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U.S. GOVERNMENT LITIGATION STRATEGIES IN THE FEDERAL APPELLATE COURTS

DISSERTATION

Presented in Partial Fulfillment of the Requirements for

the Degree of Doctor of Philosophy in the Graduate

School of the Ohio State University

By

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ABSTRACT

The United States federal government is the most frequent and important litigant in the federal judicial system. Critical to this influence are the decisions the government makes as to which of the hundreds of possible cases to request a rehearing *en banc* by a circuit court of appeals, or to appeal to the U.S. Supreme Court. I examine this government appeals process by analyzing data on federal government appeal decisions in U.S. court of appeals cases unfavorable to the government during 1993 and 1994. The recommendation of the Department of Justice and the decision of the Office of the Solicitor General to appeal the case are substantially related to case-specific measures of the cost, salience, reviewability and prospects on the merits of each unfavorable lower court decision. Because of their different institutional positions, however, the impact of these factors varies across actors in the appeals process. These factors are also shown to influence the type of appeal undertaken. The analysis suggests that the complex process by which appeal decisions are made has important implications for the government's success in the courts, both at the agenda-setting stage and on the merits.

To my parents.

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CHAPTER 1

INTRODUCTION

The United States federal government is the most frequent, the most important, and the most successful litigant in the American federal courts. The government's dual role as prosecutor in federal criminal cases and enforcer in civil ones places it in court with greater regularity than any other litigant. This in turn means that, more than any other entity, the federal government plays a central role in the development of law and policy in the United States courts.

In the federal courts, no other litigant appears with such regularity as the United States. In fiscal year 1996,[1] for example, the United States was a party in 48,755 civil cases filed in U.S. District Courts, or 18.1 percent of all civil cases filed in those courts. That same year saw the U.S. bring 67,700 criminal cases in federal district courts. The combination of civil and criminal cases means that 36.7 percent of all filings in federal district courts

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[1]The federal courts operate on a fiscal year calendar, which runs from October 1 to September 30; FY1996 is therefore the period from October 1, 1995 to September 30, 1996.

had the United States as a party to the suit ("Federal Courts Caseload Continues Upward Spiral" 1997).

A similar pattern holds in the federal appellate courts. In the twelve U.S. courts of appeals, all federal criminal appeals, as well as a large number of civil appeals and all appeals from administrative agency decisions, involve some part of the federal government as a litigant. And on average, approximately forty percent of the cases heard by the U.S. Supreme Court involve the government as a party (Baum 1995). The frequency with which the federal government appears in the federal courts means that the United States is the only litigant capable of significantly affecting the workload of the federal courts (e.g. "DOJ Increases Reflected in Judiciary Workload" 1997).

In addition to their frequency, court cases involving the United States typically involve the most consequential issues for people's lives. Civil rights, environmental regulation, criminal justice, immigration, welfare, Social Security, taxation, and a host of other issues receive treatment in the courts in cases to which the government is a party. Because of its frequency in court, the United States is the only single litigant capable of significantly affecting the shape of the law across this whole range of issues. And in those cases, the federal government wins far more often than any other litigant, the result of which is that the position taken by the government in its litigation, more often than not, becomes the law of the land. In sum, no other

litigant wields the influence of the United States in matters of the law.

That said, we know surprisingly little about the government as a litigant in the federal courts. In particular, while students of judicial politics have long recognized both the importance of the United States as a litigant and the critical role of agenda-setting on the decisions of the federal appellate courts, they have largely failed to address the nexus of the two points: that the U.S. is responsible for a large part of the courts' work, and that it has a large amount of discretion in determining the content of that work. The potential significance of these circumstances is great, for they suggest that the government's success in the courts, including that before the U.S. Supreme Court, is potentially more a function of case selection than of institutional deference, the quality of representation, or other factors which have been advanced previously.

The focus of this dissertation is on the process by which federal government appeal[2] decisions are made. Specifically, I seek to answer a number of basic questions regarding the appeal process of the United States.

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[2]A lexicographic note: I refer throughout this dissertation to the general practice of "(R)esort(ing) to a superior (i.e., appellate) court to review the decision of an inferior (i.e., trial) court or administrative agency" (*Black's Law Dictionary*, 6th Ed.) as an *appeal*. My general usage of "appeal" thus refers to requests that a case be reheard by courts of appeals, both in panels and *en banc*, as well as to petitions for certiorari to the Supreme Court. While appeals to the Supreme Court have been all but completely eliminated (Pub. Law 100-352, 102 Stat. 662 [1988]), those instances in which the word "appeal" is used in this more limited sense are distinguished from the broader usage in context.

How is the decision to appeal a loss in the federal courts of appeal made? Who are the relevant actors in that process, and in what ways do they interact to reach an appeal decision? What criteria are used to decide which cases to appeal and which not? What factors influence the governments appeal strategy; i.e., its decision to either request a rehearing *en banc* or to petition for certiorari? Finally, what are the results of this process? At what rate do government appeals occur? And, finally, what are the implications of the government's appeal decisions for its success in the federal appellate courts, and for the larger agenda of those courts?

I begin to address these questions by examining in-depth the appeals process itself; Chapters 2 and 3 serve this purpose. Because any examination of government appeals must begin with a thorough understanding of the means by which those appeal decisions are made, Chapter 2 provides an overview of that mechanism. Unlike other litigants, for whom the decision to appeal is a discrete action by a single individual, the government's appeal process consists of a series of decisions by different government actors with widely divergent perspectives and goals. The federal agency responsible for the litigation in the first instance, the appellate sections of the Justice Department, and the Office of the Solicitor General all play a role in determining which losses the U.S. will appeal and which it will allow to remain unappealed. Chapter 2 describes these various actors in the process, the alternatives open to them in making their respective appeals decisions,

and the dynamics of the interactions between them.

Chapter 3 continues my description of the appeals process, but moves from the abstract to the concrete by examining two empirical aspects of government appeals. First, I sketch the broad contours of government appeals to the U.S. Supreme Court over the past seventy years, examining frequencies and rates of appeal as well as government success in those appeals. From this analysis several characteristics of government appeals become apparent: that the government is highly selective in its appeals, that it is very successful in pursuing those appeals when it chooses to do so, and that both this selectivity and this success have been very consistent over the past several decades. Second, I provide a first look at the results of the appeals process for two recent years by analyzing data on the appeal decisions of the federal agencies, the Justice Department appellate sections, and the solicitor general's office. In doing so, I illustrate how the process described in Chapter 2 translates to actual decisions in real cases, as well as affording an initial look at the results of those decisions. Chapter 3 thus illustrates, at both the aggregate and the individual level, the operation and consequences of the government's appeals process.

Having established the procedures by which government appeals occur, my examination of government appeals continues in Chapter 4 with a discussion of the motivations for those appeals. I review the literature on federal government litigation and the Office of the Solicitor General, seeking

to illuminate the motives of the actors in the appeal process. In turn, I suggest four general factors which influence the appeal decision, each rooted in the motivations of the relevant participants in the litigation. While each of the participants in the process recognize the importance of these factors, however, the importance of each factor to their decisions will not be consistent. Instead, differences in the institutional positions and motivations of each of the appeal participants leads us to varying expectations about the influence of each of the four factors on the appeal decisions made by them in each case

In Chapters 5 and 6 I turn to analyses of the appeal decisions themselves. I seek to explain those decisions in light of the four factors discussed in Chapter 4, and to test the hypotheses regarding the varying impact of those factors on the actors in each stage of the process. In Chapter 5, I examine the simple choice of whether to pursue further litigation in a case or not, examining the decisions of both the various divisions of the Department of Justice and that of the U.S. solicitor general. Variables relating to each of the four factors presented in Chapter 4 are evaluated with respect to their influence on the decisions of the actors in question. I find that, largely as expected, the Justice Department and the solicitor general exhibit variation in the importance they attach to various case-related factors when making their appeal decisions, and that this variation is consistent with the expectations set out in the previous chapter.

Chapter 6 extends this analysis to the decision of the mode of appeal: whether to let an adverse ruling stand, request a rehearing *en banc*, or petition for certiorari in the Supreme Court. I label this decision the appeal strategy decision, and consider three possible ways in which the government may view that decision: as a sequential process, as a choice over a ordered set of alternatives, and as a discrete choice among unordered alternatives. Each of these perspectives finds some support in the data. In addition, I reexamine the influence of the various factors analyzed in Chapter 5 on the appeal strategy decision. The results are again consistent with the hypotheses set forth in Chapter 4 regarding the differential impact of each of the factors on the appeal decision makers.

The dissertation concludes in Chapter 7, with a review of the findings and a discussion of the ramifications of the research. In particular, I focus on the implications of these results on two widely-studies areas of judicial politics research. First, I discuss agenda-setting in federal appellate courts, particularly the U.S. Supreme Court, noting the importance of the government's appeals process in determining the makeup of the high Court's docket. Second, I examine the influence of the government appeals process on the success of the federal government as a litigant in the federal courts, both with respect to having its cases accepted for discretionary review and winning those cases on the merits. In this light, this research into the structure of and influences on the government appeal process is shown to be

an integral part of our more general understanding of the operation of the federal appellate courts in the United States.

CHAPTER 2

THE FEDERAL GOVERNMENT'S APPEALS PROCESS

The United States, like any other litigant, arrives in court for one of two reasons: either it is initiating an action against the opposing litigant, or it is responding to an action brought against it.[1] In the latter case, the litigation decision is out of the hands of the government; when a suit is filed against it, it must respond. In the former case, however, the decision to litigate is an elective one, and one which has numerous and wide-ranging implications for the formulation of public policy.

The United States and its minions also share all litigants' discretion in its decisions to appeal unfavorable rulings in the federal appellate courts. But when we move beyond the government's initial litigation decision in the

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[1]A third possibility exists: government intervention. By law, the United States government has the right to intervene in cases "wherein the constitutionality of any Act of Congress affecting the public interest is drawn into question" (28 U.S.C. §2403[a]), including in cases to which the United States or its agents is not a party. Should the government decide to do so, it has all the rights of a party to the case, and is liable for court costs and other expenses necessary for presentation of the case as relates to the constitutionality of the act in question. Because of my focus on the United States as a litigant, however, I do not examine interventions here.

courts of original jurisdiction, our understanding of these litigants' decisions to litigate in the appellate courts, and especially in the U.S. Supreme Court, begins to lessen.

It is this last phenomenon, discretionary government appellate litigation following a loss in the U.S. courts of appeals, which comprises the central focus of this dissertation. The actions of the United States in appealing losses are certainly not the only way in which the executive influences public policy through the federal appellate courts. The United States is frequently the target of appeals brought by parties who have lost in the lower courts; a substantial part of the *en banc* decisions of the courts of appeals, and of the docket of the Supreme Court, are composed of such cases.[2] Likewise, the United States frequently participates in litigation in which it is not a party, either through submission of briefs *amicus curiae* or via intervention. I choose, however, to focus on cases in which the United States brings an appeal following a loss, for two reasons. First, because in such cases the government has a direct interest in the outcome of the case, and

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[2]Interestingly, as Horowitz notes, the government has no formal process for deciding when to defend against appeals brought in cases which it has won; instead, such defenses are conducted as a matter of routine. Horowitz attributes this difference in procedure to the implications of the two situations for the legitimacy of the government's position: "When the soundness of the government's position is confirmed by a judicial decision, there is no occasion to challenge or review that presumption, but when the government does not prevail, there is every reason to consider carefully whether its position is well founded" (1977, 81).

because that interest has not been served by the decision below, such cases provide a context in which the potential for intrabranch conflict is highest. Second, because of the discretionary nature of these appeals, these cases allow for the most direct examination of the factors which drive government appeal decision making. The combination of government interest and government discretion, together with the often substantial policy ramifications of such decisions, make government appeals from losses in the court of appeals an attractive subject for analyzing the interplay of politics and the law in the executive and judicial branches.

In this chapter, I begin my examination of government litigation in the federal appellate courts with a descriptive overview of the process by which those appeals decisions are made. This description includes a brief look at the often-contested subject of exactly who may litigate on behalf of the government, and continues with a portrait of the manner in which appellate litigation, particularly that arising in the U.S. Courts of Appeals, is managed by the federal government.

2.1 GOVERNMENT APPEALS AND FEDERAL LITIGATING AUTHORITY

From its inception, it has been the prerogative of the Department of Justice to conduct litigation on behalf of the United States government in the federal courts. Included in the Judiciary Act of 1789 was a provision for the

appointment of an Attorney General "learned in the law...whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned..." (1 U.S. Stat. 73). The law also provided that "(E)xcept as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General" (28 U.S.C. §516). Thus between 1789 and 1870, it was typically the Attorney General who pressed the government's case before the justices, while government litigation in lower courts was mainly conducted by attorneys within or hired by the agencies and departments themselves (Meador 1980).

The establishment of the Department of Justice in 1870 also led to the creation of the post of solicitor general (SG); like the Attorney General, he or she was required by law to be "learned in the law", and was to "assist the Attorney General in the performance of his duties" (28 U.S.C. §505).[3] Both the creation of the Department of Justice and the Office of Solicitor General were the result of efforts to centralize the legal work of the federal government (see e.g. Clayton 1992, Chapter 2), particularly in light of the increased frequency with which various parts of the federal government

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[3]Former Solicitor General Charles Fahy, among others, has noted the "curious" fact that, with the creation of the Solicitor General's office, the requirement that the Attorney General be "learned in the law" was removed (Fahy 1942).

found themselves in opposition to one another.[4] The Revised Statutes of 1878 furthered this goal, providing that the Attorney General and the solicitor general "shall conduct and argue suits and appeals in the Supreme Court" unless the Attorney General directs otherwise (28 U.S.C. §518[a]).

While the initial role of the solicitor general was that of advising and assisting the Attorney General in the conduct of litigation in the Supreme Court, the evolution of the office was such that such that by 1942 Solicitor General Charles Fahy wrote that "(T)ime and circumstance have in fact lodged this work almost entirely with the solicitor general" (Fahy 1942, 21). The informal establishment of solicitor general control over government litigation was formalized in a Department of Justice regulation implemented in 1969, which provided that:

> "The following-described matters are assigned to, and shall be conducted, handled, or supervised by, the Solicitor General, in consultation with each agency or official concerned:
> (a) Conducting, or assigning and supervising, all Supreme Court cases, including appeals, petitions for and in opposition to certiorari, briefs and arguments, and, in accordance with Sec. 0.163, settlement thereof.
> (b) Determining whether, and to what extent, appeals will be taken by the Government to all appellate courts (including petitions for rehearing en banc and petitions to such courts for the issuance of extraordinary writs) and, in accordance with Sec. 0.163, advising on the approval of settlements of case in which he had determined that an appeal would be taken.
> (c) Determining whether a brief amicus curiae will be filed by the Government, or whether the Government will intervene, in any appellate court.

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[4]See e.g. *The Gray Jacket* 72 U.S. 370 (1866).

(d) Assisting the Attorney General, the Deputy Attorney General and the Associate Attorney General in the development of broad Department program policy." (20 C.F.R. Sec. 0.20 [1969])

Thus the solicitor general has formal control over nearly all government litigation at the appellate level. This includes appeals from federal district courts to the courts of appeals, as well as to the U.S. Supreme Court. At the same time, it is rarely the case that the Department of Justice or the solicitor general will become involved in the initial decision to file or prosecute a case; the various executive agencies, including the offices of the U.S. Attorneys, and the independent agencies and commissions still retain near-total control over litigation at the trial level.

This initial control, coupled with the established authority of many such agencies to control their own litigation at higher levels, has over the years led to some disagreement as to the proper balance of autonomy and centralization in the government's litigating power. In particular, inclusion of the clause "Except as otherwise authorized by law" in 28 U.S.C. §516 has allowed Congress to empower all manner of governmental entities with varying degrees of independent litigating authority at the appellate level (e.g. Stern 1960, Olson 1982, Devins 1994, Lochner 1994). Moreover, as Devins has noted, "Congressional exceptions to Department of Justice control...lack a coherent pattern" (1994, 264), and range from executive agencies such as the Departments of Agriculture and Health and Human Services, to independent

agencies such as the FEC (e.g. Fraley 1996) and others such as the special prosecutor (Jordan 1991; but see also the Court's decision in *U.S. v. Providence Journal Co. et. al* 485 U.S. 693 [1988]).

In general, however, the control of the solicitor general over government appellate litigation is very nearly complete. Even in those instances where an agency does not formally need the acquiescence of the Office to proceed, it will typically seek it anyway.[5] Moreover, a number of recent decisions of the Court indicate that it also tends to favor more centralized control over government litigating authority.[6] The result is that nearly all government appellate litigation passes through the Department of Justice and the Office of the Solicitor General.

In an important sense, then, both the Justice Department and the solicitor general serve as the government's attorneys, with the various agencies as their "clients", conducting litigation on their behalf and assisting them in making legal decisions. Those decisions include the choice of

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[5]The reason for their doing so is clear: failure of the solicitor general to "sign on" to the cert petition of an independent agency signals the Court that something is amiss. Former Solicitor General Drew Days III recently noted that "the absence of the Solicitor General's involvement raises questions about the merits of such filings; in fact, such briefs are described as having a 'tin can tied to them'" (Days 1994, 496).

[6]E.g. *U.S. v. Providence Journal Co.*, and *FEC v. NRA Political Victory Fund*, 115 S. Ct. 537 (1994) (failure of 2 U.S.C. §437d(a)(6) to explicitly provide the FEC with authority to file a writ of certiorari or otherwise conduct litigation before the Supreme Court without authorization of the Solicitor General).

whether or not to appeal a case which the agency has lost, a determination with potentially wide-ranging impact on the agency, and one which occurs through a complex and institutionalized process.

2.2 AN OVERVIEW OF THE GOVERNMENT APPEALS PROCESS[7]

When the United States loses a case in one of the U.S. courts of appeals,[8] the case file is returned to the interested government party for review. In civil cases involving federal agencies, this individual is the attorney in the executive agency ir independent commission responsible for handling the case. In federal criminal cases, this person is the U.S. Attorney

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[7]This description of the government's appeals process is based largely on the writings of Caplan (1987), Scigliano (1971), and Horowitz (1977), and on a number of personal communications between the author and Harriet Shapiro, who has served as an assistant to the solicitor general in that office since 1972 (Shapiro 1994a,b).

[8] In some instances, the direction of the court of appeals ruling vis-a-vis the government litigant may not be unambiguous; neither side may have achieved a clear "victory". A common example of this phenomenon involves federal criminal cases in which the convicted individual appeals both his or her conviction and some aspect of his or her sentence. In these circumstances, it is not uncommon for the court of appeals to uphold the conviction while, for example, striking down a district court judge's upward departure from the sentence suggested by the United States Sentencing Guidelines. Such situations, and others like them, occasionally give rise to cross-appeals on the part of the government; such appeals are handled in exactly the same manner as a clear ruling against the government.

or assistant U.S. Attorney who is responsible for the case.[9] This individual begins the appeal process by making an initial decision as to whether or not the government should pursue an appeal in that case, and, if so, how that appeal should be undertaken. In cases decided by the usual three-judge panel of the circuit court, the agency attorney or prosecutor has four options vis-a-vis the final disposition of the case.

Obviously, one possibility is that the government litigator may decide to forego any further action in the case, and simply allow the adverse ruling to stand. In such instances, the government bears the full costs of the adverse ruling, whatever they may be. Why would a government litigant choose not to appeal such a loss? One possibility is simply that the agent in question was satisfied that the loss was the correct outcome in the case. As former Solicitor General Simon Sobeloff once noted, "government lawyers, like those in general practice, may experience that marvelous adjustment of perspective which often comes to the most ardent advocate when he loses — that is, the realization that he really should have lost" (1955, 230). In other instances, agencies may recognize that the issue in a case will likely be relitigated in the future, so that final judgement is merely delayed rather than denied (Devins 1994).

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[9]In those divisions of the Department of Justice which have the power to file criminal prosecutions (e.g. Antitrust), criminal cases are typically handled by the division itself rather than the local U.S. Attorney.

All other options involve the government seeking to have the case reheard, with the hope that a more favorable outcome will be forthcoming. In some cases, for example, the government attorney may request that the case be reheard by the same three-judge panel. Should he or she decide to seek such a rehearing, it is not necessary for the agency or U.S. Attorney to receive clearance from the solicitor general in order to proceed with a request for a rehearing, though in a small number of cases the attorney does so anyway.[10]

A second appeal strategy is to request that the case be reheard *en banc*; i.e., by all active judges currently on that circuit.[11] The decision on the part of the circuit court to hold such an *en banc* rehearing is a discretionary one; while each individual circuit has its own rules regarding the granting of such rehearings, it is typical for the circuit to require that a majority of the active judges on the circuit vote in favor of the rehearing for it to be allowed. The success of such a request causes the decision of the three-judge panel to be vacated, and gives the government's position a rehearing before all the

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[10]Because under most circumstances these requests do not pass through the Office of the Solicitor General, however, I do not examine these requests for panel rehearings here.

[11]One prominent exception here is the Ninth Circuit, which since 1978 has been allowed to hold *en banc* rehearings before panels composed of the chief judge and ten randomly chosen active judges. Even there, however, a majority vote of the entire circuit is required before such a rehearing can proceed.

active judges on the circuit.

The final alternative is for the government litigant to ask that a petition for a writ of certiorari in the U.S. Supreme Court be filed. If such a petition is filed, a vote of four of the nine justices is required for the writ to be granted and the case to be heard by the Court. A writ of certiorari is the only appeal alternative remaining for the government in cases involving an unfavorable ruling by a circuit court sitting *en banc*, or in a case in which a petition for a rehearing *en banc* has been denied, or where direct appeal to the Supreme Court is mandated (e.g. in cases decided by three-judge district courts).

The decision of the agency or U.S. Attorney initially involved in the case, however, is only the first stage of the appeals process. As noted above, a request for a panel rehearing may be filed in the circuit court without the consent of the solicitor general's office. In all other instances, however, the agency counsel or U.S. Attorney forwards his or her recommendation on further action in the case to the appellate section of the appropriate division of the Department of Justice (DOJ). There are appellate sections in a number of the divisions of the Department of Justice, including the Antitrust Division, the Civil Division, the Criminal Division and the Tax Division. Each such section is responsible for handling the appellate litigation of its respective division, and each agency which conducts litigation in the federal courts must forward its requests for appellate review to one of these sections.

The Civil Division's appellate section is illustrative of these appellate sections more generally. The section was established in 1955 by Warren Burger, who was at that time the Assistant Attorney General in charge of the Civil Division. It was designed as a common clearinghouse for all appellate litigation arising in that division, and draws cases from all branches of the Civil Division. In 1996, the section consisted of 55 attorneys and a number of other administrative staff members, who are responsible for cases in the U.S. courts of appeals, including those coming directly from the various federal agencies, and in the U.S. Supreme Court (Report of the Attorney General 1996).

Case files are sent to the appellate section of the appropriate Justice Department division depending largely on the agency in which the litigation originated, and on the subject matter of the case. In antitrust cases, for example, it is the Antitrust Division of the Justice Department who is responsible for initiating litigation in the first instance; on appeal, antitrust cases are returned to the appellate section of the Antitrust Division for review. In cases where a government party outside one of the divisions initiated the litigation (e.g. one of the executive agencies), the subject matter of the case is controlling. Federal criminal cases, for example, which are initially prosecuted by the U.S. Attorneys, are referred to the Criminal Division's appellate section; tax cases begun by the Internal Revenue Service are referred to the Tax Division's appellate arm.

Once cases reach the appropriate appellate section, they are reviewed by the attorneys there. Appellate staff members examine the case record, the recommendation of the originating attorney, and the court of appeals' decision, and make their own recommendation as to the advisability of requesting a rehearing or appealing the case. Their options for appeal are, of course, the same as those available to the originating attorney, but their recommended course of action need not be the same. In fact, the differences between the perspectives of the U.S. or agency attorneys and the lawyers responsible for appeal recommendations in the Department of Justice can occasionally lead to disagreements over the advisability of an appeal being made in a given case.[12]

Following the review and recommendation of the DOJ appellate section, the case file, along with both recommendations, are transferred to the Office of the Solicitor General, who reviews the record and makes the final decision on whether or not to take any further action in the case. Accounts of exactly how the internal process of the solicitor general's office operates indicate that the process has remained remarkably stable over time. Writing nearly 40 years ago, one prominent former member of the Office stated that the recommendations are "reviewed by one of the solicitor general's lawyers, as well as by the First or Second Assistant", who either

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[12]I examine this possibility and its implications more fully in Chapter 4.

note their approval or make comments about the case, and then submit these recommendations to the solicitor general himself for final review (Stern 1960). More recently, veteran staffer Edwin Kneedler described the process thusly:

> "The case would be assigned to an assistant to the SG...who would write a memo assessing the pros and cons of the recommendation. Making a proposal of his own, he sent the memo to a deputy, who added his thoughts in a brief note that was sometimes handwritten on a modest slip of yellow paper. The memo and note went to the SG, who made a decision. If there was any disagreement about what to do, lawyers from the agency and division involved might be invited to a meeting with the assistant to the SG, the deputy, and, perhaps, the solicitor general, to resolve the case." (Caplan 1987, 211)

While the process has changed little over the past several decades, the same cannot be said for the extent of direct participation on the part of the solicitor general himself. While Stern and others suggested in past years that the solicitor general himself reviewed all appeal decisions, more recent SG's have suggested the that increasing workload of the office makes such personal attention impossible (Bork 1972). Under current practice, recommendations in which no further action is requested by both the originating entity and the appellate section of the Justice Department ("unanimous no's", in the parlance of the Office) are disposed of by one of the five Deputy Solicitors General; only in cases where an appeal is desired does the SG himself render the final decision (Shapiro 1994a).

In making the final appeal decision, the SG's office considers the

recommendations of both the originating entity and that of the DOJ's appellate section. As is the case with the Department of Justice, the solicitor general's office may in the end make any recommendation it sees fit. In a case in which an agency may wish to directly petition for certiorari, for example, the solicitor general may instead suggest a request for rehearing *en banc*, both to allow the court of appeals an opportunity to "correct itself" and, some would suggest, as a prelude to filing a petition for certiorari (Uelmen 1986).

In those instances where some further actions is authorized by the solicitor general, it is his office, in coordination with the other actors in the process, who typically handles the briefs, arguments, and other details of the appeal. This is emphatically the case for petitions to the U.S. Supreme Court, where the solicitor general's office is almost always responsible for the presentation of the government's case before the justices (Salokar 1992). Regardless of the decision made, however, the government litigant must live with the outcome, for the judgment of the SG regarding any appeal is final. While the Attorney General, or even the president himself, can in theory overrule the decision of the solicitor general, in practice such interventions into the appeal decisions of the SG's office have always been quite rare (Hearings 1987); moreover, an agency attempting to "go over the head" of a solicitor general runs the risk of having its future appeal requests received with less favor by the SG.

2.3 CONCLUSION

The government appeals process for adverse rulings in the federal courts of appeals is illustrated schematically in Figure 2.1. The process can be summarized as proceeding from the originating entity, through the Justice Department appellate sections, and culminating in the final appeal decision of the solicitor general. Every circuit court of appeals case in which some segment of the federal government is on the losing side goes through this process by which a decision on its appeal is made.

Critical to understanding the influence of this process on the flow of government appellate litigation is the sequential nature of the appeal decision mechanism. In the vast majority of cases, the appeal decision is made not through a collegial, deliberative process, but via a series of discrete choices made in successive stages. On one hand, these decisions are made in relative isolation from each other, and each decision maker is relatively free to make whatever suggestion he or she feels would best serve those interests s/he wishes to promote. On the other hand, the sequential character of the process means that each successive decision maker has the benefit of the decisions made previously by other actors.

The importance of this sequential aspect of the process becomes apparent when considered in light of the fact that the solicitor general is solely responsible for the final appeal disposition of the case. While this

might otherwise suggest that the SG's control over the appeal process is nearly total (and the process therefore largely uninteresting), in fact we will see in Chapter 3 that the solicitor general largely follows the recommendations of the originating entities and the appellate sections. The sequential nature of the appeal process, and the information that is consequently presented to the SG's office by the recommendations of the other participants in that process, allows the earlier decision makers exert real influence over the appeal decisions. I examine the extent of this influence in Chapter 3.

Figure 2.1: The Federal Government Appeals Process from the U.S. Courts of Appeals.

CHAPTER 3

GOVERNMENT APPEALS: A FIRST LOOK

As outlined in Chapter 2, the process by which the United States makes an appeal decision in court of appeals cases which are unfavorable to it is a sequential one. Following a loss in the circuit courts of appeals, cases move from the originating agency, through the various Justice Department appellate sections to the Office of the Solicitor General, where a final decision on appeal is reached. The apparent result of this process is that, in some cases, the government chooses to forego an appeal and allow decisions unfavorable to it to remain unappealed.

While the process itself is suggestive, however, information on the results of the government appeals process has, to this point, been relatively limited. In particular, while most scholars have a general sense that the United States appeals many fewer lost cases than it might, little analysis has been done to determine exactly how much restraint is exercised in the appeal process. Equally unclear is the locus of this restraint: are the agencies and federal prosecutors largely self-regulating in their appeals, or do the

appellate sections and/or the solicitor general act to prevent the courts from a flood of government appeals? Finally, while, as noted in Chapter 2, the potential for intragovernmental conflict in appeal recommendations certainly exists, there has been little research into the true extent of this conflict, or on its effects, if any, on the government's appeal decisions.

In this chapter I begin my empirical examination of the results of the federal government's appeal decision process. Here I show that, in addition to its sequential nature, the government's appeal mechanism may be accurately summarized as winnowing process. As the cases pass through the hands of each of the various individuals responsible for making the appeal decision, each decision maker in question has only a limited ability to a case is appealed, but near-total power to prevent such an appeal by offering a negative recommendation. The result, as one would expect, is that only a relatively small number of cases are finally appealed by the United States.

The chapter has two main parts. First, I examine the results of the federal government's appeal process vis-a-vis the Supreme Court, in terms of appeal rates, numbers of appeals, and success in having those appeals heard, for the period from 1925 to 1983. This historical overview provides establishes the context in which a more detailed analysis of discretionary government litigation in the Supreme Court can be placed. I go on to examine in greater depth the empirical results of this appeal process, using data on individual court of appeals cases in which the federal government

was a party during 1993 and 1994. These more detailed data allow me to examine each stage of the appeal process, and thus provide a more nuanced picture of the overall appeal decision. In particular, they show how the appeal process serves to systematically reduce the number of cases appealed by the government.

3.1 GOVERNMENT APPEALS TO THE SUPREME COURT, 1925-1983

I begin my examination of the government's appeal decisions by considering aggregate data on the government's activity in the U.S. Supreme Court in the years since passage of the Judiciary Act of 1925.[1] The effect of this Act was to make much of the Supreme Court's workload discretionary, by requiring that, in most instances, cases be brought to the Court by writ of certiorari. As a result, limiting the analysis of government appeals to the period following the Act aids in comparability with respect to success rates. In addition, I limit my analysis to petitions and appeals to the U.S. Supreme Court.[2]

The most basic question one might ask with respect to government

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[1]43 Stat. 937 (1925).

