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# Solicitor General Influence and Agenda Setting on the U.S. Supreme Court

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## Abstract

Do Solicitors General (SGs) influence how justices vote? Years of scholarship suggests that the answer is yes but has largely failed to examine what influence means and just how much influence the SG wields. The authors examine SG influence during the Court's agenda-setting stage. They find, first, that justices follow SG recommendations even when they are completely opposed to them and, second, that law exerts a strong independent influence. Justices are significantly less likely to follow SG recommendations that contravene important legal factors.

## Keywords

law, courts, solicitor general, influence

On January 24, 1994, the U.S. Supreme Court unanimously ruled that federal racketeering laws apply to abortion protesters.<sup>1</sup> The decision paved the way for proabortion groups to sue protesters for demonstrating at abortion clinics—a tremendous setback for the prolife movement. Yet the case nearly failed to receive the Court's attention. Only Justices White, Blackmun, and Stevens cast clear votes to grant review. Chief Justice Rehnquist and Justices Kennedy, Scalia, Thomas, and Souter indicated their intent to deny review. As was so often the case during the Rehnquist Court era, Justice O'Connor was in a position to cast the key vote. If she voted to deny review to the case, it would receive no attention from the Court. If she voted to grant review, the Court once again would traverse the thicket of abortion politics. She voted to grant review. Remarkably, however, O'Connor's original inclination in the case was to *deny* review. Yet after receiving the U.S. Solicitor General's (SG) brief, in which he recommended the Court hear the case, O'Connor switched her vote to grant. In short, but for O'Connor's vote switch—which itself likely turned on the SG's recommendation—the case never would have been decided.

This story, and others we could tell, leads us to ask two related and fundamental questions: Do SGs influence justices' behavior, and if so, what are the limits of that influence? Despite its importance, a robust answer to the question of SG influence has eluded scholars for decades. To be sure, studies find that the SG is highly successful before the Court. Nevertheless, success does not equal influence. The SG's success might have nothing to do with influence (Segal 1988). Indeed, judicial outcomes

may look the same whether influence exists or not. To determine whether the SG *influences* a justice, one must account simultaneously for a host of factors, chief of which is the justice's likely course of action *absent the SG's intervention*.

In what follows, we examine whether the SG influences the votes justices cast and whether there are limits on the SG's influence. We undertake this task in the context of the Supreme Court's agenda-setting process. More specifically, we examine how justices respond to SG recommendations to grant or deny review to cases, focusing on cases where the SG files briefs at the behest of the Court and those (less frequent) cases where the SG files such briefs on her own cognition. We are aided in this endeavor by a research design that contains three critical components. First, we theorize justices' *ex ante* preferences in each case. After controlling for these prior beliefs, we can then employ archival data to compare their actual votes to their expected votes and, thereby, detect influence. Second, by focusing primarily (though not exclusively) on cases where the SG has been forced to participate, we largely remove the possible selection effects that would arise from a strategic SG getting involved only in cases

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she expects to win. And, finally, we address features that may limit the amount of influence the SG wields.

We witness two important results. First, we find strong support for SG influence. Justices who completely disagree with the SG nevertheless follow her recommendations 35 percent of the time, a number we take to be powerful evidence of influence. Second, we discover that the SG's influence is bounded by law. Justices of all ideological persuasions—even ideological allies—are significantly less likely to follow an SG recommendation that contradicts the weight of the law. This finding highlights the importance of law in judicial decision making and suggests that researchers should continue to look for evidence of legal influence elsewhere. In short, our results suggest that SGs will be most influential when they balance the often competing features of law and policy (Pacelle 2003; Wohlfarth 2009).

## The SG and The Court

The SG supervises and conducts government litigation in the U.S. Supreme Court and is intricately involved in every stage of U.S. appellate litigation (Pacelle 2003). Lawyers in the SG's office "do the bulk of the legal work in Supreme Court cases in which the federal government participates, including petitions for hearing, the writing of briefs, and oral argument" (Baum 2007, 88). According to Perry (1991), the SG serves at least three functions. First, she represents the interests of the United States before the Supreme Court. Second, she decides which cases the U.S. will appeal when it loses its cases in the lower federal courts. And third, she decides whether the United States will file an *amicus curiae* brief or seek rehearing in any case involving the United States. The SG also synthesizes the government's sometimes varying legal positions. When federal agencies take competing positions on legal issues, the SG decides which side may appeal to the Supreme Court and which legal arguments the United States will pursue. The SG, then, coordinates the long-term U.S. legal strategy in the judiciary and has tentacles spreading throughout the federal court system.

The SG is highly successful. During the Rehnquist Court era, the SG won over 62 percent of all cases in which the United States was a direct party and over 66 percent of cases in which she participated as *amicus curiae* (Epstein, Segal, Spaeth, and Walker 2007). Numerous additional studies provide systematic confirmation of the SG's success (e.g., Deen, Ignagni, and Meernik 2003; Segal 1990; Segal and Reedy 1988). Whether trying to persuade the Court to hear (or not hear) a case at the agenda-setting stage or winning a case at the merits stage, the SG usually gets what she wants.

Still, scholars present various assorted theories on *why* she so commonly succeeds. The longest-standing view

argued that much like a "Tenth Justice," the SG serves as an agent of the Court (Caplan 1988). She plays a special role for the Court, screening cases and advocating positions that advance the goals of the Court as an institution (Salokar 1992). As one former clerk told us, the SG is expected to "play as an honest broker of the facts" when communicating with the Court. Perry's (1991, 132) seminal text likewise is replete with comments from justices who assert that the SG aids the Court:

Every solicitor general . . . has taken this job very seriously . . . not to get us to take things that don't require our attention relative to other things that do. They are very careful in their screening and they exercise veto over what can be brought to the board.

In recent years, scholars have taken a different tack and applied signaling theory to examine the ideological conditions under which justices accept the information provided to them by the SG (Bailey, Kamoie, and Maltzman 2005). Given an asymmetry in information between sender and receiver, the receiver relies on shortcuts, such as ideological agreement, to determine the accuracy of the sender's signal. If the sender and receiver generally share the same worldview, the receiver has good reason to trust the information conveyed by the sender. Alternatively, if the sender and receiver hold competing worldviews, the receiver will discount the information *except* when it is contrary to the sender's self-interest. Applying this theory to the Court's relationship with the SG, Bailey, Kamoie, and Maltzman (2005) find that a justice is likely to vote with the SG when she is more liberal (conservative) than the justice but happens to take a conservative (liberal) position in the case.

Other theories assert that SG success is the result of separation of powers considerations (Johnson 2003). Because the Court relies on the executive to enforce its decisions, justices defer to the SG (Epstein and Knight 1998). Consistent with this theory, Johnson (2003) finds that the Court is more likely to invite the SG to participate in cases to determine whether the president will enforce its decisions. Along similar lines, Segal (1988) argues that SG success is the result of general deference by the Court to its more democratically elected counterparts.

