

# THE SOLICITOR GENERAL'S CHANGING ROLE IN SUPREME COURT LITIGATION

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**Abstract:** Over the last two decades, as the Supreme Court has sharply cut back its case load, the Solicitor General has wielded the tremendous influence that comes with being the Court's most frequent and successful litigant in new ways. In this Article, the authors examine both the causes and consequences of these changes, which have diminished the Solicitor General's role at the certiorari stage and expanded it at the merits stage. They find that at the certiorari stage, when the Court is selecting its cases and setting its agenda, the Solicitor General is now seeking certiorari in so few cases—just fifteen per Term—that the Solicitor General is ceding the federal government's once-substantial influence over the Court's agenda-setting to more aggressive litigants. At the merits stage, in contrast, the Solicitor General is now participating in over three-quarters of the Court's cases, and is doing so more frequently as *amicus curiae* than as a party. The authors address concerns that, with this nearly pervasive involvement, the Solicitor General may have become too intrusive in private litigation or too partisan in cases presenting high-profile, socially controversial issues. They find, however, that solicitors general have acted within their proper constitutional role, largely confining involvement as *amicus* to cases that directly and substantially affect the federal government's institutional interests.

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## INTRODUCTION

The U.S. Solicitor General, as the U.S. Supreme Court's premier advocate, has long exerted significant influence over both the Court's case selection decisions and its substantive decisions on the merits. Over the past two decades, the Solicitor General's use of that influence has changed dramatically, moving away from the certiorari stage, where the Court sets its agenda, in favor of broader participation as *amicus curiae* at the merits stage.<sup>1</sup>

In the 1980s, when the Court's docket was brimming with cases, the Solicitor General participated vigorously (and highly successfully) at the case selection stage, seeking review in fifty cases per Term, and receiving it in over thirty.<sup>2</sup> But as the size of the Court's docket plunged from 170 cases per Term at the end of the Burger Court to just eighty per Term during the Roberts Court, the Solicitor General's office steadily and significantly scaled back the number of certiorari petitions it filed to a mere fifteen per Term.<sup>3</sup>

While the Solicitor General's role in the Court's agenda-setting process was dwindling, the office's presence in the Court's merits docket was expanding. From participating in 60% of the merits cases during the 1980s, the Solicitor General's involvement grew to over 75% in the Rehnquist and Roberts Courts.<sup>4</sup> Surprisingly, almost all of this growth occurred in cases where the federal government was not a party: over the past fifteen years, the Solicitor General has sat out only twenty cases per Term, down from about seventy in the 1980s.<sup>5</sup> As a result, the Solicitor General now participates in considerably more cases as *amicus* than as a party (reversing the proportions of the 1980s), and does so with remarkable success, supporting the winner close to 90% of the time during the early years of the Roberts Court.<sup>6</sup>

This Article looks at how the Solicitor General's participation has changed both at the certiorari and merits stages. With respect to the certiorari stage, we examine in Part II whether the Solicitor General's increasingly restrictive petitioning practices have played a role in the docket's decline, and we find strong evidence that they have had an

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<sup>1</sup> See *infra* notes 90–94, 148–155 and accompanying text.

<sup>2</sup> *Infra* notes 91–92 and accompanying text.

<sup>3</sup> *Infra* notes 90–94 and accompanying text.

<sup>4</sup> *Infra* notes 151–155 and accompanying text.

<sup>5</sup> *Infra* note 154 and accompanying text; see *infra* notes 160–162 and accompanying text.

<sup>6</sup> *Infra* note 55 and accompanying text.

independent dampening effect on the size of the Court's docket.<sup>7</sup> In addition, this Article considers why the Solicitor General's office has cut back its petitions so sharply.<sup>8</sup> We find that neither politics nor concerns about a hostile Court can adequately explain the steady downward trajectory, which occurred over the tenures of multiple solicitors general from across the political spectrum.<sup>9</sup> Instead, the pullback, at least initially, was a result of the federal government litigating fewer civil cases and winning more of them, leaving fewer candidates for review.<sup>10</sup> More recently, the decline also seems to reflect a tightening of the Solicitor General's standard for seeking review, perhaps in recognition of the Court's preference for hearing fewer cases.<sup>11</sup>

We then consider in Part III the consequences of the Solicitor General's reduced involvement at the certiorari stage, which appears to have led the Court to grant more cases brought against the federal government.<sup>12</sup> We argue that, in presenting such a limited set of options to the Court, the Solicitor General has opened the door to other, more aggressive litigants, many of whom are highly effective advocates from the emerging Supreme Court bar.<sup>13</sup> As a result, the Solicitor General's office is surrendering some of its control over the government's litigation strategy, and relinquishing its central role in the Court's agenda-setting process.

With respect to the merits stage, this Article argues the Solicitor General's influence is growing. We track the Solicitor General's increasing presence in the Court's docket, looking at how the composition of the docket changed as the size of the docket contracted, and the particular areas in which the Solicitor General has expanded the office's participation as amicus.<sup>14</sup> We then discuss the leading theories on the Solicitor General's role in the constitutional hierarchy and consider whether the Solicitor General is now too aggressive in entering cases that are only tangentially related to the federal government's institutional interests.<sup>15</sup> In particular, we respond in Part III to concerns that the Solicitor General may be intruding too freely into controversies between private parties, and that the Solicitor General may be too profligate in entering

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<sup>7</sup> See *infra* notes 88–122 and accompanying text.

<sup>8</sup> See *infra* notes 123–147 and accompanying text.

<sup>9</sup> See *infra* notes 124–130 and accompanying text.

<sup>10</sup> See *infra* notes 131–134 and accompanying text.

<sup>11</sup> See *infra* notes 135–147 and accompanying text.

<sup>12</sup> See *infra* notes 214–225 and accompanying text.

<sup>13</sup> See *infra* notes 226–231 and accompanying text.

<sup>14</sup> See *infra* notes 75–87, 148–181 and accompanying text.

<sup>15</sup> See *infra* notes 183–213, 232–295 and accompanying text.

high-profile cases which present hot-button political issues.<sup>16</sup> On both counts, we conclude that the Solicitor General has not overreached, but rather the office has largely limited its involvement to cases that directly implicate the institutional interests of the United States.

## I. THE SOLICITOR GENERAL

The Solicitor General, as the federal government's chief appellate lawyer, is the country's most influential litigator.<sup>17</sup> In recent years, the Solicitor General's involvement in the Supreme Court has changed in important ways, both at the certiorari and merits stages.<sup>18</sup> Before embarking on our discussion of these changes, we begin with a brief overview of the Solicitor General's office, describing its responsibilities, advantages, and extraordinary success in Supreme Court litigation.

### A. Responsibilities

The Solicitor General is tasked with supervising all of the government's appellate litigation.<sup>19</sup> In performing this responsibility, the office focuses on two primary functions: coordinating the government's legal strategy across the various agencies and departments, and stepping in to represent the government in cases that have reached the Supreme Court level.<sup>20</sup>

Consolidating all appellate litigation within the Solicitor General's office enables the federal government to coordinate and present a considered litigation strategy that looks beyond the immediate concerns of individual agencies to the longer-term interests of the federal government.<sup>21</sup> In a bureaucratic structure as vast as that of the United States,

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<sup>16</sup> See *infra* notes 232–293 and accompanying text.

<sup>17</sup> See 28 U.S.C. § 505 (2006). By statute, the Solicitor General is required to be “learned in the law.” *Id.* The Solicitor General is also responsible for conducting all Supreme Court litigation, determining whether the government will pursue an appeal to any appellate court, and determining whether the government will file an amicus brief or intervene in any appellate litigation. 28 C.F.R. § 0.20(a)–(c) (2008).

<sup>18</sup> *Infra* notes 70–293 and accompanying text.

<sup>19</sup> 28 C.F.R. § 0.20(b).

<sup>20</sup> See *id.* § 0.20(a)–(b).

<sup>21</sup> See Edward N. Beiser et al., *Perspectives on the Judiciary*, 39 AM. U. L. REV. 475, 480 (1990) (providing a discussion by Solicitor General Kenneth Starr on the important role that the Solicitor General plays in “bringing greater consistency to the government’s litigating positions by controlling the government’s participation in the appellate process”); Ronald S. Chamberlain, *Mixing Politics and Justice: The Office of Solicitor General*, 4 J.L. & POL. 379, 395–96 (1987) (discussing the Solicitor General’s role in providing a centralized litigation strategy); Jim Rossi, *Does the Solicitor General Advantage Thwart the Rule of Law in the Administrative State?*, 28 FLA. ST. U. L. REV. 459, 465–66 (2000) (outlining the central role

the specific litigation preferences of the individual agencies and departments often conflict with one another, or are inconsistent with the broader interests of the government as a whole.<sup>22</sup> The Solicitor General, however, is able to take a more comprehensive view, and thus pursue only those cases which present significant issues and are compatible with the government's larger goals.<sup>23</sup>

Management of the government's overall litigation strategy is tightly interwoven with the Solicitor General's other primary focus—representing the United States in the Supreme Court.<sup>24</sup> Conducting all Supreme Court litigation involves a myriad of tasks, including selecting the cases on which to seek certiorari, writing briefs at the certiorari and merits stages, responding to the justices' requests for the Solicitor Gen-

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the Solicitor General plays in litigation strategy); Seth P. Waxman, *Twins at Birth: Civil Rights and the Role of the Solicitor General*, 75 IND. L.J. 1297, 1313 (2000) ("The overarching imperative for creating the office, and the mandate under which Solicitors General have acted ever since, focused on the need to vest in one position the responsibility for ascertaining, and promoting, the interests of the United States with respect to all litigation . . ."); see also Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 256–62 (1994) (discussing the widespread belief in the value of centralization, but questioning its necessity); cf. Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. REV. 705, 706 & n.4, 720–21 (2006) (describing the Solicitor General's efforts in the formulation of a Supreme Court rule regarding unpublished opinions).

<sup>22</sup> See Linda R. Cohen & Matthew L. Spitzer, *The Government Litigant Advantage: Implications for the Law*, 28 FLA. ST. U. L. REV. 391, 402 (2000) (discussing the Solicitor General's ability to force disparate agencies to adhere to a centralized litigation strategy); see also Chamberlain, *supra* note 21, at 396–98 (discussing how the Solicitor General handles intragovernmental conflict).

<sup>23</sup> The justices have noted the value to both the Court and the government of concentrating litigation authority in the Solicitor General: "[A]n individual Government agency necessarily has a more parochial view of the interest of the Government in litigation than does the Solicitor General's office, with its broader view of litigation in which the Government is involved." *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 96 (1994); see also *Andres v. United States*, 333 U.S. 740, 765 n.9 (1947) (Frankfurter, J., concurring) (noting that the "various Governmental agencies are apt to see decisions adverse to them from the point of view of their limited preoccupation" but the Solicitor General can "take a comprehensive view in determining when certiorari should be sought"). The Solicitor General approves only a fraction of agency requests to appeal adverse trial-level decisions. See Cohen & Spitzer, *supra* note 22, at 401 (estimating that the Solicitor General approves approximately one-quarter of agency requests to appeal to the circuit courts of appeal). The Solicitor General authorizes an even smaller fraction of requests to petition for certiorari to the Supreme Court. See *infra* note 27 (discussing the percentage of cases in which the Solicitor General seeks Supreme Court review).

<sup>24</sup> *NRA Political Victory Fund*, 513 U.S. at 88–89. In 1994 in *FEC v. NRA Political Victory Fund*, the Supreme Court held that the FEC could not petition for certiorari without the Solicitor General's authorization, reaffirming that the authority to conduct the federal government's litigation in the Supreme Court rests exclusively with the Solicitor General. *Id.*

eral's views on whether the Court should grant review in certain non-government cases, deciding whether to participate as *amicus curiae*, and presenting oral arguments.<sup>25</sup> Two of these tasks in particular—the selection of cases on which to seek certiorari and the decision of which cases to enter as *amicus*—are highly discretionary, and thus effectively enable the Solicitor General to set the government's legal agenda.<sup>26</sup>

At the certiorari stage, the Solicitor General employs a rigorous screening process, petitioning for Supreme Court review in only a small fraction of the cases that the government loses below.<sup>27</sup> In determining which cases to pursue, the Solicitor General relies on the Supreme Court's own standards, which focus on the presence of a conflict between the lower courts and the importance of the issue.<sup>28</sup> The Court's

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<sup>25</sup> See REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 12–13 (1992) (listing the Solicitor General's responsibilities in managing the federal government's Supreme Court litigation); Karen O'Connor, *The Amicus Curiae Role of the U.S. Solicitor General in Supreme Court Litigation*, 66 *JUDICATURE* 256, 259–60 (1983) (noting the Solicitor General screens prospective cases for certiorari, files certiorari petitions, submits briefs, and acts as *amicus curiae*).

<sup>26</sup> See O'Connor, *supra* note 25, at 259–60.

<sup>27</sup> See LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 6 (1987) (reporting that Justice Potter Stewart had said that the justices “regarded the SG as a ‘traffic cop,’ acting to control the flow of cases to the Court”); SALOKAR, *supra* note 25, at 18 (indicating that, on average, the Solicitor General sought review in fewer than thirteen percent of eligible cases from 1952–1962, and in fewer than fifty-three cases per Term from 1959–1989); *id.* at 160 (noting that in the 1975 Term, Solicitor General Robert H. Bork sought review in only thirty-two of 606 cases); Rex E. Lee, *Lawyeering for the Government: Politics, Polemics & Principle*, 47 *OHIO ST. L.J.* 595, 598 (1986) (estimating that the Solicitor General files petitions in only about one-sixth of the cases recommended by cabinet heads, U.S. attorneys, assistant attorneys general, and general counsels from departments and agencies); *cf.* Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 *GEO. L.J.* 1487, 1496 n.45 (2008) (noting that figures reflecting the number of petitions for certiorari the Solicitor General files are misleadingly high, as many petitions are filed simply to allow a case to be held pending decision on a related case, and are not true requests for plenary review).

<sup>28</sup> See SUP. CT. R. 10(a)–(c). The full text of the rule states:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

standards, however, are highly amorphous, giving the justices virtually unfettered discretion and litigants limited guidance.<sup>29</sup>

Nonetheless, former solicitors general have identified key factors that shape their decisions on whether and when to seek review.<sup>30</sup> First among these factors is the presence of a true conflict between the U.S. courts of appeals.<sup>31</sup> In addition, the Solicitor General looks for “important” cases, based on the degree to which the adverse ruling limits executive power, undermines enforcement of federal legislation, or restricts the federal government’s power regarding the states or individuals.<sup>32</sup>

Beyond these core factors, the Solicitor General considers whether the facts of a particular case present the issues and the government’s position favorably, how the case will impact the long-term development of the law, whether the subject area will be of interest to the Court, and

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

*Id.*

<sup>29</sup> See H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 221 (1991) (“Fundamentally, the definition of ‘certworthy’ is tautological; a case is certworthy because four justices say it is certworthy.”); Sanford Levinson, *Strategy, Jurisprudence, and Certiorari*, 79 VA. L. REV. 717, 736 (1993) (reviewing PERRY, *supra*) (“[I]t seems difficult indeed to read the Court’s own Rule 10 as anything other than an invitation to balancing, to the making of ‘political choice(s)’ about what is ‘important’ enough.”).

<sup>30</sup> See SALOKAR, *supra* note 25, at 110–15 (outlining the major criteria for case selection, based on conversations with former solicitors general and their staff).

<sup>31</sup> See *id.* at 110. The Solicitor General’s reliance on this factor is unsurprising, as the presence of a conflict markedly improves the chances that the Court will take the case. See, e.g., Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1120 (1988) (“Whenever actual conflict was present, the likelihood that certiorari was granted jumped dramatically.”); David R. Stras, *The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 981–83 (2007) (reviewing TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* (2006) and ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS’ APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* (2006)) (showing that approximately seventy percent of cases granted in the 2003–2005 Terms involved a conflict among the lower courts).

<sup>32</sup> See SALOKAR, *supra* note 25, at 111–12 (identifying criteria that solicitors general use to determine importance); Chamberlain, *supra* note 21, at 392–93 (identifying criteria solicitors general use when deciding whether to seek certiorari).

whether the government will win on the merits.<sup>33</sup> The Solicitor General also must prioritize, bringing only the most important cases to the Court. By carefully limiting the number of petitions filed, the Solicitor General's office not only safeguards its reputation with the Court, but also avoids ceding to the justices control over which cases from the federal government the Court will hear.<sup>34</sup>

Political considerations also influence the Solicitor General's decision-making process. Although solicitors general frequently claim independence from politics, they are appointed by and serve at the pleasure of the President.<sup>35</sup> They are advocates for the policies and priorities of the administrations in which they serve, and ideology thus inevitably plays a role as they set the government's litigation agenda, select cases, and frame arguments.<sup>36</sup>

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<sup>33</sup> See SALOKAR, *supra* note 25, at 112–13, 160; Chamberlain, *supra* note 21, at 393 (“[T]he most regretful and damaging mistake a solicitor general can make regarding his certiorari screening process is to ‘risk an important legal question, on a poor case that has bad facts.’”); Cohen & Spitzer, *supra* note 22, at 402–05 (noting that the government can engage in “administrative nonacquiescence”—refusing to change its behavior more generally—if it loses in a lower court, which dramatically lowers the cost of not appealing an adverse decision, whereas the cost of appealing and losing a case in the Supreme Court is especially high for the government).

<sup>34</sup> See SALOKAR, *supra* note 25, at 114–15 (noting that solicitors general must set priorities so as not to overburden the Court or undermine the Solicitor General's reputation with it); Lee, *supra* note 27, at 598–99 (opining that, if the Solicitor General did not sharply restrict the petitions for certiorari he files, he would enable the Court, rather than the administration, to decide which cases were comparatively most important); *cf.* Cohen & Spitzer, *supra* note 22, at 396, 421 (contending that the Solicitor General's screening processes are so selective that it changes the Supreme Court's “menu of cases,” making unavailable to the Court cases it would like to hear); *id.* at 414 (estimating that the Solicitor General may be withholding twenty percent of the cases that the Supreme Court would like to review).

<sup>35</sup> See SALOKAR, *supra* note 25, at 114 (opining that the “myth” that law can be separate from politics has led to “claims of independence by former solicitors general”); Chamberlain, *supra* note 21, at 413 (noting “the Solicitor General has a public aura of uniqueness and neutrality,” but contending that the Solicitor General's office has the same “mixture of law and politics” as the Department of Justice does generally); *id.* at 418 (“The extent of neutrality and autonomy exercised by the solicitor general is both exaggerated and illusory.”); Kristen A. Norman-Major, *The Solicitor General: Executive Policy Agendas and the Court*, 57 ALB. L. REV. 1081, 1086 (1994) (“[T]he Solicitor General is a political position, although the extent to which the work is politicized is largely controlled by the administration under which the Solicitor General serves.”).

<sup>36</sup> See Devins, *supra* note 21, at 318 (noting that in selecting cases, the “Solicitor General must also balance concerns far removed from the standard criteria for cert-worthiness, including policy objectives of the Department of Justice and the White House”); John O. McGinnis, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799, 802–08 (1992) (reviewing CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* (1991)) (arguing that, under the Constitution, the Solicitor General's role is to advocate the President's posi-

The role of ideology is perhaps most evident in the Solicitor General's decisions on whether to participate in a case as *amicus curiae*.<sup>37</sup> The Solicitor General has great leeway to enter cases in which the government is not a party; indeed, the Supreme Court's procedures facilitate, and even encourage, the Solicitor General's doing so. The Court's rules specifically exempt the Solicitor General from the standard requirement that a prospective *amicus* obtain the consent of the parties or the Court to file a brief.<sup>38</sup> And further, although the Court rarely grants an *amicus*'s request to participate in oral argument, it routinely permits the Solicitor General to do so.<sup>39</sup>

In addition, at the petition stage, the Supreme Court frequently invites the Solicitor General to provide views on whether the Court should grant *certiorari* (a privilege extended to no other litigant),<sup>40</sup>

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tions); *see also infra* notes 183–213 and accompanying text (discussing the role of the Solicitor General).

<sup>37</sup> *See* Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 697–721 (1963) (tracing the history of the *amicus* brief and its increasingly partisan character).

<sup>38</sup> *See* SUP. CT. R. 37.4 (exempting the Solicitor General, as well as state and local governmental entities, from having to obtain leave to file an *amicus* brief); O'Connor, *supra* note 25, at 260 (noting the same); James L. Cooper, Note, *The Solicitor General and the Evolution of Activism*, 65 IND. L.J. 675, 680 (1990) (noting that the Solicitor General enjoys this special advantage). This privilege is not all that significant as a practical matter, however, because the Supreme Court grants virtually every motion for leave to file an *amicus* brief. *See* Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 762 & n.58 (2000) (finding that the Court denied only one of 115 such motions in the 1990 Term).

