Summer 1990

The Solicitor General and the Evolution of Activism

James L. Cooper

*Indiana University School of Law*

Follow this and additional works at: https://www.repository.law.indiana.edu/ilj

Part of the [Courts Commons](https://www.repository.law.indiana.edu/ilj), and the [Law and Politics Commons](https://www.repository.law.indiana.edu/ilj)

**Recommended Citation**


Available at: [https://www.repository.law.indiana.edu/ilj/vol65/iss3/6](https://www.repository.law.indiana.edu/ilj/vol65/iss3/6)
The Solicitor General and the Evolution of Activism†

JAMES L. COOPER*

INTRODUCTION

Although concern about the role and behavior of attorneys representing the state is neither a new nor a distinctly American problem,1 it has been a relatively infrequent matter of public debate. After the election of President Reagan in 1980 however, the Solicitor General’s Office in general, and Solicitor General Charles Fried in particular, became the focus of an expanding debate about the place of advocacy and politics in the arguments of those who represent the federal government before the Supreme Court. *Amicus* filings by Solicitor General Fried in both abortion2 and establishment clause3 cases have precipitated a vigorous examination of the role of the Solicitor General in the pursuit of executive policy.4 Relying almost entirely on anecdotal evidence,5 both sides of this dispute

† © Copyright 1990 by James L. Cooper.


2. President Reagan campaigned against the Court’s holding in Roe v. Wade, 410 U.S. 113 (1973). Although the Justice Department had not filed a brief in Roe or subsequent abortion cases, the Reagan Solicitors General began to file briefs in these cases, first arguing to limit Roe and then to overrule it. Compare Brief for the United States as Amicus Curiae, City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) (No. 81-746) (Roe should be limited) with Brief for the United States as Amicus Curiae in Support of Appellants, Thornburgh v. American College of Obstetricians, 476 U.S. 747 (1986) (Nos. 84-495, 83-1379) (Roe should be overruled).

3. President Reagan also supported limiting the establishment clause. See, e.g., Brief for the United States as Amicus Curiae, Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986) (No. 84-773).


make claims about the nature and propriety of Charles Fried’s behavior as Solicitor General in light of the design and history of the Office.  

Underlying this dispute is the inherent tension in the nature of the Solicitor General’s Office. Both the statutory structure and the traditional function of the Office work to make the Solicitor General an agent of several diverse principals. While the most explicit among these is the executive branch, specifically the Attorney General and the President, they also include the Supreme Court and a positive legal ideal which has variously been labeled “the rule of law,” or more simply “justice.” Given the complexity of working under these disparate masters, it is inevitable that as each pressures the Solicitor General, the goals of the others will suffer. Anytime the executive branch has a particular concern with the development of the law, therefore, the Solicitor General is likely to feel heightened pressure to bring the government’s legal arguments in line with the administration’s policy goals. Should the Solicitor General respond to that pressure, we might expect both the Supreme Court and those who see the change as a violation of “careful legal reasoning” to disapprove. Observers of Fried’s tenure as Solicitor General (and to some extent that of his predecessor Rex Lee), have suggested that this politicization has occurred; that the Solicitor General has become overly active at the behest of a political agenda. In response, Fried’s supporters have both denied the allegations and argued in the alternative that a politically active Solicitor General is not new.

6. Although Charles Fried resigned as Solicitor General in June 1989, his successor in the Bush administration, Kenneth Starr, has continued to file amicus briefs in areas of attenuated federal interest such as abortion. See, e.g., Brief for the United States as Amicus Curiae, Hodgson v. Minnesota (U.S. 1989) (Nos. 88-1125, 88-1309) (The government argues that requirement of parental notification before abortion is constitutional and urges reversal of Roe v. Wade).

7. L. Caplan, supra note 5, at xiv.

8. In a brief confessing error by the lower court, Solicitor General Frederick Lehmann wrote: “The United States wins its point whenever justice is done its citizens in the courts.” Id. at 17 n.45. His words have been inscribed on the walls of the Justice Department Building.

9. “[I] have frankly concluded that it is virtually impossible in today’s world to occupy a position like solicitor general without, on the one hand, incurring the disfavor of some groups with very strong ideological views or, on the other hand, impairing your credibility with the Court . . . .” Freiwald, supra note 4, at 13, col. 2 (quoting former Reagan Solicitor General Rex Lee).


11. See, e.g., Lauber, An Exchange of Views: Has the Solicitor’s Office Become Politicized?, Legal Times, Nov. 2, 1987, at 22, col. 1 (“Although the political pressures brought to bear on the solicitor general have concededly been tremendous, Rex Lee and Charles Fried have in my view successfully upheld the office’s longstanding commitment to the rule of law.”).

This Note presents an empirical examination of the "activism" of the Solicitor General where the government has filed as an *amicus curiae* in the Supreme Court. In order to evaluate the current *amicus* practices of the Solicitor General, I consider the federal interest in cases in which the government participated from the 1984 through the 1987 Supreme Court terms, as well as two other periods of alleged executive activism: the New Deal struggle between President Roosevelt and the Court, and the pre-legislative civil rights period marked by *Brown v. Board of Education*.

The data show that the Reagan Solicitors General were not the first to file *amicus* briefs in cases with no significant federal interest, though they oversaw an expansion in the extent and breadth of federal *amicus* filings. Perhaps more importantly, however, these more aggressive briefs do not appear to have had any significant adverse effects on the Supreme Court's relationship with the Solicitor General.