Others claim, however, that the SG's key to success is simply experience. Because she appears before the Court more often than any other litigant, the SG is "familiar with the predilections of individual justices and the Court" (Pacelle 2003, 44). Accordingly, "The Solicitor General is merely one of many successful lawyers who appear before the Court. . . . There is no evidence for the literature's frequent assertion that the [SG's] success is derived from an uncommon reputation as the Supreme Court's leading practitioner" (McGuire 1998, 506).

But does the SG *influence* justices to behave differently than they would like? On this score, existing studies largely have been plagued by problems of observational equivalence (but see Nicholson and Collins 2008). To be sure, there is likely a role for all of these important theories in explaining SG success. Nevertheless, the question of SG influence remains unresolved. No existing work of which we are aware examines the likely action a justice would take *but for the recommendation of the SG*. We build off recent findings that yield strong predictions for justices' agenda votes. By theorizing each justice's *ex ante* desires in a case and analyzing whether they follow those predictions, we infer whether the SG influences them. Along the way, we discover a compelling role for the law and legal considerations.

## Theory and Hypotheses

To examine whether SGs influence judicial behavior, we expand on the important contributions of Bailey, Kamoie, and Maltzman (2005), Pacelle (2003), and Wohlfarth (2009) and focus on both policy and legal considerations and the role they jointly play in justices' decisions to set the Court's agenda. We examine the Court's agenda stage for three reasons.

First, justices set the Court's agenda so as to achieve their policy goals. That is, justices set the Court's agenda by looking ahead to the expected policy the Court will make if it hears the case to determine whether they prefer that policy over existing policy. Few quotes make the point so clearly as the following, which comes from a Blackmun clerk in the markup to a cert pool memo in *Thornburgh v. Abbott* (no. 87-1344):

I think it pretty much comes down to whether you want to reverse the judgment below (the likely outcome of a grant). If you are pretty sure you do, you should vote to grant now. Otherwise, it's better to wait.

Systematic empirical studies likewise illustrate the tremendous importance of policy predictions during the agenda-setting stage. Justices cast their votes with one eye fixed on the Court's expected merits outcome. For example, Black and Owens (2009a) find that, all else equal, justices are more likely to vote to hear cases when the policy they expect the Court to make is better for them than the status quo. Justices who are closer to the expected policy location of the Court's decision are 75 percent more likely to grant review to a case than justices who prefer the status quo. Other studies find similar results (Caldeira, Wright, and Zorn 1999; Owens 2010; Boucher and Segal 1995).

Our second reason for focusing on the agenda-setting stage turns on the fact that there are fairly well defined

and measurable legal variables that can theoretically be pitted against policy motivations, which provides us leverage to examine the limits of SG influence. Similar objectively defined and measurable legal factors at the merits stage do not currently exist.

Third, the agenda stage provides a good way for us to circumvent selection effects that could bias a finding in favor of SG influence. During the agenda stage, the SG makes recommendations to the Court as an *amicus curiae* one of two ways: voluntarily or at the direction of the Court. When the United States is not a party to the case, the SG may file an *amicus* brief with the Court stating why she thinks it should or should not grant review to a particular case. If the SG has not filed an *amicus* brief voluntarily, the Court can invite her to do so. When the Court invites the SG (called a "CVSG"), it issues a statement which reads, "The Solicitor General is invited to file a brief in this case expressing the views of the United States." The invite is, in practice, an order by the Court to appear as an *amicus* at all stages of the case's progression.<sup>2</sup> If the SG primarily gets involved in cases she knows she will win, a finding of SG influence is likely to be exaggerated. What we seek, then, are cases where the threat from that selection bias is minimized—the CVSG minimizes such a threat. Thus, to avoid the selection effects we mentioned above, we examine invited and voluntary SG recommendations, though, as an empirical matter, invited recommendations far outnumber voluntary recommendations at the Court's agenda-setting stage.<sup>3</sup>

We tackle the question of SG influence in four stages. First, we examine the concept of general agreement (i.e., ideological compatibility) between a justice and the SG. Second, we focus on the notion of specific agreement between the SG and the voting justice—whether the two desire the same outcome in the particular case. Third, we examine how legal factors affect votes. Finally, we examine the interaction of general policy agreement, specific policy agreement, and legal agreement.

*General ideological agreement.* Whether a justice follows the SG's recommendation likely depends, in part, on the ideological distance between the justice and the SG. Archival evidence and empirical findings show that justices take the SG's general ideological proclivities into account when casting their votes. For example, in *National Advertising Company v. Raleigh* (no. 91-1555) Justice Blackmun's clerk stated, "As we know from [earlier cases this term], the SG's views will be very slanted." Indeed, Bailey, Kamoie, and Maltzman (2005) show that justices follow the recommendation of the SG when they are ideological allies. Wohlfarth (2009), too, finds that the SG's success rate is, in part, the result of her ideological relationship to the Court median: when the Court median becomes more liberal, Democrat SGs fare better; when

the Court drifts more conservative, Democrat SGs do worse and Republican SGs do better. Accordingly, we expect that as the ideological distance between a justice and the SG decreases (increases), the likelihood a justice will follow the SG's recommendation will also increase (decrease).

**Specific policy agreement.** Justices also are more likely to follow the SG's recommendation when it accords with their preferred outcome in the specific case at hand. We draw on a host of studies to support this theory. Segal (1988), for example, examined justices' support for the SG's position based on the ideological position taken in her brief. Of the twenty justices in Segal's study, thirteen exhibited significant differences in how they responded to liberal and conservative SG briefs. Indeed, Justice Marshall supported the SG 86 percent of the time when he filed a liberal brief but just under 30 percent when the SG filed a conservative brief. Guided by these studies, we expect that a justice will be more likely to follow the SG's recommendation when it supports her desired outcome in a case. Justices who wish to grant review to a case (and set favorable legal policy) should be more likely to follow a grant recommendation made by the SG. Conversely, justices who wish to deny review to a case to preserve the status quo should be less likely to follow a grant recommendation made by the SG.

**Legal agreement.** Of course, policy preferences do not fully explain the behavior of justices. A growing body of research documents the role played by legal factors at various stages of the Court's decision-making process (Black and Owens 2009a; Hansford and Spriggs 2006). We argue that legal factors are likely to condition how justices respond to SG recommendations. After all, "politics and the law are at the intersection of the Solicitor General's responsibilities" (Pacelle 2003, 10, emphasis added). Legal considerations, then, may condition SG influence. In particular, when legal factors counsel toward granting or rejecting a petition, we would expect justices to consider whether the SG's recommendation accords with those legal factors. When legal considerations support the granting of review and the SG recommends a grant, a justice will be more likely to follow that recommendation. Conversely, when the SG's recommendation clashes with the outcome predicted by those legal factors, a justice will be less likely to follow her recommendation.

What are these legal factors? To determine the operative legal factors at the agenda stage, we turned to Perry (1991) and Stern et al. (2002), who suggest that legal conflict and legal importance apply, as do the exercise of judicial review in the court below and justiciability concerns.

