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Former Solicitors General
Kenneth Starr, 1989-1993
(left); Drew Days, 1993-1996
(center); and Walter Dellinger,
1996-1997 (below).

JAY MALLIN/IAS



Amicus curiae or amicus praesidentis?*

Reexamining the role of the solicitor general in filing amici

by RICHARD L. PACELLE, JR.

There are limits to the impact that
the president and political forces have

The Office of the Solicitor General (OSG) shares a symbiotic relationship with the United States Supreme Court. The office and the Court have developed “a tradition of mutual trust and respect.”¹ As former Solicitor General Kenneth Starr noted, “There is a unique relationship between the two branches that is valued and treasured and is a factor that counsels care, caution, and effective lawyering.”² While analysts may dispute the reasons why,³ virtually everyone recognizes the excellence and success of the Office of the Solicitor General.⁴

The solicitor general’s primary responsibilities to the Court are to screen petitions scrupulously to keep many off the Court’s crowded docket and to prepare briefs of the highest quality. Former Solicitor General (SG) Wade McCree argued that “It is the duty of the Solicitor Gen-

in influencing the amicus position adopted
by the solicitor general

eral to serve as a first-line gatekeeper for the Supreme Court and to say ‘no’ to many government officials who present plausible claims of legal errors in the lower courts.”⁵ The SG also “focuses and directs the development of law,” helping the justices to impose stability on doctrine.⁶ The OSG appears before the Court more than any other litigant, thus its attorneys are quite familiar with the predilections of individual justices and the Court.

Another important function of the solicitor general is informational. Oral arguments and written briefs are good places for justices to get information and signals.⁷ The Court, however, is bombarded with information. Litigants may fabricate or exaggerate circuit conflicts or misrepresent the impact of precedent.⁸ The SG seeks to provide the justices with accurate and balanced informa-

*This loosely translates to Friend of the President. There is no word in Latin for president.

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1. Richard Wilkins, *An Officer and an Advocate: The Role of the Solicitor General*, 21 LOY. L.A. L. REV. 1167, 1179-80 (1988).

2. Richard Pacelle, BETWEEN LAW AND POLITICS: THE SOLICITOR GENERAL AND THE STRUCTURING OF RACE, GENDER, AND REPRODUCTIVE RIGHTS LITIGATION 44 (College Station, Texas: A&M University Press, 2003).

3. Rebecca Salokar, THE SOLICITOR GENERAL: THE POLITICS OF LAW (Philadelphia: Temple University Press, 1992); Jeffrey Segal, *Amicus Curiae*

Briefs by the Solicitor General During the Warren and Burger Courts: A Research Note, 41 W. POL. Q. 135 (1988); Rebecca Deen, Joseph Ignagni & James Meernick, *The Solicitor General as Amicus, 1953-2000: How Influential?* 87 JUDICATURE 60 (2003); Kevin McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 POL. RES. Q. 505 (1998).

4. Salokar, *supra* n.3; Robert Scigliano, *THE SUPREME COURT AND THE PRESIDENCY* (New York: Free Press, 1971); Kristen Norman-Major, *The Solicitor General: Executive Policy Agendas and the Court*, 57 ALB. L. REV. 1081 (1994); Steven Puro, *The United States as Amicus Curiae*, in S. Sidney Ulmer, ed. *COURTS, LAW, AND JUDICIAL PROCESSES* (New York: Free Press, 1981); Pacelle, *supra* n.2. Michael Bailey, Brian Kamoie & Forrest Maltzman, *Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making*, 49 AM. J. POL. SCI. 72 (2005).

5. Wilkins, *supra* n.1, at 1179.

6. *Id.* at 1179-80.

7. Bailey, Kamoie & Maltzman, *supra* n. 4.

8. H.W. Perry, *DECIDING TO DECIDE: AGENDA SETTING IN THE U.S. SUPREME COURT* (Cambridge: Harvard University Press, 1991).

tion and assure that the briefs maintain a high level of professionalism. In short, as James Cooper argued, the solicitor general "is a brand name" that insures quality.⁹

The SG decides which of the cases the government lost in the district courts and the courts of appeals should be appealed. The OSG also assumes full control over government cases appealed to the Supreme Court. Though these represent an impressive array of powers and give the solicitor general a major voice in the construction of judicial policy, the influence of the office extends even further. The SG often enters cases in which the government is not a party through an amicus curiae brief.¹⁰ This permits the solicitor general to influence the structure of doctrine and advocate a position even though the government is not involved in the particular case.¹¹ Over time, the office has earned a high degree of credibility with the justices. One manifestation of that credibility is that the Court will, on a number of occasions, "Call for the Views of the Solicitor General" (CVSG). In these instances, the Court formally invites the SG to express its views on the case before it.

The significance of the Supreme Court as a policy maker, the use of litigation as a mechanism for influencing policy, and the sheer volume of government litigation magnify the potential influence of the solicitor general. That potential also exposes the office to a variety of different pressures. The solicitor general plays a critical role in translating the policies of the government, the president, and the executive branch (and they may not be the same thing) into litigation.

As a presidential appointee, the SG might be expected to carry water for the administration on the important issues of the day. At the same time, legislation often needs to be interpreted in court and the SG would be expected to argue the position from Congress' perspective. Many of the cases come from an executive agency that sets policy goals that the SG would be expected to argue faithfully in Court. The vol-

ume of litigation and the fact that the office argues on behalf of the same client in every case mean that the SG must pay close attention to the Supreme Court.

The need to balance obligations to the Court, the president, Congress, agencies, and the law complicate the calculations of the solicitor general. Analysts have been concerned with unraveling the relative influence of the different forces in the office's environment. There is a significant difference in the perceptions of the Office of the Solicitor General between those who work in the office¹² and those who study the institution.¹³ The latter are inclined to emphasize the political nature of the OSG, while the former concentrate on the legal requirements attendant to the office. In many ways, this is similar to the differences between the way that justices characterize their work and how many analysts explain Supreme Court decision making. Perhaps, like the Supreme Court, the truth lies somewhere in the middle. This study looks at the role the solicitor general plays in filing amicus briefs and evaluates the conventional wisdom about the use of such briefs. The amicus curiae brief presumably provides the fewest constraints for the SG and, thus, the best opportunity to advocate a position for the president.

