"Hands-off" the Solicitor General: *Florence v. Board of Chosen Freeholders* and the Supreme Court's Deference in Prison Cases

Loui Itoh*

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* J.D., New York University School of Law, 2012; B.A., Harvard University, 2007. I would like to thank my faculty advisor, Troy McKenzie, Associate Professor of Law at New York University, for his guidance. All errors are my own.

I. INTRODUCTION

Albert W. Florence is the finance director of a car dealership who lives in Burlington County, New Jersey.[1] On May 3, 2005, he was driving with his family in his BMW when he was stopped by a state trooper.[2] The officer informed Florence that he was under arrest, based on an outstanding bench warrant from neighboring Essex County for civil contempt, a non-indictable offense.[3] Florence protested the validity of the warrant, claiming that he had already paid the fine on which it was based.[4] The trooper nevertheless continued with the arrest, and Florence was admitted that night to Burlington County Jail (BCJ).[5] Florence claimed that upon his arrival, he was subjected to strip and visual body-cavity searches by BCJ officials:

> An officer took petitioner to a shower stall with a partially opened curtain. The officer removed petitioner's handcuffs and directed petitioner to strip naked. From roughly an arm's length away, the officer directed petitioner to open his mouth and lift his tongue, lift his arms, rotate, and lift his genitals. Petitioner was then directed to shower in the officer's sight.[6]

Florence was held at BCJ for six days, and then was transferred to Essex County Correctional Facility (Essex).[7] He alleged that he was subjected to another strip and visual body-cavity search at Essex.[8] Florence was released from Essex the day after he entered the facility, after which the charges against him were dismissed.[9]

After his release, Florence sued BCJ and Essex, arguing that they both violated his Fourth Amendment rights by subjecting him to strip searches without any reasonable suspicion.[10] The District Court for the District of New Jersey granted Florence's motion for summary judgment,

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[1] Brief for Petitioner at 2, Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510 (2012) (No. 10-945) [hereinafter *Florence Petitioner's Brief*].

[2] *Id.* at 3

[3] *Id.* at 2–3.

[4] Florence v. Bd. of Chosen Freeholders, 621 F.3d 296, 299 (3d Cir. 2010), *aff'd* 132 S. Ct. 1510 (2012).

[5] *Id.*

[6] *Florence Petitioner's Brief* at 5.

[7] *Florence*, 621 F.3d at 299.

[8] *Id.* ("As described by Florence, he and four other detainees were instructed to enter separate shower stalls, strip naked and shower under the watchful eyes of two corrections officers. After showering, Florence was directed to open his mouth and lift his genitals. Next, he was ordered to turn around so he faced away from the officers and to squat and cough.").

[9] *Id.*

[10] *Id.*

but certified its ruling for an interlocutory appeal.[11] The question certified for appeal to the Third Circuit was "whether a blanket policy of strip searching all non-indictable arrestees admitted to a jail facility without first articulating reasonable suspicion violates the Fourth Amendment."[12] A divided Third Circuit panel noted that although ten circuits had found such searches unconstitutional, "[r]ecently, the Eleventh and Ninth Circuits, sitting en banc, reversed their prior precedents," creating a "newly-minted circuit split."[13] Applying *Bell v. Wolfish*,[14] the leading Supreme Court case concerning prison strip searches, the Third Circuit ruled for the jail and correctional facility, finding that prisons have valid reasons for strip searching arrestees charged with non-indictable offenses.[15] The Supreme Court affirmed the Third Circuit, 5–4, in an opinion by Justice Kennedy.

At the heart of this case, *Florence v. Board of Chosen Freeholders*, is a dispute about the degree of intrusion posed by strip searches and the likelihood that misdemeanor arrestees will intentionally smuggle contraband into jails via their body cavities. Florence (hereinafter "petitioner") argued that the strip searches performed on him by BCJ and Essex violated his Fourth Amendment rights because the invasion of privacy and resulting psychological harm necessarily associated with such searches outweighed any interest the government had in detecting and deterring contraband from being smuggled into the jails.[16] BCJ and Essex (hereinafter "respondents") countered that the searches were constitutional because they served the legitimate penological interest of preventing contraband from entering the jails and that they must be performed on non-indictable arrestees because they are "just as likely to introduce contraband as major offenders."[17] Respondents noted that the searches at issue were no more intrusive than those the Supreme Court upheld in *Bell v. Wolfish* and were similarly justified by the need to detect contraband.[18]

The United States Solicitor General submitted an amicus brief supporting respondents, echoing the prisons' concern that even minor offenders present a smuggling threat, and correcting petitioner's

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[11] *Id.* at 301.

[12] *Florence*, 621 F.3d at 301.

[13] *Id.* at 303–6.

[14] Bell v. Wolfish, 441 U.S. 520, 558 (1979) (holding, per Justice Rehnquist, that strip searches of prisoners including pretrial detainees following contact visits constitutional under the Fourth Amendment because they serve the legitimate penological purpose of preventing and deterring contraband from entering the prison).

[15] *Florence*, 621 F.3d at 308.

[16] *Florence Petitioner's Brief* at 28 ("The relevant question is whether the remaining tiny risk of smuggling justifies subjecting thousands of individuals to the gross intrusion and loss of dignity of a strip search.").

[17] Brief for Respondents at 14–15, Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510 (2012) (No. 10-945) [hereinafter *Florence Respondents' Brief*].

[18] *Id.* at 42, 45.

assertion that federal practice does not allow for such searches.[19] "The United States . . . has a significant interest in the Court's resolution of the question presented in this case," the Solicitor General explained, because the Federal Bureau of Prisons (BOP) operates 116 prison facilities that require "all incoming pretrial detainees to be subject to visual body-cavity inspections before they may be placed in the general prison population."[20]

This Note argues that in light of the Court's historical deference to the Solicitor General in prisoners' rights cases and the corresponding doctrine developed over the last thirty years, the Solicitor General's position was crucial to the outcome in *Florence*. This is because while the Supreme Court is generally deferential to the views of the Solicitor General, the Court is *especially* deferential in cases concerning constitutional challenges to prison policies because of the constitutional separation of powers concern. The existence of a deference regime helps to explain the *Florence* decision not only because the majority ruled in favor of the state prison, as the Solicitor General urged, but also because two justices wrote separate concurrences demonstrating that their views of the constitutional limits to searching inmates were closely tied to the BOP policy.[21] Justice Alito concurred as follows: "I join the opinion of the Court but emphasize the limits of today's holding. The Court holds that jail administrators may require all arrestees *who are committed to the general jail population of a jail* to undergo visual strip searches not involving physical contact by corrections officers."[22] As he explained later, this is BOP's policy.[23] Rather than articulating its own notion of what is "reasonable" under the Fourth Amendment, the Court held the practices employed by the Solicitor General's client up as the constitutional standard, demonstrating considerable deference. Not only was the Solicitor General's input crucial to the outcome in *Florence*, but the decision cannot be fully understood without examining the Court's unique deference to the Solicitor General in prison cases.

Part II describes the doctrine established over the last three decades, in which separation of powers concerns led the Court to defer to the Solicitor General.

Part II(a) analyzes *Bell v. Wolfish*, in which the Court deferred to the Solicitor General's judgment by taking a "hands-off" approach to prison administration, believing it to be a responsibility delegated to the political branches of government.[24]

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[19] Brief for the United States as Amicus Curiae Supporting Respondents at 9, Florence v. Bd. of Chosen Freeholders, 131 S. Ct. 1816 (2011) (No. 10-945) [hereinafter *Florence Amicus Brief*].

[20] *Id.* at 1–2.

[21] *See* Florence v. Bd. of Chosen Freeholders of the Cnty. of Burlington, 132 S. Ct. 1510 (2012).

[22] *Id.* at 1524 (Alito, J., concurring).

[23] *Id.* Note, however, that the agency has typically chosen to segregate selected minor offenders from the general prison population.

[24] Bell v. Wolfish, 441 U.S. 520, 562 (1979).

Parts II(b) and II(c) analyze *Block v. Rutherford*, *Hudson v. Palmer*, and *Turner v. Safley*, cases in which the Court demonstrated that its "hands-off" approach also extended to prisons run by state governments.[25] The Court's deference to the prisons in these cases can also be understood as deference to the Solicitor General, who submitted amicus briefs urging the result in two of these cases.

Part II(d) examines the outer limits of the Court's deference to state prison officials. In *Johnson v. California* and *Hudson v. McMillian*, two rare cases in which the Court found state prison policies to be unconstitutional, it did so at the Solicitor General's urging.[26] While it is difficult to say whether the Court and the Solicitor General simply reached similar conclusions about the constitutionality of the practices at issue in these cases or whether the Solicitor General's views actually influenced the Court, it is plausible that at least some justices were more comfortable striking down state policies with the Solicitor General's approval. Justice O'Connor, for example, extensively quoted from the Solicitor General's brief in *Johnson*.

The analysis in Part III shifts to the Office of the Solicitor General, and offers reasons for the Court's deference. Part III(a) examines the three roles of the Solicitor General: as a gatekeeper for the Supreme Court's docket; as an advocate for the United States; and as amicus curiae on the merits. Empirical studies demonstrate that the Solicitor General is extremely influential in each of these roles, and is especially successful in its role as amicus curiae.

Part III(b) introduces three theories that academics have raised to explain the Solicitor General's influence on the Supreme Court: the Repeat Player Theory, the Tenth Justice Theory, and what I refer to as the Executive Power Theory. These theories are not mutually exclusive, and most sources endorse more than one theory. The Executive Power Theory—that the Court tends to defer to the Solicitor General especially in cases in which the Executive argues in favor of maintaining institutional power—is especially relevant in the prison cases. It was this concern that motivated Justice Rehnquist to take the hands-off approach in *Bell*, and was arguably a deciding factor in the *Florence* case.

Part IV analyzes the *Florence* decision, and argues that the majority and concurring opinions suggest that the Solicitor General's input played a significant role in the case.

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[25] *See generally* Turner v. Safley, 482 U.S. 72 (1987); Block v Rutherford, 468 U.S. 576 (1984); Hudson v. Palmer, 468 U.S. 517 (1984).

