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American Politics Research 2008; 36; 382 originally published online Dec 27, 2007;
DOI: 10.1177/1532673X07309602

The online version of this article can be found at:
http://apr.sagepub.com/cgi/content/abstract/36/3/382

Published by:
SAGE Publications
http://www.sagepublications.com

American Politics Research
Volume 36 Number 3
May 2008 382-415

10.1177/1532673X07309602
http://apr.sagepub.com
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http://online.sagepub.com

The Solicitor General's Amicus Curiae Strategies in the Supreme Court

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Scholars have devoted a great deal of research to investigating the role and influence of the U.S. solicitor general (SG) as amicus curiae in the Supreme Court. Yet, we know little about the SG's decision to file an amicus brief and how this relates to the SG's success on the merits. We fill this void by examining legal, political, and administrative factors that affect the SG's decision to participate as amicus curiae. We subject our hypotheses to empirical testing using data on the 1953 to 1999 Supreme Court terms by linking the SG's decision to file an amicus brief to the SG's ultimate success on the merits, employing a Heckman-style selection model. We find that the SG's decision to file an amicus brief is influenced by legal, political, and administrative considerations, suggesting that the SG is best viewed through the incorporation of a variety of theoretical perspectives.

Keywords: *solicitor general; Supreme Court; separation of powers; amicus curiae; executive branch; presidential agenda*

Although the government of the United States is based on a separation-of-powers system, in which power is divided among the three branches of government, this does not denote that the branches operate in isolation from one another. Rather, it has long been recognized that a host of opportunities exist for interbranch interactions. For example, scholars have investigated congressional control of the bureaucracy (e.g., Balla & Wright,

Authors' Note: We extend our thanks to Katherine Barillas, Matt Eshbaugh-Soha, Wendy Martinek, Lisa Solowiej, Laila Sorurbakhsh, Amy Steigerwalt, and the anonymous reviewers for their sage comments on previous versions of this article. We also express our gratitude to Joseph Kearney and Thomas Merrill for sharing their data on amicus curiae briefs. Collins thanks the National Science Foundation for its generous financial assistance under Grant SES-0350416. A previous version of this article was presented at the 2007 annual meeting of the Midwest Political Science Association. Naturally, any errors in fact or judgment remain our own.

2001; Huber & Shipan, 2002), presidential influence on congressional agendas and legislation (e.g., Barrett & Eshbaugh-Soha, 2007; Fisher, 2007; Jones, 1994; Mayhew, 1991; Peterson, 1990), the effectiveness of presidents in appointing like-minded judges to the federal bench (e.g., Abraham, 1974; Goldman, 1997; Segal, Timpone, & Howard, 2000), and the ability of Congress to constrain Supreme Court decision making (e.g., Epstein & Knight, 1998; Eskridge, 1991; Katzmann, 1997; Segal, 1997; Shipan, 1997). In addition to these avenues, students of judicial politics have focused substantial attention on examining the influence of the executive branch on the Supreme Court, which offers another rich opportunity to analyze interbranch interactions. Indeed, it is well established that the solicitor general (SG)—the primary litigator for the executive branch in the Supreme Court—is one of the most frequent and successful litigants and amicus curiae[1] participants in the nation's highest judicial arena (e.g., Bailey, Kamoie, & Maltzman, 2005; Caldeira & Wright, 1988; Caplan, 1987; Deen, Ignagni, & Meernik, 2001, 2003; Johnson, 2003; Lindquist & Klein, 2003; McGuire, 1998; O'Connor, 1983; Puro, 1981; Salokar, 1992; Scigliano, 1971; Segal, 1988). Although scholars have reached a general consensus on this point, there has been virtually no attention devoted to the SG's decision to participate as a litigant or an amicus in the first place. Indeed, with the exception of treatments of the executive branch's decisions to appeal cases to the Supreme Court by Horowitz (1977), Yates (2002), and Zorn (2002), we have accumulated little systematic knowledge concerning why the SG decides to litigate in the Court (Deen et al., 2003, p. 71). To remedy this state of affairs, we investigate the SG's decisions to participate as amicus curiae in the Supreme Court and subject our theoretical expectations to empirical scrutiny during the 1953 to 1999 terms of the Court.

Investigating the SG's amicus curiae strategies is significant for a number of reasons. First, political scientists have long recognized the importance of actors' agenda-setting decisions. For example, we know a great deal about the Supreme Court's certiorari decisions (e.g., Caldeira & Wright, 1988; Perry, 1991) and why members of Congress (e.g., McLauchlan, 2005; Solberg & Heberlig, 2004) and organized interests (e.g., Hansford, 2004) opt to file amicus curiae briefs. Given this, it is surprising that there has been little accumulated knowledge regarding the SG's decision to participate as amicus (cf. Meinhold & Shull, 1998; Puro, 1971; Salokar, 1992). Moreover, of the research that does exist, none has attempted to link the SG's decision to file an amicus brief to the SG's subsequent success on the merits. This is troubling because if the SG selects cases based in part on his[2] estimate of whether the Court will endorse his position, this suggests that scholars have

likely overstated the influence of the SG on the Court. Simply put, absent an understanding of the SG's decision to file an amicus brief in the first place, we cannot fully comprehend the SG's influence on the Court. Second, understanding the SG's motivations for filing amicus briefs is important precisely because of the extraordinarily high levels of success he enjoys in the Court. For example, Deen et al. (2003) report success rates as amicus ranging from 66% (Carter) to 89% (Johnson). Because the Court overwhelmingly endorses the positions advocated by the SG, this indicates that, through filing an amicus brief, the SG alters the litigation environment at the Court, tipping the scales of justice toward the litigant he supports. Thus, it is important to understand the SG's amicus strategies to more fully recognize the complex nature of litigation in the Court. Third, it is imperative to comprehend the SG's decision to participate as amicus because this litigation strategy affords presidents the opportunity to further their agendas outside of the elected branches of government. This is particularly significant because, if the SG is successful as an amicus, this provides presidents the ability to influence public policy long after they leave the White House, given that Supreme Court precedents are difficult to dislodge (Wasby, 1995, p. 105). Finally, by investigating the SG's amicus strategies, a more complete picture of executive branch litigation is revealed. Prior research on the SG focuses on two roles: the SG as an agent of the Court and as an agent of the president. We introduce a third perspective on the SG by illustrating how bureaucratic considerations, in addition to legal and political factors, shape the decision to file an amicus brief.

We begin with a discussion of the options presented to the SG once the Court has agreed to hear a case. Next, we present our theory of the factors that contribute to the SG's decision to file an amicus brief. By integrating legal, political, and administrative considerations, we illustrate that a host of elements contribute to the SG's amicus strategies in the Court. We then operationalize the variables derived from our hypotheses and subject them to empirical testing by employing a Heckman-style selection model that links the SG's decision to participate as amicus to his subsequent success in the Court. We conclude with a brief discussion of the implications of our findings as well as suggestions for further research.

The Solicitor General Before the Supreme Court

The SG can participate before the Supreme Court in one of two primary ways: as a litigant or as amicus curiae.[3] During the 1953-1999 terms, the

SG participated as a litigant in almost 40% of the Court's cases, whereas the SG filed an amicus brief, either by invitation of the Court or on his own accord, in almost 20% of cases heard on the merits.[4] An amicus brief filed by the SG concerning the Court's decisions on the merits arrives at the Court in one of two ways. First, like other entities with an interest in the Court's jurisprudence, the SG may file an amicus brief at his own discretion. However, unlike private amici, the SG is not required to obtain permission from the parties to litigation to file an amicus brief. As such, procedurally speaking, the SG faces no barriers to filing an amicus brief. Through these discretionary amicus filings, the SG performs a dual role. First, as an agent of the bench, the SG provides the justices with information regarding the correct application of the law in a case (e.g., Caplan, 1987; Scigliano, 1971). Second, as an agent of the president, the SG advances the policy goals of the president he represents through the positions he advocates before the Court (e.g., Bailey et al., 2005; Deen et al., 2003). In this mode, the SG attempts to further the president's political agenda and engages in position taking by alerting the public and the Court to where the president stands on a given controversy (e.g., Mayhew, 1974). During the 1953-1999 terms, the SG filed amicus briefs at his own discretion in 24.1% of the Court's cases in which he did not represent the federal government as a direct party to litigation, comprising almost 15% of the Court's docket. These discretionary amicus filings constitute a major means of participation for the SG in the Court, second only to directly representing the executive branch as a party to litigation.

