

AN EMPIRICAL ANALYSIS OF SUPREME COURT
CERTIORARI PETITION PROCEDURES:
THE CALL FOR RESPONSE AND THE CALL FOR THE
VIEWS OF THE SOLICITOR GENERAL

David C. Thompson and Melanie F. Wachtell

Introduction.....	240
I. Call for Response (or CFR).....	245
A. Process	246
1. The Waiver Process.....	246
2. The CFR Process	247
B. The Significance of a CFR.....	248
1. The Frequency of CFRs	248
2. The Impact of a CFR on the Likelihood of a Certiorari Grant.....	250
3. The Relevance of Time of Year	252
C. The Significance of a Waiver	253
1. Frequency of Waiver	253
2. The Implications of Waiving.....	255
D. The United States as a Party	257
1. Waiver Practice of the United States as Respondent.....	257
2. The Predictive Value of the Solicitor General's Waiver of Response on Certiorari Denial	258
3. Calls for Response from the United States as Respondent	260
4. Calls for Response to Cert Petitions Filed by the United States	261
E. States as Parties.....	261
1. Waiver Practice of Individual States as Respondents	261
2. The Predictive Value of a State's Waiver of Response on Certiorari Denial.....	263
3. Calls for Response from Individual States as Respondents	264
4. Calls for Response to Cert Petitions Filed by Individual States	265
F. Private Litigants	265
1. Waiver Practice of Private Litigants as Respondents.....	265
2. The Predictive Value of a Private Litigant's Waiver on Certiorari Denial.....	267
3. Calls for Response from Private Litigants as Respondents	268

4. Calls for Response to Cert Petitions Filed by Private Litigants.....	269
G. Conclusions on Waiver and CFR Practices	270
II. Calls for the Views of the Solicitor General (or CVSGs)	270
A. The CVSG Process	271
B. The Significance of a CVSG.....	273
1. The Effect of a CVSG on Grant Rate	273
2. The Effect of the Solicitor General’s Recommendation ...	275
a. On the Decision to Grant or Deny	275
b. On the Merits.....	277
C. The Court’s Decision to Seek the Views of the Solicitor General	278
1. The Unique Role of the Solicitor General.....	278
2. The Court’s Use of the CVSG, by Case Type.....	279
3. The Likelihood of CVSG, by Party Type.....	282
D. Timing Patterns in the Court’s CVSG Practice	284
E. The Solicitor General’s Response to an Invitation from the Court	287
1. The Solicitor General’s Process in Response to a CVSG	287
2. The Solicitor General’s Timeline in Response to a CVSG	290
a. The Solicitor General’s Response Time	290
b. Time of Year	293
F. Conclusions on CVSG Practices.....	295
Conclusion	295
Appendix: Methodology	297
CFR Data	297
CVSG Data	299

AN EMPIRICAL ANALYSIS OF SUPREME COURT
CERTIORARI PETITION PROCEDURES:
THE CALL FOR RESPONSE AND THE CALL FOR THE
VIEWS OF THE SOLICITOR GENERAL

David C. Thompson and Melanie F. Wachtell***

The Supreme Court frequently uses two tools to gather information about which cases to hear following a petition for writ of certiorari: the call for response and the call for the views of the Solicitor General. To date, there has been no empirical analysis of how the Supreme Court deploys these tools and little qualitative study. This Article fills in basic gaps in the literature by providing concrete answers to common questions regarding these two tools and offers detailed analysis of how and why states, private parties, and the United States (through the Solicitor General) respond to petitions. In addition, the Article provides much-needed data for litigators and litigants to be able to estimate the probability of their case being heard by the Court, and provides insight on how to react when the Court calls for a response or calls for the views of the Solicitor General. To reach these conclusions, the Article relies on detailed, quantitative analysis of a novel, 30,000-petition dataset, as well as interviews with top Supreme Court litigators, former Supreme Court clerks, and former staff of the Clerk's office.

* Former Clerk to Judge Alex Kozinski, U.S. Court of Appeals for the Ninth Circuit; Clerk to Justice Antonin Scalia, October Term 2008. J.D., Stanford Law School, 2007; B.A., Yale University, 2002. The views expressed in this Article do not reflect those of Judge Kozinski or Justice Scalia. This Article was completed before the author's Supreme Court clerkship and nothing in this Article reflects any knowledge gained while at the Supreme Court.

** Project Manager, Special Report on Regulatory Reform, Congressional Oversight Panel; Former associate, Quinn Emanuel Urquhart Oliver & Hedges, LLP, Silicon Valley, California. J.D., Stanford Law School, 2007; A.B., Princeton University, 2004. The views expressed in this Article do not reflect those of Quinn Emanuel or the Congressional Oversight Panel.

The authors would like to thank Tom Goldstein for his early and ongoing support of this project. Deputy Clerk Chris Vasil was also very generous with his time and resources. We would also like to express our appreciation to the following Supreme Court practitioners and scholars who were interviewed for and contributed to the substance of this Article: Deputy Clerk Frank Lorson, David Frederick, Kenneth Geller, Charles Rothfeld, Kevin Russell, Jeffrey Fisher, Dan Schweitzer, and Roy Englert.

INTRODUCTION

Countless frustrated litigants have sworn to take their cases “all the way to the Supreme Court” after exhausting their remedies in a federal court of appeals or highest state court. Of course, one major obstacle stands in the way of this threat: the Supreme Court does not have to hear most cases, and usually chooses not to. In fact, the Court selects only several dozen cases for its argument calendar from the thousands of petitions filed each year. Nonetheless, litigants spend countless hours trying to persuade the Supreme Court that their cases should be among the select few granted argument on the merits.