The conventional wisdom

In no area of the solicitor general's work are the differences between the

internal and external perceptions of the OSG more striking than in the use of the amicus curiae brief. Those discrepancies suggest the need to reexamine the role of the solicitor general in filing amicus briefs. The conventional wisdom says that if the solicitor general files an amicus brief at the certiorari stage, the Supreme Court is more likely to grant the petition and accept the case.¹⁴ At the merits stage, the prevailing wisdom is that the amicus curiae brief is the opportunity for the president to use the SG to push the administration's agenda.¹⁵ While both of these notions merit attention, this study addresses the former and concentrates on the latter.

At the case selection stage, the justices have to evaluate roughly 8,000 petitions each year in choosing the cases to decide. Studies have posited that the justices use cues or signals that suggest which petitions deserve close attention. Virtually every study identifies the presence of the solicitor general as petitioner as the most important cue.¹⁶ The proof is demonstrated annually by the fact the solicitor general has the highest percentage of cases accepted of any litigant.

Thus, when Caldiera and Wright discovered that when the solicitor general filed an amicus brief at the certiorari stage the Court was much more likely to grant the petition, it became part of the conventional wisdom. It was not typical for litigants or the solicitor general to submit an amicus brief at the certiorari stage,

9. James Cooper, "The Solicitor General and Federal Litigation: Principal-Agent Relationships and the Separation of Powers" (Ph.D. Dissertation, Indiana University, 1993, at 70).

10. An *amicus curiae*, or "friend of the court," brief is filed by a group that is not party to the case, but will be affected by the outcome. Such briefs provide the SG with the opportunity to expand or contract issues in the case, provide expertise, and offer the Court an informal tally of public opinion. Richard Pabelle, *THE TRANSFORMATION OF THE SUPREME COURT'S AGENDA: FROM THE NEW DEAL TO THE REAGAN ADMINISTRATION* 31 (Boulder: Westview, 1991).

11. Karen O'Connor, *The Amicus Curiae Role of the U.S. Solicitor General in Supreme Court Litigation*, 66 *JUDICATURE* 256 (1983).

12. Drew Days, *The Interests of the United States, the Solicitor General and Individual Rights*, 41 *ST. LOUIS L. REV.* 1 (1996); Drew Days, *The Solicitor General and the American Legal Ideal*, 49 *SMU L. REV.* 73 (1995); Charles Fahy, *The Office of the Solicitor General* 28 *ABA J.* 20 (1942).

Erwin Griswold, *OULD FIELDS, NEW CORNE: THE PERSONAL MEMOIRS OF A TWENTIETH CENTURY LAWYER* (St. Paul: West, 1992); Rex Lee, *Lawyer for the Government: Politics, Polemics & Principle*, 47 *OHIO ST. L. J.* 591 (1986). See a variety of quotes from interviews with members of the office in Pabelle, *supra* n.2.

13. Jeffrey Segal, *supra* n.3; Jeffrey Segal, *Supreme Court Support for the Solicitor General: The Effect of Presidential Appointments*, 43 *W. POL. Q.* 137 (1990); Salokar, *supra* n.3; Norman-Major, *supra* n.4; O'Connor *supra* n.11; Puro, *supra* n.4; Jeffrey Yates, *POPULAR JUSTICE: PRESIDENTIAL PRESTIGE AND EXECUTIVE SUCCESS IN THE SUPREME COURT* (Albany: SUNY Press, 2002).

14. Gregory Caldeira & John Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 *AM. POL. SCI. REV.* 1109 (1988).

15. Bailey, Kamoie & Maltzman, *supra* n.4.

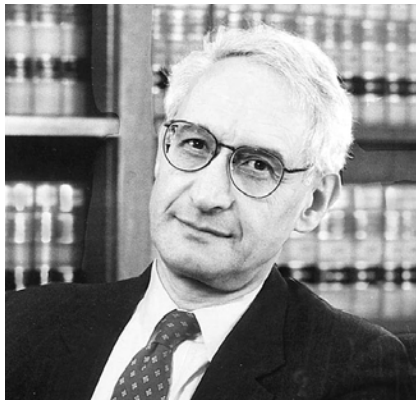
16. Joseph Tanenhaus, Martin Schick, Matthew Muraskin & Daniel Rosen, *The Supreme Court's Certiorari Jurisdiction: A Cue Theory* in Glendon Schubert, ed. *JUDICIAL DECISION-MAKING* 111-32 (New York: Free Press, 1963); Perry, *supra* n.8.

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Robert Bork, 1973-1977

FILE PHOTO



Charles Fried, 1985-1989

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Seth Waxman, 1997-2001

so the presence of the office seemed to carry the message that this was a particularly important case that merited the Court's attention.¹⁷

There is, however, a problem with this interpretation; the solicitor general almost never voluntarily files an amicus petition at the certiorari stage. Deen, Ignagni, and Meernick find but six cases over the last half-century.¹⁸ The solicitor general only files an amicus brief at the certiorari stage when the Supreme Court invites the office to do so. As a consequence, Caldeira and Wright have reversed the causality. The case is not important because the Office of the Solicitor General has identified it as such. Rather, the Court has determined that it is important and that is why the solicitor general has been invited to participate.

On more than a few occasions, the Court disregards the solicitor general's advice to deny certiorari. In those instances, the SG typically still files an amicus brief at the merits stage. As Lawrence Wallace, a former Deputy Solicitor General who argued

more cases before the Supreme Court than any other attorney said, "if we tell them to take the case and they do, we have an interest. If we ask them to deny the petition and they take it, we look like we are sulking if we do not file on the merits."¹⁹

At the merits stage, the literature argues that the amicus curiae brief provides the best chance for the president to use the solicitor general to further the administration's agenda. The reasons appear to be relatively clear. When the U.S. is a party to a case, there is positive law, in the form of agency regulations or legislation that constrains the SG. The SG might have to abide by an agency's position or argue for statutory interpretation that reflects the position of Congress. Given the frequent periods of divided government, this is not an insignificant issue. On the other hand, when the government is not a party to the case, the constraints are significantly reduced, permitting the SG to have greater discretion. These cases often involve state activity and the conse-

quences of a negative precedent would be limited. With fewer constraints, the SG can presumably carry the administration's policy views into Court. The balance of this study evaluates the influence of the president on the amicus filings of the OSG.