Alternatively, the SG may participate as amicus curiae by invitation from the Court. Such invitations are quite unique to the SG, as they are rarely bestowed on other amici. As a former staff member in the SG's office noted, such a request "is not an invitation. It's an invitation from the king. You don't turn it down" (Salokar, 1992, p. 143). Given this, when the SG participates as amicus at the request of the Court, it is not truly by his own discretion. Instead, such invitations might best be viewed as mandatory amicus filings. During the 1953-1999 terms, the SG participated as amicus by invitation of the Court in 6.4% of the Court's cases where he did not represent the federal government as a direct party to litigation, comprising almost 4% of the Court's docket.

The Solicitor General's Decisions to File Amicus Curiae Briefs

Provided that the Court did not invite the SG to file an amicus brief, the SG has considerable discretion with regard to the cases he briefs as amicus

curiae (O'Connor, 1983). Below, we present our theoretical expectations for why the SG will choose to file an amicus curiae brief. Consistent with recent research (e.g., Bailey et al., 2005; Deen et al., 2003; Pacelle, 2003a; Strauss, 1998; Zorn, 2002), we do not believe that the SG's decisions are solely motivated by either legal or political factors. Instead, it is our perspective that both legal and political considerations shape the SG's decision making. In addition, we posit that administrative factors will influence the SG's decision to file an amicus brief. A discussion of the legal, political, and administrative determinants that we hypothesize will influence the SG's amicus strategies in the Court follows.[5]

Legal Factors

The traditional view of the SG in the Supreme Court can be generally construed as legalistic in nature, viewing the SG as an agent of the bench (e.g., Caplan, 1987; Scigliano, 1971). In this mode, rather than merely representing the president, the SG provides the justices with unbiased information that enables the Court to render legally sound decisions (Salokar, 1992, p. 22). Statements made by a former SG to Puro (1971) corroborate this perspective:

> We have a role in the administration of justice. However, we are not judges; we are interested in the sound development of law and not just winning a case. The Solicitor General must be fair, broad-minded and not just out to win cases. . . . It is our responsibility to say that even the best arguments would be no good. The Supreme Court respects our role and it is a mutual activity. (p. 130)

This outlook corresponds to the unique facets of the SG's office: He is the only federal official required to be "learned in the law" and is one of only two federal officials (the other being the vice president) who maintains formal offices in two branches of government (Waxman, 1998).

From this point of view, the SG is assumed to have genuine concerns about providing the justices with information concerning the Court's best interests, particularly in relation to the development of legal doctrine (e.g., Kearney & Merrill, 2000). As such, it is expected that the SG will seek out cases with a careful eye toward resolving confusion as a result of his dedication to the advancement of law (Salokar, 1992, p. 22). Following from this, we expect the SG to participate in cases in which the disposition of a case in the lower courts is ambiguous. When intercircuit conflict exists,

this increases the uncertainty surrounding the correct application of the law for the justices, thus suggesting that the case is legally ambiguous. In such cases, two or more lower courts have diverged in their rulings as to the correct application of the law, indicating that both sides of the dispute carry legal weight. If the SG is concerned with the Court's development of legal doctrine in such cases, he will likely view these stimuli as a signal that his expertise will be useful to the justices.

Hypothesis 1: The SG is more likely to file an amicus curiae brief in a legally ambiguous case.

In addition, we hypothesize that the SG will pay particular attention to where the lower court decision originated. Under the view of the SG as an agent of the bench, we propose that the SG will be especially attracted to cases appealed from federal courts or federal administrative agencies, as opposed to state courts of last resort. In his capacity as the "Tenth Justice" (Caplan, 1987), the SG is expected to promote the coherency of the law by targeting cases with wide-ranging implications for the federal government. Because cases appealed from state courts of last resort are only binding on the state jurisdictions from which they emanate, this creates an incentive for the SG to participate in cases with greater breadth in terms of the constituencies they affect. Indeed, Puro (1971, p. 138) identifies these cases as particularly worthy of the SG's attention because they more closely parallel the public interest, as compared to cases appealed from state courts. An assistant to the SG confirms this expectation:

> The cases in which the government had a direct interest usually concern the administration of federal acts, e.g., National Labor Relations Act. There are many cases like that. In cases concerning a federal statute administered by an agency or the Department of Justice it is important for the United States to present to the Supreme Court what the act meant or means. (quoted in Puro, 1971, p. 140)

Moreover, the SG does not necessarily have to make such decisions in a vacuum. This is the case because administrative agencies will often communicate to the SG the desirability of expressing the government's viewpoint as a means to ensure that the agency's views are considered by the justices (Salokar, 1992, p. 138). We believe that the SG will be attentive to this consideration and, seeking to promote the intelligibility of federal law in cases that have far-reaching impact, will participate more often in cases stemming from the federal courts or bureaucracies than from state courts.

Hypothesis 2: The SG is more likely to file an amicus curiae brief in a case appealed from a federal court.

Hypothesis 3: The SG is more likely to file an amicus curiae brief in a case involving the actions of a federal administrative agency.

Under 28 U.S.C. § 518(a), the SG is granted the authority to represent the federal government in cases "in which the United States is interested." In addition to cases involving appeals from federal agencies and courts, we believe that the SG will be especially attracted to cases involving challenges to congressional statutes (Pacelle, 2003b; Strauss, 1998). In such cases, the justices are expected to exhibit particular interest in determining the legislative intent surrounding the statute implicated in the dispute to assist them in adjudicating its constitutionality (e.g., Whittington, 1999). Although members of Congress can file amicus briefs providing various interpretations of legislative intent, they do so infrequently (McLauchlan, 2005; Solberg & Heberlig, 2004). Given this fact, the primary mechanism by which the justices obtain information regarding legislative intent comes from the SG. Attesting to the import of this information to the justices, Supreme Court Rule 29.4(b) requires that a litigant challenging the constitutionality of an act of Congress must provide its filing to the Office of the Solicitor General if the federal government is not a party to the proceeding. In filing amicus briefs in cases that implicate the constitutionality of congressional legislation, the SG can assist the Court in two ways. First, he is able to provide the justices with information regarding legislative intent, often by working with congressional committees to determine that intent (McLauchlan, 2005; Pacelle, 2003b; Salokar, 1992, p. 87). Second, the SG can communicate to the justices the executive branch's experience in implementing the congressional legislation at issue (Strauss, 1998). In this way, SGs are uniquely positioned to make a valuable contribution to the justices' decision making, a consideration SGs recognize as an important determinant in their decisions to file amicus briefs (Puro, 1971, p. 138).

Hypothesis 4: The SG is more likely to file an amicus curiae brief in a case involving an act of Congress.

Consistent with the view of the SG as an agent of the Court, we hypothesize that the SG will respond to signals from the justices that the Court is interested in the SG's participation to assist the justices in developing legal policy. Although the Court has no formal mechanism to solicit certain types of cases, recent work by Baird (2004) illustrates that the justices can, nonetheless, signal to the legal community a desire for litigation that assists in the

growth of law within particular issue areas. Because the justices operate in an environment of incomplete information (Epstein & Knight, 1998; Murphy, 1964), they are often reliant on outside information transmitted through amicus briefs to assist in reaching decisions that create efficacious law and/or maximize the application of their policy preferences (Collins, 2007). Although the Court can virtually compel the SG's participation through invitations to file amicus briefs, the SG can also play an active role in providing the Court with desired information by responding to the Court's indirect signals that it is interested in the further advancement of a particular area of law. Because the SG participates as either an amicus or litigant in almost 60% of the Court's cases, we believe the SG is uniquely situated to respond to the justices' signals by filing amicus briefs in issue areas that the justices indicate they are especially interested in developing.