[2]The Department of Justice does not provide data for instances in which it authorized requests for *en banc* rehearings; I therefore limit my analysis in this section to petitions for certiorari. I address government requests for such rehearings of cases in section 3.2.

appeals of losses to the Supreme Court is how often such appeals occur. Figure 3.1 presents data on the number of petitions for certiorari and appeals filed by the United States during the period from 1925 to 1983. These data were collected from the United States Department of Justice's *Annual Report of the Attorney General* for various years.[3] The number of federal government petitions for certiorari during this period ranged from a low of 16 in 1927 to a high of 76 in 1937, with an average of 47.5 and a standard deviation of 14.0. Consistent with passage of the 1925 Act, appeals are seen to drop dramatically following the 1925 term; excluding 1925 and 1926, the number of government appeals varies from 2 in 1927 to 21 in 1952, averaging 10.9 per year with a standard deviation of 5.0. As a general rule, moreover, both levels of appeals and certiorari petitions have remained relatively stable overall; that is, there does not appear to be any trend, either upwards or downwards, in the frequency of government recourse to the Supreme Court.

The pattern of appeal behavior over this period is also informative. While numbers of appeals have remained relatively constant since 1927 or so, certiorari petitions have shown a substantial degree of variability over the

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[3]Beginning in 1985, the Department of Justice altered the format of the report, removing much of the information regarding government litigation during the previous year. Also, because of a change in the format of the *Report* between 1941 and 1952, no data are available for the 1941 and 1942 terms of the Court.

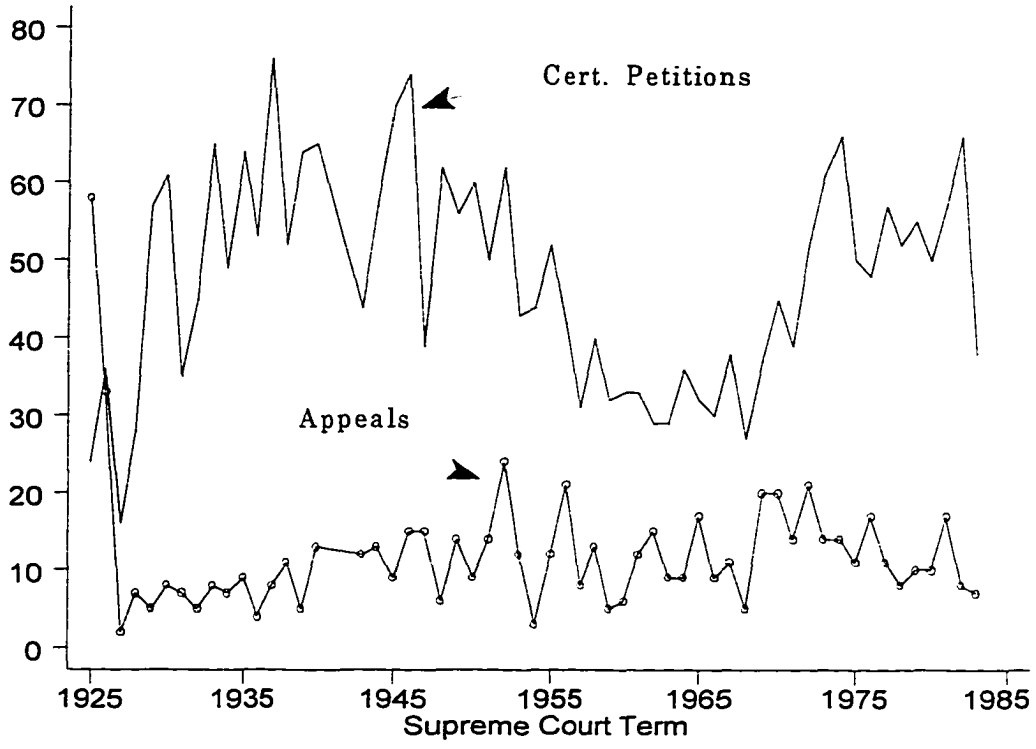

FIGURE 3.1: Number of appeals and petitions for certiorari filed by the United States in the U.S. Supreme Court, 1925-1983.

period. Numbers of petitions for certiorari are high from the Hoover to the Truman administrations, but appear to decrease during around the time of the election of President Eisenhower and the appointment of Earl Warren to the Court. They remain low during the presidencies of Kennedy and Johnson, then appear to rise again with the election of President Nixon, and remain consistently so through President Reagan's first term.

These patterns suggest that there is some systematic partisan element to the level of certiorari activity by an administration. While both high and low numbers of petitions have been made by both Democratic and Republican administrations, Republican-appointed solicitors general filed on average about 7.4 more petitions than did their Democratic counterparts, a significant difference ($t = 2.04$, $p<.05$, two-tailed). The implications of this result, however, are unclear; I return to this point later in the chapter.

The fact that overall activity has remained relatively constant is particularly intriguing in light of the general trend in federal court caseloads during the past century (e.g. Posner 1985). The upward trend in numbers of federal court cases is well documented, and this growth extends to cases involving the federal government. The general stability in numbers of appeal actions taken by the federal government thus points to a remarkable restraint on the part of the U.S. in bringing cases to the Court.

The restraint exercised by the United States in petitioning cases to the Supreme Court is reflected in the proportion of cases in which the

government declines to file such a petition. Figure 3.2 illustrates the proportion of cases in which the U.S. filed a petition for certiorari, out of all cases in which such a petition could have been filed, for the 1930-1940 and 1954-1983 terms of the Supreme Court.[4] In the pre-World War II period, the U.S. actually filed petitions for certiorari in about 19 percent of the cases in which it could have done so. Following the war, beginning in 1954, that level drops to around eight percent on average, ranging from a low of 5.4% in 1971 to a high of 11.4% in 1979. In each period the level remained relatively stable, though this is more true for the latter period than the former.

While the absence of data for the period during and immediately after the war necessitates speculation about the nature of the decrease in the rate of petitions during that period, one possible explanation takes into account the information presented in Figure 3.1. Note that during the 1941-1952 period, the frequency of certiorari petitions filed by the government, while varying substantially from year to year, did not increase or decrease systematically. Because the absolute *number* of petitions have remained relatively constant over the period in question, it is likely that the solicitor

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[4]As indicated in note 3, *infra*, data for the 1941-1953 terms are not available due to the change in format of the Attorney General's *Report*. Also, the total number of possible cases in which a petition for certiorari could have been filed was not reported for the 1967 term, or prior to 1930. Data on the rate at which potential appeals were brought is not examined here.

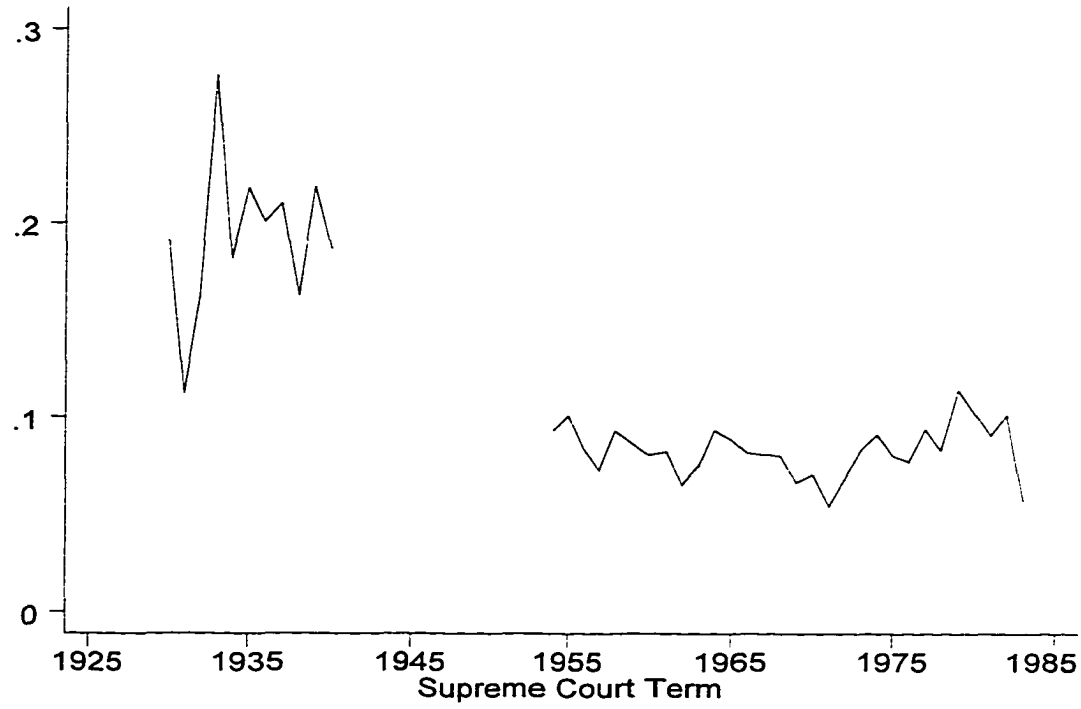

FIGURE 3.2: U.S. cases petitioned for certiorari, as a proportion of all potential cases, 1930-1940 and 1954-1983.

general, rather than maintaining a fixed *rate* at which petitions are brought, instead adjusts the rate so as to keep the absolute numbers of petitions stable from one term to the next.

The relative stability in the amount of federal government activity in the Court over time has a number of interesting implications, the most important of which goes to the nature of the relationship between the solicitor general and the Court. By keeping the overall number of certiorari petitions roughly constant, the solicitor general prevents the Court from being deluged from cases to which the government is a party. This reflects the position of the solicitor general as being accountable to both the executive and judicial branches, a fact which I explore in greater detail in Chapter 4. Moreover, as noted in Chapter 2, it is widely accepted that one result of this restraint is the United States' higher rate of success in having its cases heard by the Court. I investigate that possibility briefly here, and return to it in more detail in Chapter 7.

The proportion of cases in which the United States succeeded in having its petitions for certiorari granted, or having probable jurisdiction noted in cases on appeal, during the 1925-1983 terms[5] of the Court is illustrated in Figure 3.3. The general trend in acceptance rates of government appeals since 1950 has been downwards (see also Norman-Major 1994), though given

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[5]The Attorney General *Reports* do not provide data on success in cases brought to the Court on appeal prior to the 1950 Term.

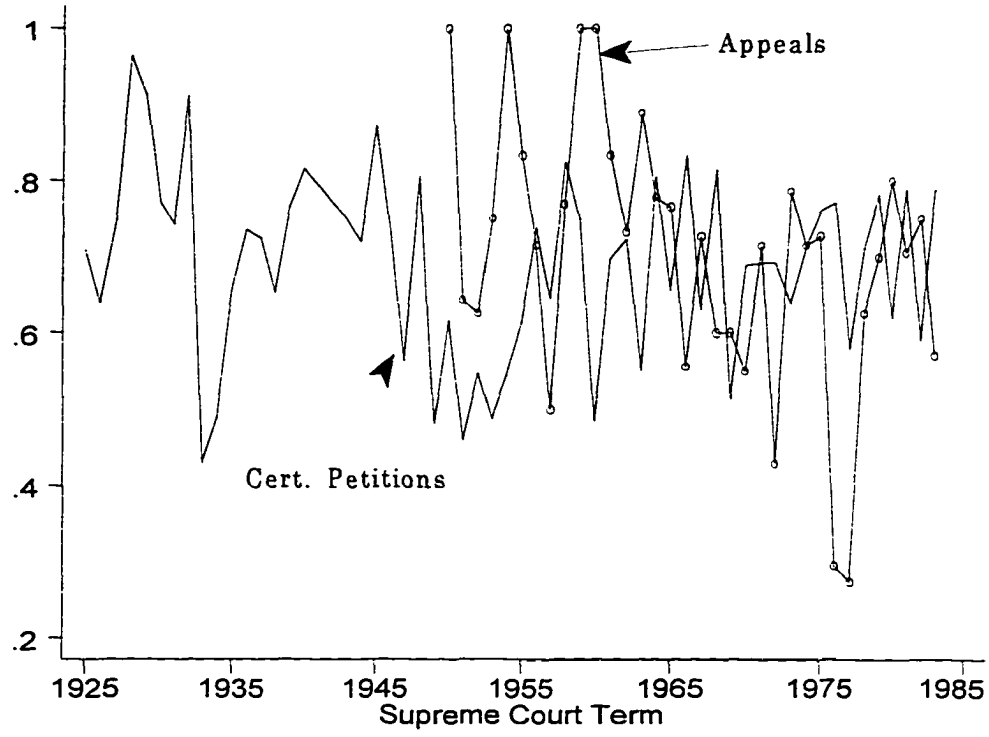

FIGURE 3.3: U.S. success on certiorari and appeal to the U.S. Supreme Court, 1925-1983. The figure illustrates the proportion of all cases petitioned or appealed by the United States which were granted or in which probable jurisdiction was noted, respectively.

the increasingly small role appeals have played in the composition of the Court's docket, the substantive significance of this decrease is slight. The United States' success in petitions for certiorari has, in contrast, remained relatively stable over the period. The government has averaged a 69 percent success rate in its petitions for certiorari, with year-to-year rates ranging from a high of 96.4% in 1928 to a low of 43.1% in 1933.[6] As has been noted extensively elsewhere, this rate is substantially greater than that achieved by private litigants; such parties achieve success in only about one to three percent of petitions filed (e.g. Stern 1960; Jenkins 1983; Norman-Major 1994).

Unlike rates of petition, success rates do not seem to be tied to the partisanship of particular administrations; a t-test of means in success rates by Republican versus Democratic administrations indicates no statistically significant difference in mean success rates (t = -1.07, p = 0.29, two-tailed). Nor is it the case that success on certiorari is related to the degree of selectivity exercised by the solicitor general in bringing cases to the Court; neither the rate of certiorari petitions nor the absolute number of petitions filed are significantly correlated with grant rates (r = -0.09 and -0.05, respectively). One could, of course, speculate at length about possible explanations for the variation in government success at having its petitions

[6]This rate is very much in line with those reported in earlier studies, e.g. Baum 1995, Clayton 1992, Lochner 1994, Schnapper 1988, and Salokar 1992.

for certiorari granted by the Court; here I choose to reserve that more detailed examination of the aggregate data for future work.

This preliminary examination of the aggregate trends in federal government litigation in the Supreme Court establish here what has long been recognized elsewhere: that as a litigant in the Court, the United States is both highly selective in the cases it takes to the Court and highly successful in having those cases accepted for review. What is less clear from these data, and what therefore makes up the next object of inquiry, is how the appeals process described in Chapter 2 relates to the outputs observed. To examine that link, we must turn to a closer examination of the federal government's appeals decisions in the cases themselves.

3.2 U.S. APPEALS 1993-94: A DETAILED ANALYSIS

Given the federal government's process for handling unfavorable court of appeals decisions, what are its results? That is, how do the individual decisions made by the various actors in specific cases translate to the overall picture presented above? To relate the process to its results, and thus begin to answer these questions, it is necessary to move from aggregate analysis to a more detailed examination of individual cases in which the United States must take on the decision to appeal.

I continue my examination of the government appeals process by

exploring data on the federal government's appeal decisions themselves during two recent years. The data examined here were obtained from Harriet Shapiro, senior Assistant to the Solicitor General in the United States Department of Justice, Office of the Solicitor General. These data represent the universe of federal court cases on which the Office of the Solicitor General took some action during calendar years 1993 and 1994, and were procured via a computer search of the internal records of the solicitor general's office. The data represent a wide range of cases, but consist primarily of cases decided by the various federal district courts and circuit courts of appeals in suits to which the government was a party. Also included in the data, however, are cases in which one or both parties of a private suit requested that the Office of the Solicitor General file an *amicus curiae* brief, either at the court of appeals level or in the Supreme Court, as well as those cases in the latter forum which the SG elected to file a brief due to interest in the case. Because of my focus on the government's appeal decisions in government losses in the U.S. courts of appeal, however, I limit my analysis here to those cases in which action was taken on a decision rendered in the U.S. circuit courts.

As they were received from the Office of the Solicitor General, the data used here contain information on the name of the case, the recommendation made by the relevant Justice Department appellate section, and the final action taken by the solicitor general's office. In addition, the date on which

final action was taken is reported, as well as the individual member of the SG's office for making the final decision with regard to the disposition of the case, and the capacity in which s/he was acting when that decision was made. The total number of such cases during calendar years 1993-1994 is 2161, 1014 during 1993 and 1147 during 1994. A complete description of these data as they were received from the Office of the Solicitor General is presented in Appendix A.

The distribution of actions in cases in which the U.S. lost in the court of appeals over the two-year period is presented in Figure 3.4. The SG's office handled an average of 95.5 such cases per month in 1994, compared with 84.5 cases per month in 1993. The change in these figures between years is likely the result of increasing caseloads in the federal courts during this period (e.g. "Caseload of Federal Courts Remained High in FY94" 1995). There is no clear chronological pattern to the cases; while there seems to be a consistent increase in activity during the month of August, and a general decline during the months of October through December, the solicitor general's office handles cases at a fairly consistent rate throughout the course of the calendar year. This consistency is undoubtedly due in large part to the time constraints placed on the office by the rules for appeal; most requests for rehearing *en banc* must be handled within 10 days, while most petitions for certiorari have a 90 day turnaround period (Shapiro 1994b).

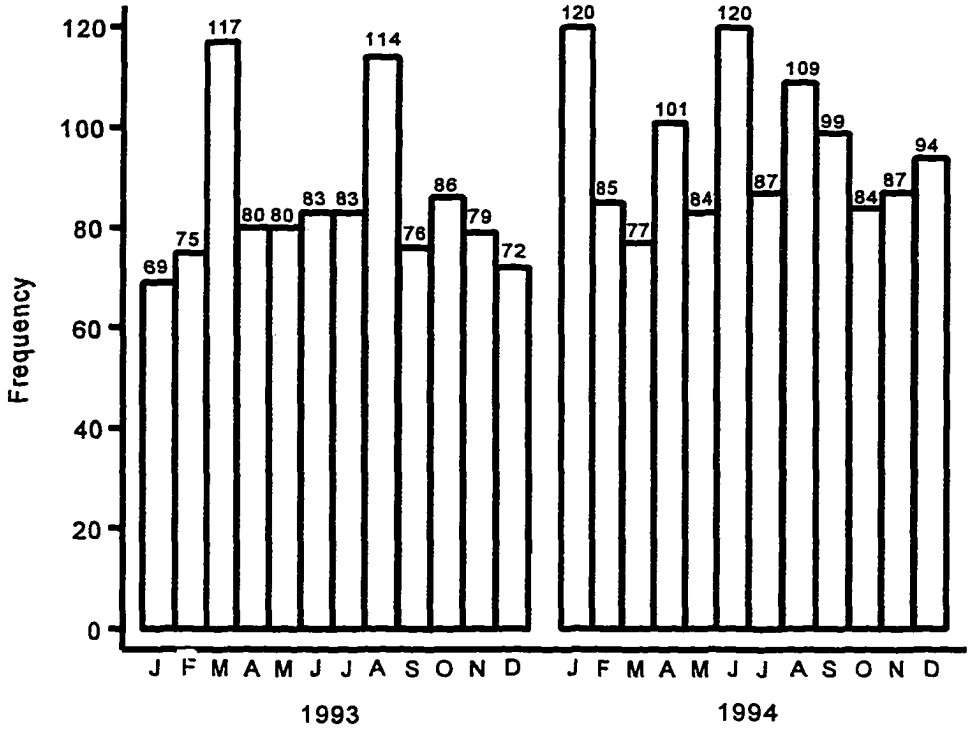

Figure 3.4: Solicitor general actions in unfavorably-decided court of appeals decisions by month and year, 1993-94.

To analyze the process by which government appeals decisions are made, I examine these data for the recommendations and actions made by each of the three primary participants in that process: the originating agencies, the Justice Department appellate sections, and the Office of the Solicitor General. By tracing each case through this process, we may begin to understand more fully how government appeal decisions are made.

3.2.1 APPEAL RECOMMENDATIONS BY THE ORIGINATING ENTITY

In analyzing government appeals during the 1993-94 period in greater detail, I begin at the beginning: by examining the recommendations of the originating attorneys on whether or not to appeal the case. The originating agency makes the initial recommendation about what further action, if any should be taken in the instant case. This initial stage of the appeal process is thus the logical starting point for an inquiry into the larger appeal decision.

As noted above, the originating agency is free to recommend any course of action with respect to appeal he or she sees fit. However, the data provided by the Office of the Solicitor General and analyzed here do not explicitly state the position taken with respect to an appeal by the originating attorney or agency. Based on information contained in the data, however, it is possible to make some limited inferences about those recommendations just the same. As discussed previously, "unanimous no's"

(cases in which both the originating entity and the appellate section agree should not be appealed), are routinely handled by one of the deputy solicitors general. Cases in which there is some disagreement between the originating attorney and the Justice Department, as well as cases in which both parties recommend some further action be taken, receive direct scrutiny by the solicitor general himself (Shapiro 1994a). Because of this fact, it is possible to use the information on who in the solicitor general's office was responsible for the final disposition of the case to make a limited inference about which cases were recommended for appeal by the originating entity.[7]

To accomplish this, I begin by assuming that the Justice Department appellate sections will not recommend an appeal in a case in which the originating attorney or agency does not wish one to occur. While this may not be perfectly accurate, it is almost always the case that, for a number of reasons, the DOJ will defer to the originating body's judgement when no appeal is requested (see e.g. Brigman 1966, Horowitz 1977 and Chapter 4, *infra*). Thus, for our purposes, all cases in which the Justice Department requested some further action may also be considered cases in which the originating entity requested such action in the first instance.

In cases in which the Department of Justice appellate sections did not

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[7]This information does not, however, allow us to determine the kind of appeal requested; i.e., whether the originating agency requested a rehearing *en banc* or a petition for certiorari to the Supreme Court.

request further action, it is still possible that the originating entity asked that an appeal effort be made. In cases where this occurred, the case would arrive in the solicitor general's office with conflicting recommendations by the two other relevant actors. As a result, the final disposition of the case would be made by the solicitor general himself. In contrast, cases in which both the agency or U.S. attorney and the appellate section recommended no further action are, as noted previously, disposed of by one of the deputy solicitors general.

Cases are treated as having been recommended for further action by the originating entity, then, if one of two conditions were met: either (1) the Department of Justice recommended some further action be taken, or (2) no such recommendation was made, but final disposition of the case was at the hands of the solicitor general or acting solicitor general himself. In the latter instance, action by the SG indicates the lack of a "unanimous no", and is therefore an indication that the originating entity requested an appeal be made.[8]

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[8]There are two obvious problems with this means of arriving at data on the recommendations of the originating agency. The first is that it assumes that the Justice Department only recommends appeals in cases where the originating entity requests it. This is likely a minor problem; as will be discussed more fully below, the nature of the appellate sections is such that there will be very few cases in which the DOJ will press for an appeal against the wishes of the originating agency.

The second, and potentially more serious, problem is that it assumes that the solicitor general handles only non-"unanimous no" cases, and that the deputies deal only with cases in which a "unanimous no" was present. The

An examination of the 2161 cases handled by the Office of the Solicitor General during the 1993-94 period indicates that 1355, or 62.7 percent, received positive appeal requests of some kind from the originating entity; correspondingly, there were 806 cases (37.3 percent) in which no appeal request was forthcoming. Thus, originating agencies asked that nearly two-thirds of all unfavorable court of appeals decisions be appealed to some higher authority. While the absence of more detailed data prevents us from a more thorough inquiry into the specific kinds of appeal requests made (e.g. suggestions for rehearings, requests for petitions for certiorari, etc.), the data are informative nonetheless. In particular, they suggest that the originating attorneys are requesting appeals in cases at a much higher rate than they would expect to be successful. Rather than limiting their own requests, agencies appear to depend on the other participants in the appeal decision process to do much of the screening of cases for appeal.

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second of these is emphatically true; only the SG himself deals with non-"unanimous no's". It is possible, however, that he or she may also take final action in some "unanimous no" cases as well; if this were true, it would have the effect of artificially inflating the number of cases in which requests for appeal were made by the originating agency. This is particularly likely to have occurred during the first six months of 1993, at which time William Bryson, a veteran deputy solicitor general, was serving as acting solicitor general prior to Senate confirmation of Drew Days III. Because of this possible discrepancy in the data, care should be taken in interpreting the results regarding appeal requests by originating agencies; I also limit my analyses of these data to descriptive statistics, and focus in Chapters 5 and 6 on the decisions of the Department of Justice and the solicitor general, for which more reliable data are available.

Month of Action	Originating Entity's Appeal Recommendation Rate	
	1993	1994
January	56.5 (69)	59.2 (120)
February	85.3 (75)	24.7 (85)
March	70.1 (117)	46.8 (77)
April	88.8 (80)	76.2 (101)
May	91.3 (80)	33.3 (84)
June	100.0 (83)	74.2 (120)
July	86.8 (83)	69.0 (87)
August	94.7 (114)	47.7 (109)
September	38.2 (76)	17.2 (99)
October	79.1 (86)	64.3 (84)
November	70.9 (79)	37.9 (87)
December	79.2 (72)	16.0 (94)
Total	79.1 (1014)	48.2 (1147)

Table 3.1: Originating entity appeal request rates, all court of appeals cases, 1993-94. Cell entries are percentages of cases in which the originating entity requested further action be taken in a case; numbers in parentheses are total numbers of cases for that month and year from which the percentages are computed.

Another interesting finding is that there appear to be significant differences in the rate of originating appeal requests over time. In particular, the appeal request rate by originating agencies was significantly higher in 1993 than in 1994. Originators favored additional action 79.1 percent of the time in 1993, compared with just 48.2 percent of the time in 1994 (χ^2=219.45, $p < .001$). In addition, we see substantial variation in the rate of appeals on a monthly basis. As indicated in Table 3.1, appeal request rates appear to increase during the early months of 1993, decline slightly towards the end of that year, and drop even further (with occasional increases) during 1994.

One potential explanation for this pattern(a pattern which is repeated in the Justice Department; see sections 3.2.2 and 3.3 below) is that the early months of the Clinton administration saw a dramatic turnover in administrative agency personnel and U.S. Attorneys. The effect of these new personnel on the appeal rate was a dual one. On one hand, their unfamiliarity with the appeal process may have led them to overambitious attempts at seeing their policy concerns enacted through appellate litigation. Once it became apparent after several months that not all of their appeal requests would be accommodated by the solicitor general, they began to be more selective in their appeal requests.

The effect of this initial unfamiliarity was undoubtedly exacerbated by the shift in the policy preferences of the individuals and agencies making the recommendations themselves. In taking over after twelve years of

Republican control of the bureaucracy, the Clinton administrative team made major shifts in the policies espoused by the various agencies. Likewise, Clinton-appointed U.S. Attorneys held, for the most part, a different set of priorities with respect to criminal prosecutions than did their Reagan- and Bush-appointed predecessors. The Justice Department itself, in a prominent obscenity case, reversed its position from that which it had espoused under President Bush (Greenhouse 1993). This shift in the agenda was undoubtedly reflected to some degree in appeal requests as well; different factors were considered important by the new administration, and shifts in policies led to increases in the rate of appeals in the short term.[9]

While only suggestive, then, examination of the data on appeal recommendations by the originating agencies nonetheless illuminates some important aspects of agency behavior in litigation. Agencies and U.S. Attorneys request appeals in a high proportion of cases in which they lose in

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[9]The change in appellate litigation tactics due to shifts in policy preferences following the 1993 change in administration certainly bears further investigation. Nevertheless, two factors prevent me from doing so here. First, as mentioned above, there is the uncertain quality of the data on the appeal requests of the various originating attorneys. Second, and more important, is the lack of data on such requests prior to the change in administration. The data currently available begin January 1, 1993, and thus contain only twenty days (and likely twenty highly unrepresentative ones) of appeal requests under the Bush administration. Acquisition of data from calendar year 1992 (or some other earlier period) would be necessary for any thorough examination of changes in litigation policies due to administrative shifts to be undertaken; I plan to investigate this possibility in future work.

the circuit courts. Moreover, it appears that the rate of these appeals is somewhat variable over time, and appears to be responsive to some extent to changing conditions in the administration. I return to the issue of agency appeals in Chapter 4; next I examine the following phase of the appeal process, the action of the Justice Department appellate sections.

3.2.2 DEPARTMENT OF JUSTICE APPEAL RECOMMENDATIONS

Following promulgation of an appeal recommendation by the originating agency, each possible case in which an appeal request could be made is subsequently forwarded to the appellate section of the appropriate Justice Department division for review. As is the case with the originating entity, the Department of Justice may suggest any of a number of different actions be taken in the case with respect to its appeal. During 1993-94, these appellate sections handled a total of 2161 cases from the courts of appeals.

The institutional position of the appellate sections within the appeal process suggests something about the character of their actions in making appeal recommendations. Because of its intermediate position between the agencies or U.S. Attorneys and the solicitor general's office, for example, the Justice Department must rectify the competing goals of the two other

actors.[10] Furthermore, as the second stage of the appeal decision process, the appellate sections act as another layer of "screening", and serve the purpose of further reducing the volume of cases receiving approval for appeal.

The actions taken by the Justice Department appellate sections in cases to which the U.S. was a losing party in the courts of appeals during 1993 and 1994 are presented in Table 3.2. The first four categories comprise the bulk of negative recommendations (i.e., those in which no further action is recommended); the combination of these recommendations accounts for 61.9 percent of all cases in the two year period. In contrast to the results presented in Table 3.1, we see that the Justice Department appellate sections are substantially more likely to "weed out" cases for appeal than are the originating agencies. Whereas the latter suggested appeal in two out of three possible cases, the former's appeal rate is almost exactly the opposite of this, an indication that the appellate sections are appreciably more selective in their recommendations than the originating entities.

Also interesting are the kinds of recommendations made by the appellate sections. For both years combined, requests for rehearings *en banc*[11] made up the bulk of positive appeal suggestions; 59.4 percent

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[10]I return to this aspect of DOJ appeals decision making in Chapter 4.

[11]In the vast majority of circumstances, an appellate section recommendation of "Rehearing" refers to a request for a rehearing *en banc*; I distinguish the two categories here only because both appellations appear in the internal documents of the solicitor general's office.