[26] Johnson v. California, 543 U.S. 499 (2005); Hudson v. McMillian, 503 U.S. 1 (1992).

II. THE SUPREME COURT'S "HANDS-OFF" APPROACH TO PRISON ADMINISTRATION AS DEFERENCE TO THE SOLICITOR GENERAL

A. *Bell v. Wolfish* and the Revival of the "Hands-Off" Approach

The leading case on the constitutionality of strip searching prisoners, *Bell v. Wolfish*, laid out a balancing test.[27] Similar to *Florence*, the Court in *Bell* weighed the prisoners' privacy interest against the prison's interest in maintaining safety and security when assessing whether visual body-cavity searches of inmates violated the Fourth Amendment's prohibition against unreasonable searches.[28] The Court sided with the defendant, a federal facility, represented by the Solicitor General.

Bell was brought in the Southern District of New York as a class action challenging numerous conditions and practices at the Metropolitan Correctional Center (MCC).[29] The district court's injunction against twenty different MCC practices was largely affirmed by the Second Circuit, which held that "under the Due Process Clause of the Fifth Amendment, pretrial detainees may be subjected to only those restrictions and privations which inhere in their confinement itself or which are justified by compelling necessities of jail administration."[30] Specifically, the Second Circuit affirmed the district court's grant of relief against "double-bunking" (housing two inmates in a room built for one); prohibiting receipt of packages of food and personal items from outside the institution; prohibiting book deliveries except those directly from the publisher; requiring detainees to wait outside of their cells during routine cell searches; and conducting body-cavity searches after contact visits.[31]

Writing for the majority, Justice Rehnquist rejected the Second Circuit's "compelling necessity standard," under which pretrial detainees have a substantive right to be free from conditions of confinement that are not justified by compelling necessity.[32] Finding that this standard was not rooted in the Constitution, Justice Rehnquist concluded that when an inmate challenges the constitutionality of conditions of pretrial confinement under the Due Process Clause, "the proper inquiry is whether those conditions amount to punishment of the detainee."[33] He

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[27] Bell v. Wolfish, 441 U.S. 520, 558–60 (1979).
[28] *Id.*
[29] *Id.* at 523.
[30] *Id.* (citing Wolfish v. Levi, 573 F.2d 118, 124 (1978)) (internal quotation marks omitted).
[31] *Id.* at 530.
[32] *Bell*, 441 U.S. at 532.
[33] *Id* at 535.

added that "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective it does not, without more, amount to 'punishment.'"[34] The majority found that double-bunking did not amount to punishment and therefore, did not violate the Due Process Clause.[35]

Turning to the MCC restrictions and practices designed to promote security that were challenged under the Due Process Clause, as well as the First and Fourth Amendments, the Court laid out four doctrinal principles that guided its analysis. "First, we have held that convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison."[36] Second, those rights are subject to certain restrictions and limitations.[37] The Court added that this principle applies to pretrial detainees as well as convicted prisoners.[38] The Court then discussed the third principle: "[M]aintaining institutional security and preserving internal order and discipline are essential goals" that may require limiting the rights of detainees and prisoners.[39] Finally, the Court concluded that because there are no easy solutions to the "problems that arise in the day-to-day operation of a corrections facility," courts should accord "wide-ranging deference" to prison administrators.[40] The Court explained that "[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters."[41]

The Court upheld the constitutionality of prohibiting inmates from receiving books unless they were mailed directly from the publisher;[42] prohibiting inmates from receiving personal packages from outside the institution;[43] and requiring inmates to wait outside their cells while their cells are being searched.[44] The Court then turned to the strip search

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[34] *Id.* at 539.

[35] *Id.* at 542.

[36] *Id.* at 545. (explaining further, "[s]o, for example, our cases have held that sentenced prisoners enjoy freedom of speech and religion under the First and Fourteenth Amendments; that they are protected against invidious discrimination on the basis of race under the Equal Protection Clause of the Fourteenth Amendment; and that they may claim the protection of the Due Process Clause to prevent additional deprivation of life, liberty, or property without due process of law") (internal citations omitted).

[37] *Bell*, 441 U.S. at 546. ("There must be a mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.") (citing *Wolfish*, 573 F.2d at 556) (internal quotation marks omitted).

[38] *Id.* ("A detainee simply does not possess the full range of freedoms of an unincarcerated individual.").

[39] *Id.* at 546.

[40] *Id.* at 547 (internal quotation marks omitted).

[41] *Id.* at 547–48 (citing Pell v. Procunier, 417 U.S. 817 (1974)).

[42] *Bell*, 441 U.S. at 550.

[43] *Id.* at 555.

[44] *Id.* at 557.

policy, stating that "[a]dmittedly, this practice instinctively gives us the most pause."[45] After having a contact visit, inmates at all BOP facilities, including the MCC, were required to undergo a visual body-cavity examination as part of a mandatory strip search.[46] The Court laid out what came to be known as the "*Bell* balancing test":

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.[47]

Applying this test to the strip search policy, the Court credited the government's reasons for conducting the searches. "A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are documented in th[e] record."[48] The Court was unmoved by the fact that there had only been one instance where contraband was discovered on an MCC inmate, reasoning that this statistic "may be more a testament to the effectiveness of this search technique as a deterrent than to any lack of interest on the part of the inmates to secrete and import such items when the opportunity arises."[49] Noting that these searches constitute an invasion of the inmates' privacy and that instances of abuse had been documented by the district court, the Court stated that the relevant question was "whether visual body-cavity inspections as contemplated by the MCC rules can *ever* be conducted on less than probable cause. . . . [W]e conclude that they can."[50]

By upholding these searches, the Court signaled its deference to the judgment of the prison officials. Respondents had presented evidence to the district court suggesting that the searches caused material harm by fostering an attitude of "psychological sadism" among the guards and causing a "correlative fear among inmates of sexual assault" that was so severe that some inmates chose to forego contact visits in order to avoid them.[51] Respondents also presented the "uncontradicted testimony of medical experts establish[ing] that the anal inspection procedure was

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[45] *Id.* at 558.
[46] *Id.*
[47] *Bell*, 441 U.S. at 559.
[48] *Id.* (citing App. 71–76; Ferraro v. United States, 590 F.2d 335 (6th Cir. 1978); United States v. Park, 521 F.2d 1381, 1382 (9th Cir. 1975)).
[49] *Id.*
[50] *Id.* at 560.
[51] Brief for Respondents at 17, Bell v. Wolfish, 441 U.S. 520 (1979) (No. 77-1829).

virtually useless."[52] That the Court refused to address the allegations of harm resulting from the searches, and instead upheld their constitutionality as a general matter indicates considerable deference to the judgment of the prison officials.

Justice Rehnquist explained that the Court's deference was motivated by a separation of powers concern:

> There was a time not too long ago when the federal judiciary took a completely "hands-off" approach to the problem of prison administration. In recent years, however, these courts largely have discarded this "hands-off" attitude and have waded into this complex arena. The deplorable conditions and Draconian restrictions of some of our Nation's prisons are too well known to require recounting here, and the federal courts rightly have condemned these sordid aspects of our prison systems. But many of these same courts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations . . . . But under the Constitution, the first question to be answered is not whose plan is best, *but in what branch of the Government is lodged the authority to initially devise the plan* . . . . The wide range of "judgment calls" that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.[53]

Given his belief that the Constitution entrusted prison administration to officials outside the judiciary, Justice Rehnquist signaled his intention to defer to the judgment of executive branch officials.[54] Viewed through this lens, even the "deplorable conditions and Draconian restrictions" that had caused courts to intervene in the past could pass constitutional muster.[55] Signaling a return to the hands-off approach, the Court in *Bell* deferred to the Solicitor General in upholding body-cavity searches at a federal prison. Thus it makes sense in later cases concerning state prisons that the Court would defer to a Solicitor General's argument that a certain procedure was constitutional, though similar deference may not be due to the state prison had the Solicitor General chosen not to intervene.[56]

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[52] *Id.*

[53] *Bell*, 441 U.S. at 562 (emphasis added).

[54] *Id.*

[55] *Id.*

[56] Though the Court has stated that it might have reason to defer to state officials out of federalism concerns, Turner v. Safley, 482 U.S. 78, 85 ("Where a state penal system is involved, federal courts have, as we indicated in *Martinez*, additional reason to accord deference to the appropriate prison authorities.") (internal citations omitted), my analysis of *Turner* and other cases suggests that deference to the Solicitor General plays a larger role in the Court's rulings than federalism does. In *Turner*, for example, the Court struck down one of the two state prison policies, but this result was consistent with the Solicitor General's position. *Id.* The Court also invalidated state prison policies in

B. The Extension of Deference to State Prisons

Consistent with *Bell*, the Burger Court deferred to the judgment of prison officials by holding in *Hudson v. Palmer* that prisoners do not have any reasonable expectation of privacy within their cells.[57] An inmate at a Virginia state prison alleged that a guard at the same facility had conducted an unannounced shakedown cell search and confiscated and destroyed his property for no reason other than to harass him.[58] The Fourth Circuit affirmed the district court's holding that respondent was not deprived of his property without due process of law, but remanded on the Fourth Amendment claim because the record reflected a "factual dispute" as to the purpose of the search.[59] The Fourth Circuit recognized that *Bell* had authorized irregular unannounced shakedown searches, but held that an individual prisoner has a "limited privacy right" in his cell, protecting him from searches conducted solely to harass or humiliate.[60] Chief Justice Burger, writing for a four-member plurality stated that in order to determine whether an inmate's expectation of privacy is legitimate or reasonable, courts must balance the relevant interests:

> The two interests here are the interest of society in the security of its penal institutions and the interest of the prisoner in privacy within his cell. The latter interest, of course, is already limited by the exigencies of the circumstances: A prison "shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room." We strike the balance in favor of institutional security, which we have noted is "central to all other corrections goals" . . . . We are satisfied that society would insist that the prisoner's expectation of privacy always yield to what must be considered the paramount interest in institutional security.[61]

Chief Justice Burger acknowledged the Fourth Circuit's concern about "maliciously motivated searches," writing that "intentional harassment of even the most hardened criminals cannot be tolerated by a civilized society."[62] However, he rejected the Fourth Circuit's solution that even "random" searches must be part of an established plan, deferring to the prison's judgment that "random searches are essential to the effective

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Hudson v. McMillian, 503 U.S. 1 (1992), and *Johnson v. California*, 543 U.S. 499 (2005), at the behest of the Solicitor General. While federalism may play a role in these cases, it is not dispositive.