Discretionary and invited briefs

Evaluation of presidential influence starts with the proposition that there is a problem with the conventional interpretation of the scope of presidential influence over the SG in the amicus cases. On the most basic level, not all amici are created equal. Initially, the amici can be divided into two categories: the discretionary and the invited briefs. It is important to note that calling the CVSG an "invitation" is misleading. In reality, according to Mark Levy, a former attorney in the OSG, it is tantamount to an order from the queen.²⁰

While the discretionary briefs could be used as vehicles to do the president's bidding, the invited cases generally appear to fulfill a very different purpose. A number of past and present members of the OSG interviewed invariably argued that when the Court "invites" the solicitor general to enter a case, the office's flexibility is circumscribed.²¹ In these cases, the solicitor general is often acting not as an agent of the executive branch, but as a legal advisor to the Supreme Court. In inviting the office's participation, some argue that the justices generally expect the office to provide a more neutral and dispassionate review of

17. Caldeira and Wright, *supra* n.14.

18. Rebecca Deen, Joseph Ignagni & James Meernick, *Individual Justices and the Solicitor General: The Amicus Curiae Cases, 1953-2000*, 89 JUDICATURE 68 (2005).

19. Pacelle, *supra* n.2, at 26.

20. *Id.* at 45. There is no formal rule concerning the invited briefs. Eugene Gressman, who wrote the book on Supreme Court procedures, claims it takes the votes of three justices to invite the U.S. to file a brief. But because it is informal, normally one or two justices will join if one or two members of the Court want to solicit the brief. See Timothy Johnson, *The Supreme Court, the Solicitor General, and the Separation of Powers*, 31 AM. POL. REV. 426 (2003). Incidentally, Johnson argues that the invited briefs are solicited because the Court wants to know where the government stands and fears retaliation, but he uses just a subset of the

invited cases.

21. I interviewed former Solicitors General Archibald Cox, Robert Bork, Charles Fried, Kenneth Starr, Drew Days, Walter Dellinger, and Seth Waxman as well as Principal Deputies Donald Ayer, John Roberts, and Paul Bender; and long-time Deputies William Bryson, Andrew Frey, Kenneth Geller, Edwin Kneeder, and Lawrence Wallace. I asked virtually all of them about the differences between the invited and voluntary amicus cases. All except Dellinger said that the invited cases were judged by different standards and even he conceded some differences. Unprompted, even others, like former Attorney General Nicholas Katzenbach and former Assistant Attorneys General for Civil Rights Jerris Leonard, Bradford Reynolds, and John Dunne, mentioned particular invited cases and how they had to handle them differently.

the law and a survey of existing precedent. This would resemble the original intention of the *amicus curiae* brief, which was designed to be a recitation of legal positions by a disinterested “expert witness” to assist the Court in making a decision.²²

Some members of the OSG argued that the reason that the office adopts a more neutral position in the invited cases is because it has no real interest in the case, or as Lawrence Wallace put it, “we do not have a dog in the fight.”²³ As Walter Dellinger noted: “Briefs filed in the invited cases give the appearance of greater disinterest and impartiality because the solicitor general chooses not to file an *amicus* brief voluntarily The case is lower on the radar screen until the Supreme Court thinks the issue needs ventilation.”²⁴ Or, according to Dellinger, it may be because the issue is very contentious:

Different branches of government have conflicting views and the solicitor general declined to get involved to avoid controversy. This can occur when there are very strong views, but they differ from one agency to another.... The solicitor general takes neither position and may draft a brief reflecting the different views of the agencies.²⁵

In this capacity as a friend of the court, the solicitor general is less the traditional “Tenth Justice” and more the “Fifth Clerk.” According to Drew Days, solicitor general under President Bill Clinton, when the Court invites the SG to participate, the justices are “explicitly asking for help. The Court wants a theory for locating the case in terms of the thousands of other cases it needs to address.” Thus, the SG serves more as an officer of the Court than an advocate for the executive or Congress.

The Court is more likely to invite the SG to participate under certain conditions. The Court may invite the SG when it perceives that a federal interest is involved. The SG is also more likely to be asked to file a brief when there is a new issue without established precedent. The SG is asked to provide a broader context.²⁶ Invitations may also be more likely when there is a change in the devel-

opment of an issue. As issues evolve, they take on greater complexity and often get attached to other issues.²⁷ When this occurs, the Court may ask the SG to help find a doctrinal niche for the new fact situation.

While the CVSG may limit the type of arguments the office can make, it provides some benefits for the solicitor general as well. First, the invitation extends the government’s influence into another area. More broadly, the solicitor general generates a reservoir of good will with the Court that can be borrowed against when he has a case the office or the administration considers important.

But the differences go beyond the amici that are invited and those that are more voluntary. Former Solicitor General Rex Lee argued that the so-called discretionary or voluntary *amicus* briefs should be divided into two categories. The first protects the enforcement powers of the government; the second furthers the particular administration’s views. The first category involves direct federal law enforcement interests, such as Title VII, voting, and economic regulation cases, in which the federal government was not a party, but a decision could have a significant impact on its interests.²⁸ All administrations file amici in these types of cases to fulfill the Justice Department’s enforcement powers and help the individual agency. These cases typically come with constraints and are more likely to be used to fulfill legal enforcement obligations rather than the president’s political goals. The SG appears to play the role of the “Attorney General as Law Enforcement Officer” in such cases.