Hypothesis 5: The SG is more likely to file an amicus curiae brief in a case if the Supreme Court signals its interest in the development of the issue area implicated in the case.

Political Factors

Unlike the legal perspective of the SG, the political view posits the SG as an agent of the president seeking to influence the Court to adopt policies favorable to his administration's interests, that is, policies that maximize the president's political goals (e.g., Bailey et al., 2005; Meinhold & Shull, 1998; Norman-Major, 1994; Salokar, 1992; Zorn, 2002). The reality that the SG is very much an agent of the president is perhaps most evident in the SG's selection process. As Salokar notes,

> The selection process is designed to ensure that the solicitor general will share the basic political values of the administration. "The Candidate for the Office must be in basic accord with the philosophical tenets of the President and Attorney General." (p. 3)

Thus, although the SG may enjoy some independence from the president in terms of his day-to-day decision making, the selection process ensures that the SG will not stray too far from the ideological bent of the administration.[6] On the rare occasions where the SG fails to advance positions that are congruent with the president's interests, the president can remedy this by reining in the SG (e.g., Caplan, 1987; Days, 2001; Salokar, 1992). For example, in *Regents of the University of California v. Bakke* (1978), the SG

prepared an amicus brief in favor of Bakke, arguing that California's affirmative action program was unconstitutional. When the brief was sent to the White House for consideration, President Carter's administration, having announced its support earlier that year for affirmative action programs, signaled its displeasure with the brief. After a series of highly contentious meetings between the administration and the SG, the SG backed down, arguing instead that race should be taken into account to remedy the effects of prior discrimination (Days, 2001, pp. 510-511). Thus, the political perspective on the SG posits that he is an ideological advocate for the president's policies in the Court.

Following from the viewpoint of the SG as an agent of the president, we expect that the SG will be particularly attracted to cases that enable him to further the president's policy agenda. Although the SG might theoretically participate as amicus in every case before the Court—with the exception of those cases where the SG represents the federal government as a litigant—the SG has an incentive to limit his participation to those cases that have considerable policy implications for the administration. This is the situation because, should the SG opt to file an amicus brief in all cases before the Court, "the Court [would] begin to expect the government's views, and as a result, give them less weight" (Salokar, 1992, p. 141). Accordingly, the SG must carefully consider the attributes of each case prior to filing an amicus brief. Clearly, not all cases heard by the Court are of equal import to the president. However, when such a case arises, the SG has a substantial incentive to attempt to shape the justices' decisions in order to maximize the president's policy preferences (Bailey et al., 2005). Indeed, SGs themselves corroborate the importance of filing amicus briefs in so-called agenda cases—those cases that are salient for promoting the president's policy priorities. For example, in interviews with Salokar (pp. 139-142), former SGs spoke to the importance of these agenda cases: For Rex Lee, SG under Reagan, these cases involved obscenity, religion, and abortion; for Archibald Cox, SG under Kennedy, agenda cases included issues dealing with civil rights and reapportionment; for SGs Stanley Reed and Robert Jackson, who served under Roosevelt, these cases covered litigation related to the New Deal. By filing amicus briefs in these agenda cases, SGs can promote the president's agenda through position taking (Mayhew, 1974), and should their positions prevail on the merits, this enables presidents to influence public policy long after they leave the White House by creating favorable precedents (Meinhold & Shull, 1998; Wasby, 1995). Former Solicitor General Rex Lee unequivocally denotes the attractiveness of cases that are congruent with the president's political agenda in observing,

> One of the purposes of the solicitor general is to represent his client, the president of the United States. One of the ways to implement the President's policies is through positions taken in court. When I have that opportunity, I'm going to take it. (quoted in Salokar, 1992, p. 139)

Hypothesis 6: The SG is more likely to file an amicus curiae brief in a case that is important to the president's policy agenda.

In addition to filing amicus briefs in cases that are central to the president's policy agenda, we also expect that the SG will file amicus briefs in cases that are politically salient for the public at large (Puro, 1971; Salokar, 1992). In his capacity as the representative of the executive branch before the Court, the SG is charged with representing the president's view of the public interest. Although SGs clearly have an incentive to further their presidents' political agendas by filing amicus briefs in cases that are important to presidential agendas, the SG, as an agent of the president, also has an incentive to attempt to shape the law in cases that are salient to the American citizenry because the president is theoretically an agent of the public. In this capacity, the SG might pay particular attention to the broad political salience of a case to communicate to the Court his administration's view of the public's perception of the case. Indeed, a former assistant to the SG substantiated this perspective in an interview with Puro (1971), noting that "in lands division cases we go in just to protect the federal interest. [Whereas] in civil rights causes we go in to advance the broader public interest" (p. 141). Similarly, former SG Charles Fried explains the significance of a case's broad import in describing his perspective of the SG's role: "You more or less view your office as sort of a constitutional ombudsman, to make sure that all areas of public interest, particularly with regard to constitutional issues, are explored, debated and discussed, as issues are decided" (Fried, 1991, p. 33).

Hypothesis 7: The SG is more likely to file an amicus curiae brief in a case that is salient to the public.

The SG is well known for his considerable success in the Supreme Court. However, the SG's apparent success before the Court does not necessarily imply that he influences the Court. This is particularly true in those cases he chooses to brief as amicus curiae because the Court is predisposed toward accepting his position (e.g., Zeppos, 1998; Zorn, 2002). There are three reasons why the SG might file amicus briefs before a Court that is inclined to accept his arguments. First, because the SG is the focus of considerable

scholarly and media attention, much of it related to his phenomenal success before the Court, this creates a stimulus for the SG to appear successful in the eyes of history. As the focus of books (e.g., Caplan, 1987; Pacelle, 2003a; Salokar, 1992), law review symposia (e.g., "The Solicitor General," 2001, in the *Journal of Appellate Practice and Process*; "The Role and Function of the United States Solicitor General," 1987, in the *Loyola of Los Angeles Law Review*), conferences (e.g., the Rex E. Lee Conference on the Office of Solicitor General held at Brigham Young University in 2002), and numerous scholarly articles, the attention accorded to the SG, relative to other members of the Supreme Court bar, is very much unique. Furthermore, SGs are aware of this differential attention, as evidenced by the lengthy list of books and articles regarding the office published on the SG's Web site.[7] Given the likelihood that SGs genuinely care about their performance in the eyes of history, and given that SGs are able to select cases to participate in as amicus curiae, one method for the SG to increase his standing in the public record is to appear successful before the Court. Second, because the SG serves at the pleasure of the president, he has further incentive to appear successful in order to maintain his position within the Department of Justice. If the SG appears ineffective before the Court, the president then has reason to consider his dismissal. To be sure, maintaining one's position in the administration is a powerful incentive to appear efficacious before the Court. Finally, SGs might be motivated to file amicus briefs in cases that they are predisposed to win in order to further their own careers after leaving office. Indeed, numerous SGs have become Supreme Court justices, including Stanley Reed, Robert Jackson, and Thurgood Marshall.[8] In determining whether to appoint a former SG to a position on the high Court, the president might be motivated by that SG's ability to etch the president's policy preferences into law as an advocate. For example, during the confirmation hearings of Chief Justice John Roberts, several journalists spoke to Roberts's extraordinary success as a deputy SG as evidence of his credentials (e.g., Holland, 2005; Mauro, 2005a). Moreover, even if a position on the Supreme Court is not a motivating force, the promise of a high-paying job in private practice might provide the incentive to appear efficacious. For example, Horowitz (1977, p. 27) notes that many government attorneys use their public sector employment as a stepping-stone to lucrative private practice positions. In point of fact, two former SGs, Seth Waxman and Erwin Griswold, parlayed their governmental service into profitable placements in two of the nation's top Supreme Court practices, which actively sought out the former SGs to serve in the vanguard of their appellate litigation teams (Mauro, 2005b). Given these stimuli, by filing amicus briefs before a Court that is predisposed

toward accepting his position, the SG is able to maintain his appearance of substantial success.