Predicting which cases will be granted review has become a parlor game among Supreme Court watchers, and many websites spill thousands of pixels handicapping the cert petitions pending before the Court.¹ But, despite the immense interest from both litigants and observers, the Court’s procedure for selecting petitions for review is not easily understood. While the Court describes some of its criteria in Supreme Court Rule 10—including the existence of a conflict among lower courts, a conflict between a lower court and the Supreme Court, or an unusually important but unsettled question of federal law²—the process by which these factors are applied to a particular case remains a mystery. Litigants are often left trying to explain the ambiguous signals emanating from the Court: If the Court calls for a response, does that signal that a case is more likely to be heard by the Court?³ What if the Court asks for the Solicitor General’s views?⁴ This uncertainty also leads to practical dilemmas: Should I waive my right to respond and wait for the Court to ask?⁵ In an effort to provide better answers to some of these questions, and more complete information about the process, this Article provides a statistical analysis of several years of petitions for certiorari, with a focus on two information-gathering tools used by the Court: the call for response and the call for the views of the Solicitor General.

A glance at the statistics reveals that the common perception—that the odds are stacked against a particular case ever being heard in the Supreme Court—is entirely true. The Court is required to hear only a handful of cas-

¹ During certiorari season, one can find predictions on sites ranging from SCOTUSblog to HowAppealing to the Volokh Conspiracy. Tom Goldstein’s “Petitions to Watch,” published on SCOTUSblog in advance of each Supreme Court conference, correctly identifies 80% of the cases that will be granted cert—in other words, 80% of the cases that the Court grants appear on his prediction lists. Posting of Jason Harrow to SCOTUSblog, “Petitions to Watch” in OT06, <http://www.scotusblog.com/wp/petitions-to-watch-in-ot06/> (July 25, 2007, 14:51 EST).

² SUP. CT. R. 10.

³ Short answer: Slightly. *See infra* Part I.

⁴ Short answer: Greatly. *See infra* Part II.

⁵ Short answer: It depends, but probably more often than litigants do now. *See infra* Part I.C.

es each year,⁶ and exercises wide discretion in deciding how to fill its small argument calendar.⁷ Of the 8,517 petitions filed in the Court's 2005-06 Term ("October Term 2005"⁸), only 78 were granted argument (0.9%). Looking only at paid petitions—those in which the filing party paid the Court's docketing fee instead of filing in forma pauperis⁹—the Court still only granted argument in 3.5% of those petitions and summarily vacated or reversed another handful.¹⁰ That means that the vast majority of litigants who paid the \$300 docketing fee,¹¹ plus whatever counsel charged to prepare the petition itself, were never given a chance for full oral argument before the Supreme Court.

On a practical level, the road to the Supreme Court starts after having a case decided in the United States Court of Appeals or a state supreme court or other court of last resort. The losing party files a petition for a writ of certiorari with the Supreme Court—better known simply as a “cert peti-

⁶ The original jurisdiction of the Court—cases in which the Supreme Court is the first court to hear a case, comprised mostly of suits between two states and often over water rights—required the Justices to dispose of only four cases in the Court year starting in October of 2005; all four were dealt with by a Special Master. *Journal of the Supreme Court of the United States, October Term 2005*, at II (2006), <http://www.supremecourtus.gov/orders/journal/jnl05.pdf> [hereinafter *Supreme Court Journal OT '05*]. Similarly, there were only five mandatory appeals—cases brought under a small group of federal laws that guarantee an appeal in the Supreme Court—in October Term (“OT”) 2005. *Id.* If you are already lucky enough to be working on a mandatory appeal then read no further; you already have your golden ticket to argue before the Court.

⁷ The Supreme Court has broad discretion over its certiorari jurisdiction. SUP. CT. R. 10 (“Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.”). See also ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* 219-21 (8th ed. 2002), for a discussion of the historical background of the Supreme Court’s certiorari jurisdiction. While thousands of litigants each year file petitions for writ of certiorari following an adverse outcome in a court of appeals or a state supreme court, the Supreme Court selects only several dozen of these cases for briefing and decision on the merits. *See, e.g.*, *Supreme Court Journal OT '05*, *supra* note 6 (documenting that of the 8,521 cases docketed during October Term 2005, only 78 cases were granted plenary review).

⁸ The Supreme Court calendar runs from the first Monday in October through the day preceding the first Monday in the following October. 28 U.S.C. § 2 (2000); SUP. CT. R. 3. Terms are numbered by the year in which they begin; for example, October Term 1998 ran from October of 1998 to October of 1999. Certiorari petitions, in turn, are numbered according to the Term in which they are docketed. STERN ET AL., *supra* note 7, at 53. The docketing for October Term 1998 (98-1, 98-2, et seq.) begins with the first petition filed after the Court leaves for the summer recess of 1998. *Id.* at 10. Paid petitions are given sequential docket numbers beginning with 1, while in forma pauperis petitions are given sequential numbers beginning with 5001. *Id.* at 53.

⁹ The Supreme Court Rules allow for litigants without financial means to proceed in forma pauperis, in which case the petitioner does not have to pay a docketing fee or other court fees. SUP. CT. R. 39.

¹⁰ *Supreme Court Journal OT '05*, *supra* note 6. As will be discussed, looking at paid petitions screens out a large number of appeals filed by prisoners without the help of an attorney; as a general rule, such petitions are less likely to raise claims that the Supreme Court will hear. *See* STERN ET AL., *supra* note 7, at 59.

¹¹ SUP. CT. R. 38(a).

tion”—and then crosses her fingers and waits.¹² The respondent then has the right to file a brief in opposition to the writ; the brief will usually argue why the Justices should decline to hear the case.¹³ Or, the respondent may simply waive his right to file a brief and wait to see if the Court requests one.¹⁴ If the respondent files a brief in opposition, the petitioner has the right to file a reply brief and to get the last word before the Court considers whether or not to hear the case.¹⁵

The Court has several information-gathering tools at its disposal to aid in the disposition of a cert petition, the two most common of which are the subject of this Article. First, if a respondent has waived the right to file a brief in opposition then the Court may request (practically, require) him to file a brief.¹⁶ This process is known as a “call for response,” or simply a “CFR.” No formal vote is necessary and any single Justice may direct the Clerk of the Court to enter the appropriate order.¹⁷ The identity of the Justice who requested the response is not publicly revealed.¹⁸ The Court uses the practice frequently, calling for an average of just over 200 responses per Term.¹⁹ The Court will almost never grant plenary review in a case without a response on file.²⁰ Second, the Court may invite the Department of Justice, through the Solicitor General of the United States (known as simply the “SG”), to file a brief analyzing the petition.²¹ This process is referred to as a “call for the views of the SG,” or “CVSG.” The Court requires a formal vote of the Justices to issue a CVSG²² and uses this practice in only about a dozen cases per Term.²³

¹² STERN ET AL., *supra* note 7, at 54-55 (discussing the Court’s procedural framework).