The other cases have less to do with

enforcement authority, but are part of the current administration’s policy priorities. These truly discretionary *amicus* briefs, sometimes referred to as the “agenda cases,” provide the best opportunity to further executive designs. When filing these briefs, the SG more closely resembles the “Attorney General as Policy Advocate.”²⁹

The “agenda cases” get a great deal of attention from the administration and it would be unusual if the president, the attorney general, or a key political operative did not try to influence the SG. But virtually all who have served in the office say such cases are relatively few. Further, as Lee argued “It is part of the duty of the SG to file amici in the so-called agenda cases and in those cases, the Court does give the SG a little more leeway. There is a realization by the justices that the SG does carry some of the administration’s positions to the Court. But all solicitors general feel it would be a mistake to file in too many.”³⁰ The OSG has to balance the need to represent the administration with the practical necessities of satisfying a majority of the Court. That alone would be a difficult task, but it is further complicated by the need to stabilize the law and to attend to congressional and agency designs.

Data and method

The data base for this study includes all full, signed decisions (n=781) in which the Office of the Solicitor General participated as *amicus curiae* in the 1953-2000 terms. I used the Supreme Court Data Base, Phase II, to identify the cases.³¹ But due to errors in that data set³² I checked and separately coded all the cases that the solicitor general entered as *amicus*

22. Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L. J. 694 (1963).

23. Pacelle, *supra* n.2, at 24.

24. *Id.* at 24.

25. *Id.*

26. *Id.*

27. Consider an issue like hate speech that involves civil rights and freedom of speech and divided long-term allies like the NAACP and the ACLU.

28. Lee, *supra* n.12, at 599-601.

29. Pacelle, *supra* n. 2, at 22-26.

30. Lee, *supra* n.12, at 599-600.

31. James Gibson, US SUPREME COURT DATA BASE PHASE II: 1953-1993. ICPSR 6987.

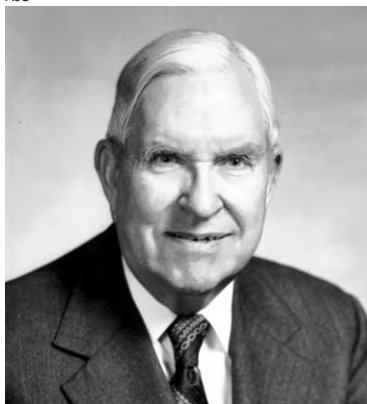
32. There are severe problems with the data for these cases. Some of the cases that are identified as *amici* are actually cases in which the SG is arguing for the federal government as a party. The opposite problem is also prevalent. In more than a few cases, the government is not participating in any form, but the case is coded as if the SG was involved. A more frequent error is found in the coding of the type of *amicus* activity: whether the SG enters the case voluntarily or is invited. There are also problems (and they are more severe) with the data in the cases in which the government is a party to the case. A significant number of cases are mischaracterized. In addition, not every case involving the government involves the solicitor general.

curiae in the 1953-2000 period. The case is the unit of analysis.

The dependent variable is the direction (liberal or conservative) of the solicitor general's position in the amicus cases. I coded the term of the original brief, whether the SG was the moving party or the respondent, the issue area of the case, whether the case raised a constitutional or a statutory question, and whether the position of the SG prevailed on the merits. I examined each case to determine whether the SG joined the case voluntarily or was invited to participate by the Supreme Court.³³

The independent variables are designed to assess the general ideological position of the three branches of government and, thus, the institutional context that the solicitor general would face. To measure the ideological positions of the House of Representatives and the Senate, I used the Poole and Rosenthal NOMINATE scores.³⁴ For the ideology of the Supreme Court, I chose the aggregate Segal and Cover scores as a measure of liberalism, updated by Segal, Epstein, Cameron, and Spaeth.³⁵ There are some choices to make for the measure for presidential ideology. Typically, studies use a dichotomous variable by party (0=Republican,

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Erwin N. Griswold, 1967-1973

1=Democratic). But this is a blunt instrument. As a proxy for presidential ideology, I used the Presidential Economic Liberalism and Presidential Social Liberalism measures developed by Segal, Timpone, and Howard.³⁶

Because the dependent variable is dichotomous, I use logit to estimate the congruence between the positions of the solicitor general and the aggregate ideology of the president, the Supreme Court, the House, and the Senate. If the president has influence over the solicitor general in the amicus cases, the relationship should be positive and significant, controlling for the other variables. The existing literature suggests that rela-

tionship is strong. Solicitors general and their deputies would argue the relationship is somewhat muted. If members of the OSG are correct about the different standards for the invited cases, there should be less evidence of confluence between the position of the SG and the ideological predilections of the president.

Results and analysis

The literature argues that the SG largely plays the role of advocate for the administration in filing amicus briefs. This analysis examines whether there are more gradations to the roles that the solicitor general plays when the office submits an amicus brief. Whether the influence is indirect and arises through normal channels or the pressure is direct as a result of the alleged politicization of the office, there seems to be a confluence between the general policy position of the president and the legal policy position of the SG in the amicus cases. The results in Table 1 show that there is a statistically significant congruence between the positions taken by the solicitor general and the general ideological positions of the Court and the president, controlling for the other variables. The results do not reflect congruence between the aggregate policy position of the House of Representatives or the Senate and the positions adopted by the OSG.

While these results appear to confirm virtually every other study, a closer examination is necessary. While there are some good reasons to expect presidential influence on the SG and the amici provide the best opportunity for that influence, the question remains whether analysts have painted with too broad a brush. It seems clear that the presidents and their attorneys general can influence the SG, but that influence may vary under certain conditions.

There are reasons to think that amicus briefs and cases vary across a number of dimensions. Some cases will likely reflect direct presidential influence (and maybe pressure). It is just as likely that some cases will inspire presidential indifference and, thus, reflect no pattern of con-

33. To determine whether the solicitor general was invited to participate, I triangulated the analysis of the cases. I read the opinion of the Court, the memoranda decisions that show the granting of *certiorari* or jurisdictional orders, as well as the briefs that the SG filed. In many of the opinions, it will state at the end of the syllabus if the SG was invited to participate. If the opinion did not state that the SG was invited, I would check all the jurisdictional statements in that case. If none of those decisions stated that the SG was invited by the Court, then I went to the brief that the SG filed in the case. After a brief summation of the issue in the case, there is a section in the brief called "The Interest of the U.S. Government." In that section, the SG would state that its interest was due to an invitation. In addition, I requested an official list of the invited cases from the Office of the Solicitor General during the 1986-1995 terms. After I collected the data, I checked my list against the one generated by the OSG. All of the cases on my list were on the list from the OSG and vice versa.