<sup>39</sup> *See* Lazarus, *supra* note 27, at 1493–94 & n.32 (noting that the Court had granted the Solicitor General's request to participate in oral argument as *amicus* seventy-nine out of eighty times during the 2005 and 2006 Terms); Cooper, *supra* note 38, at 693 (showing that the Court grants the Solicitor General's request for oral argument time as *amicus* in the great majority of cases).

<sup>40</sup> The Court periodically "calls for the views of the Solicitor General" on whether to review cases in which the United States is not a party. *See* Ruth Bader Ginsburg, *Workways of the Supreme Court*, 25 T. JEFFERSON L. REV. 517, 519 (2003) (opining that the Solicitor General "acts as a true friend of the Court" in this regard); Office of the Solicitor General Workload Report Compilation, 1984 Term Through 2008 Term 4–13 (Jul. 6, 2009) [hereinafter OSG Workload Reports] (unpublished data compilation) (on file with authors) (providing data on invitations received in each of the 1986–2008 Terms—ranging from a high of forty-three in the early 1990s to a low of eleven in the late 1990s—and the total number of *amicus* briefs filed at the petition stage). Most cases in which the Court takes this step are civil cases involving complex statutory or regulatory schemes. *See* David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 245, 280–81 (2009) (providing data on the Court's practices and examples of its inviting the Solicitor General's views in regulatory areas "involving complex regulatory regimes," including antitrust, intellectual property, and ERISA). The Solicitor General invariably files a brief in response to the Court's invitation both at the petition

and then generally follows the Solicitor General's recommendation.<sup>41</sup> At this stage, the Solicitor General's office typically comes in as amicus only in response to such an invitation, although it occasionally participates as amicus without invitation.<sup>42</sup>

At the merits stage, however, the Solicitor General exercises much greater discretion over whether to enter cases in which the government is not a party, and it is here that the office can "play partisan hardball."<sup>43</sup> Although most cases the Solicitor General enters involve legal issues that directly affect federal interests,<sup>44</sup> the office can, and periodically does, participate in cases raising issues of social policy independent of any direct federal interest.<sup>45</sup> In determining whether to participate as amicus, the Solicitor General considers whether presentation of the federal government's views will be valuable to the Court, whether there are significant federal law enforcement interests at stake, and whether the case

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stage and, if the case is granted, at the merits stage. See SALOKAR, *supra* note 25, at 142–45 (discussing the Court's practice of inviting the Solicitor General to provide views on cases at the certiorari stage). The Court may also invite the Solicitor General to participate at the merits stage, but does so rarely. See EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 738 (9th ed. 2007).

<sup>41</sup> See Thompson & Wachtell, *supra* note 40, at 276 (finding that in the 1998–2004 Terms, after calling for the Solicitor General's views, the Court followed his recommendation to grant 75% of the time, and followed his recommendation to deny 80% of the time); see also *infra* note 51 (providing additional data).

<sup>42</sup> See OSG Workload Reports, *supra* note 40, at 4–5 (showing that in the nine Terms from 1999 to 2008, 177 of the 187 amicus briefs that the Solicitor General filed at the petition stage were at the invitation of the Court). In the mid-1980s, however, the Solicitor General more frequently joined as amicus at the petition stage without an invitation from the Court. See *id.* at 9–12 (showing that in the 1986–1988 Terms, the Court invited the Solicitor General's views in an average of thirty cases per Term, and the Solicitor General filed amicus petitions in an average of thirty-five cases per Term).

<sup>43</sup> See SALOKAR, *supra* note 25, at 166. Professor Rebecca Mae Salokar has demonstrated significant partisan differences, based on Solicitor General and administration, in individual rights case amicus filings. See *id.* at 166–73.

<sup>44</sup> See Lee, *supra* note 27, at 599 (providing examples of cases directly implicating federal interests, including Title VII cases, antitrust cases, securities cases, voting cases, and criminal cases); Cooper, *supra* note 38, at 686–90 (showing that, during the mid-1930s, mid-1950s, and mid-1980s, the Solicitor General filed the vast majority of the office's amicus briefs in cases involving either (1) the interpretation of federal codes or (2) a state issue that might affect a complementary federal issue (under, for example, the Fourth or Fifth Amendments to the Constitution)).

<sup>45</sup> See Lee, *supra* note 27, at 599 (providing examples of cases independent of federal law enforcement interests, including obscenity cases, abortion cases, and Religion Clause cases); Cooper, *supra* note 38, at 688–89 (noting the Solicitor General's activism in cases not involving a direct or implied federal interest and showing the level of amicus participation in such "public interest" cases during the mid-1930s, mid-1950s, and mid-1980s).

presents issues that are critical to the administration's political agenda.<sup>46</sup> The significance of this last consideration is reflected in the pattern of amicus filings under different administrations: solicitors general in Democratic administrations have submitted substantially more amicus briefs in civil rights cases (and have primarily advocated pro-rights positions), whereas solicitors general in Republican administrations have submitted substantially more amicus briefs in criminal cases (and have generally advocated tighter restrictions on defendants' rights).<sup>47</sup>

### B. *Success Rate*

When the Solicitor General decides to pursue a case, the office enjoys remarkable success. This success begins with the petition stage and continues through the merits stage, whether the United States is participating as a party or as an amicus.<sup>48</sup>

At the petition stage, the Court grants approximately 70% of the Solicitor General's petitions for certiorari, an astonishing number compared to the approximately 3% that the Court grants at the request of other litigants.<sup>49</sup> When the Solicitor General is participating as

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<sup>46</sup> See CAPLAN, *supra* note 27, at 197 (describing the standards that former Solicitor General Archibald Cox employed in deciding whether to enter a case as amicus: the case had to present an important question of constitutional law, which would affect a large number of people, and would have an impact on the government's more direct interests, in the sense that the government would be directly affected by the outcome); Lee, *supra* note 27, at 599–600 (opining that “in every single case the Court would be better off if it had the benefit of [the Solicitor General's] views,” but that the Solicitor General must carefully limit the number of cases entered, so as not to risk undermining the Solicitor General's special status with the Court); Steven Puro, *The United States as Amicus Curiae, in COURTS, LAW, AND JUDICIAL PROCESSES* 220, 221 (S. Sidney Ulmer ed., 1981) (quoting Robert Stern, former Acting Solicitor General, on the key question in deciding whether to participate as amicus: “Is this case valuable in presenting the United States' arguments to the Court?”).

<sup>47</sup> See Chamberlain, *supra* note 21, at 421–22 (“[T]he solicitor general is not neutral, and amicus participation is not an apolitical activity.”); O'Connor, *supra* note 25, at 261–64 (analyzing the amicus participation of three solicitors general—Erwin Griswold, Robert H. Bork, and Wade McCree—who served administrations from different political parties, and finding that there were significant differences in both the types of cases they pursued and the positions they took).

<sup>48</sup> See *infra* notes 49–56 and accompanying text.

<sup>49</sup> See Lazarus, *supra* note 27, at 1493 (noting the Solicitor General's certiorari petitions are granted approximately 70% of the time, versus 3–4% for others); Corey A. Ditslear, Office of the Solicitor General Participation Before the United States Supreme Court: Influences on the Decision-making Process 32 (2002) (unpublished Ph.D. dissertation, The Ohio State University) (on file with authors) (showing that in the 1950 through 1998 Terms, the Court granted the Solicitor General's request for review in 69.3% of the cases, but granted such requests for other litigants in only 2.7% of the paid cases); see also SALOKAR, *supra* note 25, at 108 (finding that the Court granted 76% of the Solicitor General's

amicus at the petition stage—almost always at the Court’s invitation<sup>50</sup>—the Court follows the Solicitor General’s recommendation to grant or deny in well over 75% of the cases.<sup>51</sup>

At the merits stage, the Solicitor General’s winning percentage is also extraordinarily high. Studies of various time periods show that when the Solicitor General represents the United States as petitioner, the Solicitor General wins 70–80% of the time (as opposed to other petitioners, who win approximately 60% of the time).<sup>52</sup> Even more im-

petitions in the 1986 Term, as compared to 4% for other litigants on the paid docket). Interestingly, the state attorneys general have also been considerably more successful at the case selection stage than the average litigant, though not as successful as the federal government. Over the 2001–2008 Terms, the Court granted 24% of the certiorari petitions filed by state attorneys general. See National Association of Attorneys General Data Compilation, Results of Cert Petitions Filed by States, 2001–2008 Terms 1–4 (unpublished data compilation) (on file with authors) (showing that over this period, the Court granted 123 of 512 petitions for certiorari filed by the states, excluding cases that were held or granted, vacated, and remanded).

<sup>50</sup> See *supra* note 42 (providing data showing that over nine recent Terms, the Solicitor General entered as amicus at the petition stage by invitation ninety-four percent of the time).

<sup>51</sup> See Lazarus, *supra* note 27, at 1494 & n.34 (noting that in the 2004 Term, the Court requested the Solicitor General’s views in eleven cases and followed his recommendation in all of them); Patricia A. Millett, “We’re Your Government and We’re Here to Help”: Obtaining Amicus Support from the Federal Government in Supreme Court Cases, 10 J. APP. PRAC. & PROCESS 209, 216 & n.20 (2009) (finding that in the 2007 Term, after seeking the views of the Solicitor General, the Court followed his recommendation in twenty-two of twenty-three cases); Thompson & Wachtell, *supra* note 40, at 276 (finding that in the 1998–2004 Terms, after calling for the Solicitor General’s views, the Court followed the office’s recommendation to grant 75% of the time, and followed his recommendation to deny 80% of the time); see also *id.* (showing that the frequency with which the Court followed the Solicitor General’s recommendation to grant jumped dramatically—to 93%—in the 2001–2004 Terms, up from 44% in the 1998–2000 Terms). The state attorneys general have also had significant success in supporting certiorari petitions as amicus. Over the 1995–2008 Terms, the Court granted 44% of the certiorari petitions supported by state attorneys general. See National Association of Attorneys General Data Compilation, Statistics on Amicus Briefs Filed by States in the U.S. Supreme Court, 1995–2008 Terms 1–4 (unpublished data compilation) (on file with authors) (showing that over this period, the Court granted 109 of 247 petitions for certiorari supported by the states as amicus).

<sup>52</sup> See SALOKAR, *supra* note 25, at 126 (showing that in the 1959–1986 Terms, the Solicitor General won 80.2% of its cases as petitioner and 54.6% as respondent); Cohen & Spitzer, *supra* note 22, at 408 & tbl.1 (finding that in the 1985–1997 Terms, the Solicitor General won 70.7% of its cases as petitioner and 59.8% as respondent; in cases where the Solicitor General did not participate at all—as party or amicus—the petitioner won 57.4% and the respondent won 42.6%); Lazarus, *supra* note 27, at 1494 (listing Solicitor General’s win rate as petitioner in recent decades as 75% versus 61% for other petitioners, and as 52% as respondent versus 35% for other respondents); Ditslear, *supra* note 49, at 34 (finding that in the 1953–1999 Terms, the Solicitor General won 75.0% of its cases as petitioner and 52.4% as respondent; in cases where the United States was not a party, the petitioner won 61.0% and the respondent won 35.4%); see also ROBERT SCIGLIANO, THE SU-

pressive, as respondent the Solicitor General wins 50–60% of the time (as opposed to other respondents, who win approximately 40% of the time).<sup>53</sup> Overall, the Solicitor General's winning percentage is 60–70% (as opposed to the 50% win rate for all litigants).<sup>54</sup>

When participating as amicus on the merits, the Solicitor General is even more successful than as a party. Overall, when the Solicitor General steps in as amicus, the office wins 70–80% of the cases, regardless of which side it supports.<sup>55</sup> And the Solicitor General's presence as amicus has a powerful effect on outcome: a petitioner's likelihood of winning increases approximately 17% when the Solicitor General comes in on its side and decreases approximately 26% when the Solicitor General supports the respondent.<sup>56</sup>

### C. *Inherent Advantages*

The Solicitor General's success is attributable to a variety of factors. Perhaps foremost is the expertise that the Solicitor General brings to each case.<sup>57</sup> The Solicitor General has a small staff of highly creden-

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PREME COURT AND THE PRESIDENCY 177–78 (1971) (showing that the United States won 62% of its cases in the nineteenth century and 64% of its cases through 1960 in the twentieth century based on a sampling of Terms at ten-year intervals).

<sup>53</sup> See *supra* note 52 and accompanying text.

<sup>54</sup> See SALOKAR, *supra* note 25, at 126 (finding that in the 1959–1986 Terms, the Solicitor General won 69.4% of its cases overall); Ditslear, *supra* note 49, at 34 (finding that in the 1953–1999 Terms, the Solicitor General won 63.4% of its cases, whether as petitioner or respondent).

<sup>55</sup> See Puro, *supra* note 46, at 224 (finding that in the 1920–1973 Terms, the Solicitor General won 72.7% of the cases it participated in as amicus); SALOKAR, *supra* note 25, at 146 (finding that in the 1959–1986 Terms, the Solicitor General won 71.9% of the cases it participated in as amicus, regardless of whether he supported the petitioner or respondent); SCIGLIANO, *supra* note 52, at 179–80 (observing that the government has an “even better record as *amicus curiae*,” and finding it won 87% of its cases as amicus in a sampling of Terms from the 1940s through the 1960s); Ryan Juliano, Note, *Policy Coordination: The Solicitor General as Amicus Curiae in the First Two Years of the Roberts Court*, 18 CORNELL J.L. & PUB. POL'Y 541, 551–57 (2009) (finding that, when the Solicitor General participated as amicus in merits cases in the first two Terms of the Roberts Court, the Court ruled in favor of the party with Solicitor General support 89% of the time).

<sup>56</sup> Kearney & Merrill, *supra* note 38, at 803–04 (using data from the 1946–1995 Terms). The Solicitor General's support gave litigants an even bigger leg up during the first two Terms of the Roberts Court. See Juliano, *supra* note 55, at 556 (finding that, in the 2005–2006 Terms, petitioners supported by the Solicitor General won 25% more often than the average petitioner, and respondents supported by the Solicitor General won 48% more often than the average respondent).

<sup>57</sup> See SCIGLIANO, *supra* note 52, at 182–83 (crediting the expertise of the Solicitor General's office as a primary reason for its success); Lazarus, *supra* note 27, at 1496–97 (contending the office's expertise is one reason for its success); cf. Kevin T. McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 POL'Y. RES. Q. 505, 522 (1998) (“[T]he solicitor gen-

tial attorneys who specialize in Supreme Court advocacy.<sup>58</sup> These attorneys are experienced in crafting petitions for certiorari, writing briefs on the merits, and presenting oral argument, all of which demand different and specific skills.<sup>59</sup> In addition, the attorneys focus exclusively on the Supreme Court, so they are intimately familiar with the views and concerns of each justice, the nuances of precedent, and the most effective way to present argument.<sup>60</sup>

With this expertise, the Solicitor General has built a reputation for excellence which has led the Court to rely on the Solicitor General to winnow out cases that do not merit the Court's attention, to present the Court with trustworthy arguments, and to provide the Court with valuable information about the practical ramifications of different decisions.<sup>61</sup> The Solicitor General carefully guards this special standing with the Court, "lest the reservoir of credibility which is the source of this special advantage be diminished."<sup>62</sup>

eral's advantage—indeed, its only advantage and a rather weak one, at that—is its command of litigation expertise.”).

<sup>58</sup> See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 142 (1996) (describing the Solicitor General's office as “superbly staffed”); SALOKAR, *supra* note 25, at 33–34 (describing the credentials of attorneys who serve in the Solicitor General's office, and opining that the “small, elite corps of lawyers who serve as deputies and assistants to the solicitor general” are the “real backbone of the office”). For decades, the Solicitor General has been assisted by a staff of just over twenty attorneys. See Office of the Solicitor General, FY 2009 Congressional Budget Submission, 1 (Jan. 30, 2008), available at <http://www.usdoj.gov/jmd/2009justification/pdf/fy09-osg.pdf> (seeking funding for twenty-two attorney positions); Lee, *supra* note 27, at 596 (referring to the Solicitor General's office in the early 1980s as a “little twenty-three member law firm”).

<sup>59</sup> See SCIGLIANO, *supra* note 52, at 182–83 (discussing the quality and experience of the Solicitor General's staff in the finer points of Supreme Court advocacy); Chamberlain, *supra* note 21, at 405 (quoting Solicitor General Fried as saying, “our work is more expert . . .”).

<sup>60</sup> See Lazarus, *supra* note 27, at 1496–97 (discussing the specialization and expertise of the Solicitor General's staff).

<sup>61</sup> See SCIGLIANO, *supra* note 52, at 183–84 (discussing the Solicitor General's role in helping the Court manage its caseload); David A. Strauss, *The Solicitor General and the Interests of the United States*, 61 *LAW & CONTEMP. PROBS.* 165, 172 (1998) (discussing the Solicitor General's importance in providing “information about the effects of legal rules and decisions in the world”).

<sup>62</sup> Lee, *supra* note 27, at 597 (arguing that the Solicitor General must use the office's adversarial advantages “with discretion, with discrimination, and with sensitivity”); see also Strauss, *supra* note 61, at 172 (noting that the “Office's reputation with the Justices, and the Court's image of the Office, are very important both to the Office's ability to do its job for the Executive Branch and to the functioning of the government in general”); *infra* notes 263–266, 286–291 and accompanying text (discussing the debate over how political the Solicitor General can be without endangering the office's elevated status with the Court).

The Solicitor General is, in fact, the quintessential repeat player, and reaps all of the advantages that flow from that status.<sup>63</sup> The Solicitor General can be, and is, highly selective about which cases to take to the Court, and thus is able to sidestep many cases with messy facts, procedural problems, or legal issues that the justices would likely greet unfavorably at the certiorari or merits stages.<sup>64</sup> The Solicitor General's established reputation and enhanced credibility cause justices and their clerks to rely heavily on the Solicitor General's briefs.<sup>65</sup> The Solicitor General's central role in managing the federal government's litigation strategy enables the office to pursue cases which will produce long-term benefits (such as procedural changes) rather than focusing on short-term outcomes.<sup>66</sup> And to top it off, the Solicitor General operates without the financial constraints that limit most private litigants.<sup>67</sup>

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<sup>63</sup> See Cohen & Spitzer, *supra* note 22, at 405–06 (explaining the Solicitor General's "repeat player" benefits); Lazarus, *supra* note 27, at 1494–97 (discussing the same); Rossi, *supra* note 21, at 463 (discussing the same); Cooper, *supra* note 38, at 683–84 (discussing the same); see also Paul M. Collins Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC'Y REV. 807, 822–23 (2004) (using statistical analysis to show that the Solicitor General's advantages as a repeat player benefit the party that he or she supports as amicus). See generally Mark Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) reprinted (with corrections) in LAW AND SOCIETY, 165–230 (R. Cotterrell ed., 1994) (describing the advantages of repeat players, including minimizing losses and playing for rules instead of outcomes).

<sup>64</sup> See SALOKAR, *supra* note 25, at 108 (noting that the Solicitor General's selectivity in petitioning for certiorari contributes to its high success rate at the petition stage); Cohen & Spitzer, *supra* note 22, at 395 (noting the same); *supra* notes 27–34 and accompanying text (discussing the Solicitor General's rigorous screening process); see also SCIGLIANO, *supra* note 52, at 185–92 (contending that the Solicitor General's pursuit of cases in which the government position is doctrinally compatible with the Court's own preferences is the most significant reason for the Solicitor General's success at the merits stage); *id.* at 192–93 (arguing that the Solicitor General is even more successful when participating as amicus because there is greater flexibility to align with the side that is ideologically in sync with the Court).

<sup>65</sup> The Court's rules require that the Solicitor General submit briefs in a unique color (gray), which enables the justices and their law clerks to easily find and read them. SUP. CT. R. 33(e); see also Cooper, *supra* note 38, at 684 (suggesting that the Court's "inability to give exhaustive consideration to each petition for review encourages it to use authorship as a 'quality cue,'" and that "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").

<sup>66</sup> See Lazarus, *supra* note 27, at 1495–96 (discussing the Solicitor General's ability to craft a litigation strategy in light of its long-term interests, without the constraint of pleasing a particular client in a particular case); Cooper, *supra* note 38, at 683 n.51 (discussing how the Solicitor General is able to "play for rules affecting litigation procedure").

<sup>67</sup> See SALOKAR, *supra* note 25, at 4 (noting that the federal government can litigate over any issue, regardless of the amount in dispute in a particular case).

Finally, and more generally, the Supreme Court, like the Solicitor General, represents a branch of government, and although the two branches serve as a check on one another, they nonetheless have common institutional interests.<sup>68</sup> The Court shares the executive's concern that government must be able to function from a practical standpoint, and both are concerned with effective enforcement of the law.<sup>69</sup> This pro-government inclination also operates in the Solicitor General's favor.