¹³ SUP. CT. R. 15.1. The party that filed the petition for a writ of certiorari is known as the “petitioner,” regardless of whether she is the plaintiff or defendant. Similarly, the party that did not file the petition is known as the “respondent.” It is possible that both parties will want the Court to hear the case—often both sides will be dissatisfied with the ruling below. In that case, the party that was first to file a petition is still called the “petitioner” and the other party is still called the “respondent.”

¹⁴ See SUP. CT. R. 15.5.

¹⁵ SUP. CT. R. 15.6.

¹⁶ SUP. CT. R. 15.1 (stating that in non-capital cases, a respondent’s reply brief is not mandatory unless “ordered by the Court”).

¹⁷ STERN ET AL., *supra* note 7, at 461 (“[T]he Court may call for a response if any of the Justices so requests.”).

¹⁸ See Timothy S. Bishop & Jeffrey W. Sarles, *Petitioning and Opposing Certiorari in the U.S. Supreme Court* (1999), <http://library.findlaw.com/1999/Jan/1/241457.html> (“You will know neither the source of the request for a response nor the reason for it.”).

¹⁹ See *infra* Part I.B.1.

²⁰ A handful of cases has been docketed without responses, but they are limited to special circumstances such as cases involving injunctions on the eve of an election.

²¹ See, e.g., *Whitburn v. Addis*, 525 U.S. 1176 (1999) (“The Solicitor General is invited to file a brief in this case expressing the views of the United States.”).

²² *Medellin v. Texas*, 129 S. Ct. 360, 364 (2008) (Breyer, J., dissenting) (stating that four votes are required to call for the Solicitor General’s views).

²³ See *infra* Part II.D.

Several scholars and practitioners have examined aspects of the certiorari process from an empirical perspective.²⁴ However, there has been little focus on the CFR and CVSG procedures. With respect to CFRs, the Stern and Gressman treatise on Supreme Court practice covers the procedure²⁵ and provides data on how often the SG, acting as counsel for the United States, waives response when the United States is a respondent. Two appellate litigators have also discussed CFRs from a practical perspective in an article on Supreme Court litigation strategy.²⁶ Regarding CVSGs, the Stern and Gressman treatise provides a helpful description of this procedure, but few statistics.²⁷ Additionally, several authors who have studied the SG's office have touched on the CVSG process,²⁸ and a few have considered narrow empirical questions related to CVSG invitation briefs.²⁹ However, there has never been a comprehensive empirical or theoretical analysis of either procedure. Given the integral role of CFRs and CVSGs in the Supreme Court's cert practice, it is important for both practitioners and scholars to better understand these processes.

This Article relies on two original datasets to explore the CFR and CVSG processes. To analyze the circumstances under which the Court calls for response and the relationship between CFRs and the likelihood of a petition being granted, this Article examines a unique dataset, created by the authors for this Article, describing every cert petition filed in the Court from OT '01 through OT '04. The CFR data cover more than 31,000 petitions, with 30 different variables for each petition, thus containing nearly 1 million total points of data. The Article also analyzes a novel CVSG dataset describing every petition in which the Court called for the views of the SG from OT '92 through OT '04—including the complete docket and an analysis of the SG's brief for all cases between OT '97 and OT '04.

²⁴ See, e.g., H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 7-11 (1991); Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 390-91 (2004); Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 738-39 (2001); Arthur D. Hellman, *Never the Same River Twice: The Empirics and Epistemology of Intercircuit Conflicts*, 63 U. PITT. L. REV. 81, 84-85 (2001); John F. Krol & Saul Brenner, *Strategies for Certiorari Voting on the United States Supreme Court*, 43 W. POL. Q. 335, 338-39 (1989); Robert M. Lawless & Dylan Lager Murray, *An Empirical Analysis of Bankruptcy Certiorari*, 62 MO. L. REV. 101, 102-04 (1997); Kevin H. Smith, *Certiorari and the Supreme Court Agenda: An Empirical Analysis*, 54 OKLA. L. REV. 727, 732-34 (2001); Stephen L. Wasby, *Intercircuit Conflicts in the Courts of Appeals*, 63 MONT. L. REV. 119, 121-26 (2002).

²⁵ STERN ET AL., *supra* note 7, at 461.

²⁶ See Bishop & Sarles, *supra* note 18.

²⁷ See STERN ET AL., *supra* note 7, at 468.

²⁸ See, e.g., REBECCA MAE SALOKAR, THE SOLICITOR GENERAL: THE POLITICS OF LAW 142-45 (1992); Kristen A. Norman-Major, *The Solicitor General: Executive Policy Agendas and the Court*, 57 ALB. L. REV. 1081, 1095 (1994); James L. Cooper, Comment, *The Solicitor General and the Evolution of Activism*, 65 IND. L.J. 675, 690-92 (1990).

²⁹ SALOKAR, *supra* note 28, at 145-50; Cooper, *supra* note 28.

Part I of this Article examines the CFR process, relying on the extensive dataset created for this project, available literature, and interviews with numerous Supreme Court specialists. First, we discuss the process by which a litigant waives the right to respond and the Court's decision to call for a response. Second, we examine the significance of a CFR, including the impact on the likelihood that a petition will be granted. Third, we consider the significance of a waiver. Finally, we explore, in turn, the practice of the United States, individual states, and private litigants in waiving response, and the Court's decision to call for a response from each type of litigant.

