine) where any group could display a similar monument.

the opportunities were relatively equal.⁷ (See Table 3 for a complete listing of all the church-state cases and actions taken during the Clinton and Bush Administrations).

Second, the Office of the Solicitor General assigned less importance to church-state cases in the Clinton Administration and greater importance under the Bush Administration, as individuals besides the solicitors general frequently argued church-state cases in the Clinton Administration, while the solicitors general usually directly argued the church-state cases during the Bush Administration. This is consistent with the agenda goals of each administration, as the promotion of religion within American society and public life had a more central role in the Bush Administration (Campbell 2007; Layman and Hussey 2007; Wilcox and Larson 2006). Bush's Solicitors general were more strongly in favor of expanding religious action in the public square and resisting the removal of religion from public life. Additionally, the solicitors general under Bush emphasized church-state cases more than the solicitors general under Clinton, choosing to be involved in more cases and choosing to have the solicitor generals argue the church-state cases rather than assistants.

Finally, the solicitors general in both administrations appear to take actions that are very politicized, but this results in different outcomes for the respective administrations. The solicitors general under Bush argued more polarizing conservative positions on church-state issues, tackling many of the most controversial establishment clause church-state cases, such as public displays of religion and vouchers for religious schools, seeking to minimize the effects of strict separation establishment clause jurisprudence. The Clinton Administration took more safe and moderate positions, staying away from controversial establishment clause church-state cases, but supporting religious free exercise. The position is moderate because it did not oppose religious elements in public life on establishment clause grounds, but it also did not support the advancement of religion

⁷ The Court heard 10 church-state cases during the Clinton Administration and 11 church-state cases during the Bush Administration.

in public life by challenging establishment clause decisions. Thus, the solicitors general of both administrations appear to be politicized, as the actions match the policy prerogatives of both presidencies. Yet, this outcome often displays itself in the type of cases in which the Office of the Solicitor General failed to get involved.

Clinton Administration

The Supreme Court rendered ten church-state decisions under the Clinton Administration,⁸ and the administration participated in four cases, making oral arguments before the court in *Zobrest v. Catalina Foothills School District* in 1993, *Agostini v. Felton* in 1997, *City of Boerne v. Flores* in 1997, and *Mitchell v. Helms* in 2000. In *Zobrest v. Catalina Foothills School District*, William C. Bryson, Acting Associate Attorney General, argued on behalf of the United States, supporting the petitioner. The Court ruled in favor of the petitioner and the Department of Justice's argument, declaring that a school district could not decline an interpreter for a student based on the establishment clause. In *Agostini v. Felton*, Acting Solicitor General Dellinger argued the case for the government. The Court supported the government's argument, overruling the previous decision in *Aguilar v. Felton*, holding that having public school teachers serve in parochial schools was not a violation of the establishment clause. Additionally, in *City of Boerne v. Flores*, Dellinger argued the case for the federal respondent, supporting the Religious Freedom Restoration Act enacted by Congress and its right to overrule local zoning laws. However, the Court ruled against the Department of Justice, declaring that the Religious Freedom Restoration Act exceeded the Fourteenth Amendment powers by subjecting local ordinances to the requirements of the Act. This

⁸ One decision, *Church of the Lukumi Babalu Aye v. Hialeah*, which was decided early in 1993 was argued under the former Bush Administration, and, while the *Good News Club v. Milford Central School* case in 2001 was technically argued under the Bush Administration, because the argument took place in February of 2001, shortly after Bush's inauguration and still while Barbara D. Underwood (a former Clinton appointee) was acting solicitor general during the transition period, the decision made to not take action in this case was most likely made during the Clinton Administration.

was the only church-state case that the Clinton Administration argued and lost. Finally, in *Mitchell v. Helms*, Principal Deputy Solicitor General Underwood, argued that materials provided to parochial schools, as part of the Education Consolidation and Improvement Act of 1981, did not violate the establishment clause. The Court sided with Underwood, supporting secular educational aid to parochial schools.

Beyond arguing before the Court, the Office of the Solicitor General also filed two briefs with the Court regarding a petition for the writ of certiorari, proposing that the Court either grant or deny hearing the case. According to the records of the Office of the Solicitor General, the solicitor general filed an amicus brief urging the Court to grant certiorari in *Zobrest v. Catalina Foothills School District* case in 1993, which the Court did. Additionally, the solicitor general filed a brief in opposition to certiorari in *Daniel J. Posner v. Central Synagogue* in 1995. In this case, the Court also agreed with the administration, choosing not to grant writ of certiorari and upholding the decision made by the Court of Appeals of the Second District, which ruled that the federal exemption of religious groups to the Americans with Disabilities Act of 1990 did not violate the establishment clause (*Posner v. Central Synagogue Brief* 1995).

