Inter-branch Communication:

When Does the Court Solicit Executive Branch Views?

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Conventional wisdom holds that in the American constitutional system the branches try to avoid constraints imposed by the other branches. Still, Supreme Court justices routinely vote to ask the executive branch’s solicitor general for his opinion on cases to which the United States is not a party. Why would members of one branch solicit the views of another branch? Scholars typically explain such interactions as the function of the justices’ respect for the legal expertise proffered by the administration’s solicitor general. Using newly available data from the papers of Justice Harry Blackman, we demonstrate instead that political and institutional, as well as legal, forces help to account for the Court’s requests for input from the executive branch. The results, we argue, suggest that the justices are well aware of both the legal and strategic value of information culled from the executive branch.
Competition among the legislative, executive, and judicial branches is enshrined in the U.S. Constitution. Each branch regularly attempts to insulate its decision-making from the other branches (Ferejohn and Shpan 1990, Gely and Spiller 1990, Spiller and Gely 1992). Still, despite such reverence for the separation of powers, the U.S. Supreme Court on a regular basis votes to solicit the views of the executive branch on cases to which the U.S. is not a party. Some of the most important constitutional cases of the post-war period (e.g. Brown v. Board of Education and Buckley v. Valeo) have been decided only after some of the justices on the Supreme Court requested that the executive branch provide its views in the form of an amicus brief from the solicitor general (S.G.). Why would one branch of government solicit the views of another branch when the information gleaned might constrain its actions?

Answering this question can shed light on a more general question regarding the relationship between the solicitor general and the Court. The solicitor general holds a unique position in the American political system-- selected and paid by the executive branch while simultaneously having responsibilities toward the Supreme Court. Scholars differ in how they explain this relationship. Many portray the relationship solely in legal terms, attributing the influence of the solicitor general to the office’s “independence from executive politics, . . . loyalty to the Court, and a personal dedication to the development of law (Salokar 1992, 2).” Others argue that the solicitor general is not beyond the reach of politics and that both the solicitor general and justices pursue policy and ideological goals in their interactions. By this account, justices seek the views of the S.G. as a
mechanism for avoiding executive sanction or to further their policy views (Segal 1988, Bailey, Maltzman, and Kamoie 2005).

In this paper, we test these competing views by analyzing Supreme Court behavior on the invitations it issues to the solicitor general to file an amicus brief on cases to which the U.S. is not a party. Given the recent release of Justice Harry Blackman’s papers, we now have the voting records of the justices in inviting the participation of the solicitor general. Using both a newly-developed inter-institutional measure of political ideology (Bailey 2005) and the originally-collected archival data on the individual votes by justices on invitations between 1971 and 1995, we find that legal, political and institutional incentives help account for the variation in justices’ willingness to invite participation of the s.g. Not only do justices appear to solicit executive views as a means of anticipating future executive action, but the justices also appear to use invitations to advance their ideological goals.

Explaining the Invitation to Participate

Much of the literature on the relationship between the solicitor general and the Court has focused on the Court’s reaction to the briefs filed and arguments made by the solicitor general (e.g. Segal 1988, McGuire 1998, Baird, N.d.). But this is not the only communication that occurs between the two. The Court regularly issues an invitation to the solicitor general to file a brief "expressing the views of the United States" (Pacelle 2003, Johnson 2003). These invitations are regularly referred to as a “CVSG,” as in “calls for the views of the solicitor general.” According to former Solicitor General Rex Lee, who served in the Reagan administration, the fact that the Court will solicit the views of the solicitor general in cases where the United States is not a party is one of -- if not the --
factor that is most remarkable about the relationship between the office of the solicitor general and the Supreme Court (1986, 597).

CVSGs are issued if four justices support such a motion at conference.\(^1\) Invitations can be issued at either the *cert* stage or after the Court has accepted a case. Most occur at the *certiorari* stage. Invitations that occur at the *certiorari* stage are usually considered by the solicitor general to reflect the Court’s interest in his office’s participation at both this stage and the merits stage if *cert* is granted. Although technically such an invitation is discretionary, they are invitations that in the word of one former employee of the Solicitor General’s office, “you don’t turn down” (Salokar 1992, 143). No other actor is regularly asked by the Court to participate in a case to which they are not a party.

There are, broadly speaking, two different explanations for why justices encourage the involvement of the S.G. The first is best termed the legal perspective: the S.G. is perceived to provide the bench with useful information about the law and its development. One version of the legal perspective portrays the solicitor general as an agent of the bench. Rather than simply representing the interests of the president and the

