



2001

Tribute to the Honorable Rex E. Lee Solicitor General of the United States 1981-85

Francis X. Beytagh

Follow this and additional works at: <https://lawrepository.ualr.edu/appellatepracticeprocess>



Part of the Legal History Commons

Recommended Citation

Francis X. Beytagh, *Tribute to the Honorable Rex E. Lee Solicitor General of the United States 1981-85*, 3 J. APP. PRAC. & PROCESS 568 (2001).

Available at: <https://lawrepository.ualr.edu/appellatepracticeprocess/vol3/iss2/12>

This document is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in The Journal of Appellate Practice and Process by an authorized administrator of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.

What could be the downside to concurring with the opinion of the smartest, most-experienced Supreme Court lawyer in America, who just happened to be the nicest person as well? There was none and that was why Rex succeeded in ways that no one else could.

That said, it is worth revisiting my initial observations. Appellate practice is not a monastic life. For lawyers like me who lack Rex's experience and grace, the process can be quite frustrating. A month does not go by that I do not think about Rex and wish he were available to resolve a difference of opinion among co-counsel about how best to present an argument. But at least I had the opportunity to watch and to learn from him what it takes to be a successful appellate counsel. Thus, for those who aspire to be appellate lawyers, do so with your eyes open. Being able to research, write and present oral arguments is necessary, but it is not sufficient to ensure great success. To be really accomplished, a young lawyer must leave the library and learn how to be respectful and responsive to the needs and desires of co-counsel and clients. They will almost always be involved, and when they are, they will always have ideas and opinions. Rex Lee learned that at an early age and taught those of us who were fortunate enough to work with him what it takes to be a lawyer's lawyer. On behalf of all who were touched by Rex, I thank him for that education.

FRANCIS X. BEYTAGH*

I first became acquainted with Rex Lee when we both served as law clerks on the United States Supreme Court during its 1963–64 Term. Rex worked with recently appointed Justice Byron White, and I with Chief Justice Earl Warren. A recent graduate of the University of Chicago's fine law school, Rex

* Founders' Chair Professor of Law, Florida Coastal School of Law; Dean Emeritus, Ohio State University College of Law.

was engaging, obviously bright, and personable. We got along quite congenially. When the term ended, we both headed back to private practice. I returned to Washington in 1966 to accept an offer from Solicitor General Thurgood Marshall to work in that prestigious office, and after four years there, I entered law teaching at Notre Dame. Rex became a very proficient appellate litigator.

It was at Notre Dame in the mid-1970s that Rex's path and mine once again crossed. Rex was interviewing law students for his law firm, and I was teaching constitutional law and related courses. Rex asked me if we could meet and chat after his interviews were over, and I, of course, was pleased to do so. I was a bit quizzical about what was on his mind. He told an interesting tale about being asked to serve as the founding dean of the new law school at his undergraduate alma mater: Brigham Young University. I encouraged him to accept the offer, but he had already decided to do so. He was interested in gaining some assistance in putting together an initial faculty.

Rex asked: "Could you recommend some experienced law teachers who don't drink, smoke, or carouse?" I thought a moment and then replied that I really could not think of any off the top of my head, but I would give it more thought. Rex laughed and proceeded to assemble a very competent faculty. He then moved the new law school through the accreditation process effectively and expeditiously.

Later Rex returned to Washington and served for several years as an Assistant Attorney General. He was then appointed Solicitor General of the United States by President Reagan. He served competently in that capacity for the first four years of the Reagan presidency. Although Rex was regarded, correctly most would conclude, as an ideological conservative, he was committed to maintaining the historically accepted autonomy and relative independence of the SG's office. Ultimately, that commendable approach cost him his job as SG at the end of the first Reagan term. Rex resented being directed by the White House to take various positions on major issues before the Supreme Court. He felt that unless he thought it was wise institutionally to do so, the position should not be taken.

Rex explained his position on the proper role of the SG in this regard in a lecture that was later published in the *Ohio State*

Law Journal in 1986.²² I quote from it in length below because I believe the quoted passage contains some of the most insightful thinking about the relationship between the Solicitor General and the Supreme Court. Politicos and the media often miss the subtlety and nuances of that vitally important relationship. They should carefully read what Solicitor General Lee had to say, especially in view of his intimate involvement in the matter.