While the Office of the Solicitor General was fairly active in promoting religious freedom and opposing cases which argued that federal laws and programs violated the establishment clause, the way the Clinton Administration approached church-state cases indicates that it was not as high a priority as civil rights cases were. During the Clinton Administration, the solicitors general frequently appeared before the Court arguing civil rights cases, but the solicitors general were less likely to argue church-state cases, instead allowing assistants to argue the church-state cases. In *Zobrest v. Catalina Foothills School District*, Acting Associate Attorney General Bryson argued before the Court, and in *Mitchell v. Helms* Principal Deputy Solicitor General Underwood, argued

the case for the Department of Justice. In fact, the only solicitor general that argued a church-state case under the Clinton Administration was Dellinger, who only served as the acting solicitor general and was never nominated or confirmed to the position. Having assistants argue church-state cases before the Court would be understandable if those who argued the case had more experience in church-state matters than the solicitor general had. However, there is no evidence that this is the case. Neither Underwood nor Bryson had an explicit legal background in church-state issues. Thus, it is reasonable to conclude that church-state cases were given less importance in the Clinton Administration.

This trend is consistent with the legal backgrounds of the Clinton appointees for solicitor general. Both Days and Waxman, Clinton's official solicitors general, had significant legal backgrounds in civil rights, and both regularly appeared before the Court in civil rights cases. Yet, neither had specific expertise in church-state cases. Dellinger was Clinton's primary advisor on church-state cases, so it would make sense that he was the only serving solicitor general that argued church-state cases before the Court. The solicitors' legal expertise provides evidence about an administration's agenda priorities vis-à-vis the Court. (Again, see Tables 1 and 2 for a more complete view of the nomination process and the backgrounds of the solicitors general). The legal backgrounds of Days and Waxman suggest that civil rights were a greater priority to the Clinton Administration than church-state cases were.

Additionally, the use of Bryson and Underwood to argue church-state cases before the Court might signal the Clinton Administration's lack of emphasis in the area of church-state cases. Clinton was famous for triangulating and compromising, and the use of Bryson and Underwood in church-state cases supports these tactics. Bryson was not an obviously partisan appointee, as he had previously served in the Department of Justice under both Carter and Reagan. Bryson had a long

and distinguished career in the Department of Justice before being nominated by Clinton to serve on the U. S. Court of Appeals for the Federal Circuit in 1994 (The White House 1994). However, Bryson was not a primary appointee, and serving in both the Carter and Reagan administrations, his partisan allegiances are difficult to discern. Rather, he was known for his legal expertise. In addition, Underwood, a 1998 appointment as Principal Deputy Solicitor General, did not promote a partisan agenda while working for the Department of Justice, though she did follow the political cues from the president (Underwood 1998). In fact, the Bush Administration named Underwood acting solicitor general for the first five months of the Bush presidency before Solicitor Olson was nominated and confirmed by the Senate, a significant sign of her political neutrality, professionalism, and legal expertise.

While there are a small number of church-state cases during the Clinton administration, several arguments about the solicitors general under Clinton can be made. First, the solicitors general under Clinton were very successful in prompting the Court to hear cases they thought were important and in getting favorable decisions from the Court. The Court sided with the government in both amicus briefs filed with the Court, and the government won three out of four cases it argued before the Court. Also, by not supporting more church-state cases at the agenda-setting stage, it may have prevented certain cases from being heard by the Court. (See Table 4 for a success breakdown of both administrations).

Additionally, the Office of the Solicitor General supported cases that were generally in line with Clinton policy initiatives. The solicitors general supported children with disabilities, education funding, and education policy in general. In addition, the solicitors general frequently defended government legislation against establishment clause challenges, such as the Religious Freedom Restoration Act (*City of Boerne v. Flores*), Chapter Two of the Education Consolidation and

Improvement Act (*Mitchell v. Helms*), and the Individuals with Disabilities Education Act (*Zobrest v. Catalina Foothills School District*).