I. The Office of the Solicitor General

Although the idea of formal legal representation for the head of government predates the ratification of the Constitution, the fundamental nature of the position in American government was cast by that event. The Constitution delegated to the executive branch the responsibility to "take Care that the Laws be faithfully executed . . . ." Toward that end, in 1789 Congress created the position of Attorney General and directed him "to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned . . . ." Eventually important, but left unspecified at the time, was the ambit of the term "concern." At the time, there was little need to make explicit the sorts of cases the Attorney General might choose to enter because procedural traditions left him with little discretion. Where the United States was a party, the statutory language was clear that the Attorney General should direct the representation. Where this was not the case, however, there were few

---

13. *See infra* text accompanying note 64.
14. 347 U.S. 483 (1954); *see infra* notes 93-98 and accompanying text.
17. *Judiciary Act of 1789*, ch. 20, § 35, 1 Stat. 73, 93.
18. This may have been intentional. *See* L. Huston, *The Department of Justice* 7 (1967) ("As prescribed by the Judiciary Act, the duties and powers of the Office of Attorney General were few and vaguely defined and reflected the legislators' concern lest the office become a center of federal power that would infringe upon the prerogatives of the states.").
formal options—the *amicus curiae* brief would not appear for several decades.\(^9\) Perhaps the only alternative was for the Attorney General to take the case as part of his private practice.\(^2\) Further constraints on the Attorney General’s ability to expand the reach of his Office included the lack of staff\(^2\) and the increasing decentralization of government legal services. The latter finally grew to such proportions as to demand congressional action.

As the government expanded, each new department developed its own independent legal staff. Consequently, although the Attorney General conducted all the government’s business in the Supreme Court, the legal opinions of the government’s departments and agencies were not uniform.\(^2\) Congress created the Department of Justice in 1870 in an effort to solve this problem by centralizing the government’s legal services. The Attorney General directed the new department which was composed of attorneys who had been dispersed throughout the government. Rather than asking the Attorney General to continue as the government’s litigator in addition to his presidential advisory role and his newly created administrative responsibilities, Congress created the Office of the Solicitor General to assist the Attorney General by “conduct[ing] and argu[ing] any case in which the government is interested . . . .”\(^2\) This legislation subtly changed the prerogative of the government’s counsel to include not just those cases in which the government was “concerned,”\(^2\) but also those in which it


20. Until 1853, the Attorney General occupied the office only part time and had a concurrent private practice. When the government lacked standing, the Attorney General could instead represent a private party with the same interests that did have standing. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Although *Hayburn’s Case* was mooted by Congress, Attorney General Randolph offered to serve as Hayburn’s attorney to pursue the government’s goals. *Hayburn’s Case*, 2 U.S. (2 Dall.) at 409; see Krislov, *supra* note 19, at 699.

21. The Attorney General had no legal assistance until 1858 when Congress authorized the hiring of two additional staff lawyers. L. Huston, *supra* note 18, at 10.

22. “W[We} have found that there has been a most unfortunate result from this separation of law powers. We find one interpretation of the laws of the United States in one Department and another interpretation in another Department.” CONG. GLOBE, 41st Cong., 2d Sess. 3036 (1870) (statement of Representative Jenckes).

23. An Act to Establish the Department of Justice, ch. 150, § 5, 16 Stat. 162, 163 (1870); *see also* 28 C.F.R. § 0.20(a) (1989) (describing the general functions of the Office of the Solicitor General).

24. *See supra* notes 17-18 and accompanying text.
was "interested." The latter remains the standard today.

A. Functions of the Solicitor General's Office

As director of the government's Supreme Court litigation, the Solicitor General has three major responsibilities. They are (1) to decide when the government ought to seek review by the Supreme Court after it has lost a case in any appellate court; (2) to present or oversee the government's arguments when it is a party before the Supreme Court; and (3) to present the government's views as amicus curiae in those cases of interest where the government is not a party. During the Supreme Court's 1984 term, the staff of twenty-three attorneys handled 1,884 cases.

The first of these duties, the decision to seek certiorari or appeal, is almost entirely at the discretion of the Solicitor General. In each case, the Appellate Section of the Justice Department that handled the case makes a recommendation. Where that recommendation is positive, the Solicitor General's staff examines the entire case record and makes its own recommendation. Finally, the Solicitor General himself reviews both recommendations as well as the record of the case and makes the final decision.

25. An interesting though largely unexplored issue concerns the extent of this "interest" and whether it in any way supersedes a court's general duty to protect (or at least consider) the public interest. At least one court has suggested that the Attorney General's interest (and thus the Solicitor General's interest) in the public welfare is essentially coequal to that of the judicial system. Vitamin Technologists, Inc. v. Wisconsin Alumni Research Found., 146 F.2d 941, 946 (9th Cir. 1944), cert. denied, 325 U.S. 876 (1945).

Other courts, however, have required a more distinctly governmental interest before allowing the government's participation or intervention. See, e.g., Calhoun County, Fla. v. Roberts, 137 F.2d 130, 131 (5th Cir. 1943); United States v. Frazer, 317 F. Supp. 1079, 1084 (D. Ala. 1970).

27. 28 C.F.R. § 0.20(b) (1989).
28. 28 C.F.R. § 0.20(a) (1989).
29. 28 C.F.R. § 0.20(c) (1989).
31. 1984 ATT'Y GEN. ANN. REP. 5.
32. Among the factors that weigh on the Solicitor General's determination of a case's "certworthiness" are:
   1. whether [it] presents only one legal question, with noncontroversial facts;
   2. the prestige of the circuit judge writing the adverse opinion;
   3. the known attitude of the Court towards the particular activity, agency, or area of law; and
   4. most important, the possibility of winning the case—it is better to lose many times in the Court of Appeals on an issue than to lose once in the Supreme Court.

33. Former Solicitor General Griswold remarked:
   If the district court in Oklahoma City makes a decision which the United States Attorney doesn't like, he may well tell the press, "I am going to appeal."
Typically, the government seeks review of only a small percentage of the cases it has lost.\textsuperscript{34}

The Solicitor General enjoys even greater discretion in decisions to file \textit{amicus curiae} briefs. While the Court frequently invites the Solicitor General to file an \textit{amicus} brief—invitations which are treated like orders\textsuperscript{33}—where the government acts \textit{sua sponte} it does not confront the barriers that other parties do. Supreme Court Rule 36, governing the filing of \textit{amicus curiae} briefs, requires that \textit{amici} obtain the consent of either the parties or the Court before filing.\textsuperscript{36} Any brief presented by the United States, however, is exempt from the consent requirement.\textsuperscript{37} Though the Solicitor General has been required to state the government’s interest in the case since 1970,\textsuperscript{38} he is free to submit briefs in any case he chooses.

