

# THE SOLICITOR GENERAL AS MEDIATOR BETWEEN COURT AND AGENCY

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## INTRODUCTION

Agencies today play a central role in shaping much of statutory law. They do so, however, in the shadow of the courts. Courts review most forms of agency action<sup>1</sup>—and some forms of inaction<sup>2</sup>—and scrutinize agencies’ interpretive decisions for consistency with the relevant statutory

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1. The Administrative Procedure Act states that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof,” 5 U.S.C. § 702 (2006), provides for judicial review of “final agency action,” 5 U.S.C. § 704, and authorizes courts to “(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold lawful and set aside agency action, findings, and conclusions found to be[] (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or] (C) in excess of statutory jurisdiction, authority, . . . or short of statutory right,” 5 U.S.C. § 706.

2. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497 (2007).

scheme. The appropriate division of labor between courts and agencies therefore is a recurring question in administrative law. It lies at the heart of ongoing debates about whether and to what extent judges should defer to agencies' statutory interpretations. The court/agency divide similarly animates the growing body of scholarship addressing agencies' interpretive methodologies: Should agencies mimic judicial modes of statutory interpretation, or should they engage in a distinctive approach to interpretation that exploits their very different institutional roles and capacities?<sup>3</sup>

In this Essay, I assume that agencies do have something unique to add to our law—that their expertise, practical experience, and political ties can generate valuable insights into many questions of statutory interpretation. Current law recognizes as much when it urges courts (with varying degrees of intensity) to defer to agencies' judgments about the statutes they administer.<sup>4</sup> The call for deference is grounded in an acknowledgement that attributes like expertise and political accountability give agencies a special claim to interpretive authority.<sup>5</sup> My aim here is not to make the case for such authority, but rather to expose and evaluate a potential threat to it: the Solicitor General (SG). The SG controls all agency litigation in the Supreme Court, and as a result he or she<sup>6</sup> stands between agencies and the nine Justices who ultimately will decide whether to embrace or reject the agencies' views of the law. As I seek to show, the SG plays an active role in shaping the arguments that reach the Court; in a significant percentage of cases involving agency statutory interpretations, the briefs filed on behalf of "The United States" are not joined by the relevant agency and may or may

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3. See, e.g., Michael Herz, *Agencies, Courts, and Statutory Purpose*, 31 ADMIN. & REG. L. NEWS 8 (2006); Jerry L. Mashaw, *Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation*, 59 ADMIN. L. REV. 889 (2007); Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501 (2005); Richard J. Pierce, Jr., *How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss*, 59 ADMIN. L. REV. 197 (2007); Peter L. Strauss, *When the Judge Is Not the Primary Official With Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321 (1990).

4. See, e.g., *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (holding that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute").

5. See *id.* at 865 ("Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments.").

6. Most references to the Solicitor General in this Essay use the masculine pronoun because, as of this writing, every SG to date has been a man. That trend will end with Elena Kagan, President Obama's pick for the position.

not reflect the agency's views. Other commentators have identified a tension between the SG's litigation authority and the independence of so-called independent agencies.<sup>7</sup> The point here is different. I argue that the SG's intervention is more legalistic than political, and that his role in filtering the arguments presented to the Court may leave insufficient room for a distinctive agency voice.

This Essay proceeds in three Parts: the first is largely descriptive, the second empirical, and the third normative. Part I supplies some necessary background information about the SG's role in agency litigation, and provides an overview of the extant literature on the SG and his interaction with the governmental entities he represents. Although several commentators have focused on the SG's relationship with administrative agencies—and the potential for conflict between the two—the literature to date provides no firm sense of the rates or subjects of such conflicts. Part II is an effort to address that gap through a study of the briefs filed in every case involving agency statutory interpretation over more than two decades. The results reveal a startling percentage of cases—roughly twenty-seven percent—in which the relevant agency did not join the brief filed by the SG. To be sure, agencies' refusal to join the SG's briefs may not always indicate substantive disagreement, but I suggest that it serves as a rough proxy for agency participation in the formulation of the arguments being advanced. In Part III, I develop the normative claim that the SG's control of litigation in the Supreme Court threatens to undermine the very attributes of agency decision-making that provide the basis for judicial deference and serve to legitimize the important role that agencies play in modern governance. I show that, on every significant point of comparison—congressional intent, expertise, accountability, and public access—the SG seems closer to the Justices than to the agencies he represents. The SG's screening process, in other words, replicates many of the features of judicial review, and as such it perpetuates a court-centered rather than agency-centered mode of statutory interpretation.

#### I. THE ROLE OF THE SOLICITOR GENERAL IN GOVERNMENT LITIGATION

The Solicitor General controls virtually all litigation on behalf of the United States in the Supreme Court.<sup>8</sup> A handful of agencies have statutory authority to represent themselves in the Supreme Court, at least as to certain

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7. See *infra* notes 44-50 and accompanying text.

8. The source of that authority is 28 U.S.C. § 516, which provides 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.”

matters.<sup>9</sup> Others have authority to control their own litigation in the lower courts.<sup>10</sup> But, generally speaking, litigation authority passes to the SG once the Supreme Court comes into the picture—that is, once the agency seeks to file or oppose a petition for certiorari. The SG must authorize any cert petitions filed by the government (again, with a handful of exceptions), and his office will draft any petition or opposition filed in the Court. If cert is granted, the SG’s office will prepare and file any briefs at the merits stage, and typically will perform the oral argument. The SG also controls any amicus filings by U.S. entities. As a result, the SG has a hand in approximately two-thirds of the cases the Court decides each year.<sup>11</sup>

In part because of its repeat-player status, and in part because of the talent and expertise of its staff, the Office of the Solicitor General enjoys tremendous success before the Supreme Court.<sup>12</sup> The SG is far more successful than other litigants in persuading the Court to grant cert,<sup>13</sup> and enjoys

9. For an overview, see Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255, 265 (1994).

10. See *id.*

11. See Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 706 (2004); see also Karen O’Connor, *The Amicus Curiae Role of the U.S. Solicitor General in Supreme Court Litigation*, 66 JUDICATURE 256, 258-59 (1983) (reporting that the SG participated in between 45% and 69% of cases argued before the Supreme Court in 1970–1979).

12. See Kevin T. McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 POL. RES. Q. 505 (1998) (attributing the SG’s success to the expertise of the SG and his deputies and assistants). For other theories about the reasons for the SG’s success rate, see Linda R. Cohen & Matthew L. Spitzer, *The Government Litigant Advantage: Implications for the Law*, 28 FLA. ST. U. L. REV. 391, 405 (2000) (noting the possibility that Supreme Court Justices may be particularly “progovernment” because of the nature of the appointment and confirmation process); *id.* at 395 (arguing that “the strategic behavior of government litigators routinely alters the set of cases from which the Supreme Court gets to choose. This advantage works in favor of the government—the Supreme Court gets to decide cases in which the government has a large chance of victory”); Jeffrey A. Segal, *Supreme Court Support for the Solicitor General: The Effect of Presidential Appointments*, 43 W. POL. Q. 137, 140-41, 149 (1990) (hypothesizing that Justices will tend to support SGs appointed by the same President who appointed the Justices, or by a President of the same party, but finding that Supreme Court support for the SG “is not related to the number of justices a President has appointed”).

13. REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 25 (1992) (finding that, between 1960 and 1989, the Supreme Court granted 69.8% of the SG’s requests for review, compared to 4.9% for private litigants); see also John A. Jenkins, *The Solicitor General’s Winning Ways*, 69 A.B.A. J. 734, 734 (1983) (reporting that “[i]n each term approximately 80 per cent of the solicitor general’s petitions for writs of certiorari are granted . . . , compared to a miniscule percentage for all other petitioners”). The numbers are even better for cases in which the SG filed an amicus brief supporting cert—the Court heard 87.6% of such cases. SALOKAR, *supra*, at 27. As one commentator observed:

So far as is known the Justices do not accord to one another the degree of deference shown to the Solicitor General concerning which cases to review; in the 1985 Term there were several hundred cases in which the Court denied review over the objec-

a win rate that ranges from 57% to 80% when he participates at the merits stage.<sup>14</sup> Indeed, the available evidence strongly suggests that the position taken by the SG is “one of the most crucial factors affecting the Court’s decisions.”<sup>15</sup>

The high correlation between positions advocated by the SG and positions adopted by the Supreme Court highlights the importance of the SG’s litigation choices. Although the ultimate decision is the Court’s to make, empirical evidence of the “SG effect” indicates that the SG’s choice to advance a particular legal argument can have a significant impact on the Court’s decisionmaking process. It thus matters a great deal how the SG decides which positions to advocate, which positions to oppose, and which simply to ignore. Those questions have spawned a lively and longstanding debate about the appropriate role for the SG as the government’s chief litigator.

One view is that the SG must (and does) act as an officer of the Court. Popularized by Lincoln Caplan’s book *The Tenth Justice*,<sup>16</sup> that view is re-

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tion of one or more Justices, but only seven cases in which the Court declined to review a petition filed or supported by the Solicitor General.

Eric Schnapper, *Becket at the Bar—The Conflicting Obligations of the Solicitor General*, 21 LOY. L.A. L. REV. 1187, 1217 (1987).

14. Commentators report a high win rate for the SG when the government is a party. See SALOKAR, *supra* note 13, at 29-30 (reporting an overall win rate of 67.6% for the SG, compared to 26.8% for private litigants); Cohen & Spitzer, *supra* note 12, at 422 (reporting that, between 1985 and 1997, the government won 70.7% of cases in the Supreme Court when it was the petitioner, and 57.4% of cases when it was respondent); O’Connor, *supra* note 11, at 261 (reporting that, from 1970–1981, government won 70% of race discrimination cases in which it was a party to the suit). The SG’s win rate is even higher when he participates as an amicus. See ROBERT SCIGLIANO, *THE SUPREME COURT AND THE PRESIDENCY* 180 (1971) (reporting that the SG enjoyed an 82% success rate when participating as amicus during the 1943, 1944, 1963, and 1965 Terms of the Court); O’Connor, *supra* note 11, at 261 (reporting that, from 1970–1981, the government won 81.6% of race discrimination cases in which the SG filed amicus briefs, compared to a win rate of 70% when the government was a party in such cases); Jeffrey A. Segal, *Amicus Curiae Briefs By the Solicitor General During the Warren and Burger Courts: A Research Note*, 41 W. POL. Q. 135, 138 (1988) (“Over the thirty years of the Warren and Burger Courts, no administration won less than 65 percent of its cases as amicus.”); *id.* at 140 (“While petitioners supported by the U.S. win 84 percent of the time respondents supported by the U.S. are also more likely than not to win (59.7 percent). This finding compares incredibly well with the 33 percent success rate typically obtained by respondents . . . .”); Segal, *supra* note 12, at 140 (“Between 1920 and 1973 the party supported by the SG has won 74 percent of the time and over 80 percent of the time in political cases . . . .” (reporting findings of Stephen Puro, *The Role of Amicus Curiae in the United States Supreme Court* (1971) (unpublished Ph.D. dissertation, State University of New York at Buffalo))).

15. Jeffrey A. Segal & Cheryl D. Reedy, *The Supreme Court and Sex Discrimination: The Role of the Solicitor General*, 41 W. POL. Q. 553, 563 (1988) (reporting the conclusions of an empirical study of Supreme Court sex discrimination cases).

16. LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1987).

flected in former SG Francis Biddle's oft-quoted statement that the SG "is responsible neither to the man who appointed him nor to his immediate superior in the hierarchy of administration. The total responsibility is his, and his guide is only the ethic of his [law] profession framed in the ambience of his experience and judgment."<sup>17</sup> For Caplan and Biddle, although the SG is a member of the executive branch and owes a duty to his governmental clients, his tasks demand that he act "as a highly principled and independent legal official, insulated from political and institutional pressures from without and within the administration, seeking only to advance the best view of the law."<sup>18</sup>

*The Tenth Justice* presented the model of a lawyerly, largely apolitical SG in sharp contrast to the primary villain of the book, President Reagan's second SG, Charles Fried. In Caplan's view, the Reagan administration had improperly politicized the office of the SG, sacrificing the reputation previous incumbents had so carefully cultivated with the Court.<sup>19</sup> Some defenders of the Reagan administration denied the charges of politicization,<sup>20</sup> but others stressed the inevitably political nature of the SG's job.<sup>21</sup> After all, the SG is appointed by the President (with the advice and consent of the Senate), and serves at his pleasure.<sup>22</sup> The SG is also directly subordinate to

17. FRANCIS BIDDLE, IN BRIEF AUTHORITY 97 (1962); see also Robert Stern, *The Solicitor General's Office and Administrative Agency Litigation*, 46 A.B.A. J. 154, 217 (1960) ("[I]n the over twenty years in which I have been familiar with the Solicitor General's Office, . . . I have never heard it criticized on the ground that it was acting as a political arm of the Administration. On the contrary, an attorney in one of the other Departments has aptly characterized it as probably more objective and free from political influences than any other office or agency in the Government.").