[57] Hudson v. Palmer, 468 U.S. 517 (1984).

[58] *Id.* at 519–520.

[59] *Id.* at 520–21.

[60] *See id.* at 521–22.

[61] *Id.* at 527–28 (citations omitted).

[62] *Hudson*, 468 U.S. at 528.

security of penal institutions."[63] Justice O'Connor concurred in the judgment, but wrote separately "to elaborate my understanding of why the complaint in this litigation does not state a ripe constitutional claim."[64] She reached similar conclusions regarding the Fourth Amendment claim.[65]

While the Solicitor General did not submit a brief in this case, the Court's holding can be understood as a continuation of the deference the Court demonstrated in *Bell*. In a four-member dissent to the Court's Fourth Amendment holding, Justice Stevens pointed out that "the reasoning in Part II-A of the Court's opinion, however, is seriously flawed—indeed, internally inconsistent."[66] He explained:

> It is well-settled that the discretion afforded prison officials is not absolute. A prisoner retains those constitutional rights not inconsistent with legitimate penological objectives. There can be no penological justification for the seizure alleged here. There is no contention that Palmer's property posed any threat to institutional security . . . if material is examined and found not to be contraband, there can be no justification for its seizure.[67]

The effect of the Court's holding, according to Justice Stevens, was to "declare that the prisoners are entitled to no measure of human dignity or individuality."[68] This holding, which according to the dissenters "cannot be squared with the text of the Constitution, nor with common sense,"[69] is a continuation of the deferential hands-off approach taken by Justice Rehnquist in *Bell*. Justice Stevens wrote the following:

> By adopting it's "bright line" rule, the Court takes the "hands off" approach to prison administration that I thought it had abandoned forever when it wrote in *Wolff v. McDonnell* . . . "[T]hough his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is

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[63] *Id.* at 529. Chief Justice Burger quoted a Supreme Court of Virginia opinion, *Marrero v. Commonwealth*, for the idea that "[t]his type of search allows prison officers flexibility and prevents inmates from anticipating, and thereby thwarting, a search for contraband." *Id.* (quoting Marrero v. Commonwealth, 284 S.E.2d 809, 811 (1981)). This holding is an indication of deference towards prison officials.

[64] *Id.* at 537 (O'Connor, J., concurring).

[65] *Id.* (O'Connor, J., concurring) ("I agree that the government's compelling interest in prison safety, together with the necessary ad hoc judgments required of prison officials, make prison cell searches and seizures appropriate for categorical treatment. The fact of arrest and incarceration abates all legitimate Fourth Amendment privacy and possessory interests in personal effects.") (citations omitted).

[66] *Id.* at 541–42 (Stevens, J., concurring in part and dissenting in part).

[67] *Hudson*, 468 U.S. at 547–49 (Stevens, J., concurring in part and dissenting in part).

[68] *Id.* at 554 (Stevens, J., concurring in part and dissenting in part).

[69] *Id.* at 555 (Stevens, J., concurring in part and dissenting in part).

> imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country."[70]

Thus, the Court's deferential holding in *Hudson* can be understood as a continuation of the deference exhibited by *Bell*'s hands-off approach as articulated by Justice Rehnquist. Although in *Bell*, separation of powers motivated Justice Rehnquist to defer to the Solicitor General and the executive branch because the Constitution had entrusted them with the administration of prisons, *Hudson* suggests that this deference extends to state prison administrators as well.

The Court's deference to prison officials and the judgment of the Solicitor General is also evident in *Block v. Rutherford*,[71] a case decided the same day as *Hudson*. Applying the principles articulated in *Bell*, the Court upheld the Los Angeles County Central Jail's policy that denied pretrial detainees contact visits with their spouses, relatives, children, and friends.[72] Writing for the majority, Chief Justice Burger rejected the district court and Ninth Circuit's determination that a blanket prohibition of contact visits for all detainees was an exaggerated response to security concerns.[73] Finding that there is a rational connection between banning contact visits and ensuring prison security,[74] Chief Justice Burger criticized the lower courts for substituting their judgments for those of the prison officials. He wrote the following:

> On this record, we must conclude that the District Court simply misperceived the limited scope of judicial inquiry under [*Bell*]. When the District Court found that many factors counseled against contact visits, its inquiry should have ended. The court's further "balancing" resulted in an impermissible substitution of its view on the proper administration of Central Jail for that of the experienced administrators of that facility. Here, as in [*Bell*], "[i]t is plain from [the] opinions that the lower courts simply disagreed with the judgment of [the jail] officials about the extent of the security interests affected and the means required to further

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[70] *Id.* at 555–56 (Stevens, J., concurring in part and dissenting in part) (quoting Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974)).

[71] 468 U.S. 576 (1984).

[72] *Id.* at 591. In its opinion, the Court also rejected the claim that the Jail's policy of conducting unannounced shakedown searches of cells in the absence of the cell occupants violated the detainees' Due Process rights, stating that this matter was settled when the Court decided *Bell*. *Id.* at 591.

[73] *Id.* at 581, 587.

[74] *Id.* at 586 ("That there is a valid, rational connection between a ban on contact visits and internal security of a detention facility is too obvious to warrant extended discussion. The District Court acknowledged as much. Contact visits invite a host of security problems. They open the institution to the introduction of drugs, weapons, and other contraband. Visitors can easily conceal guns, knives, drugs or other contraband in countless ways and pass them to an inmate unnoticed by even the most vigilant observers. And these items can readily be slipped from the clothing of an innocent child, or transferred by other visitors permitted close contact with inmates").

those interests."[75]

Significantly, this was exactly the result urged by the Solicitor General, who submitted an amicus brief in support of the jail. Although the Solicitor General acknowledged that BOP generally permits contact visits,[76] it was perhaps troubled by the prospect of a potential ruling that such visits are constitutionally mandated,[77] because any ruling against the state prisons would be applicable to the federal prisons as well.[78] Quoting from *Bell*, the Solicitor General stated that "[t]his Court plainly indicated that the federal judiciary is not to apply a strict or heightened scrutiny analysis in making the above determination . . . . Federal courts, in short, are obligated to give 'wide deference' to the expert judgment of corrections officials unless they are 'conclusively shown to be wrong.'"[79] At the urging of the Solicitor General, the Court once again applied the hands-off approach from *Bell*[80] and deferred to the judgment of the prison officials.[81]

C. *Turner v. Safley* and Deference Outside the Fourth Amendment Context

With the exception of the *Florence* case, no Fourth Amendment challenges by prisoners have made it to the Supreme Court after *Hudson v. Palmer*. According to one commentator, the *Bell*, *Block*, and *Hudson* trilogy raised the question whether "prison inmates maintain any right to privacy under the Fourth Amendment."[82] That commentator explains, "[t]he question arises in part because dicta in *Hudson* could be read as saying that it is unreasonable for prisoners to retain any privacy interests at all, including in their bodies, though *Hudson* itself did not actually say this and applied only to privacy in cells."[83]

In *Turner v. Safley*, the Court demonstrated its deference to prison

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[75] *Block*, 468 U.S. at 589 (quoting *Bell*, 441 U.S. at 554).

[76] *See* Memorandum for the United States as Amicus Curiae at 6–7, Block v. Rutherford, 468 U.S. 576 (1984) (No. 83-317).

[77] *Id.* at 1 ("Any decision by this Court concerning the constitutional rights of pretrial detainees in state facilities will necessarily have implications for federal pretrial detainees. In addition, the United States has enforcement responsibilities under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. (Supp. V) 1997 et seq., to assure that state prison officials do not deprive inmates of the rights, privileges or immunities secured or protected by the Constitution and laws of the United States.").

[78] *Id.*

[79] *Id.* at 8–10 (quoting *Bell*, 441 U.S. at 547, 555).

[80] *Bell*, 441 U.S. at 562.

[81] *Block*, 468 U.S. at 591.

[82] Deborah L. MacGregor, *Stripped of All Reason? The Appropriate Standard for Evaluating Strip Searches of Arrestees and Pretrial Detainees in Correctional Facilities*, 36 COLUM. J.L. & SOC. PROBS. 163, 174 (2003).

[83] *Id.* at 174–75.

officials and the Solicitor General outside the Fourth Amendment context, by using a rational relationship test to assess prisoners' constitutional claims under the First and Fourteenth Amendments. Considering "the constitutionality of regulations promulgated by the Missouri Division of Corrections relating to inmate marriages and inmate-to-inmate correspondence,"[84] Justice O'Connor wrote, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[85] She identified four factors that courts ought to consider in determining the reasonableness of the regulation at issue: (1) whether there is a "valid, rational connection" between the prison regulation and a legitimate government interest; (2) "whether alternative means of exercising the right remain open to inmates"; (3) the "ripple effect," or the impact that accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally; and (4) the absence of ready alternatives.[86]

Applying these factors, Justice O'Connor found that Renz prison's practice of generally prohibiting correspondence with inmates at other institutions[87] was "logically connected" to "legitimate security concerns" caused by the presence of prison gangs.[88] She noted that inmates were not deprived of all means of expression, as they were only prohibited from communicating with a "limited class of other people with whom prison officials have particular cause to be concerned—inmates at other institutions within the Missouri prison system."[89] She found that there would have been a significant "ripple effect" if the right was granted. Allowing inmate to inmate correspondence would facilitate "the development of informal organizations that threaten the core functions of prison administration."[90] In support of her final point, Justice O'Connor noted that "[o]ther well-run prison systems, including the Federal Bureau of Prisons, have concluded that substantially similar restrictions on inmate correspondence were necessary to protect institutional order and

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[84] Turner v. Safley, 482 U.S. 78, 81, 89 (1987).