In arguing before the Court, the Clinton Administration did not seek to limit free exercise of religion or oppose public religion with establishment clause claims, yet it also remained neutral on significant cases involving public religious exercise, such as school prayer (*Santa Fe Independent School District v. Doe*), religious displays (*Capitol Square Review and Advisory Board v. Pinette CHECK*), and public funding of religious groups (*Rosenberger v. University of Virginia and Lamb's Chapel v. Center Moriches School District*). The solicitors general under Clinton had the opportunity to take positions on church-state cases involving school prayer, the use of public facilities and public funding for religious actions by religious organizations, and public displays of religion, but the solicitor general declined to take action on these cases.⁹ The lack of action in these cases speaks volumes about the agenda of the Clinton Administration. The Clinton Administration sought to participate in church-state cases where it was politically valuable, such as supporting education and the underprivileged, but the Clinton Administration decided not to become involved in high profile, divisive church-state cases involving public displays of religion and religious exercise.

Bush Administration

While the Clinton Administration participated in a few church-state cases, the Bush Administration was a very frequent participant before the Supreme Court in church-state cases. In fact, the government was involved in virtually all church-state cases. There were 11 church-state cases heard by the Court during the Bush Administration, and the Office of the Solicitor General has been involved in nine of them. However, a more accurate count is that the Bush Administration

⁹ *Santa Fe Independent School District v. Doe* (2000) was a school prayer case argued during the Clinton Administration, *Lamb's Chapel v. Center Moriches School District* (1993) was an equal access case for religious groups, and *Capitol Square Review and Advisory Board v. Pinette* (1995) was a religious displays case.

was involved in nine out of ten cases because one case, *Good News Club v. Milford Central School*, was argued within a month of Bush's inauguration, meaning that it was most likely the Clinton Administration that decided not to argue the case. Taking this into consideration, the only church-state case that the Bush Administration was not involved in was *Watchtower Bible & Tract Society of New York v. Village of Stratton* in 2002, a case filed by the Jehovah's Witnesses involving local laws requiring that religious and political groups register with a city before soliciting. Thus, the Bush solicitors general were significantly more active than the Clinton solicitors general in church-state cases, even having similar amounts of opportunities. (See Table 3 for a complete breakdown of solicitor general activity).

Though the Bush Administration was extremely involved in church-state cases before the Court, unlike the Clinton Administration, the solicitors general under Bush were not as successful litigants. Bush's solicitors general won six cases argued before the Court and lost three. (See Table 4 for success statistics). The reason for the Bush solicitors general losing more cases is most likely due to case selection. The solicitors general under Clinton limited their arguments, staying away from cases involving freedom of expression and public displays of religion. The Bush Administration, however, chose to get involved in these types of church-state cases. For example, Clement argued two cases involving the public display of the Ten Commandments (*Van Orden v. Perry* and *McCreary County v. ACLU*) and Deputy Solicitor General Joseffer argued one (*Pleasant Grove City v. Sumnum*). Olson argued for continued use of the phrase "under God" in the Pledge of Allegiance (*Elk Grove Unified School District v. Newdow*), and he argued for the expansion of public funding for religious education (*Locke v. Davey*; *Zelman v. Simmons-Harris*). The Office of the Solicitor General lost one of the Ten Commandments cases (*McCreary County v. ACLU*) and the public funding of religious college tuition (*Locke v. Davey*). Additionally, the Deputy Solicitor General Edwin S. Kneidler lost the case of *Gonzales v. O Centro Espirita Beneficiente Uniao Do*

Vegetal in 2005 for the Department of Justice, when Alberto Gonzales tried to prevent a religious group from importing illegal drugs for religious ceremonies.

That the Bush Administration made arguments and statements on controversial church-state cases is one of this study's most significant findings. The Bush Administration was aggressive in promoting the role of religion in the public square and attempting to halt secularism, while the Clinton Administration took a more moderate approach in supporting religion.

While the Bush Administration was not as successful as the Clinton Administration in winning church-state arguments before the Court, it was both active and successful in setting the agenda for the Court. According to internal documents, under the Bush Administration the Office of the Solicitor General filed five amicus briefs in favor of the Court granting a writ of certiorari (*Hein v. Freedom From Religion Foundation*,¹⁰ *Elk Grove Unified School District v. Newdow*,¹¹ *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, *Zelman v. Simmons-Harris*, and *Kempthorne v. Buono*); the Court granted certiorari in each case except for *Kempthorne v. Buono*, a case about the constitutionality of the public display of a religious cross.