18. Pillard, *supra* note 11, at 725 (describing Caplan's view of the SG).

19. CAPLAN, *supra* note 16, at 7, 277; see also SALOKAR, *supra* note 13, at 99-102 (describing an increase in media attention to the SG's office during the Reagan administration, and an increased public acknowledgement of the political role of the SG); Burt Neuborne, *Testimony Before the Subcommittee on Oversight of the House Judiciary Committee*, 21 LOY. L.A. L. REV. 1099, 1102 (1988) ("I sense that in the past several years, the tone and content of the Solicitor General's work has shifted far more toward an ideological stance that views the Solicitor General's office as a vehicle for advancing a particular set of political and ideological positions.").

20. See CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT*, 36-40 (1991).

21. See Richard G. Wilkins, *An Officer and an Advocate: The Role of the Solicitor General*, 21 LOY. L.A. L. REV. 1167, 1177 (1988) ("The charge that President Reagan has 'turned [the Solicitor] into an ideological mouthpiece' is decidedly overblown; the Solicitor General has always been a mouthpiece.") (alteration in original) (quoting Monroe E. Price, *What Price Advocacy?*, N.Y. TIMES, Oct. 25, 1987, §7, at 13) (reviewing LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1987)).

22. See 28 U.S.C. § 505 (2006) ("The President shall appoint in the Department of Justice, by and with the advice and consent of the Senate, a Solicitor General, learned in the law, to assist the Attorney General in the performance of his duties."); Segal, *supra* note 14, at 136 ("It is expected that the ideological position taken by the solicitor general will depend

the Attorney General,<sup>23</sup> who typically has close ties to the President.<sup>24</sup> Not surprisingly, then, studies show that the SG's behavior tends to be affected by the views of the incumbent President.<sup>25</sup> And many commentators maintain that politicization of that sort not only is to be expected, but is normatively desirable.<sup>26</sup>

Debates about the appropriate place for politics in the SG's work tend to focus on a relatively stable set of questions about litigation choices. For example, one recurring question is whether, or under what circumstances, the SG properly may refuse to defend congressional legislation against constitutional attack.<sup>27</sup> Similarly, commentators continue to debate whether the SG should accept or challenge Supreme Court precedents with which the President disagrees.<sup>28</sup> Still others focus on whether and when the SG should

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upon who is president. The president should generally have such control since he is unlikely to appoint anyone who does not share his views, and unlike the situation with Supreme Court justices, he can remove solicitors who do not live up to expectations.”).

23. See 28 U.S.C. § 505 (stating that the Solicitor General is to “assist the Attorney General in the performance of his duties”); Rex E. Lee, *Lawyering in the Supreme Court: The Role of the Solicitor General*, 1985 SUP. CT. HIST. SOC'Y Y.B. 15, reprinted in 21 LOY. L.A. L. REV. 1059, 1067 (1988) (“The solicitor general does what he does in the context of assisting the attorney general . . .”).

24. See Neal Devins & Michael Herz, *The Battle That Never Was: Congress, the White House, and Agency Litigation Authority*, 61 LAW & CONTEMP. PROBS. 205, 219 (1998) (“Unlike most agency and department heads, the Attorney General is usually a close confidante of the President, in many cases someone who was active in the President's political campaign and possesses deep personal loyalty to the President.”).

25. See SALOKAR, *supra* note 13, at 167 (finding that the SG advocated “[c]onservative” positions in 5.13% of amicus briefs filed under Democratic administrations, and in 58.33% of amicus briefs filed under Republican administrations); O'Connor, *supra* note 11, at 261-64 (studying amicus curiae participation by three SGs from 1967 to 1979 and finding variations between administrations in the number of “pro-rights” amicus briefs filed in personal liberties, civil equality, and criminal cases); Segal, *supra* note 14, at 142 (finding evidence, based on a study of SG amicus filings from 1953 to 1982, “that the position of the solicitor general changes as presidential administration changes”).

26. See, e.g., John O. McGinnis, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799, 802 (1992) (reviewing CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* (1991)) (arguing that the SG “is unique not because of his duty to the Court, but because of his duty to an individual—the President—who has a constitutional responsibility to interpret the law *independently* from the Supreme Court”).

27. See, e.g., Joshua I. Schwartz, *Two Perspectives on the Solicitor General's Independence*, 21 LOY. L.A. L. REV. 1119, 1152-58 (1988); Rex E. Lee *Conference on the Office of the Solicitor General of the United States*, 2003 BYU L. REV. 1, 30-32 (2003) (statement of Judge Frank Easterbrook) [hereinafter *Rex Lee Conference*].

28. See McGinnis, *supra* note 26, at 805 (“Given that representing the United States before the Court is a ‘sphere of action’ assigned to the Executive, it is emphatically the duty and within the province of the President, and through him the Solicitor General, to be an independent interpreter of the Constitution in his submissions to the Court.”). For a contrary view, see Burt Neuborne, *In Lukewarm Defense of Charles Fried*, MANHATTAN LAW., Oct. 20-26, 1987, at 37, reprinted in 21 LOY. L.A. L. REV. 1069 (1988). Cf. Michael W. McCon-

participate as amicus in cases not directly related to a federal enforcement interest.<sup>29</sup> All of these questions share a common theme: uncertainty about who or what is the SG's "client." Is it the President?<sup>30</sup> The executive branch as a whole?<sup>31</sup> The entire U.S. government?<sup>32</sup> And if the last, what is the SG to do when different arms or interests of the government are pitted against each other?

This Essay takes up a subset of these questions concerning the SG's relationship with the administrative agencies he represents in the Supreme Court. That relationship can become complicated and conflictual for a number of reasons. The potential for conflict is most obvious when two or more agencies disagree on a particular legal or policy question.<sup>33</sup> It is technically possible for the SG to present multiple inconsistent positions to the Court,<sup>34</sup> but the practice is unpopular with the Justices, who tend not to ap-

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nell, *The Rule of Law and the Role of the Solicitor General*, 21 LOY. L.A. L. REV. 1105, 1114-15 (1988) (arguing that "[n]o dogmatic solution to the problem of precedent is possible").

29. See David A. Strauss, *The Solicitor General and the Interests of the United States*, 61 LAW & CONTEMP. PROBS. 165, 170-74 (1998) (discussing the systemic costs of the SG's advocating positions supported by the current administration but untied to a recurring institutional interest of the United States); *Rex Lee Conference*, *supra* note 27, at 54-58 (statements of John Garvey and Andrew Frey) (debating the propriety of amicus filings in cases where there is no direct federal enforcement interest).

30. See Bruce E. Fein, *Promoting the President's Policies Through Legal Advocacy: An Ethical Imperative of the Government Attorney*, 30 FED. B. N. & J. 406, 406 (1983) (arguing that government attorneys' client is the President).

31. See Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987) (arguing that government attorneys' client is the executive branch as a whole and the President in particular, not individual agencies).

32. See Neuborne, *supra* note 19, at 1100 ("[A] Solicitor General represents more than just the President or, even, the current administration. The Solicitor General represents Congress as well, to say nothing of the career civil service and the independent administrative agencies. Indeed, . . . the Solicitor General represents the people as well.").

33. See *Rex Lee Conference*, *supra* note 27, at 12 (statement of Theodore B. Olson) (noting that "agencies with different mandates and constituencies will often disagree about the government's position"); *id.* at 72 (statement of John Roberts) ("I was surprised about the degree of disagreement throughout the executive branch in a wide variety of cases."); Office of Legal Counsel, *Memorandum Opinion for the Attorney General: Role of the Solicitor General*, 1 OP. OFF. LEGAL COUNSEL 228 (1977), *reprinted in* 21 LOY. L.A. L. REV. 1089, 1092 (1988) [hereinafter OLC Memo] ("Because it is not uncommon for there to be conflicting views among the various offices and agencies within the executive branch, the Solicitor General, having the responsibility for presenting the views of the Government to the Court, must have power to reconcile differences among his clients, to accept the views of some and to reject others, and, in proper cases, to formulate views of his own.").

34. See *Rex Lee Conference*, *supra* note 27, at 25 (comments of Judge Daniel Friedman) (describing a case in which SG Cox filed a brief arguing both sides of a case, and presented both sides in oral argument); *see also, e.g.*, Brief for the Petitioner, *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) (No. 76-1701), 1978 WL 206589 (brief filed by SG on behalf of TVA, with an appendix presenting the contrary views of the Secretary of the Interior). Compare Brief for the Attorney General and the Federal Election Commission,

preciate advocates speaking out of both sides of their mouths.<sup>35</sup> Typically, therefore, the SG will have to forge a consensus between the warring factions, or choose only one of the candidate positions.<sup>36</sup> As former SG Rex Lee acknowledged, “the startling consequence of [the SG] making a decision in these circumstances is that the side [he] rule[s] against doesn’t get represented at all.”<sup>37</sup>

A similar type of conflict can arise when an agency adopts a position on a legal issue that will recur in many different contexts—e.g., a procedur-

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Buckley v. Valeo, 424 U.S. 1 (1976) (Nos. 75-436, 75-437), with Brief for the United States, Buckley v. Valeo, 424 U.S. 1 (1976) (Nos. 75-436, 75-437) (multiple briefs from governmental entities advocating contrary positions). Compare Brief for the United States, Personnel Adm’r of Massachusetts v. Feeney, 442 U.S. 256 (1979) (No. 78-233), with Brief of the Office of Personnel Management, the United States Dept. of Defense, and the United States Dept. of Labor, and the Equal Employment Opportunity Commission, Personnel Adm’r of Massachusetts v. Feeney, 442 U.S. 256 (1979) (No. 78-233) (same).

35. At a conference honoring former SG Rex Lee, Judge David Friedman offered an anecdote that nicely illustrates the risks associated with advocating contrary positions in the Court:

[T]he acting solicitor general filed a brief and argued both sides of the case. And then one of the assistants to the solicitor general was sent up to argue the case, and he argued both sides of the case and after he had been doing this for a while, Chief Justice Warren interrupted him rather annoyed and said to him, “Well, what are you asking us to do in this case? You say on the one hand that this could be said on one side and on the other hand there is this that could be said on the other side. What is your position?” So, the assistant said, “Well, it depends. If I am wearing my SEC hat, I think they are entitled to claim the deduction, but if I am wearing my Internal Revenue Service hat, I think they are not entitled to the deduction.” So, Chief Justice Warren looked at him very annoyed and said, “Well, what kind of an answer is that? That is no help to us.” He said, “We have got a case here. We have to do something with it. We have to either affirm the judgment of the court of appeals or reverse it. Now, you are here on behalf of the government. What are you asking us to do in this case?” Glaring like that, “What are you asking us to do in this case? Are you asking us to affirm or are you asking us to reverse?”

*Rex Lee Conference*, *supra* note 27, at 26-27.

36. Former Deputy Solicitor General (now Chief Justice) John Roberts has described the process as follows:

That was resolved by holding, and this was typical, a series of interminable meetings with all interested parties that looked like nothing so much as Thanksgiving dinner at a dysfunctional family because—as you rapidly find out—these agencies have a long history of sort of squabbling with each other and now they are—it is wrong to view it this way, but—before their parents and the parents are going to decide which one gets punished and which one gets rewarded. I have always been a little surprised at the prominence of the office in resolving those types of decisions.

*Id.* at 73.

37. Jenkins, *supra* note 13, at 738 (quoting Rex Lee). Compare Stern, *supra* note 17, at 157 (“The Court is always apprised of the intragovernmental conflict, and I know of no case in which the Solicitor General has precluded an independent agency from presenting its position.”).

al rule involving the requirements for pleading. The agency's position might make sense in the narrow context of the case, but might be bad for the same agency or for other arms of the government in other cases.<sup>38</sup> Again, the SG must choose between advocating the position pushed by the agency and the position that (in his view) will better serve the interests of the United States going forward.

Finally, and most controversially, conflict can develop between the SG and the agencies he represents because the SG simply disagrees—on policy or legal grounds—with the position advanced by the agency.<sup>39</sup> Such conflicts are different in kind from those just discussed, as the SG does not find himself caught between the competing demands of different “clients.”<sup>40</sup> Here there is but one client, and the question is how the SG will discharge his job of representing it. Unlike other potential litigants, who can find new representation if their existing counsel refuses to advance a particular argument, agencies may not have any options other than the SG. Generally speaking, if the SG does not deem an agency case cert-worthy or refuses to support the positions advanced by the agency, no cert petition will be filed by the government.<sup>41</sup> If the case nevertheless makes it to the merits stage, again the SG may permit the agency to represent itself, but he rarely does

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38. Cohen & Spitzer, *supra* note 12, at 402 (“While the federal government only rarely finds itself in direct litigation against itself, the immediate litigation interests of different agencies frequently are at odds with the positions of other agencies; other parts of the executive; or the longer-run goals, interests, or reputation of the government as [a] litigator.”).