The central means by which the SG can manipulate his appearance of success before the Court is by filing amicus briefs in cases where the SG and the Court are ideologically aligned. Decades of research on Supreme Court decision making reveal the paramount importance of the justices' ideological preferences in shaping their decisions (e.g., Pritchett, 1948; Schubert, 1965; Segal & Spaeth, 2002), a fact of which SGs are surely aware. By filing an amicus brief in a case in which the Court is predisposed to accept the SG's arguments due to ideological proximity, the SG is offered a powerful method to appear successful before the justices without actually influencing their decision making.[9]

Hypothesis 8: As the ideological proximity between the SG and the Supreme Court increases, so too will the likelihood that the SG will file an amicus curiae brief.

Administrative Factors

Thus far, we have focused on the two primary perspectives on the SG in the literature, viewing the SG as an agent of both the Court and the president. However, it is important to note that neither of these perspectives offers a complete understanding of the SG's amicus strategies. This is the case because, like other bureaucracies, the Office of the Solicitor General faces administrative constraints that can potentially shape the decision to participate as amicus curiae (e.g., Horowitz, 1977; Zeppos, 1998). Extant scholarly analyses of the SG generally focus on his participation and success before the Court (e.g., Bailey et al., 2005; Caldeira & Wright, 1988; Deen et al., 2001, 2003; Johnson, 2003; Lindquist & Klein, 2003; McGuire, 1998; O'Connor, 1983; Segal, 1988) while ignoring the myriad responsibilities of the office. But, it is important to note that, in addition to deciding which cases to appeal to the Court and those in which to file amicus briefs, the SG performs numerous administrative functions. These include working with bureaucratic agencies to determine litigation strategies, managing the office staff, determining the allocation of oral arguments among the deputy and assistant SGs, and interacting with the media, all while ensuring a congenial relationship with the White House and attorney general (McGinnis, 1992; Salokar, 1992).[10] We theorize that three factors related to the SG's role as a bureaucrat will influence the decision to file an amicus brief.

First, we hypothesize that SGs will experience acclimation effects that limit their amicus activity during their first year in office. In their freshman terms, SGs are thrown in to steer what is, in effect, a small law firm. Among other things, a new SG must manage the current workload of the SG's office, which typically involves becoming familiar with pending litigation brought by previous SGs. Moreover, turnover in the SG's office is not uncommon as one administration departs the White House (McGinnis, 1992, p. 812); it is the SG's duty to fill these positions with qualified assistant and deputy SGs (Salokar, 1992, p. 56). In addition, like other chief bureaucrats, the SG is charged with familiarizing himself with the bureaucratic subculture within the office (e.g., Wilson, 1989), including the SG's somewhat unique standard operating procedure of filing briefs with exhaustive citations to Supreme Court precedent (Fried, 1991, p. 66). Once more, as the leader of a bureaucracy, the SG is required to ensure the smooth functioning of the office by imparting faith in his abilities among the other attorneys and office staff (Wilson, 1989). Importantly, all of this occurs before the new SG even begins one of his central tasks: to further the president's policy agenda.[11] Thus, it should not be surprising that former SG Charles Fried (p. 24) reports that, upon entering the SG's office, he was somewhat unprepared for the demands of his new position. As a result, he experienced a period of initial disorientation until he became more fully acclimated to the rigors of serving as SG. Because newly appointed SGs must dedicate substantial time to dealing with these administrative considerations, we expect that this will limit the number of amicus briefs they file.

Hypothesis 9: The SG is less likely to file an amicus curiae brief during his first year in office.

In addition to acclimation effects, we also expect that the level of resources available to the SG will influence his ability to file amicus briefs. Like other executive branch agencies, the Office of the Solicitor General is dependent on budget appropriations made by Congress to operate and carry out its duties.[12] Following Ippolito (2003), we view the SG's budgets as both a resource and a constraint that can potentially shape the decision to file an amicus brief. On the one hand, budgets provide the necessary funds to hire staff, purchase equipment, and operate the office. In this sense, as the budget grows, so too does the capacity of the SG to devote resources to hiring assistant and deputy SGs and staff that can promote the legal and political goals of the SG through the filing of amicus briefs. Moreover, as Parkinson (1957) notes, there is a clear relationship between the supply and demand aspects of budgetary

resources as they relate to administrative action: the greater the agency's budget, the greater the agency's capacity for output. On the other hand, the finite funds available can constrain agency heads and affect their decision-making processes as related to the most effective uses for these resources. For the SG, the level of available resources can influence the decision to file amicus briefs because these are, after all, discretionary decisions. In this sense, when facing resource constraints, the SG might choose to deploy the office's limited resources by focusing on litigation in which the government is a party, rather than promoting legal and policy goals through facultative amicus participation. Accordingly, we expect that the SG's decision to file an amicus brief will be influenced by the size of the office's budget.

Hypothesis 10: As the size of the Office of the Solicitor General's budget increases, so too will the likelihood that the SG will file an amicus curiae brief.

Finally, we hypothesize that the SG's choice to file an amicus brief will be influenced by the SG's non-amicus workload. In particular, we expect that the SG's decision to file an amicus brief will be constrained by the number of cases in which the SG represents the federal government as a direct party to litigation. Because these cases make up the majority of the SG's participation in the Court and require the allocation of resources and the assignment of personnel that might otherwise be expended on discretionary amicus briefs, the SG's non-amicus workload can potentially limit the number of amicus briefs filed (e.g., Wilson, 1989). In this sense, both the supply (budget) and demand (workload) sides of the equation might affect the SG's amicus strategies.

Hypothesis 11: The SG is less likely to file an amicus curiae brief as the number of cases in which the SG represents the federal government as a party to litigation increases.

Data and Method

To determine whether our hypotheses comport with reality, we examine data on the SG's amicus participation during the 1953-1999 Supreme Court terms. These data were drawn primarily from Kearney and Merrill's (2000) amicus curiae database, which includes information on the SG's participation as both amicus and as the attorney for the federal government when it

appears as a direct litigant for the 1953-1995 terms.[13] We updated this information with data on the SG's participation in the 1996-1999 terms using the coding rules established by Kearney and Merrill. Because the Court's rules prohibit the SG from filing amicus briefs in cases where he represents the United States as a direct litigant, such cases were excluded from consideration. In addition, we excluded those cases in which the SG participated as amicus curiae by invitation from the Court, because such invitations are most appropriately viewed as mandatory filings and therefore not subject to the SG's discretion.[14] To obtain information regarding the justices and cases, we merged the Kearney and Merrill database with Spaeth's (2003) judicial database. The final dataset contains information on every orally argued case in which it was at the discretion of the SG whether to file an amicus brief. The unit of analysis is the case citation.

Our central interest is determining the factors that motivate the SG to file an amicus brief and whether these considerations influence the success of the SG as amicus on the merits. Statistically, this can be accomplished by employing a Heckman-style selection model (Heckman, 1979). This model is most appropriate because the opportunity for the Court to rule in favor of the SG as amicus is contingent on the SG's decision to file an amicus brief in the first place. As such, observations of the SG's success as amicus in the Court are not necessarily drawn from a random distribution if—as is argued here—the variables that shape the SG's decision to file an amicus brief are related to his subsequent success on the merits. The Heckman-style model provides a test for whether the factors that contribute to the SG's decision to participate as amicus are related to his ultimate success before the Court. The exact selection model employed here involves probit procedures for both stages because each of the outcome variables are dichotomous.[15] The first stage of the model predicts whether the SG filed an amicus brief in the 3,149 cases in which he did not represent the federal government as a direct litigant or was invited by the Court to participate as amicus. This variable is scored 1 if the SG filed an amicus brief and 0 otherwise. The second stage of the model predicts whether the Court ruled in favor of the SG's position in the 743 instances where he participated as amicus. This variable is scored 1 if the Court ruled in favor of the litigant supported by the SG's amicus brief and 0 otherwise.[16] We use robust standard errors to account for the possible effects of model misspecification (King, 1998, p. 34).