## II. THE SOLICITOR GENERAL'S EXPANDING ROLE IN THE COURT'S DECLINING DOCKET

In recent years, the Solicitor General's participation in the Supreme Court's docket has become nearly pervasive. In the mid-1980s, the Solicitor General was participating in approximately sixty percent of the Court's merits cases, either as a party or as an amicus.<sup>70</sup> Over the next decade, the Solicitor General's office sharply curtailed the number of requests for review it filed at the certiorari stage, but stayed very active as amicus at the merits stage.<sup>71</sup> As a result, the Solicitor General has been participating in seventy-five percent of the merits cases since the mid-1990s, though increasingly in cases where the government itself is not a party.<sup>72</sup>

This expansion of the Solicitor General's presence in merits cases occurred as the Court's docket was undergoing a dramatic decline.<sup>73</sup> In the Sections that follow, we discuss the key reasons for the docket's decline, the Solicitor General's role in causing the decline, and the decline's role in magnifying the Solicitor General's presence in the

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<sup>68</sup> See SCIGLIANO, *supra* note 52, at 182 (noting that certain factors "draw the two branches toward each other; the consequence of this tendency is to incline the Supreme Court somewhat toward the position of the executive in litigation"); Strauss, *supra* note 61, at 172 ("[T]he Court has a significant community of interests with the institutional agenda of the federal government, including the Solicitor General's Office.").

<sup>69</sup> See SCIGLIANO, *supra* note 52, at 182 (noting that the two branches share "a rather similar governmental perspective, in that the power they exercise is generally concerned with the execution or enforcement of law"); Strauss, *supra* note 61, at 172 ("The Court does not want to see the government unable to perform its legitimate functions."). The considerable success that the states have enjoyed at the certiorari stage, both as petitioner and as amicus, underscores the influence of this shared governmental view. See *supra* notes 49–51 (providing data on the states' success at the certiorari stage).

<sup>70</sup> See Office of the Solicitor General Annual Report Table III Compilation, 1985 Term Through 1989 Term [hereinafter OSG Annual Reports, Table III] (unpublished data compilation) (on file with authors) (classifying Supreme Court cases argued or decided on the merits).

<sup>71</sup> See *id.* (1990–2008 Terms).

<sup>72</sup> See *id.* (1992–2008 Terms).

<sup>73</sup> See *infra* notes 75–87 and accompanying text.

docket. Relying on data from the Solicitor General's office,<sup>74</sup> we look at the Court's docket over four periods: (1) the 1984 Term through the 1988 Term, when the docket was at its peak (which we shorthand the "mid-1980s"); (2) the 1989 Term through the 1993 Term, when the docket was in freefall (the "transition period"); (3) the 1994 Term through the 2004 Term, when there were no personnel changes and the docket size stabilized (the "latter Rehnquist Court"); and (4) the 2005 Term through the 2008 Term, when Chief Justice Roberts, and then Justice Alito, came aboard and the docket size decreased a bit further (the "Roberts Court").

### A. *The Supreme Court's Declining Docket*

During the 1970s and most of the 1980s, the Supreme Court's plenary docket hovered around a dependable, if unwieldy, 170 cases per Term.<sup>75</sup> By the end of the 1980s, however, the size of the docket began to decline, and then did so significantly through the first half of the 1990s.<sup>76</sup> At that point, the Court's docket stabilized at a mere ninety cases per Term, and it has shrunk to approximately eighty cases in the first four years of the Roberts Court.<sup>77</sup>

In an earlier article, we examined the causes of this precipitous drop in the Court's caseload.<sup>78</sup> We concluded that, despite the variety

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<sup>74</sup> The Solicitor General's office tracks its activities in two reports: the OSG Workload Report (which provides data from the 1984 Term through the 2008 Term), and the OSG Annual Report (which provides data from the 1985 Term through the 2008 Term). *See supra* notes 40, 77.

<sup>75</sup> Throughout most of the 1970s and 1980s, the Court decided an average of 169 cases per Term. *See* LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 81 tbls.2-8 (4th ed. 2007) (providing data on cases disposed of by signed opinion and per curiam opinions after oral argument from 1970-1988); OSG Workload Reports, *supra* note 40, at 16 (providing data on number of cases decided on the merits from 1984-1988). The number of cases on the Court's plenary docket is reported in two ways: (1) by number of signed opinions and per curiam opinions following oral argument; and (2) the number of cases decided by signed opinion and per curiam opinions following oral argument. *Id.* at 58. The former number is lower, because consolidated cases that are addressed in a single opinion are counted as only one case. *Id.* at 58, 81. Although we used the lower number (based on signed opinions) in previous articles, we are using the higher number (based on cases decided) in this Article. The Solicitor General's office reports its data based on cases decided (not signed opinions), and we want to be as consistent as possible.

<sup>76</sup> *See* OSG Workload Reports, *supra* note 40, at 7, 16. From the 1994 Term through the 2004 Term, the Court decided an average of eighty-nine cases per Term. *Id.*

<sup>77</sup> *Id.* From the 2005 Term through the 2008 Term, the Court decided an average of eighty-one cases per Term. *Id.*

<sup>78</sup> Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 737-94 (2001).

of explanations rattling around, the shrinkage was almost entirely attributable to two factors: first and most importantly, changes in personnel on the Court; and second, the significant reduction in the number of petitions for review filed by the Solicitor General.<sup>79</sup>

With respect to personnel, we found that the retirement of justices who were more aggressive in voting to grant cases, and their replacement with justices who were less eager to do so, was a key cause of the decline.<sup>80</sup> During the tumultuous period from 1986 through 1993, there were seven personnel changes, and the docket was nearly halved, dropping from 174 cases in the 1986 Term to ninety-four cases in the 1994 Term (the first to feature all of the new justices).<sup>81</sup>

Writing at the conclusion of the 2000 Term, we predicted that the historic lows that marked the second half of the 1990s would continue until new personnel changes on the Court prompted another shift in its collective practices.<sup>82</sup> The Court's activity in subsequent years has borne out that prediction, further confirming the importance of this personnel-centered explanation for the docket's decline.<sup>83</sup> Over the eleven Terms that followed Justice Blackmun's retirement in 1993, the composition of the Court remained unchanged. During that period—from 1994 through 2004—the size of the Court's docket also stabilized, with the number of cases decided ranging from eighty-one to ninety-four, and averaging eighty-nine.<sup>84</sup> When the Court's personnel finally changed again in the 2005 and 2006 Terms, the docket did as well.<sup>85</sup> Somewhat surprisingly, it dropped even further: from 2005 through 2008, the number of cases decided ranged from seventy-four to eighty-seven, with an average of eighty-one per Term.<sup>86</sup>

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<sup>79</sup> See *id.* at 763–71, 776–90, 793–94.

<sup>80</sup> See *id.* at 776–90 (using data on the justices' case-selection votes to demonstrate that the retiring justices voted to grant cases at a greater, and in some cases much greater, rate than their replacements).

<sup>81</sup> See *id.* Six justices retired during that period—first Chief Justice Burger and then (in order) Justices Powell, Brennan, Marshall, White, and Blackmun. The seventh personnel change was Justice Rehnquist's elevation to Chief Justice in 1986. See *id.* at 784–85 (discussing the dramatic change in Chief Justice Rehnquist's voting behavior on certiorari following his elevation to chief); see also OSG Workload Reports, *supra* note 40, at 16 (providing data on number of cases decided on the merits in the 1986 and 1994 Terms).

<sup>82</sup> See Cordray & Cordray, *supra* note 78, at 794.

<sup>83</sup> See Kevin M. Scott, *Shaping the Supreme Court's Federal Certiorari Docket*, 27 JUST. SYS. J. 191, 203–05 (2006); David R. Stras, *The Supreme Court's Declining Plenary Docket: A Membership-Based Explanation* 1–2 (Minnesota Legal Studies Research Paper No. 09–39) 1–2, available at <http://ssrn.com/abstract=1476537>.

<sup>84</sup> See OSG Workload Reports, *supra* note 40, at 16.

<sup>85</sup> See *id.* at 8.

<sup>86</sup> See *id.*

Although personnel changes were the critical driving force behind the docket's decline, the Solicitor General also played a role.<sup>87</sup> In the next Section, we look at the interplay between the docket's size and the Solicitor General's petitioning practices.

## B. *The Solicitor General's Role in the Docket's Decline*

### 1. Filing Fewer Petitions for Review

Traditionally, the Supreme Court has devoted a sizeable chunk of its docket to cases brought by the federal government.<sup>88</sup> Indeed, as discussed above, the Court grants an extraordinarily high percentage of the Solicitor General's petitions for certiorari (approximately seventy percent for the Solicitor General versus approximately three percent for other litigants).<sup>89</sup> A pullback by the Solicitor General in requesting review would, therefore, almost certainly lead to a decline in the number of cases granted, and that appears to be exactly what happened.

The Court's docket began its descent in the 1989 Term,<sup>90</sup> right as the number of cases in which the Solicitor General sought review also began to plunge. In the five-Term period preceding the decline, the Solicitor General had sought review in, on average, fifty cases per Term.<sup>91</sup> But in the 1989 Term, that number dropped to thirty cases, and though there was considerable fluctuation, the average number of petitions per Term remained at approximately that level through the remainder of the Rehnquist Court years.<sup>92</sup> In the 2005 through 2008 Terms—the first Terms of the Roberts Court—as the docket shrank

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<sup>87</sup> See Cordray & Cordray, *supra* note 78, at 763–71 (discussing the impact of the Solicitor General's declining requests for review on the Court's docket size).

<sup>88</sup> See OSG Annual Reports, Table III, *supra* note 70. In the mid-1980s, for example, nineteen percent of the cases on the Court's merits docket were brought by the federal government. See *id.* (providing data on the number of cases argued in which the federal government was petitioner or appellant during the 1985–1988 Terms).

<sup>89</sup> See *supra* notes 48–56 and accompanying text (providing data on the Solicitor General's success rate); see also *supra* notes 30–36 and accompanying text.

<sup>90</sup> See OSG Workload Reports, *supra* note 40, at 16 (providing data on number of cases decided on the merits in the 1989–1993 Terms). After two decades of deciding approximately 170 cases per Term, the Court decided only 146 in the 1989 Term, and the number continued to fall over the next several Terms. *Id.*

<sup>91</sup> See *id.*

<sup>92</sup> See *id.* In the 1989–2004 Terms, the Solicitor General sought review in an average of 30.8 cases per Term. See *id.* at 8, 16. The Solicitor General's filings in the 1988 Term, which had already declined to thirty-seven at that point, would also have affected the docket in the 1989 Term. See *id.*

even further,<sup>93</sup> the Solicitor General's filings did as well. Amazingly, the Solicitor General sought review in an average of only fifteen cases per Term during those four Terms, and this (more than the changes in personnel on the Court) may be the key explanation for the docket's most recent decline.<sup>94</sup>

## 2. The Solicitor General's Role in Causing the Decline

The reduction in the Solicitor General's requests for review is clearly reflected in the Court's docket. When the Solicitor General scaled back from seeking review in fifty cases per Term to thirty, the number of government-initiated cases that the Court heard on the merits dropped in near-perfect sync.<sup>95</sup> Overall, the number fell by an average of seventeen cases per Term, from thirty-two in the mid-1980s to fifteen in the latter Rehnquist Court years (1994–2004).<sup>96</sup> When the Solicitor General further scaled back from seeking review in thirty cases per Term to fifteen, the number of government-initiated cases heard on the merits again tracked the change.<sup>97</sup> Overall, the number was almost halved, falling from fifteen in the latter Rehnquist Court years to eight in the Roberts Court.<sup>98</sup>

In our earlier article, we contended that the Solicitor General's initial pullback in filing petitions for review (dropping from approximately fifty to approximately thirty petitions per Term) was responsible for about a quarter of the decline in the Court's docket.<sup>99</sup> And it now

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<sup>93</sup> See *supra* notes 84–86 and accompanying text (the docket shrunk to an average of eighty-one cases per Term during this period, down from an average of eighty-nine cases per Term in the preceding eleven Terms of the Rehnquist Court).

<sup>94</sup> See OSG Workload Reports, *supra* note 40, at I. Starting in the 2000 Term, the data on total petitions or jurisdictional statements filed in the OSG Workload Report includes the portion of total filings which were “hold petitions”—those in which the Solicitor General asks the Court to hold a petition pending the disposition of another case. See *id.* If the government's hold petitions are excluded during the 2005–2008 Terms, the Solicitor General filed an average of only twelve petitions per Term. See *id.*; see also *infra* notes 95–122 and accompanying text (discussing how the Solicitor General's reduced filings have affected the docket).

<sup>95</sup> See OSG Annual Reports, Table III, *supra* note 70 (providing data on the number of cases argued in which the federal government was petitioner or appellant during the 1985–2004 Terms).

<sup>96</sup> See *id.*

<sup>97</sup> See *id.* (providing data on the number of cases argued in which the federal government was petitioner or appellant during the 2005–2008 Terms).

<sup>98</sup> See *id.*

<sup>99</sup> See Cordray & Cordray, *supra* note 78, at 763–71 (showing that the Court was granting about fifteen fewer cases per Term at the behest of the federal government in the latter part

appears that the Solicitor General's more recent pullback (dropping from approximately thirty to approximately fifteen petitions per Term) may account for virtually all of the additional eight cases erased in the docket's most recent decline.<sup>100</sup>

Nevertheless, the causal relationship is murky. The numbers of both petitions filed and cases on the docket have remained low over a now-substantial period of time. (It has been twenty years since the start of the decline, and fifteen since the docket came to its initial resting point at fewer than ninety cases per Term.)<sup>101</sup> Any reduction in the number of petitions filed under a particular solicitor general could have been restored by a successor, and the Court could easily have boosted its caseload by granting more cases from other sources if it were inclined to keep its merits docket at a higher level.<sup>102</sup> But neither has occurred, which suggests both that the justices remain content with a smaller docket, and that the Solicitor General's more meager offerings have been consistent with the Court's preferences. It is possible, therefore, that the Court was simply inclined to make across-the-board cuts in all areas of its docket, and that it would have granted about the same number of petitions from the Solicitor General regardless of how many the office filed.

Although we ultimately find that explanation unpersuasive, two points arguably support it. First, during the latter Rehnquist Court years—from 1994 to 2004—the Solicitor General's participation in the Court's docket as a party petitioner declined at close to the same rate as the docket itself.<sup>103</sup> In the mid-1980s, cases in which the United States was the petitioner took up an average of 19% of the docket.<sup>104</sup> As both the docket and the Solicitor General's petitions for review contracted,

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of the 1990s). The numbers we are citing in this Article are slightly higher because the Solicitor General counts all cases decided, rather than opinions issued. *See supra* note 75.

<sup>100</sup> *See* OSG Annual Reports, Table III, *supra* note 70 (providing data on the number of cases argued in which the federal government was petitioner or appellant during the 2005–2008 Terms); OSG Workload Reports, *supra* note 40, at 1.

<sup>101</sup> *See supra* notes 75–77 and accompanying text.

<sup>102</sup> *See supra* notes 75–87 and accompanying text.

<sup>103</sup> *See infra* note 104 and accompanying text.

<sup>104</sup> *See* OSG Annual Reports, Table III, *supra* note 70 (providing data on the number of cases argued in which the federal government was petitioner in the 1985–1988 Terms). In the 1985–1988 Terms, the Court heard on average 171 cases per Term, in thirty-two of which the United States was petitioner. *See id.* The Annual Report breaks down the data based on cases argued (rather than decided) on the merits. This produces slightly higher numbers, because some cases are dismissed before a decision is issued. Thus, for example, in the four-Term period from 1985–1988, the Court heard on average 171 cases per Term, *see id.*, but only decided on average 169 cases per Term. *See* OSG Workload Reports, *supra* note 40, at 16.

that percentage remained fairly stable at 17% during the latter Rehnquist Court era.<sup>105</sup>

Second, the Court's invitations to the Solicitor General to participate as amicus at the certiorari stage also declined dramatically in this era. From the mid-1980s through most of the transition period, the Court called for the views of the Solicitor General in about thirty cases per Term.<sup>106</sup> But in the 1993 Term that number fell abruptly to fifteen, and stayed there through the remainder of the Rehnquist Court.<sup>107</sup> The Court's more sparing use of the "CVSG" procedure is a further indication that the justices were asserting tighter control over the docket as a whole, including areas where the Court had previously perceived a sufficiently significant federal interest to seek the Solicitor General's guidance.<sup>108</sup>

Nevertheless, it seems much more likely that the Solicitor General's pullback was directly responsible for a significant slice of the decline. Perhaps most tellingly, over many years the Court had granted around 70% of the Solicitor General's requests for review, and it continued to do so through the docket's decline.<sup>109</sup> Although it is possible that the Court would have slashed that percentage had the Solicitor General continued to submit fifty petitions per Term, the change would surely have been more gradual than it actually was, given the consistently high quality of the Solicitor General's work (both in briefing and in case selection) and the importance of the federal interests at stake in such cases.<sup>110</sup>

In addition, when the Solicitor General's office further scaled back its requests for review at the outset of the Roberts Court, both the size of the docket and the Solicitor General's participation as a party peti-

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<sup>105</sup> See OSG Annual Reports, Table III, *supra* note 70 (providing data on the number of cases argued in which the federal government was petitioner in the 1994–2008 Terms). In the 1994–2004 Terms, the Court heard on average eighty-nine cases per Term, in fifteen of which the United States was petitioner. See *id.*

<sup>106</sup> See OSG Workload Reports, *supra* note 40, at 12. The Court issued an average of thirty invitations per Term during the 1986–1988 Terms, thirty-one per Term during the 1989–1993 Terms, and fifteen per Term during the 1994–2004 Terms. See *id.* at 4, 12.

<sup>107</sup> See *id.*

<sup>108</sup> See *supra* notes 40–41 and accompanying text. The "CVSG" procedure refers to a call by the Court for the views of the Solicitor General on a pending certiorari petition in which, though the government is not a party, government interests are involved. BLACK'S LAW DICTIONARY 443 (9th ed. 2009).

<sup>109</sup> See *supra* note 49 and accompanying text.

<sup>110</sup> See *supra* notes 19–47 and accompanying text (discussing the role of the Solicitor General); *supra* notes 57–69 and accompanying text (discussing the advantages of the Solicitor General).

tioner decreased.<sup>111</sup> But no other portion of the docket declined: the average number of merits cases argued per Term in the Roberts Court (2005–2008) was exactly the same as it had been in the latter Rehnquist Court (1994–2004), except for cases in which the Solicitor General was the petitioner.<sup>112</sup> This is strong evidence that the Solicitor General's petitioning decisions had a direct and independent impact on the Court's docket (accounting for virtually all of the recent decline), and it bolsters the view that the Solicitor General's earlier pullback also caused a distinct (though smaller) portion of the much greater initial decline during the transition period.

Moreover, it is not at all clear that the Court wanted to cut back as deeply as it has on cases from the federal government. As the Solicitor General's requests for review declined in the latter Rehnquist Court era, the percentage of the docket devoted to its cases did as well, but the percentage of the docket devoted to cases brought *against* the federal government rose.<sup>113</sup> In fact, the overall percentage of the docket occupied by cases involving the federal government actually grew over most of the docket's decline.<sup>114</sup> In the four periods we considered, the Solicitor General's participation in the merits docket as a party increased from 35% in the mid-1980s and the transition period, to 41% in the latter Rehnquist Court years, before falling back to 33% during the Roberts Court.<sup>115</sup> All of the growth was in cases where the federal

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<sup>111</sup> See OSG Annual Reports, Table III, *supra* note 70; see also *supra* note 104 (explaining why the numbers reported for cases argued in the Annual Report are slightly higher than those reported for cases decided in the Workload Report).

<sup>112</sup> See OSG Annual Reports, Table III, *supra* note 70. From 1994–2004, the Court heard argument in an average of eighty-nine cases per Term. The Solicitor General was petitioner in an average of fifteen of those cases, and other parties were petitioner in the remaining seventy-four. See *id.* From 2005–2008, the Court heard argument in an average of eighty-two cases per Term. See *id.* The Solicitor General was petitioner in an average of eight of those cases, and other parties were petitioner in the remaining seventy-four. See *id.*; see also *supra* note 104.

<sup>113</sup> See OSG Annual Reports, Table III, *supra* note 70. The percentage of the Court's docket in which the federal government was respondent went from an average of 17% in the mid-1980s, to 25% in the latter Rehnquist Court years, to 23% in the early Roberts Court years. See *id.* Specifically, in the 1985–1988 Terms, the Court heard on average 171 cases per Term, with the United States as respondent in an average of twenty-nine cases per Term. See *id.* In the 1994–2004 Terms, the Court heard on average eighty-nine cases per Term, with the United States as respondent in an average of twenty-two cases per Term. See *id.* In the 2005–2008 Terms, the Court heard on average eighty-two cases per Term, with the United States as respondent in an average of nineteen cases per Term. See *id.*

<sup>114</sup> See *supra* note 113 and accompanying text.