39. See Stern, *supra* note 17, at 155 (“[T]he Solicitor General does not follow [] agency recommendations if, in his best judgment as a lawyer, that would be clearly wrong.”).

40. See Note, *The Solicitor General and Intragovernmental Conflict*, 76 MICH. L. REV. 324, 350 (1977) (“The Solicitor General’s opposition to the merits of an agency’s decision presents a harder problem when that opposition rests upon his own view of the validity of the agency’s position rather than on the stance of another agency.”). Cf. Peter L. Strauss, *Foreword: Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 744-45 (2007) (distinguishing between inter-agency disputes and disputes between the White House and a single agency, and arguing that the latter present a more controversial occasion for the President to direct agency decisionmaking).

41. See Jenkins, *supra* note 13, at 734 (“Only one in six government losses is appealed to the Supreme Court.”); Kristen A. Norman-Major, *The Solicitor General: Executive Policy Agendas and the Court*, 57 ALB. L. REV. 1081, 1090 (1994) (“Traditionally, nearly eight hundred government cases are submitted to the Solicitor General as potential cases for appeal or certiorari each year. Of these cases, the Solicitor General can realistically only choose between sixty and eighty to bring before the Court. Agencies have little recourse if their cases are not selected . . . .”); Jim Rossi, *Does the Solicitor General Advantage Thwart the Rule of Law in the Administrative State?*, 28 FLA. ST. U. L. REV. 459, 462-63 (2000) (“The Solicitor General rejects five requests for appeal from federal agencies for every one he sends to the Supreme Court.”); Stern, *supra* note 17, at 156 (“The refusal of the Solicitor General to petition for certiorari provokes the most friction between his Office and the administrative agencies.”).

so.<sup>42</sup> More frequently, the SG will file a brief on behalf of the United States (and sometimes on behalf of the agency itself, if it is a party) advocating a position contrary to what the agency hoped to argue. Agencies sometimes join such briefs, though it is difficult to determine whether their acquiescence reflects successful arm-twisting by the SG or a sincere change of heart.<sup>43</sup> In many other cases of conflict between SG and agency, the brief will not be joined by the agency and may or may not mention the agency's preferred position.

As other commentators have observed, the SG's control of agency litigation in the Supreme Court—and in particular his ability to prevent the Justices from hearing agency arguments with which he disagrees or which conflict with the arguments advanced by other governmental units—is difficult to square with the concept of *independent* agencies.<sup>44</sup> Independent agencies typically are run by a bipartisan slate of commissioners who serve for staggered terms. The President appoints independent agency heads with the advice and consent of the Senate, but he has only limited power to remove them.<sup>45</sup> Independent agencies, moreover, typically are exempt from other aspects of executive control such as the requirements of review by the executive Office of Management and Budget (OMB).<sup>46</sup> Although commen-

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42. For examples of cases in which the SG has authorized dual representation, see Devins, *supra* note 9, at 277; Stern, *supra* note 17, at 157-58. It bears emphasis that agency advocacy before the Supreme Court used to be far more common than it is now. See Schnapper, *supra* note 13, at 1266-69 (tracing the evolution of the SG's policy with respect to agencies with which he disagrees); *supra* note 37 and accompanying text.

43. See Devins, *supra* note 9, at 299 & n.255 (discussing EEOC Chairman Johnny Butler's surprising decision to sign a brief filed by the SG that took a position opposite to that advocated by the EEOC in the lower courts).

44. See Jenkins, *supra* note 13, at 738 ("The solicitor general's appellate philosophy sometimes can cause day-to-day problems for independent agencies. 'We're supposed to be independent,' explained a senior lawyer at one agency. 'But if the solicitor general won't present our policy view to the Supreme Court, that's political interference in our policies, and we object to it.'").

45. See Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 488 (2008) ("Presidents cannot fire independent-agency heads on policy grounds and, as such, have been constrained in their efforts to direct independent-agency policy making."); George F. Fraley, Note, *Is the Fox Watching the Henhouse?: The Administration's Control of FEC Litigation Through the Solicitor General*, 9 ADMIN. L.J. AM. U. 1215, 1240-41 (1996) ("While the limit on the President's power to remove independent agency heads is the significant distinguishing feature, there are other attributes that differentiate independent agencies from other executive agencies. These include multiple member panels, fixed terms of commissioners, specialized mandates, and bipartisan requirements.").

46. See Devins & Lewis, *supra* note 45, at 488 ("[U]nlike executive agencies, independent agencies need not submit their regulatory proposals to OMB for approval. They often manage to escape OMB review of budget requests or at least submit their budget requests to Congress directly at the same time."). *But see* Strauss, *supra* note 40, at 736-37

tators have questioned the extent to which independent agencies really are insulated from presidential influence and control,<sup>47</sup> there is no question that they are designed to be independent.<sup>48</sup> The SG's authority over Supreme Court litigation poses a risk to that independence,<sup>49</sup> leading some commentators to argue that Congress should expand independent agency litigating authority to permit such agencies to present their views to the Supreme Court in cases where the SG refuses to do so.<sup>50</sup>

In this Essay, I explore a different set of concerns regarding conflicts between the SG and agencies—concerns that are not limited to independent

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(noting uncertainty over whether certain aspects of President George W. Bush's executive order 13,422 apply to independent agencies).

47. See, e.g., Devins & Lewis, *supra* note 45, at 488 (arguing that, given increasing party polarization and party loyalty, Presidents are able to influence the policymaking of independent agencies whenever a majority of the commissioners are from the President's party); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 596 (1984) ("In sum, any assumption that executive agencies and independent regulatory commissions differ significantly or systematically in function, internal or external procedures, or relationships with the rest of government is misplaced.").

48. See Fraley, *supra* note 45, at 1244 (noting that "Congress consistently asserts its preeminence over the independent agencies, referring to them as 'arms of Congress.'").

49. See Devins, *supra* note 9, at 260 ("For better or for worse, independent agencies are empowered to make policy at odds with White House priorities. To allow an Executive Branch official to control both the decision to seek certiorari and the arguments presented before the Supreme Court is to risk that power."); Fraley, *supra* note 45, at 1257 ("[T]he independent agencies are unique and autonomous entities purposely detached from both the executive and the legislature. Congress intended these commissions to speak with a distinct voice and to have the ability to disagree with a particular administration. Allowing an executive official to control regulatory litigation is logically inconsistent with the purpose and design of the independent agencies."); Note, *supra* note 40, at 354 ("Although the views of the Executive on issues within its administrative domain should be presented, the Executive has no license to intercede in litigation of the independent agencies."); Todd Lochner, Note, *The Relationship Between the Office of Solicitor General and the Independent Agencies: A Reevaluation*, 79 VA. L. REV. 549, 565 (1993) (arguing that partisan behavior by a "politically motivated Solicitor General . . . is problematic because it runs the risk of misallocating the resources of the Office to the disadvantage of the independent agencies and thus infringes upon certain values of our political system. In effect, partisanship injects bias into the decisionmaking processes of bodies that were designed to be decidedly unbiased."); Schnapper, *supra* note 13, at 1220-21 ("The Solicitor General's litigation authority could in theory be used . . . to impose on an independent agency the views of the administration . . . . Such a policy-based refusal would squarely pose a conflict between the Solicitor General's general authority to supervise Supreme Court litigation and the more specific statutory charter guaranteeing the independence of the agency involved."). Cf. Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345, 1360 (2000) ("There is . . . every reason to be concerned about the substantive consequences for particular agencies' programs that flow from granting DOJ litigation authority. By definition, DOJ will never be as committed to the agency's program as will the agency itself.").

50. See Devins, *supra* note 9, at 260-61.

agencies but that apply with equal force to agencies within the executive branch. In short, I argue that the SG's ability to control the message that is conveyed to the Supreme Court in cases involving agency interpretations of statutory law threatens to undermine core justifications for the administrative state, and to stifle the growth of an agency- rather than court-centered mode of statutory interpretation. I develop that argument in Part III. Before taking up the normative case against SG control of agency litigation, however, Part II tentatively explores an empirical question lurking behind this and other commentary on the potential for SG-agency conflicts: Do such conflicts actually occur with any regularity?

## II. THE SUBJECTS AND RATES OF SOLICITOR GENERAL-AGENCY CONFLICT

The extant literature on SG-agency conflicts provides only vague hints as to the frequency of such conflicts,<sup>51</sup> and no data whatsoever on the types of issues that tend to generate them. That gap should not be surprising, as it can be extraordinarily difficult to determine whether the arguments presented in the SG's briefs represent the views of the relevant agency. In order to answer that question accurately, one must identify the agency's own independent views and then weigh them against the views expressed in the brief. Such analysis is possible when the agency has addressed the issue in question in a regulation, adjudication, or some other form of interpretive guidance—but that will not always be true. Moreover, even where the necessary information is available, the task of digesting and comparing SG and agency interpretations, especially across different agencies and subject areas, can be quite daunting. It is not clear that the game is worth the candle.

In other work, I examined the Supreme Court's decisions in cases involving an issue of interpretation or application of Title VII of the Civil Rights Act of 1964, and compared the Court's interpretations to those of the Equal Employment Opportunity Commission (EEOC).<sup>52</sup> For purposes of that project, I identified the EEOC's interpretations not only from the briefs it filed in the Court, but also from other sources (such as the agency's guidelines) that predated the litigation. That research makes it possible to gauge the level of SG-EEOC conflict in one area of federal law.

At least in the context of Title VII, SG-agency conflict is not just a theoretical possibility—it is a reality. I was able to identify an EEOC posi-

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51. Neal Devins, for example, reports that “the volume of public disputes between the Solicitor General and independent agencies is far from insignificant. Substantive conflicts arise every year in cases argued before the Court.” Devins, *supra* note 9, at 258-59.

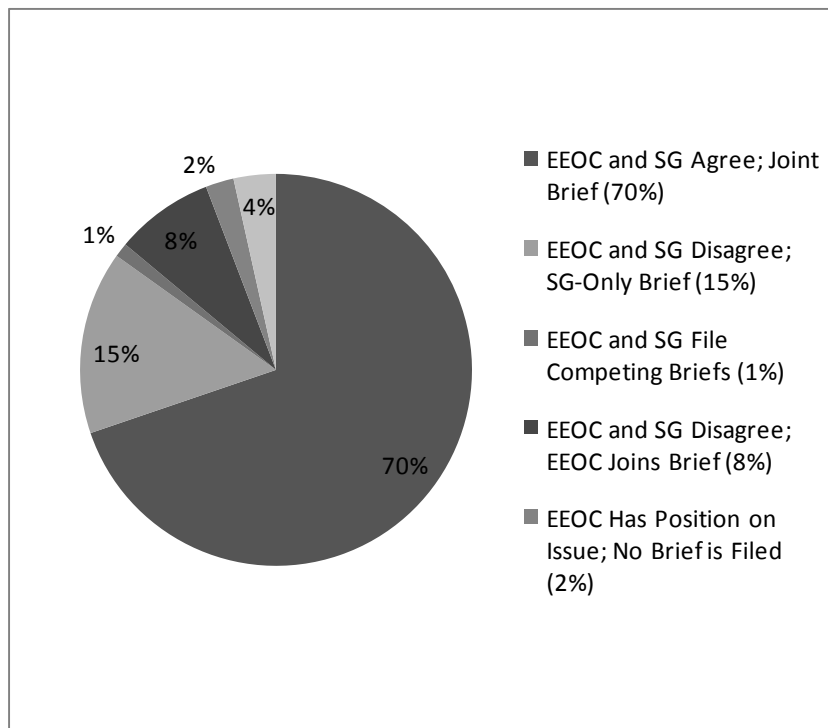
52. See Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. \_\_ (forthcoming 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1474873](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474873).

tion in 85 of the 102 cases the Supreme Court has decided to date involving interpretations of Title VII.<sup>53</sup> Chart 1 shows how the SG's representation of the EEOC played out in those 85 cases. The EEOC's position was reflected in the SG's brief in 60 of the cases (or 70%). In 13 cases (15%), the SG filed a brief that was not joined by the EEOC and that advocated a position that diverged in some substantive respect from the EEOC's own previously stated views. The SG and the EEOC filed briefs advocating different positions in one case (1%). In seven cases (8%), the EEOC joined the SG's brief even though it advocated a position different from the EEOC's previously stated views. In two cases (2%) involving issues on which the EEOC had an identifiable position, no brief was filed by the government. Finally, the SG filed a brief that was not joined by the EEOC in three cases (4%), although there was no apparent divergence between the positions of the SG and the EEOC.

In total, then, the views of the SG and the EEOC clearly diverged in 14 of the 85 cases in which the EEOC had an identifiable position (or 16%). In all but one of those cases (the one exception being the case in which both the EEOC and the SG filed briefs), the arguments presented to the Court were the SG's, not the EEOC's. In an additional seven cases (8%), the arguments presented to the Court were backed by both the EEOC and the SG, but represented a change of position for the agency. And in two cases (2%), the EEOC's views were not presented to the Court because no brief was filed. Depending on whether one counts the seven change-of-position cases and the two no-brief cases, the rate of SG-EEOC conflict ranges from 16% to 26%.