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\(^1\) The number of votes required to issue a CVSG is an unwritten Court rule, and court officials are reluctant to confirm the number of votes required. Based on personal communication with one of Chief Justice William Rehnquist’s former administrative assistants, it appears that four votes are required. (The assistant confirmed the four vote rule for us in a conversation with the Chief Justice.) Timothy Bishop (2005), a former Brennan clerk in the late 1980s, also believes that invitations could be issued with three or more votes. Our analysis of Lewis Powell’s records on CVSG’s votes for civil liberties cases suggests that between 1975 and 1986 there were twelve cases in which three justices supported a CVSG. In eight of these, an invitation was issued; in the other three cases, no invitation was issued. The nine cases could reflect the fact that there were unrecorded “Join 3” votes for the CVSG motion or reliability problems associated with Powell’s records (see Maltzman and Wahlbeck 1996). As will become apparent below, our analysis does not depend on the number of votes needed to invite.
administration, the solicitor general is said to work “almost as a surrogate for the Court, rather than as an unrestrained advocate for the government” (Perry 1991, 130). This view of the S.G. has led many scholars to refer to him as the “Tenth Justice” (Caldeira and Wright 1988, Caplan 1987, Scigliano 1971, Segal 1988, and Ulmer and Willison 1985). Consistent with this view is Caplan’s claim that the “Justices expect him [the solicitor general] to look beyond the government’s narrow interests” (1987, 1). Caplan goes on to explain that it is the S.G.’s ability to contribute to the development of the law that leads the Court to solicit his views:

The justices also turn to the solicitor general for help on legal problems that appear especially vexing, and two or three dozen times a year they invite him and his office to submit briefs in cases where the government is not a party. In these cases especially, the Justices regard him [the solicitor general] as a counselor to the Court (1987, 7).

The willingness of the solicitor general to act in the interests of the Court, rather than of the administration, is frequently considered to be greatest when the Court issues a formal invitation. According to former Solicitor General Lee of the Reagan administration, CVSGs are issued when “the Court would like another dispassionate view by one who litigates in the federal courts frequently” (Sakolar 1992, 144). Former Solicitor General Drew Days from the Clinton administration echoes Lee’s views when he argues that when the Court solicits the views of the s.g., “it is not seeking the advice of an advocate or a partisan but rather an officer of the Court committed to providing his best judgment with respect to the matter at issue” (1995, 79). Deputy Solicitor General Lawrence Wallace (who served in the S.G.’s office from the Johnson Administration
through the Bush (II) administration) also suggests as much when he notes that the solicitor general’s office provides a neutral position to the Court because “we do not have a dog in the fight” (as cited in Pacelle 2003, 24). In a similar vein, Pacelle characterizes the S.G.’s assistance as “nonpartisan advice to help the justice with their decisions” (Pacelle 2002, 123), and Zorn concludes that “The Supreme Court takes little or no account of policy or strategic considerations in the extent to which it requests amicus filings of the solicitor general” (1999, 9).

In another version of the legal perspective, the Court is said to rely heavily on the S.G. given his office’s unparalleled level of knowledge and expertise. As Justice William Brennan once noted, “The ablest advocates in the U.S. are advocates in the Solicitor General’s Office” (as cited in Segal 1988, 138). Thus, the Court can effectively use CVSGs as a vehicle for expanding its capacities beyond what justices and clerks can provide. As Kathryn Oberly, an assistant to the Solicitor General from 1982-1986 explained, the Court invited the solicitor general “to act as extra law clerks for the Court” (Sakolar 1992, 143). Carter Philips, a former law clerk to Chief Justice Warren Burger and a former assistant to the solicitor general recalls that:

CVSGs were a pretty good device when you had a hard time figuring out what a case was all about. The view was, 'Let the solicitor general sort it out and tell you whether the Court should take the case.' When times got busy, I remember seeing a lot more CVSGs (Mauro 2003).

Pacelle’s research led him to a similar conclusion when he concluded that when responding to CVSGs, “the solicitor general is less the ‘Tenth Justice’ and more the ‘Fifth Clerk’” (Pacelle 2003, 24). Consistent with this portrait are claims that the views
of the solicitor general are disproportionately accepted by the Court because of the solicitor general’s expertise developed as a “repeat player” rather than his concern for the interests of the Court (see Galanter 1974, Caldeira and Wright 1988, Spriggs and Wahlbeck 1997, and most notably McGuire 1998).

The need for the sort of legal expertise than can be provided by the S.G. may vary by justice. Several studies have found that justices who are new to the bench may not have the knowledge of their more senior colleagues and thus need more assistance in sorting through the legal issues involved in a particular case (Brenner and Hagle 1996; Hagle 1993). The S.G.’s experience leaves him in a unique position to help these new justices learn about the legal issues involved. As Bailey, Kamoie, and Maltzman (2005) show, justices who have recently joined the bench are more likely to vote in a manner consistent with the direction advocated by the S.G’s amicus brief.

These legal explanations imply that a justice’s enthusiasm for inviting the solicitor general should vary with the value of the expertise that the S.G. can bring to a case. Given the legal talent available to the office, one might expect the justices to be more anxious to rely on the knowledge of the solicitor general’s office for cases that are either especially complex or legally salient. Because the solicitor general represents the views of the United States government, one might also expect the Court to value the views of the solicitor general on cases that involve federal issues. Solicitor General Kenneth Starr explains, “The CVSG…serves to offer the position of the US on the merits of the issue (Pacelle 2003, 25).” Similarly, Palmer has observed that the justices typically call for the views of the solicitor general in “cases that will potentially affect the
federal government” (2001, 110). Hence, the legal perspective can be tested based on the following hypotheses:

**Legal Hypothesis – Complexity:** Justices will be more likely to vote to invite the solicitor general when the Court considers more complex issues.