DOJ Recommendation	1993	1994	Total
No Rehearing	227 (22.39)	457 (39.88)	684 (31.67)
No Certiorari	146 (14.40)	329 (28.71)	475 (21.99)
No Appeal	6 (0.59)	4 (0.35)	10 (0.46)
No Review	48 (4.73)	120 (10.47)	168 (7.78)
Rehearing	328 (32.35)	140 (12.22)	468 (21.67)
Rehearing En Banc	9 (0.89)	12 (1.05)	21 (0.97)
Certiorari	198 (19.53)	72 (6.28)	270 (12.49)
Appeal	4 (0.39)	1 (0.09)	5 (0.23)
Review	48 (4.73)	11 (0.96)	59 (2.73)
Withdraw	0 (0.00)	1 (0.09)	1 (0.05)
Total	1014 (100.0)	1147 (100.0)	2161 (100.0)

Table 3.2: Department of Justice appellate section recommendations, all court of appeals cases, 1993-94. Cell entries are numbers of cases receiving each type of recommendation; numbers in parentheses are column percentages.

(489/823) of the appellate sections' appeal recommendations took the form of *en banc* requests, compared to 32.8 percent for certiorari petitions. This nearly two-to-one favoring of *en banc* requests by the appellate sections suggests that the DOJ may be looking forward to the likelihood of review when making its appeal recommendations. I return to the issue of appellate section appeal strategies in Chapter 6.

A third aspect of the Justice Department's recommendations apparent from Table 3.2 is that the appellate sections' tendency to reject requests for additional actions was not consistent across the two years examined. Negative recommendations comprised only 42.1 percent of all cases in 1993, while making up 79.3 percent in 1994; conversely, 57.9 percent of cases received favorable recommendations for appeal in 1993, compared to just 20.7 percent in 1994. Between the two years, recommendations for rehearings and certiorari petitions comprised the largest decrease in numbers, while recommendations for "no review" and "no certiorari" doubled and those suggesting "no rehearing" increased substantially. Overall, the difference in the rate of recommendation for further action was significant across the two years (χ^2=317.79, $p < .001$).

This large drop in the number and rate of appeal recommendations between 1993 and 1994 suggests that the various Justice Department divisions were undergoing a similar change as those seen above in the federal agencies and U.S. Attorney's offices. The combination of changes in

personnel and shifts in the substantive positions taken by the various divisions likely led to overall higher rates of positive appeal recommendations during 1993 than in 1994.

This examination of appellate section appeal recommendations illustrates a number of important aspects of the larger appeal process. Probably most obvious is that the Justice Department, as we might expect, acts to filter out cases for appeal. Because the appeal rate of this section is just over half that of the originating agencies, it is clear that the Justice Department acts as a brake on appeals by those agencies. Moreover, the DOJ makes a far greater number of recommendations for *en banc* rehearings than for certiorari petitions. As with the originating entities, however, it is also the case that the appellate sections' appeal recommendations are to some degree influenced by external factors related to the administration; rates of appeal varied significantly across the two years observed. I return to the matter of Justice Department recommendations in section 3.3.; next I turn to the final appeal decision of the solicitor general.

3.2.3 ACTION BY THE OFFICE OF THE SOLICITOR GENERAL

As noted in Chapter 2, all federal government losses arising in the circuit courts of appeal must pass through the Office of the Solicitor General, and the occupant of that office makes the final and ultimately dispositive

decision regarding the appeal of all cases which come before it. Because of this fact, the SG's office has been described as the "base of a funnel" (Geller, quoted in Jenkins 1983); it is the last stop before a case goes before a full circuit or the Supreme Court.

The actions taken by the Office of the Solicitor General in cases involving federal government losses in the courts of appeals during 1993 and 1994 are presented in Table 3.3. As in Table 3.2, the first several categories represent the bulk of negative recommendations: cases in which the solicitor general chose to let the decision of the lower court stand. For both years, positive appeal outcomes (i.e., those in which the solicitor general took some further action be taken in a case[12]) were made in only 234 cases, or 10.8 percent of the total. This number represents only about one third of the number of cases in which the Department of Justice appellate sections recommended an appeal,[13] and only one sixth of the number of cases in which an appeal request was made by the interested agency. Moreover, in contrast to the results in Tables 3.1 and 3.2, the level of appeals made by the solicitor general's office remained relatively constant across the two years for which

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[12]These include the categories "panel rehearing", "rehearing en banc", "certiorari", "appeal", "review", "rehearing en banc, no certiorari", "interlocutory appeal", "certiorari with request to vacate and remand", "certiorari with request for summary reversal", "certiorari contingent on outcome of panel rehearing", and "certiorari and hold for later case".

[13]I examine the correspondence between DOJ recommendations and the final actions of the solicitor general in section 3.3 below.

Solicitor General's Action	1993	1994	Total
No Rehearing	68 (6.71)	131 (11.43)	199 (9.21)
No Rehearing, No Certiorari	524 (51.68)	508 (44.33)	1032 (47.78)
No Certiorari	288 (28.40)	386 (33.68)	674 (31.20)
No Review	8 (0.79)	1 (0.09)	9 (0.42)
No Further Review	1 (0.10)	0 (0.00)	1 (0.05)
Panel Rehearing	1 (0.10)	1 (0.09)	2 (0.09)
Rehearing En Banc	85 (8.38)	73 (6.37)	158 (7.31)
Certiorari	24 (2.37)	31 (2.71)	55 (2.55)
Appeal	0 (0.00)	1 (0.09)	1 (0.05)
Review	8 (0.79)	5 (0.44)	13 (0.60)
Rehearing En Banc, No Certiorari	1 (0.10)	0 (0.00)	1 (0.05)
Partial Acquiescence to Certiorari	0 (0.00)	1 (0.09)	1 (0.05)
Waive Right to File Response to Petition for Certiorari	0 (0.00)	1 (0.09)	1 (0.05)
Moot	1 (0.10)	1 (0.09)	2 (0.09)
Interlocutory Appeal	1 (0.10)	0 (0.00)	1 (0.05)

Solicitor General's Action	1993	1994	Total
Certiorari with Request to Vacate and Remand	1 (0.10)	0 (0.00)	1 (0.05)
Amicus Participation in Support of Certiorari	1 (0.10)	0 (0.00)	1 (0.05)
Certiorari with Request for Summary Reversal	1 (0.10)	0 (0.00)	1 (0.05)
Withdraw Appeal	0 (0.00)	1 (0.09)	1 (0.05)
Certiorari Contingent on Outcome of Panel Rehearing	0 (0.00)	1 (0.09)	1 (0.05)
No Acquiescence and No Change of Position on Reviewability	1 (0.10)	0 (0.00)	1 (0.05)
Withdraw Petition for Review	0 (0.00)	1 (0.09)	1 (0.05)
No Action Required	0 (0.00)	1 (0.09)	1 (0.05)
Protective Motion for Divided Argument	0 (0.00)	1 (0.09)	1 (0.05)
Removed	0 (0.00)	1 (0.09)	1 (0.05)
Certiorari and Hold for Other Case	0 (0.00)	1 (0.09)	1 (0.05)
Total	1014 (100.0)	1147 (100.0)	2161 (100.0)

Table 3.3: Actions taken by the Office of the Solicitor General in court of appeals cases, 1993-94. Numbers in parentheses are column percentages.

we have data. Positive appeal decisions were rendered in 121 cases (11.9%) during 1993, compared to 113 cases (9.9%) in 1994; a difference which fails to reach statistical significance (χ^2=2.41, $p > .10$).

In examining the actions taken by the solicitor general's office in cases during 1993 and 1994, another aspect of the SG's role in the appeal process becomes apparent. In addition to deciding cases, it is the prerogative of the solicitor general and his staff to draft briefs and present arguments in cases which are ultimately appealed. The combination of the SG's role as final appeal decision maker and advocate renders that office with unparalleled flexibility in the manner in which cases are handled on appeal, a fact reflected in the proliferation of ways in which the SG's office took action in cases coming before it. Table 3.3 illustrates the fact that the solicitor general can adapt his appeal strategy to fit the specifics of the myriad cases which come before him. For example, the Office may decide, as did Solicitor General Drew Days in *Mother Frances Hospital v. Shalala*[14], to petition for certiorari in a case knowing that a "better" case[15] involving the same issue was either already or soon to be before the Court. Likewise, the solicitor general may make his certiorari petition contingent on some other event, or

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[14]34 F3d 305 (5th Circ. 1994).

[15]In this instance, *Guernsey Memorial Hospital v. Shalala*, 996 F2d 830 (6th Circ. 1993); I address the issue of what constitutes a "better case" more generally in Chapter 4.

may request that the Court take some action (e.g. summary reversal) in addition to granting certiorari. This flexibility is undoubtedly at least somewhat responsible for the SG's remarkable success on appeal.

In addition to information concerning the disposition of these cases on appeal, data obtained from the Office of the Solicitor General also contains information on the individual within the office responsible for making the appeal decision in each case. This information thus provides some further insight into the functioning of the office, and in particular how appeal decisions are routinely handled. A summary by year of the number of cases handled by each of the individuals in the SG's office during 1993 and 1994 is presented in Table 3.4. In viewing these statistics, it is most important to remember that these data include only cases arising out of the U.S. courts of appeal, and then only those in which the United States has lost. In many instances, staff members who appear to handle few appeals are in fact responsible for the other business of the office: appeal decisions arising in the federal district courts, responding to appeals and certiorari petitions filed by opponents of the United States, and working with other attorneys in the Department of Justice in composing briefs and conducting litigation.

The data presented in Table 3.4 suggest that the solicitor general himself is directly involved in roughly 20 percent of the cases handled by the office. While the rate of participation by Drew Days III in 1993 was lower than this, it must be remembered that he did not take office until mid-year,

Party Responsible for Decision on Final Solicitor General Action	1993	1994	Total
Kenneth Starr	3 (0.30)	0 (0.00)	3 (0.14)
Drew Days, III	150 (14.79)	234 (20.47)	384 (17.80)
William Bryson	600 (59.17)	244 (21.37)	844 (39.15)
Paul Bender	17 (1.68)	86 (7.53)	103 (4.78)
Edwin Kneedler	70 (6.90)	158 (13.84)	228 (10.58)
Maureen Mahoney	31 (3.06)	0 (0.00)	31 (1.44)
Lawrence Wallace	125 (12.33)	120 (10.51)	245 (11.36)
Jeffrey Miniear	2 (0.20)	211 (18.48)	213 (9.88)
Christopher Wright	12 (1.18)	0 (0.00)	12 (0.56)
John Roberts	4 (0.39)	0 (0.00)	4 (0.19)
Michael Dreeben	0 (0.00)	90 (7.88)	90 (4.17)
Total	1014 (100.0)	1143 (100.0)	2157 (100.0)

Table 3.4: Identity of the individual responsible for the solicitor general's final appeal decision in court of appeals cases, 1993-94. Numbers in parentheses are column percentages. Four cases contained missing data in this field.

and assumed a very active role immediately upon his confirmation. Also, the SG is involved in cases being appealed from the district courts to the courts of appeal, as well as in drafting and presenting arguments in the Supreme Court; it is therefore clear that the SG maintains a prominent role in the operation of the office.

A large part of the routine business of handling appeals is seen to be conducted by the deputy solicitors general: during 1993-94, these individuals were William Bryson, Paul Bender, Edwin Kneedler and Lawrence Wallace.[16] Together these four individuals were responsible for the appeals decisions in 1420 cases (65.8 percent) which passed through the SG's office during the two year period under study, illustrating the central role of the deputies in the appeal management of the office.

This analysis of the appeal decisions of the solicitor general's office allows us to draw a number of conclusions. The selectivity of the solicitor general in making appeals is clearly apparent in the figures reported here; the SG's office acts as the final brake on appeals in government losses, and only a small number of such losses are authorized for appellate review.

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[16]As noted previously, William Bryson also served as acting solicitor general for the first several months of the Clinton administration. Thus, unlike the other DSG's, a number of cases in which Bryson made the final appeal decision were not "unanimous no" recommendations. Upon William Bryson's appointment to the Court of Appeals for the Federal Circuit in September 1994, former assistant to the solicitor general Michael Dreeben was promoted to deputy solicitor general.

Additionally, unlike the agencies and the Justice Department, the solicitor general's office maintained a good deal of consistency in the number of such authorizations over the two years studies. In this respect, the SG's office appears to be less responsive to changes in the administration than the other entities involved in the appeal process.[17] Finally, data on the internal operation of the SG's office indicates that there is a good deal of decentralization in how it makes appeal decisions. While the solicitor general himself is responsible for many of the appeals, this work is also delegated in many instances to the deputy SG's.

3.3 EVALUATION AND CONCLUSION

The data presented in sections 3.1 and 3.2 paint a picture of the appeals process in the U.S. government in recent years. As has long been understood, the U.S. is very selective in the cases it chooses to pursue on appeal. Furthermore, that selectivity is accomplished by a series of stages, each to a large extent narrowing the field of cases for possible review. The result is that the United States appeals only a fraction of the total number of cases it could.

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[17] This in turn supports the widely-asserted notion that the solicitor general is allowed to act independently from political concerns in the administration, a point I address more fully in the next chapter.

In concluding this initial look at the appeal decisions of the federal government, it is informative to look at the entire process. I do this by first examining the overall patterns of appeals and appeal requests made by the various actors, looking at the degree of "winnowing" that the appeal process achieves. I go on to examine the effect of the month-to-month variations in the appeal request rates on the overall decisions of the government to appeal cases. These two different views of the relationship between the solicitor general, who makes the final decisions in such cases, and the other actors in the appeal process, illustrate the duality of their relationship: on one hand, the substantial deference given by the solicitor general to the appeal recommendations of the originating agents and the DOJ, on the other, the ability of the SG, when necessary, to maintain its independence from those other actors.

To assess the overall performance of the federal government's appeal process, I choose initially to focus only on the decision to take some further action in a case. Figure 3.5 presents frequencies for the various actions taken by the Office of the Solicitor General in cases to which the federal government was a party during calendar years 1993-94. Of the 2161 cases, the originating attorneys asked that an appeal be made in 1355, or 62.7 percent. Of these, the Department of Justice appellate sections recommended

that some form of further action be taken in 823, or 60.7 percent.[18] Of these, 494 (60.0 percent) were requests for en banc rehearings, while 329 (40.0 percent) were recommendations for certiorari.[19] That recommendations for certiorari by the Department of Justice represent only twelve percent of the total number of possible appeals which could be brought by the U.S. indicates to some extent the selectivity with which the government considers its appeals.

This selectivity is further reflected in the decisions of the solicitor general. Of those 823 cases which the Department of Justice recommends for further action, the SG agreed to take further action in only 230 (or 27.9 percent) of them. The odds are even lower for cases which receive a negative recommendation from the Department of Justice: in only nine out of 1338 such cases (0.7 percent) did the SG agree to take further action against the suggestion of the Department of Justice.[20]

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[18]Recall that, by construction, cases in which the originating agency did not request an appeal also received a negative recommendation by the DOJ; see note 7 and accompanying text *infra*.

[19]Cases in which "Appeal" was recommended are treated as requests for *en banc* rehearings; those in which "Review" was suggested as requests for certiorari. See Table 3.2 for details.

[20]Of the nine, five resulted in petitions for certiorari and four in requests for *en banc* rehearings. The nine cases were *United States v. John Fred Woolard and Dempsey A. Bruner, U.S. v. Pedro Alvarez-Sanchez, U.S. v. Romeo T. Flores, Jr., National Treasury Employees Union, et. al. v. U.S., Adolph Coors Co. v. Lloyd Bentsen, et. al., Demjanjuk v. Petrovsky, Elliot v. U.S., U.S. v. Thekkedajh Peethamb Menon*, and *Zika K. Koray v. Frank Sizer*.

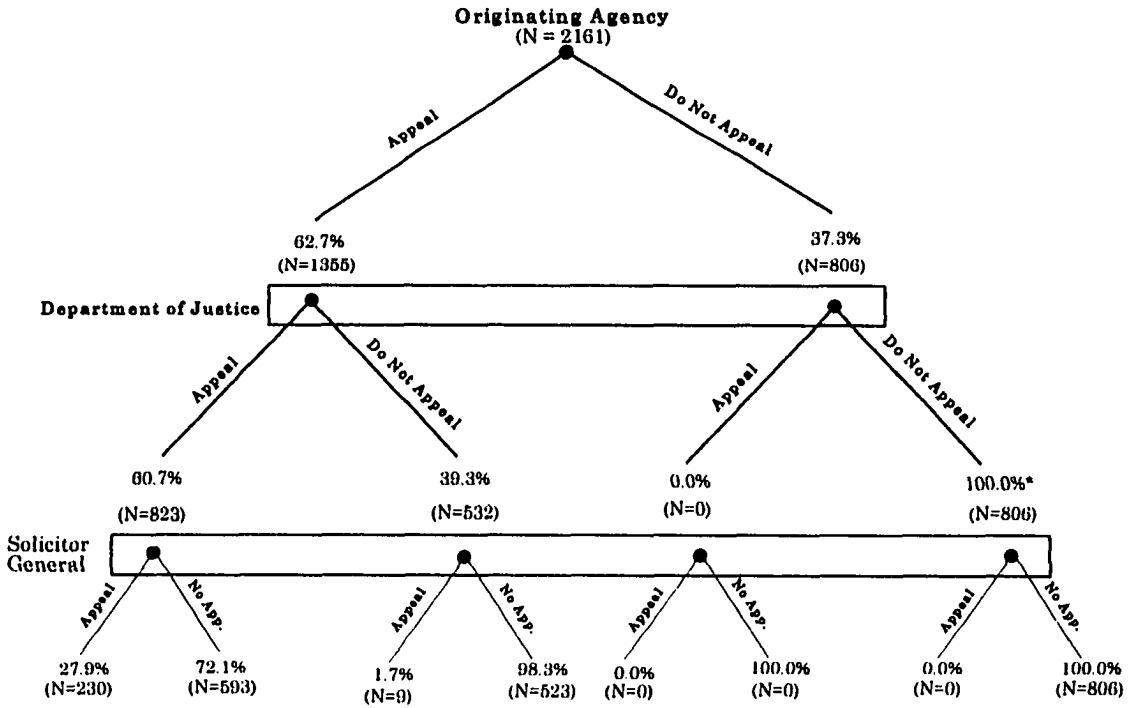

Figure 3.5: Schematic diagram of originating agency, Department of Justice, and Office of the Solicitor General's appeal decisions, 1993-94. * indicates that 100 percent no appeal rate is by definition; see text for details.

Overall, the appeals data presented in Figure 3.5 suggest two things. First, the odds of any further action being taken in any given government loss are relatively small. The solicitor general agreed to further action in only 239 of the 2161 cases (11.1 percent) in which he could have done so. These cases included 2 requests for panel rehearings, 158 suggestions for *en banc* rehearings, 56 petitions for certiorari, and 23 other miscellaneous suggestions for further action (e.g. petitions for certiorari accompanied by a request for summary reversal).

Second, and perhaps more important than the overall rates, it is clear that the solicitor general takes the recommendations of the originating entity and the Department of Justice very seriously. For example, the odds of the SG appealing an unfavorable decision are nearly 40 times greater if the Department of Justice suggests such action than if they do not. Likewise, the fact that all nine cases in which the solicitor general decided to advance with an appeal over the negative suggestion of the Justice Department had received a positive suggestion from the originating agency indicates that these suggestions, too, are important in the solicitor general's appeal calculus. The decisions of the originating agency and the DOJ thus represent, to some extent, a "screening" of cases for the solicitor general. This result thus supports the supposition that the solicitor general is quite deferential to the appeal decisions of the previous actors in the process, at least in instances where a negative recommendation was made.

On the other hand, it is also clear from these data that this deference has its limits. As noted in sections 3.1.1 and 3.1.2, a signature characteristic of appeal rates for both the originating agencies and the appellate sections of the Department of Justice were large increases during the early months of 1993, followed by a decline and leveling off in 1994. How did the solicitor general's office respond to these changes in appeal requests? One hypothesis is that the SG's office, like other parts of the executive branch, required an initial adjustment period after the new administration took office. If this were the case, we might expect that the number of appeal requests made by the solicitor general would be in line with those made by the other actors in the process. On the other hand, the relatively small number of political appointees in the office, combined with the presence of a long-time deputy serving as acting solicitor general during the transition, may have served to reduce the amount of adjustment to the new administration by the office.

A monthly summary of appeal requests by the Department of Justice appellate sections and the solicitor general's office during 1993-94 is presented in Table 3.5. For each month, the percentage of cases in which the appellate sections requested that some further action be taken in a case is presented in the first column, along with the number of cases on which that percentage is based. This is followed by the percentage of those cases in which the solicitor general's office authorized an appeal action, both as a

Month and Year	Department of Justice's Appeal Recommendation	Solicitor General's Appeal Recommendations	
		Total	Conditional*
1993: January	17.39 (69)	11.59	66.67 (12)
February	25.33 (75)	13.33	47.37 (19)
March	11.97 (117)	6.84	57.14 (14)
April	27.50 (80)	12.50	40.91 (22)
May	73.75 (80)	15.00	18.64 (59)
June	98.80 (83)	14.46	14.63 (82)
July	84.34 (83)	10.84	12.86 (70)
August	93.86 (114)	14.04	14.95 (107)
September	35.53 (76)	6.58	18.52 (27)
October	74.42 (86)	12.79	17.19 (64)
November	69.62 (79)	13.92	20.00 (55)
December	77.78 (72)	15.28	19.64 (56)
Totals for 1993	57.89 (1014)	12.13	20.44 (587)
1994: January	56.67 (120)	10.00	16.18 (68)
February	17.65 (85)	8.24	46.67 (15)
March	20.78 (77)	15.58	75.00 (16)
April	18.81 (101)	14.85	68.42 (19)
May	7.14 (84)	7.14	83.33 (6)
June	17.50 (120)	12.50	66.67 (21)
July	17.24 (87)	11.49	66.67 (15)
August	22.02 (109)	11.01	50.00 (24)

Month and Year	Department of Justice's Appeal Recommendation	Solicitor General's Appeal Recommendations	
		Total	Conditional*
September	13.13 (99)	6.06	46.15 (13)
October	22.62 (84)	9.52	36.84 (19)
November	12.64 (87)	10.34	81.82 (11)
December	9.57 (94)	4.26	44.44 (9)
Totals for 1994	20.58 (1147)	10.11	46.61 (236)
Grand Totals	38.08 (2161)	11.06	27.95 (823)

Table 3.5: Recommendations for further action by the Department of Justice and the Office of the Solicitor General in court of appeals cases, 1993-94. Cell entries are percentages of all cases acted upon that month in which a recommendation for some further action was made (DOJ), or in which further action was taken (SG). Numbers in parentheses are N's of cases; N's for Total SG recommendations are the same as those for DOJ recommendations.

* Cell entries are percentages of cases in which the Office of the Solicitor General took further action, conditional on the Department of Justice recommending such action. Numbers in parentheses are the number of cases that month in which the DOJ recommended some further action be taken.

percentage of the total cases for that month and as a percentage of those in which the DOJ requested such action be taken.

The clear conclusion one draws from the distribution of cases in Table 3.5 is that the Office of the Solicitor General remained remarkably consistent in its appeal behavior over the two-year period in question. While the numbers of cases in which the DOJ requested appeals increased dramatically during the latter nine months of 1993, this increase was not accompanied by a concomitant increase in the number of such appeals which the solicitor general allowed. During the 1993-94 period, the solicitor general averaged ten appeals per month, with a standard deviation of 3.1, and never appealed more than sixteen cases in a one-month period. The third column of Table 3.5 indicates that the solicitor general responded to increasing appeal request rates by decreasing the rate at which such requests were honored; rates fall from two out of three in January of 1993 to a low of 13 percent in July of that year, before rebounding to their previous levels in early 1994.[21] It thus appears that the solicitor general sought to maintain a relatively constant number of appeals per month over the entire period, and did so irrespective of the recommendations of the Department of Justice or the originating agencies.

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[21]Not surprisingly, if we treat the month as the unit of analysis, we find that the correlation between DOJ appeal rates and the percentage of those requests honored is substantially negative ($r = -0.84$, $p < .01$).

This finding reinforces the claim that the Office of the Solicitor General sees itself as an agent of the judiciary as well as the representative of the executive. On the other hand, the large increases in appeal requests by the appellate sections, particularly in light of the concurrent increase in such requests by the various agencies, bear out assertions that the various divisions of the Justice Department are often more closely tied to the executive branch officials they serve than to the courts in which they operate.[22] In any event, it is clear that, while the solicitor general gives substantial weight to the recommendations of both the recommending agencies and the DOJ appellate sections, it also takes seriously its role as "gatekeeper" to the judiciary.

Given this duality on the part of the solicitor general's office, it behooves us next to ask which factors is the more dominant. Is the solicitor general, in his or her appeal decisions, driven more by acquiescence to the wishes of the executive branch agencies which hold a stake in the outcomes of these cases (and thus by largely political concerns), or by his or her role as an officer of the courts? To answer this, it is in turn necessary to ask a number of more fundamental questions: On what basis is the decision to appeal an adverse court of appeals ruling made by the federal government? How do those factors vary in their influence on the different actors in the appeal

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[22]I examine this possibility more fully in Chapter 4.

process? What factors influence the decision to request an *en banc* rehearing, versus that to petition for certiorari in the Supreme Court? And what impact does this screening process have on the success of the United States as a litigant in these fora, and on the agendas of the courts (particularly the U.S. Supreme Court) in which they occur? In the remainder of this dissertation I seek to answer these questions.

CHAPTER 4

FACTORS IN GOVERNMENT APPEAL DECISION MAKING

The preceding chapter illustrated the outputs of federal government appeal decision making from the U.S. courts of appeal. Beginning with over one thousand cases each year, the United States, through a regularized, multi-stage process of evaluation and recommendation, requests appellate review of only around ten percent of the cases in which it might do so. How it does this was discussed in Chapter 2; what has yet to be determined is why. That is, what criteria are used by each of the relevant parties in the appeals process to determine which cases receive appeal requests and which do not?

The importance of this inquiry extends beyond intellectual interest. Political scientists, lawyers, and others have long understood that the cases which reach the courts are in fact only a fraction of the justiciable conflicts that exist, and in many instances not a particularly representative fraction at that.[1] Because cases to which the United States is a party make up a

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[1]The classic discussion is Hart and Sachs 1958; see also Sarat and Grossman 1975, Miller and Sarat 1980 and Galanter 1983. A different view is taken by Levine and Plott 1977 and more recently, Gertner 1993.

substantial part of the business of the federal appellate courts, a view of the decisions reached (and, consequently, the policies rendered) by the courts must necessarily consider the possible influence of government case selection. Assessing how the government decides which cases to appeal is thus informative about how appealed cases differ from those which are allowed to stand, and hence to what extent government case selection impinges on the courts lawmaking role.

In this chapter, I outline the bases for the examination of government litigation strategy which follows. I assess the determinants of government appeals decisions by considering them in light of four broad categories of influences: matters relating to the cost of the lower court's decision, the salience of that outcome, the likelihood that the case will be accepted for appellate review, and the likelihood that, conditional on that acceptance, the reviewing court will rule in favor of the government. In addition, I show how, because of their institutional goals and positions, the three critical actors in the appeal process (the originating agency, the Department of Justice appellate sections, and the Office of the Solicitor General) will each vary in the emphasis they place on the different types of factors. These conclusions then provide testable hypotheses for the analyses which follow in Chapters 5 and 6.

4.1 FOUR COMPONENTS OF THE APPEAL DECISION

Why does the United States appeal a loss in the U.S. courts of appeal? To answer this question, we must begin by determining what the government seeks to achieve when it appeals a loss to a higher authority. In particular, we must examine the motivations of the originating agencies, the Department of Justice, and the solicitor general, in order to uncover their goals in litigation. The most obvious goal served by appealing a decision is simply winning;[2] yet as a tool for understanding the decision to appeal this simple goal is not particularly informative. The key question instead is what one seeks to accomplish by winning.

In one respect, the goals that the United States seeks to attain by having an adverse ruling overturned are not substantially different from those pursued by more typical litigants in the federal courts. Unsuccessful litigation exacts a toll from the government as it does from any litigant: damages may be assessed, and at the very least, litigation resources are expended. This latter fact may be of special concern for the government, since, particularly in the regulatory agencies, each unsuccessful prosecution

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[2]This is not to say that factors other than winning are not important in the selection of cases for appeal. Rather, this statement should be taken in the spirit of Mayhew's (1974) reelection-driven member of Congress: to the extent that one wins the instant case, one's other goals (e.g. sound, consistent legal policy, personal career ambitions, etc.) are facilitated as well.

or suit represents not only resources used, but opportunity costs as well.

In other ways, however, the government is far from the typical litigant. For example, because the government can more easily absorb run-of-the-mill losses in the courts, it can be somewhat selective in choosing cases for appeal. This in turn allows the United States to designate only its most important losses for review. The other side of the government's repeat status in the courts means that it will place special emphasis on the development of the law, with the result that it will also select for appeal only those cases which present its position in the best possible light.

These similarities and differences therefore lead me to assert four general factors which motivate the federal government's appeal decision: costs, salience, reviewability and prospects on the merits. These components are by no means exhaustive of the range of issues which influence the appeal decision; nor are there bright lines of differentiation among them. Instead, they should be considered as heuristic categories, designed to impose some organizing structure on the otherwise diverse set of elements which enter into the appeal calculus. I discuss each in turn below.

4.1.1 COSTS

For most litigants, the key reason for seeking an appeal is to maximize some benefit or, equivalently, minimize some loss. Losers in civil suits

appeal to avoid paying judgements; in criminal cases, the convicted appeal to have fines and sentences reduced or overturned. The U.S. shares this desire with other types of litigants; U.S. Attorneys seek to obtain and retain convictions in federal criminal cases for a number of reasons, not the least of which is self-interest (Eisenstein 1978). Similarly, budget-conscious agencies attempt to minimize the financial impact of civil litigation brought against them, while (in some cases) instigating civil and/or criminal suits for compliance with and enforcement of federal regulations. As a result, we would expect that factors relating to the *costs* of allowing an unfavorable decision to stand will exert some influence over the government's appeal decision.

What are the costs to government of an unfavorable decision? The most obvious costs are those borne by the agency or U.S. Attorney's office: civil damages and awards in the former case, "lost" prosecutorial resources in the latter. It is not surprising that these immediate consequences of a loss weigh more heavily on those who are most affected by them — federal prosecutors and agency counsels — than on those higher up in the appeal process. One agency attorney, for example, remarked (with respect to appeals to the circuit courts) that "(I)f the case only involves a few dollars, then we won't go up, but otherwise we want an appeal" (Horowitz 1977, 52).[3]

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[3]Weaver reports a similar attention to matters of cost — measured in terms of market impact — in the prosecution decisions of the Antitrust

There are also more expansive notions of a decision's "cost" that enter into the appeal calculus. Because an adverse decision affects the position of the government not only in the instant case, but also in the conduct of its business in similar cases in that circuit which follow the decision, the U.S. is also sensitive to the extent to which a decision encroaches on its ability to function in the future. These encroachments may fall into several categories, but all share the common trait of modifying the power of the federal government, and in particular, the executive branch.