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53. In the remaining cases, the EEOC did not join the brief filed by the SG (if any) and did not appear to have addressed the relevant issues in any other context. There were twelve cases in which the SG filed a brief that the EEOC did not join, and I was unable to identify an EEOC position elsewhere. In the remaining five cases in which I was unable to identify an EEOC position, neither the SG nor the EEOC participated in the litigation at the Supreme Court level.

**Chart 1: EEOC-SG Agreement**

The EEOC is of course just one agency and Title VII just one statute. In an effort to assess whether the relatively high rate of conflict between the SG and the EEOC extends to other contexts and agencies, I also examined the briefs filed in the cases included in William Eskridge and Lauren Baer's comprehensive empirical study of Supreme Court deference to agency statutory interpretations.<sup>54</sup> The Eskridge–Baer data set contains every case decided by the Supreme Court from the 1983 through the 2005 Term that involved an agency's interpretation of a federal statute.<sup>55</sup> As such, it provides a promising window onto the question of SG-agency conflicts.<sup>56</sup>

54. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008).

55. The Eskridge–Baer data set contains a total of 1014 cases. *Id.* at 1089. For purposes of my study, I omitted the cases in which the only relevant agency was the Department of Justice, or where the “agency” was the White House. The resulting data set contains 661 cases for which the briefs are accessible online.

56. I focus on merits-stage briefing and argument rather than decisions as to whether to authorize or support petitions for certiorari. The omission of the cert stage inevitably results in the loss of some potentially interesting data, but I do not believe that loss is espe-

For this part of my study, I treated an agency's signature on the SG's brief as evidence of agreement, and an agency's failure to join the brief as evidence of disagreement. Concededly, an agency's decision to join the SG's brief is at best a rough proxy for agreement with the arguments presented there.<sup>57</sup> But as Chart 2 illustrates, the EEOC's presence on the SG's briefs in Title VII cases accurately reflected substantive agreement or disagreement in at least 86% of the cases.<sup>58</sup> If anything, the brief-joining metric understates the level of SG-agency conflict over Title VII, given the seven cases (8%) in which the EEOC signed briefs that advanced arguments at odds with the agency's previously stated views.<sup>59</sup>

The correlation between the briefing in Title VII cases and substantive agreement between the EEOC and the SG may not hold for other agencies, however. For example, some agencies—the Immigration and Naturalization Service, the Internal Revenue Service, and the Sentencing Commission—never signed the briefs filed in cases involving the statutes they administer. Similarly, the Departments of Defense and Interior signed the briefs very rarely. Those patterns likely reflect agency culture more than substantive disagreement with the positions advocated in the briefs. As a result, a focus on brief-joining would seriously overstate the level of conflict between the SG and such agencies.

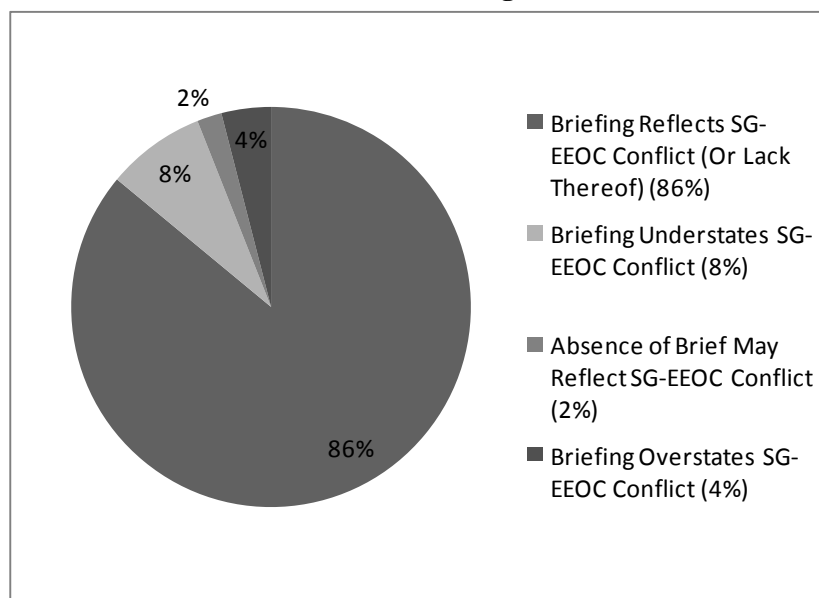
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cially costly. Because private parties play a large role in bringing questions before the Court, it seems unlikely that the SG's decision not to permit an agency to seek cert will keep important questions of statutory interpretation from the Court's attention for very long. *See Note, supra* note 40, at 351 n.133 (“[T]he agency may be able to circumvent the Solicitor General by trying to win on the same arguments in a different circuit and hoping that the opposing party will petition for certiorari.”). As for the agency, the doctrine of nonacquiescence means that uncorrected losses in the lower courts need not be crushing blows to agency policy. *See Cohen & Spitzer, supra* note 12, at 402 (noting that, due to the possibility of administrative nonacquiescence, “the cost to the federal government of staying with a loss at a district court, or even circuit court, can be modest”). *Cf. Samuel Estreicher & Richard L. Revesz, Nonacquiescence by Federal Administrative Agencies*, 98 *YALE L.J.* 679 (1989) (discussing nonacquiescence generally).

57. *Cf. Stern, supra* note 17, at 218 (“When an agency is permitted by law or by the Solicitor General to represent itself, the Solicitor General's failure to join with it in signing the brief indicates to the Court that he is not in accord with its position.”).

58. Here I am counting the 60 cases (70%) in which a joint SG/EEOC brief accurately reflected agreement between the EEOC and the SG, the 13 cases (15%) in which an SG-only brief accurately reflected disagreement between the two, and the one case (1%) in which the EEOC and SG filed conflicting briefs.

59. As noted above, *see supra* note 43 and accompanying text, it is difficult to discern whether such changes of position result from arm-twisting by the SG or others in the executive branch, or instead sincere changes of heart. Happily, nothing here turns on the answer to that question.

**Chart 2: Correlation Between Briefing and EEOC-SG Conflict**

With those important caveats in mind—and omitting the agencies that never, or almost never, join the briefs filed by the SG—my survey of the briefing indicates some degree of SG-agency conflict in roughly 27% of the cases involving agency statutory interpretation.<sup>60</sup> Chart 3 shows the rates of

60. The resulting dataset contains 488 cases. The SG and the relevant agency filed joint briefs in 340 of the 488 cases (70%); the SG filed briefs that were not joined by the relevant agency in 133 of those cases (27%), and the relevant agencies filed briefs that were not joined by the SG in 15 of those cases (3%). (If the never- or seldom-joining agencies (INS/DHS, IRS, Sentencing, Defense, and Interior) are *not* omitted from the count, the dataset contains 661 cases; the rate of joint briefs falls to 53%; the rate of SG-only briefs rises to 45%; and the rate of agency-only briefs drops to 2%.)

Interestingly, the rate of conflict is significantly higher for executive agencies than for independent agencies: The SG filed briefs that were not joined by the relevant agency in 36% of cases involving executive agencies, compared to 14% of independent-agency cases. That difference might suggest that the SG shows greater solicitude to the arguments presented by independent agencies. *Cf.* Devins, *supra* note 9, at 288 (“The Solicitor General seeks certiorari far more often in cases involving independent agencies than in those involving executive agencies.”); Jenkins, *supra* note 13, at 738 (“[I]ndependent agencies occupy a privileged place in the solicitor general’s delicate winnowing process for Supreme Court appeals. The deference exists partly because an agency’s independence still counts for something, and partly because the solicitor general wants to prevent any challenge from arising against his Supreme Court monopoly.”). But the numbers also might be skewed by agency practice at a handful of executive agencies that join SG briefs relatively rarely. For example, the Department of Health and Human Services joined the SG’s briefs in only 14 of 51 cases, or 27%. The Environmental Protection Agency joined the SG’s briefs in 10 of 27 cases, or

conflict for each agency.<sup>61</sup> Even when taken with a healthy grain of salt, the numbers suggest that the Title VII example is not an anomaly. The SG plays an important role in controlling the message presented to the Court in cases involving agency-administered statutes.<sup>62</sup>

My study also exposes interesting patterns in the *types* of issues that tend to generate a SG-only brief. Perhaps predictably, agencies are more likely to participate in the briefing of cases that raise fairly narrow questions regarding the meaning of the relevant statute or regulation. SG-only briefs are most common with respect to issues that extend beyond the four corners of the relevant statute, such as the availability of various forms of relief or of attorneys' fees. Similarly, agencies rarely can be found on briefs addressing the constitutionality or the preemptive force of statutes.

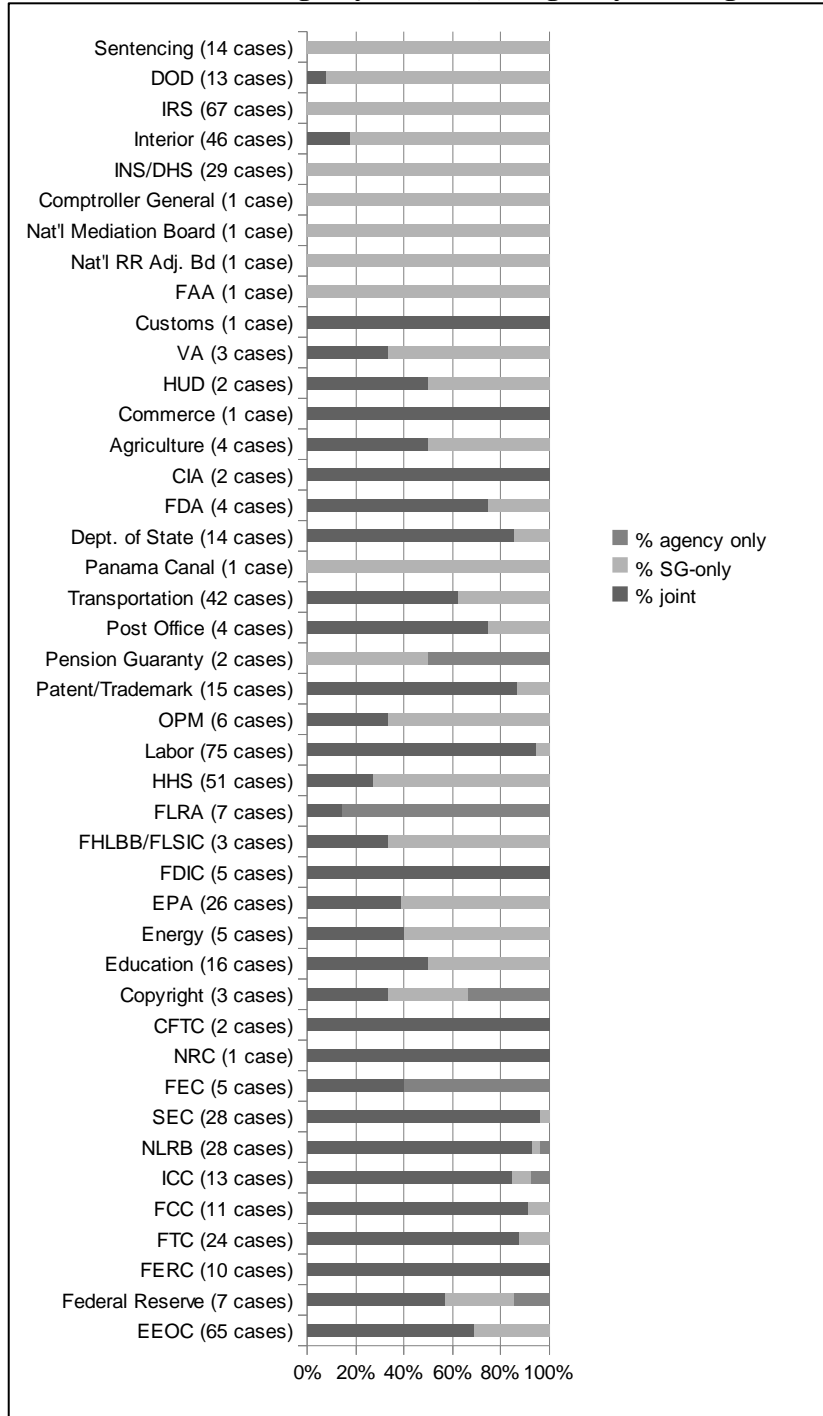
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37%. And the Department of Education joined the SG's briefs in 8 of 16 cases, or 50%. Additional research is required to determine whether those patterns accurately reflect high rates of SG-agency conflict.

61. Note that Chart 3 includes agencies—Sentencing, Defense, IRS, Interior, and INS/DHS—that are omitted from the count.

62. It bears emphasis that I did not seek to identify in any systematic way the *causes* of SG-agency disagreement. Thus, the set of cases discussed here includes those touching on multiple agencies, statutes, or governmental programs, as well as cases involving more narrow statutory questions and a single agency. As I argued above, SG-agency conflict in the former category of cases may be unavoidable, as the SG must serve as a referee among the competing interests. SG-agency conflict is more controversial in the latter category of cases, where the SG's disagreement with the relevant agency tends to reflect a different view of law or policy rather than the demands of other governmental clients. *See supra* notes 33-43 and accompanying text.