**Legal Hypothesis – Salience:** Justices will be more likely to vote to invite the solicitor general when a case is legally salient.

**Legal Hypothesis – Federal Issues:** Justices will be more likely to invite the solicitor general when a case involves federal questions.

**Legal Hypothesis – New Justices:** Justices recently appointed to the bench are more likely to support motions to solicit the views of the solicitor general.

The second major explanation of the court’s decisions to invite the solicitor general falls under the rubric of a “political” perspective. This account stems from the notion that justices are motivated by their policy preferences (Segal and Spaeth 2002) and that they make strategic calculations about how to best advance these policy goals (Murphy 1964, Epstein and Knight 1998, Caldeira, Wright, and Zorn 1999, Maltzman, Spriggs, and Wahlbeck 2000). Since *amicus curiae* briefs provide the bench with information about the policy preferences of various interests and the policy implications of specific rulings (Johnson 2003, Epstein and Knight 1999, Caldeira and Wright 1988), they have the potential to shape judicial decision-making.

In the political perspective, inviting the S.G.’s involvement may serve two purposes. First, inviting the solicitor general may serve justices’ ideological goals. All cases involve some uncertainty about their political implications. Getting the feedback of someone with detailed knowledge of the case is useful to resolve these uncertainties; getting the feedback of an ideological compatriot is all the more valuable, as the
likelihood of this person trying to lead you astray for ideological reasons are low. Hence, Bailey, Kamoie and Maltzman (2005) use signaling theory to develop and test the notion that there is an ideological component to the influence of the solicitor general on individual justices. These same ideas would explain ideology mattering when justices request information along the same lines as when they receive information. Just it makes sense to ask a friend with similar taste what he or she thought of a movie before deciding to see it, it may make sense for a justice to ask a S.G. with similar policy outlooks what he thinks of a case before deciding to hear the case or taking a position on it.

Ideology can have other effects at the invitation stage, as well. Individual justices need to craft legal arguments for their positions. A brief from an ideologically sympathetic solicitor general is likely to provide justices with a stronger legal argument, making it more likely that their position will prevail within the court and will create precedent that will accurately reflect the justice’s ideological orientation.

This political account of CVSGs is consistent with evidence that the positions embraced by the solicitor general reflect the views of the administration in which they serve (Meinhold and Shull 1998). It is also consistent with Mauro’s (2003) observation that “Others have also speculated that the current, mainly conservative, Supreme Court tends to ask for the views of Republican solicitors general more than it has from Democrats.”

The second political purpose that may be served by the S.G.’s involvement is that the S.G. may help the bench understand whether the executive branch would try to

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2 Mauro’s “spot-check of the statistics” leads him to reject this political explanation (2003).
overturn or otherwise counteract a decision on a case. This explanation is rooted in the notion that strategic justices are constrained by the separation-of-powers system (Murphy 1964, Ferejohn and Shipan 1990, Gely and Spiller 1990, Spiller and Gely 1992, Epstein and Walker 1995, Epstein and Knight 1996). According to this portrait, justices strive to craft their rulings so “that they will not be overturned” by the elected branches (Bawn and Shipan 1997, 1-2). The Court, in other words, can use invitations to learn what rulings might provoke an effort by the executive branch to counteract the Court’s rulings (Johnson 2003).

If such institutional incentives motivate the justices, we might expect to find that invitations to the solicitor general would be more prevalent in periods of enhanced presidential power. In exploring this conjecture, Johnson (2003) finds case-level support: The Supreme Court is more likely to issue a CVSG during periods when the president is most likely to dominate the policy-making process. Here, we focus on several key indicators of presidential influence over the legislative process. First, unified party control may enhance presidential influence (see among others Cutler 1988, Sundquist 1988, Edwards, Barrett and Peake 1997; cf. Mayhew 2005). Second, public support for the president may bolster his influence, as presidents lacking public support have a harder time implementing their policy agendas (Edwards 1990, Kernell 1997). Third, timing matters, as presidential capital is said to enhanced during the honeymoon period and diminished in the run up to re-election (Light 1982, Brace and Hinckley 1993).

Taken together, the political perspectives imply into the following hypotheses:

*Political Hypothesis (Separation of Powers) – Divided Government: Justices will be less likely to vote to solicit the views of the S.G. during periods of divided government.*
Political Hypothesis (Separation of Powers) – Presidential Popularity: The probability that a justice will support a motion to invite the S.G. is diminished when the president lacks public support.

Political Hypothesis (Separation of Powers) – Executive Lifecycle: A justice’s willingness to solicit the views of the S.G. will be greater during the first year of a president’s term and diminished when the president seeks reelection.

Justices may seek the views of the S.G. because of more than just a desire to anticipate the sorts of actions that might be taken within a system of separated powers. Strategic justices may also be more likely to call for the views of the S.G. when such views may help to build a winning coalition. Because individual justices disproportionately vote with the S.G. even after controlling for ideology (e.g. McGuire 1998; Bailey, Maltzman and Kamoie 2005), justices may recognize that a brief by a sympathetic S.G. may assist them in their attempts to see their views written into law. As a result, we might expect:

Political Hypothesis (Attitudinal) – Ideological Distance: Justices who are ideologically proximate to the solicitor general will be more likely to vote to invite the views of the solicitor general.