One such cost which is considered important is the effect of a decision on executive power relative to that of the legislative and judicial branches. Salokar frames the issue in this way: "Has the executive branch, as a result of the lower-court decision, been weakened vis-à-vis the power of other branches, and to what degree has this occurred? If the holding results in a significant decrease in executive power or an intrusion into the constitutional powers of the president, the case will receive serious consideration for submission" (1992, 111). Other cases which will also receive special attention for appeal are those which reduce executive power, or federal power more generally, as against that of the states or individuals. These concerns with executive power is balanced by attention to the *extent*, as well as the mere

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Division: "Most of the lawyers say there is no absolute minimum on the size of an acquisition that will appear 'interesting' to them; they only say that the bigger the acquisition and the acquiring company, the more likely they are to 'look very closely'" (1977, 65).

presence, of that encroachment; if the lower court ruling is limited in scope or otherwise has only a slight impact on executive power overall, the mere presence of a breach in executive authority is unlikely to trigger an appeal (Ibid., 112).

While the costs of a case related to its impact on agency authority are of obvious importance to the agencies themselves, such costs also impinge on the decision of the solicitor general's appeal decision, albeit in a slightly different fashion. In some cases, issues of cost appear to be tied more to a case's overall importance or impact on the government than to its effect on any one agency. Former Solicitor General Simon Sobeloff, for example, once said that "it often happens that despite our personal preferences in the instant case, we deem it necessary to appeal because of the harm apprehended from the operation of the prescribed rule in a wider orbit" (1955, 230), suggesting that the SG is at times a less-than-willing participant in appeals driven mainly by such costs.

The costs of an unfavorable decision, then, represent the most fundamental consideration in the decision of whether or not to appeal that decision. While this concern for costs is shared by all potential appellants, the unique position of the federal government means that its understanding of a case's costs must be broader than those of the typical litigant. Government costs in litigation encompass not only matters relevant to the instant case, but also the results of that decision to future cases, as well as its

effect on the power of the government vis-a-vis other political actors. Any attempt to examine cases in light of these costs, then, must take this wider view into account.

4.1.2. SALIENCE

The broader notion of the costs of an unfavorable decision developed above suggests a second dimension on which cases eligible for appeal are evaluated. In addition to their instrumental importance to the agencies involved, matters involving the balance of power within the federal government, or between it and the states, are typically among the most significant addressed by the federal courts. Conversely, rules promulgated in cases which are unfavorable to federal or executive power, but which apply only in very limited circumstances, are of less importance than broader-based applications.

This distinction points to a crucial difference between the government as a litigant and other parties. While we might expect the United States to be driven in its appeal decisions by criteria common to other litigants, it is also the case that, as Galanter (1974) and others have noted, the resources of the government enable it to more easily bear the costs of adverse decisions in civil cases. Conversely, whereas a one-time litigant may care very little about the impact of his or her case on the law over time, the government's

pervasive presence in the federal courts means that cases which effect fundamental shifts in the legal "playing field" will be of special interest to it. This suggests that a second potentially crucial factor in the government's appeal decision is the long-term importance, or *salience*, of a case.

In the context of government litigation, salience encompasses many different properties of a case. Cost is certainly one aspect of salience; all else equal, a case with higher costs will be viewed as more important than a less costly one. At the same time, however, cost is not completely determinative of salience; a costly case is not necessarily an important one. More critical to case salience is the legal significance of a decision, an attribute of a case that is made up of many components.

The scope of a rule is one such aspect. Horowitz's study, for example, found that cases in which the solicitor general overruled the unanimous appeal recommendations of the other actors were often those which failed to meet a threshold of salience: "(T)he decision to be appealed may have been a very limited one that applied only to the particular factual situation in that case and one, therefore, of no general importance to the government" (1977, 57). Conversely, those cases with the greater likelihood of being appealed are those which "set a precedent affecting a broad spectrum of governmental agencies and departments" (Jenkins 1983, 737). While related to it, this idea of salience is a slightly different notion than that of cost. The impetus is less on the extent of the encroachment into an agency's power, but on the long-

term importance of that encroachment; decisions relating to an isolated set of facts or a narrow part of government are often simply not viewed as consequential enough to merit appeal.

Another, more overtly political aspect of case salience is the extent to which the decision harms the interests of an agency's clients. "If there are political constituencies with a strong interest in the program under attack," writes Horowitz, "the defense may be pushed on even in the face of impending judicial disaster" (1977, 84). Obviously, some agencies and programs have more extensive, organized and vocal constituencies than others, and litigation decisions, no more than any others with policy importance, do not take place in a political vacuum. To the extent that agencies must be attentive to these groups, cases which have a significant negative impact on those clients will be considered more important than others.

A third component of salience is rooted in the policy significance of a case. Simply put, some cases address issues that are of substantial importance to the development of the law and public policy, while others do not. While this general conception of salience is related its to other, more specific aspects, from the perspective of the government's appeals it is also an instrumental one. Salience is to some extent context-specific; presidential and congressional attention, public opinion, and the focus of the media all change over time, and likewise the agenda of the federal courts, particularly

that of the Supreme Court, has varied substantially over the years (Pacelle 1991). If its litigation strategy is to be effective, the government must respond to these changes by reevaluating what it considers important in light of changing standards. As far back as 1955, a former solicitor general (reflecting on a decline in the number of tax cases reviewed by the Supreme Court) remarked that "(I)ncreasingly the justices seem to regard their function as that of a gyroscope to keep the ship on an even keel, confining themselves more so than in the past to the consideration of grave national issues" (Sobeloff 1955, 232). From this statement it is clear that the government is especially sensitive to the changing agenda of the federal courts, and considers such matters in its decisions with respect to litigation. Notions of case salience are therefore not static, but change with the times.

4.1.3 REVIEWABILITY

The responsiveness of the government's litigators to changing notions of case importance points to yet a third factor that it must consider if it is to be successful in its appeal strategy. In formulating its appeal decisions, the government must consider the likelihood that the reviewing court will agree to hear an appeal in the case at all. Thus we might also expect that factors which make a case a likely one for review will also enter into the decision of the government to push forward with an appeal. It is therefore necessary to

examine factors relating to what I term the *reviewability* of each case for their influence on the appeal decision.

The notion that reviewability plays a part in the government's appeals decisions is an intuitively attractive one. Both *en banc* rehearings and grants of certiorari are discretionary in nature, and the ability of the U.S. to challenge an inauspicious ruling depends in large measure on the willingness of the reviewing body to take the case. General studies of litigation have made it clear that litigants pay attention to such factors when making their appeals; the widespread practice of asserting an intercircuit conflict in one's certiorari petition (e.g. Estreicher and Sexton 1986) attests to the fact that the Court's explicit criteria for review enter into appeal strategies.

The most obvious way in which the reviewability of a case enters into the decision calculus is in the solicitor general's decisions, particularly the decision to file a petition for certiorari in the Supreme Court. This sort of forward-looking behavior on the part of the solicitor general is widely recognized. In Congressional hearings in 1949, for example, then Solicitor General Philip Perlman remarked that "(L)ots of times we think that an application would be rejected by the Supreme Court, and we think it not proper to present it" (quoted in Schnapper 1988, 1214).

The natural outgrowth of this attention to "certworthiness" is that the solicitor general follows the Court's own standards when deciding which cases to petition there (e.g. Stern 1960; Chamberlain 1987; Caplan 1987;

Salokar 1992). To the extent possible, the Office adhere's to the Court's Rule 10 regarding the criteria for granting certiorari. For example, the SG's office "will almost always petition for certiorari when an act of Congress is declared unconstitutional" (Lochner 1994, 559), and also considers such factors as intercircuit conflict, conflict with Supreme Court precedent, and the likelihood that the issue will be a recurring one (Chamberlain 1987).[4] In addition, the solicitor general's experience in handling cases before the Court means that he also has a knack for knowing what kinds of informal case characteristics make a case a desirable one for the Court to hear. Brigman lists several of these: whether a case presents only a single legal question, with noncontroversial facts; the prestige of the circuit judge writing the adverse opinion; and the known attitude of the Court towards the particular activity, agency, or area of the law (quoted in Chamberlain 1987).[5]

In summary, in order to secure a reversal from an unfavorable appeals court decision, one must first obtain leave to be heard by a higher court. Its frequency in the courts means that this fact is not lost on the government when making its appeals decisions. The result of this realization is that the

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[4]Some commentators have noted, however, that issues of reviewability also enter into the decisions of the agencies and Justice Department with respect to review, if for no other reason than their internalization of the solicitor general's emphasis on this characteristic (e.g. Note 1969; Horowitz 1977).

[5]Brigman also lists as "most important, the possibility of winning the case." I treat this issue separately below.

criteria for having a case accepted for review, both explicit and implicit, necessarily play an important role in the appeal decisions of the United States.

4.1.4 PROSPECTS OF WINNING ON APPEAL

Finally, note that even when the costs, importance and reviewability of a case recommend it for appeal, these factors will come to naught if there is not some chance for a reversal. It is thus necessary to return to my initial assumption that the United States, like all other litigants, prefers to win the cases in which it is involved. The same factors which suggest the importance of case salience also underscore the need for the U.S. to litigate cases which it feels certain of winning: for a litigant often before the courts, an adverse ruling is particularly damaging. Furthermore, in addition to the government's repeated involvement in the courts over time, there is also a geographic aspect to such a loss. While a state or corporation may only face the results of an unfavorable Supreme Court precedent in the circuit in which it lies or does business, the United States faces a nation-wide impact from an adverse outcome. As a result, we might expect the U.S. to be especially careful in choosing only those cases it feels confident it will *win on the merits* for appeal.

The claim that the United States appeals cases it feels confident of

winning reflects both the universality of the government's position and its uniqueness. On one hand, it is simply saying that the government does what other litigants have been shown to do: consider the likely outcome of an appeal before deciding whether or not to make it (Songer et. al 1995). In the case of the government, the aforementioned ability to absorb the costs of an isolated negative ruling and the attendant opportunity costs of appealing a loss would suggest that this type of rational anticipation would be even more prevalent than for nongovernmental parties.

On the other hand, it is in some respects the government's unique position as a repeat litigant allows such anticipation to be possible at all. The knowledge that another, more favorable case is "in the pipeline" goes a long way towards making acceptance of a particular loss more palatable. Former Solicitor General Erwin Griswold put it this way: "Never risk an important question on a weak case" (Hearings, 1987).

In fact, the issue of a government's chances of reversal on appeal are typically framed in terms of the facts of the individual case. Because of the potential importance of a court's ruling in a matter involving the government, the United States, and in particular the solicitor general, are especially careful to appeal only cases which provide attractive "vehicles" for the development of the law. Former Solicitor General Charles Fried, referring to appeals recommended by the Antitrust Division of the Justice Department, once testified that "I...make a decision whether the position which the

Antitrust Division wishes to argue in the Supreme Court is tenable under the law, and particularly — this is very important — particularly whether the facts of the particular case support the position which is being argued..." (Hearings 1987, 19). Likewise, former Solicitor General Bork once stated that "(W)e urgently need some strategic management so that in the cases that make the turning points in the law, the factual record is developed with the complexities and opportunities of Supreme Court litigation in mind" (1973, 705). The importance to appealing only those cases which best present the government's case is a thread common to nearly all writing by and about solicitors general over the past half-century.

If only cases likely to be won on the merits are fodder for government appeals, then it is correspondingly the case that cases which have little prospects for reversal will not be appealed, or even recommended, no matter how likely a candidate for appeal such a case may be. This is clearly reflected in the comments of the solicitors general presented above, but also holds for the other participants in the appeals process, particularly since each realizes the importance of such matters to the SG. Discussing agency appeal recommendations, for example, Horowitz notes that "either side may independently see what it regards as the handwriting on the wall and tailor its recommendations accordingly ... Whatever its convictions, either side may base its recommendation on a prediction of the probable outcome of a disagreement, should one come to pass" (1977, 55).

In the context of the discussion regarding prospects on the merits, mention must be made of how the government decides what constitutes a "win". Two issues deserve attention here: policy considerations and the viability of the government's argument. First, at least since publication of Caplan's *The Tenth Justice,* it has become axiomatic that the solicitor general's office is driven, to some extent, by political concerns. This seemingly rudimentary fact has been the topic of extensive tooth-gnashing in the legal academy (e.g. Chamberlain 1987; McConnell 1988; Schnapper 1988; Wilkins 1988; Devins 1994; Lochner 1994; Fraley 1996). And indeed, studies have found that the solicitor general is responsive to the incumbent administration, both with respect to its filing of *amicus curiae* briefs (O'Connor 1983; Segal 1988) and in the positions it takes when litigating before the Court (Puro 1971; Salokar 1992).

The importance of this responsiveness for his appeal decisions, however, must be considered in light of the other influences addressed herein. In fact, matters relating to policy preferences necessarily operate only at the margins of the SG's case selection process. "The Solicitor General", notes Eric Schnapper, "has an obligation to keep down the number of requests for review, and to limit the requests to cases that are arguably certworthy, but so long as the selections are made within that group, whatever the executive branch regards as important to the attainment of its policies might presumptively be regarded as important by the Court as well"

(1988, 1216-17). Similarly, Chamberlain (1987) points out that most cases appealed by the solicitor general are not especially political in nature, and would be treated in much the same way irrespective of who occupied the office. Under such conditions, it is clear that in most instances political considerations fall well down the list of the solicitor general's concerns, and easy to understand why the SG's office has a reputation for independence from political pressure.

The second point concerns the viability of the government's position on appeal. As former Solicitor General Fried noted in hearings on the SG's office in 1987, cases arrive at the solicitor general's office with a history, having already been litigated by the agencies in the courts below (Hearings 1987). The result is that, occasionally, the office will receive a case in which the position advocated by the government is simply untenable. In such instances, the SG will sometimes "confess error", in effect stating that the government should not have won in the lower court; in most cases,[6] this results in a reversal by the reviewing court. Error confession tends, however, to be ill-regarded, and will thus occur only in circumstances where "there is no respectable argument on the Government's side" (Stern 1960, 158).

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[6]But not all; Sobeloff relates a case in which "a young lawyer on the Solicitor General's staff...went into court and confessed error, but the Court nevertheless gave him an unwelcome decision for the Government. He came back moaning and gloating simultaneously, and said 'I can't lose a case even when I try'" (1955, 230).

In summary, we might expect that each of these four components — costs, salience, reviewability and winnability — will enter into the appeals decisions of the various governmental actors involved in the process. At the same time, though, it is clear that not all of these factors are given equal weight in the appeal decision; nor would we expect it to be the case that the various participants give equivalent emphasis to any one particular component. Instead, the institutional goals of the agencies, the Justice Department appellate sections, and the solicitor general, and their position in the appeal decision making process, mean that each will give different emphasis to these components. It is to assessing our expectations with regard to these differences that I now turn.

4.2 FACTORS IN DECISION MAKING: GOALS, EXPECTATIONS AND IMPACT

> *"The various Governmental agencies are apt to see decisions adverse to them from the point of view of their limited preoccupation and too often are eager to seek review from adverse decisions which should stop with the lower courts. The Solicitor General, however, must take a comprehensive view in determining when certiorari should be sought. He is therefore under special responsibility, as occupants of the Solicitor General's office have recognized, to resist importunities for review by the agencies, when for divers reasons unrelated to the merits of a decision, review ought not to be sought."*[7]

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[7]Justice Felix Frankfurter, concurring in *Andres v. United States*, 333 U.S. 740, 764 n. 9 (1948).

I return to the question at hand: By what criteria do the participants in the government appeals process select some unfavorable court of appeals decisions for appellate review, while allowing others to remain unappealed? The four broad criteria discussed above provide an overview of the kinds of matters which the U.S. will consider in making these decisions. The preceding discussions, however, also highlight a signature characteristic of government appeals: to paraphrase professor Shepsle, "The United States" is a "they", not an "it".[8] The appeal decision is a collective one, and one which is made by actors with divergent goals in pursuing an appeal. These different goals mean that each sees the cases before it through a different lens, consequently coloring its view of the desirability of an appeal. In this section, I discuss what these goals are, and how they influence the factors deemed influential by each of the participants in the appeal decision.

As discussed in Chapter 2, the first step in the appeals process is the review of a case by the agency responsible for the initial litigation, and a subsequent recommendation regarding the appeal of that case. How is this decision made? To answer that, we must determine what are the agency's goals in seeking an appeal, and how it uses the appeal process to pursue those goals.

For government agencies, litigation is either a dispute to be avoided or

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[8]After Shepsle (1992).

a means to an end, depending on whether it was instigated by or against the agency in question. In either event, however, the resolution of litigation results in real policy effects on the agency in question. It is not surprising, then, to discover that agencies view the primary importance of litigation (and, by extension, appeals of federal court losses) as being its impact on the policies and practices of the agency, both for the instant case and for the future. Consequently, agencies tend to be much more result-oriented and far less concerned with the development of the law in any broader sense.

The agencies' emphasis on specific cases and policies is widely recognized. It has been the subject of commentary by solicitors general past and present:

> "A sometimes bothersome feature of the Solicitor General's duty of deciding what business to present to the Supreme Court is in dealing with the government agencies concerned. His is the task of resisting their tearful importunities to seek review of cases they have lost. The loss seems to them calamitous. Their preoccupation is with the immediate result, or at least their purview is likely to be limited to their particular work" (Sobeloff 1955, 231).

> "...an individual Government agency necessarily has a more parochial view of the interest of the Government in litigation than does the Solicitor General's office, with its broader view of litigation in which the government is involved throughout the state and federal court systems" (Days 1995, 77).

Justice Frankfurter's comment suggests that the Court is also well aware of the importance of policy to the agencies involved in litigation, and of the

function served by the solicitor general in limiting the effects of that policy concern on the Court's docket.

This policy focus on the part of the agencies arises from several sources. One of the most basic is the role played by the agency counsels making such decisions. In-house attorneys for the major executive branch and independent agencies are civil service employees, owe a good deal of allegiance to those agencies, and see their litigation role as advocates for their policy missions. Moreover, as Horowitz has noted, these attorneys often also serve the role of solicitor for the agencies, providing advice and counseling policy personnel on legal matters; this fact further reinforces their position as proponents for their branches. Agency lawyers, he wrote, "cannot afford to indulge their taste for the pristine purity of the law or the preferences of judges. They must first do the bidding of their clients, the program managers" (1977, 75-6).

In addition to the positions of the agency counsels themselves, the position of the agencies in the appeal process also exacerbates the agencies' emphasis on policy outcomes. Unlike the Justice Department and the solicitor general, the agencies are somewhat removed from the appellate courts; while they participate in the preparation of briefs and memoranda, the actual advocacy is most often handled by specialized litigators, either in the Justice Department or, in the case of Supreme Court litigation, the Office of the Solicitor General. This aloofness from the actual business of advocacy

allows agencies to focus more on the policies they wish to pursue and less on the arguments necessary to advance those arguments in court.

Yet another reason for the agencies concentration on policy matters is their relatively narrow view of the law. Because they consider the legal process in largely instrumental terms, the agencies have the luxury of ignoring any instant precedent's effect on anything outside their relatively narrow scope of action. The fact that a particular result favorable to, say, the Department of Health and Human Services may be detrimental to the operation of OSHA, or to some other arm of the regulatory bureaucracy, is of no concern to HHS.

In summary, then, the agencies of the federal government take a distinctly narrow, policy-oriented view of appellate litigation. Horowitz sums up this fact nicely: "The heightened importance of the particular case, the diminished importance of government cases in general, and the agencies' greater distance from judicial reactions all lead the (agencies') general counsels' offices to a less discriminating attitude toward the defenses to be employed than is found at Justice" (1977, 46). One would expect, then, that the initial appeal decisions made by the originating agencies would reflect this policy emphasis.

Review of each case by the appellate sections of the Department of Justice constitutes the intermediate stage of the government's appeals process, and the goals and expectations of these sections reflect that

intermediate status. On one hand, we might expect that the divisions within the Justice Department would embrace a very different set of goals than do the agency attorneys.[9] Unlike their agency counterparts, they operate primarily in the judicial, as opposed to the administrative, realm, and therefore must pay attention to the means of litigation as well as its ends. In addition, some of the larger appellate sections (e.g. those located in the Criminal and Civil Rights Divisions) must deal with appeals from a variety of different agencies, a fact which makes it necessary for those sections to consider the broader implications of a rule of law decided in any particular case. As a result, appellate section recommendations ought be less concerned with matters relating to policy, and more to those connected to the conduct of litigation and to the extended importance of the rule of law it derives.

On the other hand, it is also the case that the appellate sections are not immune from policy considerations. Each operates within a division of the Justice Department, itself an executive agency, and each is to some extent subject to the political pressure which accompanies that status. Additionally, even if no direct coercion is exercised on the appellate sections, the repeated interaction between the sections and the agencies with which they deal allows for at least the possibility of "capture" of the former by the

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[9]Indeed, in Horowitz's (1977) book, the distinction between agency counsel and DOJ attorneys is the primary one. His book's focus on appeals to the circuit courts, however, means that the role of the solicitor general is notably less than in the case of appeals following circuit court opinions.

latter.

Whether and to what extent each division reflects the political concerns of the agencies it serves is, however, the topic of some debate.[10] At one end of the spectrum, Horowitz sees the DOJ as almost entirely removed from the partisan concerns of the agencies: "Its stated mission of screening cases, its position between the courts and the agencies, its recruitment — geared primarily to a noncareer corps — all tend to elicit from its personnel something approaching an outsider's view of the Department's business" (1977, 75). At the other end, more recent writers have noted that "many of the(se) Appellate Divisions (sic) are unabashedly partisan" (Lochner 1994, 559-60), and that the policy foci of the Department's various divisions is as fully operative in the appellate sections as anywhere else (Meador 1980; Chamberlain 1987).[11]

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[10]Interestingly, the formal procedures of the divisions themselves provide little insight into this question. In its section on "The Appellate Process", for example, the manual for the Antitrust Division provides only that "(A)fter the assigned Appellate Section attorney has reviewed the recommendations of the trial staff and obtained the views of Operations, if appropriate, the attorney will prepare a draft memorandum for the Solicitor General either recommending an appeal or recommending against an appeal" (*DOJ Antitrust Division Manual* 1987).

[11]It is important to note, however, that the extent to which the appellate sections exhibit deference to the missions of their respective agencies varies not only by division and agency, but also across individual attorneys. Writing on the Civil Division, for example, Horowitz provides evidence that "(S)ome Justice lawyers may take their screening role somewhat more seriously than others and disagree with agency recommendations more readily. Some, on the other hand, may take their representative role more

The overall result of the Justice Department's intercessory position is something of a division, both with respect to its loyalties to the agencies and the courts, and to its goals over policy and the law. We might expect, then, that the motivating factors of the appellate sections' appeal recommendations would also be a hybrid of those most important to the agencies, and to the final arbiter of government appeals, the Office of the Solicitor General. That is, while the appellate sections would, out of concern for their agency "clients", certainly be expected to pay attention to policy matters, their status as frequent litigators before the courts also ensures that they will give some weight to matters of legal development in making their appeal recommendations.

Sitting in final judgement of appeals by the United States, the solicitor general is in many ways a polar opposite of the agencies he ultimately serves. Developments of the last decade notwithstanding, the solicitor general is regarded as in many ways more an agent of the courts, and in particular the Supreme Court, than an executive branch official. The SG has been called the "Celestial General" (e.g. Sobeloff 1955), and the office has a long tradition of political independence and legal craftsmanship (e.g. Fahy 1941; Stern 1960; Salokar 1992). This removal from the political melée arises out of the

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seriously, deferring to the wishes of their agency clients even in cases where, as an original matter, they might have arrived at a different recommendation" (1977, 48).

institutional position, characteristics, and goals of the Office.

The foremost cause of this independence is the extent to which the solicitor general identifies with the courts rather than the executive branch. Catch-phrases like the "tenth justice" (Caplan 1987) and the "38th clerk" (Schnapper 1988) capture this aspect of the solicitor general and his office. In appearing before the bench more often than any other litigant, the SG's office is particularly careful to maintain its reputation for scrupulously accurate and insightful advocacy (e.g. Hearings 1987; Starr 1990; Devins 1994).[12] As Horowitz notes, for such an attorney, it is the courts, not the agencies, which are his "reference group" (1977, 74).

This identification is exacerbated by the quasi-judicial function the office serves. By screening cases to the Supreme Court, it acts in many instances as a de facto court of last resort: cases which it allows to go forward are very likely to be reversed, while those which it does not are left standing. Solicitors general past and present have taken this screening role very seriously (e.g. Bork 1972; Starr 1990), and the SG's office has developed a reputation among the various agencies and Justice Department divisions for what has alternatively been termed "strategic selectivity" (Salokar 1992) or

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[12]It is interesting to note that the solicitor general himself has begun to co-opt the language of social science in his self-descriptions: "Even if he were not inclined by reasons of principle to adhere to high standards of candor and fair dealing before the Court, the pragmatics of the Solicitor General's 'repeat player' status before the Court would require such adherence" (Days 1994, 487).

"niggardliness" (Horowitz 1977) in its appeal decisions. Even the Supreme Court itself has recognized the unique position of the solicitor general in controlling the flow of litigation to the Court; in a recent decision, for example, Chief Justice Rehnquist stated that "(U)nlike a private litigant who generally does not forego an appeal if he believes that he can prevail, the Solicitor General considers a variety of factors, such as the limited resources of the government and the crowded dockets of the courts, before authorizing an appeal"[13]

Moreover, to an even greater extent than the Justice Department appellate sections, the solicitor general must take a broad view of government litigation. This is in part due to the frequency with which he appears in the courts, but is also due to the fact that he is responsible for the entirety of government appellate litigation. The SG is therefore responsible for ensuring that a legal rule arising out of a case dealing with a particular agency does not unduly burden other functions of government, a fact which has long been one of the primary bases for the SG's claim to a litigating monopoly over government appellate litigation (e.g. Stern 1960; Olson 1982).

The solicitor general's removal from the day-to-day operation of the agencies, his strong identification with the judiciary in which he functions,

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[13]*United States v. Mendoza* 464 U.S. 154 at 161 (1988) (stating that the doctrine of nonmutual offensive collateral estoppel is limited to private litigants and does not apply against the federal government).

and the need on the part of the Office to coordinate litigation across the whole range of government agencies and programs means that the criteria by which he assesses cases for appeal will be notably different than those considered by the agencies, and even by the appellate sections. Rather than concern with policy outputs, the solicitor general's institutional position results in goals relating to the quality and consistency of his advocacy, the government-wide impact of a given case's outcome, and the long-term development of the law.

4.3 CONCLUSION

In his study of agency litigation in federal district courts and courts of appeal, Horowitz summarizes the relationship between the executive agencies and the litigating arms of the Department of Justice thusly:

> "Because Justice is the barrister for all agencies, it cannot allow the interests of one to overshadow or damage the interests of all. And because Justice is constantly in Court, it must worry about the esteem in which it is held by the judiciary, for that esteem is presumed to have an impact on success rates in general. Justice tends to believe that if it indiscriminately defends the indefensible, a boy-who-cried-wolf effect may set in with the courts, and that such an effect would in all probability be counterproductive...
>
> The agencies tend to compute their cost-benefit ratios rather differently. For them, the case at hand is of principal importance. Winning it is the goal. In each such case, the agency must bear only a small increment of the total loss of credibility that may arise from repeated invocation of blanket defenses, and just such a defense might win that particular

case" (1977, p. 45-46).

As this description makes clear, the Department of Justice and the agency counsels hold very distinct perspectives on the same body of litigation, a result of their different goals, and their divergent views of the function of litigation. These differences have two important consequences.

First, the various actors different goals have implications for the frequency of appeal recommendations. The agencies, whose focus is on winning the instant case and who must bear the brunt of the damage in an unfavorable court decision, are therefore also the most likely to ask that an appeal be carried forward. In contrast, the appellate sections' dual focus on policy and the law will undoubtedly lead to the recognition that not all lost cases are suitable for appeal; they will therefore recommend such in fewer cases than the agencies would prefer. Finally, the solicitor general's disengagement from the agencies concerns, emphasis on the development of the law, and screening duty in the federal appellate courts suggests that it will allow even fewer cases to be appealed than either of the entities which precede it. As described in Chapter 3 and elsewhere (e.g. Brigman 1966; Horowitz 1977), this expectation is borne out in the appeal decisions of each party.

Second, the differences in perspectives of the three appellate decision makers lead us to varying expectations regarding the importance of the four

factors noted previously — cost, salience, reviewability, and winnability — in the appeal decisions made by each. From the perspective of the agencies and U.S Attorneys, the matter of costs is paramount. They wish to see the decision in question reversed in order to avoid the judgment which accompanies it, and care little either about how to achieve that reversal in the short term, or its effect on other cases and agencies in the long term. Cost factors, then, ought to dominate the appeal decisions of the agencies, to the exclusion of nearly all other considerations.

The Justice Department appellate sections share this concern with costs to some extent: they are also engaged, to varying degrees, in a policy mission, and their frequent contact with the agencies places them in a position to be sympathetic to such matters. On the other hand, the appellate sections are made up of frequent litigators, with some attendant interest in their position before the courts. Moreover, their need in some instances to balance the concerns of several different agency "clients" requires that they take a view both more abstract and more expansive in making their appeal decisions. We would expect, therefore, that the costs of the decision, while important to the Justice Department's appellate sections, would be less so than it is for the agencies. At the same time, we might also predict that the nonpolicy components of a case — those relating to salience, reviewability and the prospects for a reversal — would occupy a more prominent position in their decision making on appeals.

Finally, the solicitor general's relative isolation from the policy domain, his broad perspective on the interests of the government, his accountability to the Court in which he acts and his emphasis on the practice of litigation means that he and his office will view appellate litigation quite differently than the agencies and Divisions. In order to most effectively pursue its unique goals in the courts, the solicitor general's office will concentrate on matters unrelated to the costs of a decision. Instead, the Office will screen cases for appeal based on their importance, the odds that they will be accepted for review, and the likelihood that the U.S. will obtain a reversal should such review be forthcoming.

We now have a general framework in which to consider the appeal decisions of the United States. We expect that matters relating to our four broad factors will operate in that decision, and will do so in varying degrees depending on the institutional position and goals of the appeal decision maker. I thus turn next to empirical tests of this framework in Chapters 5 and 6.

CHAPTER 5

A MODEL OF THE DECISION TO APPEAL

The federal government's choice of whether or not to proceed with an appeal is the most basic decision that the various parties to the process must make. A decision to allow the unfavorable lower court ruling to stand amounts to acquiescence in the case, and can entail substantial costs in both the short and the long term. On the other hand, a decision to move forward with some type of appeal in the case calls upon the resources of the original litigants, the Justice Department, and the solicitor general's office. Moreover, an appeal also carries with it opportunity costs: given the limited number of cases which the solicitor general is willing or able to appeal, the decision to move forward with any one case necessarily also entails foregoing an appeal in other cases. This fact points up the importance of the various actors' ability to effectively differentiate among the cases under consideration for appeal.