[T]here is a widely held, and I believe substantially accurate, impression that the Solicitor General's office provides the [Supreme] Court from one administration to another—and largely without regard to either the political party or the personality of the particular Solicitor General—with advocacy which is more objective, more dispassionate, more competent, and more respectful of the Court as an institution than it gets from any other lawyer or group of lawyers. [Appearing with frequency in cases in which the government is otherwise not involved is of considerable benefit to the SG, and] it is not only proper for the Solicitor General to use the adversarial advantages that result from that kind of relationship; it would be a breach of obligation to the President who appointed him to fail to do so. But it must be done with discretion, with discrimination, and with sensitivity, lest the reservoir of credibility that is the source of this special advantage be diminished, with adverse consequences not only to the government's ability to win cases, but also to an important institution of government itself.

[One] example of temptations that can consume the Solicitor General's capital concerns the selection of cases in which to file as *amicus curiae* [I]f I filed in every single [important] case the Court would not have taken me as seriously [as otherwise].

. . .

The harder cases [are those] that have nothing to do with any federal law enforcement responsibility, but which [are] at the core of the current administration's broader agenda. For me these included cases involving obscenity, the religion clauses, and abortion. There are people who argued with great force during my four years in office that the

22. Rex E. Lee, *Lawyering For the Government: Politics, Polemics, & Principle*, 47 *Ohio St. L.J.* 595 (1986).

Solicitor General should never file in this kind of case. They believed that pursuing the President's social agenda was not a legitimate objective for the President's Supreme Court lawyer. There were others who argued that I should file in virtually every one of them because the only person who can speak for the President in the United States Supreme Court is the Solicitor General. If he does not speak, then the President's views will not be heard on those important issues; and since most important changes that will occur in the law of abortion, obscenity, and freedom of religion will be changes in judge-made law, the President's view must be made known to those who have final decisional authority in those areas.

My own view is an intermediate one and it is this: It is not only all right to file in a few of those non-federal enforcement issue cases, it is part of your job, but it is a mistake to file in too many . . . [W]hile I think it is proper to use the office for the purpose of making my contribution to the President's broader agenda, a wholesale departure from the role whose performance has led to the special status that the Solicitor General enjoys would unduly impair that status itself. In the process, the ability of the Solicitor General to serve any of the President's objectives would suffer.

[Another] example of a temptation to consume the Solicitor General's capital [is whether the SG should] make arguments that he knows the Court will reject[.] There are two arguable reasons for taking a position which you know the Supreme Court will reject. First, even though the Court will disagree now, you may start a dialogue (either within the Court or in other quarters) which might eventually contribute to the Court's adopting your view. . . . The other argument in favor of taking positions that the Solicitor General knows will be rejected takes as its premise that the nine members of the Court do not constitute the Solicitor General's only audience. . . . That argument profoundly misunderstands the Solicitor General's office and function. The audience for his briefs and arguments consists of nine people and nine people only. To the extent that his efforts to persuade those nine people also yield some other benefits, that is fine, but that is not his job. Public relations and mass communications are not what he was trained for

and not what he does well. He is not the pamphleteer general nor the neighborhood essayist.

...

There has been built up, over 115 years since this office was first created in 1870, a reservoir of credibility on which the incumbent Solicitor General may draw to his immediate adversarial advantage. But note if he draws too deeply, too greedily, or too indiscriminately, then he jeopardizes not only that advantage in that particular case, but also an important institution of government. The preservation of both—and striking just the right balance between their sometimes competing demands—lies at the heart of the Solicitor General's stewardship.²³

Upon leaving the SG's office, Rex returned to law practice in Washington. He also developed cancer, which he fought bravely and, at least in the short run, successfully. Soon thereafter, Brigham Young University called once again, inviting Rex to assume the institution's presidency. I recall asking why he would take on such a demanding job in view of his health problems. He replied by saying that he felt that anyone asked to assume such a responsibility had an obligation to respond positively if he thought he was able to handle the job.

Rex Lee served with distinction as Brigham Young's chief executive until, sadly, cancer revisited him. This time he was not able to lick it, and he was forced to resign. He remained active as long as his situation allowed, but ultimately succumbed to the inevitable, passing away in 1996, far too early in a life lived to the fullest. Rex was indeed a distinguished American, a person of integrity and commitment. I am fortunate that our paths crossed on a number of occasions. The country is fortunate that he saw fit to serve its institutions—in government, higher education, and the legal profession—in such a capable and dedicated manner.

23. *Id.* at 600-01.