34. Eskridge argues that the Court pays attention to the current Congress, rather than the one that passed the legislation in question, because it is the current Congress that can override a decision it opposes. William Eskridge, *DYNAMIC STATUTORY INTERPRETATION* (Cambridge: Harvard University Press, 1994); William Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L. J.* 331 (1991); William Eskridge, *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 *CAL. L. REV.* 613 (1991).

35. Jeffrey Segal & Albert Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 *AM. POL. SCI. REV.* 557 (1989); Jeffrey Segal, Lee Epstein, Charles Cameron & Harold Spaeth, *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 *J. POL.* 812 (1995). I summed the 9 individual scores and divided by 9 to create a mean ideological score. I chose the Segal and Cover measure because it is an independent of decision and therefore avoids the problem of being tautological. There are alternatives, the measures developed by Andrew Martin & Kevin Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 *POL. ANALYSIS* 134-153 (2002) and Lawrence Baum, *Measuring Policy Change in the U.S. Supreme Court* 82 *AM. POL. SCI. REV.* 905-912 (1988), but they use votes to determine the attitudes of the justices. In the end, the differences in the results from using the two measures are minimal with one exception.

36. Jeffrey Segal, Richard Timpone & Robert Howard, *Buyer Beware? Presidential Success Through Supreme Court Appointments*, 53 *POL. RES. Q.* 557 (2000). I use the Social Liberalism scores for the criminal procedure, civil rights, and civil liberties cases and the Economic Liberalism scores for the economic cases. The question would be which one to use when looking at the entire data set. Given that the correlation between the Social Liberalism and Economic Liberalism is .97, they can be used interchangeably.

fluence or levels of agreement that are merely coincidental. The question is whether there are systematic factors that divide those amici that reflect presidential-SG congruence and those that do not.

There are a number of dimensions by which amici may vary: whether the SG is invited to submit a brief or does so voluntarily, whether the case involves a constitutional or statutory question, and by issue area. Finally some issues are settled or at least based on relatively clear precedents. As Rex Lee noted, a contrary argument in an area of settled law would “destroy the special status that I enjoyed by virtue of my office.... The Court would have written me off as someone not to be taken seriously.”³⁷ A test of this last factor is beyond the scope of this study, but the other propositions can be examined.

Call for the Views

Many members of the OSG argue that there are very different expectations when the office is invited to participate via a Call for the Views of the Solicitor General than when the office voluntarily submits an amicus brief. While the latter seem to provide greater discretion for the SG and thus potential for external influence, the former appear to carry significant constraints. In these cases, the SG is seen as more likely to be acting not as an agent of the executive branch, but as a legal advisor to the Supreme Court providing a less partisan review of the law and a more dispassionate survey of existing precedent.³⁸

The empirical results, shown in Table 2, appear to support this contention. There is no statistically significant evidence of confluence between aggregate presidential ideology (or for that matter, the policy positions of the House and Senate and the ideology of the Supreme Court) and the position adopted by the SG when the office is invited. Thus, when the SG files an amicus brief at the request of the Court, the office appears to be acting more as the “Fifth Clerk” of the justices and not necessarily pressing the administration’s case.

The lack of a relationship may be a function of the fact that many of these issues are not high on the agendas of the president or Congress. But it may also be due to the perception that the Court seeks a more neutral perspective on the law in proffering an invitation to file an amicus. The position of the SG is also not reflective of the ideology of the Court. That is not surprising, as noted, but the invited brief does fulfill other needs such as helping the Court establish the doctrinal foundation for a new or changing area of law.

It is worth noting that the success rate of the SG in the invited cases is marginally higher than in the voluntary amicus cases. This appears a little surprising because while there is a confluence between the positions of the SG and the ideology of the Court in the latter, there is a decided lack of same in the invited cases. Thus, even with no apparent relationship between the position of the SG and the ideological position of the Court, the success of the solicitor general does not suffer. It may be that the Court is truly searching for solutions to novel questions and its respect for the SG is such that it adopts the recommendations of the office.

This leaves the voluntary amicus cases, and Table 3 shows a statistically significant confluence between the position of the solicitor general and the ideology of the president and Court. These results confirm the findings of previous studies that suggested presidential influence in amicus briefs, at least the more discretionary ones. Given that former Solicitor General Lee argued that there is a variation among these briefs, it is worth examining the differences between constitutional and statutory briefs and between various issue areas.

Constitutional and statutory issues

One potential source of variation between amicus briefs may be found in the presumed differences between cases that raise constitutional questions and those that are based on statutory interpretation. Those differ-

ences should lie across two fault lines. First, although there are exceptions, constitutional issues are considered more important, more controversial, and more visible than statutory questions. The heightened importance presumably makes presidential interest more attenuated. Second, statutory issues carry a significant constraint: Congress. When interpreting a legislative provision, the SG and the Court need to attend to the position of Congress. In addition, if Congress objects to the Court’s decision, a simple majority is all that is necessary to overturn it. By contrast, a constitutional decision requires an extraordinary majority to reverse it.

The results seen in Table 4, show some differences between constitutional and statutory cases. In constitutional cases, there is confluence between the ideology of the president and the position advocated by the OSG, controlling for the other variables. In addition, there is a confluence between the SG and both the Court and the House. In statutory cases, much of that confluence disappears. Interestingly, though, there is no congruence between the general ideological stance of either house of Congress and the position adopted by the solicitor general. There is also no apparent confluence between the Court and the SG. There is, however, a confluence between the ideology of the president and the position taken by the solicitor general, lending further credence to the impact of the president in the voluntary amicus cases, at least.