Five variables related to the view of the SG as an agent of the Court are used in the first stage of the equation to predict whether the SG will file an amicus curiae brief. The first four of these variables were derived from the Spaeth (2003) database. To measure a case's legal ambiguity (Hypothesis 1),

we develop a variable that accounts for dissensus among lower courts. This variable is scored 0 if the Supreme Court did not identify lower court conflict as the reason for granting certiorari and 1 for cases in which the Court identified lower court conflict as the impetus for reviewing the case. To determine whether the SG is more likely to file an amicus brief in a case that is appealed from a federal court (Hypothesis 2), we employ a federal appeal variable. This is scored 1 if the case was appealed from a federal court and 0 otherwise. To investigate whether the SG is more likely to file an amicus brief in a case that implicates the actions of a federal administrative agency (Hypothesis 3), we use an administrative action variable, scored 1 if federal administrative action preceded the litigation and 0 otherwise. To assess whether the SG is more likely to file an amicus brief in a case in which the constitutionality of an act of Congress is in question (Hypothesis 4), we use an act of Congress variable. This variable is scored 1 if the Supreme Court's decision dealt with the constitutional or statutory interpretation of an act of Congress and 0 otherwise. To evaluate whether the SG responds to signals from the Court (Hypothesis 5), we adopt the technique developed by Baird (2004). That is, we operationalize a Supreme Court signal variable indicating the number of cases that were accompanied by front-page stories in *The New York Times* during the previous term that fall within the 13 issue areas in the Spaeth (2003) database.[17] We believe that this variable provides a sensible proxy for the Court's interest in hearing cases by providing a contemporaneous measure of an issue area's broad political salience, which is likely to garner the SG's attention.

We use three variables to capture political influences on the SG's decision to participate as amicus curiae. To determine whether the SG is more likely to file an amicus brief in a case that is important to the president's agenda (Hypothesis 6), we adapt the method developed by Heck and Shull (1982) and Meinhold and Shull (1998) by content analyzing presidential inaugural and State of the Union addresses. More specifically, we examined these addresses to determine the number of sentences in which presidents made an explicit policy statement involving seven issue areas: civil rights, crime, economic activity, federalism, First Amendment, judicial power, and privacy.[18] Following Heck and Shull (1982, p. 329), we defined policy statements as those sentences in which the president expresses a clear philosophy, attitude, or opinion about one of these issues, often involving encouraging, proposing, supporting, or opposing specific actions. For example, we include the sentence from Eisenhower's 1954 State of the Union address announcing the creation of the Department of Education but exclude the sentence from Clinton's 1997 State of the Union address where he references a visit to

northern Illinois with his secretary of education, because the latter involves no explicit statement of public policy. We then matched these statements to the issue areas identified in the Spaeth (2003) database.[19] To control for the fact that the presidents under analysis did not serve the same number of years in office, and therefore gave varying numbers of State of the Union and inaugural addresses, we divided our salience measure by the number of State of the Union and inaugural addresses given by each president, resulting in our measure of presidential salience.[20]

To determine whether SGs are more likely to file amicus briefs in cases that are salient to the public (Hypothesis 7), we employ a political salience variable in the model, scored 1 if the case appeared on the front page of *The New York Times* on the day after the decision and 0 otherwise (Epstein & Segal, 2000).[21] To examine whether the SG participates as amicus curiae with increased frequency when ideologically aligned with the Court (Hypothesis 8), we employ a variable that captures the ideological distance between the president who appointed the SG and the median justice on the Supreme Court. Because this requires ideal point estimates that put presidents and justices on the same metric, we use the scores developed by Epstein, Martin, Segal, and Westerland (2007). For presidents, these scores are Poole's (1998) first-dimension Common Space scores. For the Court, these scores are a tangent-based transformation of Martin and Quinn's (2002) ideal point estimates that put the justices' scores on the same ideological space as the president's Common Space scores. From these scores, we derived an ideological distance variable that is the absolute value of the president's ideology score subtracted from the ideology score of the median justice on the Court. Thus, higher values on this variable reflect increased ideological distance between the president and the Court.[22]

Three variables are employed to capture administrative factors that might contribute to the SG's decision to file an amicus brief. First, to determine whether SGs experience acclimation effects (Hypothesis 9), we include a freshman variable in the model, scored 1 during the Supreme Court term corresponding to the SG's first year in office and 0 otherwise. Second, to evaluate whether the SG's budget influences the decision to file an amicus brief (Hypothesis 10), we use a budget variable that is a simple calculation of the Office of the Solicitor General's budget for each fiscal year, reported in 1999 dollars to adjust for inflation. To facilitate interpretation, we have divided this variable by 100,000. Third, we include a workload variable to examine whether the resource demands that accompany representing the government as a party to litigation influence the decision to file an amicus brief (Hypothesis 11). This variable is a per-term count of the number of

cases in which the SG represents the federal government as a direct party to litigation.[23]

Several variables are included in the second stage of the model that predicts the SG's success as amicus curiae. To control for the SG's ideological compatibility with the Court, we use a measure of ideological congruence adopted from Bailey et al. (2005, p. 78) that is based on the judicial Common Space scores discussed previously (Epstein et al., 2007). When the SG argues a conservative position, this variable is the ideology score of the Court's median justice multiplied by +1; when the SG argues a liberal position, this variable is the median justice's ideology score multiplied by –1. Because conservative justices have positive ideology scores and liberal justices have negative scores, higher values on this variable indicate an increased ideological congruence with the median justice on the Court. It is expected that the sign of this variable will be positive, indicating that, when the SG argues a position congruent with the ideology of the Court, his likelihood of success will increase. In addition to arguing a position that is ideologically congruent with the Court, we expect that the SG will be more likely to prevail if he represents an administration that is ideologically proximate to the Court (Bailey et al., 2005). To test this possibility, we include the ideological distance variable, discussed earlier, in the second stage of the equation. We expect that this variable will be negatively signed, indicating that the SG is more likely to prevail if he represents an administration that is ideologically proximate to the median justice on the Court.

Past research indicates that the justices rely more on their policy preferences in salient cases as compared to relatively trivial disputes (Bailey et al., 2005; Spaeth & Segal, 1999, pp. 309-311; Unah & Hancock, 2006). As such, in salient cases, we expect that the influence of the SG will be diminished. To control for this possibility, we include the political salience variable, discussed earlier, in the second stage of the model. We expect this variable will be negatively signed, indicating that the SG's probability of success will decrease in salient cases. In addition, we include our measure of presidential salience in the outcome stage of the equation. This offers us leverage over whether SGs are particularly successful at etching the president's policy preferences into law in cases important to the president's political agenda. If SGs are especially influential in these agenda cases, we expect that this variable will be positively signed.

Several studies indicate that presidents can use approval as a source of political capital to promote their interests in Congress and the courts (e.g., Ducat & Dudley, 1989; Yates, 2002). In relation to the Court, this line of research argues that the justices should be increasingly deferential to the interests of presidents who enjoy high approval ratings. To control for this

possibility, we include a variable labeled *presidential approval*. This variable is simply the percentage of the public who responded that they "approve of the way President [name] is handling his job as President" and is derived from Gallup polls. We use a mean quarterly measure of presidential approval and peg it to each Supreme Court case using the date of oral argument. The expected direction of this variable is positive, indicating that the SG's success as amicus will increase along with presidential approval.