<sup>115</sup> See *supra* note 113 and accompanying text (providing data on the number of cases argued in which the federal government was a party in the 1985–2008 Terms). In a 1986 address, former Solicitor General Rex E. Lee suggested that the justices would continue to

government opposed review: in the mid-1980s, cases in which the United States was the respondent took up an average of 17% of the docket, then rose to 25% in the latter Rehnquist Court era, and dropped only slightly to 23% in the early years of the Roberts Court.<sup>116</sup> In consequence, during the Roberts Court the federal government was the respondent in over twice as many cases as it was the petitioner, whereas this division used to be roughly equal.<sup>117</sup>

In granting a greater percentage of cases brought against the federal government, the Court appears to be taking the initiative to fill the gaps created by the very limited menu of offerings from the Solicitor General.<sup>118</sup> If this is correct, it strongly suggests that the Solicitor General's pullback is now thwarting the Court's desire to hear more cases involving the federal government, and thus independently has contributed to the docket's decline.<sup>119</sup> It also suggests that the Solicitor General's highly restrictive petitioning decisions are opening the door to more of the least desirable cases for the federal government, a point that we discuss in more detail in Part III.B, below.

The biggest difficulty in pinning down the causal relationship between the Solicitor General's pullback and the docket's decline, however, is that the reductions in the Solicitor General's petitions for review have coincided with the overarching effects of the personnel changes on the Court. The two most significant points of decline in the Solicitor General's filings were in the 1989–1993 Terms, when the Court had

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allocate "something in the range of forty percent of [the Court's] decisional capacity" to the United States regardless of how many petitions for review the Solicitor General filed. Lee, *supra* note 27, at 598. Although Solicitor General Lee was explaining why it would be counterproductive for the Solicitor General to seek certiorari in more than the fifty to sixty cases he then did, his prediction has been largely fulfilled more recently, as the Court has granted more petitions filed against the federal government as the number of petitions filed by the Solicitor General has declined. *See infra* note 117 (providing data showing the growth in petitions granted in cases filed against the federal government corresponded with the decline in petitions filed by the Solicitor General).

<sup>116</sup> *See supra* note 113.

<sup>117</sup> *See* OSG Annual Reports, Table III, *supra* note 70. In the 1985–1988 Terms, the Court heard on average thirty-two cases per Term in which the United States was the petitioner and twenty-nine in which the United States was the respondent. *See id.* In the 2005–2008 Terms, the Court heard on average eight cases per Term in which the United States was the petitioner and nineteen in which the United States was the respondent. *See id.*

<sup>118</sup> *See supra* notes 113–117 and accompanying text.

<sup>119</sup> *See* Cohen & Spitzer, *supra* note 22, at 414 (estimating that the Solicitor General's screening processes are so selective that the Solicitor General may be withholding twenty percent of the cases that the Supreme Court would like to review).

four personnel changes,<sup>120</sup> and again in the 2005–2008 Terms, when the Court had its next two personnel changes.<sup>121</sup> The major downward shifts in the docket's size also occurred in these two periods, but the overlap in the factors—the Solicitor General's reduced petitioning and the Court's membership changes—makes it difficult to tease out the extent to which the Solicitor General has played an independent role in the docket's decline.<sup>122</sup> Thus, although it is clear that the Solicitor General's increasingly restrictive practices at the certiorari stage went hand in hand with the docket's decline, it is unclear exactly how much the Solicitor General's pullback caused the justices to grant fewer cases, and how much the justices' preference for granting fewer cases led the Solicitor General's office—with its finely-honed sense of the justices' inclinations—to pull back on the number of cases it offers for review.

### 3. Reasons for the Reduction in Petitions for Review

A related question is why the Solicitor General is petitioning so infrequently. The federal government is vast and sprawling, and so is the litigation it is involved in. Yet in the last two decades, as federal legislation continues to be enacted and implemented, the Solicitor General's office has cut back its requests for review by over seventy percent, now finding only about fifteen cases each Term worthy of the Supreme Court's attention.<sup>123</sup>

As the chart below details, the decline has been remarkably steady since the mid-1980s. Each Solicitor General—regardless of political affiliation—has not only maintained, but accelerated his predecessor's downward trajectory.<sup>124</sup> The two apparent aberrations in this otherwise

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<sup>120</sup> From the 1989 Term to the 1993 Term, four new justices joined the Court. During that same period, the average number of petitions filed each Term by the Solicitor General was thirty, down from an average of fifty in the preceding five Terms. *See* OSG Workload Reports, *supra* note 40, at 9 (providing data on government petitions or jurisdictional statements filed in the 1984–1993 Terms).

<sup>121</sup> *See id.* at 1, 9. In the 2005 and 2006 Terms, a new Chief Justice and a new associate justice joined the Court. From the 2005 through the 2008 Terms, the average number of petitions filed each Term by the Solicitor General was fifteen, down from an average of twenty-nine in the preceding eleven Terms. *See id.*

<sup>122</sup> *See* OSG Annual Reports, Table III, *supra* note 70. The docket fell from an average of 171 cases in the 1985–1988 Terms, to an average of 89 cases in the 1994–2004 Terms, to an average of 82 cases in the 2005–2008 Terms. *See id.*

<sup>123</sup> *See* OSG Workload Reports, *supra* note 40, at 1, 9.

<sup>124</sup> *See id.* The chart does not include acting solicitors general and those who served for less than one Term (except for Paul Clement, who served as Acting Solicitor General in the 2004 Term before being confirmed as Solicitor General in 2005). Data in the chart is derived from authors' compilation of OSG Workload Reports. *See id.*

predictable pattern occurred in the 2000 Term, when the number of petitions filed jumped from twenty-three to forty-seven, and in the 2003 Term, when they jumped again from twenty-three to thirty-one.<sup>125</sup> But in both instances, the increases are explained by the unusually large number of “hold petitions” filed (which merely ask the Court to hold a petition pending the disposition of another case)—twenty-three in the 2000 Term and ten in the 2003 Term, as compared to the usual three to five.<sup>126</sup>

Petitions by Solicitor General							
Solicitor General	Administration	Terms	Petitions Filed	Petitions Filed	Petitions Filed	Petitions Filed	Average
Charles Fried	Reagan	OT 1985-1988	1985 57	1986 56	1987 49	1988 37	50
Kenneth Starr	Bush, G.H.W.	OT 1989-1992	1989 30	1990 35	1991 35	1992 38	35
Drew Days	Clinton	OT 1993-1995	1993 33	1994 28	1995 31		34
Seth Waxman	Clinton	OT 1997-2000	1997 21	1998 32	1999 23	2000 47*	31
Theodore Olson	Bush, G.W.	OT 2001-2003	2001 23	2002 23	2003 31*		26
Paul Clement	Bush, G.W.	OT 2004-2007	2004 22	2005 15	2006 11	2007 17	16

\* The Solicitor General filed an unusually large number of hold petitions in these terms. Note 126 provides additional information on the hold petitions and their effect on the averages.

The uniformity and durability of the pattern refute any possibility that the decline in the number of filings was due to the idiosyncratic behavior of any one Solicitor General.<sup>127</sup> Moreover, it makes it extremely unlikely that the Solicitor General was simply positioning to maintain the federal government’s success rate in a hostile Court.<sup>128</sup>

<sup>125</sup> See *id.* at 1, 9.

<sup>126</sup> See *id.* (providing data on government petitions or jurisdictional statements filed in the 1985–2008 Terms). The Workload Report first began tracking hold petitions in the 2000 Term, presumably because of the unusually large number filed, so it is not possible to identify such distortions in earlier Terms. See *id.* at 1. In the 2000 Term, most of the hold petitions were for *Reno v. Kim Ho Ma*, 531 U.S. 924 (2000) (No. 00–38), and *Zadvoydas v. Davis*, 531 U.S. 923 (2000) (No. 99–7791), which presented the question whether the Attorney General is authorized to continue to detain an alien beyond the 90-day statutory removal period. Excluding that aberrant Term, Seth Waxman’s average is twenty-five petitions per Term. See OSG WORKLOAD REPORT, *supra* note 40 at 1. In the 2003 Term, the hold petitions were for a variety of pending cases. Excluding that aberrant Term, Theodore Olson’s average is twenty-three petitions per Term. See *id.*

<sup>127</sup> See *supra* note 124 and accompanying chart.

<sup>128</sup> See *supra* note 124 and accompanying chart.

Indeed, most of the decline occurred while conservative administrations were ideologically compatible with a relatively conservative Court; the most recent drop in petitions in the early years of the Roberts Court, for example, occurred while the federal government was highly successful in winning cases.<sup>129</sup> Instead of filing petitions aggressively to take advantage of the favorable climate, however, the Solicitor General did the opposite, seeking to put fewer cases on the docket.<sup>130</sup>

A decade ago in our earlier article, we concluded that the Solicitor General's pullback was primarily the work of two overlapping factors: the federal government was involved in considerably less civil litigation than it had been in the 1980s,<sup>131</sup> and it was winning more of those cases in the federal courts of appeals.<sup>132</sup> More specifically, we found that in the period between 1984 and 1994, the federal government's involvement in new civil cases filed in the district courts had fallen by more than 35%, and its involvement in civil cases that were decided on the merits in the courts of appeals had fallen by almost 20%.<sup>133</sup> In addition, using proxies based on the actions of the Solicitor General's office and its adversaries at the petition stage, it appeared that the federal government was winning more of its civil cases on appeal than it had in the mid-1980s.<sup>134</sup>

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<sup>129</sup> See Juliano, *supra* note 55, at 551–57 (finding that, when the Solicitor General participated as amicus in merits cases in the first two Terms of the Roberts Court, the Court ruled in favor of the party with Solicitor General support 89% of the time, which exceeded both the historical average (75%) and the success rate of any other Solicitor General).

<sup>130</sup> See OSG Workload Reports, *supra* note 40, at 1. The Solicitor General filed an average of fifteen petitions per Term during the first four Terms of the Roberts Court, down from an average of thirty per Term during the latter Rehnquist Court.

<sup>131</sup> See Cordray & Cordray, *supra* note 78, at 768–69 (providing data on the sharp decline in federal civil litigation in the district courts and courts of appeals).

<sup>132</sup> See *id.* at 769–71.

<sup>133</sup> See *id.* at 768 & nn.167–68. Civil cases filed in the district courts in which the federal government was a party declined from 117,488 in 1984 (79,371 as plaintiff and 38,117 as defendant) to 43,158 in 1994 (14,130 as plaintiff and 29,028 as defendant), and the number of civil cases in which the federal government was a party that were decided on the merits after oral argument in the courts of appeals (including administrative appeals) fell from 2392 in 1968 to 1982 in 1994. See *id.* (citing 1995 ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. OF THE DIRECTOR 23 tbl.4, 87 tbl.B-2; 1987 ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. OF THE DIRECTOR 8 tbl.4, 136 tbl.B-1).

<sup>134</sup> See Cordray & Cordray, *supra* note 78, at 769–71 & nn.173–83. For one proxy, we compared the number of civil cases in which the Solicitor General either filed or waived a response in the Supreme Court each Term to the total number of “recommendations received” in civil cases in the same period, which indicated an improving trend in the government's success rate in the courts of appeals during the 1990s. See *id.* As another proxy, we compared the total number of petitions filed in civil cases involving the federal government (including administrative appeals), which jumped from 391 in the 1986 Term to 863 in the 1996 Term, to the number of petitions filed by the Solicitor General, which was

Neither of these factors, however, can explain the Solicitor General's most recent reduction in petitions for review. The federal government's involvement in civil cases appears to have stabilized: although the number of civil cases filed in the district courts has declined somewhat further since 1998, the number of civil cases decided on the merits in the courts of appeals has actually increased slightly since 1998.<sup>135</sup> In addition, the federal government's win rate has not continued to rise; instead, our proxies for the federal government's "winning percentage" indicate some erosion in its success rate in civil appeals.<sup>136</sup> We must look elsewhere, therefore, to understand the most recent decline in petitions filed.

One possibility is that the Solicitor General's office has tightened its standards for filing petitions.<sup>137</sup> In our earlier article, we concluded

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declining. *See id.* at 770 & n.178 (citing 1997 ANNUAL REPORT, *supra* note 133, at 85 tbl.B-2; 1987 ANNUAL REPORT, *supra* note 133, at 146 tbl.B-2). In our interview with Solicitor General Starr, who served from 1989–1992, he suggested that the decline in the federal government's petitions reflected the government's increasing comfort with the decisions issued by the courts of appeals, and perhaps also a greater sense of harmony between the courts and the government with respect to the proper extent of judicial power. Telephone Interview with Kenneth W. Starr, Solicitor Gen. 1989–1992 (Jun. 15, 2010); *see also* Ruth Marcus, *High Court's Caseload Is Unprecedentedly Light*, WASH. POST, Feb. 5, 1990, at A4 (“[T]he government is not losing nearly as many cases as it used to and therefore it's filing fewer petitions.”) (quoting former Deputy Solicitor General Andrew Frey).

<sup>135</sup> *See* 2008 ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. OF THE DIRECTOR 19 tbl.4 & 84 tbl.B-1; *supra* note 96 (providing the data for 1986 and 1998). In 2008, the number of civil cases filed in the district courts in which the federal government was a party stood at 44,164 (9649 as plaintiff and 34,515 as defendant), down from 57,852 in 1998. *See id.* The number of civil cases in which the federal government was a party that were decided on the merits after oral argument in the courts of appeals (including administrative appeals) was 1882, up from 1728 in 1998. *See id.*

<sup>136</sup> *See* Cordray & Cordray, *supra* note 78, at 769–71 & nn.173–83 (providing data, explanation, and analysis of these factors). The proxy figures are derived by comparing the number of civil cases in which the Solicitor General either files or waives a response in the Supreme Court each Term against the total number of “recommendations received” in civil cases in the same period. This number fell from the 1987–1989 Terms to the 1996–1998 Terms, but rose again to near the initial level by the 2006–2008 Terms, which indicates that the government's success rate has declined in the courts of appeals during the past decade. *See id.* With respect to the other proxy, the total number of petitions filed in civil cases involving the federal government (including administrative appeals) fell from 1168 in 1998 to 936 in 2008, as the number of petitions filed by the Solicitor General continued to decline. *See* 2008 ANNUAL REPORT, *supra* note 135, at 93 tbl.B-2; 1999 ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. OF THE DIRECTOR 93 tbl.B-2.

<sup>137</sup> Solicitor General Clement, whose tenure coincided with the most recent decline in the number of petitions filed, suggested another possibility as well: in recent years, Congress may have produced less legislation, or at least less of the type of legislation that generates significant interpretive litigation, and this downturn may have contributed to the most recent decline. Telephone Interview with Paul D. Clement, Solicitor Gen. 2004–2008 (Mar. 8, 2010). He also noted that by the end of his tenure, the litigation generated by

that the Solicitor General had not done so, because the decline in petitions filed spanned several solicitors general from different political parties, individual solicitors general affirmed that they were following the same standards,<sup>138</sup> and the Solicitor General's highly professional staff of attorneys (who operate within a longstanding and well-defined structure) were closely involved in the case selection process.<sup>139</sup> For more direct confirmation of this conclusion, we also sought to compare the number of cases in which the Solicitor General requested review to the number in which he or she could have, a task complicated by the fact that the Solicitor General does not report the number of cases in which the office elected not to petition for review.<sup>140</sup> Nevertheless, a comparison of the number of petitions filed to the total number of "recommendations received"—which includes recommendations to appeal from losses in the district courts as well as in the courts of appeals—provided a rough indication that the Solicitor General had not been seeking review in a smaller percentage of available cases.<sup>141</sup>

The same comparison in the first Terms of the Roberts Court, however, suggests that the Solicitor General is now seeking Supreme

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important statutes such as the Civil Rights Restoration Act and the Americans with Disabilities Act had slowed considerably. *Id.* In a speech at Harvard Law School, Clement had suggested that this factor might help explain the Court's declining docket more generally. *See Solicitor General: Supreme Court's Shrinking Caseload Due to Fewer Laws Enacted by Congress*, HARV. L. SCH. (Nov. 2, 2007), [http://140.247.200.140/news/2007/11/02\\_solicitor.html](http://140.247.200.140/news/2007/11/02_solicitor.html).

<sup>138</sup> In recent interviews with the solicitors general who served during this period, each confirmed that he had not made a conscious effort to scale back the number of petitions filed. Telephone Interview with Paul D. Clement, *supra* note 137; Telephone Interview with Drew S. Days III, Solicitor Gen. 1993–1996 (Feb. 22, 2010); Telephone Interview with Charles Fried, Solicitor Gen. 1985–1989 (Mar. 10, 2010); Telephone Interview with Theodore B. Olson, Solicitor Gen. 2001–2004 (Feb. 26, 2010); Telephone Interview with Kenneth W. Starr, *supra* note 134; Telephone Interview with Seth P. Waxman, Solicitor Gen. 1997–2001 (Feb. 26, 2010); *see also* Marcus, *supra* note 134 (quoting Solicitor General Starr's statement that regarding decisions to seek review, "[t]here's no difference in our standards").

<sup>139</sup> *See* Cordray & Cordray, *supra* note 78, at 765; *see also* SALOKAR, *supra* note 25, at 63 ("[The] well-structured process for handling the cases that flow through the office . . . has changed very little over time despite the different management styles of the various solicitors general."); Telephone Interview with Kenneth W. Starr, *supra* note 134 (describing the case-selection policy during his tenure as a "continuation of the traditions of the office," which involved consideration of many factors in a "very collaborative and deliberative process").

<sup>140</sup> *See* Cordray & Cordray, *supra* note 78, at 766 (discussing this gap in the Solicitor General's statistics); OSG Workload Reports, *supra* note 40, at 1 (only providing data on the Solicitor General's petitions and jurisdictional statements filed).

<sup>141</sup> *See* Cordray & Cordray, *supra* note 78, at 766–67 (assessing the data and explaining the use of "recommendations received" as a proxy showing trend lines).

Court review in a smaller percentage of civil cases.<sup>142</sup> Likewise in federal criminal cases, despite an explosion of activity in the district courts,<sup>143</sup> the number of cases in which the Solicitor General petitioned for review dropped from an average of eight per Term in the mid-1980s to four per Term during the Roberts Court.<sup>144</sup>

This shift, along with the absence of an obvious alternative explanation for the further reduction in the Solicitor General's filings suggests that the Solicitor General's office has raised the threshold for seeking review. The most recent pullback in the early years of the Roberts Court (despite the Solicitor General's overwhelming success in merits cases) is consistent with a philosophical view that the Court should play a more limited role in our government and society, but this tightening of the standard seems not to have been deliberate.<sup>145</sup> Rather, it seems to reflect a recognition that the Court prefers a more limited volume of merits cases,<sup>146</sup> although as discussed above, the strength of that preference may have been overestimated.<sup>147</sup>

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<sup>142</sup> See *id.* at 767 & n.159. In civil cases, the comparison in the 1990s ranged between 1.36% and 1.73%, but in the first two three-Term averages for the Roberts Court, it declined to 0.67% and 0.76%, which indicates that the Solicitor General was choosing to file petitions in a smaller percentage of the cases available for seeking review.

<sup>143</sup> See 2008 ANNUAL REPORT, *supra* note 135, at 22 tbl.5; 1998 ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. OF THE DIRECTOR 21 tbl.3; 1989 ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. OF THE DIRECTOR 12 tbl.5. The number of federal criminal cases terminated in the district courts grew from 39,328 in 1986, to 51,428 in 1998, to 70,629 in 2008. See *id.*

<sup>144</sup> See OSG Workload Reports, *supra* note 40, at 1, 9 (providing data on government petitions or jurisdictional statements filed in the 1984–2008 Terms, broken down by issue area). Statistics on the Supreme Court's decided cases by issue area are available in Table III of the *Harvard Law Review's* annual recap of the Supreme Court Terms. See, e.g., *The Supreme Court, 1967 Term, The Statistics*, 82 HARV. L. REV. 93, 301–02, 313–16 (1968) [hereinafter *Supreme Court Statistics*] (explaining the basis for calculating the statistics). These statistics are found in the first issue of each volume of the *Harvard Law Review*; volumes 99–123 include the statistics for the 1984–2008 Terms. The number of federal criminal cases decided by the Supreme Court remained relatively constant from the mid-1980s to the Roberts Court, at about ten per Term. See *Supreme Court Statistics, supra* (1985–2008 Terms).