In this chapter, I elaborate and test a model of the appeal decision, both that of the Department of Justice appellate sections, in their

recommendations on the disposition of cases, and of the solicitor general, in his final decision regarding appeal.[1] I draw upon the four general factors related to the appeal decision, and on the expectations with respect to their relative influence on each of the decision makers presented in Chapter 4, to operationalize and test a model of the decision to take some further action in a case or not. This model captures a number of the characteristics of the appeal process uncovered in previous chapters, including the sequential nature of the appeal decision and the resulting interrelatedness of those decisions.

5.1 DATA

To empirically examine the factors which impact the government's appeal decisions, and to test the relative influence of those factors, I return to the data on the appeal decisions of the Department of Justice and the solicitor general during the 1993-1994 period. For the analyses into the impact of various case-related factors on the government's appeals decisions, I selected a random sample of 15% of the population of these cases (N=334). Specifically, I drew a systematic random sample of 10 percent of the cases from calendar year 1993 (N=99), and 20 percent of those from 1994 (N=235).

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[1]For reasons relating to the data described in Chapter 3, I do not test a model of the appeal decision of the originating body.

Comparative statistics on the sample data suggest that the sample is a generally representative one. The Department of Justice recommended further action in 31.1% (104/334) of the cases in the sample data (20.7% for *en banc* rehearings and 10.4% for certiorari); this compares to an overall recommendation rate of 38.1% (823/2161, with 25.6% for *en banc* rehearings and 12.5% for certiorari). The differences here are likely due to the combination of the oversample of cases from 1994 and the exceptionally high percentage of Department of Justice appeal recommendations during much of 1993 noted in Chapter 3. For the decisions of the solicitor general, the sample data are even more accurate, showing further action taken by the solicitor general in 12.6% (42/334) of the cases (9.6% for *en banc* rehearings and 3.0% for certiorari petitions); the corresponding population figure is 11.1% (239/2161, with 8.2% for *en banc* rehearings and 2.9% for certiorari). Other variables (e.g. the staff member responsible for the cases) are similarly well-represented by the sample data.

In addition to the information on these cases provided by the office of the solicitor general, I coded each of the cases in the sample data on a number of factors suggested to be influential on the decisions to appeal at each stage. Using the information provided by the Office of the Solicitor General, each case in the sample was located using the LEXIS legal research service. Each case in the sample was then coded for a range of factors relating to the case, including Federal Reporter citation and docket number,

date on which the court of appeals decision was filed, and the circuit in which the case was heard. Also coded are the number of appellees and appellants, an indicator for *en banc* decisions, the identity of the judges who heard the case, the opinion judge, concurring and dissenting opinions, number of *amicus curiae* briefs filed in the case, three issue variables, indicators regarding decisions involving the Federal Sentencing Guidelines, and indicators of intercircuit conflict, reversal of the lower court decision, invalidation of federal statutes, orders, or directives, the presence of a constitutional claim, and the ideological policy direction of both the trial court and court of appeals decisions. In cases where a subsequent rehearing *en banc* or petition for certiorari was granted, that information was also recorded. A complete list of variables, codes, and coding protocols is presented in Appendix B. These data comprise the basis for the analysis which follows.

5.2 OPERATIONALIZATION

I expect that each of the four broad factors noted in Chapter 4, costs, salience, reviewability and winnability, contributes to some degree to the decision of both the Department of Justice and the solicitor general to appeal losses in the courts of appeals. I examine each of these four factors by evaluating the impact of indicator variables for each on the decisions made in

each case. In addition to analyzing the expected influence of these variables on the decisions made by the Justice Department appellate sections and the solicitor general, I also speculate here on their *relative* influence; that is, which factors will be more or less influential at each stage of the appellate decision process.

Given the range of variation in the subject matter of litigation in which it is involved, the costs of a government loss in the courts of appeals are difficult to measure consistently. Nonetheless, it is possible to say that, in general, some types of cases are more costly to the government than others. Probably the most conspicuous such type are cases in which the court invalidates some federal statute, regulation, or order (see Chapter 4). In addition to the usual expense incurred, cases in which the courts invalidate a government decree require additional effort on the part of governmental actors in order to "undo the damage" caused by the decision. Cases were coded one if such an invalidation occurred, zero otherwise; I expect the impact of this variable to be positive, i.e., cases in which such an invalidation has occurred will be more likely to be appealed than those without.

In addition, because the costs of an invalidation are felt most by the government litigant closest to the initial litigation, I expect that the influence of this variable will be greater for government litigants the closer they are to the detrimental impact of the loss. Thus, one would expect that agency counsels and U.S. attorneys, who must bear the brunt of these adverse

decisions, will place the most weight on such invalidations in making their appeal recommendations. The once-removed position of the various Justice Department appellate sections serves to insulate them from these costs; they therefore ought to be concomitantly less affected by such invalidations, and will therefore weight them less heavily in their decision calculus. Finally, the unique position of the solicitor general in the appeal process serves to completely divorce that office from nearly all the negative ramifications of most policy invalidations; I expect, therefore, that this variable will be relatively less influential on the decisions of that office.

In addition to their impact on government policies, it is also the case that hostile decisions involving certain subject matter will also, as a rule, impose greater or lesser costs on the government than others. Following the aforementioned logic of Galanter (1974), for example, we would expect that losses in criminal cases would be less costly to the U.S. than in civil ones. This assertion is supported by the fact that, while U.S. attorneys may care a great deal about successful prosecutions, attorneys in the Department of Justice and the Office of the Solicitor General are less so (e.g. Horowitz 1977). This is because the costs of a court of appeals reversal in a criminal case is borne by someone other than the individual(s) responsible for making the final appeal decision. As a result, I expect that criminal cases will, on balance, be less likely to be appealed than non-criminal ones. I code cases one in cases involving criminal prosecutions and zero otherwise.

Inclusion of a variable denoting criminal cases also serves another important purpose: it allows us to distinguish among the varying appeal propensities of the different sections of the Department of Justice. As discussed in Chapter 2, appeal recommendations in federal criminal cases are made in most instances by the Criminal Division of the Justice Department, while those in civil cases are generally handled by the other divisions (Civil, Tax, etc.). By including a variable for cases handled by the Criminal Division, we are also able to test for systematic differences in the propensity of each division to recommend appeals, and in the tendency of the solicitor general to grant recommendations from the different sections.[2]

Turning next to measures of case salience, I analyze the impact of three variables on the appeal decision. First, given their relative rarity in the courts of appeals (e.g. McIntosh and Parker 1986), we would expect that the presence of an amicus curiae brief in that court would be a good indicator of the case's salience (Caldeira and Wright 1988). I code cases one if there was one or more amicus briefs filed in the court of appeals, and zero otherwise, with the expectation that cases with such briefs will be more likely to be candidates for appeal, *ceteris paribus*, than those without.

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[2]Note that it is impossible from the LEXIS search to know precisely which Justice Department division handled the case. Thus, in the absence of internal data on which section made the recommendation, tests of variability in appeal rates across divisions cannot be conducted. I hope to obtain such data in future work.

Another measure of case salience is the publication of the decision in the court of appeals. This fact is broadly true, in the U.S. district courts (Songer 1988) and the circuit courts of appeal, as well as elsewhere (e.g. Atkins 1992). Unpublished cases carry no precedential value, and thus are by definition of less significance than their published counterparts. Moreover, the fact of their lack of value as precedent suggests that judges will select only the more important cases for entry into the *Federal Reporter*. I therefore code cases one if they were nonpublished, and zero otherwise; theory suggests that this variable will bear a negative relationship to the appeal decision.[3]

Yet a third indicator of salience is the nature of the claim made by the litigants. All federal courts, and appellate courts in particular, are particularly concerned with claims of a constitutional nature. Such claims have at least the potential for greater impact than those resting on purely statutory or administrative grounds. Accordingly, I code all cases according to the nature of the claim made by the litigants bringing the appeal: one in cases where that claim has a constitutional basis, zero where no such claim is made. Given that this variable reflects, to some extent, the importance (real

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[3]Robel (1989) offers a different, but complimentary perspective, noting that it is generally repeat litigants (most notably the federal government) who are the most benefitted by nonpublication of decisions. His survey of federal government litigants found that nearly all of them routinely file and circulate unpublished opinions, and also use the information in those opinions in making litigation and settlement decisions and writing briefs.

or potential) of a case, I expect that the presence of a constitutional claim will increase the odds of an appeal decision by the government.

I expect that all three of these indicators of salience will influence the appeal decisions of the appellate sections and the solicitor general. However, because of the circumstances outlined in Chapter 4, I further expect that these matters will be relatively more influential in the decisions of the latter than the former. The solicitor general's greater concern with the long-term development of the law, as well as his gatekeeping role in the appellate courts, suggests that the salience of a case will be especially important in his decision calculus.

To model the impact of factors relating to reviewability and winning on the decision of the Department of Justice and the solicitor general to appeal an unfavorable court of appeals decision, I turn to the literature on Supreme Court agenda setting, especially that of Caldeira and Wright (1988, 1990; Caldeira et. al. 1996; also McGuire and Caldeira 1993), and on appellate court decision making (e.g. Goldman 1975; Rohde and Spaeth 1976; Segal and Spaeth 1993; George and Epstein 1994), respectively. Turning first to the issue of case "winnability", I analyze three measures of the impact of the likely decision on the merits on the appeal decision. First, I examine the differences between the decisions in the trial court[4] and the court of appeals.

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[4]In cases which involve appeal of an administrative agency action directly to one of the U.S. circuit courts of appeal, I treat the agency decision as that

Because the data here consist of government appeals court losses, cases in which the circuit court reversed the trial decision necessarily mean that the government won in the lower court. That fact indicates that the government had a fairly strong case, and suggests the potential (or at least the belief by the government in the potential) for a second reversal *en banc* or in the Supreme Court. Horowitz frames the issue by stating that "a prediction of an unfavorable result on appeal, based on an already unfavorable result in the court below, is more credible than the same prediction not based on an already adverse decision" (1977, 94). I therefore expect that a reversal by the court of appeals (coded one) will be more likely to be appealed than a case where the appellate court affirmed the trial decision (coded zero).[5]

Unanimity in the court's decision may also serve as an indicator of the quality of the government's case as perceived by the judiciary. Cases in which the government loses by a split vote, like those in which a reversal took place, suggest that the position taken by the United States is not totally without merit, and are therefore likely candidates for appeal. I code a

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of the "trial court".

[5]It is interesting to note, however, that this variable also taps another phenomenon. When this variable equals zero, it implies that the government also lost in the trial court, *and chose to appeal that outcome.* This variable thus also measures, at least indirectly, a case's "appealibility", a fact which is confounding with respect to the variable's overall impact. A complete untangling these effects would require a model of the decision to appeal the trial court decision, an endeavor beyond the scope of this dissertation, but a valuable prospect for future work.

variable one in cases where the decision of the court of appeals was unanimous, and zero otherwise, with the expectation that this variable will bear a negative relationship to the appeal decision.

In addition to those factors influencing the government's perception of the strength of its case, another crucial factor in determining the likely outcome of an appeal on the merits is the ideological outcome of the decision. There is no gainsaying the claim that ideology influences judicial decision making, and the attorneys in the Justice Department and the SG's office are undoubtably aware of this fact. To capture this dynamic, I include a variable for the ideological direction of the policy outcome in the court of appeals decision, coded one if that outcome is generally conservative, and zero if it is liberal. This coding follows that used by Spaeth (1995), and conforms to generally-accepted conceptions of ideological content in a legal context. I make the assumption that reviewing courts were generally conservative during 1993-94, a claim with ample empirical support for both the en banc panels of the U.S. courts of appeals (e.g. Van Winkle 1996) and for the U.S. Supreme Court (e.g. Epstein and Mershon 1996). Thus, I expect that liberal cases are more likely to be reversed on appeal than conservative ones, and that, recognizing this fact, the government will be less likely to appeal conservatively-decided cases than liberal ones.[6]

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[6]Note that, for all but 20 days (and seven cases in the sample), both the Department of Justice and the solicitor general's office were under the

Overall expectations for the relative influence of the winnability variables is similar to that for those which capture case salience. The solicitor general is responsible for arguing cases on appeal; in addition, he seeks to maintain his office's credibility with the court by appealing only cases which make a strong case for the government's position. I therefore expect that the influence of these variables will be greater on the appeal decision of the solicitor general than on that of the Justice Department appellate sections.

Finally, it is important for the government to consider the likelihood that a case will actually warrant review by the court to which it appeals. A range of factors have been shown to influence the likelihood of a case being heard by the U.S. Supreme Court (Caldeira and Wright 1988). Many of these variables (e.g. reversal between lower courts, unanimity in the lower court, ideology) have already been included in the model. One variable which is both unrelated to the decision on the merits and which has proven to be

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supervision of the first Clinton administration; I thus expect little variation in the ideological preferences of the offices over the period under study. The idea that the Clinton administration would work to strike down liberal lower court rulings, while allowing conservative ones to stand, may seem problematic to some. For example, as noted in Chapter 3, the early months of 1993 saw a number of cases in which the administration reversed its position in cases from that of the Bush administration. In fact, however, the Clinton administration has been anything but consistent in its advocacy of traditionally liberal positions in federal litigation. Additionally, in many cases the pro-government position is one which is by definition conservative (e.g. in all federal criminal prosecutions), so that this expectation is not as difficult to accept as may first be imagined.

substantially related to the likelihood of the Court granting plenary review is the existence of an intercircuit conflict in a particular case. Because of the role of the Supreme Court as final arbiter of conflicts in judicial interpretation, it grants review far more often to cases where such conflict exists than those in which it does not (Ulmer 1984).[7] I therefore code a variable one in cases in which an intercircuit conflict was mentioned in either the majority opinion, or in a concurring or dissenting opinion, of the decision handed down by the court of appeals; cases in which no such mention was made are coded zero.[8] To the extent that the Department of Justice and the solicitor general take account of the likelihood of plenary review in making their appeal decisions, this variable should be positively related to such appeals. Moreover, because the solicitor general is responsible for conducting litigation in the Supreme Court, and because of the nature of the relationship between the SG and the Court discussed in Chapter 4, we would expect that the influence of this variable on the appeal decision would be greater for the

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[7]In addition, the approbation which accompanies such conflictual decisions, and the resulting desire among the judges of a circuit to avoid promulgating such conflicts, also recommends these cases for requesting *en banc* review.

[8]Coding intercircuit conflicts is difficult. It is likely that the measure I adopt here fails to capture instances in which actual conflict between circuits is in fact present. Nonetheless, this measure has the advantage of heing both more reliable than the statements of the parties themselves and more workable than more labor-intensive measures requiring extensive searches on every case.

solicitor general than for the Justice Department appellate sections.

Summary statistics for the variables used in this analysis, and their bivariate correlation with the two dependent variables, are presented in Table 5.1. Because all the variables in question are dichotomous, their means indicate the proportion of cases which possessed that characteristic. Based on these statistics, the data seem consistent with what one would expect for cases on the government's docket. We see, for example, that the majority of cases dealt with issues of the criminal law, that invalidations of government acts and amicus curiae briefs were both relatively rare, and that the decisions of the courts of appeals were overwhelmingly unanimous. As one would expect for cases in which the government lost, the ideological direction of the decisions tended to be liberal, and intercircuit conflict was a relatively rare occurrence.

The question of the extent of each variable's influence on the decisions of the Department of Justice to recommend a case for review, and on the solicitor general's decision regarding the final disposition of the appeal, remains an open one. As noted in Chapter 4, some authors (e.g. Horowitz 1977) have stressed the similarities between the background, socialization, and goals of the attorneys in the two offices. Belief in the congruence of the two actors is buttressed by the bivariate correlations presented in Table 5.1.

Variable	Mean	Std. Dev.	Min.	Max.	r_{DOJ}	r_{SG}
Dept. of Justice Appeal Decision	0.311	0.464	0.0	1.0	-	0.55**
SG's Appeal Decision	0.126	0.332	0.0	1.0	0.55**	-
Invalidation of Law/Order	0.078	0.269	0.0	1.0	0.29**	0.23*
Criminal Case	0.560	0.497	0.0	1.0	-0.16	-0.14
Constitutional Claim	0.211	0.409	0.0	1.0	0.02	0.02
Amicus Brief in Lower Court	0.045	0.207	0.0	1.0	0.18	0.24*
Unpublished Lower Court Decision	0.150	0.357	0.0	1.0	-0.07	-0.08
Lower Court Reversal	0.790	0.408	0.0	1.0	-0.18	-0.14
Unanimous Lower Court Decision	0.868	0.339	0.0	1.0	-0.14	-0.14
Conservative Lower Court Decision	0.202	0.402	0.0	1.0	0.07	0.06
Square Conflict	0.136	0.343	0.0	1.0	0.23**	0.27**

N = 334
* $p < .05$ (two-tailed)
** $p < .01$ (two-tailed)

Table 5.1: Summary statistics for sample data. Data consist of a 10% random sample of all cases in which the solicitor general's office made a recommendation in 1993, and a 20% sample of all such cases in 1994. Columns labeled r_{DOJ} and r_{SG} indicate bivariate correlations between the independent variables and the Department of Justice's and solicitor general's appeal decisions, respectively.

In general, the pattern is one of similarity; while the various independent variables impact the two decisions to different degrees, the direction of their impact is uniformly consistent across the two actors. The similarity of the two decisions is also supported by the results presented in Chapter 3, which show that, at least in cases where the Department of Justice recommends that no further action take place, the solicitor general's office nearly always agrees with that assessment.

This is pattern of deference persists in the data which make up the sample analyzed here. Table 5.2 presents a crosstabulation of the decisions to take some further action in cases in the sample data. Clearly, a similar norm of deference is at work in the sample as well; in only one case out of 230 did the solicitor general proceed with an appeal over the negative recommendation of the Justice Department. Once again, then, we see the solicitor general giving substantial weight to the recommendations of the other decision makers in the appeal process.

At the same time, other students of the government's appeal process have noted differences in the priorities and goals of the two actors. Additionally, it is clear from a number of personal communications with members of the solicitor general's office that they are occasionally called upon to "be the bad guy", and refuse appeals which both the Department of Justice and the litigants themselves wish to have taken forward (Shapiro 1994b). As discussed in Chapter 4, one result of these differences in perspective and

Department of Justice Recommendation	Solicitor General Action		Total
	No Further Action	Further Action	
No Further Action	229 (99.57)	1 (0.43)	230 (100.0)
Further Action	63 (60.58)	41 (39.42)	104 (100.0)
Total	292 (87.43)	42 (12.57)	334 (100.0)

Table 5.2: Crosstable of Department of Justice recommendations for further action and solicitor general's decision, sample data 1993-94. $\chi^2 = 99.02$ ($p<.001$); $\gamma = 0.99$; $\tau_b = 0.54$.

goals is a disjunction between those factors that the relevant appellate section of the Department of Justice feels are important in deciding which cases to appeal and those which are of greatest significance to the final decision of the solicitor general. I choose to answer this question empirically, by examining the impact of each of the various factors on both stages of the process. Doing so will reveal differences in the criteria used by each office in making their decisions, and the weight given to those criteria, thus illuminating the goals which each pursues.

5.3 MODELING THE APPEAL DECISION: RESULTS AND ANALYSIS

The discussion in the preceding section of the interrelatedness of the Department of Justice's and solicitor general's appeal decisions has important implications for how these decisions are modeled econometrically. A model of dichotomous choice is the natural choice to analyze the impact of various case-related factors on the decision of the Department of Justice and the solicitor general to recommend or appeal a case, but the question of the proper form of the model remains. I begin by modeling the decisions of those actors probabilistically, as functions of (potentially overlapping) sets of independent variables:

$$Z_{i1} = X_{i1}\beta_1 + \epsilon_{i1} \tag{5.1.1}$$

$$Z_{i2} = X_{i2}\beta_2 + \epsilon_{i2} \tag{5.1.2}$$

where Z_{i1} and Z_{i2} represent underlying probability distributions for the appeal decisions of the Department of Justice and solicitor general, respectively. We observe only the dichotomous outcome of these two processes:

$$Y_{i1} = 1 \text{ if } Z_{i1} > 0 \qquad Y_{i2} = 1 \text{ if } Z_{i2} > 0$$

$$= 0 \text{ otherwise} \qquad = 0 \text{ otherwise}$$

Under these circumstances, a simple and intuitively plausible alternative is simply to estimate the two models separately, using a logit or probit specification (e.g Aldrich and Nelson 1984).[9] Doing so allows us to examine the impact of each of the various independent variables on the probability that either the Justice Department or the solicitor general will proceed with some form of appeal a case:

$$\text{Prob}(Y_{i1} = 1) = \Phi(X_{i1}\beta_1) \qquad (5.2.1)$$

$$\text{Prob}(Y_{i2} = 1) = \Phi(X_{i2}\beta_2) \qquad (5.2.2)$$

where Φ indicates the cumulative normal distribution function. I begin by examining such a model of the appeal recommendation made by the Department of Justice.

The results of estimating a probit model for the Department of Justice appeal recommendation is presented in Table 5.3.[10] Coefficient estimates are

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[9]Use of the probit model amounts to making the assumption that the errors in equations 5.1.1. and 5.1.2 are distributed independently and normally; the logit, that those errors are independently distributed according to a Type I extreme value distribution. In practice, the choice between logit and probit is typically inconsequential. For purposes of comparability with later analyses, I use a probit specification in this section; reestimation of these models using logit yields substantively identical results.

[10]Two cases were omitted from the analysis due to missing data on the conflict and ideological direction variables; a third case contained missing

presented, with their standard errors in parentheses, in the second column. The third column reports the change in the probability of a positive Department of Justice recommendation associated with that characteristic being present in a case, holding all other variables constant at their mean values.

In statistical terms, the model represents a good fit to the data. Examining the log-likelihood ratio statistic, we can reject the hypothesis that the coefficients are jointly zero with a great deal of confidence. The predicted probability of a positive recommendation, holding all variables at their mean values, is 0.30; this compares to an actual overall probability of 0.31 for such a positive recommendation. In general, the results comport with what was expected; all variables signs are in the expected direction, and a number achieve accepted levels of statistical significance.

Examining individual variables' effects, we note first that at least one factor of each type (cost, salience, reviewability and winning) is at least marginally influential at this stage of the process. The Department of Justice is significantly more likely to recommend some further action be taken in a case if the decision of the court of appeals either led to or upheld the invalidation of a statute or government order. Holding all other variables

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data on the variable for lower court reversal, thus yielding a valid N of 331.

Independent Variable	Estimate (Standard Error)	Probability Change
(Constant)	0.082 (0.282)	-
Law/Order Invalidation	1.073** (0.315)	0.407
Criminal Case	-0.350* (0.183)	-0.122
Constitutional Claim	0.026 (0.202)	0.009
Amicus in Lower Court Decision	0.670 (0.415)	0.256
Unpublished Lower Court Decision	-0.307 (0.235)	-0.099
Lower Court Reversal	-0.458** (0.191)	-0.167
Unanimous Lower Court Decision	-0.241 (0.227)	-0.087
Conservative Lower Court Decision	-0.189 (0.213)	-0.063
Intercircuit Conflict	0.842** (0.217)	0.318

$lnL = -175.51$
$-2lnL = 59.45$ ($p < .01$)
Pseudo-$R^2 = 0.145$
$N = 331$
* $p < .05$ (one-tailed)
** $p < .01$ (one-tailed)

Table 5.3: Results of probit model estimation of Department of Justice recommendations for further action.

constant at their means, the presence of such an invalidation increases the probability of an appeal recommendation by a sizeable .41. This result suggests that, as expected, the Department of Justice's position an intermediary between the attorneys or agencies initially responsible for the case and the solicitor general impacts on its decision with respect to appealing government losses. Because of its proximity to these individuals, and because of the departmentalized nature of the appellate sections, we find that the Department takes substantial account of the potential costs to the government entity involved in the litigation in making its recommendations to the solicitor general.

That departmentalization is also exhibited in the differential tendencies of the various sections of the Justice Department to recommend appeals. As reflected in the coefficient for criminal cases, the Department's Criminal Division appellate section, as a rule, is less likely to recommend an appeal be taken forward than those sections responsible for civil litigation. This results also comports with the hypotheses regarding the costs of such cases; as noted in Chapter 4, because of the relatively limited stakes the United States has in most such cases, we expected that criminal cases would be appealed at a lower overall rate than civil litigation. That hypothesis is borne out in Table 5.3; *ceteris paribus*, a criminal case is roughly 12 percent less likely to be recommended for appeal by the appellate sections than a comparable civil case.

The presence of a constitutional claim does not appear to have a substantial influence on the Department of Justice's decision to carry a case forward. It is possible that one explanation for this lack of effects is this variable's relationship with another variable in the model; cases involving issues of federal criminal law also tended to raise constitutional issues (r = 0.26, $p < .05$). More likely, though, is the fact that in many instances (particularly in criminal cases) constitutional issues are raised trivially by defendants. Constitutional issues thus raised are viewed by both the courts and the Justice Department as being of no more import than matters of common or statutory law.

The presence of one or more amicus curiae briefs in the lower court, and of an unpublished decision by that court, appear to influence the Justice Department's recommendations for appeal. Though neither variable reaches traditionally-accepted levels of statistical significance (one-tailed p = .054 and .096, respectively), both exhibit an important substantive impact on the Justice Department's appeal recommendation. The chances for a favorable appeal recommendation increase in the presence of one or more amicus curiae briefs by over 25%; a similar case in which the decision is unpublished would have its odds of an appeal recommendation reduced by nearly 10 percent. In both cases, the results are consistent with our previous hypotheses about the impact of these variables on the appellate sections' appeal decisions.

In cases where the court of appeals reversed the decision of the district court or administrative agency, our results show that the Department of Justice is substantially less likely to recommend any further action be taken in the case. Cases involving an appeals court reversal of the initial outcome are nearly 17 percent less likely to be recommended for appeal than those in which no such reversal is present. This result runs counter to our hypothesis, and suggests that cases in which the government is a "two-time loser" are more likely to be appealed than those in which it won at trial. As noted above, a possible explanation for this finding is that the variable for reversal in fact taps a kind of selection effect. On one hand, cases in which no reversal takes place were necessarily appealed by the United States in the first instance; this suggests that only cases which the government sees as particularly meritorious will take on a zero value for this variable, since those which are not will not be appealed to the court of appeals. Conversely, cases in which a reversal did occur were necessarily appealed by the non-government litigant; to the extent that these individuals also make appeal decisions on the basis of their perceived odds of winning on appeal (e.g. Songer et. al 1995), they necessarily consist of the "best" cases from the perspective of the other litigant. In this light, the negative influence of this variable is somewhat less surprising.

Neither unanimity in circuit court of appeals decisions nor ideological conservatism in such decisions appears to influence the Justice Department's

appeal decision. While both coefficient estimates carry the expected sign, neither achieves any level of statistical significance (one-tailed $p = .144$ and .193, respectively). In contrast, cases in which some intercircuit conflict is noted are substantially more likely to be recommended for appeal by the appellate sections. The presence of such a conflict, *ceteris paribus*, increases the probability of an appeal recommendation by the Justice Department by a sizeable 0.32. Whether for reasons of legal consistency or more pragmatic concerns over the probability of review by the appellate court, the Department of Justice clearly takes matters of intercircuit conflict seriously in making its appeal decisions.[11]

The foregoing picture of the Department of Justice's appeal recommendations provides us a baseline from which to make comparisons with the final appeal decision of the solicitor general. Accordingly, I estimated a probit model of that decision, including the same independent

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[11]Another possibility must also be considered. The existence of a split among the circuits on a rule of law means that agencies charged with that law's enforcement must adapt their procedures depending on where they are operating. Clearly, when substantial conflict exists, the potential costs to an agency to make such adaptions are quite high; in fact, geographic consistency (and the subsequent reduction in ambiguity and costs associated with enforcement) is one of the primary rationales presented for the centralization of litigating authority in the Department of Justice (e.g Olson 1984; also Chapter 4 *infra*), as well as a substantial part of the rationale for the Supreme Court's emphasis on resolving such conflicts (Stern, Gressman and Shapiro 1986). Thus, for earlier actors in the process at least, conflict in the circuits may in fact be a proxy less for reviewability than for costs associated with a decision.

variables as were included in the model for the Department of Justice's recommendation. Results of this analysis are presented in Table 5.4.

The results presented in Table 5.4 follow the format of Table 5.3, including presentation of the change in probability associated with each variable in the "mean case". Once again, the overall fit of the model is adequate; we may confidently reject the hypothesis that all coefficients are jointly zero. We note that invalidations, cases with amici in the Court of Appeals, and cases exhibiting intercircuit conflict are all significantly more likely to be the subject of action by the solicitor general. Conversely, criminal cases and reversals are less likely than others to be appealed by the SG, while the variables for constitutional claims, unpublished decisions, unanimity and ideology show no statistically important influence on the SG's decision process.

Comparing the results of Tables 5.3 and 5.4, one is first struck by their overall similarity. While minor variations in the effects of the independent variables on the solicitor general's appeal decision from those of the Department of Justice are apparent, the larger picture is one of consistency. With one statistically unimportant exception, the signs of the coefficients across the two models are identical, and their relative magnitudes are also

Independent Variable	Estimate (Standard Error)	Probability Change
(Constant)	-0.680** (0.320)	-
Law/Order Invalidation	0.551* (0.315)	0.118
Criminal Case	-0.414* (0.232)	-0.069
Constitutional Claim	-0.039 (0.260)	-0.006
Amicus in Lower Court Decision	1.004** (0.399)	0.267
Unpublished Lower Court Decision	-0.384 (0.338)	-0.051
Lower Court Reversal	-0.420* (0.225)	-0.079
Unanimous Lower Court Decision	-0.302 (0.256)	-0.056
Conservative Lower Court Decision	-0.050 (0.248)	-0.008
Intercircuit Conflict	1.074** (0.242)	0.270

lnL = -100.25
$-2ln$L = 51.35 ($p < .01$)
Pseudo-R^2 = 0.204
N = 331
* $p < .05$ (one-tailed)
** $p < .01$ (one-tailed)

Table 5.4: Results of probit model estimation of the solicitor general's decision on further action.

relatively consistent between the two decisions.[12] Nonetheless, important differences remain. The coefficient for invalidations is nearly twice as large in the model of the Justice Department recommendations as in that for the solicitor general; this confirms our earlier speculation that the Justice Department, because of its proximity to the agencies and others involved in the litigation, will be more responsive to such concerns than the relatively insulated Office of the Solicitor General. On the other hand, these results indicate that the presence of amicus curiae briefs in the court of appeals serves as a more important signal to the solicitor general than to the Department of Justice. To the extent that amicus briefs serve as signals of a case's political, legal, or social importance, the solicitor general is best served in the long run by taking account of these factors; such matters of case importance are of relatively less consequence to the Department of Justice in making its own recommendations.