We offer several findings regarding the CFR process:

(1) Overall, the Court issued approximately 200 CFRs per Term. The likelihood of a CFR is 2 times as high for paid petitions as for petitions filed in forma pauperis.

(2) The overall grant rate increases from 0.9% to 8.6% following a CFR from the Court. In other words, a petition is 9 times more likely to be granted once the Court calls for a response. For a petition on the paid docket, the grant rate increases only 4 times; for a petition filed in forma pauperis, the grant rate increases 30 times.

(3) In 80.5% of petitions, a respondent waives his or her right to file a brief in opposition.

(4) When the SG represents the respondent, and chooses to file a voluntary response brief, the grant rate is 26 times higher than in instances where the SG opted to waive response. When an individual state is respondent, the grant rate increases by a factor of about 16 where the state voluntarily files an opposition brief. For private respondents, the grant rate increases only by a factor of 3.

(5) When the United States files a petition in the Supreme Court, a response brief ultimately was filed in 87.5% of appeals (with 78.9% filed voluntarily). State petitioners trigger response briefs in 89.5% of appeals (with 71.6% filed voluntarily); for private petitioners, a response was only filed in 72.3% of appeals (with 68.1% filed voluntarily).

Part II of this Article examines the CVSG process, relying on existing literature, interviews with Supreme Court specialists, and the novel CVSG dataset. First, we describe the process through which the Supreme Court invites the views of the SG. Second, we discuss the significance of a CVSG, including its effect on grant rate and the influence of the SG's recommendation on the Court. Third, we examine the Court's process in calling for the SG's views, including the frequency with which the Court issues CVSGs, and the factors motivating this decision. Finally, we examine the SG's response to a CVSG, including the competing interests at play and his timeline for filing the invitation brief.

Our study of the CVSG process yielded several notable conclusions:

(1) The Supreme Court calls for the views of the SG in approximately 11 petitions each year, with the frequency of CVSGs increasing over the decade from 1994 to 2004.

(2) The overall grant rate increases from 0.9% to 34% following a CVSG from the Court; in other words, the Court is 37 times more likely to grant a petition following a CVSG. For petitions on the paid docket, the grant rate increases even more, to 42%; a paid petition is 47 times more likely to be granted following a CVSG.

(3) The Supreme Court follows the recommendation of the SG 79.6% of the time, when the SG recommends either a straight grant, deny, or grant/vacate/remand (“GVR”).³⁰

(4) Where the SG recommends a merits outcome in his brief responding to a CVSG, the Court’s ultimate decision on the merits is only loosely correlated with that recommendation.

(5) The Court calls for the views of the SG most often in intellectual property cases, antitrust cases, ERISA cases, and other matters involving complex regulatory regimes.

(6) The Court calls for the views of the SG more often in December than in other months, in order to obtain a response in time to vote on certiorari by the end of the Term in May and calendar the case in time for the October sitting.

(7) The SG takes, on average, about four and a half months to respond to the Court’s invitation. The SG files a disproportionate number of response briefs in December and in May, likely to ensure that the cases are calendared by the end of the Term and for the following October sitting, respectively.

I. CALL FOR RESPONSE (OR CFR)

When a petition for a writ of certiorari is filed in the Supreme Court, the respondent has the right to file a brief in opposition.³¹ The respondent can either file an opposition brief or waive the right to respond until the Court acts.³² In a few hundred cases per year, the Supreme Court will call for the response (“CFR”) of a party who has waived. This Part considers

³⁰ One option available to the Court in evaluating a cert petition is, colloquially, a “GVR,” whereby the Court grants certiorari, vacates the decision below, and remands for further consideration, often in light of a recent Court decision. STERN ET AL., *supra* note 7, at 317-20.

³¹ SUP. CT. R. 15.1.

³² SUP. CT. R. 15.5. However, a brief in opposition is mandatory in capital cases. SUP. CT. R. 14.1(a). In such cases, the Clerk’s office will automatically alert the respondent of the need to file a response; the case will not be sent to conference without a brief in opposition on file. Telephone interview with Frank Lorson, Former Supreme Court of the U.S. Chief Deputy Clerk (Apr. 10, 2007).

both the waiver and CFR processes and presents empirical conclusions based on data covering all petitions for a writ of certiorari filed from October Term (“OT”) ’01 through OT ’04.

A. *Process*

1. The Waiver Process

Every respondent in the Supreme Court has the right to file a brief in opposition to certiorari after being served with a cert petition.³³ Response is optional; it would be wasteful for the Court to require a brief in opposition for every case as the Court typically grants plenary review in less than 1% of all cert petitions, and many petitions can be readily identified as frivolous or otherwise unlikely to be granted.³⁴ In the vast majority of cases—on both the paid and in forma pauperis (“IFP”) dockets—the respondent waives the right to respond.³⁵ Respondents may opt to waive response for a variety of reasons, ranging from the cost to private litigants to file a brief, to the overwhelming work that the SG and state Attorneys General would be required to perform in order to respond to every IFP petition filed by prisoners.

The Rules of the Supreme Court allow the respondent party or parties thirty days from the date a case is placed on the docket to file a brief in opposition.³⁶ To waive the right to respond, a party can either file a letter with the Clerk’s office to expressly waive or simply take no action;³⁷ a failure to respond within thirty days is construed as a waiver.³⁸ A notice of waiver will expedite the process, as the Clerk’s office will distribute the cert petition to the Justices’ chambers immediately after the waiver is received instead of waiting until the thirty days has expired.³⁹ While the Justices may not be made aware of whether a waiver was express or silent, “[t]he Clerk prefers a respondent to file its waiver letter as soon as possible after receipt

³³ SUP. CT. R. 15.1.

³⁴ See, e.g., Supreme Court Journal OT ’05, *supra* note 6 (noting that of the 8,521 cases docketed during the Term, only 78 cases were granted plenary review).