Additionally, unlike the solicitors general under Clinton, the solicitors general under Bush primarily argued the cases themselves. Solicitor General Olson argued three cases before the Court and Solicitor General Clement argued four cases before the Court, though two were argued while Clement was serving as Principal Deputy Solicitor General. (See Table 2 for these results). In the Clinton Administration, only two church-state cases were argued by a present or future solicitor general (Solicitor General Dellinger), while seven cases have been argued by present or future

¹⁰ This brief was originally filed as *Grace v. Freedom From Religion Foundation*, but this case was consolidated into *Hein v. Freedom from Religion Foundation*.

¹¹ This brief was originally filed as *United States of America v. Michael A. Newdow*, but this case was consolidated into *Elk Grove Unified School District v. Michael A. Newdow*.

solicitors general in the Bush Administration. The only case not argued by Clement or Olson during their tenures was *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, which is the only case where the government argued to limit the expansion of religious freedom and expression. Solicitor General Clement failing to argue this case might be a sign that this was not a church-state agenda case for the administration, rather a case where Attorney General Gonzales was trying to make a firm stand against drug trafficking of any kind. During Garre's short tenure, however, he did not argue the only church-state case heard by the Court (*Pleasant Grove City v. Summum*), leaving the argument to a deputy.

While the solicitors general for both administrations were politicized, adhering to the policy agendas of the president, the Office of the Solicitor General under Bush was more polarized than the Clinton administration was. Bush's solicitors general filed briefs and made arguments in controversial and political cases regarding religious displays and expression, while Clinton's solicitors general decided to refrain from being involved in similar cases. This is congruent with Bush's agenda of promoting policies favorable to conservative Christians and supporting government programs such as the faith-based initiatives that expand the relationship between government and religion. The solicitors general under Bush went beyond supporting government laws, as the Clinton solicitors general did, supporting individual rights and the expansion of the government's relationship with religion. This was a result the Office of the Solicitor General being more ideological on church-state issues under the Bush administration, and is consistent with the growing view that Bush not only significantly politicized the solicitor general's office into supporting his agenda, but that it used the solicitor general to promote ideologically conservative issues such as church-state policy and the war on terror (Blum 2004).

To further support this argument, both Olson and Clement are known for their partisan and ideological activity. Olson was rewarded with the solicitor general position after supporting Bush and Cheney before the Court during the 2000 election, and Clement has gained a reputation in Washington and in legal circles for his partisan actions in defending the Bush Administration's policies used to fight the War on Terror in multiple court cases. Therefore, while both the Clinton and Bush Administrations politicized the solicitor general to achieve their policy goals, the Bush Administration used the solicitor general in a much more polarizing way in church-state cases. It is likely that this is predominantly due to Bush's agenda on certain conviction issues such as the role of religion in the public square. Clinton, by contrast, took a moderate approach to church-state policy, not opposing the expansion of religion into public life, but only favoring it when it provided political rewards or coincided with his more important agenda items—education and civil rights.

Conclusion

In this study of the involvement of the solicitor general in church-state cases during the Clinton and Bush presidencies, the actions of the solicitor general align with the presidential agenda. Thus, both Clinton and Bush continued along the trend of politicizing the solicitor general. Each used the solicitor general to support the goals of his administration. Both presidents used the appointment process and cues about the administration's agenda to politicize the Office of the Solicitor General.

This study also shows the similarities and differences between the Bush and Clinton Administrations in the area of church-state policy. The Clinton Administration supported less controversial church-state cases that supported Clinton's broader policy agenda, while the Bush Administration was very active in supporting the expansion of religion in several areas of public life. Additionally, this study shows that Bush's solicitors general were much more polarizing in the area

of church-state policy, where Clinton's solicitors general supported the status quo by arguing for the constitutionality of bills previously enacted by Congress. The solicitors general under Bush chose to argue more divisive cases such as freedom of religious expression, public funding for religious activities, and religious displays in public, while the solicitors general under Clinton avoided these topics, instead focusing primarily on public funding to religious groups for secular education.

Many questions and areas concerning the contemporary relationship between the president, solicitor general, and Supreme Court remain open to investigation. Future case studies on civil rights cases, individual liberties, and criminal procedure would be fruitful in expanding knowledge of this unique relationship. In fact, this study's findings indicate that Clinton's solicitors general may have been more politicized and ideological in supporting his civil rights agenda. Comparing Clinton and Bush's solicitors general's actions on civil rights and church-state issues could provide a useful comparative case study.