Data and Methods

Although many scholars have commented on the importance of CVSGs, the absence of data has hindered systematic exploration of the dynamics of CVSG motions. Scholars have lacked two important types of data. First, scholars have not had access to the voting record of individual justices on CVSG motions. Second, scholars have lacked a measure of ideology that allows justices and executive branch actors to be placed on the same metric. We employ a newly devised ideology measure and newly released data on the voting records of individual justices on CVSGs to test our alternative conjectures.

In the only other empirical study dedicated to accounting for CVSG’s, Johnson (2003) analyzed Court decisions on CVSGs over a 32-year period. In the study, Johnson
used case-specific data to explore whether presidential capital and legal forces are related to the Court’s tendency to invite the S.G.’s participation. Hypotheses about variation over cases and time can be tested with such case-level data, but hypotheses about variation across the justices cannot.

Although votes surrounding the Court’s invitations to the solicitor general occur in conference and are normally outside the purview of Court scholars, Justice Blackmun’s papers have created a unique opportunity for scholars interested in the relationship between the Court and solicitor general. On Blackmun’s docket sheets, the justice routinely recorded votes calling for the participation of the solicitor general. Figure 1 shows the justices’ CVSG votes in *United Auto Workers v. Johnson Controls* (1991): Justices Brennan, Thurgood Marshall, Anthony Kennedy and Chief Justice Rehnquist voted in favor of inviting the solicitor general.

[Figure 1 about here]

Our dependent variable consists of individual-level votes by the justices on whether to support a CVSG motion for 1,486 civil liberties cases before the Supreme Court between 1971 and 1995 in which the United States was not a party. One or more justices voted to solicit the views of the S.G. in 97 cases (6.6%). The S.G. was invited to participate in 61 of these civil liberty cases. With one observation for each justice on each case, these 1,486 cases produce 12,710 observations. In these cases, the number of yea votes to invite the S.G. ranged between one and nine. Among the 97 cases in which

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3 Because the views of the solicitor general are routinely provided to the Court when the United States is a party, we dropped these cases from the analysis.
4 In cases where Blackmun has not recorded any CVSG votes, we assume that no justice supported such a motion.
there were one or more CVSG votes, 3.9 justices on average voted in favor of inviting the solicitor general.

To determine whether a political model of decision-making explains the Court’s decision to invite the solicitor general, we need an ideology measure that can capture the ideological views of both the S.G. and each justice on comparable scale. Our task is made easier by the fact that the solicitor general serves at the pleasure of the president and thus embraces in amicus filings positions that reveal information about the executive’s preferences (Puro 1981, 228).

To create inter-institutionally comparable estimates of ideology, we follow Bailey (2005) and Bailey, Kamoie, and Maltzman (2005). In this approach, “bridge” observations provide fixed references against which the preferences of presidents, senators, and justices can be estimated and compared. For the 1950-2002 period, there are more than 8,000 bridge observations based on public statements by presidents and members of Congress, amicus filings by members of the Congress, and congressional roll call votes that explicitly take a position on Supreme Court cases. Although our interest in the bench’s support for CVSG motions mean that we only need to have the executive and judicial branches on the same scale, we include the statements, amicus filings, and votes

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5 Numerous factors the contention that the solicitor general’s actions reflect the goals and preferences of the president. First, there is the explicit chain of command: Former Solicitor General Starr explains, “As Solicitor General... I was an ‘inferior’ or ‘subordinate’ officer in the executive branch. If I could not in conscience abide by the president’s judgment, then I should resign” (2002, 143). Second, statistical evidence indicates that presidential preferences are correlated with the solicitor general’s decision to participate as an amicus (Meinhold and Shull 1998; Bailey, Kamoie, and Maltzman 2005). Indeed, Sakolar shows that a comparison of the briefs filed by Solicitor General Erwin Griswold during the Johnson and Nixon administrations demonstrates that “the White House plays a role in the decision-making processes of the solicitor general.” (1992, 171). Third, there are many examples of presidents explicitly guiding the actions of the solicitor general (e.g. Fraley 1996, 22).
of representatives and senators to increase the number of bridge observations and our confidence in the inter-institutional linkages. The estimation method is a Bayesian Markov Chain Monte Carlo (MCMC) procedure that allows justices’ ideologies to vary over the course of their careers.

The approach we use to create inter-institutional measures accord with intuition. For the presidents, the rank ordering from the left to right is (where low values represent liberal policy views and high values represent conservative policy views): Carter, Clinton, Ford, Nixon, George H.W. Bush, and Reagan. For the justices, William Douglas, Marshall, and Brennan anchor the left; Clarence Thomas, William Rehnquist, Antonin Scalia, and William Burger the right. The scores are consistent with other measures of preferences. For example, Figure 2 below plots the average yearly estimated inter-institutional ideological score against the percentage of the time justices vote in liberal direction on civil liberties. The two measures track quite well. The value of the inter-institutional measure is that unlike the percentage of the time a justice votes in a liberal direction, it provides a score that is comparable across institutional contexts and time, as is necessary for testing our hypotheses.