\textbf{B. The Solicitor General and the Agency Problem}

Although the Solicitor General has a large degree of discretion in the control and function of his Office, he is not entirely free. Like all public officials, the Solicitor General is constrained by those who exercise, de jure
or de facto, some control over his actions. For the Solicitor General, the clearest and most important institutional linkage is with the President. It is the President who, by statute, nominates the Solicitor General and at whose pleasure he serves.\footnote{28 U.S.C. § 505 (1988).} Should he care to, therefore, the President has the coercive leverage to direct the activities of even a reticent Solicitor General.\footnote{Presidential control of this kind was noted during deliberations on the Act to Establish a Department of Justice, the same Act that created the Solicitor General’s Office. “[Recall] a former President who sent word to his Attorney General that if he could not find law for a particular policy he (the President) would find an Attorney General who could find law for it.” CONG. GLOBE, 41st Cong., 2d Sess. 3036 (1870) (statement of Representative Maynard).}

For several reasons, however, this kind of immediate direction is rarely exercised. First and most importantly, the President often chooses a Solicitor General who shares his political values. Solicitor General Charles Fried has commented, “I have no trouble saying what the Attorney General and his crew want me to, because I’m more conservative than they are.”\footnote{L. CAPLAN, supra note 5, at 150 (quoting Solicitor General Fried). Rex Lee similarly suggested that he supported all Reagan policies. Jenkins, The Solicitor General’s Winning Ways, 69 A.B.A. J. 734, 736 (1983). Although a Solicitor General in the same political camp as the President may appear to be a better agent, the improvement is born of coincidence rather than better agency. This sort of relationship is vulnerable to changes or a divergence in perspective between the Solicitor General and the President. Though less sustainable, this is the same problem that occasionally haunts Presidents and their judicial appointees. As Professor Tribe observes, cases of apparent bad agency on the Court are generally the result of Presidents who choose appointees for contemporary, sometimes short-term, purposes. L. TRIBE, GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUDGES SHAPES OUR HISTORY, 59-92 (1985). Unlike a Supreme Court Justice, however, the President may fire the Solicitor General for the same divergence in views.}

Second, most of the Solicitor General’s work is politically routine. In most cases, where the government is a party, the political value of the dispute is limited. Indeed, even in many amicus appearances, the issues are rather apolitical and unlikely to be of special interest to the President. Finally, when the President does take an interest in a particular case, the bureaucracy may shield the Solicitor General from administration pressure.\footnote{Former Deputy Solicitor General Frey remarked, “About 95 percent of the work of the office has no significant political ingredient . . . . The key questions are how were the decisions made in abortion cases or affirmative action cases—those cases where the issues coincide with the ideological concerns of the administration.” Coyle, Starr Potential, Nat’l L.J., Sept. 25, 1989, at 22, col. 3 (citing and quoting Frey).}

Pulling the Solicitor General in a different direction is his traditional closeness to the Supreme Court. The Supreme Court's influence is not statutory, but customary. In 1984, the Solicitor General was involved in a staggering thirty-eight percent of the cases on the Court's docket. Of just those 175 cases that were argued on the merits the government participated or submitted briefs in sixty-five percent. The Solicitor General himself appears before the Court more than any other lawyer or law firm. At the same time, the Solicitor General litigates exclusively in the Supreme Court—the Court is as important to the Solicitor General's business as he is to its.

In addition to their institutional familiarity, each party in this symbiotic relationship reaps important benefits. Perhaps the most valuable benefit to the Court is the Solicitor General's careful screening of cases before allowing the government to seek Supreme Court review. Without this check, the already busy Court would be flooded by petitions for review from innumerable federal officials. The Court has acknowledged, both publicly and privately, the importance of this "gatekeeping" function to the management of its docket.

The Solicitor General further assists the Court by responding to the Court's invitations to file amicus briefs. Although the Solicitor General files without invitation, each year a significant percentage, often a majority, of the government's amicus briefs are filed in response to an invitation by the

44. Of the 5,006 cases on the Court's docket, the Solicitor General was involved in 1,888. 1984 ATT'Y GEN. ANN. REP. 5.

Without the centralization of the decision whether to seek certiorari, this Court might well be deluged with petitions from every federal prosecutor, agency, or instrumentality, urging as the position of the United States, a variety of inconsistent positions shaped by the immediate demands of the case sub judice, rather than by longer-term interests in the development of the law.

Id. at 1510.

In United States v. Mendoza, 464 U.S. 154 (1984), the Court refused to apply collateral estoppel to the United States. The Court noted the importance to its docket of the Solicitor General's control of the federal government's appellate litigation.

The Solicitor General's policy for determining when to appeal an adverse decision would also require substantial revision. The Court of Appeals faulted the Government in this case for failing to appeal a decision that it now contends is erroneous. But the Government's litigation conduct in a case is apt to differ from that of a private litigant. Unlike a private litigant who generally does not forgo an appeal if he believes that he can prevail, the Solicitor General considers a variety of factors, such as the limited resources of the Government and the crowded dockets of the courts, before authorizing an appeal. The application of nonmutual estoppel against the government would force the Solicitor General to abandon those prudential concerns and to appeal every adverse decision in order to avoid foreclosing further review.

Id. at 160-61 (citations omitted). The Court has dubbed the Solicitor General a quasi-judicial agent, in the process granting the government a significant litigation advantage that private parties do not enjoy. See generally Schwartz, supra note 5, at 1123-46.

The government's *amicus* briefs may give the Court an indication of the administration's position on a particularly divisive case, an alternative to the reasoning the parties have proposed, or simply the benefit of an informed interpretation of a particular piece of legislation or other federal code. The traditionally high quality of the Solicitor General's legal work has encouraged the Court to continue to solicit *amicus* briefs.