One critical duty of the Supreme Court is to resolve conflict among the lower federal courts, which occurs when two or more lower courts diverge over the interpretation or application of the law. Supreme Court Rule 10 (as well as statements made by the justices) highlights

that part of the Court's role is to resolve such conflict: "I would say that there are certain cases that I would vote for. . . . If there was a clear split in circuits, *I would vote for cert. without even looking at the merits*" (Perry 1991, 269; emphasis added). Legal conflict, then, is a legal factor that counsels toward granting review and might influence whether justices follow the SG's recommendation.

Legal importance is a second factor that motivates justices during the agenda stage. Perry (1991) explains that justices believe themselves obligated to grant review to some cases that are legally important and to deny review to cases that are legally unimportant. Surely, importance turns on a number of factors; yet whether the lower court published its decision must be among them. Courts of appeals judges are allowed to dispose of easy or mundane cases through a brief opinion (usually no more than a few sentences) that they declare to be unpublished. Justices are hesitant to review such decisions because of their non-precedential nature.<sup>4</sup> Accordingly, an unpublished lower court decision is a legal factor that would, on average, counsel against granting review.

The use of judicial review in the lower court is a third legal factor that is likely to affect agenda behavior and whether a justice follows the SG's recommendation. When a lower court strikes down a federal law as unconstitutional, legal norms compel the Supreme Court to grant review to the case (Stern et al. 2002, 244). That is, because of their legal goals of clarifying law and diminishing its uncertainty, justices grant review to cases where the lower court struck down a federal statute. Justices themselves have made this point:

[I]f a single district judge rules that a federal statute is unconstitutional, I think we owe it to Congress to review the case and see if, in fact, the statute they've passed is unconstitutional. (Perry 1991, 269)

Finally, justiciability concerns constitute legal issues that make granting review less likely when present.<sup>5</sup> When the Court faces a petition that suffers from justiciability problems (e.g., ripeness, mootness, etc.), it is supposed to deny review unless compelling reasons direct otherwise.

**The conditional relationship among general, specific, and legal agreement.** It is likely that general and specific policy agreement and legal agreement are conditionally related to one another and that to examine SG influence one must examine them jointly. The reason, again, for so doing is that to infer SG influence, one must examine whether the SG succeeds in persuading justices to vote differently than they would like. This standard, of course, requires that we make inferences based on the behavior of justices who lack both general and specific agreement with the SG in cases where the SG makes recommendations that contradict the legal cues in the case. That is, we would *expect*

other justices to follow the SG's recommendation and, accordingly, could not determine whether their votes stem from SG influence or simply from the pursuit of their own policy goals—the problem of observational equivalence. To overcome this limitation we predict which justices would otherwise be *least* likely to follow SG recommendations and focus on their voting behavior.

## Measures and Data

To examine SG influence, we analyze every case coming from a federal court of appeals in which the SG filed an amicus curiae brief at the agenda stage between the 1970 and 1993 terms ( $N = 277$ ).<sup>6</sup> As stated above, we examine cases in which the Court forced the SG to participate at the agenda stage as well as the much smaller number of cases in which the SG voluntarily elected to participate.

Before we proceed, we address one question: does the SG's failure to participate voluntarily in cases suggest that they are unimportant or that the SG does not care about them? The data say no. We examined a variety of sources to make sure that invited (i.e., CVSG) cases are just as important as noninvited cases. Establishing the importance of invited cases is necessary because we are testing whether the SG can motivate justices to move from their preferred positions. If, conversely, invited cases are unimportant and neither justices nor SGs care significantly about them, our finding of SG influence would be empty, the result of a flawed assumption. Fortunately, a wide array of empirical and archival evidence (which we include as an online supplement to this article) shows strongly that invited cases are just as important as non-invited cases.<sup>7</sup>

Our dependent variable is whether a justice cast a vote consistent with the SG's recommendation. If the justice voted in the manner recommended by the SG, the dependent variable equals 1, 0 otherwise. To make this determination, we examined the docket sheets and cert pool memos of former Justice Harry A. Blackmun,<sup>8</sup> which Black and Owens (2009b) show are highly reliable sources of data.<sup>9</sup> We reviewed the docket sheet in each case to determine how each justice voted in every successive round of voting at the agenda stage. The cert pool memos provided information on the SG's recommendations. We examined only those cases where the SG recommended a clear outcome, such as recommendations to grant or deny review, note probable jurisdiction, or affirm or dismiss the appeal. These recommendation types account for 91 percent of the recommendations made between 1970 and 1993.<sup>10</sup>

**General agreement.** To tap into the general policy agreement between a justice and the SG, we created a variable called *justice-SG distance*, which is simply the ideological distance between the justice and the SG. Coding this variable required three steps. First, we employed the

Judicial Common Space (JCS) (Epstein, Martin, et al. 2007) to estimate the revealed preferences of each Supreme Court justice. Second, to estimate the ideological preferences of the SG, we followed common practice (e.g., Bailey, Kamoie, and Maltzman 2005; Nicholson and Collins 2008) and assumed that the SG's preferences reflect those of her appointing president, which we measure as the first dimension of a president's Poole and Rosenthal Common Space Score.<sup>11</sup> Finally, we calculated the absolute value of the difference between a justice's JCS score and the SG's preference estimate.<sup>12</sup>

**Specific agreement.** To measure specific policy agreement between a justice and the SG, we created a variable called *policy agreement*, which examines whether the SG and the justice agree on how to treat the petition. We undertook five steps to create this variable. First, to measure each justice's revealed preferences, we again relied on the JCS. Second, we estimated the predicted policy location of the Court's merits decision—that is, the policy the justice would expect the Court to make if it heard the case. We believe that justices will predict the Court's policy outcomes by looking back at the majority coalitions in the Court's recent cases in the same general area. To determine this, we read the cert pool memo written in each petition to determine the topic at issue in a petition. We then looked backward at the Court's previous cases in the same areas.<sup>13</sup> To place these previous cases in ideological space, we followed Carrubba et al. (2007) and used the JCS score of the median member of the majority coalition. That is, we assume the policy location of a decision can be represented by the JCS score of the median member of the majority coalition in a case. We then took the median of those medians to determine the expected policy outcome. We were agnostic as to *how many* previous cases the justices would look back to in order to determine the Court's likely outcome. Two? Ten? Twenty-five? We opted to follow a broad approach and measured the expected policy of the Court as the median of the majority coalition medians using the Court's previous two cases all the way back to its previous twenty-five cases. (The results we present here assume that justices look back to the previous ten cases decided by the Court in the issue area, though our results remain the same whether we looked at any case window of two to twenty-five years.)<sup>14</sup>

Third, following Black and Owens (2009a) we estimated the status quo.<sup>15</sup> Fourth, we computed spatial distances between the justice and the status quo as well as the justice and the expected merits outcome. If a justice was ideologically closer to the expected merits outcome than to the status quo, we expected him to vote to grant review. If the justice was closer to the status quo than to the expected merits vote, we expected him to vote to deny review. Finally, we compared the justice's expected vote to the SG's recommendation: if a justice was expected to

grant (deny) review to a petition and the SG recommended a grant (deny), policy agreement equals 1, 0 otherwise.