Using this inter-institutional measure of ideology, we create a variable, IDEOLOGICAL DISTANCE, that measures the absolute value of the ideological distance between each justice and the solicitor general. We assume that the solicitor general is a

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6 Bailey, Kamoie, and Maltzman’s (2005) ideology measure was based upon 1,130 bridge observations. Their observations do not include statements, Amicus filings, or roll call votes by members of the House of Representatives. The inclusion of these additional observations provides an ideological measure that is more stable.

direct agent of the president, and thus represents the policy views of the president in *amicus* briefs. The farther the solicitor general is ideologically from a justice, the less likely a justice will vote to invite the solicitor general. Thus, we expect the coefficient for this variable to be negatively signed. In light of the widespread belief noted above that the solicitor general is non-partisan when responding to invitations, this is a hard test of the notion that ideological considerations shape the relationship of the S.G. and the Court.

To test the political capital conjectures, we use five measures to account for presidential influence. First, we have a dummy variable (DIVIDED GOVERNMENT) to denote whether each appeared on the Court’s docket during a period of divided government (1 if divided, 0 if unified).\(^8\) Second, we measure the president’s influence in Congress with the percent of the time the president was on the winning side of congressional votes (on votes for which the president took a public position; see Table 6-7 in Stanley and Niemi 1998) (CONGRESSIONAL SUPPORT OF PRESIDENT). Third, we include the president’s annual average approval rating (PRESIDENTIAL PUBLIC APPROVAL) for each president during the year in which a case was orally argued (Ragsdale 1996, 193). Finally, we employ dummy variables to demark cases that arose during either an election year (ELECTION YEAR) or the first year of a president’s term (HONEYMOON).

A legal explanation for CVSGs suggests that votes to invite the solicitor general depend in part on the complexity or legal salience of the issues involved. To measure case complexity, we rely on the case complexity measure used in Maltzman, Spriggs, and

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\(^8\) If a case arose during a Supreme Court term that spanned a period of unified and divided government, we based our measure on whether or not there was divided government on the date of oral argument.
Wahlbeck (2000, 46). This measure is built from three case-level indicators available in Spaeth (1999, 2002): the number of issues raised, the number of relevant legal provisions, and the number of opinions released. We factor analyze the three indicators to produce factor scores for each case. As our measure of COMPLEXITY, we use the factor scores for the factor that has an eigenvalue greater than one.

To test the hypothesis that justices who have recently been appointed have a greater need for the expertise that the S.G. can provide, we include in our model a dummy denoting any justice who was serving during one of his or her first two terms when the Court heard oral argument (NEW JUSTICE).

To tap legal salience of each case, we use two measures: PRECEDENT and UNCONSTITUTIONAL. The PRECEDENT variable uses Spaeth (1999) to determine whether a case overturns precedent (1 if yes, 0 otherwise). The UNCONSTITUTIONAL variable indicates whether the Court declared a federal or state law as unconstitutional (1 if yes, 0 otherwise), based on Spaeth (1999).

The value of the information the solicitor general provides might depend upon more than the complexity of the issues involved and the salience of the case. If the United States has an interest in a case, the value of the solicitor general’s views may be greater. To test this, we include two dummy variables. The first, FEDERAL ISSUE, denotes those cases where there was a clear federal issue (Spaeth 1999). The second, STATE ISSUE, denotes those cases that involve state, rather than federal, issues. In these cases,

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9 We coded this variable a 1 in those instances where Spaeth (1999) denoted the legal authority on which the Supreme Court rested its decisions as involving the interpretation of a federal statute, an executive order, administrative regulation or federal common law. The variable was also activated if the court’s opinion reflects the Court’s interpretation of either constitutional issues or federal laws. In particular, we relied upon variables 22 (LAWS) and 23 (AUTHDEC) in Spaeth’s dataset.
we suspect that the views of the solicitor general are less relevant to the court’s decision-making.¹⁰ These two dummy variables are neither mutually exclusive nor exhaustive.

Finally, solicitors general may each have unique relationships with the bench. This may occur because each solicitor general has a unique conception of the office and its responsibilities. For example, if a solicitor general actively seeks to provide the Court with its views, regardless of a formal invitation, the need for an invitation is diminished.¹¹ Likewise, some solicitor generals are more experienced litigators than others and this may influence the Court’s interest in issuing an invitation.¹² Therefore, we estimate a fixed-effects model, controlling for each confirmed solicitor general.

**Analysis and Results**

To test the alternative accounts of why justices vary in their inclination to invite the S.G., we use two modeling strategies. Because our dependent variable in both models is a dummy variable denoting whether or not a justice votes in favor of issuing a CVSG, both models use probit analysis. Because there are numerous observations for each justice, we employ robust standard errors, clustering on each justice.

The left hand column of Table 1 shows the estimated coefficients and significance levels for a basic model of each justice’s likelihood of voting for a CVSG motion. The model provides a direct test of the political and legal explanations. To interpret the model’s coefficients, we assess in Table 2 the impact of each statistically significant

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¹⁰ This variable is a dummy variable to denote those cases where the court’s decision primarily involved interpretation of state law. This designation is based upon variable 23 (AUTHDEC) in Spaeth (1999).

¹¹ Consistent with this are claims that the number of amicus briefs filed by the solicitor general increased significantly during the Reagan administration (Caplan 1987; Sakolar 1992, 147-158).