³⁵ See *infra* Part I.C.1.

³⁶ SUP. CT. R. 15.3; STERN ET AL., *supra* note 7, at 451. The respondent may also file for an extension. SUP. CT. R. 30.4.

³⁷ STERN ET AL., *supra* note 7, at 461. As explained by two Supreme Court practitioners: “One way to waive is simply to allow the period for response to elapse without filing a brief. A much more helpful and courteous course is to write a letter to the Clerk (be sure to serve it on opposing counsel) . . . Such a letter tells the Clerk that respondent received service and identifies respondent’s counsel of record.” Bishop & Sarles, *supra* note 18.

³⁸ STERN ET AL., *supra* note 7, at 288.

³⁹ *Id.*; SUP. CT. R. 15.5.

of the petition.”⁴⁰ Also, failing to take any action may delay consideration of the case, as the Clerk’s office must wait the full thirty days to determine if the respondent is filing an opposition brief or waiving.⁴¹ As noted by two practitioners: “This may be an important factor if you want to move rapidly to enforce a judgment in your favor—especially when a Court recess looms. For example, when a petition is filed close to the long summer recess, quickly filing a waiver can reward you with a June denial of certiorari and avoid the long wait until the first October order list.”⁴² Of course, if a longer wait is advantageous to the respondent, the respondent may intentionally sit on the case—instead of sending an express waiver letter—in order to benefit from the additional thirty-day delay.

The Supreme Court does not give guidance as to when a party should waive his right to respond; the Rules note only that a brief in opposition “may be filed by the respondent in any case, but is not mandatory.”⁴³ Typically, however, respondents aim to file briefs in opposition in cases where the petition is potentially cert-worthy, but may “choose to waive the right to oppose a petition that is clearly without merit.”⁴⁴ Moreover, in some cases, a respondent may decide not to file an opposition brief where he believes the cert petition may have merit, either because he wishes to downplay the cert-worthiness of the petition or seeks to avoid writing an opposition brief in which he would have to concede the cert-worthiness of the petition.⁴⁵ Supreme Court practitioners have struck different balances between filing and waiving, depending on their experience, litigation strategy, relationship with the Court, and resource limitations.⁴⁶

2. The CFR Process

The process of calling for a response brief is both more common and less formal than the system used to call for the views of the SG.⁴⁷ After a cert petition has been filed and the respondent has waived his right to file a response, the Clerk’s office will distribute the petition and any related materials (such as amicus briefs) to the nine chambers.⁴⁸ Unlike a CVSG, which is voted on and issued by the Justices at conference, a single Justice can call

⁴⁰ Bishop & Sarles, *supra* note 18.

⁴¹ *See id.*; Interview with Jeffrey L. Fisher, Assoc. Professor of Law, Stanford Law Sch., in Stanford, Cal. (Apr. 9, 2007).

⁴² Bishop & Sarles, *supra* note 18.

⁴³ SUP. CT. R. 15.1.

⁴⁴ STERN ET AL., *supra* note 7, at 461.

⁴⁵ Interview with Jeffrey L. Fisher, *supra* note 41.

⁴⁶ *See infra* Parts I.D-F.

⁴⁷ *See infra* Part II.A.

⁴⁸ STERN ET AL., *supra* note 7, at 288-89.

for a response, which almost always occurs prior to conference.⁴⁹ As described by two Supreme Court specialists, “the origin of the request will usually be some concern of a single law clerk or, less often, a single justice.”⁵⁰ The ability of a single Justice to call for a response is not an official Rule of the Court; instead, specialists report that it is contained in the Court’s internal practice manual.⁵¹ However, it is fairly common knowledge that a CFR requires only one vote.⁵²

While a Justice must sign off on any request by a clerk to issue a CFR, this process is more clerk-driven than the CVSG system.⁵³ When a Justice’s law clerk reads a cert petition, which she believes is potentially cert-worthy or in need of clarification from the respondent, she will recommend a CFR and the Justice for whom she works will almost invariably call for the response. According to former law clerks, Justices will rarely reject a clerk’s recommendation for a CFR. The one-vote threshold is low and will often be met by a Justice whose clerk seeks a response to clarify a claim made in a petition of an alleged split or a petitioner’s assertion of the importance of a case. Moreover, petitions written without the aid of an attorney—often by prisoners filing pro se and IFP—are often unclear,⁵⁴ and the Court might seek the aid of state or federal respondents to clarify the issues presented.

B. *The Significance of a CFR*

1. The Frequency of CFRs

The Supreme Court calls for responses relatively frequently. Based on an analysis of the dataset,⁵⁵ between OT ’01 and OT ’04, the Court issued a CFR in an average of 212 cases per Term, whereas the Court granted argument on the merits in an average of only 84 non-mandatory cases per Term during the same period. In total, the Supreme Court called for a response in 839 cases, or 2.7% of all 31,408 cert petitions filed during those four

⁴⁹ Telephone interview with David C. Frederick, Partner, Kellogg, Huber, Hansen, Todd, Evans & Figel (Apr. 7, 2007); Telephone interview with Frank Lorson, *supra* note 32; Telephone interview with Charles A. Rothfeld, Counsel, Mayer Brown (Apr. 9, 2007).

⁵⁰ Bishop & Sarles, *supra* note 18.

⁵¹ The authors, again, emphasize that this Article was completed prior to the author starting work at the Supreme Court or gaining any information directly from the Court.

⁵² STERN ET AL., *supra* note 7, at 461 (“[T]he Court may call for a response if any of the Justices so requests.”).

⁵³ See Interview with Jeffrey L. Fisher, *supra* note 41; Telephone interview with David C. Frederick, *supra* note 49.

⁵⁴ See Kevin H. Smith, *Justice for All? The Supreme Court’s Denial of Pro Se Petitions for Certiorari*, 63 ALB. L. REV. 381, 386 (1999).

⁵⁵ See *infra* Appendix.