Chart 3: SG-Agency Conflict, Gauged by Briefing



The apparent division of labor reflected by the briefs may seem natural. After all, agencies presumably have the most to add with respect to the details of statutory implementation. I argue below, however, that agencies' expertise and experience with the regulatory regimes they administer may be valuable with respect to constitutional and statutory questions alike. The pattern of agency non-participation in constitutional cases—and the notable percentage of purely statutory cases in which agencies appear not to play a major role in the briefing and argument—reveal an unfortunate consequence of the SG's monopoly over Supreme Court advocacy: A significant swath of law is being made in the Court without the distinctive contribution of the agency most intimately involved in the relevant government program. I take up that problem in the following Part.

### III. THE SOLICITOR GENERAL AND THE ADMINISTRATIVE STATE

As explained in Part I, the few scholars who have addressed the potential for conflict between the SG and administrative agencies have focused on the SG's relationship with independent agencies.<sup>63</sup> Their work builds from the premise that the SG represents and advances the views of the sitting President; that feature animates the conflict between SG control of litigation and independent agencies' supposed protection from presidential control. Other work on the SG's office calls into question the conception of the SG as presidential mouthpiece, however. Indeed, a recognition that the SG is not always—or only—a hired gun for the President lies at the heart of the ongoing debates about the SG's role. The SG's job is delicate precisely because he can and sometimes does serve as an important check on presidential politics, offering a level-headed and lawyerly counterpoint to the political ambitions of other executive branch officials. Of course, the extent and propriety of SG independence are themselves debatable. The important point for present purposes is simply that the SG is not a perfectly political creature; his work does not simply channel the President's desires. Equally important, the characteristic that makes the SG something more than a presidential mouthpiece is his legal expertise. The SG can say “no” to the President and the Attorney General because of his knowledge about the Court's doctrine and precedents. “Trust me,” the SG can explain, “this argument just won't fly in Court.”<sup>64</sup>

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63. See *supra* notes 44-50 and accompanying text.

64. See Neuborne, *supra* note 19, at 1100 (“[T]he principal task of the Solicitor General's office is to provide the Executive branch . . . with technically excellent advice about the meaning and logical application of existing law.”); Pillard, *supra* note 11, at 685 (“It is largely because the SG can backstop his judgments in judicial doctrine—and because his judgments are often subject to Supreme Court evaluation—that he speaks with a level of authority that his clients overwhelmingly respect.”); OLC Memo, *supra* note 33, at 1092-93 (“The Solicitor General has been permitted his independence largely because of the belief . . .

Recognizing the potential for separation—indeed, for conflict—between the SG and his political superiors has important consequences for our understanding of the relationship between the SG and agencies of all stripes. Most obviously, it complicates the critiques described above, which see the SG’s role in agency litigation as an improper presidential intrusion into the autonomy of independent agencies. But while intrusion by the SG is not necessarily equivalent to intrusion by the President, it may nevertheless be problematic for a very different set of reasons. I argue in this Part that the SG injects a legalistic, court-centered perspective into agency decisionmaking, filtering agency arguments through a quasi-judicial screen so as to prepare them for presentation to the Court. That process, I suggest, can operate to leech out many of the characteristics of agency decisionmaking typically thought most valuable. Thus, the problem is not that SG control of agency litigation in the Supreme Court gives political actors (particularly the President) too much control. SG interference is more like *judicial* interference, and we might question it for all the reasons we question judicial second-guessing of agency interpretations.

Judicial deference to agencies’ statutory interpretations has become one of the defining features of the administrative state. Deference comes in various guises, ranging from virtually conclusive deference to the executive in matters of foreign affairs,<sup>65</sup> to *Chevron*’s familiar rule that courts must defer to agencies’ “reasonable” interpretations of the statutes they administer,<sup>66</sup> to weaker *Skidmore* deference, under which “an agency interpretation

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that ‘the ethic of his law profession framed in the ambience of his judgment and experience’ should be his only guide.”); *Rex Lee Conference*, *supra* note 27, at 45-46 (statement of Andrew Frey) (explaining that members of the SG’s Office resisted the calls of others in the Reagan administration to take “very aggressive positions” on civil rights issues by explaining “‘This is not the way to persuade the Supreme Court to adopt any of the legal principles that you are so anxious to get them to adopt. You are pushing too fast; you are pushing in the wrong ways.’”); *id.* at 47 (statement of Richard Wilkins) (describing a case in which the SG’s office re-wrote a brief arguing against busing as a remedy for racial discrimination: “It still argued against the extension of busing, but it did not make arguments that simply flew in the face of legal reality at the time. Now when you did that, you made people who were, you know, really true believers very, very mad.”); *id.* at 49 (statement of Kenneth Geller) (“It is a mistake to ask the Supreme Court to do things that it is simply not going to do, based on precedent or the predilections of the [J]ustices.”); *id.* at 115 (statement of Michael Dreeben) (“By having a somewhat complex status with potentially different client interests to serve, the solicitor general is actually able to achieve a fair amount of independence. The SG can tell people in the government, who are urging a position on him that he is not particularly wild about taking, that that is not going to sell in front of the Supreme Court, and here is the legal interpretation that supports that conclusion.”).

65. See Eskridge & Baer, *supra* note 54, at 1100-02 (discussing what the authors call “*Curtiss-Wright* super-deference,” referring to *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936)); see also *id.* at 1100-17 (describing the continuum of deference).

66. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

is entitled to ‘respect proportional to its power to persuade.’”<sup>67</sup> Despite their differences, the competing deference regimes share a common core—a notion that agency decision-making is superior in some respects to decision-making by judges. Although the precise reasons for deference remain controversial, several agency characteristics figure in most accounts: agencies act pursuant to a delegation from Congress; they have specialized expertise; they are democratically accountable through their ties to Congress and the President; and their decision-making processes are subject to procedural requirements designed to ensure fairness, transparency, and public access. As I explain below, few of the features that are thought to make agency decision-making valuable are replicated in the Office of the Solicitor General. If the functional arguments underlying the various deference regimes are correct, then something is being lost every time the SG files a brief or presses an argument in the Court that omits or otherwise diverges from the agency’s considered views on the issue.<sup>68</sup>

#### A. Delegation

One reason to prefer decisionmaking by agencies to decisionmaking by judges is because it is what Congress wanted. Theories of delegation therefore loom large in many arguments for deference.<sup>69</sup> The link between

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67. Eskridge & Baer, *supra* note 54, at 1109 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 220 (2001)).

68. Although the arguments in this Part draw from the principles that drive the practice of deference, my conclusions have little to do with deference as such. The Court has never purported to defer to the views of the SG in the same way it does those of agencies, and its refusal to defer to agency interpretations adopted in the course of litigation, see, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988), means that strong *Chevron* deference will not apply to positions advanced for the first time in the SG’s briefs.

Similarly, I do not suggest that the brief filed by the SG is the only place for the Justices to find an agency’s argument. Even if the agency plays no role in litigation at the Supreme Court level, its position may be discussed by the parties or amici, and may well be reflected in the arguments presented (and perhaps adopted) in the lower courts. Nevertheless, the available evidence suggests that the Justices pay particularly close attention to the position advocated by the SG. See *supra* notes 12-15 and accompanying text. Accordingly, the SG’s decision not to advance an argument favored by the relevant agency may shape the Court’s decision-making even if the Justices are aware of the agency’s position.

69. Delegation plays a particularly important role in the application of *Chevron* deference, as the Court has clarified that *Chevron*’s “strong medicine,” Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 859 (2001), should only be used when Congress has authorized agencies to act with the force of law. *United States v. Mead Corp.*, 533 U.S. 218 (2001). But delegation is important even under looser deference regimes like *Skidmore*. *Skidmore* does not encourage deference to just any agency; it tells courts to defer (where appropriate) to the views of the agency charged with administering the relevant statute. Congress may not have vested that agency with the authority to craft regulations that carry the force of law, but it nevertheless gave the agency a significant role in the ongoing life of the statute. That fact—that delegation—is what distinguishes the agency

delegation and deference is straightforward and, to many, intuitively appealing.<sup>70</sup> The idea is that Congress delegated primary interpretive authority to agencies, not to courts, so agencies, not courts, should determine what the relevant statutes mean. As long as our legal system accepts such delegations,<sup>71</sup> it seems entirely appropriate for courts to defer to the agency's views on questions that Congress has left in the agency's care. Doing so gives effect to Congress's evident intent and prevents courts from constructing statutory law out of whole cloth.

If Congress's desire to delegate interpretive authority to an agency argues in favor of judicial deference, it suggests that the SG, too, should hesitate before second-guessing the agency's views. The point is strongest with respect to independent agencies, which Congress uses quite intentionally in contexts where it hopes to minimize executive branch influence.<sup>72</sup> But the argument for SG deference applies to executive agencies as well. Congress

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from any other institution that might want to chime in on questions of statutory interpretation, and it is what creates the foundation for judicial deference.

70. Some commentators have concluded that delegation is *the* key to deference. See, e.g., Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637, 2637 (2003) (describing the congressional delegation theory as the Supreme Court's new "consensus view"); see also Lisa Schultz Bressman, *Chevron's Mistake*, 58 DUKE L.J. 549 (2009) (arguing that courts should scrap *Chevron's* two-step inquiry and instead focus explicitly on the question whether Congress intended to delegate primary interpretive authority to the relevant agency).

71. Of course, many would argue that open-ended delegations to agencies violate the constitutional separation of powers. For a sampling of such arguments, see generally, e.g., THEODORE J. LOWI, *THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY* (1969); MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* (1995); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993); Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); Ernest Gellhorn, *Returning to First Principles*, 36 AM. U. L. REV. 345 (1987); Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807 (1999); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002); Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U. L. REV. 295 (1987); Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and its Implications for Clinton v. City of New York*, 76 TUL. L. REV. 265 (2001); David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731 (1999); David Schoenbrod, *Separation of Powers and the Powers that Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355 (1987).

72. See DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 147, 158 (1999) (arguing that Congress is less likely to delegate at all during periods of divided government, and, when it does delegate, more likely to choose independent agencies than executive agencies subject to greater presidential control); Devins & Lewis, *supra* note 45, at 464 (explaining that Congress is more likely to delegate authority to independent commissions when legislators "fear the administrative influence of the current President on policies post-enactment").

chose to delegate to the agency, not to the SG or some other member of the executive branch. To the extent decisionmaking authority stems from a congressional delegation—or congressional intent more broadly—agencies would seem to hold an important advantage over the SG.

There are at least two possible objections to this claim, one focused on executive prerogatives, the second on Congress. First, one might respond that delegations to executive agencies necessarily imply a delegation to the President, as the head of the executive branch. That view, advocated most forcefully and famously by Elena Kagan,<sup>73</sup> certainly is not inevitable.<sup>74</sup> Even if correct, however, Kagan's argument would not necessarily support a strong decisional role for the SG. The SG is not the President. Moreover, as I argue in more detail below, there is good reason to doubt whether every position espoused by the SG reflects the President's own views of the matter.<sup>75</sup> Thus, even on Kagan's strong view of presidential authority, SG interference could be defended only in circumstances where the disagreement with the agency's position truly emanates from the President himself.

Second, one might object that Congress, which created the office of the Solicitor General by statute, may well have intended for the SG to perform a checking function on any agencies that Congress creates and otherwise empowers. On that account, delegations to agencies occur against the backdrop of—and necessarily are limited by—SG control of Supreme Court litigation. The difficulty with that view is that it assumes a level of congressional awareness that may not be realistic. The SG must inform Congress when he chooses not to defend federal legislation against constitutional challenge, but there is no equivalent mechanism for cases in which the SG decides not to defend an agency's statutory interpretation. Nor is there any easy way for members of Congress to gauge the frequency of such cases. Absent some good reason to believe that Congress knows about, and condones, the substantive role the SG has assumed in agency litigation, it is hard to defend that role by reference to congressional intent.

## B. Expertise

A common argument in favor of centralized SG control over Supreme Court litigation is that the SG's office is staffed by generalists who, unlike single-mission agencies, can see the big picture.<sup>76</sup> As the Court explained in

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73. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

74. For critiques of Kagan's argument, see, e.g., Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006); Strauss, *supra* note 40.