**Legal considerations.** To tap into the various legal considerations that might influence whether justices follow the SG's recommendations, we constructed measures for legal conflict, legal importance, judicial review, and justiciability. We code *weak legal conflict* as 1 if the law clerk writing the pool memo—while acknowledging a split—suggests that it is shallow and tolerable. We also include *strong legal conflict*, which is coded as 1 when the pool memo writer notes the existence of conflict that is neither shallow nor tolerable.<sup>16</sup> To determine whether the lower court decision was published, we again examined the cert pool memo in the case. If the pool writer noted the case was published, *published opinion below* equals 1. If the case was unpublished, the variable takes on a value of 0. If the pool memo writer notes that the lower court struck down a federal legal provision as unconstitutional, *judicial review below* takes on a value of 1, 0 otherwise. If the pool writer notes problems with justiciability, *justiciability concerns* takes on a value of 1, 0 otherwise.

We then were in the position to measure whether the SG's recommendation contradicted or accorded with any of these four legal factors. To measure *legal agreement*, we examined the SG's recommendation in the case. If there were one or more legal reasons to grant (e.g., strong conflict or judicial review exercised below) and the SG recommended granting the petition, we coded legal agreement as 1. For the same reasons, if there were one or more legal grounds on which to deny the petition (e.g., no conflict, an unpublished lower court decision) and the SG recommended denial, we coded legal agreement as 1. Legal agreement equals 1 for 30 percent of the petitions in our data. Conversely, when the SG's recommendation ran contrary to the legal cues embedded in the petition, we coded legal agreement as -1.<sup>17</sup> For example, if there was strong legal conflict but the SG recommended denial, legal agreement would equal -1. Of the petitions in our data, 18 percent are coded with legal agreement as -1. Finally, we identified and categorized as legally neutral those petitions that possessed no legal reasons to grant or deny review as well as the small number of petitions (11 out of 277) where there were legal reasons both to grant and deny the petition.<sup>18</sup> We coded legal agreement as 0 when petitions were legally neutral. Of the petitions in our data, 52 percent were coded this way.

To examine whether legal factors limit potential SG influence, we interacted legal agreement with general and specific policy agreement. We created six exhaustive and mutually exclusive dummy variables that correspond to each of the possible combinations of specific policy and legal agreement. We then interacted each of these dummy variables with our justice-SG distance variable. Again, it

is our contention that the best way to analyze whether the SG influences justices is to examine whether justices follow the SG's recommendation under conditions in which they are *least* likely to do so.

**Controls.** In addition to these covariates of interest, we control for a host of additional factors. Perhaps most importantly, because we expect justices who initially sought the views of the SG to be more likely to follow her recommendation, we code *justice voted to CVSG* as 1 if a justice voted to CVSG (and 0 if he did not). Similarly, if the justice originally voted to support the position ultimately recommended by the SG, we code *initial agreement with SG* as 1, 0 otherwise. We control for the *political salience* of the case by counting the total number of amicus curiae briefs filed when the Court decides to grant, deny, or CVSG. We next control for whether the voting justice was a freshman. We code *freshman justice* as 1 if the voting justice was in her first two full terms of service on the Court when casting his agenda vote, 0 otherwise. To examine *case complexity*, we coded the proportion of the cert pool memo devoted to a discussion of the case's procedural history. We further control for whether the SG's submission was voluntary or invited. If the brief was voluntary, *voluntary SG recommendation* takes on a value of 1, 0 otherwise. *SG experience* is the natural logarithm of the number of oral argument appearances by the SG or someone from her office. We also control for several separation of powers variables that Johnson (2003) found related to the Court's decision to CVSG. *Presidential honeymoon* takes on a value of 1 if the president was in the first year of his first term when the cert vote took place, 0 otherwise. *Presidential election year* takes on a value of 1 if the cert vote took place during a presidential election year (e.g., January 1, 1992, through November 3, 1992). *Presidential House strength* and *Presidential Senate strength* are coded as the percentage of seats held by legislators of the president's party in the House and Senate, respectively.

## Method and Results

We report parameter estimates and substantive effects for our logistic regression model in Table 1.<sup>19</sup> The model correctly predicts roughly 77 percent of the observations, which translates into approximately a 10 percent reduction in error over guessing the modal category. Our control variables largely perform as expected. Justices are somewhat less likely to follow the SG's recommendation in politically salient cases and are more likely to follow her in complex cases. In other words, when the law is unclear, justices rely on the SG for clarification (Pacelle 2003). Perhaps not surprisingly, justices who voted to call for the SG's views in the case are more likely to vote consistent with her recommendation. Similarly, justices

**Table 1.** Logistic Regression Model of Agreement between a Justice's Agenda-Setting Vote and the Recommendation of the Solicitor General (SG)

Variable	Coeff.	Robust SE
SG recommendation variables		
Policy and legal consistent	1.219*	0.398
Policy consistent and legally inconsistent	-0.332	0.304
Policy consistent and legally neutral	0.811*	0.265
Policy inconsistent and legally consistent	-0.170	0.273
Policy and legally inconsistent	-0.625	0.336
SG-justice distance interaction variables		
Justice-SG ideological distance	-0.375	0.270
Policy and legally consistent × distance	-0.383	0.505
Policy consistent, legally inconsistent × distance	0.200	0.482
Policy consistent, legally neutral × distance	-0.629	0.380
Policy inconsistent, legally consistent × distance	0.607	0.478
Policy and legally inconsistent × distance	0.370	0.491
Control variables		
Freshman justice	0.053	0.124
Political salience	-0.190*	0.059
Case complexity	0.957*	0.429
Justice voted to CVSG	1.003*	0.132
Initial SG agreement	2.986*	0.219
Voluntary SG recommendation	1.404*	0.228
SG experience	0.031	0.074
Presidential honeymoon	-0.005	0.198
Presidential election year	0.022	0.124
Presidential house strength	-1.990	2.232
Presidential senate strength	3.313	3.552
Constant	-1.212	0.799
Observations		2,151
Log likelihood		-1014.772
Percentage correctly predicted		76.6
Proportional reduction in error		10.3

The omitted baseline category is policy inconsistent and legally neutral (and its interaction with justice-SG ideological distance).

\* $p < .05$ , two-tailed.