¹² McGuire (1998) argues that the success of the solicitor general depends in part upon their experience and expertise.
independent variable from its minimum to maximum values by calculating the average predicted probability with all values at their actual values except the variable in question which is first held to its minimum value and then to its maximum value. Because 93.4% of the time no justices felt the involvement of the S.G. was appropriate, the changes we illustrate in the left hand-column of table 2 are large even though the aggregate percents are very low. Hence, to provide further information about the affect of the significant independent variables we identified in table 1, model 1, we report in the right hand column of table 2 the impact of the significant independent variables for those cases with at least one CVSG vote.

[Tables 1 and 2 about here]

Consistent with previous claims, legal factors influence a justice’s decision to solicit the views of the solicitor general. As hypothesized, justices are more likely to invite the solicitor general when a case involves issues that clearly involve federal questions, and they are less likely to invite the S.G. when a case involves primarily state questions. The probability that a justice will vote to invite the S.G. is 0.6 percent on a non-federal case, while on a federal case the probability that a justice will vote to invite the S.G. increases to 2.4 percent, meaning the average predicted probability of voting to invite is four times higher on federal cases. The change is even more dramatic when a simulation is limited to the cases where there is at least one vote to call for the S.G.’s

13 In the model, the S.G. specific indicator variables are significant. These controls demonstrate that idiosyncratic factors that are unique to each S.G. influence each justice’s tendency to support voting to invite the S.G. Likewise, justices whose position in the voting order suggests that the CVSG motion already has enough support to be adopted are more likely to cast an additional vote. The results on ideological distance and most other variables are similar when there are no fixed effects for individual solicitors general.
views. On the right hand side of table 2, the probability that a justice will vote to invite the S.G. is 3.7% on a non-federal case; on a federal case the probability increases to 18.3%. In other words, the average predicted probability to invite is almost five times higher on federal cases. Likewise, the value of the solicitor general’s input is seen as greater when a case is legally salient (UNCONSTITUTIONAL or PRECEDENT). Justices who are new to the bench (NEW JUSTICE) are also more likely to value the sort of information provided by the solicitor general. Indeed, a justice who is new the bench is almost twice as likely to vote to invite the S.G. when one looks at the all cases.

One variable that does not accord with the legal hypothesis is the complexity variable. The expectation is that as cases get more complex, justices will be more willing to invite the solicitor general. In fact, we find the opposite: the more complex a case as measured by the variable, the less likely justices are to invite the S.G. This pattern persists if we replace the complexity measure with the component variables of the complexity scale (e.g. the number of relevant legal provisions and the number of opinions released). The results on the other variables (and the ideology variables in particular) are generally unchanged if we drop the complexity variable. The failure of the complexity variable inevitably reflects in part the nature of the relationship that exists between the S.G. and the bench. Contrary to conventional wisdom, the S.G.’s value stems in large part from the political information he transmits on highly salient cases, rather than his ability to help the justices understand the law (see Bailey, Maltzman, and Kamoie 2005).

If claims that the solicitor general responds to invitations by providing apolitical advice were correct, there would be no reason to expect justices with an ideological affinity with the solicitor general to be more likely to vote to issue an invitation to the
solicitor general. But the significant IDEOLOGICAL DISTANCE variable suggests that a justice’s willingness to issue a CVSG depends upon the probability that the solicitor general’s position will concur with the views of the justice. As one can see in table, if the ideological distance of all justices were set to its minimum value (e.g. the distance between Stevens and Clinton in 1993) the average predicted probability of support for a CVSG motion is 3.2%. However, when the justice’s and the administration’s ideological views are different (e.g. the distance between Marshall and Reagan in 1988), this probability drops to 0.2%.

With respect to the impact of presidential influence, our results only partly confirm Johnson’s (2003) analysis. We find that justices are more likely to support inviting the S.G. when the S.G. represents an administration that has broad support in Congress and that is not in the midst of an electoral campaign (ELECTION YEAR). We do not find support for the hypotheses that individual justices are more likely to advocate inviting the administration to file a brief during periods of unified government, when the president is popular or during an administration’s honeymoon period.\(^\text{14}\)

The modeling strategy employed suggests that both legal and political grounds are independent. Of course, this is not necessarily the case. Conceivably, there are issues where the federal government’s interest in a case is so prominent that a justice will support a CVSG motion regardless of ideological compatibility with the executive. Consistent with this is the simple fact seven or more justices supported the CVSG motion

\(^\text{14}\) In contrast, Johnson (2003) found that administrations were more likely to receive an invitation during their first year in office and when their party had a large majority in the House of Representatives.
on 12 of the 61 cases where the S.G. was invited to participate. In other words, CVSG motions frequently have support that spans the Court’s ideological spectrum.

To explore this, in the right hand model in table 1, we interact our ideological distance measure with the FEDERAL ISSUE and STATE ISSUE dummy variables. The coefficient for the FEDERAL ISSUE x IDEOLOGICAL DISTANCE interaction is significant, and in both the opposite direction (e.g. positive) and almost the size as the IDEOLOGICAL DISTANCE coefficient, suggesting that ideology plays little or no role on cases where there is a clear federal issue and no state issue. When there is only a state issue, the effect of ideology is the sum of the coefficients on IDEOLOGICAL DISTANCE and STATE ISSUE x IDEOLOGICAL DISTANCE, implying the impact of ideology is at its highest when justices consider an invitation on an issue that is really outside the domain of the federal government.