In the only court it graces, the Solicitor General's Office has consistently enjoyed great success. Each year almost 80 percent of the government's petitions for certiorari are granted and in 80 percent of those cases the government's position on the merits is supported. While this success ratio would be astonishing for an individual litigator, it is less so for a repeat institutional litigator. As the court of last review, the Supreme Court receives many frivolous or weak private petitions for certiorari. Unlike the Solicitor General, most private parties have little to lose by asking for the Court's review. A private party's interest is not in the long-term development

---

47. In 1987, 38% of the Solicitor General's 32 *amicus* briefs in cases that resulted in opinions on the merits were in response to invitations.

48. See, e.g., Brown v. Board of Educ., 347 U.S. 483 (1954); see also infra text accompanying notes 89-93.

49. H. Perry, supra note 46, at 19 (One Supreme Court clerk refers to Solicitor General's brief as "the answer sheet."). Even Solicitor General Fried's critics acknowledge the technical competence of the Office under his administration. See, e.g., *Solicitor General's Office: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 100th Cong., 1st Sess. 36, 43 (1987)* (statement of Professor Burt Neuborne).

50. See, e.g., 1984 ATT'Y GEN. ANN. REP. 5.

51. Political scientists and legal scholars have widely noted that repeat players of a game (here litigation), often develop different strategies and goals than do their "one-shot" counterparts. Repeat players also have opportunities their unitary counterparts do not. See Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974); see also R. AXELROD, *EVOLUTION OF COOPERATION* (1984); S. MACAULAY, *LAW AND THE BALANCE OF POWER: THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS* (1966).

Professor Galanter lists a number of advantages enjoyed by repeat players, notably the ability to adopt strategies that minimize the maximum loss, and to play for rules instead of outcomes. Galanter, *supra*, at 99-100. The Solicitor General is able to minimize his overall losses by not appealing cases lost in lower courts that might be affirmed by the Supreme Court and thus cover the whole country rather than just one circuit. Carrington, *United States Appeals in Civil Cases*, 11 Hous. L. REV. 1101, 1102 (1974). Moreover, the Solicitor General is able to play for rules affecting litigation procedure such as the exemption from collateral estoppel won in *Mendoza*, 464 U.S. at 154. See *supra* note 45. The Solicitor General also may efficiently devote resources to seek rule changes other than by judicial decision. Supreme Court Rules 36.4 (waives the general *amicus* brief consent requirement for the Solicitor General) and 28.4(b) (allows the Solicitor General to intervene when the constitutionality of a federal statute is impugned) are examples.

Of course a repeat player may have some special *duty* to more lofty ends than one-shot litigants. Indeed former Solicitor General Lee suggested this is especially true for the Solicitor General. "[T]he government lawyer must be more sensitive to the values on the other side of the lawsuit than is true of lawyers in general." Lee, *supra* note 5, at 596. He does note, however, that attention to these responsibilities will ultimately "help win more lawsuits." *Id.*
of the law, or in the preservation of the Court's institutional integrity, but rather in the success of her particular case. The Solicitor General, by contrast, would exhaust both his staff and the Supreme Court if he pursued every case the government lost. Instead, only the strongest of the government's cases are allowed to go forward—those the Court is both likely to hear and likely to rule on favorably.

The Court's inability to give exhaustive consideration to each petition for review\(^{52}\) encourages it to use authorship as a "quality cue."\(^{53}\) Repeat players such as the Solicitor General are especially likely to emerge favorably from such a process. The Court has historically found the Solicitor General's advice to be helpful, which has evolved into the Solicitor General's signature serving as a sort of legal brand name: a quick assurance of quality. Both the Court and the Solicitor General accrue benefits from this state of affairs. The general quality of the government's legal work allows the Supreme Court to relax the thoroughness of its review and use its scarce resources in other ways. The government, in turn, enjoys prestige in the Court as well as an occasional opportunity to pursue political ends rather than the "rule of law." There may be, in other words, room for some political grandstanding as long as it is not frequent enough to undermine the Court's general confidence in the Solicitor General.\(^{54}\)

---

52. One manifestation of this problem is the "cert. pool" in which six Justices pool their law clerks to allow less time consuming consideration of certiorari petitions. See W. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 263-66 (1987).
53. See Songer, Concern for Policy Outputs as a Cue for Supreme Court Decisions on Certiorari, 41 J. Pol. 1185 (1979); Tanenhaus, Schick, Maraskin & Rosen, The Supreme Court's Certiorari Jurisdiction: Cue Theory, in JUDICIAL DECISION MAKING (G. Schubert ed. 1963); see also R. STERN, E. GRESSMAN & S. SHAPIRO, SUPREME COURT PRACTICE 573 (6th ed. 1986) ("The number of amicus briefs is so great that most of the Justices have their law clerks sift out the briefs . . . .").
54. Because the Court does not know the quality of the Solicitor General's advice until it has already agreed to hear the case, there is an "informational asymmetry" in the Solicitor General's favor. He knows, before the Court does, whether his advice is politically motivated. This sort of problem has been labeled the "lemon principle" in other contexts. Akerlof, The Market for "Lemons": Quality Uncertainty and the Market Mechanism, 84 Q.J. ECON. 488 (1970). The principle holds that where the seller has more information about a relatively fungible good than does the buyer, the seller has an incentive to reduce the quality of the goods she sells and thereby increase her profit.

Left unchecked, operation of the lemon principle in the relationship between the Solicitor General (the seller) and the Supreme Court (the buyer) would reduce or eliminate their interaction. The Solicitor General has the opportunity to reduce the quality of his advice—to get a "bad" case onto the Court's docket on the strength of his reputation. The repetitive nature of the Solicitor General's business in the Court, however, reduces the incentive to do this by allowing the Court to retaliate by subsequently ignoring or disfavoring the Solicitor General.
The complexity of this relationship creates measurement difficulties. Normative approaches, such as the interview and anecdotal evidence collected by Lincoln Caplan in *The Tenth Justice,*\(^5\) provide a rich picture of the Solicitor General's personality but generally ignore the Office's output—its briefs. Yet the Solicitor General's briefs are much more fundamental to his relationship with the Court than either his own public statements or those of the Attorney General. Neglecting to consider them is equivalent to considering a politician's press releases while ignoring her voting record: the brief is the Solicitor General's final statement.