To account for the influence of interest group amicus curiae participation in the Court (e.g., Collins, 2007; Kearney & Merrill, 2000), we use two variables: supporting amicus briefs and opposing amicus briefs. These variables represent the number of amicus briefs filed by entities other than the SG that support or oppose the SG's position, respectively, and were derived from the Kearney and Merrill database. The expected sign of the supporting amicus briefs variable is positive in direction, indicating that the SG's success will increase when he is supported by an increasing number of amicus briefs. Conversely, the expected sign of the opposing amicus briefs variable is negative, indicating that the SG's success is attenuated by an increasing amount of opposing amicus participation. Finally, we include the legal ambiguity variable in the second stage of the equation to determine whether the SG is particularly successful in cases involving lower court conflict. We expect that, in such cases, the information transmitted by the SG will be especially useful for the justices because these cases are accompanied by substantial uncertainty as to the correct application of the law. As such, we expect that this variable will be positively signed, indicating that the Court is more likely to rule in favor of the SG's position when the case involves ambiguity between lower courts.[24]

Results

Table 1 reports the results of the Heckman-style selection model. The significant and positive estimate of Rho signifies that the two equations in the model are correlated with one another. This indicates that the factors influencing the SG's decision to file an amicus brief in the first place are positively associated with his ultimate success as amicus, thus supporting the overall line of argumentation presented above. For purposes of comparison, Table 1 also reports the results from the two probit models corresponding to each equation, which we will discuss shortly. To facilitate interpretation, we discuss our findings in terms of their marginal effects, which were calculated by altering the variables of interest while holding all other variables at their mean or modal values.[25]

Table 1
The Solicitor General's Amicus Curiae Strategies and Success in the Supreme Court, 1953-1999 Terms

Predictor	Heckman Model	Probit Models
SELECTION EQUATION		
Will the solicitor general file an amicus curiae brief?		
Legal ambiguity	0.158	0.149
	(.058)**	(.070)*
Federal appeal	0.119	0.100
	(.049)**	(.058)*
Administrative action	0.300	0.260
	(.084)***	(.107)**
Act of Congress	0.225	0.269
	(.060)***	(.065)***
Supreme Court signal	0.026	0.021
	(.008)***	(.010)*
Presidential salience	–0.038	–0.029
	(.026)	(.031)
Political salience	0.456	0.464
	(.054)***	(.067)***
Ideological distance	1.11	1.06
	(.236)†	(.262)†
Freshman	–0.127	–0.120
	(.055)*	(.065)*
Budget	0.010	0.011
	(.003)***	(.003)***
Workload	–0.008	–0.007
	(.002)***	(.003)**
Constant	–1.50	–1.55
	(.180)***	(.204)***
OUTCOME EQUATION		
Will the Court rule in favor of the solicitor general as amicus?		
Ideological congruence	0.591	0.848
	(.346)*	(.419)*
Ideological distance	0.024	–1.30
	(.571)	(.483)**
Political salience	0.142	–0.142
	(.133)	(.129)
Presidential salience	–0.045	–0.048
	(.055)	(.069)
Presidential approval	0.002	0.003
	(.004)	(.005)

(continued)

Table 1 (continued)

Predictor	Heckman Model	Probit Models
Supporting amicus briefs	0.050	0.055
	(.019)**	(.022)**
Opposing amicus briefs	–0.069	–0.084
	(.021)***	(.025)***
Legal ambiguity	0.252	0.129
	(.106)**	(.125)
Constant	–0.508	1.04
	(.503)	(.352)**
Rho	.684	—
	(.150)**	
Wald χ^2 (Heckman)	21.6**	—
Wald χ^2 (selection equation)	—	238.3***
Wald χ^2 (outcome equation)	—	27.5***
n (selection equation)	3,149	3,149
n (outcome equation)	743	743

Note: Entries in parentheses are robust standard errors.
*$p < .05$, one-tailed. **$p < .01$, one-tailed. ***$p < .001$, one-tailed. $^{\dagger}p < .001$, two-tailed.

Turning initially to the variables that represent the role of the SG as an agent of the bench, we find strong support for all five hypotheses. First, Table 1 indicates that the SG is more likely to file an amicus brief in a legally ambiguous case. This suggests that the SG is particularly attentive to his role as agent of the Court and selects cases to brief as amicus curiae with a careful eye toward resolving confusion between lower courts. For example, compared to a case with no lower court conflict, in a case with this form of dissensus, the SG is 5% more likely to file an amicus brief. Second, the SG is 3% more likely to file amicus briefs in a case appealed from a federal court, as compared to a state court. This corroborates our argument that the SG selects cases that have wide-ranging legal implications for large segments of American society. That is, rather than focusing attention on cases appealed from state courts, which are only binding on the state populations from which they originate, the SG seeks to develop the coherency of law for those cases affecting larger, circuitwide populations. Third, our results illustrate that the SG directs a significant amount of amicus participation toward cases involving federal administrative action. As compared to a case involving no federal administrative action, in a case where a federal bureaucracy took action, the SG is 10% more likely to file an amicus brief. In this role, the SG clarifies the meaning of federal administrative rules for the justices to promote the transparency of bureaucratic regulations. Finally, the results

show that the SG responds to signals from the Court showing its interest in developing legal policy within a particular issue area. For example, compared to an issue area in which the Court handed down no salient opinions in the previous term, in an issue area in which the Court handed down six salient opinions the SG is 5% more likely to file an amicus brief. As such, it is clear that the SG's decision making, from the standpoint of the SG as an agent of the bench, is driven both by the SG's own determinations as to which cases are appropriate to brief and by his responsiveness to signals sent by the Supreme Court.

With regard to political factors, we find support for only one of our hypotheses. That is, the SG is 15% more likely to file an amicus brief in a politically salient case. This indicates that the SG is attentive to the fact that one of his primary responsibilities is to communicate the president's view of the public interest in cases that are significant for society at large. However, we do not find that the SG is more likely to file an amicus brief in cases that are important to the president's policy agenda. This is evidenced by the fact that the 95% confidence intervals (CI) associated with the presidential salience variable straddle zero (CI = –0.090 to +0.014). As mentioned (in Note 20), we used alternative proxies for a case's salience to the president's policy agenda, none of which achieved statistical significance. As such, although we do not doubt that the SG acts as an agent of the president, it appears that the salience of an issue to the president does not drive the SG's decision to file an amicus brief. Although we are conscientious of the hazards related to the interpretation of null findings (e.g., Gill, 1999), we nonetheless believe that this result deserves some attention. In particular, we believe that this finding can cautiously be explained from the perspective of the SG as an agent of the bench. If the SG opted to file amicus briefs in an overwhelming number of cases that are important to the president's policy agenda, he could risk losing credibility in the eyes of the justices, who might view him as overly partisan (Strauss, 1998). Indeed, comments made by attorneys in the Office of the Solicitor General corroborate this point. For example, a former assistant SG spoke to this perspective in an interview with Salokar (1992), noting,

> The question is whether you lose some of [the SG's] credibility by filing briefs in cases where it was clear to everybody, including the Court, that the only interest is political, political in the sense that this is the administration's philosophy. (pp. 139-140; see also Puro, 1971, p. 141)

Moreover, contrary to our expectations, the SG is not more likely to file amicus briefs when he is ideologically aligned with the Court. In fact, the

results indicate just the opposite: the more ideologically distant the SG is from the median member of the Court, the more likely he is to file an amicus brief. In substantive terms, a 1 standard deviation change in this variable, moving the SG further from the median justice on the Court, increases the likelihood of the SG filing an amicus brief by 4%. As such, we can reject the hypothesis that the SG selects cases based on their perceived winnability. Of course, it is important to note that the SG has no control over the ideological preferences of the median member of the Court. In this sense, the SG can only exploit ideological proximity; he cannot directly affect it. But, the results here suggest that SGs do not take advantage of their proximity to the median justice in deciding to file amicus briefs.