The differences between the results for the appellate sections and the solicitor general generally confirm our expectations with respect to the

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[12]In part, this attenuation is due to the different rates of appeal of the two actors. While the mean probability of an appeal recommendation by the Justice Department is .31, the probability of an appeal by the solicitor general when all variables are at their mean levels is only .09. This lower rate of appeal, combined with the nonlinear nature of the probit model, means that direct comparison of the probability changes attributable to each of the independent variables is misleading. In this case, cross-model comparisons of the actual coefficient estimates provide a better means of assessing the relative influence of the independent variables on the two decisions.

relative influence of each of the four factors. Those variables related to the costs of the lower court loss show a stronger impact on the decisions of the appellate sections than on that of the solicitor general. Conversely, variables which tap salience, reviewability and winnability exhibit mostly stronger effects on the solicitor general's appeal decision.

Separate modeling of the appeal decisions of the Department of Justice and the Office of the Solicitor General, while informative, ignores the fact that, because of the weight which the solicitor general places on the DOJ's recommendation, it is likely that the errors in the two models will be substantially correlated. Failure to account for this correlation, and the information it contains, will result in estimates which are inefficient, and potentially critically so. Here I consider two possible means of dealing with this issue. The first such means, and one with substantial intuitive appeal, is to simply estimate a model of the SG's decision and include among the explanatory variables the recommendation of the Department of Justice:

$$Prob(Y_{i2} = 1) = \Phi(\beta_2 X_{i2} + \gamma Y_{i1} + \epsilon_{i2}) \qquad (5.3)$$

This specification is attractive, in that it explicitly models the impact of the Justice Department's recommendation on the solicitor general's decision to file an appeal. Results of estimation of this model using the sample data from 1993-94 are presented in Table 5.5.

Independent Variable	Estimate (Standard Error)	Probability Change
(Constant)	-2.379** (0.549)	-
Law/Order Invalidation	0.003 (0.372)	<0.001
Criminal Case	-0.274 (0.295)	-0.013
Constitutional Claim	-0.086 (0.330)	-0.004
Amicus in Lower Court Decision	0.957* (0.486)	0.106
Unpublished Lower Court Decision	-0.302 (0.440)	-0.011
Lower Court Reversal	-0.241 (0.277)	-0.013
Unanimous Lower Court Decision	-0.193 (0.320)	-0.010
Conservative Lower Court Decision	0.083 (0.312)	0.004
Intercircuit Conflict	0.930** (0.312)	0.088
DOJ Recommendation	2.241** (0.409)	0.295

lnL = -67.20
-2lnL = 117.44 ($p < .01$)
Pseudo-R^2 = 0.466
N = 331
* $p < .05$ (one-tailed)
** $p < .01$ (one-tailed)

Table 5.5: Results of probit model estimation of the solicitor general's decision on further action, including the effect of the Department of Justice's recommendation.

The results in Table 5.5 are striking; of the factors which were shown in Table 5.4 to influence the solicitor general's appeal decision, only the presence of one or more amicus briefs and intercircuit conflict remain statistically significant in the presence of the Justice Department's recommendation. Controlling for the influence of the Justice Department's recommendation, the influence of all other variables is reduced, in some cases very substantially. The estimated coefficient on the recommendation variable itself is large, very statistically significant, and of great substantive importance. For example, in a case in which all other variables are set to zero, the probability of a non-recommended loss being appealed by the solicitor general is .009. The same case, with only the DOJ's appeal recommendation, will have further action taken by the solicitor general with a probability of .444; the Justice Department's recommendation alone increases the chances of an appeal by nearly fifty fold. The results presented in Table 5.5 thus provide yet more strong evidence of the importance of the SG's deference to the decisions made by the coordinate actors in the government litigation process.

Inclusion of the Department of Justice's recommendation into our model of final appellate action is a straightforward and intuitively appealing way of introducing the idea of interrelated decision processes into our model of government appellate decision making. This specification is problematic, however, for a number of reasons. First, to the extent that similar variables

predict both Y_1 and Y_2, substantial collinearity among the independent variables is introduced. The result is that estimated standard errors on the coefficients in Table 5.5 will likely be biased upwards. In fact, this appears to be the case; a comparison of the standard errors of the estimated coefficients in Tables 5.4 and 5.5 reveals that inclusion of the Justice Department's recommendation in the model results in standard errors for the other coefficients which are uniformly larger, in some cases by as much as 58 percent. Moreover, introduction of Y_1 into the right-hand side of the equation for the SG's decision means that we now have an explicitly endogenous explanatory variable. Under such circumstances, many of the desirable properties of the maximum likelihood estimates of β_2 and γ (e.g. unbiasedness, consistency) are lost (Greene 1997).

A second alternative, then, is to treat the two models as separate but related decisions by the two actors. Substantively, this implies that, while we may be unable to specify each equation perfectly (hence the stochastic error terms in equations 5.1.1 and 5.1.2), we can incorporate our knowledge that these unobserved factors exhibit some influences on both decision makers. Formally, this is accomplished by allowing the error terms in equations 5.1.1 and 5.1.2 to be distributed as a (standard) bivariate normal distribution:

$$[\epsilon_{i1}, \epsilon_{i2}] \sim BVN(0,0,1,1,\rho)$$

In this *bivariate probit* specification, the correlation between the two processes is captured by the estimated covariation between the two error components (ρ).

This specification has numerous advantages relative to the previously presented alternatives. First and most important, it captures the interrelatedness of the two decisions, allowing for a specific estimate of the degree of this relationship. Because the error terms of the two choice equations (and therefore also the probability estimates themselves) are explicitly allowed to be correlated in this way, estimates of the impact of a given explanatory variable on one decision process is made conditional on its influence on the other. This fact allows us to more accurately assess the relative impact of particular independent variables on the choices made by each of the relevant actors, without the problem of collinearity introduced by explicit incorporation of an endogenous variable into the second equation. Finally, the model ensures that the estimates obtained retain the desirable properties of MLE's more generally.[13]

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[13]A third alternative would be to treat the Department of Justice's decision as limiting the number of cases which the solicitor general reviews for final appeal consideration. Such a conceptualization implies a selection model, a specification which, given the previous discussion regarding the deference given to the Department of Justice's recommendations, has considerable intuitive appeal. However, two factors mitigate against a selection model specification in this case. First, unlike other circumstances in which such models have been applied (e.g. reservation wages and women's participation in the labor market), the selection mechanism is imperfect; the SG can, and occasionally does, ask for review of a case against the Department of Justice's

Estimates derived from maximum likelihood estimation of the bivariate probit model outlined above are presented in Table 5.6. The dependent variables are the decisions by the Department of Justice and the Office of the Solicitor General to recommend or proceed with an appeal, respectively. The model overall is strongly significant, and comparisons with restrained models indicate the superiority of the current specification. For example, a likelihood-ratio test allows us to reject a model in which the coefficients are constrained to be equal across the two decisions ($-2lnL = 82.24$, $p<.001$), suggesting further that there are important differences in the factors which drive the appeals decision at the different stages.

In large part, the results presented in Table 5.6 confirm those of Tables 5.3 to 5.5. As was the case in the analyses presented above, some variables appear to be important for both actors. The presence of an intercircuit conflict is again influential in both stages of the process, suggesting that both the Department of Justice and the solicitor general are aware of the increased probability of review of such cases; that influence is, however, substantially greater for the solicitor general than for the Justice

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recommendation. Second, the desire to test for the effects of each of the various independent variables on both appeal decisions necessarily means that X_{i1} and X_{i2} will be perfectly collinear; under these circumstances, use of many common sample selection models (e.g. Heckman 1979) is inappropriate (Nawata and Nagase 1996).

Independent Variable	Department of Justice Decision	Solicitor General Decision
(Constant)	0.069	-0.728**
	(0.288)	(0.328)
Law/Order Invalidation	1.073**	0.539*
	(0.318)	(0.310)
Criminal Case	-0.339*	-0.393*
	(0.189)	(0.227)
Constitutional Claim	-0.017	-0.016
	(0.218)	(0.284)
Amicus in Lower Court Decision	0.714	1.027*
	(0.462)	(0.435)
Unpublished Lower Court Decision	-0.292	-0.387
	(0.239)	(0.379)
Lower Court Reversal	-0.473*	-0.433*
	(0.192)	(0.224)
Unanimous Lower Court Decision	-0.208	-0.270
	(0.247)	(0.260)
Conservative Lower Court Decision	-0.210	-0.042
	(0.224)	(0.251)
Intercircuit Conflict	0.833**	1.135**
	(0.218)	(0.271)
$\rho_{\epsilon_1\epsilon_2}$	0.898**	
	(0.075)	

lnL = -242.71
N = 331
* $p < .05$ (one-tailed)
** $p < .01$ (one-tailed)

Table 5.6: Results of bivariate probit model estimation of Department of Justice's recommendation and the solicitor general's decision on further action.

Department. Likewise, invalidation of a law or order also appears to exert a positive effect on the probability of appeal recommendations, although that effect is greater for the Department of Justice than for the solicitor general.

While there is thus some overlap in the effects of these factors, Table 5.6 also indicates that, consistent with out earlier findings, some variables appear important only in the decision process of one or the other actor. In particular, the presence of an amicus curiae brief in the court of appeals appears to exert a stronger influence on the SG in his or her decision, but a less substantial (though still somewhat substantively important) impact at the recommendation stage.

Finally, as in previous models, the presence of a constitutional claim, for example, appears to make little difference in the decisions of either actor to appeal a case. Likewise, we see little evidence of ideological influence on the decisions of either the Justice Department or the solicitor general; conservatively-decided court of appeals losses were no more or less likely to be recommended or appealed than liberal ones. While the estimates for the impact of unanimous decisions on the appeal probabilities are in the expected direction, neither reaches conventional levels of statistical significance (p = .20 and .15, one-tailed, for the Justice Department and solicitor general models respectively). Finally, the presence of an unpublished opinion in the lower court also has only a marginally significant negative effect on the solicitor general's appeal decision (p = .15, one-tailed), and a similarly

insignificant impact on the actions of the appellate sections.

The estimated correlation coefficient ρ also provides information about the degree of dependence between the two decisions. The estimated value of .898 is large and strongly significant, indicating that the two decisions are highly related even after controlling for the effect of the independent variables. A likelihood ratio test rejects the hypothesis that the errors of the two equations are uncorrelated (i.e., that $\rho = 0$) at high levels of confidence ($-2lnL = 66.10$, $p<.001$).[14] In substantive terms, this high correlation indicates that factors not included in the model (for example, those relating to case facts) are viewed in much the same way by the Justice Department and the solicitor general. The positive correlation also indicates that cases which tend to receive appeal recommendations from the Department of Justice appellate section also tend to be appealed by the solicitor general, thus providing even more support for the notion that a norm of deference operates in the government's appeals process.

The presence of a correlation between the errors suggests that the impact of a given independent variable on the appeals decisions will have both direct and indirect effects on the probability of a final appeal recommendation. That is, the effect on the solicitor general's appeal decision

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[14]Since uncorrelated errors cause the bivariate probit model to reduce to two separate, univariate probits, the likelihood ratio test in this case can be based on a test between the log-likelihood of the model in Table 5.6 against the sum of the log-likelihoods for the models given in Tables 5.3 and 5.4.

of a change in a given independent variable will be manifested both through its direct influence on his or her consideration of the case, and on its concurrent effect (if any) on the decision made by the Department of Justice. Computing these probabilities is straightforward. The two decision processes yield a total of four possible outcomes, corresponding to the four cells of Table 5.2. We can write the joint probability of each of these as a function of the independent variables. For example, the probability of both the appellate section and the SG recommending further action in case i is:

$$\Pr(\text{Appeal, Appeal})_i = \Phi_2(\beta_1 X_{i1}, \beta_2 X_{i2}, \rho), \tag{5.4}$$

where the terms in parentheses are the appeal decisions of the Justice Department and the solicitor general, respectively, and Φ_2 denotes the bivariate normal cumulative distribution function (Greene 1997). The joint probabilities for the two "split" outcomes are

$$\Pr(\text{Appeal, No Appeal})_i = [\Phi(\beta_1 X_{i1})] - \Pr(\text{Appeal, Appeal}) \tag{5.5}$$

and:

$$\Pr(\text{No Appeal,Appeal})_i = [\Phi(\beta_2 X_{i2})] - \Pr(\text{Appeal,Appeal}), \tag{5.6}$$

while the probability that neither decision maker will recommend an appeal be made can be written as:

$$\Pr(\text{No Appeal,No Appeal})_i = 1 - \Pr(\text{Appeal,Appeal}) - \Pr(\text{Appeal, No Appeal}) - \Pr(\text{No Appeal, Appeal}) \quad (5.7)$$

To further illustrate the impact of the various factors in the bivariate probit model, I calculated these predicted probabilities under a range of different circumstances regarding the independent variables; these results are presented in Table 5.7. The baseline for comparison is the "modal" case, one in which all independent values take on their modal values; i.e., a liberally-decided, unanimous, published decision involving a federal criminal matter and reversing the decision of the district court, in which neither intercircuit conflict, invalidation of a statute or policy, a constitutional claim, nor an amicus curiae brief was present. As we would expect, such a case has a relatively low probability of appeal. The picture of these probabilities squares well with our earlier findings: the probability of review in a "typical" case is generally small, and the Justice Department's appellate sections appear to serve a pre-screening function for the solicitor general. This latter fact is reflected in both the low overall probabilities for appeal in general, and in the particularly small chance of a (No Appeal, Appeal) outcome.

Case Characteristic	Pr(No Appeal, No Appeal)	Pr(Appeal, No Appeal)	Pr(No Appeal, Appeal)	Pr(Appeal, Appeal)
Modal case	0.828	0.138	0.001	0.033
Modal case + Intercircuit Conflict	0.539	0.216	0.008	0.237
Modal case + Invalidation	0.450	0.450	0.001	0.099
Modal case + Amicus brief	0.585	0.202	0.009	0.204
Modal case + Intercircuit Conflict + Invalidation	0.169	0.390	0.001	0.440
Modal Case + Intercircuit Conflict + Amicus brief	0.247	0.121	0.029	0.603
Modal Case + Invalidation + Amicus brief	0.201	0.400	0.001	0.398
Modal Case + Intercircuit Conflict + Invalidation + Amicus Brief	0.046	0.144	0.002	0.808

Table 5.7: Predicted probabilities of various appeal decision outcomes, by independent variables. "Modal" case has all independent variables at modal values. The first probability term is the recommendation of the Department of Justice; the second is the final decision of the solicitor general.

To illustrate the different effects of the various case-specific factors on the decisions of the two relevant actors, I evaluate the influence of three independent variables on the appeal probabilities of both actors: intercircuit conflict, policy invalidation, and amicus participation. While the expected influence of all three variables on the appeal decision is positive (i.e., each is associated with an increase of an appeal recommendation or action), the estimated coefficients associated with these variables illustrate their differential impact on the two appeal stages. Conflict, for example, increases the probability of an appeal action by both actors roughly equally; invalidation, on the other hand, shows a much greater impact on the DOJ's recommendation than on the decision of the SG, while the effect of amicus briefs are exactly the opposite, exhibiting greater influence on the decision of the solicitor general than on that of the Department of Justice.

The relative influences are borne out in the predicted probabilities presented in Table 5.7. The presence of an intercircuit conflict alone, for example, increases the probability of an appeal recommendation and that of an actual appeal by roughly equal amounts; the slightly greater influence of this variable on the decision of the solicitor general is seen in its effect on the probability of a (No Appeal, Appeal) outcome. This is also true of the change in appeal probability associated with the presence of one or more amicus briefs; such a brief brings the (Appeal, No Appeal) and (Appeal, Appeal) probabilities from a substantial difference in the modal case to a nearly equal

level, thus illustrating that variable's larger effect on the solicitor general's decision. The opposite effect is true of the variable indicating the presence of an invalidation of a government policy; that variable shows a substantial increase in the (Appeal, No Appeal) category relative to the mode, but a correspondingly smaller increase in the (Appeal, Appeal) outcome, and no significant increase at all in the probability of a (No Appeal, Appeal) decision.

The joint impact of these variables is substantial as well, such that cases with two or three of these characteristics have increasingly high appeal probabilities. Here again, the differential effects of the variables across the two decisions are apparent; we see dramatic differences in the various outcome probabilities between, for example, a modal case with intercircuit conflict and one or more amicus briefs, and the same case with both conflict and invalidation of a law or policy. And an otherwise "typical" case with all three factors present has nearly as great a chance of being appealed as does a case with none of them has of being let stand.

5.4 CONCLUSION

This chapter has established and tested a model of federal government appeals in cases decided in the U.S. courts of appeal. Drawing on the structure of the appellate process described in Chapter 2, and the discussion of actors and goals in Chapter 4, it has examined the influence of a wide

range of case-related factors on the appeals process of the United States. I set forth hypotheses and operationalized variables corresponding to four general issues to which the federal government would be expected to give consideration in its appeals decision outlined in Chapter 4: cost, significance, winnability, and the probability of appellate review.

The results of the analysis both confirmed and disconfirmed a number of these hypotheses. While variables measuring each of the four broad factors mentioned were shown to be related to at least one stage of the appellate process, a number of expectations regarding those variables were not met. In general, the invalidation of a statute or policy, the presence of an amicus brief in the court of appeals, and the existence of a conflict among circuits on the matter addressed by the decision increased the probability of a government appeal, while federal criminal cases and cases in which a lower court decision was reversed were less likely to be appealed, or recommended for appeal. Neither constitutional claims, lack of publication, unanimity or ideological content, in contrast, showed any influence on the appeal decisions of either the appellate sections of the Justice Department or the solicitor general's office.

In addition, a number of our hypotheses regarding the relative influence of these variables were also confirmed; invalidations, for example, seem to be treated with greater concern by the various branches of the Justice Department than by the solicitor general, while the reverse is true for

cases in which briefs amicus curiae were filed. Similarly, the solicitor general's office gave more weight to the presence of intercircuit conflict in their appeal decisions than did the appellate sections. The results largely support the notion that the institutional position of the decision makers influences their goals, and subsequently results in varying importance being attached to different influences on the appeal decision.

Finally, our modeling efforts again points up the sequential, conditional nature of the appeal decision making process. I uncover a substantial degree of correlation between the decisions of the appellate sections and the solicitor general, even after controlling for the effect of a number of important influences on those decisions. This result, along with the general similarities in coefficient estimates, indicates that these two decision makers view cases in much the same way. This fact in turn provides support for the idea that the solicitor general relies on the Justice Department appellate sections to do some of his "screening" of cases for him. These results again emphasize the importance of considering the entire process, rather than just the decisions of the solicitor general, in understanding government appeals.

In this chapter an explanation of the federal government's appeal decisions begins to emerge. But while the decision to appeal or not is, as noted in the introduction to this chapter, the most basic one faced by a government litigant, it is also not the only one he or she must make. Equally

important as the decision to appeal, if not more so, is the choice of forum; beyond *whether* to appeal lies the issue of how (or, more accurately, *where*) to appeal. This choice is as potentially crucial to the government's success as a litigant as any other, and forms the basis of the analysis presented in Chapter 6.

CHAPTER 6

GOVERNMENT APPEAL STRATEGIES: THREE VIEWS

While it is clear from the results presented in Chapter 5 that the decision to appeal or not appeal a loss is both important and complex, this decision does not capture the full subtlety of the government's litigation choices. In particular, when a case is decided adversely to the government by a three judge panel of a U.S. court of appeals, there are two options available should the U.S. wish to litigate the case further: a request that the case be reheard *en banc,* or filing of a petition for certiorari in the Supreme Court. Should the government decide that further action is warranted, it must also decide how to pursue that action; that is, in which forum to seek a reversal. The decision becomes not only one of whether to seek an appeal, but also where to do so.

In this chapter I examine this issue of the choice of forum in which an appeal is sought, a decision I label "appeal strategy". I do so by considering three different ways in which one might conceptualize appeal strategies, and the potential ramifications of those different conceptualizations for how

appeal decisions are made. I go on to link these characteristics to the theoretical discussion set forth in Chapter 4, and to show how the different conceptualizations of the appeal strategy decision suggest various means of examining the impact of these factors on the decision. I then examine appeal strategies in cases handled by the Office of the Solicitor General during 1993 and 1994, using these data to empirically examine the impact of the factors in question using each of the three approaches.

6.1 APPEAL STRATEGIES: CONCEPTUALIZATION AND HYPOTHESES

Before any analysis of the government's appeal strategy may begin, it is important that we understand exactly what the Department of Justice and the solicitor general believe they are doing when making an appeal strategy decision. That is, how do the different actors in the appeal process view the decision among no appeal, *en banc* requests, and petitions for certiorari?

An accurate understanding of how this decision is viewed is critical for a number of reasons. First, having a valid picture of the government's characterization of the appeal strategy decision reinforces the conclusions which can be drawn from the analysis. As will be seen, different views of the appeal strategy decision imply substantively different expectations about the influences on those decisions. An incorrect understanding of the participants' views of the decision making process will undoubtedly lead to incorrect

findings about the proximate causes of that decision.

Second, and relatedly, how the government views the appeal strategy decision is relevant to efforts to model that decision quantitatively. Different decision frameworks necessarily imply different modeling strategies to accurately reflect the nature of the decision being made. Relatedly, understanding how the decision makers view their options enables us to establish more plausible expectations with respect to the influence of the various factors outlined above on the appeal strategy decision.

How, then, does the government view its decision of if and where to appeal an unfavorable decision?[1] To reiterate: when the U.S. loses a case in a three-judge court of appeals, it may choose to let that decision stand, request a rehearing of the case *en banc*, or petition the Supreme Court for a writ of certiorari. This decision among three quite distinct alternatives could be considered in a number of different ways.

One possibility is that the government views the two positive appeal alternatives as *sequential* in nature. Under this view, a request for a rehearing *en banc* constitutes the first stage of the appeal process, and a petition for certiorari occurs only after the rehearing was either denied or

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[1]It should be noted from the outset that while there is a substantial amount of scholarly work on the topic of the government's (and particularly the solicitor general's) decision to file a petition for certiorari (see Chapters 4 and 5, *infra*), there is no such work extant on the government's decision to request an *en banc* rehearing of a case.

was unsuccessful in securing a reversal of the panel decision. Such a sequential view of the appeal process is intuitively attractive. The structure of appeals in the federal courts is such that a rehearing *en banc* is a natural point in the process between a three-judge panel and the Supreme Court. Moreover, the entire *raison d'etre* of the rehearing *en banc* is so that the circuits can, to some extent, "police themselves"; a decision in a three-judge panel which does not reflect the views of the circuit as a whole is ripe for being overturned *en banc* (e.g. Van Winkle 1996).

The sequential view is also supported by scholarship, and the by practices of the judiciary. Writing on the decision to grant or deny certiorari, for example, Perry refers to the idea of "percolation":

> "*Perry*: ...I have often heard about the need to let an issue...
> *Justice*: [Interrupting] — percolate?
> *Perry*: Yes. But how does one know when it has percolated enough?
> *Justice*: That is driven by time...Conflicts often work themselves out, particularly if the conflict is within a circuit, we will let them decide *en banc*." (1991, 233)

From this notion of "percolation", one might expect that a case which was heard by a full circuit would have a greater chance of being accepted on certiorari than one decided by a three-judge panel. If indeed this is the case, it buttresses the sequential view in two ways. First, and most obviously, it suggests that the government (and, in fact, any losing party) has little to lose

from requesting a rehearing *en banc*. Whether the full court of appeals reverses the panel's decision, affirms it, or refuses the request entirely, the costs are small and the potential gains are large.

Second, and more subtle, is the possibility that a request for a rehearing *en banc* acts as a message to the circuit: correct the decision of your panel, or face the possibility of a reversal in the Supreme Court. This latter aspect of the sequential model conforms with aspects of the solicitor general's office as well. A simplified view of the solicitor general's goals might be to win as many cases on appeal as possible while taking as few of them as possible to the Supreme Court. Rehearings *en banc* facilitate this goal by allowing for the possibility of achieving reversal of a government loss without burdening the Supreme Court's docket more than necessary.[2]

Yet another way of considering appeal strategy is one I refer to as an *ordinal* approach. It is possible that consideration of the options as to where to appeal a case might take place concurrently, but that different weight may be given to the outcomes. In particular, the gravity associated with taking a

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[2]Uelmen (1986) has suggested this possibility with respect to the Reagan Justice Department and the decisions of the Ninth Circuit during the early 1980's: "To the extent that the Solicitor can convince judges at the court of appeals level that the denial of a rehearing *en banc* is simply a prelude to Supreme Court review, and Supreme Court review means a substantial probability of Supreme Court reversal, he may be able to increase his rate of success on petitions for *en banc* hearings, and get at least some of the decisions he is unhappy with reversed without having to bother the Supreme Court." (1986, 365)

case to the Supreme Court, coupled with the desire of the solicitor general to limit such petitions (and the long odds of having them granted) may cause that option to be afforded greater weight than a *en banc* request. This suggests a relative ranking for the appeal alternatives open to the government, with the least significant or "appealable" cases being allowed to have their decisions stand, more favorable cases receiving requests for rehearings, and the most important and appropriate cases being taken to the Supreme Court. In this ordinal conception, the appeal decision amounts to a decision over an ordered choice set, with each successive alternative representing a higher level of intensity than those below it.

The ordinal approach's intuitive appeal lies in the great importance accorded to decisions of the Supreme Court. Furthermore, this significance is compounded in the case of the government as a party to litigation. As has been discussed elsewhere, the repeat status of the United States as a litigant means that it can ill afford either to promulgate bad precedent or to lose credibility with the Court. As a result, the ordinal approach, imbuing the notion that appeal to the Supreme Court represents an action of potentially greater importance than other manner of appeals, is an attractive one to consider.

There is also some support for an ordinal approach in the practices of the government appeal decision makers themselves. In contrast to the more sequential view, the solicitor general in particular will often make a

simultaneous statement about the suitability of a case for both kinds of appeal. The most common of these are decisions of "No Rehearing En Banc, No Cert" made by the office (see Appendix A). In at least one instance during 1993-94, however, the solicitor general's decision was for "Rehearing En Banc, No Certiorari". This indicates that, at least occasionally, cases are seen as likely candidates for one form of appeal, but not another.

A final possibility is that the parties in question view the decision as a contemporaneous choice among three different, relatively discrete options. Under this view, each case is evaluated in light of the relevant factors with respect to its prospects in each of the two alternative appellate fora, and a decision is reached about which, if any, offers the best chance for a reversal. In this *discrete* approach, no particular weight or order is assigned to the options considered; each is examined solely in terms of its relationship to the instant case, and the alternatives are considered simultaneously rather than sequentially.

While there is little support in the literature for the proposition that the government handles appeal decisions in precisely this fashion, there is some support for it in the data. Most of this support arises from the fact that, in many instances, various government litigants opts to forego an *en banc* request and go directly to a petition for certiorari. It is not uncommon, for example, for originating agencies to request the filing of certiorari petitions in cases decided by three-judge courts of appeals (Shapiro 1994b). Similarly,

as illustrated in Table 3.2, recommendations for certiorari petitions are made in large numbers of cases where no *en banc* rehearing has occurred.[3] Finally, in a not inconsequential number of instances the solicitor general himself petitions for certiorari in cases decided by three-judge panels (see Table 6.1, below).

Whether the government views the choices associated with its appeal strategy as sequential, discrete, or ordinal has important implications for our understanding of those decisions.[4] A commonality among them, however, is that each suggests some general structure in which factors specific to a case can be considered pursuant to a decision regarding an appeal. A sequential view, for example, allows for case-specific factors to weigh differently in the *en banc* and certiorari decisions: a case which is seen as a "good bet" for a reversal *en banc* may nonetheless not be authorized for certiorari should that

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[3]While it is not clear from the data provided by the solicitor general's office alone what proportion of these recommendations occur in decisions handed down by three-judge panels, the large number of such recommendations, combined with the relative infrequency of *en banc* rehearings in the courts of appeals, indicates that this is very likely the case. See also Table 6.1 below.

[4]Bear in mind as well that each of these views of the appeal process is something of a pure type. The reality of appeals decision making undoubtedly embodies aspects of all three. Moreover, it is very likely that the perspective taken on appeal may vary across cases, and even across different actors in the same case. In addition, one could quite easily come up with additional views; for example, combining a sequential and ordinal approach might lead to a process in which many *en banc* petitions are filed, but few cases are subsequently taken to the Supreme Court. I address the three possibilities outlined above empirically in sections 6.2 and 6.3 below

reversal not be forthcoming, if the fact circumstances dictate that it would have little chance of reversal on the merits. Additionally, the sequential model also suggests an important restriction on how cases proceed through the appeals process to the Supreme Court. If the sequential view is true, cases will rarely, if ever, be authorized for Supreme Court review without having first been either decided by a full circuit or having had a request for such review denied.

Conversely, a discrete model imposes no such restriction on a case's advancing to the Court: cases may come to the Court directly from three-judge panels. Like the sequential perspective, however, the discrete view allows different factors to be given varying weight in the consideration for appeal. The most conspicuous example would be the matter of intercircuit conflict: while a panel's enunciation of a rule which conflicts with that of another circuit may or may not provoke a reaction by that circuit, it will most certainly weigh heavily in the Supreme Court's decision of whether or not to hear the case on appeal. More generally, cases which possess a number of characteristics traditionally associated with success in one appellate forum, but not the other, become likely candidates for appeal to that reviewing body.

In further contrast to the discrete model, the ordinal conception suggests that the influence of the various case-specific factors is essentially equal across alternatives. What is most critical in the ordinal view is the overall *intensity* of the combination of case stimuli: only the very "best" cases,

i.e., those with the highest prevalence of positive case facts, will be selected for appeal to the Supreme Court. Those with lesser facts may receive suggestions for *en banc* rehearings, while the bulk will be allowed to remain unappealed.

In the remainder of this chapter, I evaluate each of these perspectives empirically. Because each has clear implications for the character of the appeals process, we may learn a good deal about how those decisions are viewed by the various actors from an examination of the cases themselves.[5] In addition, because each makes assumptions about how case-specific factors play into the appeals decisions, an empirical examination of the models which emerge from each provides another gauge of their adequacy. Accordingly, I turn next to a review of the data on recent appeals decisions by the federal government. I review these data for evidence regarding which of the three views receives the most support, and go on to examine the influence of a number of independent variables on the decision of which appeal option to pursue.

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[5]Obviously, this is not the only way that perspectives on the government's appeal strategy may be ascertained. One especially promising avenue of inquiry in this regard is to talk to the individuals making those decisions. As part of my continuing research into government appeals, I plan to conduct interviews with individuals in the litigating arms of the various federal agencies, the Justice Department, and the solicitor general's office, in part to gain a clearer picture of their views of the appeal strategy decision.