Of all the briefs the Solicitor General files, the *amicus* briefs are the most revealing of political activity. Although the Solicitor General may take an activist position when the government is a party, the bounded nature of the dispute and the federal stake at issue limit the legal positions the government may adopt. As an *amicus,* however, the government has both the freedom to enter the case and the freedom to take any substantive position. If there is political activism in the Solicitor General's Office, it is most likely to appear in *amicus* filings.

II. A TAXONOMY OF BRIEFS: THE SOLICITOR GENERAL AS AMICUS

Longitudinal analysis of institutional actors in the legal system is a necessarily imprecise pursuit. As the country's social and legal environment changes so do the sorts of cases that appear on the Supreme Court's docket. To measure the change in an institution like the Solicitor General's Office, then, one must either consider the concomitant changes in the legal environment or construct a measure that is independent of the substantive issues at stake. That the Solicitor General is now filing in fewer civil rights cases, for example, reveals very little. There may be fewer cases being filed or simply fewer novel issues being raised. Any measure linked to a particular issue(s), therefore, is unstable across time.\(^6\) I have examined the "interests of the United States" in the cases the Solicitor General has chosen to pursue, a method designed to avoid the difficulties caused by changes in position or in the "type" of the case.

Changes in the Solicitor General's position on the merits of a particular issue do not necessarily constitute activism but may simply represent a difference of legal opinion. Many instances exist where different Solicitors General reached different positions on the same point,\(^7\) where the Office

---

55. L. Caplan, *supra* note 5.


has changed its mind midstream, and where the Office has supervised amicus briefs that the Solicitor General has refused to endorse. Indeed, there is an expression of some political preference in almost every decision the Solicitor General makes: which government cases should go forward, when to file amicus briefs, and what to argue on the merits. Even where the Court invites the Solicitor General to express the government’s views, he remains free to take a position that is either expansive or contractive of federal power. Neither the Court nor the parties expect that an amicus curiae will be a literal “friend of the court.”

Broadly viewed, disputes about the appropriate behavior of the Solicitor General can be placed into two categories: disputes concerning political control of the Office, and more generally, disputes about the role for the federal government in the legal development of social policy. Although the former evades measurement, instances of the latter do not. The Solicitor General’s success shows the federal government hefts a good deal of weight in the Supreme Court. The circumstances under which the government chooses to use that weight, therefore, is of great interest not only to those on the opposing side but to students of the government and the Court.

A. Federal Amicus Briefs in Aggregate

I have taken all the amicus briefs filed by the federal government in cases that have resulted in opinions on the merits during three periods that are generally considered highwater marks in the legal activism of the executive.

The first period encompasses the 1935 to 1938 Supreme Court terms, when

---

58. In Bob Jones Univ. v. United States, 461 U.S. 574 (1983), the Solicitor General’s Office changed its position between consideration of jurisdiction and the merits in apparent response to administration pressure. See L. Caplan, supra note 5, at 51-64.

59. In the Brief for the United States at 1, Bob Jones Univ., 461 U.S. at 574 (Nos. 81-1, 81-3), Acting Solicitor General Lawrence Wallace inserted a footnote saying, “The Acting Solicitor General fully subscribes to the position set forth on question number two, only.” In Peters v. Hobby, 349 U.S. 331 (1955), Solicitor General Sobeloff refused to sign the government’s brief or to argue the merits before the Supreme Court. Another Justice Department lawyer took the case instead. See L. Caplan, supra note 5, at 10-12. This is known as “tying a tin can” and generally serves as a negative cue to the Court.

60. See, e.g., Clegg, Book Review: The Thirty-Fifth Law Clerk, 1987 DUKE L.J. 964, 965 (“Caplan’s argument that the Solicitor General’s independence suddenly has eroded is necessarily anecdotal; it would of course be impossible to quantify.”).

61. See supra note 50 and accompanying text.

62. Although the Solicitor General files briefs at both the jurisdictional level and on the merits, older volumes of the Records and Briefs of Cases Decided by the United States Supreme Court do not contain briefs for cases that did not reach the merits.

Stanley Reed was Solicitor General under President Franklin Roosevelt. During this time, the President was engaged in a protracted battle with a conservative Supreme Court over the constitutionality of his New Deal legislation. The second period includes the 1954 to 1957 terms, during which time both Simon Sobeloff and J. Lee Rankin served as Solicitors General under President Eisenhower. The period is distinguished by the federal government’s involvement in the school desegregation case, *Brown v. Board of Education*. *Brown* not only illustrates the pre-legislation civil rights cases but is often cited as precedent for contemporary government activity in social policy cases. The third period spans the 1984 to 1987 terms, during which Rex Lee and Charles Fried served as Solicitors General in the Reagan administration. The Reagan Justice Department filed several controversial *amicus* briefs supporting, among other things, the reversal of *Roe v. Wade*, the constitutionality of a state statute creating a mandatory “moment of silence” in public schools, and the use of public school facilities by religious groups.

The government’s *amicus* briefs filed during the three periods can be divided into three general categories of decreasing “federal interest.” The first category of federal interest, which I have labeled “direct,” includes those cases that invoke the Solicitor General’s interest in the construction and interpretation of various federal codes. Generally these are cases where

---

64. February 1954 to July 1956.
66. 347 U.S. 483 (1954); see Silber, *supra* note 63, at 824-44.
69. October 1985 to June 1989. Fried has been replaced by Kenneth Starr, a former judge of the Federal Court of Appeals for the D.C. Circuit.
73. The basic notion that the federal government’s interests in cases may be grouped was apparent to Solicitor General Lee.

I divided the non-government cases into two categories. The first class of cases—the easier one—consisted of those that involved direct federal law enforcement interests. Examples are Title VII cases, antitrust cases, securities cases, voting cases or criminal cases, in which the federal government did not happen to be one of the litigants, but the holding in the case would probably have a larger impact on the interests of the United States than it would have on the immediate parties.