<sup>145</sup> In our interview with Solicitor General Clement, he indicated that there was no conscious effort to apply a different standard. Telephone Interview with Paul D. Clement, *supra* note 137. All of the other solicitors general interviewed indicated the same. See *supra* note 138.

<sup>146</sup> See Telephone Interview with Charles Fried, *supra* note 138. Solicitor General Fried neatly described the phenomenon as an example of “parallel causation”: as the standards of the Supreme Court changed, the standards of the Solicitor General's office changed with them. *Id.* Solicitor General Olson, who served during the 2001–2003 Terms, also indicated that, although there was no special effort to reduce the number of petitions filed, his office was sensitive to the changes in the Court's docket. Telephone Interview with Theodore B. Olson, *supra* note 138.

<sup>147</sup> See *supra* notes 113–119 and accompanying text (discussing whether the Solicitor General is offering the Court fewer cases than it would like).

### C. *The Decline's Effect on the Solicitor General's Role*

In contrast to the Solicitor General's sharp reduction in requests for review at the certiorari stage, the Solicitor General's involvement in cases at the merits stage has remained robust, particularly as amicus in cases where the United States is not itself a party.<sup>148</sup> In the first four years of the Roberts Court, the Solicitor General filed an average of thirty-six merits briefs per Term as an amicus, down only slightly from an average of forty-one merits briefs per Term as an amicus in the mid-1980s, when the Court's merits docket was stuffed full of cases.<sup>149</sup> As a result, the Solicitor General now participates in considerably more cases as amicus than as a party, which represents a marked shift since the mid-1980s, when the situation was reversed.<sup>150</sup>

By remaining involved in so many merits cases as amicus, the Solicitor General's office has dramatically increased its presence in the Court's merits docket. From the 1950s through the 1980s, the Solicitor General participated in roughly 60% of the cases, either as party or as amicus.<sup>151</sup> As the size of the Court's docket began to decline, however, the Solicitor General's rate of participation steadily grew.<sup>152</sup> In the 2001–2003 Terms the Court heard an average of eighty-eight cases per Term, and in each of those Terms, the Solicitor General participated in all but thirteen cases—a participation rate of over 85%.<sup>153</sup> Indeed, over the 1994–2008 Terms, the Solicitor General sat out, on average, only twenty cases per Term, in sharp contrast to the sixty-nine cases per Term, on average, that the Solicitor General sat out in the mid-1980s.<sup>154</sup>

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<sup>148</sup> See OSG Annual Reports, Table III, *supra* note 70 (providing data on the number of cases argued in which the federal government submitted briefs as amicus in the 1985–2008 Terms).

<sup>149</sup> See *id.*

<sup>150</sup> See *id.* In the 1985–1988 Terms, the Solicitor General filed an average of sixty-one merits briefs per Term as a party and forty-one merits briefs per Term as an amicus. See *id.* In contrast, in the 2005–2008 Terms, the Solicitor General filed an average of twenty-seven merits briefs per Term as a party and thirty-six merits briefs per Term as an amicus. See *id.* Solicitor General Fried observed that this shift is a “striking fact.” Telephone Interview with Charles Fried, *supra* note 138.

<sup>151</sup> See SALOKAR, *supra* note 25, at 21–22 (showing that in the 1959–1989 Terms, the federal government participated in 2921 of the 4968 cases in which the Court heard oral argument—58.8%); Norman-Major, *supra* note 35, at 1088 (“[I]n any given year between 1950 and 1984, the Solicitor General was involved in between thirty and fifty percent of the Court's business . . .”).

<sup>152</sup> See OSG Annual Reports, Table III, *supra* note 70.

<sup>153</sup> See *id.*

<sup>154</sup> See *id.* The Solicitor General did not participate in, on average, nineteen cases per Term from 2005–2008, twenty cases per Term from 1994–2004, forty cases per Term from 1989–1993, and sixty-nine cases per Term from 1985–1988. See *id.*

Overall, the Solicitor General has participated in more than 75% of the cases on the Court's plenary docket since the docket settled down in the 1994 Term.<sup>155</sup>

To some extent, of course, the Court dictates the Solicitor General's participation. Most obviously, the Court pulls in the Solicitor General whenever it grants review in cases brought against the federal government. As noted above, the Court has been more active in granting such cases in recent Terms, at least in proportion to the rest of its docket.<sup>156</sup> This tendency has helped to counterbalance the drop in cases granted at the Solicitor General's behest, leaving relatively stable the portion of the docket allocated to cases involving the federal government.<sup>157</sup>

As a practical matter, the Court also requires the Solicitor General's involvement when the justices call for the views of the Solicitor General at the petition stage, and then ultimately grant the case.<sup>158</sup> When the Court issues these "invitations," the Solicitor General regards participation as mandatory; the office invariably files an amicus brief in response, and then generally continues to participate as an amicus at the merits stage if the Court grants the case.<sup>159</sup> In such cases, therefore, the Solicitor General's involvement as amicus on the merits is also functionally at the Court's request.

The great majority of the amicus briefs that the Solicitor General submits at the merits stage, however, are at his or her discretion.<sup>160</sup> As

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<sup>155</sup> See *id.* During the 1994–2008 Terms, the Solicitor General participated in an average of seventy-seven percent of the cases argued. See *id.* (providing data on the Solicitor General's caseload for each Term).

<sup>156</sup> See *supra* note 113 and accompanying text (discussing the percentage of cases on the Court's docket in which the federal government is the respondent).

<sup>157</sup> See Lee, *supra* note 27, at 598 (suggesting that the justices would continue to allocate "something in the range of forty percent of its decisional capacity" to the United States regardless of how many petitions for review the Solicitor General filed); see also *supra* notes 113–117 and accompanying text (discussing how the percentage of cases granted against the federal government was increasing over the periods when the percentage of cases granted for the federal government was decreasing).

<sup>158</sup> See *supra* notes 40–41 and accompanying text (discussing the Court's practice of calling for the views of the Solicitor General at the petition stage).

<sup>159</sup> See SALOKAR, *supra* note 25, at 142–43. Once the Court invites the Solicitor General to provide views at the certiorari stage, the Solicitor General "will usually maintain its amicus status during the consideration on the merits." See *id.* at 142–45. For example, in the 2004 Term, the Court granted four cases in which it had sought the Solicitor General's views, and the Solicitor General filed an amicus brief on the merits in all of them. See Office of the Solicitor Gen., *Briefs: Type of Filing by Term*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/osg/briefs/index.html#filingtype> (last visited Oct. 16, 2010).

<sup>160</sup> See *supra* notes 43–47 and accompanying text (discussing the Solicitor General's decision-making process).

the docket shrank, the Solicitor General nevertheless continued to submit amicus briefs in about the same number of cases (around thirty-five per Term), causing the Solicitor General's participation in proportion to the total docket to expand significantly.<sup>161</sup> Indeed, from participating as amicus in just over one-third of the merits cases in which the federal government was not a party during the mid-1980s, the Solicitor General's involvement in such cases climbed to almost two-thirds during the latter Rehnquist and Roberts Courts.<sup>162</sup>

In addition, the Solicitor General's physical presence at oral argument has greatly expanded, and is now nearly pervasive. Although the Court rarely allows private amici to participate in oral argument, it almost always grants the Solicitor General's requests to share argument time with the party the office is supporting.<sup>163</sup> In the 1980s, the Solicitor General made only periodic use of this privilege, presenting oral argument as amicus in slightly more than ten percent of the Court's cases; in recent Terms, however, the Solicitor General has requested

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<sup>161</sup> See OSG Annual Reports, Table III, *supra* note 70; OSG Workload Reports, *supra* note 40, at 4–5.

<sup>162</sup> See OSG Annual Reports, Table III *supra* note 70 (providing data on the number of cases argued in which the federal government submitted an amicus brief on the merits in the 1985–2008 Terms). On average, the Solicitor General participated as amicus in 37% of the cases in which the federal government was not a party during the 1985–1988 Terms, 49% of such cases during the 1989–1993 Terms, 62% of such cases during the 1994–2004 Terms, and 66% of such cases during the 2005–2008 Terms. Overall, the Solicitor General participated in, on average, 24% of the total cases on the merits docket in the 1985–1988 Terms, 33% in the 1989–1993 Terms, 36% in the 1994–2004 Terms, and 44% in the 2005–2008 Terms. *See id.*

<sup>163</sup> See GRESSMAN ET AL., *supra* note 40, at 765 (explaining that the Court “seldom” permits private amici to participate in oral argument, but is “more liberal” with the Solicitor General); *id.* at 765 n.28 (noting that Chief Justice Roberts has estimated that the Court grants leave for the Solicitor General to participate as amicus in oral argument approximately 80% of the time); Lazarus, *supra* note 27, at 1494, 1562 (noting that the Court routinely denies argument time to private amici, but routinely grants it to the Solicitor General, even when the federal interest is not central); *id.* at 1494 n.32 (finding that in the 2005 and 2006 Terms, the Solicitor General requested argument time as an amicus seventy-nine times and the Court denied permission only once); *id.* at 1519 n.140 (noting that in the 1980 Term, the Solicitor General requested argument time as an amicus twelve times and the Court denied permission only once). Interestingly, although the Court was also quite receptive to the relatively rare requests for oral argument time from the state attorneys general during the latter Rehnquist Court years, it has become increasingly stingy in granting such requests during the Roberts Court. *See* National Association of Attorneys General Data Compilation, State Arguments as Amicus Curiae, 1996–2008 Terms 1–4 (unpublished data compilation) (on file with authors) (showing that the Court granted a total of twenty-three of thirty such requests (77%) over the 1996–2004 Terms, but only seven of eighteen such requests (39%) over the 2005–2008 Terms). The decline is likely attributable to the recent and dramatic increase in the Solicitor General's requests for argument time. *See infra* notes 164–165 and accompanying text (discussing this phenomenon).

and received argument time in virtually every case the office entered as amicus.<sup>164</sup> As a result, the Solicitor General now presents oral argument as amicus in almost half of the cases on the Court's merits docket.<sup>165</sup> Moreover, when cases where the federal government is a party are included, the Court hears the Solicitor General's views at oral argument in the vast majority of its cases.<sup>166</sup> Overall, the Court is allowing the Solicitor General to participate with this important privilege in more than three-quarters of its cases.

With this expanded role in the Supreme Court's docket, the Solicitor General is now seeking directly to persuade the justices on the merits in a wide range of cases. A review of the cases that the Solicitor General participated in (and sat out) during the most recent Terms compared to the mid-1980s reveals both that the composition of the merits docket has changed, and that the Solicitor General now participates more readily as amicus on the merits in certain categories of cases.<sup>167</sup>

As the docket fell to half its former size, issue areas were affected differently, causing the docket's internal contours to change in impor-

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<sup>164</sup> See Lazarus, *supra* note 27, at 1519 n.140. Professor Richard Lazarus vividly demonstrates the Solicitor General's changing protocol on seeking argument time as amicus by comparing the 1980 and 2005 Terms. *Id.* In 1980, the Solicitor General requested argument time as amicus in twelve of thirty-three cases, whereas in 2005, he sought permission in all forty-nine cases in which he filed an amicus brief. *Id.*; see also Cooper, *supra* note 38, at 693 (showing that in the 1984–1987 Terms, the Solicitor General participated in oral argument as amicus in an average of seventeen cases per Term).

<sup>165</sup> See Lazarus, *supra* note 27, at 1519 n.140. Professor Lazarus offers two explanations for the rise in the Solicitor General's requests to participate in oral argument: first, the Solicitor General may increasingly feel that the Court benefits from having the expertise and unique perspective of the United States at oral argument, and second, the Solicitor General may be seeking opportunities for the lawyers in the office to participate in oral argument in light of the meager supply of cases in which the United States is now a party. *Id.*

<sup>166</sup> See *id.* at 1519 n.140. Solicitor General Days observed that the increase in the Solicitor General's amicus filings also may be driven in part by the Solicitor General's desire to find opportunities for the talented lawyers in the office to participate in oral arguments, and he noted that he took this "staff morale" factor into account. Email from Drew S. Days III, Solicitor Gen. 1993–1996, to Richard Cordray, Ohio Attorney Gen. (June 23, 2010) (on file with authors).

<sup>167</sup> See *Supreme Court Statistics*, *supra* note 144 (1985–2008 Terms). For the comparisons in the Section, we relied on the statistics in the *Harvard Law Review's* annual recap of the Supreme Court's Terms. See *supra* note 144 (describing the annual recaps). These statistics are based on the number of opinions issued, rather than the number of cases decided, and they include a few per curiam opinions that were issued without oral argument. As a result, the numbers here are slightly different than those we cite from the Solicitor General's reports (which track cases decided), but they are internally consistent. See *supra* note 75 (discussing the different methods of counting cases).

tant respects.<sup>168</sup> On the criminal side, the total number of cases dropped by about one-third, but the number of federal criminal cases remained intact, so that the reduction occurred entirely in state criminal cases and habeas cases.<sup>169</sup> In the surviving state criminal cases, the Solicitor General's amicus participation has expanded from about one-quarter of the cases in the mid-1980s to about one-half of the cases in more recent Terms.<sup>170</sup> Especially in capital cases, those involving habeas procedures, and those involving various other constitutional issues unlikely to arise in federal prosecutions, however, the Solicitor General continues not to participate.<sup>171</sup>

On the civil side of the docket, the total number of cases dropped by over half, leaving only one-quarter of the civil cases previously heard from the state courts, and one-half of those previously heard from the

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<sup>168</sup> See *id.* (1985–1987, 2005–2008 Terms). In the mid-1980s, the Court issued an average of 151 decisions per Term; by the first four Terms of the Roberts Court, that number had fallen by exactly half, to an average of 75.5 cases per Term. See *id.*

<sup>169</sup> See *id.* (1985–1988, 2005–2008 Terms). In the mid-1980s, the Court decided an average of forty criminal cases per Term; in the Roberts Court, the Court decided an average of twenty-six criminal cases per Term (a decline of thirty-five percent). See *id.* The number of federal criminal cases (in which the United States is a party) has remained the same over these two periods, at ten per Term. See *id.* The number of state criminal cases and federal habeas cases (which often involve challenges to state convictions) declined by about the same proportions as the full docket (from thirty to about seventeen per Term). See *id.*

<sup>170</sup> In the 1987–1988 Terms, for example, the Solicitor General participated as amicus in an average of twenty percent of the state criminal cases each Term—four of seventeen in the 1987 Term, and four of twenty-six in the 1988 Term (the numbers include all criminal cases challenging state convictions, whether on direct review or habeas). See generally *Duckworth v. Eagan*, 492 U.S. 195 (1989) (involving self-incrimination); *Jones v. Thomas*, 491 U.S. 376 (1989) (involving double jeopardy); *Alabama v. Smith*, 490 U.S. 794 (1989) (involving due process); *Massachusetts v. Morash*, 490 U.S. 107 (1989) (involving ERISA); *Patterson v. Illinois*, 487 U.S. 285 (1988) (involving right to counsel); *Michigan v. Chesternut*, 486 U.S. 567 (1988) (involving search and seizure); *Taylor v. Illinois*, 484 U.S. 400 (1988) (involving compulsory process); *Lowenfield v. Phelps*, 484 U.S. 231 (1988) (involving capital punishment). During the Roberts Court (2005–2008), the Solicitor General participated as amicus in an average of forty-five percent of the state criminal cases each Term—eleven of twenty-two in the 2005 Term, four of fifteen in the 2006 Term, four of eight in the 2007 Term, and eight of fifteen in the 2008 Term. See *infra* note 271 (citing and describing the cases in which the Solicitor General participated during the 2007 and 2008 Terms).

<sup>171</sup> See *infra* note 272 (citing and describing the cases). In the 2007 Term, for example, the Solicitor General sat out four criminal cases; these cases raised issues of *Teague* retroactivity in state cases raising issues involving hearsay and the Confrontation Clause, jury selection in death penalty cases, imposition of the death penalty for the crime of rape, and the scope of the forfeiture-by-wrongdoing exception to the Confrontation Clause. See *id.* In the 2008 Term, the Solicitor General sat out seven criminal cases; these cases raised issues of deference to state courts in capital cases on habeas, right to a jury for sentencing decisions, validity of waiver of right to counsel during police interrogation, and a defendant's qualification for the death penalty under *Adkins*. See *id.*

lower federal courts.<sup>172</sup> Moreover, the mix of cases changed, moving away from constitutional issues: whereas two-thirds of the civil cases in the mid-1980s principally presented a constitutional issue, only one-half have done so in the Roberts Court.<sup>173</sup>

In civil cases, the Solicitor General's amicus participation has increased substantially overall. In the mid-1980s, the Solicitor General sat out most of these cases, but now the office files an amicus brief in over two-thirds of them.<sup>174</sup> Part of the explanation for this expansion lies in the dearth of civil cases from the state courts. The Court used to hear about sixteen of these cases per Term, and the Solicitor General participated in them infrequently, because most involved issues of tangential interest to the federal government, such as Commerce Clause challenges to state laws, taxation issues, procedural issues, and issues arising from state tort litigation or under state compensation statutes.<sup>175</sup> The Solicitor General likely would have continued to sit out many of these cases if they remained on the docket, but they have become much more sparse over the past twenty years.<sup>176</sup>

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<sup>172</sup> See *Supreme Court Statistics*, *supra* note 144 (1985–1988, 2005–2008 Terms). In the mid-1980s, the Court issued an average of 108 opinions in civil cases per Term; in the first four Terms of the Roberts Court, the Court issued an average of forty-nine decisions in civil cases per Term (a decline of fifty-five percent). See *id.* The number of civil cases coming from the state courts dropped sharply, from sixteen to four per Term; the number of civil cases coming from the lower federal courts dropped by half, from ninety-two to forty-five per Term. See *id.*

<sup>173</sup> See *id.* In the mid-1980s, an average of sixty-eight of the 108 civil cases each Term (63%) principally presented a constitutional issue; in the first four Terms of the Roberts Court, an average of twenty-five of the forty-nine civil cases each Term (51%) principally presented a constitutional issue. See *id.*

<sup>174</sup> See *id.* In the 1987–1988 Terms, for example, the Solicitor General sat out almost sixty percent of the civil cases in which the United States was not a party (on average, forty-nine of eighty-three such cases each Term). In the 2005–2008 Terms, in contrast, the Solicitor General sat out only thirty percent of such cases (on average, eleven of thirty-five cases each Term). See *id.* In order to calculate the Solicitor General's participation rate, we matched the decided cases from each Term to the issue areas used in Table III of *Harvard Law Review's* annual recap of the Supreme Court Terms, and then determined on a case-by-case basis whether the Solicitor General did or did not participate as amicus in each case. See *id.*

<sup>175</sup> See *id.* (1985–1988, 2005–2008 Terms) (identifying the number and subject areas of civil cases from the state courts). In the 1987–1988 Terms, for example, the Solicitor General participated as amicus in about one-quarter of all civil cases from the state courts (on average, five of twenty such cases per Term). See *id.*; see *supra* note 174 (describing how the authors determined the Solicitor General's participation rate). In the 2005–2008 Terms, the Solicitor General participated as amicus in about one-third of these cases (on average, one or two of four such cases per Term). See *Supreme Court Statistics*, *supra* note 144 (2005–2008 Terms); *supra* note 174 (describing how the authors determined the Solicitor General's participation rate).

<sup>176</sup> See *Supreme Court Statistics*, *supra* note 144 (2005–2008 Terms).

The bulk of the Solicitor General's expanded involvement in civil cases, however, has been in cases that originated in the lower federal courts. In civil cases that principally present constitutional issues, the Solicitor General's office has more than doubled its amicus participation: it now participates in two-thirds of such cases, whereas it participated in only one-quarter in the mid-1980s.<sup>177</sup> In civil cases that principally present non-constitutional issues, the Solicitor General's amicus participation has become even more pervasive, particularly in cases where the interpretation of a federal statute is at issue.<sup>178</sup> Cases from the mid-1980s where the federal government did not participate—even though statutory issues in areas such as antitrust, labor, patent, or pre-emption were at stake—now routinely draw in the Solicitor General to present the federal perspective.<sup>179</sup> Indeed, the Solicitor General's office now participates as amicus in three-quarters of the non-constitutional civil cases from the lower federal courts, up from one-half during the mid-1980s.<sup>180</sup>

The Solicitor General's more pervasive involvement as amicus in cases on the merits may indicate that the Solicitor General now has a lower threshold for participation, or it may simply reflect the practical reality that the lighter docket now makes it possible for the Solicitor

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<sup>177</sup> See *id.* (1987–1988, 2005–2008 Terms) (identifying the number and subject areas of civil cases in which the federal government was not a party). In the 1987–1988 Terms, for example, when the federal government was not a party, the Solicitor General sat out 80% of all of the civil cases in which the principal issue was a constitutional issue (on average, twenty-two of twenty-seven per Term), and he sat out 75% of such cases from the inferior federal courts (on average, eleven of fourteen per Term). See *id.*; *supra* note 174 (describing how the authors determined the Solicitor General's participation rate). In the 2005–2008 Terms, the Solicitor General sat out only 44% of all of the civil cases in which the principal issue was a constitutional issue (on average, four of nine per Term), and he sat out only 34% of such cases from the inferior federal courts (on average, two or three of seven per Term). See *Supreme Court Statistics*, *supra* note 144 (2005–2008 Terms); *supra* note 174 (describing how the authors determined the Solicitor General's participation rate); see also *infra* notes 275–279, 281–284 (citing and describing the cases from the 2007–2008 Terms in which the Solicitor General did and did not participate).