[85] *Id.* at 89.

[86] *Id.* at 89–91 (quoting *Block*, 468 U.S. at 586). Justice O'Connor qualified the final factor she listed as "not a 'least restrictive alternative' test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint. But if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id.* at 90–91 (citations omitted).

[87] The regulation permitted correspondence with immediate family members who are inmates at other correctional institutions as well as correspondence between inmates regarding legal matters. "Other correspondence between inmates, however, is permitted only if the classification/treatment team of each inmate deems it in the best interest of the parties involved . . . . At Renz, the District Court found that the rule as practiced is that inmates may not write non-family inmates." *Turner*, 482 U.S. at 81–82 (internal quotation marks omitted).

[88] *Turner*, 482 U.S. at 91.

[89] *Id.* at 92

[90] *Id.* at 92–93.

security."[91]

Noting that marriage was a constitutionally protected interest even in the prison context, Justice O'Connor held that the Missouri marriage regulation[92] lacked a reasonable relationship to the prison's stated objectives of promoting security and inmate rehabilitation.[93] Justice O'Connor found that the marriage ban was not rationally related to the security interest, as "[c]ommon sense likewise suggests that there is no logical connection between the marriage restriction and the formation of love triangles."[94]

Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, joined the part of the opinion striking down the marriage prohibition, but dissented from the rest of the opinion.[95] The dissenters were perplexed by the varying levels of deference the Court had expressed towards the prison with regard to the correspondence and marriage prohibitions. According to Justice Stevens,

> The contrasts between the Court's acceptance of the challenge to the marriage regulation as overbroad and its rejection of the challenge to the correspondence rule are striking and puzzling. The Court inexplicably expresses different views about the security concerns common to prison marriages and prison mail. In the marriage context expert speculation about the security problems associated with "love triangles" is summarily rejected, while in the mail context speculation about the potential "gang problem" and the possible use of codes by prisoners receives virtually total deference.[96]

Justice Stevens reasoned that the differential treatment of the two regulations was due to the Court's conception of marriage as warranting greater constitutional protection:

> When all the language about deference and security is set to one side, the Court's erratic use of the record to affirm the Court of Appeals only partially may rest on an unarticulated assumption that the marital state is fundamentally different from the exchange of mail in the satisfaction, solace, and

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[91] *Id.* at 93.

[92] *Id.* at 96–97. The Missouri marriage regulation prohibited inmates from marrying other inmates as well as civilians unless the prison superintendent approved the marriage after finding that there were compelling reasons for doing so. Generally, only pregnancy and the birth of a child were considered "compelling reasons."

[93] *Turner*, 482 U.S. at 97. ("The security concern emphasized by petitioners is that 'love triangles' might lead to violent confrontations between inmates. With respect to rehabilitation, prison officials testified that female prisoners often were subject to abuse at home or were overly dependent on male figures, and that this dependence or abuse was connected to the crimes they had committed.") (internal citations omitted).

[94] *Id.* at 98.

[95] *See id.* at 100–01 (Stevens, J., concurring in part and dissenting in part).

[96] *Id.* at 112–13 (Stevens, J., concurring in part and dissenting in part).

support it affords to a confined inmate.[97]

Justice Stevens chided the majority for ruling based on this assumption, reminding them that "[e]ven if such a difference is recognized in literature, history, or anthropology, the text of the Constitution more clearly protects the right to communicate than the right to marry."[98]

Another explanation for the differing treatment of the correspondence and marriage rules is that the majority was influenced by the Solicitor General's amicus brief, which advocated for upholding the correspondence rule, but did not comment on the marriage rule. The Solicitor General argued that the correspondence rule was reasonable, noting that "[f]ederal prison officials have come to this conclusion as well, and have promulgated a substantially similar regulation."[99] In contrast, the Solicitor General noted that "[t]here is no comparable federal regulation" to the marriage rule,[100] and thus, "[t]he United States expresses no view on the constitutionality of the Missouri marriage regulation."[101] The Court's deference to the Missouri prison officials regarding the correspondence rule, in contrast to its more critical analysis of the marriage rule, could be understood as deference to the judgment of the Solicitor General, who expressed strong views in favor of the former but not the latter.

The vast majority of constitutional claims asserted by prisoners since *Turner* have been decided in favor of the state prisons and the Solicitor General, who weighed in on the side of the prisons.[102] Notably,

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[97] *Id.* at 115–16 (Stevens, J., concurring in part and dissenting in part).

[98] *Turner*, 482 U.S. at 116 (Stevens, J., concurring in part and dissenting in part).

[99] Brief for the United States as Amicus Curiae Supporting Petitioners at 15, Turner v. Safley, 482 U.S. 78 (1987) (No. 85-1384).

[100] *Id.* at 3.

[101] *Id.* at 17, n. 7.

[102] *See* Beard v. Banks, 548 U.S. 521 (2006) (rejecting First Amendment challenge to Pennsylvania Department of Corrections policy restricting access to newspapers, magazines, and photographs by inmates placed in the most restrictive level of the prison's long-term segregation unit. A plurality held that the district court failed to apply *Turner* and exercise due deference to the judgment of the prison officials); Brief for the United States as Amicus Curiae Supporting Petitioner, Beard v. Banks, 548 U.S. 521 (2006) (No. 04-1739) (urging Court to apply *Turner* and reject First Amendment claims); Overton v. Bazzetta, 539 U.S. 126 (2003) (applying *Turner*, upholding state prison regulations regarding visitations against First, Eighth and Fourteenth Amendment challenges); Brief for the United States as Amicus Curiae Supporting Petitioners, Overton v. Bazzetta, 539 U.S. 126 (2003) (No. 02-94) (arguing that prison regulations are valid under *Turner*); Shaw v. Murphy, 532 U.S. 223 (2001) (holding that inmates do not possess a special First Amendment right to provide legal assistance to fellow inmates that enhances the protections otherwise available under *Turner*); Brief for the United State as Amicus Curiae Supporting Reversal, Shaw v. Murphy, 532 U.S. 223 (2001) (No. 99-1613) (same); Washington v. Harper, 494 U.S. 210 (1990) (rejecting mentally ill state prisoner's claim that being treated by antipsychotic drugs against his will without a judicial hearing violated his substantive and procedural due process rights); Brief for the United States as Amicus Curiae Supporting Petitioners, Washington v. Harper, 494 U.S. 210 (1990) (No. 88-599) (same); Thornburgh v. Abbott, 490 U.S. 401 (1989) (applying *Turner's* deferential standard to reject facial challenge to Federal Bureau of Prisons regulation allowing prison officials to reject incoming publications found to be detrimental to prison security); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (holding that even where claims were made under the First Amendment, Courts should not substitute their judgment on difficult and sensitive matters of

the Court stated in *Washington v. Harper* that "the standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights."[103] According to the Court, "[t]his is true even when the constitutional right claimed to have been infringed is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review."[104] Thus, if the Court is to be taken at its word, after *Harper*, all constitutional challenges to prison policies must be evaluated according to the deferential *Turner* standard, which would uphold any prison regulation deemed to be "reasonably related" to "legitimate" penological interests.

D. The Limits to Deference

Despite the Court's promise in *Harper*, there are a few cases in which the Court has applied something other than the *Turner* standard to uphold constitutional challenges against state prisons—often at the Solicitor General's urging. For example, in *Hudson v. McMillian*, the Court reversed the Fifth Circuit's holding that a prisoner's Eighth Amendment claim failed on the grounds that the injuries he sustained in a beating by prison guards was "minor" and did not require medical attention.[105] According to Justice O'Connor's majority opinion, as well as the Solicitor General's amicus brief, the proper judicial inquiry for courts faced with an accusation that prison officials used excessive force is not merely whether the use of force left a lasting injury, but "whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm."[106] The Solicitor General noted that "even giving due deference to the concerns respondents may have had in attempting promptly to defuse what may have seemed a tense situation[,]" it was difficult to see why it was necessary for the guards to apply any considerable force, given that the prisoner was in handcuffs and shackles and unable to resist the guards as he was beaten.[107]

In *Johnson v. California*, the Court held that strict scrutiny must be applied in an equal protection challenge to the California Department of

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institutional administration for those of prison officials); Brief for the United States as Amicus Curiae Supporting Petitioners, O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (No. 85-1722) (same).

[103] *Harper*, 494 U.S. at 224.

[104] *Id.* at 223.

[105] Hudson v. McMillian, 503 U.S. 1, 5, 12 (1992).

[106] *Id.* at 6–7; Brief for the United States as Amicus Curiae Supporting Petitioner at 13, Hudson v. McMillian, 503 U.S. 1 (1991) (No. 90-6531).

[107] Brief for the United States as Amicus Curiae Supporting Petitioner at 14–15, Hudson v. McMillian, 503 U.S. 1 (1991) (No. 90-6531).

Corrections (CDC) policy of placing new inmates with cellmates of the same race.[108] The Court, per Justice O'Connor, clarified that *Turner* deference does not apply to racial classifications, because the right to be free of racial discrimination is "not a right that need necessarily be compromised for the sake of proper prison administration."[109] She continued:

> When government officials are permitted to use race as a proxy for gang membership and violence without demonstrating a compelling government interest and proving that their means are narrowly tailored, society as a whole suffers. For similar reasons, we have not used *Turner* to evaluate Eighth Amendment claims of cruel and unusual punishment in prison.[110]

Thus *Johnson* circumscribes the outer limits of *Turner* deference, indicating that the Court was backpedaling on its suggestion in *Washington v. Harper* that *Turner* applies to all constitutional rights. In doing so, the Court was undoubtedly influenced by its own precedent establishing that strict scrutiny applies to all government racial classifications.[111] However, the extent to which Justice O'Connor quotes from the Solicitor General's amicus brief suggests that the Solicitor General's opinion influenced the Court's ruling. She wrote the following:

> Virtually all other States and the Federal Government manage their prison systems without reliance on racial segregation. . . . Federal regulations governing the Federal Bureau of Prisons (BOP) expressly prohibit racial segregation. . . . ("[BOP] staff shall not discriminate against inmates on the basis of race, religion, national origin, sex, disability, or political belief. This includes the making of administrative decisions and providing access to work, housing and programs".) The United States contends that racial integration actually "leads to less violence in BOP's institutions and better prepares inmates for re-entry into society." . . . Indeed, the United States argues, based on its experience with the BOP, that it is possible to address "concerns of prison security through individualized consideration without the use of racial segregation, unless warranted as a necessary and temporary response to a race riot or other serious threat of race-related violence."[112]

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[108] Johnson v. California, 543 U.S. 499, 514 (2005).
[109] *Id.* at 510.
[110] *Id.* at 511.
[111] *Id.* at 505 (citing Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995)).
[112] *Id.* at 508–09 (citations omitted).