75. See *infra* Section III.C.

76. See, e.g., Fraley, *supra* note 45, at 1265-66 ("While agency attorneys tend to be specialists in narrow areas, the Solicitor General is an objective third party who can review petitions from a perspective similar to that of the nonspecialist Justices."); *Rex Lee Confe-*

*Federal Election Commission v. NRA Political Victory Fund*, a case in which it rejected the FEC's bid to bypass the SG and file a cert petition of its own, "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."<sup>77</sup>

The claim that the SG's status as a generalist gives him an advantage over specialist agencies stands in rather obvious tension with the emphasis on expertise that runs throughout much of administrative law.<sup>78</sup> Agencies have, or can accumulate, specialized knowledge about and understanding of the issues involved in the statutes they administer. Indeed, agency expertise is thought to be a key factor in Congress's decision to leave significant policy questions in agency hands rather than resolving them itself, and it is one of the primary justifications for the vast power wielded by agencies in the modern administrative state.<sup>79</sup> Specialized expertise also gives agencies a

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*rence, supra* note 27, at 121 (statement of Walter Dellinger) ("The Solicitor General's Office brings to bear . . . the view of the generalist . . . . And the SG, I think, will inevitably serve as a moderating influence."); *id.* at 174-75 (statement of Walter Dellinger) ("[T]he Solicitor General's Office is made up of generalists, including the solicitor general. [T]he fact that generalists bring their judgment to bear upon questions often makes an enormous difference. For people who work in a single area for a single agency, it is very difficult from that perspective to have the broader interest of the United States in mind."); Stern, *supra* note 17, at 158 ("The nature of [the SG's] job, as compared to that of the specialists who have drafted the brief he reviews, gives him a broader perspective and greater objectivity."). *Cf.* Herz & Devins, *supra* note 49, at 1346 ("[B]ecause the Attorney General sees the big picture—and sees it with the same eyes as the President—centralization ensures that the lawyering is consistent with the broader policy concerns of the Administration. This perspective ensures that the parochial concerns of single-mission agencies do not take precedence over larger policy commitments . . . ."); Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 600 (2002) ("[G]enerations of administrative law scholars and DOJ attorneys have assumed that agencies have tunnel vision and are unable to perceive countervailing factors that should make a reasonable person hesitate about the agency's single-minded pursuit of its particular mission.").

77. 513 U.S. 88, 96 (1994).

78. *Cf.* Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219, 260 (1993) ("To the extent we want expertise, DOJ is too full of generalists. *Chevron* takes DOJ out of the loop.").

79. *See, e.g.*, David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 967 (1999) ("[T]he executive branch is filled (or can be filled) with policy experts who can run tests and experiments, gather data, and otherwise determine the wisest course of policy, much more so than can 535 members of Congress and their staff."); David B. Spence & Frank Cross, *A P[ublic Choice Case for the Administrative State*, 89 GEO. L.J. 97, 135-36 (2000) ("It would place an enormous burden on Congress to evaluate all the data supplied in a typical notice-and-comment rulemaking process before an agency. The frequency of legislative hearings and the size of legislative staff would have to multiply many times over. Additionally, there is little that could be done to provide Congress with the engineering expertise of OSHA or EPA. Congress would either have to embark on an enormously costly

meaningful advantage over judges. Judges are lawyers, not engineers or economists or scientists. Equally important, judges are generalists. They do not and cannot focus single-mindedly on a particular field in the same way that agencies can.<sup>80</sup> Thus, just as considerations of comparative expertise help explain (and validate) Congress's practice of delegating authority to agencies, they also motivate judges' practice of deferring to agency judgments.<sup>81</sup>

Considerations of expertise suggest that the SG should refrain from substituting his judgment for that of the specialist agency for precisely the same reasons that judges do. The SG himself is a generalist in the full sense of the term: Excepting cases from which he must disqualify himself for ethical reasons, the SG signs every brief that his Office files, and he tends to pick cases for argument based on their importance rather than subject-matter. The SG is assisted by four deputies who specialize only to the extent that their work is divided into broad categories of responsibility.<sup>82</sup> The other lawyers in the office are known as "Assistants to the Solicitor General," and are assigned cases "on a relatively random basis, although some consideration [may be] given to the specific areas of expertise or existing workload of a given assistant."<sup>83</sup> It is possible, then, for both assistants and deputies to develop expertise in a given subject (say, Indian law). Nevertheless, the office is sufficiently small, the tenure of most assistants suffi-

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self-education program and on the expansion of the congressional bureaucracy, or else act with much less information than agencies currently possess.").

80. See Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1042 (2006) ("Perhaps the most common explanation for why a legislator would prefer delegation to an agency rather than a court is that agencies have specialized expertise and better access to relevant information, and they are therefore more likely to 'get it right' than courts."); Spence & Cross, *supra* note 79, at 140 ("Judges do not possess the technical expertise that justify agency delegations, and courts are the poorest of all government institutions when it comes to independent information-gathering capabilities.").

81. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) ("Judges are not experts in the field . . ."); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Mislplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735 (2002) (arguing that deference is best explained by considerations of comparative expertise).

82. See *Rex Lee Conference*, *supra* note 27, at 44 (statement of Andrew Frey) (explaining that "each deputy solicitor general has an area of responsibility—certain agencies, certain divisions of the [Justice] department that he or she is responsible for overseeing and handling the cases that come from there").

83. Wilkins, *supra* note 21, at 1170 n.23; see also Schwartz, *supra* note 27, at 1132 ("Each assistant develops . . . an array of . . . subspecialties, but these are rarely allowed to coalesce into a conventional form of subject matter specialization of practice."). Assistants likewise are hired "for their general skill at legal analysis and appellate advocacy, rather than for any particular area of substantive expertise. Consistent with that pattern, SGs routinely hire lawyers from the Justice Department's appellate divisions, but rarely hire from client agencies." Pillard, *supra* note 11, at 708.

ciently short,<sup>84</sup> and the caseload sufficiently large that true specialization is rare.<sup>85</sup> Moreover, whatever expertise the SG and his staff develop comes from repeated exposure to the same sorts of issues. In other words, it is the same sort of expertise that judges might develop through their experience on the bench.<sup>86</sup>

The fact that both the SG's Office and the Court are staffed by generalist lawyers does mean that the SG has a valuable part to play in *presenting* the agency's views to the Court. It may be easy for specialist agencies to lose sight of the fact that the statutory minutiae so familiar to them may be Latin to others,<sup>87</sup> and arguments so mired in technicalities as to be inaccessible to a non-expert are unlikely to fare well with the Justices. As former SG Charles Fried noted, SG participation means that "it is generalists talking to generalists, and that is a very important translation function."<sup>88</sup>

There is a significant difference, however, between repackaging an argument and fundamentally changing it. Agencies' ability to apply expert judgment remains one of the primary justifications for the administrative state. The value of agency expertise is diluted, if not lost entirely, when an agency's considered position as to the meaning or application of a statute is pushed to the side in favor of the SG's "broader view."

That is not to say that specialized expertise will always yield ideal outcomes—sometimes, of course, it will not. But the line between valuable expertise and unproductive tunnel vision is hardly firm and bright. Consider, for example, *Riverside v. Rivera*,<sup>89</sup> a case concerning the amount of at-

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84. See Schwartz, *supra* note 27, at 1129 ("Most of the Assistants to the Solicitor General do not plan a career of service in the Office. They average three years or so in the position.").

85. See *id.* at 1132 (explaining that the "primary effect, if not [the] conscious purpose[] [of the lack of specialization] is to insulate the staff attorney responsible for handling a case from the needs, objectives and passions of the agency or governmental unit directly involved in the case," resulting in a "quasi-judicial perspective").

86. Cf. Steven R. Greenberger, *Civil Rights and the Politics of Statutory Interpretation*, 62 U. COLO. L. REV. 37, 61 (1991) ("[J]udges faced with a continuing stream of cases requiring scientific expertise will necessarily begin to develop such expertise and will likely become far more expert than members of Congress who consider such matters infrequently."). Similarly, the SG can consult with the more specialized agencies and can make use of their expertise even if ultimately he rejects their positions. See OLC Memo, *supra* note 33, at 1095. But so can judges. Cf. Pillard, *supra* note 11, at 742 ("The SG and OLC hear from their client agencies about the practical needs, capabilities, and constraints of governing, yet they generally lack the kinds of experience and expertise that would permit them to evaluate or question client contentions much more deeply than could a court.").

87. Robert Stern gave the example of "reviewing a tax brief which started out by talking about Section 103(B)(1)(X), or something like that, as if every person of sound mind must have known what that was since the third grade—or at least the third year of law school." Stern, *supra* note 17, at 158.

88. *Rex Lee Conference*, *supra* note 27, at 175 (statement of Charles Fried).

89. 477 U.S. 561 (1986).

torneys' fees that may be awarded to prevailing parties under the Civil Rights Attorney's Fee Awards Act of 1976.<sup>90</sup> The petitioners argued that fees should be limited to a proportion of the judgment won by the civil rights plaintiff—a computation that would have resulted in fees of \$11,000 for the lawyers involved in the case, or an hourly rate of \$5.65. The EEOC, which often assists private counsel in litigating discrimination cases, maintained that a proportionality rule would reduce the availability of private counsel in low-stakes cases.<sup>91</sup> The SG took a different view, largely because the U.S. government can be on the hook for attorneys' fees when civil rights plaintiffs successfully challenge unlawful governmental action.<sup>92</sup> The SG's brief therefore endorsed the petitioners' proportionality rule, and assured the Court that "[t]he prospect of recovering \$11,000 for representing [respondents] in a damages suit . . . is likely to attract a substantial number of attorneys."<sup>93</sup> The SG refused to permit the EEOC to file an amicus brief advocating the contrary position, and did not mention the EEOC's conflicting views in his own brief.<sup>94</sup>

Was the EEOC's opposition to the proportionality rule in *Rivera* caused by tunnel vision, preventing the agency from seeing the government's broader interest in limiting fee awards? Or was the EEOC advocating a different, but equally broad, sort of government interest—the interest in facilitating remedial litigation by citizens acting as private attorneys general?<sup>95</sup> Reasonable minds surely could disagree on the answers to such questions, and that is just the point. The choice among competing goals—whether or not the competition takes the form of “big picture” versus “small picture”—is value-laden, perhaps inevitably so. Generally speaking, administrative law tends to leave such choices to the agency engaged in implementing the relevant statute. If an exception to that approach is to be made for the SG, it must be because of his position in the executive branch—an issue I take up in the following Section. For present purposes, it suffices to say that SG expertise is not a reason—or at least not a reason consistent with the core commitments of the administrative state—to depart from the agency's judgment.

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90. 42 U.S.C. § 1988 (2000).

91. See Schnapper, *supra* note 13, at 1208 & n.64.

92. See Brief for the United States as Amicus Curiae Supporting Petitioners at 1-2, *Riverside v. Rivera*, 477 U.S. 561 (1986) (No. 85-224), 1985 WL 669356 (discussing the U.S. interest in the case).

93. *Id.* at 22-23.

94. See Devins, *supra* note 9, at 300.

95. See Brief for the United States as Amicus Curiae Supporting Petitioners at 2, *Riverside v. Rivera*, 477 U.S. 561 (1986) (No. 85-224), 1985 WL 669356 (acknowledging this interest).

## C. Accountability

Agencies, unlike judges, are politically accountable for their decisions. Although agency heads are not elected and do not answer directly to the electorate, agencies are subject to significant control by the political branches. The President appoints agency heads (subject to the advice and consent of the Senate) and, with the exception of independent agencies, can remove them from their offices. Modern presidents also have exercised control through executive orders requiring review of proposed agency actions and regulatory plans by OMB and the Office of Information and Regulatory Affairs.<sup>96</sup> Congress likewise can steer agency policymaking by specifying procedures for agency decisionmaking,<sup>97</sup> controlling the agency's budget,<sup>98</sup> holding oversight hearings,<sup>99</sup> and so on. Taken together, such mechanisms help ensure that agency action reflects the policy preferences of the political branches and, by extension, the people.

Courts, on the other hand, are structurally insulated from political influence. Federal judges enjoy constitutional protections of life tenure and guaranteed salary and therefore cannot be prodded by threats of removal or budget cuts.<sup>100</sup> Moreover, because few judges harbor aspirations to higher office, they are largely immune to carrots such as promises of future employment.<sup>101</sup>

For the *Chevron* Court, judges' insulation from politics provided a powerful reason for them to defer to the views of the more politically con-

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96. See, e.g., Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1263 (2006); Kagan, *supra* note 73, at 2281-309 (describing how President Clinton used administrative oversight to promote desired policy ends).

97. On the relationship between agency procedures and congressional control, see generally Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749 (2007); Mathew D. McCubbins, Roger G. Noll & Barry Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989).

98. Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 785 (1999) ("The appropriations process sharply constrains the authority and discretion of agencies.").

99. See *id.* at 785 ("While the nature, quality, and intensity of legislative oversight vary from committee to committee, it is often used to signal congressional preferences on agency policy issues and to extract policy commitments from agency officials.").

100. U.S. CONST. art. III, § 1.

101. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 124 (1994) ("[F]ederal judges traditionally come to the bench as a final vocation. . . . Although judges are not completely indifferent to alternative job opportunities, the range of alternatives attractive to judges appears to be more limited than for political . . . actors.").

nected agency.<sup>102</sup> Commentators also have homed in on agencies' political responsiveness as a reason both to tolerate the extraordinary power agencies possess in today's government, and to prefer their judgments to those of unelected, unaccountable judges. Like expertise, then, agencies' political accountability not only inspires judicial deference by highlighting an advantage that agencies have over courts; it is also an important justification for the administrative state more generally.