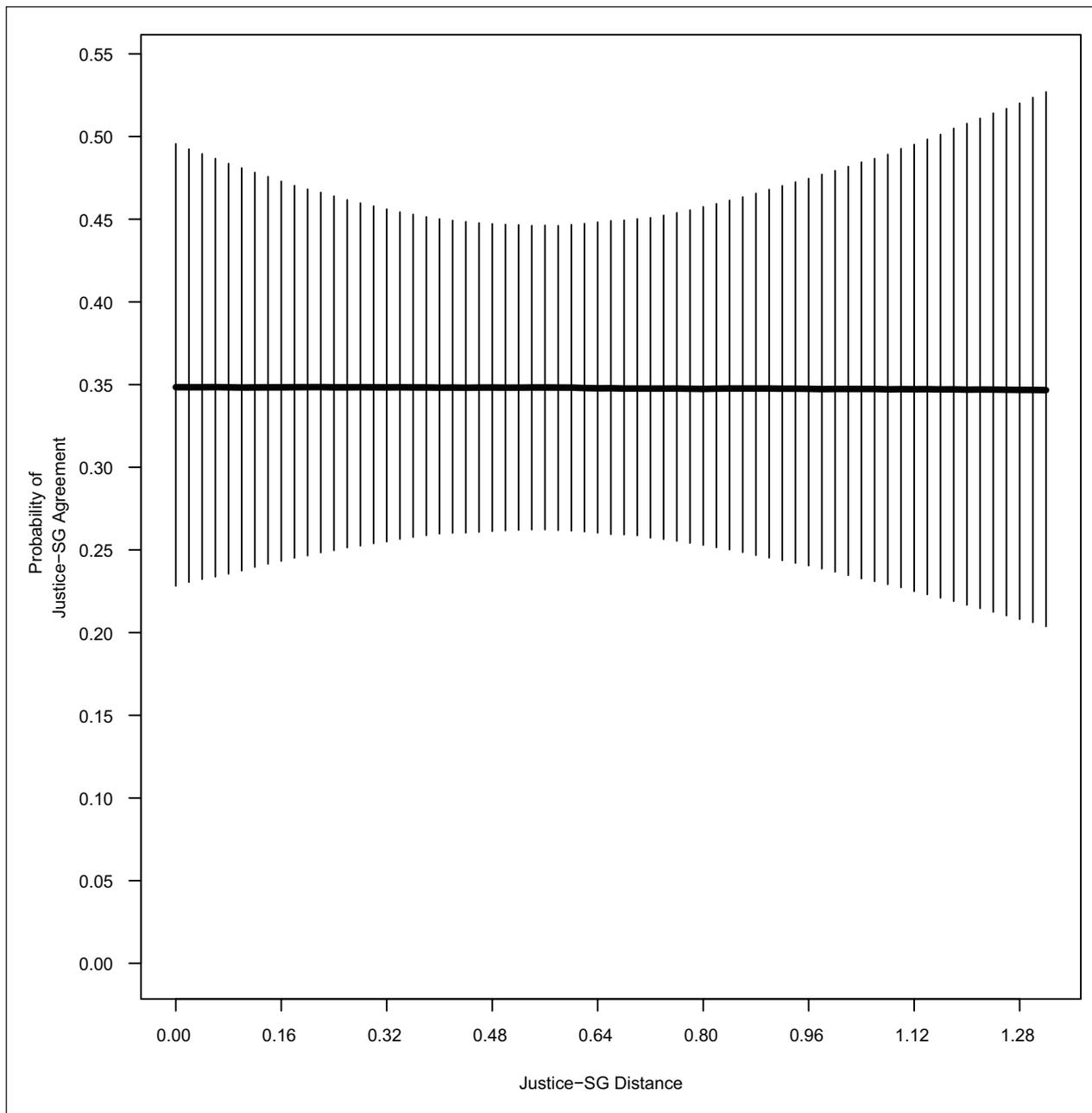
who, in the initial round of voting, cast the same vote as the SG later recommended were strongly likely to follow the SG's recommendation. That is, when the justice reveals a preference in the first round of voting (i.e., his colleagues voted to CVSG in round 1 while he cast a grant or deny vote) and that vote happens to be the same as the SG's recommendation, the justice, not surprisingly,

sticks with his vote. Finally, we find that justices are more likely to follow the SG's recommendation when she voluntarily submits a brief at the agenda-setting stage. We find no results to support the theory that justices follow more experienced SGs. Nor do we find support for the proposition that presidential honeymoons or strength in Congress matter. Similarly, justices are no more likely to follow SG recommendations during presidential election years.

We now turn to our covariates of interest. We argued that the interaction of general, specific, and legal agreement would explain whether justices follow SG recommendations. Because both the statistical significance and the sign of an interactive term can change across a variable's range (Berry, DeMeritt, and Esarey 2010; Kam and Franzese 2007), we follow the advice of King, Tomz, and Wittenberg (2000) and Brambor, Clark, and Golder (2006) and present our key results visually.<sup>20</sup>

The first question we raised in this study is whether the SG influences justices' votes. Our argument was that to determine influence and overcome observational equivalence, we must examine those justices who are *least* likely to agree with the SG. Stated differently, the most exacting test of SG influence comes from examining whether justices follow SG recommendations when they are ideologically distant from her, when they disagree with her on policy grounds, *and* when her recommendation contravenes the legal factors in the case—in short, when the only persuasive component of the SG's argument is that *it is being made by the SG*. Figure 1 speaks to this specific scenario and shows clearly that the SG influences justices. Figure 1 examines the voting behavior of justices who disagree with the SG's recommendation when such recommendation also clashes with the legal cues in the case. On the *y*-axis we present the probability that a justice will follow the recommendation made by the SG. On the *x*-axis we present the level of general agreement, as measured by the ideological distance between the SG and a justice. Justices on the left of the figure are ideologically close to the SG while those on the right are ideologically distant from her.

Two aspects of this figure are especially telling. First, the figure shows that ideologically distant (and ideologically close) justices follow the SG's recommendations. While it would be unsurprising to find that justices who *generally* agree with the SG are likely to follow her recommendations, a better indicator of influence comes from the fact that the most ideologically distant justices follow SG recommendations in such an unfavorable combination of policy and legal disagreement. Put in more personal terms, these results demonstrate that Justice Thurgood Marshall, a staunch liberal, was just as likely to follow a recommendation made by President Reagan's SG Rex Lee as was then Associate Justice William H. Rehnquist, an ardent conservative.