The harder cases fall in the second category: cases that have nothing to do with any federal law enforcement responsibility, but which fall right at the core of the current administration's broader agenda. For me these included cases involving obscenity, the religion clauses, and abortion.

Lee, *supra* note 5, at 599.
the Solicitor General asserts an interpretation of a statute,\textsuperscript{74} treaty,\textsuperscript{75} or regulation.\textsuperscript{76}

The second category consists of those cases where a decision regarding a state issue may affect a complementary federal issue.\textsuperscript{77} Here, the federal interest is not as strong or unique, but rather implied. Many of these cases, especially in recent years, concern aspects of state court procedure that might have federal trial implications. The Reagan Solicitors General, for example, took a special interest in state cases involving the fourth and fifth amendments to the Constitution and narrowing the exclusionary\textsuperscript{78} and \textit{Miranda} doctrines.\textsuperscript{79}

The third group of cases, in which the Solicitor General’s involvement is most activist, are those cases involving state issues that are independent of any contemporary federal practice or interest. These cases typically affect social policy around the country, but do not otherwise involve the federal government. They are cases which may be of particular interest to the President, but in which the federal government has no special interest or expertise. These are briefs filed in the public interest as the Solicitor General sees it. Examples include school desegregation\textsuperscript{80} and abortion.\textsuperscript{81}


77. Where a party has directly attacked the constitutionality of a federal statute, the Solicitor General may intervene as a party rather than appear as an \textit{amicus}. See \textit{Sup. Cr. R. 28.4(b)}.


The exclusionary rule requires that evidence which is illegally seized not be used at trial. See, e.g., \textit{Mapp v. Ohio}, 367 U.S. 643 (1961).


\textsuperscript{80} See, e.g., \textit{Brown}, 347 U.S. at 483.

\textsuperscript{81} See, e.g., Brief for the United States as Amicus Curiae, Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989) (No. 88-605); Brief for the United States as Amicus Curiae, \textit{Thornburgh}, 476 U.S. at 747 (Nos. 84-495, 84-1379); Brief for the United States as Amicus Curiae, \textit{City of Akron}, 462 U.S. at 416 (No. 81-746).
Table I shows the number and distribution of *amicus* briefs filed by the federal government in cases that reached decision on the merits during the three time periods. The data show a marked increase in the number of briefs filed by the federal government, but they also show a change in the nature of the cases selected. During the 1984 to 1987 Supreme Court terms, the Solicitor General more than doubled the percentage of his briefs which had only an implied federal interest. In "public interest" cases, supporters of the Reagan Solicitors General correctly note that there is some precedent for government participation. Yet it is significant that even during these periods of executive pressure on the Court, the actual number of such briefs has been quite small. In both the implied and the public interest categories the data suggest there has been no assault on the boundaries of federal interest, but rather an erosion.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Direct</td>
<td>81 % (n=17)</td>
<td>77 % (n=10)</td>
<td>57 % (n=68)</td>
</tr>
<tr>
<td>2. Implied</td>
<td>14 % (n=3)</td>
<td>15 % (n=2)</td>
<td>38 % (n=45)</td>
</tr>
<tr>
<td>3. Public</td>
<td>5 % (n=1)</td>
<td>8 % (n=1)</td>
<td>5 % (n=6)</td>
</tr>
<tr>
<td>Total</td>
<td>21 %</td>
<td>13 %</td>
<td>119 %</td>
</tr>
</tbody>
</table>

Source: Records and Briefs of Cases Decided by the United States Supreme Court

Change of this nature is emergent. Its evolution is punctuated by exceptional cases of activism, but the underlying process is apparent in aggregate not anecdotal accounts. Government briefs in abortion and school prayer—public interest—cases only add to the attention these cases already receive when they reach the Supreme Court. These exceptional instances are then easily labeled as the rule rather than the exception, obscuring the real process. As the data in Table I illustrate, however, these public interest

82. See, e.g., Clegg, *supra* note 60, at 965-66.
83. From the 1984 through 1987 terms, for example, the Solicitor General filed only six such briefs, five percent of government *amicus* briefs filed in cases considered on the merits during the period. Those *amicus* briefs include: Karcher v. May, 484 U.S. 72 (1987) (No. 85-1531) (state statute requiring “moment of silence” in public schools); Hobbie v. Unemployment Appeals Comm., 480 U.S. 136 (1987) (No. 85-939) (free exercise clause and state unemployment statute); Bethel School Dist. v. Fraser, 478 U.S. 675 (1986) (No. 84-1667) (application of the first amendment in schools); *Thornburgh*, 476 U.S. at 747 (Nos. 84-495, 84-1379) (constitutional validity of abortion); *Jaffree*, 472 U.S. at 38 (Nos. 83-812, 83-929) (state statute mandating a minute of public school day reserved for "silent prayer"); *T.L.O.*, 469 U.S. at 325 (No. 83-712) (constitutional requirements for searches on school grounds).
briefs belie the importance of the expansion of somewhat less adventure-
some, but far more numerous implied interest briefs.

B. The Court's Response

The government is interested in winning its arguments before the Court, and to a lesser extent in using the Court as a forum for its views. In either case the Court's respect for the Solicitor General's Office is of great importance to the government. Evaluating the Supreme Court's response to changes in the Solicitor General's Office, however, is a difficult task. Only in rare instances does the Court react explicitly to a particular amicus brief of the government. Even where members of the Court have allegedly spoken about the changes in the Solicitor General's Office, denials have quickly followed.

Aside from the Solicitor General's win/loss record, which conflates too many factors to be useful here, there are two empirical ways the Court reacts to the Solicitor General. The first is the number of invitations the Court extends to the government to file amicus briefs, and the second is the Court's response to government motions to participate in oral argument as an amicus.