Why is it the case, though, that Congress does not seem to have a greater influence on the position of the SG in statutory cases? The agenda cases often carry the fewest legal constraints. Many are state cases, thus, there is no countervailing federal positive law to constrain the SG or the president and the consequences of a negative precedent are limited. In addition, many of these cases implicate federal enforcement authority and the SG needs to adopt a consis-

37. Lee, *supra* n.12, at 600-01.

38. Pacelle, *supra* n.2, at 24-26.

tent position regardless of the party controlling Congress. Examining whether there are differences between issue areas may help unravel some of these complexities.

Nature of the issue

Studies show that Supreme Court justices are more interested in some issues than others.³⁹ It stands to reason that presidents and their political operatives will also care more about some issues than others. In

If we isolate the different issues in Table 5, there is clear evidence of a statistically significant presidential-SG confluence in civil rights and non-criminal civil liberties, but no apparent agreement in regulation, criminal procedure, federalism, state regulation, ordinary economic issues, and cases that involve jurisdictional questions. These issues are likely to spawn cases that reflect the law enforcement responsibilities that Lee referred to when he

mer assistant in the office, argued that “In 80 to 90 percent of the cases handled, the dispositions did not change that much. Probably 40 to 60 percent were criminal cases. We were still trying to keep the bad guys in jail.”⁴¹

In the area of government regulation, while some presidents such as Ronald Reagan tried to dismantle large portions of the federal bureaucratic structure, most accepted the need for regulation and did not interfere with the OSG in formulating positions protecting the government’s authority. The lack of confluence in federalism cases seems a little surprising given the differences between the political parties. But in view of the fact that many of the cases involve questions of preemption, the reach of the commerce clause, or the viability of state regulation and taxation policies, it is understandable that the SG would need to protect federal prerogatives. In each of these areas, the general trend of the office’s briefs can be characterized as consistent, and largely unrelated to the party in control.

The policy connections between the solicitor general and the president in the amicus cases are not as strong across the board as most studies argue.

addition, some issues are partisan in nature and divide the political parties while others do not. Issues like crime control know no partisan divisions. Both parties campaign on platforms promising safer streets and tougher sentencing. Other issues, like economic regulation, tend to require more nonpartisan law enforcement rather than a particular ideological position. On the other hand, issues like civil rights are at the heart of partisan differences and are expected to lead the SG to take a policy oriented position.⁴⁰

divided the voluntary amici into two categories. In some, perhaps many, of these areas, presidents are likely to be indifferent or unwilling to invest their political capital in directing the SG to take a particular position. Whatever the reason, there is no statistically significant confluence between presidential ideology and the position adopted by the solicitor general in amicus cases in most issue areas.

The congruence between the position of the SG and the ideological tenor of the administration in civil liberties and civil rights is due to the salience of the issues, to be sure. But solicitors general have a wider berth in these cases because of a couple of other factors. The risk of an adverse precedent is reduced because these are often state cases and not tied as closely to positive law. More importantly, perhaps because these cases tend to be fact intensive, it is much easier for solicitors general to develop a compelling argument for distinguishing an existing precedent that might otherwise tie their hands.

The lack of confluence in many of the other issue areas should not be surprising. In the criminal cases, there is no expectation of partisan differences. Indeed, Richard Seamon, a for-

Another explanation?

The results of the analysis suggest that the policy connections between the solicitor general and the president in the amicus cases are not as strong across the board as most studies argue. Certainly the invited cases weaken some of the hypothesized connections. In some issue areas, the relationship appears quite strong. It might be because the president and his operatives exert pressure, but is more likely because the president carefully screened his solicitor general and assistant attorneys general to insure they would reflect the administration’s view. But are there other explanations that might be obscuring a positive relationship between the policy position of the president and the amicus filings of the OSG in other areas? There are a couple of candidates. First, are the results time bound? Second, is there a difference between the government being the moving party in cases or the respondent?

Lincoln Caplan charged that the Reagan Administration had politi-

39. Lawrence Baum, *THE PUZZLE OF JUDICIAL BEHAVIOR* (Ann Arbor: University of Michigan Press, 1997); Paclelle, *supra* n.10; Perry, *supra* n.8; Craig Ducat & Robert Dudley, *Dimensions Underlying Economic Policy-Making in the Early and Later Burger Courts*, 49 J. POL. 521 (1987); David Rohde & Harold Spaeth, *SUPREME COURT DECISION MAKING* (San Francisco: Freeman, 1976).

40. Edward Carmines & James Stimson, *ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS* (Princeton: Princeton University Press, 1989).

41. Paclelle, *supra* n.10, at 26. Of course, these cases are fact intensive also, but there is no policy incentive to deviate from the consistent position.

42. Lincoln Caplan, *THE TENTH JUSTICE* (New York: Vintage Books, 1987). That politicization has occurred and at every level: the assistants, the creation of the principal deputy (sometimes referred to as the political deputy), and in the types of men chosen to be solicitors general. It began in earnest in the Carter Administration. But there are countervailing forces and even those selected for overt political reasons are quite mindful of them. In the end, it seems like the differences have been of degree rather than kind.

cized the OSG.⁴² That politicization apparently came in the form of increased pressure from the White House on the solicitor general. If that politicization has had an impact, then the confluence between the position of the OSG and the president should be more pronounced after 1981. The results from aggregate numbers are mixed, but if anything, they seem to lend further credence to the less partisan nature of the OSG. Only one relationship changes when the Reagan Administration is used as the dividing point and that is in civil rights. Prior to the Reagan Administration, whether the solicitor general was appointed by a Democrat or a Republican, there was consistent strong support for civil rights claimants.⁴³ Only since 1981 has that changed and while some of that was certainly ideologically motivated, it is partially a function of the more difficult nature of the issues before the Court since that time.⁴⁴

Perhaps the answer lies in the relative status of the solicitor general in individual cases. Studies demonstrate that the Supreme Court largely grants certiorari to reverse lower court decisions. As a result, litigants are much more likely to prevail on the merits when they brought the case to the Supreme Court.⁴⁵ The solicitor general is no different: the office is more successful when it is the moving party. Of course, while the average litigant is successful only about a third of the time as respondent, the SG wins over half its cases when it is the appellee. Is it possible that the solicitor general's briefs better reflect the president's policy position when the office is the appellant and can be more aggressive? Perhaps the SG needs to be more defensive when placed in the role of respondent. To examine that possibility, I controlled for the status of the solicitor general. The SG is much more successful when it files as an amicus supporting the moving party (76 percent) than when it joins the respondent (56 percent). But interestingly, none of the relationships between the position of the solicitor general and the aggregate ideological scores

of the institutional actors change as a function of the status of the office.