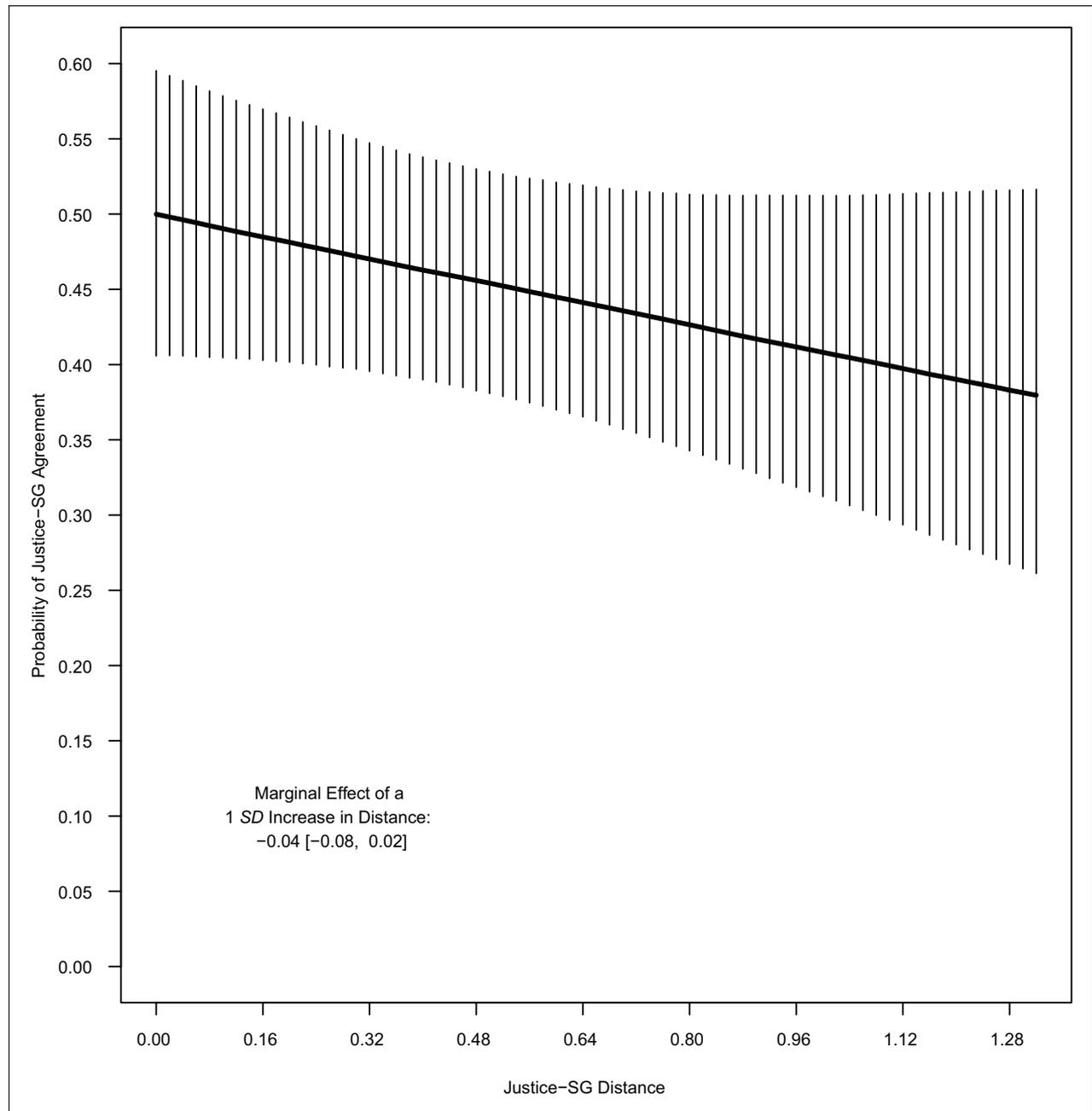


**Figure 1.** Conditioning effect of justice-solicitor general (SG) distance in presence of both specific policy and legal disagreement. Vertical line segments denote 95 percent confidence intervals around the point estimate (the thick black line). All other variables were held at their mean or modal value, as appropriate.

Second, we find that the predicted likelihood of agreement is quite high. The predicted likelihood of agreement remains constant at a probability of .35 regardless of a justice's level of general ideological agreement. Justices who completely disagree with the SG still follow her recommendations 35 percent of the time. Again, we emphasize that this is the predicted agreement level in cases where the SG's recommendation clashes with both a justice's specific policy goals (e.g., deny instead of Grant) and the legal considerations in the petition. That justices

follow SG recommendations to such a degree when they have such little agreement with her provides, we believe, strong evidence of SG influence.<sup>21</sup>

To determine further whether SGs influence justices' votes, we examined those cases where law provides no clear answer for a voting justice. That is, we examine those instances when there are no legal cues on which justices can rely to determine whether to grant or deny review. In these cases, justices can focus primarily on policy. Consistent with our earlier arguments, to infer

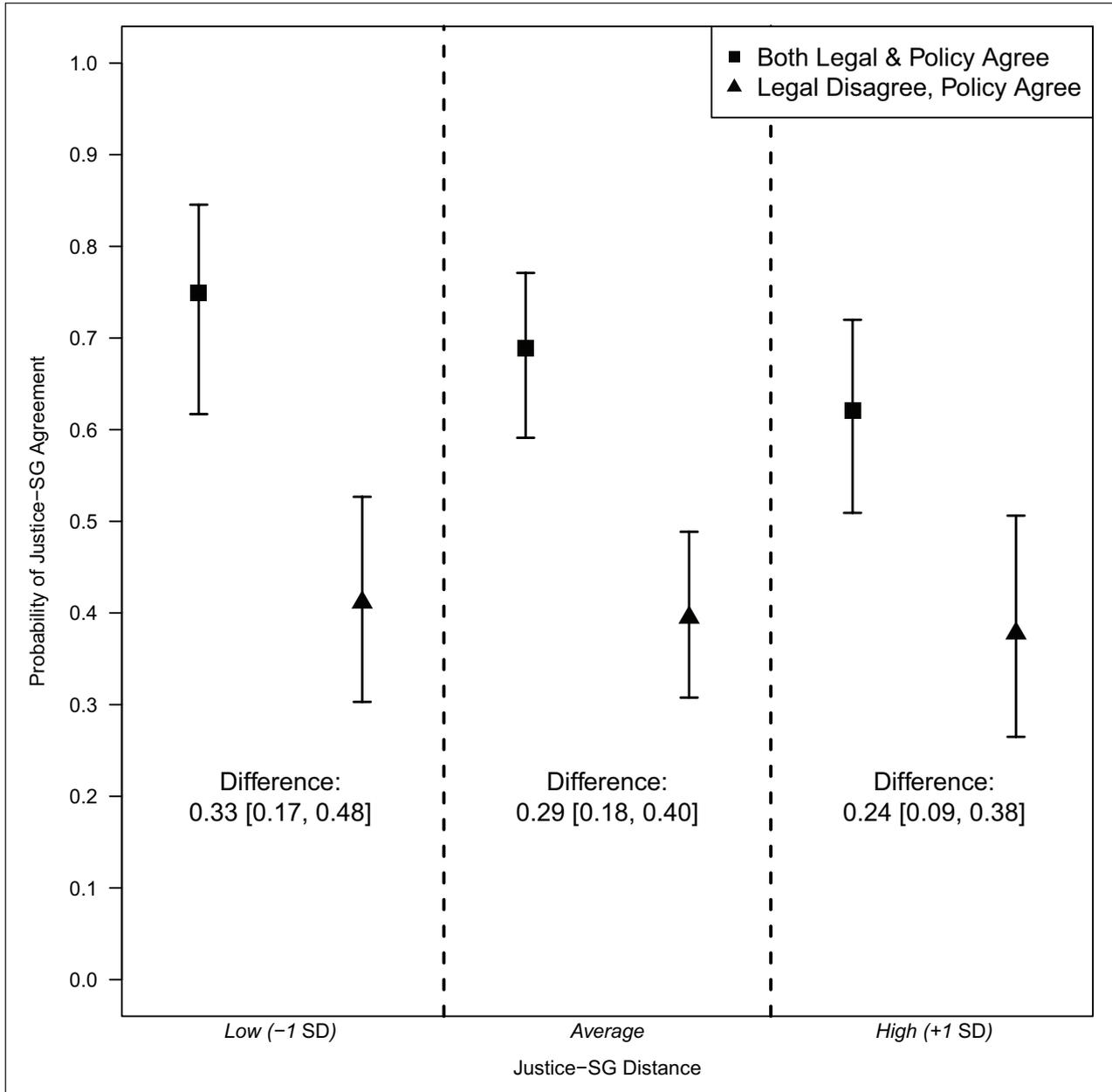


**Figure 2.** Predicted probability of justice–solicitor general (SG) agreement when the law is neutral and the SG’s recommendation disagrees with a justice’s desired policy outcome in a specific case, conditional on the level of general ideological agreement between the SG and a justice ( $x$ -axis)