1. Invitations to File Amicus Briefs

Other than granting certiorari, invitations to file an amicus brief are the only part of the Court's order list that require less than a majority vote. By standing informal agreement, the votes of three Justices are required to invite an amicus brief. Yet this "rule of three" seems unnecessary as the Justices can ignore any amicus brief, and seem willing to allow any colorable amici to file a brief. The rule is significant, however, in that almost all of the Court's amicus invitations are extended to the Solicitor General.

84. The Court does occasionally react negatively to the Solicitor General's legal analysis. See, e.g., Thornburg v. Gingles, 478 U.S. 30, 55 (1986) ("The United States . . . isolates a single line in the court's opinion and identifies it as the court's complete test . . . . We read the District Court opinion differently.").


85. Caplan alleges that a majority of the Court (Brennan, Marshall, Blackmun, Powell, and Stevens, JJ.) told him they felt "sadness and distress" about the changes in the Solicitor General's Office. L. CAPLAN, supra note 5, at 265. After their retirements, both Burger and Powell publicly denied any such sentiment. Lauber, supra note 11, at 22.

86. Letter from Chief Justice Rehnquist to author (Mar. 17, 1989).

87. See supra note 36 and accompanying text.

As I have suggested above, there are several reasons why the Court conceives of the Solicitor General as different from other members of its bar: The Solicitor General assists the Court by screening government appeals, answering requests for briefs and encouraging legal craftsmanship. Yet the Solicitor General operates with a small staff and handles a large case load. If there were no minimal procedural hurdle to inviting a brief the Court might find itself with a "tragedy of the commons" problem. The "rule of three" safeguards the value of the Solicitor General's work as a common resource by preventing any single Justice from soliciting a government brief simply on a perception that the Solicitor General supports the Justice's position in a particular case.

Implicit in this argument is the utility of the Solicitor General's work. Not only do the Solicitor General's briefs generally display careful reasoning, but they putatively represent the opinion of the United States government. The clarity of the Solicitor General's voice and the significance of his client lend the Solicitor General's arguments a certain power in the Court's dialogue. The government's brief may buttress a party's weak presentation, provide appropriate support for decision of an issue not argued by the parties, or simply represent the majoritarian viewpoint. The function, if not the intent, of the rule of three is to limit the use of the government's influence, especially where the federal interest is turbid.

Regardless of its intended purpose, the rule of three ensures that amicus invitations are extended only in the types of cases where the Court values the government's opinion. The data presented in Table II show the relationship between the number of amicus invitations and the strength of the federal interest for the cases in each time period. As the Table illustrates, the Court is much more solicitous of the government's views when the federal interest is direct and unqualified. Where that interest is implied or public, the Court shows great reluctance in asking the Solicitor General to file an amicus brief.

89. See supra notes 44-49 and accompanying text.

90. A situation which creates a "tragedy of the commons" (also known as a "prisoner's dilemma"), is one in which individuals acting in their individual self-interest will achieve a sub-optimal result for the group as a whole. See Hardin, The Tragedy of the Commons, 162 Sci. 1243 (1968); see also R. Hardin, COLLECTIVE ACTION (1982).

91. Other institutional litigants such as the NAACP Legal Defense Fund or the American Medical Association are also theoretically susceptible to overuse. Their interests and their usefulness to the Court, however, are so much more narrow than the interests of the federal government that the problem is unlikely to occur.

92. The government's amicus briefing of the constitutional issues in Robinson v. Florida, 378 U.S. 153 (1964), was significant enough to provoke an exceedingly rare dissent from the Court's invitation to the Solicitor General. Robinson v. Florida, 375 U.S. 918 (1963) (Black, Clark, Harlan and White, JJ., dissenting).
### Table II. Supreme Court Invitations to the Solicitor General

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>All</td>
<td>Inv.</td>
<td>All</td>
</tr>
<tr>
<td>1. Direct</td>
<td>17</td>
<td>2</td>
<td>10</td>
</tr>
<tr>
<td>2. Implied</td>
<td>3</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>3. Public</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>21</td>
<td>4</td>
<td>13</td>
</tr>
</tbody>
</table>

Source: *Records and Briefs of Cases Decided by the United States Supreme Court*

A notable exception to this pattern was the Court's request that the federal government file an *amicus* brief in the 1954 case *Brown v. Board of Education*. Strong public sentiment about racial integration in the schools and the incumbent questions about the difficulty implementing integration and the costs to the Court's institutional legitimacy encouraged the Court to postpone overturning *Plessy v. Ferguson* for some time. Newly appointed Chief Justice Warren wanted to ensure that *Brown* would be a unanimous decision by the Court, and that the decision would be supported by the executive who would have to enforce it. The Court's invitation to the Solicitor General was designed to secure this support, and was delayed until the Court was assured the government's brief would favor integration. The Court wanted to avoid making the decision more of a "hot political issue" and further to ensure that "both the present and former Presidents of the United States... [were] publicly on record as having urged the Court to take the position it [did]."

*Brown* was a special case, a rare instance where the Court encouraged the government to file an *amicus* brief in the public interest. The government's views in *Brown* were important to the Court not because it needed help with the legal task, but because it needed help with the political task. In *Brown* the Court exploited its own importance as a forum by inviting the government to file a brief supporting integration. For these reasons, *Brown* is a special sort of public interest case. Although the Court must anticipate that its invitations to the government in public interest cases will blur the proper boundaries of federal interest, it may not welcome regular uninvited public interest briefs from the government.

---

93. 347 U.S. at 483.
94. 163 U.S. 537 (1896).
96. *Id.* at 832.
97. *Id.*
2. Government Participation in Oral Arguments

An additional way in which the Court indicates its regard for the Solicitor General's Office is its response to motions by the Solicitor General to participate in oral argument as an amicus. Rule 38.7, which provides for oral argument by amici, warns that "[a]ny such motion will be granted only in the most extraordinary circumstances," but the Court has generally been more receptive to government requests to participate than to similar requests by private parties. The Rule's stiff language is proportional to the greater burden that oral argument places on the Court's resources. While the Justices may ignore an amicus brief, they must attend oral argument. Thus a majority vote, rather than the rule of three, is necessary to approve an amicus' request for oral argument.