<sup>178</sup> See *infra* note 179 and accompanying text.

<sup>179</sup> See *Supreme Court Statistics*, *supra* note 144 (1987–1988, 2005–2008 Terms). In the 1987–1988 Terms, for example, when the federal government was not a party, each Term the Solicitor General sat out an average of twenty-three of forty-five civil cases (51%) from the lower federal courts in which the principal issue was not a constitutional issue; in the 2005–2008 Terms, the Solicitor General sat out an average of only seven of twenty-seven such cases (26%) each Term. See *id.*; *supra* note 174 (describing how the authors determined the Solicitor General's participation rate); *infra* notes 243–245 and accompanying text (citing and describing the cases from the 2007–2008 Terms involving private litigation in which the Solicitor General did and did not participate).

<sup>180</sup> See *supra* note 179 (providing the data).

General to participate in virtually every case in which the federal government has a tangible interest. In the mid-1980s, it was inevitable that the Solicitor General, whose legal staff was (and still is) composed of twenty-two lawyers, had to pick and choose more carefully amongst the Court's heavy docket, leaving aside many cases that might affect the federal government; in today's circumstances, the Solicitor General's office has the capacity to participate in virtually all such cases.<sup>181</sup> But regardless of whether the Solicitor General is applying a lower standard for participating, or is applying the same standard substantially freed from resource constraints, the result is the same: the Solicitor General's influence over the Supreme Court's merits cases has grown, especially on the civil side, and the situation is likely to endure for as long as the Court's plenary docket remains at its current low ebb.

### III. IMPLICATIONS FOR THE SOLICITOR GENERAL'S ROLE AS ADVOCATE

In the last fifteen years, across Supreme Courts led by two different chief justices, the reduced size of the plenary docket has moved from a passing phenomenon to a settled fact, as has the Solicitor General's extensive participation in it.<sup>182</sup> Given this new status quo, it is worth considering how the Solicitor General's reduced participation in the case selection process and expanded presence in the merits docket is affecting the Solicitor General's role as advocate. In the Sections that follow, we discuss the leading theories on the Solicitor General's proper relationship to the President and the Court, and then examine the issues raised by the changes in the scope and manner of the Solicitor General's participation.

#### A. *Theories on the Solicitor General's Proper Role*

The Solicitor General resides at the intersection of all three branches of government, serving the President and the executive branch, advising the Court, and interpreting and defending the laws that Congress enacts.<sup>183</sup> This unique position has raised questions

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<sup>181</sup> See *supra* note 58 (describing the staffing of the Solicitor General's office).

<sup>182</sup> See *supra* notes 75–147 and accompanying text.

<sup>183</sup> See Drew S. Days III, U.S. Solicitor Gen., In Search of the Solicitor General's Clients: A Drama with Many Characters, Lecture at the University of Kentucky College of Law (Nov. 10, 1994), in 83 KY. L.J. 485, 489–503 (1995) (discussing the Solicitor General's obligations to the executive branch, Congress, and the Court); Theodore B. Olson, U.S. Solicitor Gen., The Advocate as Friend: The Solicitor General's Stewardship Through the Example of Rex E. Lee, Address Before the Rex E. Lee Conference on the Office of the Solicitor General at Brigham Young University (Sept. 12, 2002), in 2003 BYU L. REV. 3, 4–5

about the office's role and where the loyalty of the Solicitor General ultimately lies. In grappling with this question, former solicitors general have suggested as many as nine different conceptions of the Solicitor General's "client."<sup>184</sup> But from a theoretical standpoint, there are three significant views on the Solicitor General's proper role: (1) the Solicitor General as "tenth justice"; (2) the Solicitor General as advocate for the federal government as an institution; and (3) the Solicitor General as advocate of the President's administration.<sup>185</sup>

Under the first of these views, the Solicitor General is in essence the "tenth justice," serving as an extension of the Court itself.<sup>186</sup> In this theory's purest form, the Solicitor General has a special duty to the Supreme Court, and must maintain a determined independence in order to meet this responsibility.<sup>187</sup> The executive branch is also "in some sense" the Solicitor General's client, but the Solicitor General "must be free to reach his own carefully reasoned conclusions about the proper answer to a question of law, without second-guessing or insistence that his legal advice regularly conform to the politics of the administration he represents."<sup>188</sup> Indeed, in this version, the Solicitor General should "simply take the position that reflects his best judgment of what the law is, just as he would if he were literally a Justice."<sup>189</sup>

In a less extreme version, however, the "tenth justice" theory captures the notion that the Solicitor General, as a lawyer and officer of the Court, has distinct duties to the Supreme Court, and is in partnership

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(describing the Solicitor General's responsibilities and explaining that the Solicitor General "has important responsibilities to all three branches of the federal government").

<sup>184</sup> See Drew S. Days III, *Executive Branch Advocate v. Officer of the Court: The Solicitor General's Ethical Dilemma*, 22 NOVA L. REV. 679, 681 (1998) ("The Solicitor General may, at any given point, conclude that the client is: 1) the people of the United States; 2) the federal government; 3) the administration in which he serves; 4) the President; 5) the Attorney General; 6) the Executive Branch departments and agencies; 7) individual federal employees; 8) independent regulatory agencies; and 9) the Congress."); cf. FRANCIS BIDDLE, IN BRIEF AUTHORITY 97-98 (1962) (asserting a strong view of the Solicitor General's independence, on the ground that "the client is but an abstraction").

<sup>185</sup> CAPLAN, *supra* note 27, at 17; McGinnis, *supra* note 36, at 802-04; Strauss, *supra* note 61, at 166.

<sup>186</sup> CAPLAN, *supra* note 27, at 17. The "tenth justice" terminology was popularized by Lincoln Caplan in his book of that name. See *id.*; cf. Kathryn Mickle Werdegar, *The Solicitor General and Administrative Due Process: A Quarter-Century of Advocacy*, 36 GEO. WASH. L. REV. 481, 482 (1968) (referring to the Solicitor General as the Court's "ninth and a half" member).

<sup>187</sup> CAPLAN, *supra* note 27, at 17 (discussing the role of the Solicitor General).

<sup>188</sup> *Id.* at 18.

<sup>189</sup> Strauss, *supra* note 61, at 168.

with the Court in the shared mission of providing justice.<sup>190</sup> The Solicitor General is uniquely positioned to provide the Court with valuable information about how a case, and the legal rule it spawns, will affect the smooth functioning of government, law enforcement, and economic relationships in regulated areas.<sup>191</sup> When the Solicitor General supplies the Court with information about the practical ramifications of a decision, or a reasoned judgment about the importance of those ramifications, the Solicitor General acts in partnership with the Court, and in that more figurative sense does serve as a kind of “tenth justice.”<sup>192</sup>

Under the second view, the Solicitor General is simply a lawyer for the federal government, and his or her duty is to represent the government in all its various capacities.<sup>193</sup> Under this theory, the Solicitor General has no special responsibility to either the Supreme Court or the President, but rather to the government as an institution.<sup>194</sup> Thus, when an administration’s policy position conflicts with the legal position that the Solicitor General must take to defend the government in litigation, the Solicitor General’s duty is to seek to win the lawsuit, even at the expense of the administration’s policy preferences.<sup>195</sup> Likewise, when filing an amicus brief, the Solicitor General’s duty is to preserve the government’s legal position in future cases, even if that precludes promotion of the administration’s preferred policy views.<sup>196</sup>

The institutional model thus defines the Solicitor General’s role as representative of the federal government’s institutional interests, separate and apart from the current administration’s partisan preferences.

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<sup>190</sup> See *id.* at 172 (“This is a more limited version of the often overstated ‘tenth Justice’ idea.”).

<sup>191</sup> See *id.* (noting that the Solicitor General’s office is “one of the Court’s few sources of information about the effects of legal rules and decisions in the world,” and providing examples).

<sup>192</sup> Cf. Roger Clegg, *The Thirty-Fifth Law Clerk*, 1987 DUKE L.J. 964, 968 (reviewing CAPLAN, *supra* note 27) (rejecting the notion that the Solicitor General should serve the Court as its “thirty-fifth law clerk”).

<sup>193</sup> See Strauss, *supra* note 61, at 166.

<sup>194</sup> See *id.*; see also Paul Clement, U.S. Solicitor Gen., Maureen Mahoney, Drew S. Days, III, Walter E. Dellinger III, Seth Waxman & Theodore Olson, Former U.S. Solicitors Gen., Solicitors General Panel on the Legacy of the Rehnquist Court, Discussion Held at The George Washington University Law School (Oct. 27, 2005), in 74 GEO. WASH. L. REV. 1171, 1180 (2006) (discussing the Solicitor General’s role). At a panel in 2005, former Acting Solicitor General Walter Dellinger stated: “[T]he Solicitor General’s client is the United States of America. It is the United States to whom you have the fiduciary responsibility and not to the particular President who happens to be serving or to his particular policies.” *Id.*

<sup>195</sup> See Strauss, *supra* note 61, at 167–68 (providing examples from issues that arose in both Republican and Democratic administrations).

<sup>196</sup> See *id.*

It emphasizes an advocacy role for the Solicitor General, but one that consistently focuses on advancing long-term federal institutional interests through success in litigation (including the maintenance of a strong relationship with the Supreme Court), rather than promoting a more transitory partisan agenda.<sup>197</sup>

Under the third view, the Solicitor General is the voice of the President, and his or her responsibility is to advocate the positions of the President and the President's administration.<sup>198</sup> According to this theory, the Solicitor General's place in the constitutional structure dictates the responsibilities of the office, and that place is squarely within the unitary executive branch headed solely by the President.<sup>199</sup> The Solicitor General thus has no special responsibility to the Supreme Court; rather, the Solicitor General's obligation is to advance the President's independent interpretation of the Constitution.<sup>200</sup> Moreover, because the Constitution grants all executive authority to the President, the current administration's policy views directly define the government's institutional interests, and the Solicitor General's duty is to focus on advancing those interests, not simply on navigating the most immediate and effective path to winning the cases that the federal government happens to be litigating at a given point in time.<sup>201</sup>

As a matter of constitutional structure, we think this third view—that the Solicitor General's duty is to the President—is most accurate. The Solicitor General is appointed by the President, and serves at the President's pleasure in the same manner that the Attorney General does.<sup>202</sup> As a member of the executive branch, the Solicitor General is

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<sup>197</sup> See *id.* at 173–75. Professor David A. Strauss contends that solicitors general and the lawyers in the office see themselves as advocates for the institutions of government, not as judicial officers. *Id.* at 168–69.

<sup>198</sup> See Louis Fisher, *Is the Solicitor General an Executive or a Judicial Agent? Caplan's Tenth Justice*, 15 *LAW & SOC. INQUIRY* 305, 306–07 (1990) (book review) (contending that the Solicitor General is responsible to the President); McGinnis, *supra* note 36, at 802–04.

<sup>199</sup> See McGinnis, *supra* note 36, at 802–03 (“Because litigation on behalf of the United States is an inherently executive branch function, the Solicitor General's authority is ultimately derived from the Constitution's grant of executive power to the President.”).

<sup>200</sup> See CORNELL W. CLAYTON, *THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY* 58–61 (1992) (contending that the Solicitor General's duty is ultimately to the President); Chamberlain, *supra* note 21, at 414 (noting that, although the Solicitor General serves the executive branch, the Court, and the public interest, “constitutionally and statutorily he owes his loyalty and allegiance only to the executive branch”); McGinnis, *supra* note 36, at 805.

<sup>201</sup> See McGinnis, *supra* note 36, at 804–05.

<sup>202</sup> See Chamberlain, *supra* note 21, at 426 (noting that the Solicitor General must answer to the President, and derives authority from the President); McGinnis, *supra* note 36, at 803 (“[T]he Solicitor General's authority is ultimately derived from the Constitution's

not, and cannot be, a tenth justice; the obligation is not to the Court, but rather to the separate branch of government in which Solicitor General serves.<sup>203</sup>

Further, the Solicitor General's allegiance is not simply to the offices and agencies that populate the executive branch, but rather to the President, who sets the policies and priorities for each of those offices and agencies.<sup>204</sup> The "institutional" view of the Solicitor General's role is thus deficient in two ways. First, as a structural matter, the Constitution does not grant the Solicitor General any authority distinct from the President's; rather, the Constitution grants all executive authority to the President, and the President appoints the Solicitor General to help him or her exercise that authority.<sup>205</sup> Second, as a practical matter, the government's "institutional" interests are not independent of the President's agenda, but rather are defined by the President's policy priorities.<sup>206</sup> Although there are definite constants in the Justice Department's institutional responsibilities—such as prosecuting criminals and defending lawsuits filed against the government or its officials—the President's priorities determine the importance of the government's various interests and are inextricably bound up with them.<sup>207</sup> It is thus

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grant of executive power to the President."); Janene M. Marasciullo, Note, *Removability and the Rule of Law: The Independence of the Solicitor General*, 57 GEO. WASH. L. REV. 750, 776–78 (1989) (noting that the Solicitor General is subject to the President's removal power).

<sup>203</sup> See Clegg, *supra* note 192, at 968 (arguing that the Solicitor General is not the Court's tenth justice, but rather "the advocate for a separate branch of government"); McGinnis, *supra* note 36, at 802 (noting that under the Constitution, "the Solicitor General has no special obligation to the Court"); see also CLAYTON, *supra* note 200, at 61 (quoting Chief Justice Burger's statement that the Solicitor General is "the Government's advocate in the Supreme Court, not the Supreme Court's representative in the Department of Justice"); SALOKAR, *supra* note 25, at 98 (quoting four former solicitors general, all of whom rejected the "tenth justice" characterization of their role); Strauss, *supra* note 61, at 168–69 (noting that solicitors general do not see themselves as part of the Court, but rather as advocates).

<sup>204</sup> See Chamberlain, *supra* note 21, at 413 ("[The] philosophy of the president and the administration at whose pleasure the solicitor general serves determines for the solicitor general the philosophy of what is just."); McGinnis, *supra* note 36, at 804 (arguing that because the Constitution "grants all executive authority" to the President, the Solicitor General, as his subordinate, "must sympathetically and vigorously advocate the President's position").

<sup>205</sup> See Chamberlain, *supra* note 21, at 426; McGinnis, *supra* note 36, at 803 ("[T]he Solicitor General's authority is ultimately derived from the Constitution's grant of executive power to the President.").

<sup>206</sup> See BIDDLE, *supra* note 184, at 98 (referring to the federal government as "an abstraction"); Strauss, *supra* note 61, at 175 ("[I]t is not always easy even to identify the institutional interests of the federal government in the abstract, unconnected to a set of specific policies.").

<sup>207</sup> See Strauss, *supra* note 61, at 166, 173–76 (discussing baseline institutional duties that all solicitors general perform and providing examples of how the President's policy

structurally and practically problematic to think of the Solicitor General as representing institutional interests separate from those that the President has established.

Determining where the Solicitor General fits into the constitutional hierarchy, however, only begins to answer the question of how the Solicitor General can best effectuate the constitutional role of the office. Within the Solicitor General's sphere of (delegated) authority, there is significant functional autonomy, and how to act within this sphere is largely a prudential matter.<sup>208</sup> In other words, in carrying out the primary duty to represent the President (and advocate the administration's policy program), the Solicitor General has substantial leeway to determine the most effective course, taking into account the expectations of the Court, the likelihood and consequences of success in litigation, the value of the Solicitor General's reputation for integrity, the usefulness of the office's aura of independence, and other such concerns.<sup>209</sup>

Solicitors general have long recognized that a blend of the three approaches enhances their effectiveness.<sup>210</sup> When the Solicitor General, acting in the "tenth justice" mode, provides the Court with valuable (and often otherwise unattainable) information about the practical consequences of a potential decision, the Solicitor General not only improves the Court's decision making, but also strengthens the Court's reliance on the Solicitor General.<sup>211</sup> Likewise, when the Solicitor General, acting in the "institution's lawyer" mode, presents the government's cases to the Court in a highly professional and nonpolitical manner, the Solicitor General reassures the Court that its reliance on

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objectives influence the Solicitor General's decisions on when to seek certiorari, when to file amicus briefs, and how to allocate resources).

<sup>208</sup> See *supra* notes 24–26 and accompanying text.

<sup>209</sup> See Strauss, *supra* note 61, at 166, 173–76; *supra* notes 198–201 and accompanying text.

<sup>210</sup> See Olson, *supra* note 183, at 13 (noting that a Solicitor General's success is tied to "realizing the president's overall litigation objectives ultimately [depend] on his preserving the solicitor general's special relationship with the Court").

<sup>211</sup> In this version of the "tenth justice" model, the Solicitor General is not acting as a justice in any literal sense, but rather is assisting the Court in ways that ultimately enhance the Solicitor General's effectiveness more generally, and thus further the interests of the President and the executive branch. See Strauss, *supra* note 61, at 172 (discussing the Court's reliance on the Solicitor General's provision of information on the practical ramifications of potential decisions); see also Krislov, *supra* note 37, at 720 (noting that amicus briefs have "allowed representation of governmental and other complex interests generated by the legal involutions of federalism," and that they serve "as a vehicle for broad representation of interests, particularly in disputes where political ramifications are wider than a narrow view of common law litigation might indicate").

the integrity of the office is well-placed.<sup>212</sup> Far from undermining the Solicitor General's responsibility to the President, the use of these two modes improves the Solicitor General's status—and advocacy—overall. The difficult judgment thus is not whether the Solicitor General should be serving in these modes, but how to combine them with advocacy of the President's particular agenda in a way that maximizes the Solicitor General's impact.<sup>213</sup>

In the next Section, we consider these approaches in light of the Solicitor General's changed participation in the Court's docket, both at the certiorari stage (where the Solicitor General's influence has contracted) and the merits stage (where it has expanded).

### B. *Consequences of the Solicitor General's Changed Participation at the Certiorari and Merits Stages*

#### 1. Certiorari Stage

One of the most striking changes in the Solicitor General's role is the substantial decline in the number of cases in which the Solicitor General seeks Supreme Court review.<sup>214</sup> As noted above, during the Roberts Court, the Solicitor General has petitioned for review in an average of only fifteen cases per Term, down from an average of fifty in the mid-1980s.<sup>215</sup> As a result, the Court has taken far fewer government-initiated cases, and the percentage of its docket devoted to such cases has shrunk from nineteen percent in the mid-1980s to an anemic ten percent in the Roberts Court.<sup>216</sup> Nonetheless, the overall percentage of the Court's docket occupied by cases involving the federal government has risen over this same period, as the Court increasingly has granted review in cases brought against the federal government.<sup>217</sup> In conse-

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<sup>212</sup> See Strauss, *supra* note 61, at 166.

<sup>213</sup> See Michael W. McConnell, *The Rule of Law and the Role of the Solicitor General*, 21 LOY. L.A. L. REV. 1105, 1105–08 (1988) (discussing different approaches to the Solicitor General's responsibility and concluding that a "Solicitor General's performance cannot be judged according to tidy criteria, for the available criteria are conflicting and require a different balance in different cases").

<sup>214</sup> See *supra* notes 90–94 and accompanying text (discussing the precipitous drop in the Solicitor General's requests for review).

<sup>215</sup> See OSG Workload Reports, *supra* note 40, at 1, 9; *supra* notes 90–94.

<sup>216</sup> See OSG Annual Reports, Table III, *supra* note 70 (providing data on the number of cases argued in which the federal government was the petitioner in the 1985–2008 Terms); *supra* notes 111–112 and accompanying text (discussing the percentage of the docket in which the federal government was the petitioner).