6.2 DATA AND ANALYSIS: EVALUATING THE THREE APPROACHES

To conduct an examination of government appeals strategies, I once again analyze data on a sample of cases in which the United States lost in the courts of appeals, and subsequently made an appeal decision following that loss, during 1993 and 1994. The data used are the 334 cases which constituted the 15 percent sample analyzed in Chapter 5.[6] Furthermore, I evaluate the impact of the various case-specific factors discussed in Chapter 4 on the different appeal options available to the different actors in the appeal process.

I begin by reviewing the actual appeal strategy decisions made by the appellate sections of the Department of Justice and the solicitor general.[7] These data are presented in Table 6.1. Of the 334 cases in the sample, the appellate sections of the Department of Justice recommended no further action in 230 (68.9 percent), while suggesting a request for an *en banc* rehearing in 69 cases (20.7 percent) and a petition for certiorari in 35 (10.5 percent). These numbers are comparable to those for all appeal

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[6]See Table 5.1 for summary statistics on these data.

[7]As discussed in Chapter 3, the data provided by the Office of the Solicitor General do not provide information on the appeal strategy recommendations of the originating agencies. While it is possible to infer whether the originating entity asked that some further action be taken in a case, I am not able to determine the kind of action suggested (*en banc* rehearing, petition for certiorari, etc.).

Department of Justice's Recommendation	Solicitor General's Action			
	No Action	Rehearing	Certiorari	Total
No Action	229 (99.57)	1 (0.43)	0 (0.00)	230 (100.0)
Rehearing	38 (55.07)	31 (44.93)	0 (0.00)	69 (100.0)
Certiorari	27 (77.14)	0 (0.00)	8 (22.86)	35 (100.0)
Total	294 (88.02)	32 (9.58)	8 (2.40)	334 (100.0)

Table 6.1: Crosstabulation of appeal strategies by Department of Justice and solicitor general for sample data. Numbers in parentheses are row percentages. $\chi^2 = 194.22$ ($p < .01$), $\gamma = 0.83$ ($p < .01$).

recommendations during 1993-94, which included 1338 recommendations against further appeals (61.9 percent), 494 *en banc* suggestions (22.9 percent) and 329 recommendations for certiorari (15.2 percent) (see Table 3.2 for details). The differences between the sample data and the population are traceable to the oversampling of cases from 1994; while this makes the sample results less comparable to the population, the unusually high level of appeal recommendations in 1993 (see section 3.3) suggests that the sample results are likely more representative of the general distribution of appeal suggestions.

In the Office of the Solicitor General, our sample data indicate that the solicitor general took no further action in 292 cases (88.5 percent), petitioned for a rehearing *en banc* in 31 (9.4 percent) and for certiorari in seven (2.1 percent).[8] The comparable figures for all data in 1993-94 are 1921 "no actions" (89.2 percent), 160 *en banc*'s (7.4 percent) and 72 petitions for certiorari (3.3 percent),[9] indicating that the sample and population data are quite similar on this measure.

In examining the concordance of the two actors in their strategy recommendations, the balance of deference and independence struck by the solicitor general is once again apparent. The solicitor general's office was nearly perfect in its following of "no action" recommendations from the appellate sections, refusing to take such action in over 99 percent of the cases in which such a recommendation was made. Additionally, there is a good deal of deference on the part of the solicitor general in cases in which some further action is suggested. For example, Table 6.1 makes clear that the

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[8]Four cases are excluded from these figures because the SG's action did not fall into any of these categories: one case of a panel rehearing and three in which the SG took action with respect to appeals brought by other parties against the U.S. I include these cases in the analyses below, however, where the DOJ had made a recommendation for some government action.

[9]In the population data, eight cases did not fall into any of these three broad categories. These cases are those in which the SG's action included "Panel Rehearing" (2 cases), and "Partial Acquiescence to Certiorari", "Waive Right to File Response to Petition for Certiorari", "Interlocutory Appeal", "Amicus Participation in Support of Certiorari", "Protective Motion for Divided Argument", and "Removed" (1 case each). See Table 3.3 for details.

solicitor general will generally not file a petition for certiorari in he Supreme Court unless the appropriate Department of Justice appellate section requests it to do so. Likewise, the sample data uncover no instances in which a request for a petition for certiorari by the Department of Justice was "demoted" to an *en banc* request. This suggests that a Justice Department request for certiorari is something of an "all or nothing" proposition, a fact which may have implications for how the appellate sections view such requests.

In contrast to this deference, however, is the fact that the solicitor general's office is free to follow its own lead in making the final appeal decision in government losses. The SG's office petitioned for *en banc* rehearings in only 45 percent of cases in which the appellate sections recommended such a request, while filing petitions for certiorari in roughly 23 percent of cases where such petitions were recommended.[10] Thus, while the solicitor general appears to follow the strategy recommendations of the Department of Justice, as was the case in Chapter 3 he is also clearly not shy about refusing to proceed with cases in the face of such positive recommendations.

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[10]The 77 percent rate at which requests for certiorari petitions are denied by the solicitor general is consistent with the remarks of former solicitor generals. In 1984, for example, Solicitor General Rex Lee remarked that his office authorizes "only one out of every six requests to file certiorari petitions" which it receives (quoted in Uelmen 1986, 363).

While the examination of strategies in the aggregate is of some importance, the more interesting question is how these decisions are made. The answer to that question will depend in large part on the perspective of the various actors, and on the appeal options available to them. I therefore seek an answer by examining in turn models corresponding to each of the three alternatives presented above.

6.2.1 THE SEQUENTIAL APPROACH

I begin evaluation of the three characterizations of appeal strategy by considering the sequential view. If the government adopts this perspective on appeals, we would expect that few cases would receive recommendations for certiorari, or actually be petitioned, without first having at least an attempt made for a rehearing *en banc*. Examining the sample data, it is therefore informative to compare the manner of the disposition of the court of appeals decision with the decision made by the Justice Department and the solicitor general, to see if this is in fact the case.

Of the 334 cases in the sample data, 322 were decided by three-judge panels of the courts of appeals. Five cases were decided by circuit courts sitting *en banc*, and six cases involved appeal decisions made following a

denial of the U.S.'s petition for an *en banc* rehearing.[11] Thus, eleven of the 333 cases on which data are available had either been ruled upon by an appeals court sitting *en banc*, or the court had refused to do so; in these cases, the only remedy available to the government was a petition for certiorari. If the sequential model is the operative one, we expect that these latter cases alone would constitute the universe of cases in which petitions for certiorari were filed by the government. On the other hand, for either of the other two models, there could be no relationship between the manner in which the court of appeals made its decision and the appeal strategy selected; that is, we might expect that *en banc* cases and denials from *en banc* ought to be no more likely to be petitioned for certiorari than cases decided by three-judge panels.

An examination of the data reveals that in fact the sequential mode of litigation strategy appears to have at least some support in the appellate sections of the Department of Justice. The crosstabulation of the manner in which the case was disposed by the solicitor general, and the Justice Department's recommendation, is presented in Table 6.2. The results indicate that cases which are decided *en banc*, as well as those in which such a rehearing has been denied, are substantially more likely to receive positive recommendations for certiorari than those decided by three-judge panels.

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[11]One case contained missing data in this field.

Manner of Disposition of the Court of Appeals Decision	DOJ Recommendation			
	No Action	En Banc	Certiorari	Total
Three-Judge Panel	225 (69.88)	69 (21.43)	28 (8.70)	322 (100.0)
En Banc	1 (20.00)	0 (0.00)	4 (80.00)	5 (100.0)
Denial of En Banc	3 (50.00)	0 (0.00)	3 (50.00)	6 (100.0)
Total	229 (68.77)	69 (20.72)	35 (10.51)	333 (100.0)

Table 6.2: Crosstabulation of Department of Justice appeal recommendation by manner of case disposition in the lower court for sample data. Numbers in parentheses are row percentages. $\chi^2 = 37.33$ ($p < .01$), $\gamma = 0.67$ ($p < .01$).

While the latter are recommended for certiorari only around nine percent of the time, both *en banc* decisions and denials thereof receive such recommendations at substantially higher rates (80 and 50 percent, respectively).[12]

This same result holds, albeit to a somewhat lesser extent, for the appeal strategies of the solicitor general. As illustrated in Table 6.3, the

[12]While these differences are large, the small number of observations which meet these criteria necessitates that we interpret this finding with some caution.

Manner of Disposition of the Court of Appeals Decision	Solicitor General Recommendation			
	No Action	En Banc	Certiorari	Total
Three-Judge Panel	285 (88.51)	32 (9.94)	5 (1.55)	322 (100.0)
En Banc	3 (60.00)	0 (0.00)	2 (40.00)	5 (100.0)
Denial of En Banc	5 (83.33)	0 (0.00)	1 (16.67)	6 (100.0)
Total	293 (87.99)	32 (9.61)	8 (2.40)	333 (100.0)

Table 6.3: Crosstabulation of the solicitor general's appeal recommendation by manner of case disposition in the lower court for sample data. Numbers in parentheses are row percentages. $\chi^2 = 37.03$ ($p < .01$), $\gamma = 0.51$ ($p < .01$).

usually low probability of the solicitor general recommending that a petition for certiorari be filed in the Supreme Court (here, about 1 chance in 40 overall) increases substantially in cases which have either been heard *en banc* (40 percent) or in which such a hearing has been denied (16.7 percent). Clearly, cases which have been either been decided by a circuit *en banc* or denied such a rehearing are considered better candidates for Supreme Court review by the solicitor general than are those decided by three-judge panels.[13]

[13]While these results are striking, however, they are tempered by the small number of cases meeting the latter criteria. More data collection would be necessary to develop greater confidence in these findings.

Taken together, Tables 6.2 and 6.3 suggest that both the Department of Justice appellate sections and the solicitor general's office adhere, to some extent, to a sequential model of appeal strategy. Cases which have already been reheard, or denied such a rehearing, are limited to an "all or nothing" certiorari prospect, and this is likely responsible for some of the difference in certiorari rates. Nonetheless, a sequential view of the appeal process on the part of government litigants undoubtedly also plays a part. Petitions for rehearings *en banc* are considered, to some extent, to be a precursor to requesting a hearing in the Supreme Court.

At the same time, it is also the case that such a petition is not necessary for the United States to appeal a case to the high Court. In fact, the majority of both certiorari recommendations by the appellate sections and of the actual petitions filed by the solicitor general involve cases which were decided by three-judge court of appeals panels. An *en banc* request, then, appears to be neither a necessary nor a sufficient condition for a petition for certiorari in a particular case, but only a contributing factor. While certainly an important consideration in the appeal strategy decision, the sequential view of the appeal process is certainly not hegemonic. I therefore examine the data in light of the other approaches as well, in order to develop a more complete depiction of the way in which the process operates.[14]

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[14]Given its obvious prominence in the appeal strategies of the government, a more comprehensive analysis of the sequential view, including

6.2.2 THE ORDINAL APPROACH

One of the strengths of the sequential view of government appeals is its intuitive appeal. The idea that *en banc* rehearings serve as something of a "minor league" for Supreme Court appeals is widely borne out in the actions of government litigants. At the same time, the analysis in section 6.2.1 also indicates that 28 of the 35 sampled cases in which the Department of Justice requested certiorari, and five of the eight instances in which that request was granted by the solicitor general, involved cases decided by three-judge appellate courts, a fact clearly counter to a purely sequential approach. Rectifying the notion that Supreme Court decisions are of greater import than those of the circuits with the reality of apparently non-sequential appeals strategy suggests an ordinal approach to government appals.

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an analysis of the influence of various case-specific factors on the different stages of the appeal process, is undoubtedly warranted. In particular, an analysis tracing the progress of such cases through the various appeal stages, and the impact of those factors on each, would be illuminating. In the present instance, however, the small number of cases in which *en banc* requests were either honored or denied, coupled with the relatively limited time period over which a case may be tracked, prevents me from doing so.

Likewise, in the models in sections 6.2.2 and 6.2.3 below, the inclusion of a variable indicating if the case had been acted upon by an entire circuit would appear to be a simple, useful way of assessing the impact of such a factor on the appeal strategy decision. The problem with such an approach is that, because such cases necessarily contain no observations in which an *en banc* request was made, the resulting lack of data for that outcome of the dependent variable renders the models unstable at best and inestimable at worst. More fullsome evaluation of the sequential aspects of the government appeals process, then, must await the collection of additional data.

For a number of reasons, it is without question that a ruling of the Supreme Court is a more important legal and judicial event than an *en banc* decision in any given court of appeals. One reason is rarity; while *en banc* rehearings of panel decisions are "not favored"[15] and therefore a relatively uncommon event, they remain more common than plenary review by the Supreme Court. This importance is compounded by the "nationalizing" effect of a Supreme Court decision with respect to the ruling promulgated. Stipulating the greater importance of a decision in the Supreme Court, it becomes difficult to treat the decision to file a petition for certiorari there as equivalent to other manner of appeals. The small numbers of cases that body sets for review each term suggests that only those of greatest importance will be accepted for review.

Under this view, one might consider the government's appeals decision as faced with a choice among three alternatives which possess a natural ordering: losses deemed to be the least meritorious are allowed to stand, while those with greater importance or prospects for reversal are appealed for an *en banc* ruling by the circuit, while the "best" cases are reserved for Supreme Court review. Moreover, this decision is one which is made simultaneously rather than sequentially, such that the only difference between cases decided by three-judge panels and those decided by (or refused)

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[15]F.R.A.P. Rule 35.

en banc is the range of options available.

This ordinal view of the appeals strategy decision tacitly assumes that differences in cases with respect to appeal strategy are not of kind but of degree only. This in turn suggests that variations in case characteristics increase or decrease the attractiveness of an appeal overall, but do so in a uniform manner across the various appeal strategy alternatives.[16] As such, the ordinal approach implies that we can model the no appeal-*en banc*-certiorari decision as a single, ordinal dependent variable, which may vary as a function of the differences in case-related factors outlined in Chapter 4.

I examine the ordinal approach to appellate strategy by modeling the strategy recommendation of the Department of Justice appellate sections as a function of the nine independent variables used in Chapter 5. These include two measures designed to tap the potential costs of the lower court decision (invalidation of a law or agency order and an indicator for criminal proceedings), three indicators of the salience of the case (presence of a constitutional claim, presence of one or more *amicus curiae* briefs in the lower court, and an indicator for unpublished court of appeals decisions), three measures designed to assess the likelihood of a victory on the merits (presence of a reversal in the lower court, a unanimous lower court decision, and a conservative outcome in the lower court), and an additional measure of

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[16]In this respect the ordinal model conforms, in a simplified form, to the model of government appeals tested in Chapter 5.

the overall reviewability of the case (the presence of "square conflict" among the circuits).

I examine the impact of these variables on the strategy decisions of both the Department of justice appellate sections and those of the solicitor general. The predominant expectations with respect to these variables comports with that presented in Chapters 4 and 5. The appellate sections, because of their proximity to and ongoing relationship with the agencies they serve, should place greater emphasis on issues relating to the costs of the case, and give correspondingly less weight to matters critical to arguing the case, such as reviewability and winning on the merits. We would expect, therefore, that the invalidation and criminal case variables, and the variable indicating intercircuit conflict[17], would exhibit the greatest influence on the appeal strategy decisions of the appellate sections. In comparison to the Department of Justice, we would generally expect that factors relating to reviewability and winnability (e.g. *amicus* briefs, ideology, etc.) will occupy a more prominent place in the solicitor general's appeal calculus.

In order to insure the full range of choice possibilities open to the government, I restrict the analysis to the 322 cases in the sample decided by three-judge court of appeals panels.[18] In addition, because the dependent

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[17]See Chapter 5 *infra*.

[18]Of these, one case contained missing data on the variable for intercircuit conflict and one on the variable for a reversal in the court of

variable is assumed to be ordinal in nature, I use ordinal probit (e.g. McKelvey and Zavoina 1975; Greene 1997) to analyze the effect of each of these variables on the appeal strategy outcome. The results of estimating the ordinal probit model for both actors appeal strategy decisions are presented in Table 6.4.

The findings presented in Table 6.4 largely confirm our expectations, both with respect to the influences operative on each actor's appeal strategy and the differential effects of those influences across different decision makers. Likelihood-ratio statistics indicate that both models are significant improvements over the null. The larger intercepts in the model for solicitor general decisions reflect the greater selectivity of cases and lower rates at which both types of appeal strategies are utilized by that office, relative to the Justice Department. In effect, the higher values reflect the higher "hurdles" that cases must clear to be appealed by the SG's office.

Examining individual variables, we note that both of the variables related to the cost of the lower court loss exhibit a significant effect on the Justice Department's recommendations: cases in which an invalidation of a statute or agency directive was present are more likely to be appealed, while those involving criminal issues are more likely to be allowed to

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appeals; this brings the total number of usable observations in the data to 320.

Variable	Department of Justice Decision	Solicitor General Decision
Invalidation of Law/Order	0.957**	0.959**
	(0.268)	(0.310)
Criminal Case	-0.342*	-0.355
	(0.174)	(0.241)
Constitutional Claim	-0.045	-0.290
	(0.191)	(0.281)
Amicus Brief in Lower Court	0.576*	1.297**
	(0.355)	(0.383)
Unpublished Lower Court Decision	-0.180	-0.313
	(0.227)	(0.357)
Lower Court Reversal	-0.437**	-0.370
	(0.179)	(0.235)
Unanimous Lower Court Decision	-0.036	-0.229
	(0.225)	(0.280)
Conservative Lower Court Decision	-0.202	-0.137
	(0.201)	(0.263)
Square Conflict	0.758**	1.123**
	(0.200)	(0.247)
Intercept 1	0.117	0.883**
	(0.278)	(0.347)
Intercept 2	1.083**	2.230**
	(0.285)	(0.410)
$-2lnL$	53.26**	60.58**
Pseudo-R^2	0.105	0.234

Table 6.4: Ordered probit results of Department of Justice and solicitor general's appeal strategies for sample data. N = 320. Numbers in parentheses are estimated standard errors. One asterisk indicates $p < .05$, two indicate $p < .01$ (one-tailed). Decisions from *en banc* rehearings and cases in which such rehearings were denied are omitted.

stand.[19] The effect of the former variable also carries over to the decision of the solicitor general, and the magnitude of the coefficients for invalidations are very similar across the two models. While the effect associated with criminal cases also appears to impact the decision of the solicitor general, our confidence in that result is somewhat less ($p = .07$, one-tailed).

In contrast to the results for the cost variables, cases in which a constitutional claim is made are once again no more or less likely to be appealed than nonconstitutional matters. While the presence of an *amicus curiae* brief appears to influence the decisions of both actors, its effect is substantially stronger on the decision of the solicitor general than that of the appellate sections. This finding is in accord with our expectations, which suggest that issues relating to case salience will be of greater concern for the solicitor general, because of his desire to maintain credibility in the judicial branch, than for the more result-oriented Department of Justice. Conversely, while a reversal by the three-judge court of appeals is substantially less likely to have an appeal recommendation made by the Justice department appellate section, the influence of that variable on the solicitor general's

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[19]A difficulty in analyzing ordered models such as this one arises in translating coefficients to impact on actual probabilities. Because a significant variable has the effect of shifting the probability metric, the influence of that variable on the probability of the "middle" outcome (here, the odds of an *en banc* recommendation) depends on the values of the other variables in the model, and is therefore somewhat ambiguous in the general case. See Greene (1997, 926-930) for a discussion of this problem.

decision is less, and only marginally significant (p = .06, one-tailed). As discussed in Chapter 5, the impetus for any effects related to lower court reversals is somewhat ambiguous: one interpretation, however, which is consistent with the theory herein is that agencies who won in the lower courts may push harder to have a reversal overturned than in cases where the agency lost in the trial court as well.[20]

Turning to the other variables for winnability, we find that while the signs of the estimates for unanimity and ideological direction are in the expected direction, neither are more than their standard errors, indicating that we cannot say with any confidence these factors influence the appeal strategies of either decision maker. Finally, the influence of the conflict variable is substantively large and strongly significant for both the SG and the appellate sections. For the former, though, it is larger by half than for the latter, a finding which confirms to some extent our expectations regarding the relative impact of this factor on the decision making process of the two actors; to the extent that the variable for intercircuit conflict captures effects related both to costs and to the importance and reviewability of a case, its effect is largely as expected.

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[20]While it is difficult, without information about the form of appeal requests emanating from the originating agency, to examine this hypothesis, an initial examination suggests that it may not be the case. In the sample data, originating agencies were no more likely to request further action in appeals court cases with reversals than in those which affirmed the decision of the trial judge ($\chi^2 = 0.79$, $p > .10$).

To summarize, the model derived from adopting an ordinal view of government appeals decision making generally results in confirmation of our expectations regarding the influence of the different causal factors on appeal strategy. Where the ordinal approach leaves us with some ambiguity, however, is in our ability to ascertain whether these effects are in fact uniform across the range of appeal options. That is, because it assumes that changes in relevant case facts serve only to shift a case's prospects up or down the "scale" of appealability, it cannot answer the question of whether some factors influence, say, the probability of filing a petition for certiorari, while at the same time having no effect (or possibly even the opposite effect) on the likelihood of an *en banc* request. In order to assess this question, it is necessary to once again reconceptualize our view of the government appeals process, this time in a fashion that allows for such inferences to be made.

6.2.3 THE DISCRETE APPROACH

As discussed in section 6.1, a discrete view of the government appeals process differs in important ways from both the sequential and the ordinal views. Unlike the ordinal approach, the discrete view of the appeal strategy decision treats the three alternatives available to the government appellant (no action, *en banc*, and certiorari) as distinct, unordered choices; in contrast to the sequential view (but like the ordinal view), it considers the appeal

decision as a simultaneous one. Under the discrete approach, the Department of Justice and the solicitor general simply evaluate each case's characteristics, then choose among the three options depending on which appears to offer the best possibility of a favorable appeal. Cases in which the lower court decision was made *en banc*, or in which such a request was denied by the full circuit, are different only in that they are faced with a more limited choice set: either allow the decision to stand or petition for certiorari.

As indicated above, eighty percent of all recommendations for certiorari by the Department of Justice, and over half of all petitions for certiorari authorized by the solicitor general in the sample data, occurred in cases decided by three-judge court of appeals panels. This fact suggests that neither of these decision makers views appeal to the Supreme Court as an alternative to be exercised only after all other options, including *en banc* requests, have been exhausted. At the same time, the high rates at which failed *en bancs* are taken to the Supreme Court indicates works counter to a purely ordinal understanding of the process, which (barring changes in the case characteristics between the panel and *en banc* stages) would dictate that a case adjudged "good enough" for Supreme Court consideration would have been taken there in the first instance.[21] The combination of these elements

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[21]Of course, one possible change in the case is the very fact of its being reheard *en banc*. That is, it is possible that a rehearing *en banc* in effect "makes a case good enough" for at least an attempt at Supreme Court review.

hint at an understanding of the appeals decision as simply choosing whichever option seems to offer the best prospects for a reversal of the loss in the instant case, and at that point in time.

One of the advantages of this discrete approach, then, is that it allows for the possibility that case-related factors vary in the extent to which they influence the decision to appeal a case in each of the various fora.[22] The premises of the discrete approach permits us to examine whether and how each of the four factors discussed in Chapter 4 impact on the appeal strategies adopted by either of the two actors. Because the discrete approach allows the DOJ and the solicitor general to choose among three, presumably unordered, appeal alternatives, the natural means for modeling this choice is a multinomial logit model (e.g. Maddala 1983; Greene 1997). In such a model, each of the covariates is allowed to have a different influence on each of the choice alternatives; that is, the estimated coefficient for each independent variable for each alternative measures the effect of that variable on the probability of the actor in question choosing that alternative.

For comparability, I model the strategy recommendation of the Department of Justice using the same variables analyzed in Chapter 5, and in section 6.2.2 above. And as described previously, some difference with respect to the influence of these variables on the two actors in question are

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[22]This is also potentially an attribute of the sequential approach, albeit one which, given data limitations, is not examined here.

expected. In particular, we would expect that the variables measuring the potential costs of allowing a decision to stand will be more salient for the Justice Department, while those related to the reviewability and winnability of the case on the merits should carry more weight with the solicitor general's office.

The results of multinomial logit estimation of the influences of the independent variables on the Department of Justice's appeal strategy is presented in Table 6.4. Because the model assumes that all three appeal alternatives are available to the decision maker, cases in which the lower court decision was made *en banc*, as well as those in which a request for a rehearing *en banc* were denied, are excluded from the model. The overall fit of the model is good; a likelihood-ratio test allows us to reject with substantial confidence the hypothesis that the model is no better than the null. The model correctly classifies 233 of the 320 cases used in the analysis, a 9.3 percent proportional reduction in error. While this predictive improvement is modest, it is compared against a null model which correctly categorizes 70 percent of the cases.

Turning to an examination of the individual independent variables, we note that our general expectations with respect to the importance of cost-related variables are confirmed. The separation of the appeal/no appeal

Variable	Rehearing Model	Certiorari Model
Constant	-0.860 (0.566)	-1.001 (0.730)
Invalidation of Law/Order	1.601** (0.602)	2.212** (0.682)
Criminal Case	-0.156 (0.356)	-1.284** (0.539)
Constitutional Claim	0.229 (0.362)	-0.409 (0.663)
Amicus Brief in Lower Court	1.040 (0.766)	1.246 (0.880)
Unpublished Lower Court Decision	-0.767 (0.529)	-0.031 (0.590)
Lower Court Reversal	-0.563 (0.372)	-0.980* (0.484)
Unanimous Lower Court Decision	-0.149 (0.447)	-0.147 (0.650)
Conservative Lower Court Decision	-0.137 (0.416)	-0.723 (0.577)
Square Conflict	1.444** (0.387)	1.524** (0.586)

lnL = -221.12
$-2ln$L = 64.61 ($p < .01$)
Pseudo-R^2 = 0.128
N = 320
* $p < .05$ (one-tailed)
** $p < .01$ (one-tailed)

Table 6.5: Multinomial logit results of Department of Justice appeal strategy for sample data. Standard error estimates in parentheses. Decisions from *en banc* rehearings, or cases in which such rehearings were denied, are omitted.

decision analyzed in Chapter 5 into its component parts allows for a finer-grained evaluation of the influence of the various factors on the appeals decision. Both invalidation of a law or agency directive and the presence of a criminal matter are significantly related to the Justice Department's recommendation for certiorari: cases in which some invalidation took place are substantially more likely to receive such recommendations, while those involving criminal matters are accordingly less likely to. The impact of an invalidation also extends to requests for *en banc* rehearings, though that for criminal cases does not; criminal cases are as likely as any other to receive recommendations for rehearings *en banc*. This in turn suggests that the appellate sections, or at least that of the Criminal Division, see the roles of *en banc* rehearings and that of the Supreme Court as different, perhaps with the former being viewed as more a device for error correction in individual cases than for the resolution of substantial policy issues.

None of the variables for case salience reach traditional levels of statistical significance, though in both models amicus briefs comes close (p = .09 and .08, one tailed, for *en banc* and certiorari models respectively), and nonpublication shows some effects in the appellate sections' *en banc* decisions as well (p = .07, one-tailed). A reversal by the court of appeals is shown to be substantially, negatively related to certiorari recommendations by the appellate sections, and marginally so for *en banc* requests (p = .065, one-

tailed); none of the other variables for winning on the merits exhibit any significant effects in either model.[23] More generally, the lack of significance of these variables is generally consistent with our expectations regarding the motivating factors for Justice Department appeal requests.

Finally, the presence of an intercircuit conflict is shown to be significantly positive in both models of Justice Department appeals; that is,

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[23]With respect to the ideological direction variable, an examination of *which* appeal forum is chosen would, it would appear, also allow for a more subtle possibility: testing for the effect of the *relative* liberalism or conservatism of the potential appellate court on the government's appeal decision. For example, we might expect that the solicitor general could maximize his odds of winning by appealing a conservatively-decided decision of a three-judge panel to the more liberal full circuit, rather than to a conservative Supreme Court. I do not examine this proposition here, for two reasons. The first reason is an empirical one: in addition to the conservatism of the Supreme Court during this period, 1993-94 also represented the zenith of conservatism in the circuit courts of appeals. As a result, there is in most instances very little difference between the decision one might expect from the Supreme Court and that from any of the circuits. The lack of variation means that any effects found would likely be small.

The second reason is a more technical one. Testing differences in forum ideology requires that one develop a comparable measure of circuit court and Supreme Court ideology. This is not in and of itself as difficult as one might imagine; one might, for example, create a measure of the expected probability of a reversal, based on each court's ideological balance and the direction of the panel decision. By treating each case as three "observations": one for no action, one for the court of appeals, and one for the Supreme Court, one could assign scores to each and model which of the three options was selected. Difficulty arises, however, in determining the value of this variable for the "no action" outcome: the probability of a reversal given that choice is always and exactly zero, yet assigning this variable a value of zero in that instance is problematic. After considerable effort to develop a better alternative, I decided to simply control for the ideological direction of the lower court decision here. I expect, however, to revisit this issue in future work, and hopefully come to a more satisfactory resolution.

the presence of a conflict increases the probabilities of both an *en banc* recommendation and a request for certiorari. As noted above, the rationale for the influence of this variable is also rather ambiguous. Tts significance in this context is consistent with the view that it taps both the administrative costs associated with divergent interpretations of the law across the circuits and a prospective concern with reviewability.

I next examine the discrete appeal model as reflected in the decisions of the solicitor general on the final action taken in a case. For comparability, I examine the same factors as in earlier models. A limitation of the model, however, prevents the use of all nine variables employed thus far: when no observations in one category of the outcome variable take on the one value of an independent variable, the multinomial logit model is inestimable. So, for example, because in no instance in the sample data did the solicitor general file a petition for certiorari in a case involving a criminal violation, that independent variable must be excluded from the analysis. Likewise, no non-unanimous cases, nor any cases involving a constitutional claim, received authorization for certiorari, nor were any requests for *en banc* rehearings filed in cases which were not published. These four variables were thus excluded from the model for solicitor general decisions. Happily, however, at least one variable for each of the four concepts remains in the model.

Results of the estimation of the discrete model for the solicitor general's appeal strategy are contained in Table 6.5. Once again, estimation

Variable	Rehearing Model	Certiorari Model
Constant	-2.550**	-5.399**
	(0.474)	(1.530)
Invalidation of Law/Order	1.153*	3.895**
	(0.614)	(1.459)
Amicus Brief in Lower Court	2.004**	3.906**
	(0.750)	(1.556)
Lower Court Reversal	-0.562	-2.473*
	(0.475)	(1.338)
Conservative Lower Court Decision	0.135	-0.532
	(0.519)	(1.382)
Square Conflict	2.117**	2.878*
	(0.431)	(1.669)

lnL = -98.90
-2lnL = 60.70 ($p < .01$)
Pseudo-R^2 = 0.235
N = 320
* $p < .05$ (one-tailed)
** $p < .01$ (one-tailed)

Table 6.6: Multinomial Logit results of solicitor general's appeal strategy for sample data. Standard error estimates in parentheses. Decisions from *en banc* rehearings, or cases in which such rehearings were denied, are omitted.

is limited to those cases decided by three-judge court of appeals panels. As before, the model appears to fit the data fairly well, though the proportional reduction in predictive error is again modest (7.8 percent). All of the independent variables save that for the ideological direction of the lower court decision show significant effects on the probability of at least one type of appeal.