It may seem strange that despite the differences in the success rate, there is no substantive or statistical change in the relationship between the SG and the institutional actors. But there are explanations for this seemingly curious result. First, one role of the SG is helping the Court stabilize the law, so it is not inconceivable that there would be some consistency in position whether joining the appellants or respondents.

Second, while the differences between what the SG is trying to achieve as appellant and appellee can be rather pronounced when the government is a party, there are good reasons to think they would be less dramatic in amicus cases. The OSG has a great deal more discretion when filing voluntary amici than in the cases when the government is a party. When the government is not a party to the case, liability is reduced because the consequences of a negative precedent are more limited than when the government is one of the named parties. Finally, in the aggregate, the sheer numbers of cases that raise questions of non-partisan law enforcement appear to overwhelm the smaller number of the agenda cases.⁴⁶

Conclusion and implications

The results of this study suggest that we may have exaggerated the connections between the president and solicitor general. That connection exists, to be sure, but there are limits to the

impact that the president and political forces have in influencing the amicus position adopted by the OSG. Indeed, congruence between the president and the SG appears largely to be a function of two issue areas: civil rights and non-criminal procedure civil liberties. In no other area is there any broad level of confluence between the ideology of the president and the legal positions advanced by the solicitor general. Undoubtedly, presidents and their attorneys general choose to intervene in cases in areas outside of civil rights and civil liberties, but those are the exception, rather than the rule. Certainly, there is some hidden congruence between the president and the SG in areas like criminal procedure where presidents would consistently champion the office's support of law enforcement regardless of party. But presidents seldom intervene in those cases.

Analysts have been too quick to reduce the role of the solicitor general in amicus curiae cases to that of presidential advocate. The results of this study challenge that conventional wisdom. But shouldn't confirmation of the conventional wisdom be considered the more surprising result? Certainly, the SG is a presidential appointee and many amicus briefs provide discretion. However, there are good reasons to expect consistency and stability in the briefs of the OSG regardless of which party resides in the White House.

The OSG has a long tradition of independence and many attorneys general respected that by trying to

43. Prior to 1981, Republican solicitors general supported civil rights claimants in 86 percent of the voluntary *amicus* cases, while their Democratic counterparts' level of support in *amicus* cases was 94 percent.

44. The Reagan and Bush I solicitors general supported civil rights claimants in just 36 percent of the voluntary *amicus* briefs. This explains the preponderance of the variation that is ascribed to presidential influence. Certainly civil rights was an agenda issue for the Reagan Administration, but many of the issues involved affirmative action, bus-ing, and second generation cases. As Lawrence Wallace noted: "Civil rights work is very trying these days. There is a great complexity to the cases. Twenty-five years ago the cases were less technical. It was a lot more apparent who wore the white hats. There are much closer issues today with merits on both sides" Paccelle, *supra* n.2, at 266.

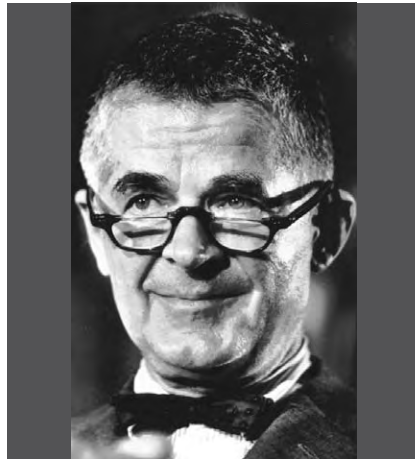
45. Perry, *supra* n.8; Gregory Calderia, John Wright & Christopher Zorn, *Sophisticated Voting*

and Gate-Keeping in the Supreme Court, 15 J. L. ECON. & ORG. 549 (1999); Jeffrey Segal, Harold Spaeth & Sara Benesh, *THE SUPREME COURT IN THE AMERICAN LEGAL SYSTEM* 285-89 (New York: Oxford University Press, 2005).

46. Meinhold and Shull find a close relationship between public statements by the president and the position adopted by the solicitor general. But they isolate a few issue areas and examine only 35 cases. Their results are certainly consistent with the general notions that agenda cases get close presidential scrutiny and are relatively few in number. Their results support one of the findings of this study: there is no variation in the positions taken by the parties in two of the areas of law they examine. The other two issues, civil rights and civil liberties, were the areas in this study that showed statistically significant differences. Stephen Meinhold & Steven Shull, *Policy Congruence Between the President and the Solicitor General*, 51 POL. RES. Q. 527 (1998).

insulate the office from political forces.⁴⁷ History is replete with examples in civil rights, one of the agenda issues, of battles between the solicitor general and the president's advisors over the position the office should articulate in an amicus brief. Those conflicts animated the relations between the office and the president from the Truman Administration through the two Bush White Houses.⁴⁸ In addition, if the office has been arguing a certain position for a number of years, it is constrained from suddenly reversing field at the behest of a new administration. Perhaps more to the point, the OSG often has to argue the position of the executive agency or Cabinet-level department in its briefs. Most studies show that bureaucratic agencies change very slowly and often resist the impulses that new administrations try to initiate.⁴⁹ Presidents and their political operatives typically have a monumental task in attempting to alter the direction and priorities of agencies in the face of budgetary restraints, interest group opposition, bureaucratic inertia, and congressional intransigence.

The results of the analysis suggest a more nuanced view of what is, in essence, a multidimensional set of roles that the SG plays when filing an amicus brief. Those results suggest that there are significant differences between the responsibilities attendant to the office when it is invited to participate by the Supreme Court and when it has more discretion. The solicitor general is often referred to broadly as the "Tenth Jus-



Archibald Cox, 1961-1965

stice." Interestingly, that title does not imply any particular presidential influence.

