

## Next Solicitor General Can Expect Tough Road Under Trump

By **Andrew Strickler**

*Law360, New York (February 15, 2017, 7:55 PM EST)* -- President Donald Trump's pick for the usually coveted position of solicitor general should expect an unusually rocky tenure, experts say, given the legal battles already underway, criticisms the president has heaped on the judiciary and the likely difficulty of dissuading a president who shoots from the hip from pursuing untenable legal positions.

Often described as the best legal job in the government, most solicitors general in recent decades have been able to focus on a short list of executive branch legal goals and high-profile cases headed to the U.S. Supreme Court, and have enjoyed a high level of deference from the justices.

But fast-moving policy changes promised by the Trump administration on a wide range of complex issues like tax and trade will force the next SG to juggle a greater range of legal questions with wide repercussions and more politically fraught cases.

And in light of Trump's professed desire for undivided loyalty from his underlings, some experts are raising concerns that the SG's traditional behind-the-scenes role as an independent sounding board for the president and attorney general on legal issues will be eroded if Trump's pick can't dissuade his or her bosses from taking shaky positions.

Mayer Brown LLP managing partner Kenneth Geller, who served in the Solicitor General's Office during the Ford, Carter and Reagan administrations, said the executive branch wins so many cases at the Supreme Court in large part because of the office's credibility with the court, built up over decades of well-reasoned arguments and through shifting political winds.

"The justices tend to view what they get out of the Solicitor General's Office as straight shooting, no fudged facts, and when there is a change of government policy, there is a legally sound reason for it," Geller said. "To the extent the SG's role as gatekeeper is diminished, either because you don't have a person of high legal stature in the office or the White House overrules his position or doesn't support him, things could become very difficult for the office."

Adding to the office's expected difficulties is the president himself, who has frequently attacked judges as politically motivated, biased or incompetent. Trump has also professed his desire for undivided loyalty among his subordinates, a stance experts said could also run up against the SG's role as guardian of the government's credibility at the court and filter for legal arguments that could have undesirable repercussions on future cases.

“Does Donald Trump look like the kind of president who wants pushback? No,” said David Cohen, a professor of political science at the University of Akron. “He’s going to want a yes man or a yes woman, and in Trump world, you better carry out the president’s wishes. That’s what the next solicitor will be dealing with.”

Historically, the solicitor general job has been seen as one of the best legal jobs available to any lawyer. Often called the “10th Justice,” the solicitor general navigates and molds the government’s various interests for cases challenging federal policy or actions in, or headed to, the Supreme Court.

From an office within the Supreme Court building, the SG also picks and chooses the oral arguments to handle personally and which to farm out to a small staff of deputies and assistants.

SGs also decide which cases the government lost in lower courts should be appealed, and enjoy considerable deference at the high court on certiorari requests. Three sitting high court justices — Chief Justice John Roberts and Justices Samuel Alito and Elena Kagan — have served in the office.

The question of who will take up the position between Trump and the high court remains unanswered. Last week, the president’s reported frontrunner, D.C. litigator Chuck Cooper of Cooper & Kirk, bowed out, pointing to the reception given in the U.S. Senate to his friend, Sen. Jeff Sessions of Alabama.

Following Senate Democrats’ vocal but ultimately failed battle to derail the nomination of Betsy DeVos as education secretary, Trump’s pick for attorney general faced heated criticism for his civil rights and Senate voting record. But Sessions’ 52-47 confirmation vote on Feb. 8 did not include any Republican “nay” votes.

Cooper, a Sessions friend from their shared time in the Department of Justice under President Ronald Reagan, said he respected those “willing to endure the sacrifices entailed in offering themselves for service in the Department of Justice and elsewhere in the Trump administration.”

Cooper, best known for his U.S. Supreme Court defense of California’s Prop. 8 gay marriage ban, said he was unwilling to subject himself and his loved ones to the confirmation process after seeing Sessions’ experience and “partisan opposition that will say anything and do anything to advance their political interests.”

Cooper’s exit reportedly left his rival for the job, Wachtell Lipton Rosen & Katz partner George Conway, as the most likely option. But other names have also been circulated in recent days as the White House tries to fill hundreds of other roles requiring Senate approval.

Conway, a Yale Law School graduate and well-regarded securities litigator who has argued one case in the Supreme Court, is married to Kellyanne Conway, widely seen as one of Trump’s most trusted advisers.

For now, the SG role is currently being filled by acting Solicitor General Noel Francisco. Francisco, who was among more than a dozen Jones Day lawyers who joined the Trump administration in January, was tapped as a “political” deputy to the solicitor general, a key No. 2 job focused on state and private party challenges to federal policy.

Days after his position was announced, the SG’s office got its first major challenge of the new

administration when Trump issued a series of controversial immigration executive orders that quickly drew lawsuits and judicial pushback, including in the Ninth Circuit.

In a move that puzzled legal ethics experts, the DOJ then said in an appeals brief fighting a stay on the ban that both Francisco and his acting second-in-command in the solicitor general's office, ex-Jones Day lawyer Chad Readler, were not signing on out of an "abundance of caution" related to Jones Day's representation of amicus parties opposing Trump's order.

While a few SG picks in the past have drawn confirmation resistance — Theodore Olson's nomination by President George W. Bush in 2001 was marked by partisan fighting and delays, and narrowly passed a Senate vote — most have been confirmed with far fewer partisan attacks than cabinet nominees.

But Cohen said the historically nonpartisan view of the office is on the wane. That's been particularly true since the intense scrutiny that fell on former Solicitor General Donald Verrilli Jr. and his successful defense of the Affordable Care Act at the Supreme Court in 2015.

"Generally, it's not been a highly visible job, and not a highly targeted position subject to controversial confirmation hearings, but we're living in different times," he said. "But obviously it's a very important position, and in the era of social media, even obscure government positions are becoming more high-profile and politically charged."

Sarah Binder, a professor of political science at George Washington University, agreed that whoever gets the job will be viewed through a more partisan lens than their predecessors, just as federal judicial nominations have under recent administrations become far more contentious.

"The inability of Congress to legislate, the rising political discord and deadlock, the courts have been drawn more and more into these disputes, and people at all levels," she said. "The next SG shouldn't expect a sleepy position. There will be a lot of attention and lot riding on their performance."

--Editing by Philip Shea and Jack Karp.