Examining those independent variables, we first note that policy invalidation exhibits a large, positive impact on both types of appeals. Its effect, however, is over three times larger in the model for certiorari than in that for *en banc* appeals, indicating that the solicitor general views such invalidations as especially prime candidates for possible Supreme Court review. This same result holds true for the presence of *amicus curiae* briefs in the court of appeals; while one or more such briefs indicating the importance of the case increases the odds of a rehearing request, they have an even greater influence on the chance of that case being selected for Supreme Court review.[24]

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[24]The large differences in the effect coefficients across alternatives points to a difficulty in interpreting these results. While the presence of, say, an invalidation unequivocally increases the odds of an appeal over that of no action, its effect on the *relative* probabilities of choosing *en banc* or certiorari is less clear. In brief, because the probabilities in each case must some to one, the presence of an invalidation might actually cause the probability of an *en banc* request to *decrease*; its probability will go up slightly, but will simultaneously be sapped by the increase in the likelihood of a certiorari petition.

The impact of a trial court reversal by the court of appeals on the SG's strategy is negative, but only of statistical significance for his certiorari decisions. This fact seems to imply that the solicitor general takes the issue of the trial court decision more seriously in appealing to the Supreme Court than in asking for a rehearing *en banc*. As discussed in Chapter 5, one explanation for this result is that it represents a kind of selection effect: cases in which the U.S. lost in the district court and did not subsequently appeal do not appear in these data, so that those cases receiving a zero value for the reversal variable are necessarily the more "appealable" of the government's district court losses. This possibility, in combination with elements of the sequential appeal model discussed above, may explain the different importance of the variable across the two kinds of appeal choices: to the extent that "reversed" cases are not substantially less likely to be appealed *en banc*, this may represent the next stage of the appeal selection mechanism at work.

As noted, no significant differences in the SG's appeal strategy are notable between liberally- and conservatively-decided cases. Cases involving intercircuit conflict, in contrast, are appreciably more likely to be appealed than those without. Here again, the effect is somewhat larger for certiorari petitions than in the case of *en banc* requests, though the magnitude of this difference is less than for the other variables, and in fact is less than one would expect given the Supreme Court's emphasis on conflict as a

prerequisite for review. In substantive terms, it is clear that the solicitor general's desire to bring "certworthy" cases to the Court operates in the appeal decision.

One of the strengths of the discrete approach to appeal strategy is that it allows the impact of individual factors on appeals to vary across the type of appeal made. In the analyses presented here, this is shown to have substantial benefits, as a number of variables differ in their impact on *en banc* appeals and certiorari decisions, both by the Justice Department appellate sections and the solicitor general. This relaxation of the restriction that variables have essentially equivalent influences over each of the appeal options presents a more realistic picture of the appeal strategy decision.

6.3 CONCLUSIONS

The choice of how to appeal a case — either through an *en banc* appeal or a petition to the Supreme Court — is one of the most important that the government, or any litigant, can make in the appeal process. Here I examined empirically three perspectives on this choice, with the goal of illuminating the government's appeal strategy decision.

Reviewing the analyses presented here, it is possible to draw out several threads of insight. Probably the most important fact to be gathered from this analysis of the three approaches to appellate decision making is

that none is completely dominant. Evidence of a sequential view of the appeals process is apparent for both the Department of Justice and the solicitor general in the high rates at which cases decided by or denied *en banc* rehearings are petitioned to the Supreme Court. While the ordinal approach reinforced the view that Supreme Court review is considered of greater significance than other kinds of review, the results of the discrete view also point to the fact that treating all appeals decisions as part and parcel of the same continuum is not without its difficulties. Factors which influence one mode of appellate strategy may or may not also be influential on others, and the analyses herein demonstrated that both the Department of Justice and the solicitor general consider such factors in light of the prospective forum of review.

The impact of case-specific factors on the mode of appeal provide another set of conclusions about government appeals. Building on the simple appeal/no appeal decision analyzed in Chapter 5, the results given here serve to extend and clarify the impact of case-specific characteristics on the appeal decisions of the United States. In particular, analyses of the discrete approach illustrates that, for both the Department of Justice and the solicitor general, the presence of some case characteristics does on occasion influence the odds of one form of appeal strategy, but not the other. The consequence of this result is a more complete picture of the appeals decisions of the federal government.

CHAPTER 7

CONCLUSION AND IMPLICATIONS FOR FUTURE WORK

The research presented here illustrates and analyzes the government's appeals decision from cases decided in the U.S. courts of appeals, and seeks to explain those decision in terms of factors relating to cost, salience, reviewability, and winning on the merits. It suggests that there are systematic elements involved in the government's decision to appeal cases, and that those elements have a real impact on the mix of cases which the government chooses to appeal. These findings also point to the variable influence of these elements, both across the kinds of appeal being considered and among the different individuals responsible for formulating the appeals in question.

To conclude, I summarize and discuss the findings presented above, and address the implications of those findings for other areas of political inquiry. In particular, I focus on the ramifications of the government appeals process for two widely-studies areas of inquiry among scholars of judicial politics: its effect on agenda setting in the United States Supreme Court, and

on the universally-recognized phenomenon of federal government success as a litigant in the federal courts.

7.1 OVERVIEW OF FINDINGS

One of the most fundamental goals of this research has been descriptive; that is, to simply illustrate the process by which the United States, as a party to litigation, makes a decision about which losses in the federal courts of appeals to pursue on appeal and which to let stand. This descriptive goal was prompted by the fact that information of this kind available to this point has been both neither current nor widely available. Extensive data on government appeals decision making of this kind were last examined in a Ph.D. dissertation by Brigman (1966) over thirty years ago. That thesis remains the canonical source for such information to the present, and it continues to be cited despite the changes that have occurred over the last four decades.

Moreover, Brigman's work, as well as those aggregate studies which have been conducted since that time (e.g. Norman-Major 1994), have focused entirely on the Office of the Solicitor General, to the exclusion of the other relevant participants in the appeals process. This has been the case because data on the "internal" decisions made in the appeals process has not been publically available prior to this point. By exploiting data on the appeal

decisions of actors within the appellate process, this description illuminates the operation of government appeals to a greater extent than had previously been the case.

If the descriptive aspects of this work were aimed at answering the question, regarding government appeals, of "How?", a second goal of this research lay in answering the question "Why?". I sought to uncover the criteria which govern the United States' appeals decisions, and to determine what it is that makes one case a more likely candidate for appeal than another. While the modest success of these efforts is testimony to the fact that the most important of these factors evade quantitative measurement, I believe there are nonetheless a number of consistent results that one may take away from this work.

One such result is that, while there are considerable similarities in the determinants of appeals made by the two decision makers examined, there are also substantial differences in the weights given to those considerations by them. Given the varying institutional positions of the participants in the appeals process, these differences are to be expected. In Chapter 4, I outlined a theory of these different expectations, and the results of my analyses were largely consistent with that theory. Decisions by the courts of appeals which invalidated some government policy, for example, rated high on the list of those suitable for appeal by both the Justice Department's appellate sections and the solicitor general. In comparing this effect across the two appeal

decision participants, however, it was consistently the case that such an invalidation was of greater import to the appellate section than for the solicitor general. Equally consistent was the reverse with respect to cases resulting in a conflict among the circuits. Such cases were strong candidates for appeal recommendations of all kinds by the Justice Department, but even stronger candidates for actual appeals by the solicitor general's office. These differences reflect the fact that while the overall goal of each decision maker is similar in one very important respect (i.e., both wish to secure reversals of unfavorable appeals court rulings), the institutional position of each results in differences of perspective on how to pursue that goal. These differences in turn effect each participant's opinion of which aspects of a case render it the most appropriate vehicle for achieving that goal. Moreover, as I discuss below, these differences also impact on the ability of the government to win on appeal, and on its power to shape the federal courts' agendas.

Yet a second, equally consistent finding of no small importance takes the form of a negative result. Throughout the analyses presented here, at no point was the ideological direction of a lower court decision shown to influence the appeal decision of any actor in the process; both the various divisions of the Justice Department and the solicitor general himself appear to pay little or no systematic attention to the political content of appeals court decisions in formulating their appellate strategies. In light of the extensive commentary surrounding the "politicization" of the Office of the

Solicitor General and the Justice Department (see e.g. Caplan 1987 and Baker 1992, respectively) this result appears counterintuitive. And in fact, given the limited time frame and coarse measure of ideology examined here, one cannot conclusively rule out such political effects on the appeal calculus. At the same time, though, the robustness of this result counsels caution in inferring that such politicization extends to all functions of the offices in question.

One final theme which remained consistent throughout these analyses is the notion that the federal government's appeal decision is a *process* rather than an *event*. Instead of a single decision, government appellate litigation is in fact a complicated series of stages through which a case passes prior to its final disposition. This seemingly simple idea is nonetheless important, for it suggests something about the manner in which the litigation "bureaucracy" functions. There is, in fact, nothing preventing the solicitor general from exercising total independent control over government litigation while completely ignoring both the agencies and the various appellate sections entirely. The fact that he does not do so indicates that each actor in the decision making process in fact plays an important part in the final "product": the choice of when, and how, to manage government appellate litigation.

This final point, that one must be concerned with matters of process, provides a natural segue into my discussion of two important areas of

political inquiry in which this work has relevance. The specialized, selective mechanism by which cases are selected for appeal necessarily influences the outcomes in those cases, both with respect to agenda-setting in the appellate courts, and in the decisions of the justices on the merits.

7.2 IMPLICATIONS FOR SUPREME COURT AGENDA-SETTING

As discussed previously, one significant aspect of the United States' success in the Supreme Court is its ability to have the cases it petitions there accepted at a much higher rate than that achieved by other litigants. The historical data presented in Chapter 3 supplement the already numerous studies showing that the federal government is highly adept at having its cases accepted for review. Beyond this, however, the current research has greater significance for government success at the Court's agenda-setting stage, and for the broader issue of agenda of the Supreme Court.

In his detailed study of the Supreme Court's agenda setting practices, H.W. Perry describes their procedures as "a modified lexicographic decision process, that is, a hierarchical process of decisional steps or gates through which a case must successfully pass before it will be accepted. Failure to 'pass a gate' will usually mean a case will be denied" (1991, 272-3). As outlined in Chapters 2 and 3, this description also squares well with the multi-stage system of the government appeals process. There, cases are

effectively "screened" by a range of different actors, and only those which are deemed viable for appeal by all parties involved are allowed to go forward.

Likewise, studies of Supreme Court agenda-setting have typically examined the determinants of the Court's decision whether or not to grant certiorari, and a number of factors have been found to be influential on both the justice's individual votes and on the aggregate decision of the Court. Not surprisingly, one of these factors has been the presence of the government as a party to the litigation, or supporting certiorari through a brief *amicus curiae.* Beginning with the very earliest (e.g. Tanenhaus et. al. 1963), these studies have tested for and found a positive response the presence of the government as a litigant, typically by separating cases involving the United States and those which do not (e.g. Armstrong and Johnson 1982; Ulmer 1984; Caldeira and Wright 1988). The research presented here points to an explanation for this positive effect: Chapters 5 and 6 indicate that a not-insubstantial part of the government's screening process relies on the same criteria used by the Court in making its own certiorari decisions.

The current research thus adds to our knowledge of Supreme Court agenda setting in an important way. The analyses here show that the government pre-selects cases to petition for certiorari, in many instances using the same criteria as the justices do in deciding which cases to grant hearings. This extends our knowledge of government influence on Supreme Court certiorari decision making by opening up the "black box" of the federal

government as a litigant. There has been, in previous studies, considerable conjecture about the reasons for the SG's phenomenally high certiorari grant rate, but little in the way of explanations for that success. The research presented here offers an empirically-supported explanation for *how* government success on certiorari comes about: through the government's case-selection mechanism, which both mimics the design of that used by the Court itself, and utilizes many of the same criteria for case selection.

A broader issue on which this research also touches is the matter of the high Court's agenda more generally. In a recent Term of the Supreme Court, litigants sought review in 6897 cases; of those, the Court accepted only 99 for review (Epstein et. al 1994). The well-documented increase in the number of petitions to the Court during the past several decades has resulted in concern about the Court's ability to dispose of all cases which merit its attention. At the same time, however, the proportion of the Court's docket made up of cases in which the federal government has an interest has remained relatively stable (e.g. Norman-Major 1994), indicating that government success at having its voice heard by the Court has increased relative to that of other litigants during this period. To the extent that cases arising out of the U.S. appeals process constitute an increasingly important part of the policy outputs of the Court, a better understanding of that process and its implications for the kinds of policies propagated by it is rendered more important.

7.3 IMPLICATIONS FOR GOVERNMENT SUCCESS IN COURT

The dominance of the United States as litigant in the federal courts is widely recognized. Particularly in the U.S. Supreme Court, the federal government is the dominant party, both in terms of sheer numbers of cases and in influence. In addition to its success in having cases accepted for review on the merits, the U.S. is also among the most successful litigants in the high Court in decisions on the merits (e.g. Sheehan et. al 1992). During the 1953-1992 Terms of the Court, for example, the United States won over 76 percent of the cases which it appealed to the Supreme Court, and nearly 65 percent of those in which it appeared as respondent; this compares with winning percentages of 61.6 and 48.5 percent for non-U.S. petitioners and respondents, respectively.[1]

But simply showing that the United States fares better in Court than its adversaries does not go very far towards explaining why this is the case. As Segal has noted, rather, "(studies) typically do not demonstrate that the solicitor general in any way *influences* the Court's decisions" (1991, 378). That is, the precise mechanism by which the solicitor general is influential has yet to be determined. In considering this question, scholars have attributed the government's success in the Court to a wide a range of factors.

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[1]Data are from the *Supreme Court Judicial Database* 1953-1992 Terms (Spaeth 1995), and are based on all orally-argued cases plus split votes.

Some credit the government's "unlimited resources" for litigation and "repeat player status" before the Court (e.g. Galanter 1974). Others point to "institutional deference" to the executive branch on the part of the Supreme Court (e.g. Cooper 1990; Perry 1991). Recently, McGuire (1995, 1996) has suggested that the root of the government's success lies in its superior litigation experience in most cases, a position with substantial support among legal scholars (e.g. Stern 1960, Jenkins 1983).

The research presented here points to yet another explanation, one rooted in the case selection process. When a potential litigant in the Supreme Court can select forty cases for appeal from a pool of over a thousand, it is only to be expected that the cases which are chosen are going to frame that litigant's case in the best possible light. When, in addition, that litigant has in place a highly specialized mechanism for selecting those cases, one which has developed over decades and which uses criteria very similar to those applied by the justices themselves, it becomes difficult to proclaim that the selection of cases must not play a crucial part in any explanation of its success in the high Court.

This explanation for government success lies in the appeal process itself; specifically, in the combination of separation of function, policy deference, and conflicts between the agencies and the parties responsible for conducting their litigation in the federal courts. The Department of Justice's lawyers (including the solicitor general) are less concerned with policy

matters than with issues of procedure, jurisdiction, and jurisprudence. Given this distribution of information and accountability, it is rational for the solicitor general to leave the policy matters to the experts in the agencies and to concentrate on the more procedural matters which are also a critical element in winning cases. In so doing, the solicitor general relies on the responsiveness of the agency lawyers to the position of the administration to keep the policy concerns in cases "in line". In contrast, agency lawyers are less concerned with jurisdictional issues and more with policy; their energies are thus better spent on issues of substance, leaving the procedural matters to the attorneys at the Justice Department. The sequential structure of the process allows those decision makers acting later to "specialize" and concentrate their focus on more procedural matters.

This division of labor means that cases are screened on both policy and procedural issues before they are brought before the Court, and those which do not conform to the wishes of the respective governmental authorities on both counts are excluded. The result is that those cases which do make it through the screening process are particularly strong in terms of the policy issues presented, the factual elements of the case, and the procedural and jurisprudential aspects of the case. The combination of specialization of function and the creative tension of the adversarial framework in which these decisions to appeal are made precipitate the government's singular success before the high Court.

The institutional design of the appeals process thus appears almost ideally suited for its function: to accurately and efficiently select only the strongest cases for government appeals. Interestingly, this fact comports well with recent theories of political institutions rooted in rational choice theory (e.g. Kreps 1990; Knight 1992). The government's appeals mechanism might be considered something of an institutional "equilibrium": an evolutionarily-developed best response to the problem of balancing agency desires for appeals and the need for judicial credibility on the part of the solicitor general.

It is clear from these analyses that the government's case selection process has a potentially critical impact on its success in the Supreme Court. Considering this fact in light of political science research, this implies that an important consideration in any explanation of government success in the Court is the influence of case selection. The fact that no previous explanation of federal government success has sought to incorporate, or even control for, the government's case selection process means that the actual impact of that process on those findings is not known. One approach for examining this influence would be to compare cases which the government appeals to the Supreme Court with those it elects not to. The analyses conducted herein have sought to determine which cases the former are likely to be; examination the influence of case selection on success on the merits would extend this analysis by looking at whether and to what extent those factors

found to be influential in the former process were also important in the latter.

These results also have consequences for models of Supreme Court decision making more generally, in that they raise the possibility of spurious results in those studies. If, for example, the United States preselects cases for Supreme Court review which have certain qualities, and subsequently wins the bulk of those cases, studies which fail to account for the selection aspect have the potential to show a connection between that characteristic and the Court's decisions. To the extent that the docket of the Supreme Court is dominated by cases in which the federal government is a party, the potential for this to occur is exacerbated.

The issue of government case selection and its success in the Court is accordingly one which merits further investigation. This is true not only for its intrinsic interest, but also because of the potentially far-reaching effects that case selection may have on our understanding of the decisions of the Court in general. The federal government's continued prominence as a litigant in the federal courts means that the issue of how those appeals are determined is an important component of our understanding of those courts and the policies they make.

The larger significance of the present work on government litigation, then, has less to do with the process itself than with its impact on the judicial process. The recognition of the importance of the government as a litigant in

the federal courts ought to be the beginning, rather than the end, of the inquiry into its impact on litigation and law in the U.S., and promote further inquiry into the means by which that influence operates.

APPENDIX A

DATA SOURCES AND DESCRIPTION

The data used in this dissertation were obtained from Harriet Shapiro, senior assistant to the Solicitor General in the United States Department of Justice, Office of the Solicitor General. The data consist of all federal court cases on which the Office of the Solicitor General took some action during calendar years 1993 and 1994, and were procured via a computer search of the internal records of the solicitor general's office. The data represent a wide range of cases, but consist primarily of rulings of the various federal district courts and circuit courts of appeals in cases to which the government or some part thereof was a party. Also included in the data, however, are some cases in which one or both parties of a private suit requested that the Office of the Solicitor General file an *amicus curiae* brief, either at the court of appeals level or in the Supreme Court, as well as those cases in the latter forum which the solicitor general elected to file a brief due to interest in the case.

Figure A1 is a sample page of the data as it was received from the Office of the Solicitor General. It is generally representative of the data, with

the exception of having more than the usual number of court of appeals cases for illustrative purposes. The actual number of such cases on a given page of data ranges from zero to seven or eight, with a mean of four or five per page. The balance are cases from the district courts, *amicus* requests, and other matters.

The "Recommend Number" is a number sequentially assigned to each of the case folders as they come into the Solicitor General's office, and bear no direct relationship to docket numbers, court of origin, or any other external identification. The name of the case is as it appears on the docket of the court in which it was most recently heard.

The column labeled "Recommendation" represents the recommendation of the appropriate division of the Department of Justice as to what should be done with the case. A good deal of information is present in this recommendation. First, this column indicates the location of the case in the federal courts. A recommendation of "APPEAL" or "NO APPEAL" is unequivocally the mark of a case heard in a district court; these cases were ignored. Likewise, cases with the recommendation "CROSS"/"NO CROSS" are cross-appeals, and are also generally district court cases. Absent other information elsewhere in the data (e.g. any reference to a "cross-petition" in the "SG Action" column), these cases were also ignored. Cases recommending "AMICUS"/"NO AMICUS" were excluded because they do not involve the government as a direct party. Recommendations of "CERT"/"NO CERT",

"REVIEW"/"NO REVIEW", or "RHG"/"NO RHG" (for *en banc* rehearings) indicate cases in the courts of appeals, and make up the universe of cases included in the analysis.

The "SG Action" column indicates the final action taken on the case by the Office of the Solicitor General. In addition to indicating the government's final decision, the data in this column are also typically informative of the nature of the case as well. For example, in case #194663 in Figure B1, the SG Action column indicates that an appeal of a limited nature was made; these data, when present, were coded as well. "Date of Action" is self-explanatory; it represents the date on which the solicitor general's office took final action in the case.

The final column indicates the individual in the Office of the Solicitor General responsible for taking final action in the case. For example, "William C. Bryson/ASG" indicates that final action was taken by William C. Bryson, acting in the capacity of Acting Solicitor General.

Technical notes: All data analysis for this project was conducted on a Dell 166 MHz Pentium PC running Windows 95. Statistical procedures were executed using Stata 5.0 and LIMDEP 7.0; graphics were generated by Stata 5.0 and edited in Wordperfect 7.0. The text of this dissertation was written in WordPerfect 7.0 for Windows, and printed in 12 point Century Schoolbook type on a Hewlett Pakcard LaserJet 5MP printer.

Recommend Number	Name	Recommendation	SG Action	Date of Action	By Whom
194658	Leonard & Harriet Nobleman v. American Savings Bank	AMICUS	NO AMICUS	93-02-11	WILLIAM C. BRYSON/ASG
194659	US Postal Service v. National Labor Relations Board	NO APPL	NO PETIT	93-05-19	WILLIAM C. BRYSON/ASG
194660	U.S. Department of Labor v. Kaiser Steel Corp.	APPEAL	NO APPEAL	93-03-08	WILLIAM C. BRYSON/ASG
194661	United States v. Maguire	NO RHG	NO RHG, NO CERT	93-01-29	LAWRENCE W. WALLACE/DSG
194662	Irving Independent School Dist. v. Packard Property	CERTIORARI	NO CERT	93-02-10	WILLIAM C. BRYSON/ASG
194663	United States v. Antonio Median Puerta	RHG	RHG ON ISSUE 1	93-02-02	WILLIAM C. BRYSON/ASG
194664	Maryland Coalition for Integrated v. Dept. of Education	APPEAL	APPEAL	93-04-15	WILLIAM C. BRYSON/ASG
194665	Calvin R. Carter v. Louis W. Sullivan	CERT	NO CERT	93-02-17	WILLIAM C. BRYSON/ASG
194666	United States v. Bullson, Pinkstaff v. U.S.	NO CERT	NO RHG, NO CERT	93-03-10	WILLIAM C. BRYSON/ASG

Figure A1: Sample data from Office of the Solicitor General

APPENDIX B

VARIABLES AND THEIR CODINGS

NUMBER Recommend number. Coded from SG information.

APPELLNT Appellant name. Coded from SG information.

APPELLEE Appellee name. Coded from SG information.

US United States capacity in the suit. Coded from SG information.

1	U.S. appellant
2	U.S. appellee
3	U.S. not a party
9	cannot determine

RECOMMND Department of Justice appellate section recommendation. Coded from SG information.

01	No Rehearing
02	No Rehearing, No Certiorari
03	No Certiorari
04	No Appeal
05	No Review
11	Rehearing
12	Rehearing En Banc
13	Certiorari
14	Appeal
15	Review
20	Cross Appeal
81	Withdraw

SG_ACT Solicitor General's action in the case. Coded from SG information.

01	No Rehearing
02	No Rehearing, No Certiorari
03	No Certiorari
04	No Appeal
05	No Review
06	No Further Review
11	Panel Rehearing
12	Rehearing En Banc
13	Certiorari
14	Appeal
15	Review
16	Rehearing En Banc, No Certiorari
17	Partial Acquiescence to Certiorari
18	Waive Right to File Response to Petition for Certiorari
21	Moot
31	Interlocutory Appeal
41	Certiorari with request to vacate and remand
51	Amicus participation in support of certiorari
61	Certiorari with request for summary reversal
71	Withdraw Appeal
72	Certiorari Contingent on Outcome of Panel Rehearing
80	No Acquiescence and no change of position on reviewability
81	Withdraw Petition for Review
82	No Action Required
83	Protective Motion for Divided Argument
90	Removed
91	Certiorari and Hold for Later Case

DATE_ACT Date of Solicitor General action (YY-MM-DD). Coded from SG information.

ACTOR Individual within the SG's office responsible for final action. Coded from SG information.

01 Kenneth Starr
02 Drew Days, III
03 William Bryson
04 Paul Bender
05 Edwin Kneedler
06 Maureen Mahoney
07 Lawrence Wallace
08 Jeffrey Miniear
09 M. Estrada
10 Christopher Wright
11 John Roberts
12 Michael Dreeben

CAPACITY Capacity in which the individual who took final action was acting. Coded from SG information.

01 Solicitor General
02 Acting Solicitor General
03 Deputy Solicitor General
04 Acting Deputy Solicitor General
05 For the Solicitor General
06 Assistant to the Solicitor General

CITE_VOL Federal reporter citation for the case: volume number. Coded from LEXIS.

9999 Unpublished opinion

CITE_PGE Federal reporter citation for the case: page number. Coded from LEXIS.

9999 Unpublished opinion

F3D Federal reporter series. Coded from LEXIS.

0 2nd series
1 3rd series
9 Unpublished opinion

DOCKET Docket number of the case in the court of appeals. Coded from LEXIS.

CIRCUIT Federal circuit court of appeals in which the decision was handed down. Coded from LEXIS.

0	District of Columbia Circuit
1	First Circuit
2	Second Circuit
3	Third Circuit
4	Fourth Circuit
5	Fifth Circuit
6	Sixth Circuit
7	Seventh Circuit
8	Eighth Circuit
9	Ninth Circuit
10	Tenth Circuit
11	Eleventh Circuit
12	Federal Circuit
20	Three-judge District Court
30	Tax Court
40	Court of Immigration Appeals

DATE_FIL Date the case was filed by the court of appeals (YY-MM-DD). Coded from LEXIS.

NPETIT Number of appellants in the court of appeals case. Coded from LEXIS.

NRESP Number of appellees in the court of appeals case. Coded from LEXIS.

TYPE Type of case. Coded from LEXIS.

0	Criminal case
1	Civil case
2	Immigration case
3	Judicial review of administrative action
9	Missing/cannot determine

ENBANC Variable indicating if the case was heard *en banc*. Coded from LEXIS.

0 Case was not heard *en banc*
1 Case was heard *en banc*
7 Case was previously denied *en banc* rehearing

JUDGE1 Identity of the first judge listed on the court of appeals decision. Coded from LEXIS.

JUDGE2 Identity of the second judge listed on the court of appeals decision. Coded from LEXIS.

JUDGE3 Identity of the third judge listed on the court of appeals decision. Coded from LEXIS.

OPJUDGE Identity of the judge writing the majority opinion in the case. In *en banc* decisions, the code of the judge who wrote the majority opinion. Coded from LEXIS.

XX00 Memorandum opinion, Circuit XX
XX77 Per curiam opinion, Circuit XX

CONCUR1 Identity of the judge writing the first listed concurring opinion in the case. Coded from LEXIS.

9999 Missing or N/A

CONCUR2 Identity of the judge writing the second listed concurring opinion in the case. Coded from LEXIS.

9999 Missing or N/A

DISSENT Identity of the dissenting judge. In *en banc* decisions, the code of the judge who wrote the dissenting opinion. If more than one dissent is present, the code for the judge who wrote the dissent

with which the greatest number of fellow judges joined. Coded from LEXIS.

9999 Missing or N/A

NMAJOR Number of judges in the majority. Coded from LEXIS.

NMINOR Number of judges in the minority. Coded from LEXIS.

NAMICI Number of *amicus curiae* briefs filed on the merits in the court of appeals. Coded from LEXIS.

ISSUE1 First (primary) issue in the case. Issue codes correspond to the ISSUE variable in the United States Supreme Court Judicial Database. Coded from LEXIS.

ISSUE2 Second issue in the case. Issue codes correspond to the ISSUE variable in the United States Supreme Court Judicial Database. Coded from LEXIS.

ISSUE3 Third issue in the case. Issue codes correspond to the ISSUE variable in the United States Supreme Court Judicial Database. Coded from LEXIS.

SENT_APP Sentencing guidelines appeal indicator. Coded from LEXIS.

-1 Criminal case in which appeal was made on conviction only.
0 Criminal case in which appeal was made on both conviction and sentencing.
1 Criminal case in which appeal was made on sentencing only.
9 Missing or N/A (including all non-criminal cases).

SENT_DEC Sentencing guidelines decision indicator. Coded from LEXIS.

0 Criminal case in which court of appeals decision (REVERSAL, IDEO_DCT, IDEO_CTA) applies to conviction.
1 Criminal case in which court of appeals decision (REVERSAL, IDEO_DCT, IDEO_CTA) applies to sentencing matters alone.
9 Missing or N/A (including all non-criminal cases).

USCODE U.S. Code at issue in the case; variable indicates part and section of U.S.S.C. (PP-§§§§). Federal Regulations are denoted ##CFR####. Coded from LEXIS.

CONFLICT Indicator of intercircuit conflict in the case. Variable coded one only if intercircuit conflict is specifically noted in a majority, concurring, or dissenting opinion. Coded from LEXIS.

0 No intercircuit conflict present
1 Intercircuit conflict present
9 Missing or N/A

REVERSAL Variable indicating if the court of appeals reversed the decision of the lower court. Coded from LEXIS.

0 Circuit Court upheld lower court
1 Circuit Court reversed lower court
9 Missing or N/A

INVALID Variable indicating if the court of appeals invalidated a statute, federal regulation, or policy (e.g. regulatory guideline). Coded from LEXIS.

0 No invalidation in the court of appeals
1 Court of appeals invalidated statute, regulation or policy
9 Missing or N/A

CONCLAIM Presence of a constitutional claim by the appellant. Coded from LEXIS.

0 No constitutional claim by the appellant
1 Constitutional claim made by the appellant
9 Missing or N/A

IDEO_DCT Ideological direction of the lower court decision, following the coding of the DIR variable in the U.S. Supreme Court Judicial Database. Coded from LEXIS.

0 Liberal lower court decision
1 Conservative lower court decision
9 N/A or cannot determine

IDEO_CTA Ideological direction of the court of appeals decision, following the coding of the DIR variable in the U.S. Supreme Court Judicial Database. Coded from LEXIS.

0 Liberal court of appeals decision
1 Conservative court of appeals decision
9 N/A or cannot determine

SC_CERT Variable indicating if the case was accepted for certiorari by the U.S. Supreme Court. Coded from LEXIS.

0 Certiorari denied
1 Certiorari granted
9 Missing or N/A

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