It could also be useful to look at the activities of all the presidents since 1980 to get a more complete scope of how Reagan affected the role of the solicitor general on church-state cases. In addition, studies could focus on the role of the solicitor general in the conservative legal countermovement in American politics, as conservatives are seeking to over turn many of the "liberal" decisions on abortion, criminal rights, free speech, and the establishment of religion (Epstein 1985; Hacker 2005; Teles 2008). No matter the topic, more work should be done on the solicitor general, as this is an influential and relevant political actor linking the executive branch and the judicial branch.

Works Cited

Bailey, Michael A., Brian Kamoie, and Forrest Maltzman. (2005). "Signals from the Tenth

Justice: The Political Role of the Solicitor General in Supreme Court Decision Making.” *American Journal of Political Science* 49:72-85.

Blum, Vanessa. (2004). “Paul Clement Leads the Charge in Defending the Administration’s Tactics in the War on Terror.” *Legal Times*. 16 January 2004
<<http://www.law.com/jsp/article.jsp?id=1073944820670>>. Accessed 14 April 2007.

Caldeira, Gregory A., and John R. Wright. (1988). “Organized Interests and Agenda Setting in the U.S. Supreme Court.” *American Political Science Review* 82:1109-27.

Campbell, David E. (2007). “The 2004 Election: A Matter of Faith?” In *A Matter of Faith: Religion in the 2004 Presidential Election*, David E. Campbell, ed. Washington, DC: Brookings Institution Press.

Caplan, Lincoln. (1987). *The Tenth Justice: The Solicitor General and the Rule of Law*. New York: Vintage Books.

Carter, Stephen L. (1993). *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion*. New York: Basic Books.

Clinton, William J. (1992) [2007]. “Acceptance Speech to the Democratic National Convention.” *The American Presidency Project*. Santa Barbara: University of California.
<<http://www.presidency.ucsb.edu/shownomination.php?convid=7>>. Accessed 14 April 2007.

Cox, Archibald. (1987). *The Courts and the Constitution*. Boston: Houghton Mifflin.

Democratic Party Platform. (1992) [2007]. “A New Covenant with the American People.” *The American Presidency Project*. Santa Barbara: University of California.
<<http://www.presidency.ucsb.edu/ws/index.php?pid=29610>>. Accessed 14 April 2007.

Epstein, Lee. (1985). *Conservatives in Court*. Knoxville: University of Tennessee Press.

Epstein, Lee, and Jack Knight. (1998). *The Choices Justices Make*. Washington, DC: CQ Press.

First Amendment Center. (2007). <<http://www.firstamendmentcenter.org/>>. Accessed 1 April – 23 April 2007.

George, Tracey E and Lee Epstein. (1992). “On the Nature of Supreme Court Decision Making.” *American Political Science Review* 86:323-37.

Hacker, Hans J. (2005). *The Culture of Conservative Litigation*. Lanham, MD: Rowman & Littlefield.

- Hansford, Thomas G. (2004). "Information Provision, Organizational Constraints, and the Decision to Submit an Amicus Curiae Brief in a U.S. Supreme Court Case." *Political Research Quarterly* 57:219-230.
- Jelen, Ted G. (2000). *To serve God and Mammon: Church-state relations in American politics*. Boulder, CO: Westview Press.
- Johnson, Timothy R. (2003). "The Supreme Court, The Solicitor General, and The Separation of Powers." *American Politics Research* 31:426-451.
- Layman, Geoffrey C. and Laura S. Hussey. (2007). "George W. Bush and the Evangelicals: Religious Commitment and Partisan Change among Evangelical Protestants, 1960-2004." In *A Matter of Faith: Religion in the 2004 Presidential Election*, David E. Campbell, ed. Washington, DC: Brookings Institution Press.
- Lowery, David and Holly Brasher. (2004). "Organized Interests and the Judiciary." Chapter 7 in *Organized Interests and American Government*. New York, NY: McGraw Hill.
- McGuire, Kevin T. (1998). "Explaining Executive Success in the U.S. Supreme Court." *Political Research Quarterly* 51:205-526.
- Moe, Terry. (1985). "The Politicized Presidency." Chapter 9 in *The New Direction in American Politics*. Ed. by John E. Chubb and Paul E. Peterson. Washington, DC: The Brookings Institution.
- O'Connor, Karen. (1983). "The Amicus Curiae Role of the U.S. Solicitor General in Supreme Court Legislation." *Judicature* 66:256-64.
- OYEZ Project. (2007, 2009). "United States Supreme Court Media." <<http://www.oyez.org>>. Accessed 1 April – 23 April 2007, 13 March – 16 March 2009.
- Posner v. Central Synagogue Brief. (1995). Department of Justice. No. 95-836. Accessed 15 March 2007.
- Rosenberg, Gerald N. (1991). *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: University of Chicago.
- Salokar, Rebecca Mae. (1992). *The Solicitor General: The Politics of Law*. Philadelphia: Temple University Press.
- Segal, Jeffrey A. and Cheryl D. Reedy. (1988). "The Supreme Court and Sex Discrimination: The Role of the Solicitor General." *Western Political Quarterly* 41:553-68.
- Supreme Court of the United States. (2007). <<http://www.supremecourtus.gov>>. Accessed 1 April – 23 April 2007.