Thus, in its decision to apply strict scrutiny to the CDC policy, the Court, although rejecting the judgment of state prison officials, nevertheless deferred to the judgment of the Solicitor General. The Court did not go as far as the Solicitor General, who urged the Court to find that the CDC policy failed to meet strict scrutiny.[113] Instead, this determination was remanded to the lower courts.[114] But because strict scrutiny is such a high bar to meet, especially in the context of race, the Court all but sided with the Solicitor General and the plaintiffs by prescribing it as the applicable standard of review.

In *Brown v. Plata*, a 5–4 opinion by Justice Kennedy, the Court found that overcrowded prison conditions in California violated the Eighth Amendment.[115] The Court's refusal to defer to the judgment of the state prison officials in this instance not only fits squarely into the Eighth Amendment exception to *Turner* identified in *Johnson*, but also is consistent with deference to the Solicitor General, who did not submit an amicus brief in this case.

The Court has deferred to the judgment of the Solicitor General both in upholding prison policies in the face of constitutional challenges and by striking down select state prison policies at the Solicitor General's urging. The next Part examines the literature regarding the Solicitor General's office and offers theories explaining the Court's deference.

III. THE OFFICE OF THE SOLICITOR GENERAL AND THEORIES EXPLAINING DEFERENCE

A. The Solicitor General's Three Roles

Appointed by the President with the consent of the Senate, the Solicitor General is the lawyer for the United States, responsible for advocating the interests of the executive branch before the Supreme Court.[116] The Solicitor General has three main responsibilities. First, as "gatekeeper," the Solicitor General decides which cases to appeal to the Supreme Court, selecting from the hundreds of cases the federal government loses in the lower federal courts. The Solicitor General also

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[113] *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 9, Johnson v. California, 543 U.S. 499 (2005) (No. 03-636). *See also Johnson*, 543 U.S. at 517 (Stevens, J., dissenting) (arguing that the prison policy of racial segregation violates the Equal Protection Clause of the Fourteenth Amendment).

[114] *Johnson*, 543 U.S. at 515.

[115] 131 S. Ct. 1910 (2011).

[116] Kristen A. Norman-Major, Note, *The Solicitor General: Executive Policy Agendas and the Court*, 57 ALB. L. REV. 1081, 1082–83 (1994).

acts as a gatekeeper in deciding in which cases the United States will file an amicus brief to persuade the Court to grant certiorari.[117] Second, and most well-known, is the Solicitor General's role in representing the United States as a party before the Supreme Court.[118] Third, in cases in which the government is not a party but it nonetheless has a substantial interest, the Solicitor General not only submits amicus briefs to the Court on the merits but often shares oral argument time with the party that it is supporting.[119]

1. Gatekeeping for the Supreme Court

The Solicitor General exercises considerable discretion in deciding which of the cases the federal government should appeal to the Supreme Court.[120] Of the 800 or so cases submitted annually to the Solicitor General, only 60 to 80 can realistically be appealed.[121] In deciding which cases to appeal, the Solicitor General is often described as "a first-line gatekeeper for the Supreme Court" who must "say 'no' to many government officials who present plausible claims of legal error in the lower courts."[122]

In deciding which cases to appeal, the Solicitor General works closely with the agencies that handled the case. According to author Rebecca Mae Salokar, "[b]ecause these other agencies have been working on the cases since the trial stage, they often provide the solicitor general with a thorough history of the cases, as well as insight on the contested legal issues."[123] While the Solicitor General considers the views of the agency seeking to appeal the case, the Solicitor General is also guided by the long-term interests of the executive branch.[124]

Not surprisingly, the Solicitor General is influential in this capacity. The Solicitor General has been described as "the most important person

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[117] *Id.* at 1083.

[118] PETER N. UBERTACCIO III, LEARNED IN THE LAW AND POLITICS: THE OFFICE OF THE SOLICITOR GENERAL 8 (2005).

[119] *Id.*

[120] Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1328 (2010) (arguing that the Solicitor General's responsibilities are highly discretionary, "and thus effectively enable the Solicitor General to set the government's legal agenda.").

[121] Norman-Major, *supra* note 116, at 1089.

[122] Wade H. McCree, Jr., *The Solicitor General and His Client*, 59 WASH. U. L. Q. 337, 341 (1981-1982).

[123] REBECCA MAE SALOKAR, THE SOLICITOR GENERAL: THE POLITICS OF LAW 13 (1992).

[124] Cordray, *supra* note 120, at 1328–30 (2010). According to former Solicitor General Wade McCree, "[a] case ordinarily will be appealed if it has substantial importance to the government and if the government's legal position has a reasonable basis. We do not, however, petition the Supreme Court to review adverse decisions unless the case satisfies the stricter standards of exceptional importance applied by the Supreme Court itself." McCree, *supra* note 122, at 340.

in the country, except for the justices themselves, in determining which cases are heard in the Supreme Court."[125] According to one source, "the Court grants approximately 70% of the Solicitor General's petitions for certiorari, an astonishing number compared to the approximately 3% the Court grants at the request of other litigants."[126] Another source wrote, "[t]he Solicitor General's success as a petitioner is astounding—it successfully obtains review fourteen times as often as private litigants."[127] If the Solicitor General decides not to appeal an agency's case, the only way in which the agency can have its case heard is if the Attorney General or the President overrules the Solicitor General, which rarely happens.[128]

Because the Solicitor General has virtually exclusive power to determine which government cases are brought before the Supreme Court, it can advance a policy agenda of its choice.[129] Former Solicitor General Paul D. Clement referred to this power as a "monopoly," arguing that unlike a private law firm, which will rarely turn down a client's request to seek certiorari, the Solicitor General frequently says "no" to agencies.[130] Clement warned that like any monopoly, this one is subject to abuse.[131] The considerable discretion and power granted to the Solicitor General in playing this gatekeeper role is one reason why the office has attracted unprecedented attention and scrutiny in recent decades.

The Solicitor General plays a further role in shaping the Supreme Court's docket by arguing for and against granting certiorari in cases in which the federal government is not a party.[132] The Solicitor General also enjoys exceptional success in this role. A 1963 study found that "the Court granted certiorari in forty-seven percent of the cases supported by the Solicitor General versus only 5.8% when the Solicitor General did not support certiorari."[133] A more recent source states that "[w]hen the Solicitor General is participating as *amicus* at the petition stage—almost always at the Court's invitation—the Court follows the Solicitor General's recommendation to grant or deny in well over 75% of the cases."[134]

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[125] UBERTACCIO, *supra* note 118, at 9 (quoting H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 129 (1991)).

[126] Cordray, *supra* note 120, at 1333.

[127] Ryan Juliano, Note, *Policy Coordination: The Solicitor General as Amicus Curiae in the First Two Years of the Roberts Court*, 18 CORNELL J.L. & PUB. POL'Y 541, 549 (2009).

[128] Norman-Major, *supra* note 116, at 1089.

[129] *Id.*

[130] Paul D. Clement, 43rd Solicitor General of the United States, Keynote Address at the Randolph W. Thrower Symposium, (February 12, 2009), *in* 59 EMORY L.J. 311 (2009) at 313–14.

[131] *Id.*

[132] Norman-Major, *supra* note 116, at 1091.

[133] *Id.* at 1092.

[134] Cordray, *supra* note 120, at 1333–34.

2. Representing the United States as a Party

The most salient role of the Solicitor General is that of representing the United States at oral argument before the Court. For reasons explored later in this Note, the Solicitor General has been extremely influential in this role as the most successful party to argue before the Court.[135] According to one study, between 1959 and 1989 "the government's position prevailed 67.6% of the time, clearly failed 26.8% of the time, and obtained some mixed result 4.8% of the time."[136] Another study examining the 1983 term found that the Solicitor General prevailed in 83% of the 150 cases it participated in before the Court.[137]

3. Participating as Amicus Curiae at the Merits Stage

The role of the Solicitor General as amicus curiae has received the most attention in scholarship. Arguably, "[i]n performing this task, the OSG [Office of the Solicitor General] is at the height of its discretion vis-à-vis the demands, implicit or otherwise, of the Supreme Court and most free to represent the unadulterated views of the administration."[138] Karen O'Connor described the Solicitor General's amicus curiae role as follows: "[T]he solicitor can inform the Court of the ramifications of the position urged by each party and can apprise the justices of his opinions, which are given great weight. The solicitor's contribution as *amicus* is particularly useful when one or both parties to the lawsuit are inexperienced yet present the justices with an important case."[139] Salokar outlined potential reasons for why the Solicitor General may file an amicus brief:

> [T]he solicitor general is likely to address the potential impact a decision will have on federal law and federal agency operations and programs or simply provide additional information and legal considerations not contained in the litigants' documentation. Finally, the *amicus* brief has served as a vehicle to express the administration's policy positions and goals on issues that have historically been considered

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[135] Norman-Major, *supra* note 116, at 1094.
[136] Juliano, *supra* note 127, at 549.
[137] Norman-Major, *supra* note 116, at 1094.
[138] Karen Swenson, *President Obama's Policy Agenda in the Supreme Court: What We Know So Far From the Office of the Solicitor General's Service as Amicus Curiae*, 34 S. ILL. U. L.J. 359, 360 (2010).
[139] Karen O'Connor, The *Amicus Curiae Role of the U.S. Solicitor General in Supreme Court Litigation*, 66 JUDICATURE 258, 260 (1983).

outside the scope of federal law.[140]

For all these reasons, the amicus brief is an important tool for the Solicitor General to advance the interests of the executive branch.