As *amicus curiae*, the SG seems to play three different roles, only one of which closely ties the solicitor general to the president. The SG adopts the role of Fifth Clerk in many of the invited cases, the Attorney General as Policy Advocate in civil rights, civil liberties, and the agenda cases, and the Attorney General as Law Enforcement Officer in the preponderance of the other voluntary amici and some of the invited cases. Certainly, there are exceptions and the office may well file briefs that reflect the administration's position in some of the invited cases or in some of the areas that are dominated by nonpartisan briefs, but in the aggregate the trends suggest different priorities emanate from the different roles.

It is important to remember that these different roles are not completely independent of each other.

The CVSG, for example, does not exist in isolation. By responding as a true friend of the court, the SG adds to its reserve of credibility with the justices. By jealously guarding that, the SG earns the right to press the agenda of the present administration in the most visible cases without incurring the wrath of the justices. But the SG understands that to do so recklessly and too often would be counterproductive and harm the office's ability to discharge all of its responsibilities. In addition, the president and the solicitor general might want to promulgate a specific position in a particular case, but their hands are tied by the office's position in past briefs or in the SG cases in which the government is a party. But if we have exaggerated the influence of the president in amicus cases, it is entirely possible that we underestimate the administration's influence in the cases in which the government is a party

The agenda cases are very important and provide a few visible opportunities each term for the administration to have a voice in the Supreme Court. The consequences and reach of those agenda cases may well outstrip the impact of the larger numbers of other amici. In most of the amicus cases, the president's influence is likely to be muted by the solicitor general's need to argue a consistent position, help the Court impose stability on doctrine, attend to congressional interests, follow the policy position staked out by the relevant agency, and formulate an argument that can attract the votes of five justices. ☞

47. Nancy Baker, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE, 1789-1990*. (Lawrence: University Press of Kansas, 1992).

48. Pacelle, *supra* n.2, has numerous examples of conflicts in the civil rights area: *Brown v. Board of Education* in both the Truman and Eisenhower Administrations; Archibald Cox's desire to go slow and Robert Kennedy's hope of speeding up integration; Nixon Administration pressure in the *Swann* case; battles over the brief in *Bakke* during the Carter Administration; disagreements between the head of the Civil Rights Division, Brad Reynolds, and both Reagan solicitors general including the *Bob Jones* case; the government's change of position in the Mississippi University desegregation case during the first George Bush presidency; a very contentious relationship between the Civil Rights Division and the OSG in the Clinton Administration; even into the George

W. Bush Administration as reflected in the OSG brief that supported affirmative action in *Adarand v. Minetta* over many objections.

49. The frustration of Cabinet officials and their relatively rapid turnover is well documented. Hugh Hecllo, *A GOVERNMENT OF STRANGERS* (Washington D.C.: Brookings, 1977); Michael Nelson, *A Short, Ironic History of American National Bureaucracy*, 44 J. POL. 747 (1982); Jack Knott & Gary Miller, *REFORMING BUREAUCRACY: THE POLITICS OF INSTITUTIONAL CHOICE* (Englewood Cliffs; Prentice-Hall, 1987); Sally Coleman Selden, James Brudney & Edward Kellough, *Bureaucracy as a Representative Institution: Toward a Reconciliation of Bureaucratic Government and Democratic Theory*, 42 AM. J. POL. SCI. 717 (1998) For a look at some agencies that did respond and under what conditions, see Dan Wood & Richard Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801 (1991).

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Table 1. Policy Congruence Between the Solicitor General and the Three Branches of Government in All *Amicus Curiae* Cases, 1953-2000 Terms

	Coefficient	Standard Error
President	.013**	.004
Supreme Court	2.692**	.543
House of Representatives	-.221	.549
Senate	-.908	1.554
Constant	-1.57**	.265

N=781
 Log Likelihood=-512.97
 Pseudo R2=.18
 VIF=1.49

**significant at .05 level

Table 2. Policy Congruence Between the Solicitor General and the Three Branches of Government in the Invited *Amicus Curiae* Cases, 1953-2000

	Coefficient	Standard Error
President	.002	.008
Supreme Court	.883	1.025
House of Representatives	.953	1.203
Senate	2.113	3.127
Constant	.359	.516

N=189
 Log Likelihood=-117.56
 Pseudo R2=.02
 VIF=1.49

*significant at the .05 level

Table 3. Policy Congruence Between the Solicitor General and the Three Branches of Government in the Voluntary *Amicus Curiae* Cases, 1953-2000

	Coefficient	Standard Error
President	.018*	.004
Supreme Court	3.169*	.669
House of Representatives	.498	.426
Senate	.701	1.828
Constant	-2.161	.320

N=592
 Log Likelihood=-381.78
 Pseudo R2=.17
 VIF=1.49

*significant at the .05 level

Table 4. Policy Congruence Between the Solicitor General and the Three Branches of Government in the Voluntary Constitutional and Statutory *Amicus Curiae* Briefs, 1953-2000

	Constitutional Briefs Coefficient	Statutory Briefs Coefficient
President	.032**	.013*
Supreme Court	7.790**	1.088
House of Representatives	2.761**	.059
Senate	-6.991	.851
Constant	-5.405	-.678
N	231	361
Log Likelihood	-105.66	-238.07
Pseudo R2	.37	.06
VIF	1.82	1.59

**significant at the .01 level
 *significant at the .05 level

Table 5. Policy Congruence Between the Solicitor General and the President in Selected Issue Areas in Voluntary *Amicus Curiae* Cases, 1953-2000 Terms

	Coefficient	Standard Error	N
Criminal Law and Procedure	-.175	.136	135
Civil Liberties (non-criminal)	.029**	.013	56
Civil Rights	.054**	.011	147
US Regulation	.014	.015	126
Federalism/State Regulation	.027	.025	61
Ordinary Economic	-.339	.281	36

**significant at .05 level