<sup>217</sup> See *supra* notes 113–117 and accompanying text (providing data showing that the percentage of the Court's docket in which the federal government was respondent went

quence, the mix of merits cases involving the federal government has changed dramatically. Whereas in the mid-1980s, the federal government was the petitioner in slightly more than half of these cases, that advantage deteriorated steadily over the next two decades; in the Roberts Court, the federal government has been the petitioner in fewer than one-third of them.<sup>218</sup>

It thus appears that the paucity of cases coming from the Solicitor General has encouraged the Court to act on its own to dip deeper into the vast pool of cases where the federal government is a party.<sup>219</sup> Although the Solicitor General's office can try to keep tight control over which of its own cases the Court hears by filing fewer petitions, it ultimately has not prevented the Court from reviewing cases—or issues—involving the federal government, because the Court has simply granted more cases in which the federal government won below.<sup>220</sup>

This development undermines the litigating interests of the federal government in important ways. Most obviously, a government victory below is now at risk in more cases.<sup>221</sup> Further, the United States is likely to lose more cases in the Supreme Court, because historically the Solicitor General, like virtually all parties, tends to prevail more often as the petitioner than as the respondent.<sup>222</sup> Over the years, the Solicitor General's office has, on average, won 70% to 80% of its cases when it

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from an average of 17% in the mid-1980s, to 25% in the latter Rehnquist Court years, to 23% in the early Roberts Court years).

<sup>218</sup> See OSG Annual Reports, Table III, *supra* note 70. In the 1985–1988 Terms, the Court heard on average thirty-two cases per Term in which the United States was the petitioner and twenty-nine cases in which the United States was the respondent. *See id.* In the 1994–2004 Terms, the Court heard on average fifteen cases per Term in which the United States was the petitioner and twenty-two cases in which the United States was the respondent. *See id.* In the 2005–2008 Terms, the Court heard on average eight cases per Term in which the United States was the petitioner and nineteen cases in which the United States was the respondent. *See id.*

<sup>219</sup> During the 2005–2008 Terms, the Court received, on average, 3995 petitions in cases against the federal government. *See* OSG Workload Reports, *supra* note 40, at 2–3 (providing data on the number of cases responding to petitions filed, excluding amicus briefs, and cases in which waivers were filed for the 2005–2008 Terms); *see also* Cohen & Spitzer, *supra* note 22, at 414 (contending that the Solicitor General is not filing petitions in a significant number of cases that the Court would otherwise review); Lee, *supra* note 27, at 598 (suggesting that the Court would allocate about the same percentage of its docket to the federal government regardless of how many petitions the Solicitor General were to file).

<sup>220</sup> *See supra* note 218 and accompanying text.

<sup>221</sup> *See supra* note 218 and accompanying text.

<sup>222</sup> *See supra* note 52 and accompanying text (describing the Solicitor General's winning percentages).

was the petitioner, as compared to 50% to 60% of its cases when it was the respondent.<sup>223</sup>

In addition, by petitioning in fewer cases than the Court apparently wishes to hear involving the federal government, the Solicitor General may be relinquishing some control over the overall litigation strategy of the United States.<sup>224</sup> To the extent that the Court would grant more petitions filed by the United States, and is filling in with petitions filed against it, the Solicitor General is allowing the justices to shape the government's litigation agenda in the Supreme Court. In cutting back on the cases offered to the Court, therefore, the Solicitor General may be forgoing presentation of issues that interest the Court in cases that are more optimal, both procedurally and factually, from the federal government's standpoint. If the Solicitor General's office were to step up the number of petitions it files, it is likely (though not inevitable) that the Court would grant more of the federal government's cases and fewer of its opponents' cases, potentially restoring the rough parity that existed in the mid-1980s.<sup>225</sup>

A further complication for the Solicitor General is the rise of the "elite Supreme Court bar," which has changed the dynamic at the case selection stage.<sup>226</sup> In recent Terms, this group of highly experienced Supreme Court advocates—many of whom are alumni of the Solicitor General's office—has been extremely influential at the certiorari stage. These advocates have used their expertise not only to present cases in the most attractive manner, but also to affect the justices' areas of interest and priorities by pursuing litigation strategies that transcend individual cases and promote the development of the law in ways that ad-

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<sup>223</sup> See *supra* note 52 and accompanying text.

<sup>224</sup> In our interview with Solicitor General Waxman, however, he noted that the reduced size of the Court's docket has enabled the Solicitor General to engage more directly in overseeing the federal government's litigation strategy in the lower courts. Telephone Interview with Seth P. Waxman, *supra* note 138. This enhanced ability to supervise the early stages of litigation may serve as a counterweight to incursions on the Solicitor General's control at the Supreme Court level. See *id.*

<sup>225</sup> See *supra* note 117 and accompanying text (describing the proportion of cases in which the Solicitor General was petitioner and respondent in the mid-1980s, the latter Rehnquist Court, and the Roberts Court).

<sup>226</sup> See Lazarus, *supra* note 27, at 1488–91 (describing the advent of an elite group of Supreme Court specialists and its transformative effect on the Court). Professor Lazarus defines a Supreme Court expert as "an attorney who has either him- or herself presented at least five oral arguments before the Court or is affiliated with a law firm or other comparable organization with attorneys who have, in the aggregate, argued at least ten times before the Court." *Id.* at 1502.

vantage their clients.<sup>227</sup> During the 2007 Term, for example, over fifty percent of the certiorari petitions granted to parties other than the Solicitor General were filed by members of this elite bar, and during the 2005 Term, a member of the elite bar was involved in almost ninety percent of the certiorari petitions that were granted with amicus support.<sup>228</sup> Moreover, in this time period, the composition of the Court's docket underwent a significant shift to substantive areas that the elite bar was promoting, specifically business cases involving issues of concern to the business clients that the elite bar primarily represents.<sup>229</sup>

The emergence and success of the elite Supreme Court bar may provide further impetus for the Solicitor General to re-engage more aggressively in the case selection process. To the extent that the Solicitor General has underestimated the Court's level of interest in cases involving the federal government, members of the elite bar are offering the Court compelling cases, and the Court is responding.<sup>230</sup> Supplying the Court with more alternatives from the government's own stock of cases might enable the Solicitor General to crowd out some of these others, all of which are less desirable from the government's point of view. In addition, the elite bar has been exerting significant influence over the Court's agenda, while the Solicitor General has assumed an increasingly reactive posture.<sup>231</sup> To regain a more substantial role in the agenda-setting process, the Solicitor General may need to press the federal government's institutional agenda (and perhaps the administration's political agenda) more overtly by expanding the menu of cases offered to the Court.

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<sup>227</sup> See *id.* at 1527–32 (discussing the success of the elite bar at the certiorari stage, both in having cases granted and influencing the Court's interests to reflect those of their clients, particularly in business areas).

<sup>228</sup> *Id.* at 1527–29 (noting that these numbers represent dramatic increases from the early-1980s, prior to the elite bar's emergence).

<sup>229</sup> See *id.* at 1531–32 (discussing this shift, and showing that in the 2006 Term, of the Court's sixty-seven signed opinions, thirty-four were cases of significant interest to business, and the interested businesses were petitioners in twenty-six of them).

<sup>230</sup> See Lazarus, *supra* note 27, at 1524–26 (noting that experienced Supreme Court advocates are more successful at the certiorari stage, and also that Supreme Court clerks pay special attention to petitions filed by prominent members of the elite bar); *supra* notes 113–117 and accompanying text (describing the increasing disproportion of cases granted in which the Solicitor General is respondent as opposed to petitioner).

<sup>231</sup> Lazarus, *supra* note 27, at 1522 (“[The] Supreme Court Bar's clearest impact is the significant role that it is playing in establishing the Court's agenda.”); *id.* at 1529–39 (documenting the influence of the elite bar on the Court's docket).

## 2. Merits Stage

The other major change in the Solicitor General's role is a dramatically increased presence in the Court's merits docket. As discussed above, the Solicitor General is now involved in more than three-quarters of the merits cases, and in the majority of them is participating as amicus.<sup>232</sup> Moreover, in virtually all of these cases, the Solicitor General's office is not only submitting a brief, but also is presenting its views at oral argument.<sup>233</sup>

The scope of the Solicitor General's participation as amicus raises two distinct concerns. The first is whether it is appropriate for the Solicitor General to be getting involved so frequently in disputes between private parties, and the second is whether the Solicitor General is participating too extensively in cases raising high-profile constitutional issues, which are politically salient but may be only tangentially related to the institutional interests of the federal government.<sup>234</sup>

### a. *Private Cases*

With respect to the Solicitor General's involvement as amicus in private cases, the key concern is whether and to what extent the federal government—with its unique status, special privileges, and extraordinary success rate—should lend its great influence to private parties by choosing sides in private controversies.<sup>235</sup> Nearly forty years ago, Professor Robert Scigliano, in his book *The Supreme Court and the Presidency*, recognized these concerns.<sup>236</sup> He suggested that it might not be “fair for the government to lend its great prestige to one of the litigants in other people's controversies,” and he questioned whether the federal government should “seek to influence the outcome of so many cases in which it is not a party,” particularly “when it does not have a concrete and substantial interest in the outcome.”<sup>237</sup>

At the time Professor Scigliano wrote, the Solicitor General's involvement as amicus on the merits had increased markedly, from approximately three cases per Term in the 1920s to approximately seven-

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<sup>232</sup> See *supra* notes 151–155 and accompanying text (discussing the expansion of the Solicitor General's presence in the merits docket).

<sup>233</sup> See *supra* notes 163–165 and accompanying text (discussing the expansion of the Solicitor General's participation as amicus in oral argument).

<sup>234</sup> See *infra* notes 235–293 and accompanying text.

<sup>235</sup> See *supra* notes 48–56 and accompanying text (discussing the Solicitor General's success rate).

<sup>236</sup> See SCIGLIANO, *supra* note 52, at 179–82.

<sup>237</sup> *Id.* at 181.

teen per Term in the mid-1960s—which amounted to about one-tenth of all argued cases, and one-quarter of argued cases in which the federal government was not a party.<sup>238</sup> But in recent years, the Solicitor General's involvement as amicus has grown much more dramatically—during the Roberts Court, the Solicitor General has participated as amicus in close to half of all argued cases, and in two-thirds of argued cases in which the federal government was not a party—giving new urgency to concerns about the Solicitor General's role.<sup>239</sup>

Despite the potential for overstepping, however, we found that the Solicitor General's office has confined its amicus participation in private cases to those in which the federal government has a direct and important interest.<sup>240</sup> In virtually every case between private parties that the Solicitor General has entered, the interpretation of a federal statute has been at stake, implicating the federal government's interest in enforcement of the statute, the statute's application to federal agencies, or both.<sup>241</sup> For example, in the 2007 Term, the Court heard sixteen private cases, and the Solicitor General participated as amicus in twelve of them.<sup>242</sup> The cases in which the Solicitor General participated involved the Age Discrimination in Employment Act, ERISA, federal Indian law, the Federal Rules of Civil Procedure, the Federal Rules of Evidence, the Medical Device Amendments of 1976, patent law, RICO, Section 1981, and the Securities Exchange Act of 1934. Conversely, the Solicitor General sat out cases involving issues less directly relevant to the federal government, including enforcement of private arbitration agreements under the Federal Arbitration Act, punitive damages, and standing.<sup>243</sup> Similarly, in the 2008 Term, the Court heard sixteen private cases, and the Solicitor General participated as amicus in ten of

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<sup>238</sup> See *id.* at 180 & n.29. In the 1963–1967 Terms, the Solicitor General was involved as amicus in 12% of all argued cases, and 28% of argued cases in which the federal government was not a party. See Office of the Attorney General Annual Report Table III Compilation, 1963 Term Through 1967 Term (unpublished data compilation) (on file with authors) (classifying Supreme Court cases argued or decided on the merits).

<sup>239</sup> See OSG Annual Reports, Table III, *supra* note 70. In the 2005–2008 Terms, the Solicitor General was involved as amicus in 44% of all argued cases, and 66% of argued cases in which the federal government was not a party. See *id.*

<sup>240</sup> See *Supreme Court Statistics*, *supra* note 144 (1984–2008 Terms).

<sup>241</sup> See *id.*

<sup>242</sup> See *id.* (2007 Term).

<sup>243</sup> See *id.* (listing the subject areas of the private cases decided in the 2007 Term). The cases that the Solicitor General sat out were *Hall Street Associates v. Mattel, Inc.*, 552 U.S. 576 (2008); *Preston v. Ferrer*, 552 U.S. 346 (2008); *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008); and *Sprint Communications Co. v. APCC Services*, 554 U.S. 191 (2008).

them.<sup>244</sup> The cases in which the Solicitor General participated involved the Federal Cigarette Labeling and Advertising Act, the Age Discrimination in Employment Act, ERISA, the Foreign Sovereign Immunities Act, the National Labor Relations Act, the Sherman Act, and Title VII, whereas those the Solicitor General sat out again involved issues less directly relevant to the federal government, including enforcement of private arbitration agreements under the Federal Arbitration Act, bankruptcy, general maritime law, and subject matter jurisdiction.<sup>245</sup>

Moreover, the Court apparently welcomes the Solicitor General's involvement in these cases, even though the issues arise in private controversies. During the Roberts Court, for example, the justices have routinely granted the Solicitor General's requests to participate as amicus at oral argument in private cases.<sup>246</sup> And even more telling, the Roberts Court frequently calls for the views of the Solicitor General in private cases at the certiorari stage.<sup>247</sup> Of the twenty-five amicus briefs that the Solicitor General filed in response to the Court's invitation during the 2007 Term, for example, nineteen were in private cases.<sup>248</sup> These cases, which raised issues comparable to those in the larger group of cases that the Solicitor General entered as amicus on the merits, indicate not only the Court's comfort with the Solicitor General's involvement, but also its reliance on the information and perspective that the Solicitor General provides.<sup>249</sup>

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<sup>244</sup> See *Supreme Court Statistics*, *supra* note 144 (2008 Term).

<sup>245</sup> See *id.* (listing the subject areas of the private cases decided in the 2008 Term). The cases that the Solicitor General sat out were *Atlantic Sounding Co., Inc. v. Townsend*, 129 S. Ct. 2561 (2009); *Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195 (2009); *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009); *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (2009); *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 129 S. Ct. 1862 (2009); and *Vaden v. Discover Bank*, 129 S. Ct. 1262 (2009).

<sup>246</sup> See *supra* notes 163–165 and accompanying text (discussing the Solicitor General's participation as amicus in oral argument).

<sup>247</sup> During the Roberts Court, the justices have called for the views of the Solicitor General an average of twenty-two times per Term, up from about fifteen per Term during the latter Rehnquist Court. See OSG Workload Reports, *supra* note 40, at 4, 12; see also *supra* notes 106–108 and accompanying text (discussing the CVSG procedure and the Court's fluctuating use of it). The justices' comfort with the Solicitor General's participation may also stem from their scholarly bent: during the first four Terms of the Roberts Court, all of the justices were formerly judges on the federal courts of appeals, and both Chief Justice Roberts and Justice Alito worked in the Solicitor General's office.

<sup>248</sup> See *Office of the Solicitor General*, *supra* note 159.

<sup>249</sup> See *id.* At issue in the cases on which the Court sought the Solicitor General's views in the 2007 Term were ERISA, patent law, the National Labor Relations Act, the Communications Act of 1934, CERCLA, the Commerce Clause, preemption, the False Claims Act, the Age Discrimination in Employment Act, Title VII, the Sherman Act, and the Family Medical Leave Act. See *id.*

Indeed, in private cases involving the interpretation of complex federal statutes, the Solicitor General, acting in the more advisory role implicit in the “tenth justice” model, is able to supply the Court with critically important information about the practical consequences of its decisions beyond the immediate situation of the parties in a particular case.<sup>250</sup> This information, which positions the Court to make better decisions, provides a significant benefit to the Court and justifies the Solicitor General’s intervention in private disputes.<sup>251</sup>

Further, it is unproblematic that the Solicitor General might act in the “institution’s lawyer” mode as well in these cases, because the federal government has significant interests of its own at stake. The Supreme Court is not simply focused on the narrow task of error correction, but rather on the broader development of the law.<sup>252</sup> Even in the context of a private dispute, therefore, it is appropriate for the Solicitor General to offer the Court not only information, but also views on the consequences to and preferred resolution for the federal government.<sup>253</sup> The Supreme Court surely expects this type of advocacy and can digest the Solicitor General’s views in light of it.<sup>254</sup>

The more worrisome question is whether the Court is too inclined to see private litigation through the lens of the federal government’s interests. During the first two years of the Roberts Court, the party that

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<sup>250</sup> See Strauss, *supra* note 61, at 172 (explaining that the Solicitor General’s office is “one of the Court’s few sources of information about the effects of legal rules and decisions in the world,” and providing examples); Note, *Government Litigation in the Supreme Court: The Roles of the Solicitor General*, 78 YALE L.J. 1442, 1476–77 (1969) (noting that the Court may need the Solicitor General to furnish “information which, though unavailable to the litigants, may be the crux of the dispute” or bring a more expert and impartial view in situations where the “optimal resolution . . . would benefit none of the litigants in the case,” and providing examples); see also *supra* notes 186–192 and accompanying text (discussing the “tenth justice” model).

<sup>251</sup> Telephone Interview with Seth P. Waxman, *supra* note 138 (noting that in statutory cases, it is important for the Court to hear from the policymaking branches, especially those that administer and enforce statutes, about how best to interpret them).

<sup>252</sup> See SUP. CT. R. 10 (“[A] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”); *Calderon v. Thompson*, 523 U.S. 538, 569 (1998) (Souter, J., dissenting) (“It is, after all, axiomatic that this Court cannot devote itself to error correction.”); see also Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 279 (2006) (“The Supreme Court . . . has cast itself not as a source of justice for individual litigants or the forum to correct aberrations in the application of law, but rather as providing the structure and guidance necessary for the lower courts to correct or avoid errors.”).

<sup>253</sup> See *supra* notes 194–197 and accompanying text.

<sup>254</sup> See Strauss, *supra* note 61, at 173 (contending that the Court expects the Solicitor General to engage in advocacy for the government as an institution).

the Solicitor General supported as amicus enjoyed more success than at any other time in the recent past, winning a remarkable eighty-nine percent of the time.<sup>255</sup> It is unclear whether this extraordinary win rate reflects the growing influence of the Solicitor General or merely that the Court's policy preferences were highly congruent with the Solicitor General's during the Bush administration. But the numbers reveal the degree to which the federal government's interests permeate the Court's own perspective, even in cases where the federal government is not a party.<sup>256</sup>

Moreover, the extent of the Solicitor General's influence raises concerns about whether the norms of Supreme Court practice are becoming overly skewed in favor of the sophisticated litigant.<sup>257</sup> During the first two years of the Roberts Court, petitioners supported by the Solicitor General won twenty-five percent more often than the average petitioner, and respondents supported by the Solicitor General won forty-eight percent more often than the average respondent.<sup>258</sup> The importance of having the Solicitor General's support gives a distinct edge to private litigants with counsel experienced in the intricacies of Supreme Court advocacy, who know that it is crucial to lobby the Solicitor General and do so effectively.<sup>259</sup> The prospect of the Solicitor General's involvement also complicates the dynamic of the litigation for private litigants, because the Solicitor General's views are highly influ-

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<sup>255</sup> See Juliano, *supra* note 55, at 551–58 (finding the party supported by the Solicitor General won 89.06% of the time in cases where the Solicitor General argued for a position in line with one of the parties and the Court's decision was clearly in one party's favor). In addition, the individual justices were more heavily inclined towards the Solicitor General's position, with five justices voting for the Solicitor General's side over 80% of the time, and all but Justice Stevens voting for his side over two-thirds of the time. See *id.* at 556–57 (reporting that whereas only one justice voted in favor of the party that the Solicitor General supported over 80% of the time during the 1953–1982 Terms, five did so during the 2005–2006 Terms).

<sup>256</sup> See *id.* at 551–58.

<sup>257</sup> See *supra* notes 226–229 and accompanying text.

<sup>258</sup> See Juliano, *supra* note 54, at 556 (comparing these rates to those from 1945–1995—16.5% for petitioners and 25.7% for respondents—and finding that the Solicitor General's participation in the 2005–2006 Terms has further improved the average win rate for parties on both sides); see also *supra* note 56 and accompanying text (discussing Kearney & Merrill's study of the 1945–1995 Terms).

<sup>259</sup> See Lazarus, *supra* note 27, at 1539–50 (discussing the rise of the elite Supreme Court bar and the influence that sophisticated Supreme Court practitioners have on the outcome of cases). In our interviews, however, both Solicitors General Clement and Days noted that, although there was a time when only sophisticated litigants knew to seek the involvement of the Solicitor General, the value of doing so is now widely recognized. Telephone Interview with Paul D. Clement, *supra* note 137; Telephone Interview with Drew S. Days III, *supra* note 138.

ential, but not subject to the party's control and direction.<sup>260</sup> Nonetheless, the impetus for private litigants to seek the Solicitor General's support is, overall, a positive byproduct of the Solicitor General's success. Through meeting with litigants, the Solicitor General gains valuable information about the practical ramifications of the statute or the legal issue in the private sector, and is thus positioned to make better decisions on whether and how to participate in cases.<sup>261</sup>

### b. *High-Profile Cases*

The second concern about the Solicitor General's ubiquitous presence is whether the office is now participating too extensively in "social agenda" cases raising politically sensitive constitutional issues that are only tangentially related to the federal government's institutional interests. During the Reagan administration, critics of Solicitor General Charles Fried argued that he had politicized the office with unabashedly partisan amicus briefs.<sup>262</sup> In his book *The Tenth Justice*, for example, Lincoln Caplan contended that Solicitor General Fried's advocacy "bent reason and spurned restraint" in agenda cases, which "made the government's rationales suspect in run-of-the-mill matters," undermining the office and its relationship to the Supreme Court.<sup>263</sup>

Solicitor General Fried's participation in social agenda cases, however, was not so unusual either in its frequency,<sup>264</sup> or in its proclivity to

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<sup>260</sup> See Millett, *supra* note 51, at 215–228 (providing advice on how to obtain support from the Solicitor General in Supreme Court litigation and emphasizing the importance of seeking such support).