All of our hypotheses related to administrative considerations find support in Table 1. First, the results indicate that the SG is 3% less likely to file an amicus brief during his freshman year in office. This illustrates that, like other actors in the judicial community (e.g., Hettinger, Lindquist, & Martinek, 2006), SGs experience acclimation effects related to time management. In this case, acclimation effects decrease the amount of amicus briefs that SGs file during their first year in office. In addition, we find strong support for the role of the office's budget in shaping the decision to file an amicus brief: As the budget increases, so too does the likelihood that the SG will participate as amicus. For example, a 1 standard deviation increase in the SG's budget augments the likelihood of filing an amicus brief by 9%. Given this, coupled with the fact that the SG's budget has grown in recent years (after controlling for inflation), it is probable that we may see an increase in the number of amicus briefs filed in the future. Our results also indicate that the SG is less likely to file an amicus brief as the number of cases in which the SG represents the federal government as a direct party to litigation increases. In substantive terms, compared to a term where the SG represents the government in 60 cases, for a term where the SG litigates only 30 cases, he is 7% more likely to file an amicus brief. These results involving administrative factors illustrate that, like other chiefs in the federal bureaucracy, the SG is attentive to administrative considerations that have the potential to constrain his actions. This suggests that, in addition to viewing the SG as a legal and political actor, it is profitable to consider the SG from a bureaucratic perspective.

Turning now to the second stage of the equation, several variables are of interest. First, the results indicate that the SG is particularly successful when arguing a position ideologically congruent with the median justice on the Court. For example, compared to a case in which the SG argues a liberal position before a Court whose median member is conservative with an

ideology score of 0.307, when the SG advances the conservative position before the same court, his likelihood of success increases by 15%. This corroborates the reality that the SG's success as amicus is not entirely due to the special status he enjoys. Instead, like other litigants, the SG is more successful when the Court is predisposed toward endorsing the position he advocates. However, we do not find that the SG is more likely to prevail when he is ideologically aligned with the median justice on the Court. Thus, it appears that the SG's success is related not to how ideologically proximate the SG is to the Court but instead to the position that the SG advocates before the Court.

At this point, it is appropriate to address the primary differences between the two probit models and the Heckman-style selection model. The first disparity between the alternative estimation techniques is the strong significance of the ideological distance variable in the probit model predicting the SG's success as amicus and its lack of significance in the Heckman model. This suggests that, absent a consideration of the factors shaping the SG's decision to file an amicus brief in the first place, the estimates associated with variables influencing the SG's success as amicus are biased, particularly with regard to the impact of ideological proximity. For example, the probit model indicates that a 1 standard deviation change in this variable, moving the SG closer to the median justice on the Court, results in a 10% increase in the SG's likelihood of victory. However, in the Heckman model, this effect dissipates. Second, we find that the probit model predicting the SG's success fails to capture the fact that the SG's probability of success is enhanced in legally ambiguous cases. For example, the Heckman-style model reveals that, compared to a case with no lower court conflict, in a case with dissensus between lower courts the SG's likelihood of emerging victorious increases by 6%. This suggests that, by providing the justices with information regarding the correct application of the law in legally uncertain cases, the SG performs a role as agent of the bench that is noted by the Court, which proves especially deferential to the SG in these legally unclear disputes. Given these differences, researchers should be particularly attentive to how factors that contribute to the SG's decision to file an amicus brief alter the influence of variables on the SG's success on the merits. Failure to do so can lead to biased estimates that do not take full advantage of available information (i.e., inefficiency).

The results also provide support for the impact of organized interests in the Court: As the number of amicus curiae briefs supporting the SG increases, so too does his likelihood of success. For example, comparing a case in which two amicus briefs are filed supporting the SG's position to a case in which five

amicus briefs support the SG, his likelihood of victory increases by 6%. Conversely, as the number of amicus briefs opposing the SG increases, his chances of success decline: An increase from two to five amicus briefs filed against the SG's position decreases his chances of success by 9%.

Finally, there are several null findings in the second stage of the equation. Contrary to our expectation, the results indicate that the SG's success in the Court is not influenced by the salience of the case, whether we consider salience as relating to the broader public (political salience) or to the president's policy agenda (presidential salience). As such, it appears that the SG is not particularly effective at etching the president's agenda into law in salient cases, as compared to cases that are less salient to the president. The results also illustrate that presidential approval does not increase the SG's likelihood of success before the Court, suggesting that the justices are relatively immune to political pressures transmitted via presidential public approval polls.

Conclusion

Students of politics have long been attentive to the opportunities for interbranch relations within the separation-of-powers system that defines American politics. We contribute to this literature by examining the role and success of the SG in the Supreme Court. Our analysis differs from previous research in three significant ways. First, we develop and test theoretical expectations regarding why the SG chooses to file amicus briefs in the Court. Second, we depart from previous analyses that focus only on the legal and political roles of the SG by introducing the concept of the SG as a bureaucrat facing administrative constraints similar to other chiefs in the federal bureaucracy. Third, we explicitly link the SG's initial decision to participate as amicus curiae to his eventual success on the merits. Our results indicate that the SG's decision to participate as amicus curiae is driven by legal, political, and administrative considerations. As such, extant perspectives that view the SG as either an agent of the president or an agent of the bench offer an incomplete picture of the SG's role in American politics. It is only through the incorporation of the SG's role as a legal, political, and administrative actor that we are afforded a more inclusive understanding of the SG. Moreover, our analysis indicates that, by failing to integrate factors that influence the SG's decision to file an amicus brief, previous studies have likely reported biased estimates with regard to the SG's influence on the Court. In particular, our findings reveal that models that do not control for the SG's decision to

file an amicus brief overestimate the importance of the SG's ideological compatibility with the Court while underestimating the significance of the SG in resolving legal ambiguity for the justices. Taken together, this suggests that previous studies have likely overemphasized the political role of the SG to the detriment of the SG's role as an agent of the bench. Of course, this is not to say that the SG does not play a political role. Rather, the vital point is that our analysis illuminates the importance of considering factors related to how the SG sets his amicus agenda and their relationship to the SG's success in the Court.

This research also speaks to the benefits derived from using qualitative studies to motivate hypothesis generation (e.g., Lijphart, 1971). Throughout this article, we have incorporated theoretical expectations adapted from a host of qualitative analyses, including interview-based studies (e.g., Caplan, 1987; Puro, 1971; Salokar, 1992), case studies (e.g., Pacelle, 2003a), and firsthand accounts of life in the SG's office (e.g., Days, 2001; Fried, 1991; McGinnis, 1992; Strauss, 1998; Waxman, 1998). In so doing, we have performed one of the most comprehensive examinations of the SG's amicus strategies to date, in the process confirming the rigor and insightfulness of these more limited qualitative analyses. This suggests that no single methodological approach has a monopoly on the study of legal and political phenomena. Instead, it is vital to recognize the benefits derived from multimethod approaches to understanding the choices legal and political actors make.

Although we focus only on the SG's amicus strategies in the Supreme Court in this analysis, we are confident that many of our core ideas are translatable to other actors and venues. For example, we believe that viewing the SG as a bureaucrat opens a new window into our understanding of one of the nation's most powerful attorneys, suggesting that it is profitable to consider how administrative factors influence other aspects of the SG's decision-making processes, such as how he interacts with Congress and organized interests. In addition, one might apply our hypotheses to an investigation of Department of Justice strategies in the federal Courts of Appeals. Similarly, our theories can be adapted to offer leverage over interest group decisions to file amicus briefs in federal and state appellate courts. Moreover, we wish to note the importance of considering selection factors to better understand a host of legal and political phenomena, including the motivations for filing lawsuits, introducing legislation, running for office, and issuing executive orders. If factors that influence the decision to engage in these activities are related to their effectiveness, this suggests that failure to consider the selection stage offers only an incomplete comprehension of the actions taken by legal and political actors.