Numerous studies document the historical success the Solicitor General has enjoyed with respect to its amicus briefs.[141] In his Note, Ryan Juliano interpreted the data for 1946–1995 collected by law professors Joseph D. Kearney and Thomas W. Merrill and concluded that "[w]hen the Solicitor General supported the petitioner, the petitioner won 76.3 percent of the time. When the Solicitor General supported the respondent, the petitioner won just 34.1 percent of the time. These rates depart significantly from the historical petitioner win rate of 59.8 percent."[142]

Juliano added his own findings after studying the outcomes of cases heard during the first two years of the Roberts Court, which indicated that the party supported by the Solicitor General won 89.06% of the arguments heard between the Fall 2005 and Spring 2007 terms.[143] Juliano also found that "[w]ithin the sample, the majority explicitly mentioned the Solicitor General in more than one quarter of the cases, and at least one opinion either explicitly mentioned or cited the Solicitor General in more than half the cases."[144] Thus, the Roberts Court was slightly more likely to mention the Solicitor General in its opinions than its predecessors, which referred to the Solicitor General in just over 40% of the cases in which the Solicitor General had submitted an amicus brief between 1946 and 1995.[145] Though the Roberts Court appeared, at least in its early years, to have taken heightened regard of the Solicitor General's position, this was not a significant departure from the historical trend.

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[140] SALOKAR, *supra* note 123, at 26.

[141] Norman-Major, *supra* note 116, at 1096 ("As one author notes, because the Solicitor General is on the winning side about seventy-five percent of the time, these briefs can play a paramount role in shaping judicial policy-making. According to another study, the United States as amicus had a success rate of over eighty percent between 1920 and 1973 in three types of cases: civil rights cases, civil liberties cases, and cases involving political provisions of the United States Constitution. The only area in which the United States success rate was below sixty percent was in cases involving issues of naturalization and aliens.") (internal quotation marks omitted); SALOKAR, *supra* note 123, at 146 (finding that between 1959 and 1986, the Solicitor General enjoyed a success rate of 78.36% when it supported the petitioner and 58.67% when it supported the respondent with its amicus brief).

[142] Juliano, *supra* note 127, at 550.

[143] *Id.* at 552–53 (in further detail: "While respondents won judgment in 29.69 percent of all cases, they won 77.27 percent of the cases where they were supported by the Solicitor General and just 4.76 percent of the cases where they were opposed by the Solicitor General. Alternatively, while petitioners won judgment in 70.31 percent of all cases, they won 95.24 percent of the cases where they were supported by the Solicitor General and 22.73 percent of the cases where they were opposed by the Solicitor General.").

[144] *Id.* at 558.

[145] *Id.* at 549.

B. Theories Explaining the Solicitor General's Influence on the Supreme Court

Several theories have emerged to explain the Solicitor General's unparalleled success before the Court. The most salient theories fall within three categories: the Repeat Player Theory, the Tenth Justice Theory, and the Executive Power Theory. While these theories are not mutually exclusive, the Court's language deferring to the Solicitor General in cases such as *Bell* lends the most support to the Executive Power Theory.

1. The Repeat Player Theory

As an office that focuses a disproportionate amount of resources on Supreme Court litigation, the Solicitor General is a "repeat player" that enjoys significant advantages over other litigants, such as "advance intelligence, expertise, [and] access to specialists throughout the Department of Justice."[146] Moreover, the Solicitor General "is not constrained by the financial burdens imposed on other litigants" and therefore "can afford to—and does—litigate over any question of principle regardless of the amount in controversy."[147] Law professor and former Assistant Solicitor General Richard Wilkins noted that another advantage of being a repeat player is that "unlike other advocates, the Solicitor General develops a personal familiarity with individual Justices and the Court as a whole."[148]

This theory recognizes the practical advantages that the Solicitor General enjoys over other litigants—expertise, experience, resources, and familiarity—as a result of its structural role as the lawyer for one of the most frequent and well-funded litigants before the Supreme Court. It complements and arguably works in tandem with the next theory, the Tenth Justice Theory.

2. The Tenth Justice Theory

The Tenth Justice Theory was advanced most famously by Lincoln Caplan. He posited that the Solicitor General is an officer of the Court

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[146] SALOKAR, *supra* note 123, at 3–4.

[147] *Id.* at 4 (internal quotation marks omitted).

[148] Richard G. Wilkins, *An Officer and an Advocate: The Role of the Solicitor General*, 21 LOY. L.A. L. REV. 1167, 1179 (1988).

with a "dual responsibility" not just to the Executive, but also the Judicial Branch, earning the nickname the "Tenth Justice."[149] Caplan explains:

> The Justices also turn to the [Solicitor General] for help on legal problems that appear especially vexing, and two or three dozen times a year they invite him and his office to submit briefs in cases where the government is not a party. In these cases especially, the Justices regard him as a counselor to the Court. But in every case in which he participates, the Justices expect him to take a long view . . . Lawyers who have worked in the [Solicitor General's] office like to say that the Solicitor General avoids a conflict between his duty to the Executive Branch, on the one hand, and his respect for the Congress or his deference to the Judiciary, on the other, through a higher loyalty to the law.[150]

In Caplan's view, the Court credits the Solicitor General's views because of his perceived (or actual) loyalty to the Court and adherence to the rule of law.

According to Caplan, "[f]or many generations before the Reagan era, in both Democratic and Republican administrations, the Solicitor General more often than not met the standards of a model public servant—discreet, able, trustworthy."[151] However, troubled by the Reagan administration's involvement and stance on hot button issues such as abortion and gay marriage, Caplan alleged that under Reagan, the Solicitor General had become "a partisan advocate for the administration in power" who treated the law "as no more than an instrument of politics."[152] Caplan was especially critical of Reagan's second Solicitor General, Charles Fried, for "misusing accepted principles of legal reasoning in major cases," which not only undermined the credibility of the Solicitor General's office before the Court, but also "threatened the law's stability."[153]

Many later authors, including Wilkins, who had worked in the Solicitor General's office during the Reagan administration, have criticized Caplan's view.[154]

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[149] LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 3 (1987) ("Because of what Justice Lewis Powell has described as the Solicitor's 'dual responsibility' to both the Judicial and the Executive branch, he is sometimes called the Tenth Justice.").

[150] *Id.* at 7.

[151] *Id.*

[152] *Id.* at 271.

[153] *Id.* at 273.

[154] *See* Wilkins, *supra* note 148, at 1168 (noting that Caplan's critique of the Solicitor General's office is "largely a polemic against the Reagan Administration") (quoting Price, *What Price Advocacy?*, N.Y. Times, Oct. 25, 1987, (Book Review) at 13); Roger Clegg, *The Thirty-Fifth Law Clerk, The Tenth Justice: The Solicitor General and the Rule of Law* (Book Review), 1987 DUKE L.J. 964, 965 (1987) (reviewing CAPLAN, *supra* note 149) ("Caplan is wrong on all counts.");

But despite these objections to Caplan's conclusions, even his critics share his view that the Solicitor General enjoys unmatched influence before the Court because of the office's perceived impartiality and supposed duty to adhere to the law. Wilkins concluded that "the most important factor influencing the Solicitor General's relationship with the Court . . . is the tradition of mutual trust and respect that has pervaded their association."[155] Viewing the Solicitor General not merely as an executive officer but as an "officer of the court," Wilkins argued that the Solicitor General is accountable to the Court and therefore has a greater incentive to provide "complete intellectual candor, even when that impairs his effectiveness as an advocate."[156] Wilkins was convinced that if the Solicitor General were ever to violate his role as an "officer of the court," the Court would "quickly come to view him no differently from any other advocate that appears before it."[157] Salokar concurred that "[t]he justices expect [the Solicitors General] to maintain some degree of independence from the partisanship of the administration."[158]

As these authors suggest, part of the reason why the Court may expect the Solicitor General to demonstrate allegiance to the rule of law rather than merely advocating his own interests is due to his role as a repeat player. Because the Solicitor General appears before the Court again and again, the Court has a built-in deterrent that holds the Solicitor General accountable for misrepresenting or deviating from the law.

3. The Executive Power Theory

The Executive Power Theory posits that, because the Solicitor General's functional role is to represent the views of the executive branch before the Court,[159] the Court defers to the Solicitor General's judgment on certain issues that concern the executive's prerogative to maintain institutional power. As Margaret Meriwhether Cordray and Richard Cordray explained,

[T]he Supreme Court, like the Solicitor General, represents a

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SALOKAR, *supra* note 123, at 68 ("The observation that the office was politicized during the Reagan administration implies that it was not political in the past. This is simply untrue.").

[155] Wilkins, *supra* note 148, at 1180.

[156] *Id.* (quoting Bork, *The Problems and Pleasures of Being Solicitor General*, 42 ANTITRUST L.J. 701, 705 (1973)).

[157] Wilkins, *supra* note 148, at 1181 (internal quotation marks omitted). However, Juliano appears somewhat skeptical that such a "special relationship" exists, as he writes that "[c]laims that the Solicitor General brings a distinctive and influential reputation to the Supreme Court have little empirical foundation. No direct evidence suggests that the Solicitor General's success results from careful case-selection or a reputation for neutrality or political independence." Juliano, *supra* note 130, at 560.

[158] SALOKAR, *supra* note 123, at 7.

[159] *Id.* at 2.

> branch of government, and although the two branches serve as a check on one another, they nonetheless have common institutional interests. The Court shares the executive's concern that government must be able to function from a practical standpoint, and both are concerned with effective enforcement of the law. This pro-government inclination also operates in the Solicitor General's favor.[160]

Along the same lines, Salokar found that the Court tended to be most deferential to the Solicitor General when it advocated in favor of institutional power, as opposed to cases in which institutional power was not an issue and the Solicitor General advocated the partisan goals of the executive branch.[161] Salokar wrote the following:

> The Court seems to recognize that there are issues so essential to the functioning of the government that to rule against the solicitor general would undermine the capacity of the executive branch to carry out its assigned duties. Thus, the Court defers to the expertise of solicitors general and rules in their favor when the arguments hinge on executive power.[162]

As these authors contend, both the executive and judicial branches share an interest in ensuring that the law is enforced. This is no less true in the prison context. Thus the Court's deference to the Solicitor General in the prison cases can be understood not only as motivated by a separation of powers concern, but also by a shared interest in ensuring the effective administration of the nation's prisons.