At first blush, considerations of accountability would seem to weigh in favor of a strong role for the SG, who is after all a high-ranking member of the executive branch. But there are at least three problems with that view—the first two fairly straightforward and the third more subtle and perhaps counterintuitive.

First and most obviously, agency actions are legitimated not only by their link to the President, but also by the many mechanisms *Congress* has to ensure that agency decisionmaking comports with the commitments of the current political majority. Although the SG arguably can claim the mantle of democratic accountability because of his position within the executive branch (a claim I question below), Congress is left out of the picture entirely. Congress could cut back on the SG's litigation authority, but it has no say in how the SG uses that authority on a day-to-day basis. Thus, to the extent that acceptance of the administrative state rests on agencies' relationship with both Congress and the President, the SG's power to control the arguments presented to the Court in agency cases stands on shaky footing.

The second problem with the SG's executive-branch ties has been aired by scholars concerned about preserving the independence of independent agencies. Independent agencies, the argument goes, are designed to be insulated from presidential interference. To the extent the SG's take on the merits of an agency's position reflects the President's views on the subject, SG control of agency litigation in the Supreme Court would seem to undermine that independence.<sup>103</sup>

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102. The Court rejected the notion that judges might resolve interpretive questions "on the basis of the judges' personal policy preferences." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984). But agencies are different, as they "properly" may rely on the policy preferences of the elected branches, particularly the President. "[I]t is entirely appropriate[.]" the Court explained, "for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." *Id.* at 865-66.

103. See *supra* notes 44-50 and accompanying text. It may be possible to extend the "undue influence" argument to executive agencies. Peter Strauss has argued that there is an important difference between a presidential power to oversee agency activities (a power the President undeniably enjoys with respect to executive agencies) and an authority to *direct* agency decisionmaking. Strauss, *supra* note 40. Strauss notes that valuable aspects of agency decisionmaking—such as decisions based on expertise rather than politics—may be lost when the President acts as "The Decider." *Id.* at 752 ("[T]he structure of judicial review of

It is not clear, however, that the SG's views *do* accurately reflect those of the President, and this gives rise to a different problem. Although the SG technically answers to the President and can be fired by him, there is reason to doubt whether, as a practical matter, firing the SG is a meaningful option for the President.<sup>104</sup> The public furor over the recent dismissals of several U.S. Attorneys—presidential appointees, like the SG—highlights the political costs of such a move.<sup>105</sup> As one commentator has noted:

It is difficult to imagine a more certain manner in which an administration could lose a case than by dismissing the Solicitor General for refusing to sign its brief; the Supreme Court would almost have to rule against the government in order to protect the competence and candor of future Solicitors General.<sup>106</sup>

Importantly, moreover, the arguments presented by the SG might diverge from the President's policy views even in circumstances where the President is perfectly satisfied with his appointee's work. Presidents have taken different approaches to the office of the SG;<sup>107</sup> while some have over-

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administrative action depends, top to bottom, on the presumption that the matter being reviewed is in some respects the product of an expert, not merely a political judgment.”). As the previous Section should make clear, the same objections apply to the SG. Although the scope of the SG's decisional role is much smaller than that of the President (the SG only controls agency litigation, and only in the Supreme Court), many of the core characteristics are the same. Thus, if the SG channels the preferences of the President, and if presidential control of agency decisionmaking is problematic for the reasons Strauss identifies, SG control might be seen as part of that broader problem.

104. See Schnapper, *supra* note 13, at 1244 (“In theory a President or Attorney General might use a threat of dismissal to try to force a Solicitor General to sign a disputed brief, but neither appears ever to have done so, and with good reason. The dismissal of a Solicitor General under such circumstances would have, at least within the legal community, an impact comparable to the infamous Saturday Night Massacre—crippling the credibility of the brief the dismissed Solicitor General had refused to sign, and generating both enormous support for the Solicitor General and stern disapproval of those who had removed him.”); Stack, *supra* note 74, at 295 (discussing the political cost the President incurs when he fires an executive official and seeks appointment of one more congenial to presidential policies); Strauss, *supra* note 40, at 714 (same).

105. See generally, e.g., David M. Dreisen, *Firing U.S. Attorneys: An Essay*, 60 ADMIN. L. REV. 707 (2008).

106. Schnapper, *supra* note 13, at 1244.

107. See Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273, 281 (1993) (“[D]ifferent administrations subscribe to different visions of Attorney General control.”). At a symposium held at BYU Law School, former Solicitors General and their assistants and deputies reminisced about their time in office, and painted very different pictures of presidential involvement. *Rex Lee Conference*, *supra* note 27, at 154-160.

Although President Clinton seems to have been a fairly active overseer of the SG's work, there remain examples of cases in which the SG argued a position contrary to Clinton's. See *id.* at 67-68 (statement of Maureen Mahoney) (describing a case early in the Clinton administration in which the SG advocated a position that Clinton had denounced while on the campaign trail: “[T]here was a bit of a vacuum of leadership, and we were kind of waiting for instructions but nevertheless continued on. And the White House ultimately

seen the SG's work fairly carefully (either directly or through the Attorney General), others have given the SG largely free rein.<sup>108</sup> Charles Fried, for example, maintained that others in the Reagan administration, including President Reagan himself, paid little attention to his work. Fried reasoned that he had been selected because of his well-known legal views, leaving little need for day-to-day oversight by his superiors in the executive branch.<sup>109</sup> Even more telling, empirical research has revealed substantial differences in the filings of different SGs serving under the same President.<sup>110</sup> Those findings strongly suggest that the SG has at least some discretion to pursue his own agenda.<sup>111</sup>

Indeed, the prevailing view is that the SG *should* be insulated to some extent from presidential control or even pressure.<sup>112</sup> As a memorandum

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decided to simply go forward not to make any changes in the policy. There was nothing announced. It was all just—we waited. Nothing happened. I went into Court, argued the issue as if there had never been a change of administration . . .”).

108. See Pillard, *supra* note 11, at 704 (“The Solicitor General plays a central role in executive constitutionalism, with little or no day-to-day supervision or input from the president or the Attorney General.”).

109. See *A Special Interview with Solicitor General Charles Fried*, 1 WASH. LAW. 48, 50 (1987) (“I have not had to bother very much checking to see whether people agree with my views because I have this sense that I’m [S]olicitor [G]eneral because of the views that I have rather than the other way around. . . . I think it is because of those views that I was chosen.”); *Rex Lee Conference*, *supra* note 27, at 84 (statement of Charles Fried) (“[T]he people who chose me knew exactly what I thought. They paid their money, and they took their choice.”). Former Deputy SG Andrew Frey once described Fried’s approach as the “Harvard law professor model of the [S]olicitor [G]eneral. . . . that naturally Harvard law professors know what is right and what is wrong in the law.” *Id.* at 39. Frey contrasted that model with the “humble lawyer model [followed by other SGs] where you have this client that may have institutional interests, and you ask yourself, ‘[w]ell, what are their interests?’—not what do I personally think.” *Id.*

110. See O’Connor, *supra* note 11, at 262, 264 (finding differences in the number of “pro-rights” amicus filings by different Solicitors General serving under President Nixon, and concluding that “the ‘government’s position’ on issues may change, not only because of changes in administrations, but also by *each* solicitor general”); see also CAPLAN, *supra* note 16, at 38 (reporting that Nixon’s second SG, Robert Bork, “was a more enthusiastic advocate of Nixon’s legal notions than [Nixon’s first SG Erwin] Griswold had been”).

111. See, e.g., David M. Rosenzweig, Note, *Confession of Error in the Supreme Court by the Solicitor General*, 82 GEO. L.J. 2079, 2081 (1994) (“Traditionally, the Solicitor General has enjoyed considerable independence from the political forces of the executive branch and the office has developed a reputation for excellent, largely nonpartisan advocacy before the Court.”). It is important not to overstate this point; of course there are limits to what the SG can do. See *Rex Lee Conference*, *supra* note 27, at 106 (statement of Drew Days) (“[F]or liberal folk like me, some of the items that would be put on an agenda, a hit list, like capital punishment, were clearly off the list because I was working for a president who was in favor of capital punishment. I had sworn to defend capital punishment in my confirmation hearings, and I certainly was not going to go back on that.”).

112. See, e.g., CAPLAN, *supra* note 16, at 18 (“[B]y tradition, and because of his responsibilities to the Court, an SG must be free to reach his own carefully reasoned conclusions about the proper answer to a question of law, without second-guessing or insistence

prepared by the executive branch's Office of Legal Counsel (OLC) explains:

[C]oncerned as [the President and the Attorney General] are with matters of policy, they are well served by a subordinate officer who is permitted to exercise independent and expert legal judgment essentially free from extensive involvement in policy matters that might, on occasion, cloud a clear vision of what the law requires.<sup>113</sup>

The OLC concluded that, given the benefits of SG independence, the SG typically should be permitted to formulate legal positions without any interference from more political actors in the executive branch.<sup>114</sup> That view reflects a general consensus in the commentary that the benefits of the SG's legal expertise would be lost if the political imperatives of the moment were consistently permitted to trump the SG's best view of the governing law.<sup>115</sup>

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that his legal advice regularly conform to the politics of the administration he represents. An SG must have the independence to exercise his craft as a lawyer on behalf of the institution of government, without being a mouthpiece for the President."); Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373, 381 (1994) (noting that we can "expect a greater independence of judgment from the Solicitor General than we do from other presidential appointees"); Neuborne, *supra* note 19, at 1100 ("I believe that the Solicitor General's office—like the great institution it serves, the Supreme Court, should function at a level of principle that minimizes, even if it cannot eliminate, the influence of politics and partisan ideology on the growth of law.").

113. OLC Memo, *supra* note 33, at 1094.

114. *Id.* at 1096 ("[H]is judgment must be permitted to be dispositive in the ordinary course."); see also Pillard, *supra* note 11, at 707 ("In practice, . . . the SG formulates legal positions on his own, without input from the Attorney General or the president, and with rare exceptions, his superiors do not second-guess the SG's decisions.").

115. Interestingly, to the extent the SG's positions constitute the triumph of law over politics, they may properly be viewed as political for precisely that reason. As former Acting SG Walter Dellinger once put it, "there is a politics in the SG's Office that does not recognize itself as politics." *Rex Lee Conference*, *supra* note 27, at 123 (statement of Walter Dellinger). Dellinger was describing a case in which California

was trying to tax foreign corporations, like Barclays Bank of England, in a way that is inconsistent with the international treaties and the right-thinking position of all people in the international community. The SG's Office was inclined, through the career people, to support the position of Barclays Bank and the right-thinking internationalists. But the White House realized that the State of California . . . had fifty-four more electoral votes than the Barclays Bank of England had.

*Id.* at 122. Dellinger eventually came to agree with the White House's position, and to recognize the forces driving the contrary view of the OSG. "To some degree," he explained, the Office

wrapped itself in the envelope that "we must be taking the high-minded position because it is the position contrary to California's fifty-four electoral votes." At the end of the day, the office agreed to support California's position, which was vindicated seven to two by the Supreme Court. It is not always the case that the SG's Office is right. There is a kind of politics that does not know its name.

*Id.* at 123.

It is the SG's expertise as a lawyer, then, that provides the basis for his independence within the executive branch.<sup>116</sup> There are undeniable benefits to such independence—my claim here certainly is not that the SG should act more like a hired gun for the President. Rather, my claim is that neither the SG's independence nor the reason for it—his legal acumen—serves to justify his authority over agency litigation in the Supreme Court. As noted above, Congress has no hand in the SG's advocacy before the Court. If the SG's decisions cannot be traced in some meaningful way to the President either, his ability to override an agency's judgment would seem inconsistent with the notions of political accountability that run throughout administrative law.<sup>117</sup>

The fact that the SG's independence from political control stems from his lawyerly expertise serves only to compound the problems associated with his role in agency cases. *Chevron* and other deference regimes rest, if sometimes implicitly, on the premise that legal know-how must take a back seat to technical expertise and practical experience when it comes to statutory interpretation and implementation. As the Court recognized in *Chevron*, the resolution of vague or ambiguous statutory language does not entail legal reasoning so much as a choice among competing policy arguments “more properly addressed to legislators or administrators, not to judges.”<sup>118</sup> It is hard to see why the SG, of all people, should be empowered to reject the relevant agencies' views on such issues (views that may well have been influenced by the agency's relationship with Congress). Put simply, nothing about the SG's impressive resume or his place in the executive branch qualifies him as a policymaker.<sup>119</sup>

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116. See *supra* note 64 and accompanying text.