Terms.⁵⁶ The Court issued more CFRs in in forma pauperis (“IFP”) cases than paid cases: of the 839 calls for response, 338 (40.3%) involved petitions on the paid docket; the remaining 501 (59.7%) resulted from in forma pauperis cases. However, any given case from the paid docket was substantially more likely to lead to a CFR than were cases from the in forma pauperis docket: only 7,156 (22.8%) of all petitions for certiorari were paid, but 338 calls for response arose from the paid docket, resulting in a CFR rate of 4.7% of all paid cases. In contrast, of the 24,252 IFP cases, there were only 501 calls for response, for a CFR rate of 2.0% of all IFP cases. In other words, the likelihood of a CFR is more than twice as high for a paid case compared to an IFP case.⁵⁷

Factoring in voluntary response changes the numbers very slightly. Of course, it is not possible for the Court to call for a response in cases in which all respondents have already filed responses, nor would the Court need to. In the 26,378 cases in which no respondent filed an opposition brief⁵⁸—of the total 31,408 cert petitions filed during the period considered⁵⁹—the Court called for response in 832 cases (3.2%).⁶⁰ The remaining seven calls for response arose from multi-party cases in which at least one respondent voluntarily filed a brief, but the Supreme Court asked for a response from another; there are at least 295 cases between OT ’01 and OT ’05 in which one respondent filed a brief and another actively waived the right to file a brief.⁶¹

⁵⁶ *Id.* The actual number of petitions filed may be slightly higher as a small handful of cases were not available online. We have no reason to believe that there is any pattern to the unavailable cases. Of the 839 cases in which a response was requested, there were seven multi-party cases in which at least one respondent had voluntarily filed a brief and the Court wanted to hear from another respondent. Unless otherwise noted, all mandatory appeals have been removed from consideration.

⁵⁷ Other scholars have speculated as to why the Supreme Court gives more attention to paid than unpaid cases. Among the most significant reasons is that a large proportion of the IFP cases are filed by prison inmates litigating *pro se*, who frequently raise frivolous and untimely appeals. STERN ET AL., *supra* note 7, at 493-94.

⁵⁸ We count any filing in opposition—including informal memoranda and partial oppositions—as a voluntary response.

⁵⁹ Again, mandatory appeals and original jurisdiction cases are excluded from calculations.

⁶⁰ There were an additional 28 CFRs, accounting for the difference between 839 and 811; those CFRs were issued in cases in which there were multiple respondents and at least one respondent filed an opposition brief.

⁶¹ The software developed for this Article could not identify the number of cases in which one respondent filed a brief and another silently waived the right to file by simply letting thirty days elapse; the docket does not always make clear which of the named parties are actually independent entities that are likely to file separate briefs versus several named respondents who act as one (such as a named individual in his role as head of a federal agency and the agency itself), so it was impossible to accurately count.

2. The Impact of a CFR on the Likelihood of a Certiorari Grant

When a CFR is issued, it is a strong sign that the Court is interested in hearing argument in a case. Of the 839 calls for a response between OT '01 and OT '04, 72 cases were ultimately granted plenary review (8.6%). In other words, a CFR from the Court increases the probability that the Court will grant oral argument by roughly 9 times, from 0.9% to 8.6%. Care must be taken in interpreting this figure. The Court will almost never hear a case without receiving a response, so the question is not "What is the likelihood of a CFR given the Court's interest in a case?" That would be 100%. Instead, looking from a litigant's perspective, what does receipt of the order suggest about the likelihood of the Court ultimately granting cert? Before the call for response, all a litigant knows is the overall grant rate, 0.9% among all cases. After receiving the request, the litigant knows that her case is now in that smaller subset of cases that the Court is more interested in, of which it ultimately grants plenary review in 8.6% of all cases. Thus, from the litigant's perspective, the likelihood of the case being heard increases from 0.9% to 8.6%, all else being equal.

Looking at only the paid docket, a grant is about 4 times greater following a CFR; the grant rate increases from 4.2% to 16.9% (i.e., 57 grants out of 338 cases with a CFR). Looking at the IFP docket, the results are even more dramatic: The probability of a grant of an IFP case after a CFR increases roughly 30 times, from 0.1% to 3.0% (i.e., 15 grants out of 501 cases with a CFR).

The likelihood of summary review also increases after the Court calls for a response. Of the 767 cases in which the Court requested a response but did not hear oral argument, 663 (86.4%) cases were denied review; 88 (11.5%) were granted, vacated, and remanded without argument; 11 (1.4%) were removed from the docket;⁶² and 5 (0.6%) received summary dispositions on the merits.

Respondents often file opposition briefs in cases that are not cert-worthy, and often fail to file briefs in cases that the Court ultimately takes. Looking at cases in which at least one respondent voluntarily filed a brief in opposition, only 4.3% of cases ultimately received plenary review; of the 6,110 cases with at least one voluntary response filed, only 263 were granted. That is, it is twice as likely that the Court will grant a petition for which a Justice called for a response than a petition where the respondent filed an opposition brief voluntarily.⁶³ Of those cases in which a response was filed voluntarily, 5,091 (83.3%) were denied review; 716 (11.7%) were

⁶² These 11 cases include voluntary dismissals and settlements under Supreme Court Rule 46 and the Clerk's notation that the case was simply "removed from docket" without explanation. *See* SUP. CT. R. 46.1.

⁶³ Again, correlation is not causation. The data suggest that parties are bad at deciding whether to file a brief, not that filing a brief necessarily prevents certiorari.

granted, vacated, and remanded without argument;⁶⁴ 30 (0.5%) were removed from the docket;⁶⁵ and 10 (0.2%) received summary dispositions on the merits. On the other hand, the instincts of counsel for the respondents are not all wrong: Of all cases ultimately granted review, 78.3% come from the 19.4% of cases in which at least one response is voluntarily filed; the remaining 21.7% of grants arise from the 80.6% of cases in which no voluntary responses were filed.