As mentioned earlier, the three theories are not mutually exclusive, but are closely intertwined. Yet the Court's language in *Bell* about deferring to executive branch officials, echoed in the subsequent prison cases is most consistent with the Executive Power Theory.[163] If the Solicitor General argues that a particular policy is necessary to ensure the effective operation of the prisons, an executive branch responsibility, the Court is likely to step out of the way so that the executive can do its job. Arguably, this is because the Court shares the executive branch's interest in ensuring the effective enforcement of the law, as Cordray and Salokar suggest. Or perhaps, it is because the Constitution entrusted prison administration to the executive, rather than the judicial branch.

Interestingly, this theory is also consistent with the rare cases when

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[160] Cordray, *supra* note 123, at 1338.

[161] SALOKAR, *supra* note 125, at 175–76.

[162] *Id.* at 177.

[163] *See, e.g.*, *Bell*, 441 U.S. at 562 ("But under the Constitution, the first question to be answered is not whose plan is best, *but in what branch of the Government is lodged the authority to initially devise the plan* . . . .The wide range of "'judgment calls'" that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.") (emphasis added).

the Court has ruled against state prisons. In these cases, the Solicitor General either urged the Court to rule against the prisons—as in *McMillian* and *Johnson*—or refused to weigh in, as in *Brown*. In every prison case the Court must weigh prisoners' rights against institutional power. Seeing that the Solicitor General had effectively come down in favor of individual rights in these cases—despite the fact that one of his clients is the federal prison system—the Court likely deferred to the executive's judgment that these prison practices were not necessary to maintain executive power. Thus the results in *McMillian*, *Johnson*, and even *Brown* can be explained by the fact that, in each of these cases, the Court heavily weighed the prisoner's constitutional rights, as advocated by the Solicitor General, and devalued the state prisons' arguments that the challenged measures were necessary for effective prison administration.

IV. THE *FLORENCE* DECISION AS EVIDENCE OF DEFERENCE

In light of the doctrine highlighted in Part I, the Court's ruling in *Florence* comes as no surprise. At the urging of the Solicitor General, the Court, in a 5–4 decision by Justice Kennedy, upheld the constitutionality of prison strip searches regardless of whether prison officials had reasonable suspicion that incoming detainees had concealed weapons or contraband on their persons.[164] *Florence* supports a theory of deference not only because of the deferential language and result of the majority opinion, but also because the concurring Justices made clear that the Court's holding is closely tied to the policies currently employed by BOP.

A. The Majority Affirms *Bell* and *Atwater*

The majority began its analysis by reviewing the Court's precedent demonstrating a high level of deference to prison officials. Referring to *Turner v. Safley*, the Court noted that "[t]he difficulties of operating a detention center must not be underestimated by the courts."[165] It continued, "[t]he Court has confirmed the importance of deference to correctional officials and explained that a regulation impinging on an inmate's constitutional rights must be upheld 'if it is reasonably related to legitimate penological interests.'"[166] Examining the precedent established in *Bell v. Wolfish*, *Block v. Rutherford*, and *Hudson v.*

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[164] Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510 (2012).
[165] *Id.* at 1515 (citing *Turner*, 482 U.S. at 84–85).
[166] *Id.* (quoting *Bell*, 441 U.S. at 546, 548 and *Block*, 488 U.S. at 584–85).

Palmer, the Court concluded as follows:

> These cases establish that correctional officials must be permitted to devise reasonable search policies to detect and deter the possession of contraband in their facilities. The task of determining whether a policy is reasonably related to legitimate security interests is "peculiarly within the province and professional expertise of corrections officials." This Court has repeated the admonition that in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations courts should ordinarily defer to their expert judgment in such matters.[167]

This language suggests that the majority viewed the *Florence* case from the deferential perspective established in these prior cases, employing the approach advocated by the Solicitor General. Assistant to the Solicitor General Nicole Saharsky stated in oral argument that "[t]he searches at issue in *Bell* are very similar to the searches at issue in this case, and they should be upheld."[168] Carter G. Phillips, arguing for respondents, said "[W]hat I would really like is an opinion that recognizes that deference to the prisons and to their judgment is what's appropriate under these circumstances, and that extends all the way to the *Bell v. Wolfish* line."[169]

Turning to the case at hand, the Court noted that "[c]orrectional officials have a significant interest in conducting a thorough search as a standard part of the intake process."[170] The Court identified several reasons why prison officials may adopt a policy of strip searching incoming detainees: detecting lice or other contagious infections; wounds that might need immediate treatment; and tattoos indicating gang affiliation.[171] Additionally, prison officials may uncover contraband that would cause security problems if brought into the facility: drugs, knives, scissors, glass shards, cell phones, chewing gum (which can block locking devices), and hairpins (which can be used to open handcuffs).[172] According to the Court, even innocuous items such as pens, cigarettes, or money can "pose a significant danger," because "scarce items, including currency, have value in a jail's culture and underground economy."[173]

The Court rejected petitioner's proposed rule excluding minor offenders from these searches because "[t]he record provides evidence

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[167] *Id.* at 1517 (quoting *Bell*, 441 U.S. at 546, 548; *Block*, 468 U.S. at 584–85) (internal quotation marks omitted).
[168] Transcript of Oral Argument at 53, Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510 (2012) (No. 10-945).
[169] *Id.* at 504.
[170] *Florence*, 132 S. Ct. at 1518.
[171] *Id* at 1518–20.
[172] *Id.* at 1518–20.
[173] *Id.* at 1519.

that the seriousness of an offense is a poor predictor of who has contraband and that it would be difficult in practice to determine whether individual detainees fall within the proposed exemption."[174] According to the Court, "[g]angs do coerce inmates who have access to the outside world, such as people serving their time on the weekends, to sneak things into the jail."[175] The Court also pointed out that "[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminals," citing examples such as Timothy McVeigh, who was stopped for driving without a license plate, and one of the terrorists responsible for September 11, who received a speeding ticket just two days before the attacks.[176] Moreover, "[e]xperience shows that people arrested for minor offenses have tried to smuggle prohibited items into jail, sometimes by using their rectal cavities or genitals for the concealment."[177] The Court noted that "[i]t also may be difficult, as a practical matter, to classify inmates by their current and prior offenses before the intake search" because "[t]he officers who conduct an initial search often do not have access to criminal history records."[178] Therefore, the Court concluded that "[i]n the absence of reliable information it would be illogical to require officers to assume the arrestees in front of them do not pose a risk of smuggling something into the facility."[179]

Some observers speculated that *Florence* might have come out differently than *Bell v. Wolfish* because of *Atwater v. City of Lago Vista*,[180] a case in which the Court upheld the constitutionality of arresting individuals even for minor offenses.[181] The Court in *Florence* acknowledged that "[p]ersons arrested for minor offenses may be among the detainees processed at these facilities," a result that is, "in part, a consequence of the exercise of state authority that was the subject of *Atwater v. Lago Vista*."[182] The Court also noted that "*Atwater* did not address whether the Constitution imposes special restrictions on the searches of offenders suspected of committing minor offenses once they are taken to jail."[183] According to Orin Kerr, *Florence* presented a question that arose out of the *Atwater* ruling: "If the Fourth Amendment allows the police to make the arrest for the very minor offense, and the arrestee is then brought to the jail, does the Fourth Amendment also allow the kind of invasive strip search that often occurs on entry into jail

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[174] *Id.* at 1520.
[175] *Florence*, 132 S. Ct. at 1519 (citing New Jersey Wardens Brief at 10).
[176] *Id.* at 1520.
[177] *Id.*
[178] *Id* at 1521 (internal citations omitted).
[179] *Id.*
[180] Atwater v. City of Lago Vista, 532 U.S. 318 (2001).
[181] Orin Kerr, *Thoughts on the strip-search case*, SCOTUSblog (Oct 12, 2011, 2:24 PM), http://www.scotusblog.com/2011/10/thoughts-on-the-strip-search-case/.
[182] *Florence*, 132 S. Ct. at 1517 (citing *Atwater*, 532 U.S. 318).
[183] *Id.* at 1518.

. . . ?"[184]

At oral argument, several Justices appeared uncomfortable with such a conclusion. Justice Alito mentioned that "[t]here have been some stories in the news recently about cities that have taken to arresting people for traffic citations" and asked respondents whether an individual arrested under such circumstances ought to be subject to such a search.[185] Justice Breyer said that his law clerk thought that for minor offenders, less than one in 64,000 had been caught with contraband.[186] Referencing Justice Alito's question, Justice Sonia Sotomayor asked,

> [S]hould we be thinking about the fact that many of these people who are now being arrested are being put into general populations or into jails, sometimes not just overnight but for longer periods of time, like this gentleman, for 6 days before he sees a magistrate? Should we be considering a rule that basically says your right to search someone depends on whether that individual has in fact been arrested for a crime that's going to lead to jail time or not, whether that person's been presented to a magistrate to see whether there is in fact probable cause for the arrest and detention of this individual? I mean, there is something unsettling about permitting the police to arrest people for things, like kids who are staying out after curfews with no other, based on probably nothing else.[187]

Respondents acknowledged her concern, conceding that Mr. Florence probably should not have been arrested in the first place.[188] Nevertheless, they did not see it as a reason to disregard the Court's precedent as articulated in *Turner v. Safley* and *Bell v. Wolfish*, which require deference to the "good faith judgment of our jailers."[189]