The marginal effect annotation in the panel reports the effect of a 1  $SD$  increase in ideological distance on the probability of SG–justice agreement, holding all else constant. The two-tailed 95 percent confidence interval for the marginal effect is reported in brackets. We use 0.56, the mean value of ideological distance, as the base line value in computing the marginal effect.

influence we focus on justices who are ideologically distant from the SG and desire a different outcome than her. Figure 2 shows the likelihood a justice follows the SG’s recommendation when it conflicts with the justice’s desired policy outcome in the case. This figure also shows that justices are influenced by the SG. The  $x$ -axis portrays general ideological agreement with the SG

while the  $y$ -axis shows the likelihood of a justice following the SG’s recommendation. Those justices most distant from the SG still follow her recommendations over 40 percent of the time. While the downward slope of the line in Figure 2 suggests that general ideological agreement can condition the SG’s influence, subsequent calculations reveal that the effect is not statistically significant.<sup>22</sup> More



**Figure 3.** Predicted probability of justice–solicitor general (SG) agreement, conditional on justice–SG distance (different panels) and the extent of congruence between the SG’s recommendation and the legal and policy aspects of a petition (points within a panel)

The vertical “whiskers” represent 95 percent confidence intervals around the point estimate. The “difference” line of text reports the point estimate (and confidence interval) for whether a statistically significant difference exists between the squares and triangles.

generally, those justices who disagree with the SG’s specific recommendations and who are ideologically distant from her still follow her recommendations in a substantial number of cases. Again, that such justices follow the SG when we would least expect it provides strong evidence of SG influence.

Our second question of interest is whether there are boundaries on SG influence—whether the law constrains SG influence. This inquiry, of course, applies more broadly

to the decision-making process: to what extent does the law moderate what might otherwise be considered preference driven behavior? Our results show that the SG’s influence is considerably bounded by legal considerations. Consider Figure 3. Once again, the y-axis provides the predicted probability of a justice following the SG’s recommendation. Each of the three panels on the x-axis shows three levels of general ideological agreement between the SG and a voting justice. Finally, within each

panel, we display two hypothetical voting situations: (1) when the SG's recommendation both is consistent with a justice's policy goals in that specific case and *agrees* with the legal cues embedded in the case (i.e., the squares) and (2) when the SG's recommendation is consistent with a justice's policy goals but *disagrees* with the case's legal cues (i.e., the triangles).

If legal considerations did not matter at all, we would expect to see no difference between the point estimates (i.e., the squares and triangles) within all three of the panels. Similarly, if "the law" is simply a shibboleth used by justices motivated exclusively by their general ideological agreement with the SG, we would expect to see differences between the point estimates for justices ideologically distant from the SG but not those ideologically close to her. The evidence provided by Figure 3 suggests that legal considerations are an important factor in *all* justices' decision to follow SG recommendations. For all three levels of ideological distance from the SG, we find a statistically and substantively significant penalty applied to the SG's recommendation when it clashes with the objective legal aspects of a case. For example, Justice Scalia, an ideological ally (and former colleague) of SG Kenneth Starr, was roughly 45 percent less likely to follow Starr's recommendation when it contradicted legal cues in the case, such as the existence of legal conflict among the circuit courts. That Scalia's more moderate (middle panel) and liberal (right panel) colleagues were also likely to penalize Starr's legally incongruent recommendation strongly suggests that, at least in this context, law is not merely a facade for ideology.<sup>23</sup> In short, the data here suggest that there are powerful legal considerations that justices and the SG must follow and that deviations therefrom can result in negative consequences.

## Discussion

We began this article with two questions—do SGs influence Supreme Court justices' votes, and if so, do legal factors limit that influence? Our results show, first, that SGs wield significant influence over the Court but, second, that this influence is limited by the law and legal considerations. We examined the agenda-setting votes of justices who could be expected to follow the SG's recommendations as well as those who would be unlikely to follow those recommendations. Drawing on archival materials and using a research design that allows us to overcome observational equivalence, we find that justices who are least likely to follow the SG still do so 35 percent of the time.

At the same time, we find that law is tremendously influential and places boundaries on SG influence. Justices discount SG recommendations when they contradict important legal features. This dynamic reinforces the claims of Pacelle (2003, 10), who contends,

The solicitor general operates in a dynamic political environment, but is charged with imposing stability upon the law and legal positions. The solicitor general must pursue a changing executive agenda, but also assist the Court in imposing doctrinal equilibrium.

Ultimately, Pacelle argues, the SG will be most influential when she balances the often competing features of law and policy.

The finding that law limits the SG also speaks more broadly to how law constrains and influences justices. After all, justices choose to discount the SG's recommendations when they contradict the law, which means that justices seem to be influenced by the law. That justices would discount the recommendations of the SG—a respected legal actor—based on legal factors, of course, suggests that law matters to justices. If law is so important at the agenda stage, surely it must also play a role at the merits stage. But that is a story for another date.

SGs influence Supreme Court justices. Justices who agree with them follow their recommendation, but more importantly, so do justices who largely *disagree* with them. This, we argue, is strong evidence of SG influence. And while justices are not lemmings who will unwittingly fall off legal cliffs for tortured SG recommendations, they nevertheless often go along with them even when we least expect it.

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## Notes

1. See *National Organization for Women v. Scheidler* (1994). The docket sheet and summary memorandum in this case (no. 92-780) can be found in Epstein, Segal, and Spaeth (2007).
2. Only one study that we know of empirically analyzes the conditions under which the Court invites the solicitor general (CVSGs), and it is limited to an examination of whether the Court CVSGs for separation of powers reasons during

the merits stage (Johnson 2003). We should note that our findings below and in the online appendix (available at <http://prq.sagepub.com/supplemental/>) suggest that justices CVSG for policy and legal considerations.