The likelihood of a grant also depends in part on the timing of a CFR. It appears that there is a slight, but statistically significant,⁶⁶ increase in the grant rate for cases in which the call for response appears to come from the “cert pool” within the Court. During the study period, eight of the nine sitting Justices—all but Justice Stevens—shared their clerks’ memos evaluating each cert petition.⁶⁷ Each Justice in the pool is responsible for initially evaluating one-eighth of the petitions, and the resulting memo is given substantial consideration by the other Justices. Thus, a call for response from within the pool may have more weight than a call from outside; seven other Justices will read the pool writer’s memo suggesting that the case might be cert-worthy. In contrast, Justice Stevens sits outside the pool and the cert pool will not rely on his thoughts when evaluating cases in which he called for a response.⁶⁸ Calls that are likely from within the pool may be identified by their timing: a necessary consequence of the cert pool system is a highly structured set of timelines by which each step of analysis must be completed, and calls for response that fit the pattern are likely to be from the pool. Many calls from within the pool occur 8 to 10 days after distribution of the petition to the Justices, when the pool writer has had time to write a memo and distribute it to the seven other chambers.⁶⁹

⁶⁴ This figure is heavily inflated by a burst of GVRs following *United States v. Booker*, 543 U.S. 220 (2005), and *Blakely v. Washington*, 542 U.S. 296 (2004), two major decisions undermining state determinate sentencing regimes. See Sena Ku, Comment, *The Supreme Court’s GVR Power: Drawing a Line Between Deference and Control*, 102 NW. U. L. REV. 383, 410 (2008) (“Following *Booker*, the Supreme Court GVR’d eighty-five times within twelve days.”).

⁶⁵ These 30 cases include voluntary dismissals and settlements under Supreme Court Rule 46, cases dismissed for abuse of in forma pauperis status under Supreme Court Rule 39.8, and cases “considered closed.”

⁶⁶ Using a chi-square test comparing the grant rate for CFRs made after 8-10 days (21 grants of 144 calls) to all other dates in between 1 and 31 days after distribution (38 grants of 676 calls), the chi-square value was found to be 14.279, resulting in p less than or equal to 0.001. True to best practices, the 8-10 day hypothesis was developed by Supreme Court watchers long before this dataset was tested.

⁶⁷ STERN ET AL., *supra* note 7, at 291 & n.14. In 2008, Justice Samuel Alito reportedly opted out of the cert pool also, though his appointment and subsequent decision to leave the cert pool occurred after the time period studied in this Article. Adam Liptak, *A Second Justice Opts Out of a Longtime Custom: The ‘Cert. Pool’*, N.Y. TIMES, Sept. 25, 2008, at A21, available at 2008 WLNR 18286015.

⁶⁸ See STERN ET AL., *supra* note 7, at 291 & n.14.

⁶⁹ Of course, a call for response by the pool writer may come earlier if a case is urgent or catches the law clerk’s eye, or later if the pool writer has fallen behind. However, 8-10 days is a safe bet for the

While it is not possible from available data to identify with certainty which CFRs arise from Justice Stevens and which from a cert pool member, it is possible to take an educated guess. Some Supreme Court watchers speculate that the procedural difference between Stevens CFRs and those from the cert pool would lead to a bimodal distribution of CFRs, but the data are not conclusive on this point. Looking at the 820 calls for response with a normal pattern of distribution and CFR dates,⁷⁰ there is a cluster of calls for response between 4 and 9 days after distribution, then a break, and then another cluster from 11 to 14 days after distribution. However, the pattern of distribution across days of the week may explain the gap at 10 days: the vast majority of cases are distributed on Wednesday and Thursday and 10 days later would be a weekend.⁷¹ Thus, it would be impossible for the Court to call for a response 10 days after most cases are distributed. Accounting for the impact of Wednesday and Thursday distributions, it seems unlikely that there is a clear break point between Stevens and non-Stevens CFRs based solely on timing, but there is still an educated guess that most CFRs made 8-10 days after the petition are pool-based.

It appears that there is a substantially higher grant rate for CFRs made based on a pool memo. Of the 144 CFRs which occurred 8-10 days after the petition was distributed for conference, 21 were granted (14.5%), substantially higher than the 8.6% grant rate for all petitions that led to a CFR. In contrast, a CFR from Justice Stevens's chambers is likely to come within the first few days after the case is distributed for conference, when the Stevens clerk assigned to the matter first evaluates the petition. There were 139 calls for response in the first 6 days from distribution of cases, which led to only 8 grants (5.8%). Thus, if the hypothesis about deducing the source of a CFR is correct, then the pool memo writer does have substantial influence over whether a case is ultimately granted plenary review.

3. The Relevance of Time of Year

Some specialists we interviewed speculate that the frequency of calls for response increase in the months shortly after new clerks arrive at the Court. The theory is that when new clerks arrive in July, they will be less

pool. Once again, the authors emphasize that this Article was written before author David Thompson started his clerkship and no internal information was collected.

⁷⁰ The 820 cases include only those in which the docket sheet lists the CFR after the distribution of the case for conference. The Justices would normally not be able to call for a response in a case before it has been distributed by the Clerk—they would not even have the files for the case yet—but it is possible that in complex cases with several docket numbers, the distribution of the case may be recorded on one docket sheet and the CFR on another, giving rise to the appearance of an order being issued in a case of which the Justices are not yet aware.

⁷¹ Of cases which eventually led to a CFR, 8.6% were distributed on a Tuesday, 41.4% were distributed on a Wednesday, and 49.9% were distributed on a Thursday.

familiar with the standards for granting and denying cases and thus more likely to suggest a call for a response than to make a hard recommendation to grant or deny. The theory goes that a CFR buys the clerk time to evaluate the case and to better understand the legal issues involved.