Appendix
Search Terms for Presidential Speeches

Civil Rights
Affirmative Action
Civil Rights
Civil Rights Act
Civil Rights Bill
Desegregation
Discrimination
Equal Employment Opportunity
Integration
Nondiscrimination
Public Accommodations
Reapportionment
Schools
Segregation
Voting Rights
White House Conference on Civil Rights

Crime
Crime Law Enforcement
Habeas Corpus
Law and Order
Law Enforcement
Search and Seizure

Economic Activity
Antitrust Laws
Clayton Act
Fair Labor Standards Act
Federal Trade Commission
Labor Unions
Liability
Monopolies
Occupational Safety and Health Act
Sherman Act

Federalism
Central Government
Decentralization
Federalism
Federalist
Governmental Relations
Preemption
Sovereignty
States' Rights
Strong Federal Government

First Amendment
Assembly
Education
Establishment of Religion
Obscenity
Petition
Pornography
Press
Private and Parochial Schools
Religion
Religious Freedom
Sedition
Speech

Judicial Power
Certiorari
Comity
Judicial Activism
Judicial Restraint
Judicial Review
Jurisdiction

(continued)

Appendix (continued)

Privacy
Abortion
Freedom of Information Act
Physician Assisted Suicide
Privacy
Reproductive Rights
Right to Die

Note: We adopted the search terms in italics from Meinhold and Shull (1998), whereas we selected the nonitalicized entries.

Notes

1. *Amicus curiae* is Latin for "friend of the court." Despite its literal translation suggesting neutrality, the term refers to entities that are not parties to a case but believe that the case's disposition will affect them and, as such, advocate for a particular outcome in the Court.

2. We use the term *his* because presidents have yet to appoint a female solicitor general (SG).

3. In addition to these principal mechanisms for participation, the SG can participate in the Court as an intervenor under 28 U.S.C. §2403(a) and does so on rare occasions (Stern, Gressman, Shapiro, & Geller, 2002, p. 388).

4. The data from which we derive these percentages are discussed in the Data and Method section.

5. We recognize that there exists some ambiguity as to whether a particular influence on the SG's decision to file an amicus brief is most consistent with a legal or a political explanation. For example, from the political view of the SG—that of an agent of the president—several of the variables we posit as falling under legal factors are also consonant with the position-taking role of the SG (e.g., Mayhew, 1974), such as showing support for a bureaucratic agency or an act of Congress. Nonetheless, we believe that our delineation of the legal and political roles of the SG is harmonious with previous research that makes such distinctions (e.g., Bailey, Kamoie, & Maltzman, 2005; Bailey & Maltzman, 2005; Deen, Ignagni, & Meernik, 2003; Pacelle, 2003a, 2003b; Lindquist & Klein, 2003; Straus, 1998; Zorn, 2002).

6. Not surprisingly, the justices are well aware of the fact that the SG serves at the pleasure of the president. As Justice Sutherland noted in *Humphrey's Executor v. United States* (1934), "It is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will" (p. 629).

7. See http://www.usdoj.gov/jmd/ls/sgbib.htm (last accessed August 31, 2007).

8. Corroborating this point, former Solicitor General Charles Fried (1991) begins the account of his term as SG by asking what the SG does, responding that he prepares to take his place on the high Court.

9. It is important to note that this hypothesis, although political in nature, is also consistent with a strategic perspective of the SG (e.g., Zorn, 2002). That is, we expect that, ceteris paribus, the SG might file amicus briefs in cases he would otherwise not brief in order to enhance his appearance of success.

10. In addition, the SG performs a number of administrative functions on a more irregular basis, such as delivering commissions to the Court on behalf of the president, presenting attorneys general to the Court, and arranging ceremonies to honor deceased justices (Salokar, 1992, p. 95).

11. We recognize, of course, that the SG is able to further the president's political agenda by hiring assistant and deputy SGs who share the administration's jurisprudential philosophies and will act in good faith to promote those perspectives before the Court. However, this primarily occurs prior to actually participating in Supreme Court litigation (McGinnis, 1992, p. 812).

12. Although part of the Department of Justice, the Office of the Solicitor General has a separate and distinct budget.

13. To determine the validity of Kearney and Merrill's (2000) database, we performed a reliability analysis on that data by extracting a random sample of 155 cases (approximately 2.5%) from the whole data set. We uncovered no errors with respect to any of the variables used in this study.

14. We used Lexis-Nexis to identify invitations from the Court to the SG to file an amicus brief. For a comprehensive treatment of these invitations, see Bailey and Maltzman (2005).

15. For a recent political science application of this model, see Solowiej and Brunell (2003).

16. Approximately 10% of the SG's amicus participation is excluded from consideration in the statistical models because the ideological position advocated by the SG was indeterminable.

17. The data indicating whether a case was covered on the front page of the *Times* were collected by Epstein and Segal (2000) for the 1953-1995 terms and collected by us for the remaining terms. Note that we experimented with alternative time lags, ranging from one to five terms. The results indicate that the 1-year lag offers the most explanatory power.

18. We located the presidential speeches at the University of California, Santa Barbara's American Presidency Project (n.d.). The exact search terms are available in the appendix. Note that our analysis differs slightly from that of Meinhold and Shull (1998) in that we focus only on inaugural and State of the Union addresses, whereas Meinhold and Shull examined all presidential addresses. We opted to limit our search to these statements because presidents vary widely in the overall number of speeches they give. For example, the American Presidency Project reports that Eisenhower made 879 speeches, compared to Clinton's 3,514 oral addresses. Because all of the presidents under analysis gave inaugural addresses and fulfilled their constitutional duty with respect to their State of the Union addresses, this puts the presidents on a near-equal footing with respect to their overall amount of communication with the public.

19. To accomplish this, we collapsed cases involving economic activity, federal taxation, and unions into a single economic activity category; we recoded cases involving the First Amendment and attorneys, which typically involve attorneys' commercial speech, into a First Amendment category; we reclassified cases involving civil rights and due process into a single civil rights category; and we recoded cases involving federalism and interstate relations into a single federalism category.

20. In addition, we used three alternative measures of salience. First, we employed the log of the variable discussed previously. Second, we operationalized the presidential salience variable corresponding to Segal, Timpone, and Howard's (2000) survey of American presidency scholars, available at www.sunysb.edu/polsci/jsegal/data/pressc_main.htm (last accessed August 31, 2007). Third, we used a variable that captures the number of cases in which the SG appeared as a petitioner falling within the 13 issue areas in the Spaeth (2003) database. Substituting our variable for any of these alternative measures does not alter the substance of the results.

21. In the data under analysis, *The New York Times* ran front-page stories in 24% of cases in which the SG filed an amicus brief and 15% of cases in which the SG did not participate as amicus.

22. As an alternative to this variable, we used the ideology scores developed by Bailey et al. (2005). These scores are based on bridged observations across institutions but are only available for civil rights and liberties cases. When we substitute these measures of ideology for the proxies used here, we find substantively identical results. This is not surprising given the high collinearity between the two measures (presidential ideology $r = .95$; Supreme Court ideology $r = .80$).

23. We also ran the model including a measure of case complexity in the selection equation, operationalized from Bailey et al. (2005), in addition to including a lame-duck variable that controlled for a president's last year in office. Those variables failed to achieve statistical significance.

24. In addition to the variables reported in Table 1, we included proxies for the SG's outlier status and a case's legal salience and complexity, operationalized from Bailey et al. (2005). We further included the administrative action, federal appeal, and freshman variables in the outcome equation. None of those variables achieved statistical significance.

25. We ran an alternative model specification by including dummy variables for each presidential administration, save one. The results of that model revealed classic signs of multicollinearity with respect to three variables that are highly correlated with administrations: The budget, workload, and ideological distance variables flipped signs and fell out of statistical significance. Because we have a priori theories for the inclusion of those variables, but do not have administration specific expectations, Table 1 reports the models without the presidential dummy variables.

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