This fact and the relatively scarcity of any CVSG votes (in under seven percent of the cases) suggests that justices might think about inviting the solicitor general in two stages. First, there is a stage in which it is decided whether to have a formal vote on an invitation to the solicitor general. Second, each justice then decides whether the solicitor general’s participation is likely to further their own policy interests. It is possible that factors associated with deciding to have a formal vote may be correlated with factors associated with justices’ decisions on the vote, a situation that could possibly lead to incorrect inferences.

We address the potential problem of selection bias by estimating a probit model with sample selection. The standard two part Heckman model is not appropriate, as the dependent variable in the “outcome” equation (did a justice vote in favor of a CVSG...
motion?) is dichotomous. In the selection model, we assess whether any justice supported inviting the solicitor general. In the outcome equation, we model the likelihood that each justice voted for the CVSG. As a result, we estimate a maximum likelihood model using STATA’s HECKPROB routine. This model is identical to the censored bivariate probit model discussed by Greene (1997, 912).

In the selection model, we include the case specific variables utilized in table 1 plus one additional variable that is invariant across justices and that we suspect are related to a motion to invite the solicitor general. The additional variable taps the distance between the median justice and the solicitor general for each case (MEDIANIDEOLOGICAL DISTANCE). Presumably, justices who are cognizant of the Court’s median preferred outcome may think it is futile to invite the solicitor general if the median and the solicitor general are unlikely to concur.

[Table 3 about here]

The results in our selection model demonstrate the importance of case specific variables to the decision to invite the solicitor general. The results suggest that a motion to solicit the views of the solicitor general was more likely to be made on cases that involve federal questions and less likely on cases that revolve around state law. Likewise, the bench was more likely to consider a CVSG motion on cases that were salient (CONSTITUTIONAL). The variable to denote whether the court eventually overturned a

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15 See Dubin and Rivers (1989) for a detailed discussion of the probit model with sample selection.
16 We followed Butler's (1996) "conventional suggestion" for "practical cases" of estimating censored probit models and "adopt[ed] the arbitrary normalization of omitting the constant term from the outcome equation" (357). Butler recommends omitting the constant in the case of “statistically significant, but not highly variable regressors, such as dummy variables with small but significant coefficients” (357). Our dependent variable clearly meets this criteria.
precedent is not significant. Again, the complexity variable runs counter to expectations, as complex cases were less likely to have a CVSG motion (and, again, the results are quite similar if this variable is omitted).

As with the earlier specifications, political factors clearly matter. As one would expect, the justices are more likely to consider issuing a CVSG when there is divided government and during an election year, but more likely to consider CVSG’s during the first year of a president’s term (HONEYMOON). Contrary to expectations, though, the Court is less likely to consider CVSG’s when the president is successful within Congress or popular with the public. Running the model with various permutations of the separation of powers variables yields the same general pattern: only the election year variable tends to matter in the outcome equation, while all the included variables tend to matter in the selection equation.

The highly significant median ideological distance variable suggests that the sort of strategic calculation justices make prior to considering an invitation also depends upon the fact that a simple majority can dictate judicial outcomes. In particular, the selection model suggests that there are fewer cases where any justice votes to invite the solicitor general when the bench median is ideologically distant from the solicitor general. This result is consistent with justices recognizing that the potential value of having an amicus brief from the solicitor general is diminished when the median is unlikely to concur with the solicitor general.

Turning to the outcome equation of Model 1 on Table 3, we see several similarities to the results in Table 1. The results imply justices are more likely to seek input from the S.G. for high profile cases (CONSTITUTIONAL) and that ideological distance
and an election year make justices less eager to hear from the S.G. There are differences, as well, however: the precedent, federal, state and new justice variables are insignificant in the outcome equations. This does not mean that these variables do not matter; instead, it means that the variables matter in determining whether or not justices even consider a CVSG. These factors play a role in making it relevant or not to even discuss inviting the solicitor general, but once the discussion is formalized, these factors play less of a role.

We also see in Model 2 of Table 3 that although justices who are ideologically proximate to the S.G. tend to be more supportive of CVSG motions, on cases that clearly involve federal issues the effect of ideology tends to largely evaporate. As before, the effect of ideology on cases affecting on state matters is very high; the net effect of ideology on cases affecting only federal matters is quite low.