<sup>261</sup> See Telephone Interview with Theodore B. Olson, *supra* note 138. Solicitor General Olson emphasized in our interview that encouraging litigants to lobby the Solicitor General "is good government," both because the Solicitor General's office learns valuable information, and because litigants and their counsel have the right to share their views with federal officials. *Id.*

<sup>262</sup> See CAPLAN, *supra* note 27, at 273.

<sup>263</sup> *Id.* Caplan's examples include *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), in which Fried urged the Court to overturn *Roe v. Wade*, 410 U.S. 113 (1973), and *Bender v. Williamsport Area School District*, 475 U.S. 534 (1986), in which Fried sought to pave the way for prayer in schools. See CAPLAN, *supra* note 27, at 135–54, 235–37. Throughout the book, Caplan catalogs criticisms of Fried's advocacy as Solicitor General, many of which were reported in the popular media, and many of which were conveyed to Caplan in private interviews. See *id.* at 222–72; see also Chamberlain, *supra* note 21, at 380 n.9 (noting contemporary critiques of Solicitor General Fried for politicizing the office).

<sup>264</sup> See Cooper, *supra* note 38, at 689 (showing that in the 1984–1987 Terms, the Solicitor General participated as amicus in a total of only six "public interest" cases where the federal government did not have a direct or implied interest). Although the absolute number of such filings was higher than it was during four-Term periods in the mid-1930s and

challenge the current state of the law.<sup>265</sup> The Solicitor General has a long tradition of pushing for change on issues of social policy, particularly in civil rights cases.<sup>266</sup> But the larger concern voiced in the mid-1980s—that at some point the Solicitor General’s partisan advocacy may undermine the office’s standing with the Court, and thus its effectiveness in the federal government’s own cases—is a fair one, especially as the Solicitor General’s role in the merits docket has expanded.<sup>267</sup>

In constitutional cases as well, however, the Solicitor General’s office, for the most part, has limited its involvement to cases presenting issues in which the federal government has a significant institutional interest.<sup>268</sup> In some ways, this is not surprising, because the great majority of cases raising constitutional issues involve state actors, meaning a state or local government is often a party.<sup>269</sup> In these cases, government interests are very much at stake, and often they are implicated in functionally similar respects at the federal level as well as the state level.

In recent Terms, for example, approximately half of the constitutional cases that the Solicitor General entered as amicus were criminal

mid-1950s, the percentage in light of the total number of amicus briefs filed was roughly consistent across all periods. *Id.*

<sup>265</sup> See CLAYTON, *supra* note 200, at 57–58 (noting that previous solicitors general had challenged prevailing precedents and providing examples); Chamberlain, *supra* note 21, at 422–26 (documenting cases in which previous solicitors general had challenged current law, including numerous early civil rights cases which sought to overturn the “separate but equal” doctrine of *Plessy v. Ferguson*); Clegg, *supra* note 192, at 965–66; Fisher, *supra* note 198, at 312–14 (providing examples from the late 1930s and early 1940s); McConnell, *supra* note 213, at 1115 (“If one could imagine a Solicitor General consistently making only those arguments he expects the Court to agree with, it would be a Solicitor General who has made himself and his Office irrelevant.”).

<sup>266</sup> See Waxman, *supra* note 21, at 1297–1315 (discussing the critical role that solicitors general played in fostering civil rights from the late nineteenth century onward, and focusing on the importance of the Solicitor General’s support as amicus in the series of private cases that led to the Court’s overturning of *Plessy v. Ferguson* in *Brown v. Board of Education*). Cases that the Solicitor General entered as amicus in favor of civil rights plaintiffs during the Civil Rights Movement include *Brown v. Board of Education*, 347 U.S. 483 (1954) (involving school desegregation); *Henderson v. United States*, 339 U.S. 816 (1950) (involving segregated seating on trains; the Solicitor General refused to defend the federal agency’s position, siding instead with the plaintiff); *McLaurin v. Oklahoma*, 339 U.S. 637 (1950) (involving segregation at the university level); *Sweatt v. Painter*, 339 U.S. 629 (1950) (involving segregation at the university level); and *Shelley v. Kraemer*, 334 U.S. 1 (1948) (involving a racially restrictive covenant); see also Note, *supra* note 250, at 1480 & n.178 (providing examples of instances in which the Court has invited the Solicitor General to participate as amicus in constitutional cases).

<sup>267</sup> See *supra* notes 262–263 and accompanying text.

<sup>268</sup> See *Supreme Court Statistics*, *supra* note 144 (2005–2008 Terms).

<sup>269</sup> See *id.* In the 2005–2008 Terms, the Court heard, on average, a total of twenty-five cases each Term in which the principal issue was a constitutional issue, but only one to two of those cases each Term involved private litigation. See *id.*

cases.<sup>270</sup> In virtually all of these cases, the outcome stood to affect the law enforcement interests of the federal government, raising issues under the Confrontation Clause, the Fourth Amendment's search and seizure provisions, the Cruel and Unusual Punishment Clause of the Eighth Amendment, and similar matters.<sup>271</sup> The Solicitor General, however, also sat out about half of the state criminal cases, and in these, the constitutional issues were less likely to affect federal prosecutions.<sup>272</sup> In the criminal area, the Solicitor General thus seems to have remained in the "institution's lawyer" mode, participating only where resolution of the constitutional issues would impact the federal government's own institutional interests.<sup>273</sup>

In the civil arena, there is broader scope for cases to present constitutional issues that affect state and local government, but only impli-

<sup>270</sup> See *infra* note 271 and accompanying text.

<sup>271</sup> In the 2007 Term, for example, the Solicitor General participated as amicus in *Baze v. Rees*, 553 U.S. 35 (2008) (involving constitutionality of lethal injection procedures); *Medellín v. Texas*, 129 S. Ct. 360 (2008) (involving executive power in state criminal cases); *Indiana v. Edwards*, 554 U.S. 164 (2008) (involving state's ability to insist that defendant be represented by counsel); and *Virginia v. Moore*, 553 U.S. 164 (2008) (involving Fourth Amendment search and seizure issue). The Solicitor General supported the state government's position in all of them except *Medellín*, where the issue involved federal-state relations. See *Medellín*, 129 S. Ct. at 361. In the 2008 Term, the Solicitor General participated as amicus in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) (involving admissibility of lab reports under Confrontation Clause); *Kansas v. Ventris*, 129 S. Ct. 1841 (2009) (involving impeachment with statement taken in violation of Sixth Amendment); *Arizona v. Gant*, 129 S. Ct. 1710 (2009) (involving search and seizure); *Rivera v. Illinois*, 129 S. Ct. 1446 (2009) (involving right to fair trial); *Arizona v. Johnson*, 129 S. Ct. 781 (2009) (involving search and seizure); and *Hedgpeth v. Pulido*, 129 S. Ct. 530 (2008) (involving jury instructions). The Solicitor General supported the state government's position in all of them except *Hedgpeth*, where the issue involved jury instructions. See *Hedgpeth*, 129 S. Ct. at 530.

<sup>272</sup> In the 2005–2008 Terms, the Court heard, on average, eleven state criminal cases each Term in which the principal issue was a constitutional issue, and the Solicitor General sat out one-half of them. See *Supreme Court Statistics*, *supra* note 144 (2005–2008 Terms); see also *supra* note 174 (describing how the authors determined the Solicitor General's participation rate). In the 2007 Term, for example, the Solicitor General sat out *Giles v. California*, 128 S. Ct. 2678 (2008) (involving scope of forfeiture by wrongdoing exception to Confrontation Clause); *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) (involving death penalty for rape); *Snyder v. Louisiana*, 552 U.S. 472 (2008) (involving jury selection in capital case); and *Danforth v. Minnesota*, 552 U.S. 264 (2008) (involving *Teague* retroactivity in state courts). In the 2008 Term, the Solicitor General sat out *Bobby v. Bies*, 129 S. Ct. 2145 (2009) (involving defendant's mental ability in capital case); *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009) (involving right to counsel); *Cone v. Bell*, 129 S. Ct. 1769 (2009) (involving AEDPA deference on habeas claim); *Knoules v. Mirzayance*, 129 S. Ct. 1411 (2009) (involving AEDPA deference on habeas claim); *Waddington v. Sarausad*, 129 S. Ct. 823 (2009) (involving AEDPA deference on habeas claim); *Oregon v. Ice*, 129 S. Ct. 711 (2009) (involving right to jury); and *Jimenez v. Quarterman*, 129 S. Ct. 681 (2009) (involving AEDPA deference on habeas claim).

<sup>273</sup> See *supra* notes 193–197 and accompanying text.

cate the federal government's interests indirectly—that is, more as a political or ideological matter. Social agenda cases raising hot-button issues about abortion, school prayer, affirmative action in higher education, and gay rights, for example, generally fall within this category.

Nevertheless, during the Roberts Court, the Solicitor General has been participating in approximately one-half of the civil cases presenting constitutional issues, and in the great majority of them, the federal government's interest has been direct and obvious.<sup>274</sup> In the 2007 and 2008 Terms, for example, the Solicitor General filed as amicus in cases involving Equal Protection and First Amendment claims in the context of public employment,<sup>275</sup> identification requirements for voting in federal elections,<sup>276</sup> the constitutionality of gun control laws,<sup>277</sup> Due Process and Fourth Amendment claims against prosecutors and law enforcement officials,<sup>278</sup> and the placement of private monuments in public parks.<sup>279</sup>

Given the extensive reach of the federal government's involvement in modern life, it is perhaps not surprising that the Solicitor General can articulate a substantial interest in most of the Court's cases.<sup>280</sup> But even so, the Solicitor General has elected not to participate in almost half of the civil cases presenting constitutional issues, and in these, the federal government's interest has been more attenuated.<sup>281</sup> In the 2007 and 2008 Terms, for example, the Solicitor General sat out cases involving: recusal of elected state judges,<sup>282</sup> First Amendment claims (in the

<sup>274</sup> In the 2005–2008 Terms, the Solicitor General participated as amicus in, on average, five of the nine civil cases (fifty-six percent) that raised constitutional issues each Term. *See Supreme Court Statistics*, *supra* note 144 (2005–2008 Terms); *see also supra* note 174 (describing how the authors determined the Solicitor General's participation rate).

<sup>275</sup> *See, e.g.*, *Locke v. Karass*, 129 S. Ct. 798 (2009); *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591 (2008).

<sup>276</sup> *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

<sup>277</sup> *See, e.g.*, *Dist. of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

<sup>278</sup> *See, e.g.*, *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009); *Pearson v. Callahan*, 129 S. Ct. 808 (2009); *Dist. Attorney's Office v. Osborne*, 129 S. Ct. 2308 (2009).

<sup>279</sup> *See, e.g.*, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009).

<sup>280</sup> *See Chamberlain*, *supra* note 21, at 424 (noting that former Solicitor General Charles Fried was criticized for participating in cases in which the federal government had no interest, and contending that “there are no articulable criteria which describe the vast scope of the federal interest”).

<sup>281</sup> During the 2005–2008 Terms, there were thirty-six civil cases in which the United States was not a party and the principal issue was a constitutional issue. The Solicitor General participated as amicus in twenty of these cases and sat out sixteen. *See Supreme Court Statistics*, *supra* note 144 (2005–2008 Terms); *see also supra* note 174 (describing how the authors determined the Solicitor General's participation rate).

<sup>282</sup> *See, e.g.*, *Caperton*, 129 S. Ct. at 2257.

context of state primaries, state nominating procedures for judges, and state bans on payroll deductions for political purposes),<sup>283</sup> challenges to state taxes, state limitations on the right to counsel, and state prisoners' access to state courts.<sup>284</sup>

Indeed, the Solicitor General has stepped in as amicus only infrequently in cases where the federal government's interest was primarily ideological or political. During the first four Terms of the Roberts Court, the Solicitor General participated in only four such cases,<sup>285</sup> and in each, the federal government was able to identify an interest.<sup>286</sup> This limited level of involvement is consistent with the Solicitor General's

<sup>283</sup> See, e.g., *Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093 (2009); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008); *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008).

<sup>284</sup> See, e.g., *Haywood v. Drown*, 129 S. Ct. 2108 (2009); *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277 (2009); *Rothgery v. Gillespie County*, 554 U.S. 191 (2008).

<sup>285</sup> *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633 (2009) (involving constitutionality of strip search of high school student suspected of carrying ibuprofen); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (involving constitutionality of race-based student assignment plans in public school districts); *Morse v. Frederick*, 551 U.S. 393 (2007) (involving constitutionality of public school's prohibition of student speech promoting drug use); *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007) (involving constitutionality of state law requiring labor unions to obtain permission of nonmembers to use compelled agency shop fees for political expenditures).

<sup>286</sup> See *supra* note 285. For example, in its brief in *Safford*, involving the strip search of a student suspected of carrying ibuprofen, the Solicitor General described the government's interest:

The federal government has provided billions of dollars to support state and local drug-prevention programs, and the efficacy and credibility of those programs is affected by the manner in which school officials enforce rules against drug possession. The United States also operates hundreds of primary and secondary schools on military installations and Indian reservations.

Brief for the United States as Amicus Curiae Supporting Reversal at 1, *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633 (2009) (No. 08–479). The Solicitor General described the government's interest similarly in *Morse*, which involved a prohibition on student speech promoting drug use. Brief for the United States as Amicus Curiae Supporting Petitioners at 1–2, *Morse v. Frederick*, 551 U.S. 393 (2007) (No. 06–278). In *Davenport*, involving the use of union dues for political purposes, the Solicitor General cited the Federal Election Commission's role in enforcing federal election laws and the Secretary of Labor's responsibility to wage earners. Brief for the United States as Amicus Curiae Supporting Petitioners at 1–2, *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177 (2007) (No. 05–1589). In *Parents Involved in Community Schools*, the Solicitor General noted the Department of Justice's role in enforcing the Equal Protection Clause in the context of public education and its history of participation in cases involving racial discrimination. Brief for the United States as Amicus Curiae Supporting Petitioners at 1–2, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (No. 05–908).

level of involvement in social agenda cases historically, and even represents a modest step back from the mid-1980s.<sup>287</sup>

Participation in social agenda cases is clearly consistent with the Solicitor General's constitutional role as the President's advocate. The President's policy agenda extends well beyond simply ensuring the smooth functioning of law enforcement and the federal bureaucracy, and the Solicitor General's obligation to represent the President encompasses advocacy of broader policy goals, in light of the President's independent interpretation of the Constitution.<sup>288</sup>

The more difficult question is whether the Solicitor General's partisan involvement in social agenda cases draws too deeply on the office's reservoir of credibility with the justices, thus undermining its advocacy in other cases.<sup>289</sup> Given how infrequently the Solicitor General has been participating in these cases, however, it seems unlikely that it has (or will) adversely affect the office's standing with the Court.<sup>290</sup> Indeed, these social agenda cases—which present high-profile issues on culturally sensitive topics—are easily recognizable. The justices are no doubt aware that the Solicitor General is acting in a different and more partisan capacity in these cases, and they can treat such advocacy accordingly.<sup>291</sup>

Nor is there any concern that the Court will give too much deference to the Solicitor General in these cases. On constitutional issues of great public importance, the Court relies less on the advocates than it

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<sup>287</sup> See Cooper, *supra* note 38, at 689. An earlier study of the Solicitor General's amicus participation in cases where the federal government's interest was primarily ideological showed that in the 1935–1938 Terms, the Solicitor General filed an amicus brief in one such case; in the 1954–1957 Terms, he also did so in one such case; and in the 1984–1987 Terms, he did so in six such cases. See *id.* The study also showed that, in those same periods, the Solicitor General filed the great majority of amicus briefs (twenty in the 1935–1938 Terms, twelve in the 1954–1957 Terms, and 113 in the 1984–1987 Terms) in cases involving the interpretation of federal codes or state issues that might affect a complementary federal issue. See *id.*

<sup>288</sup> See Chamberlain, *supra* note 21, at 427 (noting that “the solicitor general has always taken an interest in political and controversial issues” and that “these issues invariably affect the social, economic, and political policies of the administration”); McGinnis, *supra* note 36, at 805 (contending that it is the emphatic duty of the President and the Solicitor General to independently interpret the Constitution); see also *supra* notes 198–207 and accompanying text (discussing this view of the Solicitor General's role in the constitutional structure).

<sup>289</sup> See Lee, *supra* note 27, at 597; Strauss, *supra* note 61, at 172.

<sup>290</sup> See Lee, *supra* note 27, at 597; Strauss, *supra* note 61, at 172.

<sup>291</sup> See Strauss, *supra* note 61, at 174 (acknowledging that, if the Solicitor General participates periodically in a social policy case, the “Court will recognize such a case as exceptional and will not think the Office has become politicized”).

does in low-salience business and statutory cases, because the justices are closely familiar with the issues and more certain of their views.<sup>292</sup> Moreover, these high-profile cases attract a wealth of amicus briefs (many of which are written by experienced Supreme Court advocates), which provide the justices with ample perspective on the pros and cons of the competing positions.<sup>293</sup>

## CONCLUSION

Over the last two decades, the Supreme Court has sliced its caseload in half, changing both the size of its docket and the substantive mix of cases it hears.<sup>294</sup> Although the docket's decline was primarily the result of membership changes on the Court, the Solicitor General's sharp reduction in requests for review of the federal government's cases contributed to the decline as well. Paradoxically, though, as the Solicitor General brought fewer cases to the Court, the office's presence in the Court's merits docket expanded dramatically. Since the docket plateaued in the mid-1990s, the Solicitor General has participated in three-quarters of the merits cases, primarily as amicus curiae, and has been highly successful in persuading the Court to adopt the government's perspective.<sup>295</sup>

In this Article, we considered how the Solicitor General's more limited participation in the case-selection process, and more pervasive presence in the merits docket, has affected the Solicitor General's role as advocate. We found that, at the case-selection stage, the Solicitor General's office is now seeking certiorari in so few cases—just fifteen per Term—that it is ceding its once-substantial influence over the Court's

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<sup>292</sup> See Lazarus, *supra* note 27, at 1549 (noting that experienced advocacy matters much more in low-salience cases than it does in high-salience cases); Andrea McAtee & Kevin T. McGuire, *Convincing the Court: Two Studies of Advocacy: Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the U.S. Supreme Court?*, 41 LAW & SOC'Y REV. 259, 273 (2007) ("In salient cases, neither previous litigation experience nor oral argument performance has any significant influence over the justices . . . . [I]n nonsalient cases, however, veteran lawyers of Supreme Court advocacy provide an advantage . . .").

<sup>293</sup> See Kearney & Merrill, *supra* note 38, at 755 (providing examples of the large number of amicus briefs filed in high-profile cases, including seventy-eight briefs filed in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (involving abortion), fifty-four briefs filed in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (involving affirmative action), and thirty-nine briefs filed in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990) (involving right to die)); see also Lazarus, *supra* note 27, at 1546–47 (noting that the quality of the advocacy from the elite Supreme Court bar "is reducing the Solicitor General's disproportionate influence on substantive outcome.").

<sup>294</sup> See *supra* notes 75–77 and accompanying text.

<sup>295</sup> See *supra* notes 49–51 and accompanying text.

agenda-setting to more aggressive litigants, who have become increasingly successful in securing review of cases where the federal government won below.<sup>296</sup> At the merits stage, in contrast, the Solicitor General's office is now participating as amicus in a much greater percentage of the cases than it had when the docket was at its peak in the 1980s.<sup>297</sup> Despite the potential for overreaching, however, the Solicitor General has largely confined the office's involvement to cases that stand to affect the federal government's institutional interests in a direct and substantial way. At this point, therefore, there is little cause for concern that the Solicitor General is too officious in entering private controversies, or is squandering the office's credibility on cases that present highly-charged political issues but only marginally affect the federal government.

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<sup>296</sup> See *supra* notes 214–231 and accompanying text.

<sup>297</sup> See *supra* notes 151–156 and accompanying text.