117. Cf. Herz, *supra* note 78, at 260 (“To the extent we want accountability, DOJ's traditional independence in its opinion-giving role renders it too removed and puts it at a disadvantage as against those with offices in the Old Executive Office Building (or those, like EPA, subject to constant congressional oversight, which is also an avenue for a certain type of electoral accountability).”). Concededly, voters could hold the President accountable for the actions of his SG regardless of whether those actions reflect the President's own policy views. It is just such an accountability-once-removed theory that serves to justify agency decisionmaking—the key point is that the President *could* control the agency, and so may be held accountable for unpopular agency decisions whether or not he was in fact involved. That theory depends heavily on voter awareness, however. It is unlikely that the average voter knows what the Office of the Solicitor General is, much less understands the role the SG plays in agency litigation. See, e.g., *Rex Lee Conference*, *supra* note 27, at 4 (statement of Theodore B. Olson) (“Americans have never spent much time thinking about the solicitor general. When a neighbor once asked [SG Rex Lee's] wife, Janet, what her husband did for a living, she replied, ‘He's the solicitor general.’ ‘Gee,’ said the neighbor, ‘it must be great being married to a military man!’”).

118. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 864 (1984).

119. Cf. Pillard, *supra* note 11, at 732 (“[I]f the SG knows a great deal about the Court and its decisions, but little or nothing about what makes good policy or how a particu-

The problems with SG control of agency litigation are not limited to policy questions, but extend to cases in which the SG's disagreement with the agency turns on his understanding of what current law requires. Increasingly, scholars working in both statutory and constitutional law have sought to reveal the value of non-judicial modes of legal reasoning. The notion that agencies might engage in a distinctive form of statutory interpretation—and that agency statutory interpretation might be valuable in its own right even though (or perhaps *because*) it differs from the “traditional tools of statutory construction”<sup>120</sup> that courts use—animates this symposium. Similar arguments often are heard about constitutional law, traveling under names like “popular constitutionalism” or “departmentalism.” Although the contexts are different, there are important commonalities between the statutory and constitutional calls for law-development outside of the courts. Both build off a sense that the legal analysis that permeates lawyers' briefs and judges' opinions—a form of reasoning that tends to stress things like text, history, precedent, and logic—is not the only or the best way to give meaning to the constitutional and statutory laws that shape people's lives. Thus, a growing number of scholars urge a “less crabbed and formalistic”<sup>121</sup> approach to legal questions, one that would exploit the “democratic pedigree,”<sup>122</sup> “[e]xperience and responsibility[,]”<sup>123</sup> and “all-things-considered, [more practical] judgment[.]”<sup>124</sup> of the political branches.<sup>125</sup>

The values of “popular statutory interpretation,” as it were, are undermined whenever the SG presents arguments in agency cases that do not reflect the views of the agency itself. The SG's work “is not a collaborative

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lar executive agency or system operates, why should an agency secretary allow the SG to decide how hard, how far, and with what arguments to push the Court to permit that agency to follow its preferred path?”).

120. *Chevron*, 467 U.S. at 843 n.9.

121. Pillard, *supra* note 11, at 678.

122. Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 122 (2001).

123. Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 355 (1994).

124. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 42 (1999).

125. Some of those scholars would reject judicial supremacy altogether. Under the strongest forms of departmentalism, for example, each branch has an independent obligation to interpret the Constitution, and judicial interpretations are not binding on the other branches. It is possible, however, to recognize the value of non-judicial legal reasoning even within a system in which courts have the last word as to statutory and constitutional meaning. On that approach, the fact that agencies (and other non-judicial actors) have a distinctive contribution to make to the resolution of difficult statutory and constitutional questions means that their views should *factor into* judges' decisions about such questions in some significant way. Arguments about judicial deference to agency judgment pick up the strains of departmentalism and popular constitutionalism in that weaker sense, which sees non-judicial reasoning as a contribution to judicial decisions rather a replacement for them. It is in that spirit that I invoke those scholarly movements here.

political–legal enterprise, promoting ‘all-things-considered’ judgments, but is quite formally doctrinal.”<sup>126</sup> As explained above, the SG can refuse to defend arguments presented by an agency (or other government client) because he is expert in the Supreme Court’s doctrine and can better predict how various arguments will fare with the Justices. Those are valuable skills, to be sure, but they serve to reinforce the role of judges in “say[ing] what the law is,”<sup>127</sup> and to minimize the part that might be played by the agency charged with administering the relevant statute.

Importantly, the point here about agency input holds regardless of whether the case involves a narrow question of statutory meaning—the type of case in which agencies are most likely to participate—or a broader question of statutory or constitutional law. As the preceding discussion should make clear, the perceived benefits of non-judicial decisionmaking extend into constitutional law; indeed, constitutional law has received the lion’s share of attention from scholars interested in the promise of more populist forms of legal judgment. Viewed from that perspective, the current pattern of agency nonparticipation in litigation testing the constitutionality of agency-administered statutes is not as inevitable as it first might appear. Although agencies’ expertise may not be relevant to constitutional questions in the obvious way that it informs more technical issues, agencies’ practical experience and policy judgment nevertheless could contribute to the development of constitutional law.<sup>128</sup> That distinctive contribution is lost when agencies’ views are muted or suppressed altogether by the SG.

#### D. Transparency and Access

The discussion thus far has focused on the aspects of agency decisionmaking—congressional intent, expertise, and accountability—that feature most prominently in defenses of the administrative state and of judicial deference to agency judgment. Various other aspects of agency decisionmaking play a supporting role, however, in justifying both delegations and deference. Like Congress but unlike courts, agencies can adopt uniform “legislative” rules that apply nationwide.<sup>129</sup> Unlike Congress, agencies have

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126. Pillard, *supra* note 11, at 709 (internal quotation marks omitted).

127. *Marbury v. Madison*, 5 U.S. 137, 177 (1803); see Pillard, *supra* note 11, at 728 (“To the extent that they shape or alter client proposals, [SG and OLC] lawyers’ ‘independent’ positions are, in fact, married to the Supreme Court’s doctrine and the Court’s role as expositor of law.”).

128. See Pillard, *supra* note 11, at 741 (noting that agency personnel “often are the only ones with the practical experience ‘on the ground’ to perceive constitutional problems and appreciate ways they could be ameliorated”).

129. See Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1098-99 (1987).

the flexibility to change those rules relatively quickly and easily if circumstances change or new information comes to light.<sup>130</sup> And, perhaps most significantly, agency decisionmaking is subject to various procedural requirements that insure transparency and facilitate public access.<sup>131</sup>

Although SG decisionmaking could in theory be flexible and could yield a uniform rule if adopted by the Supreme Court, it is hardly transparent and it is subject to scant procedural requirements. It is open to question whether many members of the voting public have ever heard of the SG. Certainly they have no insight into his decisionmaking process. The SG's arguments are, of course, presented to the Court in full public view. But the SG and his deputies and assistants formulate those arguments in private—much as the Justices do in the opinions they ultimately present to the public.<sup>132</sup>

Nor is there any sure opportunity for interested groups or individuals to seek to influence the SG as they can an agency. An agency considering a new rule must publish notice of its proposed action, and any interested member of the public can comment.<sup>133</sup> Agencies have strong incentives to take seriously the comments they receive, because failure to consider particular points of view can subject an agency's decision to judicial invalidation as arbitrary and capricious.<sup>134</sup> The opportunities for access are more limited when agencies proceed through adjudication rather than rulemaking, but agency adjudications are governed by a host of procedural rules designed to promote transparency and fairness.<sup>135</sup> By contrast, there are no formal avenues for the public to participate in SG decisionmaking, and no equivalent procedural protections. Although in practice the SG tends to

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130. See Epstein & O'Halloran, *supra* note 79, at 954 (noting that “one of the primary reasons for delegating” is “the ability of agencies to respond flexibly to changing conditions”).

131. See Schuck, *supra* note 98, at 781 (“Today, the administrative agency is often the site where public participation in lawmaking is most accessible, most meaningful, and most effective.”).

132. See O'Connor, *supra* note 11, at 264 (“In effect, a subtle, though substantial change in public policy may occur at a level where there is little public scrutiny.”); Pillard, *supra* note 11, at 703 (noting that government lawyers “make most decisions without any written or public record of the reasons for their actions”). Cf. Robert Pear, *Democrats Seek Files of Cases Roberts Worked On as Deputy Solicitor General*, N.Y. TIMES, Aug. 2, 2005, at A16 (discussing the Bush Administration's refusal to release the memos Supreme Court nominee (now Chief Justice) John Roberts wrote as Deputy SG).

133. See Administrative Procedure Act § 4, 5 U.S.C. § 553 (2006).

134. See 5 U.S.C. § 706(2)(a) (2006) (providing for judicial review under the arbitrary and capricious standard); *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (describing the arbitrary and capricious standard).

135. For example, agencies must give interested parties an opportunity to submit proposed findings and to object to proposed agency decisions rendered in the course of adjudications. See 5 U.S.C. § 557(c) (2006).

solicit the views of interested agencies and other governmental actors,<sup>136</sup> and may hear from private groups as well,<sup>137</sup> nothing compels him to do so.

The opaque and inaccessible nature of the SG's decisionmaking process further complicates his role in agency litigation. Transparency and procedural regularity are important attributes of agency decisionmaking—attributes that help validate a form of governmental action that has struck many as a troubling departure from the norms of representative democracy. The SG's ability to control the arguments presented to the Supreme Court in agency cases is difficult to square with those central principles of the administrative state.<sup>138</sup>

### CONCLUSION

I have argued that the SG shares few of the characteristics that are thought to give agencies a special claim to interpretive authority. Indeed, on all the points of comparison discussed above, the SG seems closer to the Justices than the agencies he represents.<sup>139</sup> Those features call into question the legitimacy of the SG's current role in agency litigation, not because the SG is an inappropriately political actor (as others have suggested), but because the SG's intervention replicates many of the difficulties associated with aggressive judicial review of agency decisionmaking. Moreover, the SG's undoubted skills as a lawyer—the very skills that have won him a substantial measure of independence from political control—threaten to burden

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136. Former SG Charles Fried described the resulting meetings as “monster rall[ies].” *Rex Lee Conference*, *supra* note 27, at 86 (statement of Charles Fried).

137. See Jenkins, *supra* note 13, at 738 (noting that the SG sometimes may hear the views of “private parties who are seeking to persuade the government to take a certain position in a case”).

138. Other commentators have emphasized the importance of transparency and procedural protections in arguing against permitting the President to direct agency decisionmaking. See, e.g., Stack, *supra* note 74, at 318 (“Agency process has been a persistent source of legitimacy for administrative action. And since the enactment of the Administrative Procedure Act, unless the organic statute otherwise provides, executive agencies must comply with the APA’s procedural requirements. . . . [S]tatutory constructions that imply directive powers [for the President] disrupt Congress’s interest in specifying the procedures through which statutory delegations should be implemented.”); Strauss, *supra* note 40, at 713 (“The congressionally specified decision maker, where she is not the President, operates at the head of a professionally staffed agency, charged with decision . . . in accordance with stated and generally transparent procedures and a particular statutory framework. But the President to whom decisional presidency theorists accord a right of decision acts outside these procedures and laws, without their transparency, and subject only to limited political check.”). Their reasoning applies with full force to the issues of SG role discussed here.

139. Cf. Pillard, *supra* note 11, at 685 (noting that both the SG and the OLC “loosely and imperfectly mimic the courts [by] specializing in legal interpretation, remaining somewhat institutionally insulated from clients, passively waiting for matters to come to them, and generating and relying on a body of precedent”).

administrative law with a double dose of legalism, first from the SG and then from the Court. Because of the SG's control of litigation at the Supreme Court level, the arguments that are presented to the Court in the briefs for the "United States" already have been filtered through a decisionmaking process that focuses on the doctrinal rules and methodological commitments that the Court itself employs. My study of the briefs filed in agency cases suggests that the SG tweaks the arguments the Court hears from the government in a substantial percentage of such cases. Thus, the SG's position between the Court and the agency may work to dilute the distinctive contribution that agencies can make to the development of both statutory and constitutional law—a contribution grounded in expertise, practical experience, and an ongoing relationship with both of the political branches.

The goal of this Essay has been diagnostic rather than prescriptive: I have sought to expose the tension between the SG's practices with respect to agency litigation and the principles at the heart of the administrative state, but I have not proposed a cure. Does it follow from my arguments that the SG should stay out of agency litigation altogether? I would not go that far. The SG's Office brings terrific skills to the table, and can be a valuable ally to agencies headed for the Supreme Court. Although I have emphasized the possible costs of harnessing the SG's legal expertise in agency cases, it would be a mistake to ignore the significant benefits of SG participation. Therefore, I do not suggest that the SG should play no role in agency cases in the Supreme Court. Nor do I believe that the SG should be required to present to the Court arguments that he deems to be seriously flawed, whether for legal or policy reasons. Instead, and like those who have focused on the SG's relationship with independent agencies, I suggest a middle road. When the SG concludes that he cannot in good faith defend an agency's interpretation, he should let the agency present its own case to the Court so that the Justices' decision can be informed by the agency's views.<sup>140</sup>

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140. See *supra* note 50 and accompanying text.