3. Of the 277 unique cases included in our data, only 19 (roughly 7 percent) were voluntarily submitted. Because of data availability issues, we could examine voluntarily filed briefs submitted by the SG only between the 1984 and 1993 terms. These 19 cases paled in comparison (10.92 percent) to the 174 cases the SG filed by invitation between the same years. To ensure that our findings were not the result of the truncated sample of voluntary briefs, we refit our models for just the 1984–1993 terms. Our findings remained unchanged. We should also note that fitting a selection model in this instance is not feasible because there are not enough data and because we have different units of analysis across our two models. Existing statistical models do not allow for such an imbalance between the selection and outcome equations.
4. In *Calderon v. United States* (no. 91-6685), for example, the pool memo writer argued that the Court should deny review to the petition because the case was legally unimportant, as the lower court decision was unpublished: “I recommend denial [because the lower court’s] decision is unpublished and therefore no ‘rule’ was created by the case.” While we do not suggest that every unpublished decision is unworthy of attention, *on average* unpublished decisions are likely to be less important than those the circuits publish.
5. Justiciability refers to whether a case is “appropriate or suitable for a federal tribunal to hear or to solve” (Epstein and Walker 2005, 74). If a case is nonjusticiable (e.g., is moot or involves a political question), then the Court should be less likely to review it.
6. We sample from Court of Appeals cases so that we may use the Judicial Common Space (JCS) to place a legal status quo on the same scale as the policy preferences of both justices and the SG. No similarly scaled preference estimates exist for state courts.
7. To conserve space, we present and discuss these results in the online supplement. The results include a statistical analysis of the conditions under which justices vote to CVSG, network analyses, descriptive comparisons of case salience between invited and CVSG cases, and archival evidence from the papers of Justice Blackmun.
8. The cert pool is a labor-sharing agreement whereby each appeal or petition for certiorari is randomly assigned to the law clerks of one of the participating justices. This law clerk (the pool memo writer) drafts a memorandum about the petition that summarizes the facts of the case and the arguments made by the parties (and amici) and concludes with a discussion that recommends how the Court should treat the petition (Ward and Weiden 2006).
9. We personally gathered all data for the 1970–1985 terms from the Library of Congress. The raw docket sheets and memos for the 1986–1993 terms come from Epstein, Segal, and Spaeth (2007). To make sure the pool memo writer’s summary of the SG’s recommendation accurately represented that recommendation, we conducted a reliability analysis using data available on the Office of the Solicitor General’s Web site. Among the briefs that were available on the SG’s Web site, we found perfect agreement between the clerk’s coding and the SG’s actual brief.
10. We cannot include other types of recommendations (e.g., holds or grant, vacate the lower court decision, and remand) because they do not provide the Court with clear policy guidance.
11. There is empirical evidence to suggest that SGs largely track the preferences of their presidents (Segal 1988; Fraley 1996; Meinhold and Shull 1998). Nevertheless, as a robustness check to this assumption, we also multiplied the SG’s (i.e., the president’s) ideal point with the polarization measure adopted by Wohlfarth (2009), who analyzed the percentage of partisan positions adopted by all recent SGs in their amicus filings. High values of this percentage correspond to, for example, a Republican-appointed SG taking a high percentage of conservative stances. In short, this approach would account for any observed disconnect between a president and his SG. Our results remained consistent when employing the alternative approach.
12. During the period of our analysis, two SGs served under presidents from different political parties. Of our 277 cases, 15 involved President Johnson’s SG, Erwin Griswold (a moderate Republican), serving under President Nixon and 5 cases involved President Carter’s SG, Wade McCree, serving under President Reagan. We used Nixon’s and Reagan’s common space scores for these observations, respectively. Our results remain unchanged if we estimate our model excluding these 20 cases.
13. We followed the coding scheme for the *value* variable as defined by Spaeth (2006).
14. Our results remain unchanged if we simply expect the Court’s merits outcome to reflect the ideal point of the median justice on the Court (see, e.g., Black and Boyd, forthcoming).
15. To do so, we examined the JCS scores of the judges who sat on the circuit court that heard the case. In the typical unanimous three-judge circuit court panel decision, the status quo is the JCS score of the median judge on the panel. In cases with a dissent or a special concurrence, where only two circuit judges constituted the winning coalition, we coded the status quo as the midpoint between those two judges in the majority. If the lower court decision was en banc, we coded the status quo as the median judge in the en banc majority. When district court judges sat by designation on the circuit panel, or when the appeal was from a three-judge district court panel, we followed Giles, Hettinger, and Peppers (2001).

16. The coding of strong and weak conflict in the clerk's discussion required, on occasion, some judgment on the part of the coders. Accordingly, we conducted an intercoder reliability study for a subset of the petitions in our sample. Our weak conflict measure had 86.7 percent agreement ( $\kappa = .640$ ), and our strong conflict measure had 93.3 percent agreement ( $\kappa = .814$ ). Both values of  $\kappa$  are statistically significant ( $p < .001$ ) and correspond to "substantial" and "near perfect" agreement by a commonly used metric (Landis and Koch 1977, 165). As Black and Owens (2009a, 1069-70) point out, there is little to fear from systematic clerk bias in the pool memos. Clerks know that their colleagues will review each memo they draft and will punish (or at least recommend punishment) for ideological transgressions. What is more, the randomization of the cert pool will largely mitigate against any ideological basis.
17. A possible alternative measure for law might combine the reasons to grant (or deny) into a scale of legal support. That is, if there were three reasons to grant a petition, the law might be considered clearer (and thus more compelling) than a petition with only one legal reason to grant. Unfortunately, our sample contains no petitions with multiple legal reasons to grant. Furthermore, out of the 2,151 observations, only 129 have two legal reasons to deny and only 17 have three reasons to deny. In short, while scaling the legal variable might help us to determine whether legal influence is stronger when "stacked," we do not have the data to test that proposition.
18. A case may have genuine conflict but justiciability concerns. Separating them out into a fourth category (i.e., "legally ambiguous") does not appreciably alter our results.
19. As stated above, given the structure of the data, a selection model is inappropriate. In particular, all justices, regardless of whether they vote to CVSG in the first stage, will cast a vote in the second stage. Nevertheless, by including our *justice voted to CVSG* variable, we control for justices who are initially more likely to follow the SG.
20. In other words, that some of the SG recommendation variables or SG–justice distance interaction variables in Table 1 do not appear to be statistically significant does not ultimately mean a variable is not statistically or substantively significant. Additional postestimation calculations are required to assess their effects (Berry, DeMeritt, and Esarey 2010). The results we report were obtained through performing such calculations. Unless otherwise noted, all other variables were held at their means or modes, as appropriate.
21. To check the robustness of these findings, we examined whether SG recommendations to deny review were more influential than those to *grant* review since the Court has a natural tendency toward denying review. Our results show no systematic differences.
22. We use a 95 percent two-tailed test to make this statement. The  $p$  value for a test of the null that the slope of the line is equal to zero is roughly .20, which is on the commonly used threshold for rejecting a *null* hypothesis that *some* effect exists (Blalock 1979, 161). Ignoring the formal significance of the effect, even its substantive magnitude is weak. Indeed, a one standard deviation increase in ideological distance yields only a 7 percent relative decrease in the likelihood of a justice following the SG.
23. Note that while the magnitude of the difference between the point estimates in the panels appears to be decreasing as ideological distance increases (i.e.,  $0.33 > 0.29 > 0.24$ ), this "difference among the differences" is not itself statistically significant. In addition, the relative percentage change is also not statistically distinguishable across the three panels.

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