Teles, Steven M. (2008). *The Rise of the Conservative Legal Movement: The Battle for Control of the Law*. Princeton, NJ: Princeton University Press.

United States Department of Justice. (1998). "Underwood Appointed Principal Deputy Solicitor General." 11 March 1998. <<http://www.usdoj.gov/opa/pr/1998/March/111.htm.html>>. Accessed 16 April 2007.

United States Department of Justice. (2007). "Office of the Solicitor General." <<http://www.usdoj.gov/osg/>>. Accessed 13 April 2007.

_____. 2009. "Office of the Solicitor General." <<http://www.usdoj.gov/osg/>>. Accessed 13 April 2009.

White House. (1994). "President Nominates William C. Bryson to Serve on the U.S. Court of Appeals for the Federal Circuit." 22 June 1994. Office of the Press Secretary. <<http://www.ibiblio.org/pub/archives/whitehouse-papers/1994/Jun/1994-06-22-Bryson-Named-to-US-Court-of-Appeals-for-Fed-Circuit>>. Accessed 15 April 2007.

Witte, John Jr. (2005). *Religion and the American Constitutional Experiment: Essential Rights and Liberties*, 2nd ed. Boulder, CO: Westview Press.

Wilcox, Clyde and Carin Larson. (2006). *Onward Christian Soldiers: The Religious Right in American Politics*. Boulder, CO: Westview Press.

Court Cases Cited

Adarand Constructors v. Peña, 515 U.S. 200 (1995).

Agostini v. Felton, 521 U.S. 203 (1997).

Board of Education Kiryas of Joel Village School v. Grumet, 512 U.S. 687 (1994).

Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995).

Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520 (1993).

City of Boerne v. Flores, 521 U.S. 507 (1997).

Cutter v. Wilkinson, 544 U.S. 709 (2005).

Dirk Kempthorne v. Buono, 212 F. Supp. 2d 1202 (2007).

Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004).

Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal, 546 U.S. ____ (2006).

Good News Club v. Milford Central School, 533 U.S. 98 (2001).

Hein v. Freedom From Religion Foundation, 51 U.S. ____ (2006).

Lamb's Chapel v. Center Moriches School District, 508 U.S. 384 (1993).

Locke v. Davey, 540 U.S. 712 (2004).

McCreary County v. ACLU of Kentucky, 545 U.S. ____ (2005).

Miller v. Johnson, 515 U.S. 900 (1995).

Mitchell v. Helms, 530 U.S. 793 (2000)
Pleasant Grove City v. Summum, 555 U.S. ____ (2009)
Posner v. Central Synagogue, 57 F. 3d 1064 (1995).
Rosenberger v. University of Virginia, 515 U.S. 819 (1995).
Santa Fe Independent School Dist. v. Doe, 530 U.S. 290 (2000).
Seminole Tribe v. Florida, 517 U.S. (1996).
Van Orden v. Perry, 545 U.S. ____ (2005).
Watchtower Bible & Tract Society of New York v. Village of Stratton, 536 U.S. 150 (2002).
Zelman v. Simmons-Harris, 536 U.S. 639 (2002).
Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993).