In summary, we find broad support for the idea that strategic forces play an important role in the relationship between the solicitor general and the Court. In particular, ideology consistently matters: the farther a justice is from a S.G., the less interested the justice will be in soliciting the views of the S.G., especially on state issues. Separation of powers factors appear to matter as well, although not all variables are always significant; taken together, however, the evidence is strong that the political standing of the executive affects the degree to which justices want to hear from an agent of the executive. We also find that legal factors matter: justices are very much less likely to consider asking the S.G. for a brief if the case does not involve a federal issue. They are also more likely to ask for input on high profile cases and when they lack experience. They are not, however, more likely to ask for input on complex cases, indicating at least one limitation of the legal perspective.
Conclusion

Conventional wisdom holds that the solicitor general’s non-partisan behavior and his reservoir of expertise make his participation an important influence on Court decision-making.\footnote{Baird (n.d.) argues that the influence of the S.G. is frequently exaggerated. Instead of shaping Court outcomes, she argues the Office of the S.G. is more of a reactive institution than is commonly thought. In particular, she argues that the S.G.’s decision to participate as an amici on cases where the Court did not call for the S.G.’s views stem from the S.G.’s understanding of the salience the Court itself attaches to the policy questions involved in a particular case.} The solicitor general is frequently portrayed as acting in the Court’s interest, rather than the administration’s—particularly so when the Court actively solicits the views of the solicitor general. This view of the solicitor general, however, is newly challenged by scholars (including Segal 1988, Segal and Reedy 1988, Segal and Spaeth 2002, and Bailey, Maltzman, and Kamoie 2005). These authors raise doubts about the purely neutral position of the solicitor general, questioning whether the solicitor general is seen by the justices as primarily concerned about the logical development of the law. Rather than viewing the solicitor general as a “tenth justice,” such works view the solicitor general as an agent of the executive branch.

In this piece, we have extended this portrait of the solicitor general, examining the extent to which strategic calculations of the justices may affect their likelihood of inviting the solicitor general to file an amicus brief in a case. It appears that such invitations are not merely the result of legal forces. Instead, justices ideologically close to the administration’s policy views are more likely to seek the input of the solicitor general, even controlling for a range of legal and political forces that might help to explain why justices would desire to hear the views of the solicitor general. It also appears that
Justices may be more interested in the views of the administration in periods of enhanced presidential power.

These findings shed new light on the character of inter-branch relations. Recent studies of the separation of powers have suggested that the judiciary views the other branches as either a source of policy information or as a potential obstacle that needs to be avoided. Our results suggest that both of these accounts have some currency. However, neither explanation can account for the patterns we observe: Justices who are most likely to agree with the executive branch turn out to be the most likely to solicit the views of the administration—especially on cases that are not central to the executive branch.

We suspect that justices who are closer ideological allies of the president use invitations to the S.G. as a tool for constructing a majority coalition among their brethren. And we suspect that the justices understand that the S.G. sends signals based on the policy views of the administration he represents. Given the range of ideological views across the bench, the value of such signals depends upon each justice’s own policy preferences. Future inter-branch studies might profitably explore the notion that the Supreme Court is not a unitary actor. Instead, the Court is comprised of justices who compete to secure opinions that best match their legal and policy outlooks and goals.
Bibliography


Segal, Jeffrey A. 1988. “*Amicus Curiae* Briefs by the Solicitor General During the Warren and Burger Courts: A Research Note.” *Western Political Quarterly* 41 (March): 135-144.


Figure 1: Docket Sheet for *United Auto Workers v. Johnson Controls*

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL., Petitioners

vs.

JOHNSON CONTROLS, INC.

<table>
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<th>CERT.</th>
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<th>MERITS</th>
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<td>O’CONNOR, J.</td>
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CVSG Vote Column
Figure 2: Comparison of Bridge Based Ideology Score and Judicial Voting

*All justices who served between 1972-1996 are included in the figure. The points demarking the ideology scores of Justices Breyer, O'Conner, and Powell are not labeled because such labels overlap with justices whose identity appears. The X-axis in this figure is the average ideology as estimated in Bailey (2005); these scores are comparable in a the statistical estimation routine that includes position taking by members of the Senate, House and the President on Supreme Court cases as discussed in the Bailey (2005). The percent liberal data is from Epstein, Segal, Spaeth, Walker (2003, 6-4).
Table 1
Voting for CVSG Motion (one stage)

<table>
<thead>
<tr>
<th>Explanatory Variable</th>
<th>Expectation</th>
<th>Parameter Estimate (std. error) Model 1</th>
<th>Parameter Estimate (std. error) Model 2</th>
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<td>+</td>
<td>0.39** (0.16)</td>
<td>0.39** (0.16)</td>
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<tr>
<td>UNCONSTITUTIONAL</td>
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<td>0.27*** (0.05)</td>
<td>0.27*** (0.05)</td>
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<td>0.36*** (0.10)</td>
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<td>0.01*** (0.003)</td>
<td>0.01*** (0.003)</td>
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<td>-0.24*** (0.06)</td>
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*p=.05; **p<.01; ***p<.001 (one-tailed, robust errors clustered on justice reported in parentheses). Fixed effects for each solicitor general are included in the model but not reported.
Table 2
Simulated Effects

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<th>Probability: Cases w/ 1 or More Votes (821 Observations)</th>
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*modal category
Table 3: Voting for CVSG Motion (two stage)

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<td>-1.25*** (0.11)</td>
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<td>( \rho )</td>
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<td>12,710 (uncensored)</td>
<td>821 (uncensored)</td>
</tr>
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</table>

*p=.10; **p<.05; ***p<.01; ****p<.001 (one-tailed, robust errors clustered on justice reported in parentheses).

Fixed effects for each solicitor general are included in the both the selection and outcome models but not reported.