The Supreme Court rules were changed in 1954 to allow oral argument by amici. Because amicus participation in oral arguments has only recently become commonplace, however, there is little longitudinal data. If the Solicitor General's participation in public interest cases has precipitated a loss of prestige for the Office one might expect the Court to refuse motions to participate in oral arguments where the substance of the case does not implicate a direct federal interest. The data in Table III, however, indicate that the Court has not responded this way. In fact, the Court is quite willing to allow the Solicitor General to participate in oral arguments, granting the great majority of such motions.

Table III. Government Motions to Participate as Amicus in Oral Argument

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Granted</td>
<td>Denied</td>
</tr>
<tr>
<td>1. Direct</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>2. Implied</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>3. Public</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>3</td>
<td>0</td>
</tr>
</tbody>
</table>

Source: Records and Briefs of Cases Decided by the United States Supreme Court

99. See R. Stern, E. Gressman & S. Shapiro, supra note 53, at 573. "An amicus other than the Solicitor General is seldom permitted to participate in oral argument, and then only by special leave of Court and usually after obtaining the consent of the party supported by the amicus to share some of that party's argument time." Id.
Table III shows, as Table II did, that the Solicitor General has not overwhelmed the Court with adventursome claims of federal interest. Of the three public interest cases the government asked to participate in during the 1984 through 1987 Supreme Court terms, the Court allowed it to do so in only *Wallace v. Jaffree.*101 In *Jaffree,* which involved an Alabama statute providing public school time for a moment of silent prayer, the Court questioned the Alabama attorney general only about Alabama state law and the statute's legislative history. The Court then questioned Deputy Solicitor General Bator about the statute's constitutionality. Neither the Court nor Mr. Bator raised the appropriateness of the government's presence. Instead, the Court used Mr. Bator as a constitutional expert, having him address the central issue, the statute's constitutionality. Although the Court resolved the issue against him, the colloquy left the impression that the Court viewed Mr. Bator's presence as helpful, a serious contribution to the Court's consideration of the issue.102

Again, these data do not support the theory that changes in the Solicitor General's *amicus* filings have precipitated any hostility from the Court. Rather, the Court appears to be quite selective about granting the Solicitor General's requests to participate in oral arguments as an *amicus* at all levels of federal interest.

**CONCLUSION**

The data show two trends rather strongly. First, the Solicitor General's Office has become gradually more activist, expanding the number of cases it enters where the federal interest is not direct. Second, the data show the Court has not reacted to these changes in any forceful way. Rather, the Court continues to allow the Solicitor General great latitude to file *amicus* briefs, while relying on the Solicitor General's work only when it is to the Court's advantage to do so.

The Court has not lost faith in the Solicitor General's integrity. The relationship between the Court and the government has too much inherent

101. 472 U.S. at 38. The Court denied the government's motion to participate in oral arguments in *Thornburgh,* 476 U.S. at 747, and *Fraser,* 478 U.S. at 675.
102. The oral argument in *Jaffree* contrasts markedly with that in *Bender,* 475 U.S. at 534, where the government was also an *amicus.* The issue in *Bender* was the use of public school facilities by student religious groups. The federal interest was the constitutionality of the Equal Access Act. Four Justices (Brennan, Marshall, Blackmun and Stevens, JJ.) had filed an unprecedented dissent from the order granting the government's motion to participate in oral argument. *Bender v. Williamsport Area School Dist.*, 472 U.S. 1015 (1985). Solicitor General Fried began his argument by addressing the strength of the federal interest in the *Bender* case and spent much of the rest of his time reiterating that interest. *The Complete Oral Arguments of the Supreme Court of the United States: 1985 Term,* 18-24 (microfiche).
stability—is too symbiotic—to be pushed into one of mutual distrust by a few politically motivated amicus briefs. If members of the Court are experiencing "sadness and distress"103 about the expansion of the government’s participation as amicus, there is no indication of it in the record of their rulings regarding the Solicitor General.104 The Court continues to invite the Solicitor General to file amicus briefs in a growing number of cases, and given the government’s success rate on the merits,105 it appears that these briefs are given serious consideration. The Court’s rulings on the government’s motions to participate in oral argument indicate its willingness to listen to the government’s views, even where the federal interest is not clear and direct; where the Court finds the Solicitor General’s participation in oral argument inappropriate or uninformative it has been quite willing to deny his motion. As Solicitor General Rex Lee said when asked about the appropriateness of a government brief, “at the end of the day, the ultimate decision is still for the courts.”106

The Solicitor General remains an important contributor to the development of the law; the government participates in many of the most important cases before the Court, and the Court respects its arguments. This is so even though there is little question that the Solicitor General has become more activist. The contemporary Solicitor General files more amicus briefs than did his predecessors, and is more willing to file in cases where the government’s interest is attenuated. The tension in the Solicitor General’s Office between the President and the Supreme Court is increasingly being resolved in favor of the President.

Yet this political resolution leaves the Office’s institutional structure intact. The Solicitor General still protects the Court’s docket by refusing to appeal the vast majority of the government’s losses below, and still maintains a standard of quality in his work product. The Court minimizes the effects of change in the Solicitor General’s view of the federal interest by distinguishing those briefs which are statements of a social or political agenda from those which have a direct federal interest. Where the Court finds the government’s views pertinent, it invites a brief. Where it does not, it is free to ignore any brief the government may file and it may deny permission to participate in oral argument. Should the Court eventually find even ignoring the government’s amicus briefs to be onerous, it may change Supreme Court Rule 36.4 to require the Solicitor General to adhere to the consent requirement.107 Though the Solicitor General may

103. See supra note 85.
104. See supra notes 88-102 and accompanying text.
105. See supra note 50 and accompanying text.
107. Currently the Solicitor General is the only litigant not required to have the Court’s permission before filing an amicus brief. See Sup. Ct. R. 36.4.
increasingly become the President's mouthpiece, it is the Court that provides him with a stage and an audience, and it is the Court that will control his influence and indirectly his behavior.