Table 1: Timetable of Clinton-Bush Solicitor Generals

Drew S. Days, III	Clinton	May 1993 – Jul. 1996
Walter E. Dellinger III (acting)	Clinton	Aug. 1996 – Oct. 1997
Seth P. Waxman	Clinton	Nov. 1997 – Jan. 2001
Barbara D. Underwood (acting)	Bush	Jan. 2001 – Jun. 2001
Theodore B. Olson	Bush	Jun. 2001 – Jul. 2004
Paul D. Clement	Bush	Jun. 2005 – Jun. 2008
Gregory G. Garre	Bush	Oct. 2008 – Jan. 2009

Table 2: Solicitors General’s Backgrounds and Experience Before the Court

Solicitor General	Law Degree	Previous Party Work	# of Arguments Before Court	# of Church-State Arguments	Previous Executive Appointments	Church-State Legal Background	Civil Rights Legal Background
Days	Yale	Carter	17	0	Assistant Attorney General for Civil Rights (Carter)	No	Yes
Dellinger (acting)	Yale	No	9	2	Assistant Attorney General & Office of Legal Council (Clinton)	Yes	Yes
Waxman	Yale	No	27	0	Principal Deputy Solicitor General & Associate Deputy General (Clinton)	No	Yes
Underwood (acting)	Georgetown	No	16	1 ¹²	Principal Deputy Solicitor General (Clinton)	No	No
Olson	Cal-Berkeley	Reagan & <i>Bush v. Gore</i> 2000	25	3	Assistant Attorney General for the Office of Legal Counsel (Reagan)	Yes	No
Clement	Harvard	Ashcroft	49	4 ¹³	Principal Deputy Solicitor General (Bush)	No	No
Garre	George Washington	No	12	0	Assistant to Secretary General & Principal Deputy Solicitor General (Bush)	No	No

¹² Argued case as Principal Deputy Solicitor General under Solicitor General Waxman.

¹³ Argued 1 church-state case as solicitor general and the other 3 as Principal Deputy Solicitor General under Solicitor General Olson.

Table 3: List of Church-State Cases During Clinton and Bush Administrations

Court Case	Year	#Win	#Lose	Pres.	Serving Solicitor General	Oral Arg.	Merit Brief	Amicus Brief	Cert. Filing	Win or Lose
Church of the Lukumi Babalu Aye V. Hialeah	1993	9	0	Clinton	Days					
Lamb's Chapel v. Center Moriches School District	1993	9	0	Clinton	Days					
Zobrest v. Catalina Foothills School District	1993	5	4	Clinton	Days	Yes		Yes		win merits
Board of Education Kiryas Joel Village School v. Grumet	1994	6	3	Clinton	Days					
Capitol Square Review and Advisory Bd. v. Pinette	1995	7	2	Clinton	Days					
Rosenberger v. University of Virginia	1995	5	4	Clinton	Days					
Agostini v. Felton	1997	5	4	Clinton	Dellinger	Yes	Yes			win merits
City of Boerne v. Flores	1997	6	3	Clinton	Dellinger	Yes	Yes			lose merits
Mitchell v. Helms	2000	6	3	Clinton	Waxman	Yes	Yes			win merits
Santa Fe Independent School Dist v. Doe	2000	6	3	Clinton	Waxman					
Good News Club v. Milford Central School	2001	6	3	Bush	Underwood					
Watchtower Bible & Tract Society of New York v. Village of Stratton	2002	8	1	Bush	Olson					
Zelman v. Simmons-Harris	2002	5	4	Bush	Olson	Yes	Yes		Yes	win merits & win cert
Elk Grove Unified School District v. Newdow	2004	8	0	Bush	Olson	Yes	Yes		Yes	win merits & win cert
Cutter v. Wilkinson	2005	9	0	Bush	Olson	Yes	Yes			win merits

Locke v. Davey	2004	7	2	Bush	Olson	Yes		Yes		lose merits
McCreary County v. ACLU	2005	5	4	Bush	Olson	Yes		Yes		lose merits
Van Orden v. Perry	2005	5	4	Bush	Olson	Yes		Yes		win merits
Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal	2005	8	0	Bush	Clement	Yes		Yes	Yes	lose merits & win cert
Hein v. Freedom From Religion	2006	5	4	Bush	Clement	Yes	Yes		Yes	win merits & win cert
Pleasant Grove City v. Summum	2009	9	0	Bush	Garre	Yes		Yes		win merits

Table 4: Filings at Certiorari Stage and Oral Arguments by Clinton and Bush Administrations

Certiorari Filings - Clinton	% Court agreed	Certiorari Filings - Bush	% Court agreed	Arguments - Clinton	% Court Agreed	Arguments-Bush
1	100%	5	80%	4	75%	9