Ultimately, the majority ruled for the prisons and the Solicitor General, citing *Atwater*'s reasoning. In *Atwater*, a woman arrested for failure to wear a seatbelt argued that subjecting her to custodial arrest without a warrant violated her Fourth Amendment rights, because the offense would not result in jail time, and there was no compelling need for immediate detention.[190] According to the *Florence* majority, "[t]hat rule promised very little in the way of administrability. Officers could not be expected to draw the proposed lines on a moment's notice, and the risk of violating the Constitution would have discouraged them from arresting criminals in any questionable circumstances."[191] The Court

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[184] Kerr, *supra* note 181.
[185] Transcript of Oral Argument, *supra* note 168, at 38.
[186] *Id.*
[187] *Id.* at 42.
[188] *Id.* at 42–43.
[189] *Id.* at 43.
[190] *Florence*, 132 S. Ct. at 1517 (citing *Atwater*, 532 U.S. at 346).
[191] *Id.* at 1522 (internal citations and quotation marks omitted).

continued:

> One of the central principles in *Atwater* applies with equal force here. Officers who interact with those suspected of violating the law have an essential interest in readily administrable rules. The officials in charge of the jails in this case urge the Court to reject any complicated constitutional scheme requiring them to conduct less thorough inspections of some detainees based on their behavior, suspected offense, criminal history, and other factors. They offer significant reasons why the Constitution must not prevent them from conducting the same search on any suspected offender who will be admitted to the general population in their facilities. The restrictions suggested by petitioner would limit the intrusion on the privacy of some detainees but at the risk of increased danger to everyone in the facility, including the less serious offenders themselves.[192]

Deferring to the judgment of prison officials at the Solicitor General's urging, the *Florence* decision is consistent with the Court's history of deference since *Bell*. Given the Court's limited expertise in prison administration as well as its place in the constitutional scheme, the justices deferred to the prison officials' views about which measures are necessary to maintain prison security and safety. The *Florence* ruling is consistent with Justice Rehnquist's statement in *Bell* that "[t]he wide range of 'judgment calls' that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government."[193]

B. The Limits of *Florence*'s Holding as Deference

In *Florence*, the Court exhibited deference to the Solicitor General not only by virtue of the majority's holding, but also by circumscribing the decision in accordance with federal policy. In his concurrence, Justice Alito described the limits of the Court's holding:

> It is important to note, however, that the Court does not hold that it is *always* reasonable to conduct a full strip search of an arrestee whose detention has not been reviewed by a judicial officer and who could be held in available facilities apart from the general population. Most of those arrested for minor offenses are not dangerous, and most are released from

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[192] *Id.* (internal citations and quotation marks omitted).
[193] *Bell*, 441 U.S. at 562.

> custody prior to or at the time of their initial appearance before a magistrate.[194]

As support for his assertion that strip searching such individuals may violate the Constitution, Justice Alito cited the Solicitor General's brief.[195] Justice Alito wrote that "[f]or example, [BOP] and possibly even some local jails appear to segregate temporary detainees who are minor offenders from the general population."[196] He continued, in a footnote:

> In its *amicus* brief, the United States informs us that, according to BOP policy, prison and jail officials cannot subject persons arrested for misdemeanor or civil contempt offenses to visual body-cavity searches without their consent or without reasonable suspicion that they are concealing contraband. Those who are not searched must be housed separately from the inmates in the general population.[197]

Thus, Justice Alito left open the possibility of a constitutional challenge to strip searching detainees who were held separately from the general population. Though Chief Justice Roberts did not join Justice Alito's opinion, his own concurrence suggests that he also left open the possibility for such a constitutional challenge.[198]

Part IV of Justice Kennedy's opinion, signed by four members of the Court,[199] states that "[t]his case does not require the Court to rule on the types of searches that would be reasonable in instances where, for example, a detainee will be held without assignment to the general jail population and without substantial contact with other detainees."[200] Citing the Solicitor General's brief, he explained that "[t]he accommodations provided in these situations may diminish the need to conduct some aspects of the searches at issue."[201] According to Justice Kennedy, "[t]he circumstances before the Court, however, do not present the opportunity to consider a narrow exception of the sort Justice Alito describes."[202]

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[194] *Florence*, 132 S. Ct. at 1524 (Alito, J., concurring).

[195] *See id.* (Alito, J., concurring).

[196] *Id* (Alito, J., concurring) (citing Brief for the United States as Amicus Curiae at 30, Bull v. City & Cnty. of San Francisco, 595 F.3d 964, 968 (9th Cir. 2010) (en banc)).

[197] *Id.* at 1524 n. * (Alito J. concurring) (internal citations omitted).

[198] *Id.* at 1523 (Roberts, C.J., concurring) ("I join the opinion of the Court. As with Justice Alito, however, it is important for me that the Court does not foreclose the possibility of an exception to the rule it announces. Justice Kennedy explains that the circumstances before it do not afford an opportunity to consider that possibility. Those circumstances include the facts that Florence was detained not for a minor traffic offense but instead pursuant to a warrant for his arrest, and that there was apparently no alternative, if Florence were to be detained, to holding him in the general jail population.").

[199] Justice Thomas joined all but Part IV of the opinion.

[200] *Florence*, 132 S. Ct. at 1522.

[201] *Id.* (citing United States Brief at 30)

[202] *Id.*

As Supreme Court journalist Lyle Denniston pointed out, "[b]ecause the votes of Alito and Roberts were necessary to make up the majority, it might well be that the Alito opinion will serve as the controlling opinion on that point, buttressed by the fact that Justice Kennedy's Part IV remarks left the issue open."[203]

This limit to the Court's holding is significant because it ties the constitutional standard to BOP policy. When asked about the BOP policy at oral argument, Nicole Saharsky, the Assistant to the Solicitor General, answered:

> Those people [misdemeanor or civil contempt offenders], when they go into the jail, would be asked whether they're willing to consent to this type of search. In most cases, they do consent. If they don't consent and there is not reasonable suspicion, then they are not placed in the general jail population; they are kept separate from the other offenders. So, it is the case, the rule that the Third Circuit identified, which is a blanket policy that anyone that's going to go into the general jail population and mix with everyone else has to be strip searched. That is the Federal Bureau of Prisons' policy.[204]

By upholding a blanket policy that anyone who is to be placed in the general jail population may be strip searched, the Court ruled as the Solicitor General urged it to. And in doing so, the Court effectively set BOP policy as the constitutional standard. Denniston pointed out that Alito's reference to BOP policy "implied that jail officials around the country might well want to adopt such a policy, to avoid having a general strip search policy partly nullified in a future case."[205] Not only did the Court defer to the Solicitor General by affirming the Third Circuit, but by tying the limits of its holding to BOP's policy, the Court relied on the executive branch's judgment regarding what is considered "reasonable" in accordance with the Fourth Amendment. This outcome suggests not only that the Solicitor General has a powerful influence on the Court in cases concerning the constitutionality of prison practices, but that some justices are even willing to allow the Solicitor General's view to dictate where to draw the constitutional line.

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[203] Lyle Denniston, *Opinion analysis: Routine jail strip searches OK (Final Update 2:56 pm)*, SCOTUSblog (Apr. 2. 2012, 2:56 pm), http://scotusblog.com/2012/04/opinion-analysis-routine-jail-strip-searches-ok/.

[204] Transcript of Oral Argument, *supra* note 168, at 55.

[205] Denniston, *supra* note 203.

V. CONCLUSION

The Solicitor General exerts a tremendous amount of influence over the Supreme Court. As a repeat player, the Solicitor General enjoys advantages over other litigants by virtue of its repeated appearances before the Court. The Court's deference to the Solicitor General may also stem from the belief that as the "tenth justice," the Solicitor General has a dual responsibility not only to the executive but also to the judiciary to uphold the rule of law. And because the Solicitor General's functional role is to represent the views of the executive branch before the Court,[206] the Court is especially deferential to the Solicitor General's judgment on issues that concern the executive's prerogative to maintain institutional power, such as the need for prisons to maintain some policies despite prisoners' complaints that these policies violate their constitutional rights.

The Court's language in *Bell* about deferring to executive branch officials, echoed in the subsequent prison cases is strong support for the Executive Power Theory.[207] In the vast majority of these cases, the Solicitor General submitted an amicus brief arguing that a particular policy was necessary to ensure the effective operation of the prisons, and the Court deferred to that judgment. In the rare instances in which the Solicitor General argued that the state prison policy was unnecessary for effective prison operation—such as in *McMillian* and *Johnson*—the Court deferred to that judgment as well and upheld the prisoner's right. Even silence from the Solicitor General—for example, regarding the marriage regulation at issue in *Turner*, and the racial segregation policy in *Brown v. Plata*—could increase the chances for a petitioner's victory, as these were two rare cases in which the prisoner prevailed.

Based on these theories and the actual language of the opinion, the Solicitor General's input was a deciding factor in the *Florence* case. Not only did the majority rule in favor of the prisons, as they were urged to by the Solicitor General, but Part IV of Justice Kennedy's opinion, signed by four members of the Court[208] carved out an exception based on BOP policy. It stated that, "[t]his case does not require the Court to rule on the types of searches that would be reasonable in instances where, for example, a detainee will be held without assignment to the general jail population and without substantial contact with other detainees."[209] In

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[206] *Id.* at 2.

[207] *See, e.g., Bell*, 441 U.S. at 562 ("But under the Constitution, the first question to be answered is not whose plan is best, *but in what branch of the Government is lodged the authority to initially devise the plan* . . . .The wide range of "'judgment calls'" that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.") (emphasis added).

[208] Justice Thomas joined all but Part IV of the opinion.

[209] *Florence*, 132 S. Ct. at 1522.

other words, four members of the Court kept the door open to constitutional challenges falling outside the policy followed by the Solicitor General's client, BOP. Justice Alito wrote separately to emphasize this caveat, and his vote was crucial to the outcome.[210] Thus, the result in *Florence* is not only further confirmation that the Court tends to defer to the Solicitor General in prison cases, but that at least some members of the Court are willing to let the executive, through the Solicitor General, dictate the limits of the Constitution.

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[210] *Id.* (Alito, J., concurring) (citing Brief for the United States as Amicus Curiae at 30, Bull v. City & Cnty. of San Francisco, 595 F.3d 964, 968 (9th Cir. 2010) (en banc)).