However, the data suggest that there is no “new clerk” effect of this sort, or at most a very slight one, in the CFR practices of the Court. The highest absolute numbers of CFRs occur in October and January, long after the new clerks arrive in July. The rate of filings is reasonably constant year-round, averaging about 655 petitions per month. The only notable increase in filings occurs in January, with an average of 746 petitions filed in each January during the sample period, and a decrease to an average of 593 filings in February. However, the Court does not dispose of cases evenly year-round. The Court does not conference to consider cases during the summer recess, and instead holds an extended conference in September to deal with the “summer list” of cases that have accumulated through July and August while the Justices were away. On average, the Court will consider 1,937 cases every September, but only 235 each December, with none in July or August.

In contrast, the clerks work year-round and produce memoranda at a roughly constant pace. Thus, the data are best analyzed by looking at how many petitions that were filed in a given month ultimately receive a CFR, as that will best reveal any hesitation among the clerks. Looking at the data this way, there appears to be a slight “new clerk” effect increasing the rate of CFRs. The highest proportion of CFRs occurs during the summer months; of cases filed in July, one in 31.2 results in a CFR. The lowest proportion occurs in February; of cases filed in February, only one in 45.6 results in a CFR. However, if there is a new clerk effect it is very slight and has worn off by mid-summer; of cases filed in August, one in 35.5 results in a CFR, barely different from October and November in which 1 in 35.6 and 35.7 cases, respectively, leads to a CFR.

C. *The Significance of a Waiver*

1. Frequency of Waiver

In most cases, the respondent is not required to file a brief; instead, she may simply waive response. This is a relatively new tactic. Modern waiver custom emerged in the mid-1970s, led by a shift in the SG’s office. Before then, the practice of the SG had been to file a brief in opposition to all cert petitions where the United States was the respondent.⁷² However, this practice proved unsustainable, as the United States became subject to an in-

⁷² SALOKAR, *supra* note 28, at 117.

creasingly high volume of cert petitions, filed largely by prisoners proceeding pro se and in forma pauperis.⁷³ The SG's efforts to respond in every case resulted in large delays within his office for both meritorious and frivolous petitions.⁷⁴ The backlog affected the ability of the Court to provide timely review of meritorious petitions.⁷⁵

	Paid Docket	IFP Docket
OT '01-OT '04 Petitions	7,156	24,252
Voluntary Response Rate	46.4%	11.5%

Consequently, Chief Justice Burger met with the SG to discuss the burden upon the SG's office. Together, they concluded that the SG would respond only to the most important and potentially meritorious petitions, where the Court could benefit from a response; the rest would be waived. Later, the waiver became a standard part of Court practice for private and government respondents alike.⁷⁶

Across the 31,408 petitions for certiorari we analyzed from OT '01 through OT '04, by far the most common choice respondents made was to waive the response. Only 6,110 (19.5%) certiorari petitions resulted in a voluntary response by one or more respondent parties.⁷⁷ The respondents in the remaining 25,298 (80.5%) of certiorari petitions did not respond voluntarily.⁷⁸

The vast majority of all petitions filed at the Supreme Court are in forma pauperis, filed by indigent petitioners—often prisoners—under Rule 39.⁷⁹ Accordingly, the certiorari grant rate for IFP petitions is extremely

⁷³ See *id.*; Telephone interview with Kenneth S. Geller, Partner, Mayer Brown (Apr. 9, 2007).

⁷⁴ See SALOKAR, *supra* note 28, at 117.

⁷⁵ See *id.* (“According to one assistant, the office was stretched so thin that filings were being submitted late to the Court.”).

⁷⁶ See SALOKAR, *supra* note 28, at 118 (“The practice of waiving response has become institutionalized . . .”).

⁷⁷ For the purposes of our dataset, a response is considered “voluntary” if it was filed by any respondent prior to the Supreme Court calling for response.

⁷⁸ There were 370 cert petitions with both a voluntary response and a waiver notice filed. These cases were generally multi-party litigation in which one party waived and one party responded. They are included in the 6,110 figure, but not the 25,298 figure. Additionally, a small number of cases were removed from the docket before a respondent would have had the opportunity to respond; they are listed as cases in which no response was filed.

⁷⁹ STERN ET AL., *supra* note 7, at 493 & n.4; SUP. CT. R. 39. The Supreme Court maintains separate dockets for petitioners who pay the filing fee (the “paid docket”) and those petitioners who move to proceed in forma pauperis (the “IFP docket”). STERN ET AL., *supra* note 7, at 53. Petitions filed along with the filing fee are given docket numbers beginning with 1 (e.g., the first paid petition filed in the October 2004 Term would be “04-1”). *Id.* Petitions filed with motions for leave to proceed in forma pauperis are given docket numbers beginning with 5000 (e.g., the first IFP petition filed in the October

low, with less than 0.5% of IFP cases granted each Term;⁸⁰ the Court “almost invariably denies their petitions.”⁸¹ Many IFP litigants also proceed pro se and are likely to file frivolous, untimely, or fact-specific cert petitions.⁸² There are certainly meritorious petitions in the IFP haystack, but the clerks and Court must work hard to find them.

Respondents are approximately 4 times less likely to file an opposition brief voluntarily where the petition was submitted IFP. Of the 24,252 petitions for cert filed by petitioners who sought to proceed IFP, only 11.5% (2,792) resulted in a voluntary response being filed. In contrast, of 7,156 paid cert petitions, 46.4% (3,318) led to a voluntary response by at least one respondent party.

2. The Implications of Waiving

It takes time and money to file an opposition brief, but waiving is free—just wait thirty days and the Clerk of the Court will do it for you. However, many practitioners question whether or not there is a hidden cost to waiving: that is, whether by waiving the right to respond they will increase the chance that the case will be granted or offend the Court in some way.⁸³ It is very difficult to determine from any data whether a respondent will increase the chance of a grant by waiving; there is no way to ascertain whether a “grant” may have been a “deny” had the respondent voluntarily filed a brief, or vice-versa. However, the related literature, discussions with former clerks, and interviews with officials in the Clerk’s office suggest that the risk of waiving response is minimal and would only arise where the petition was plainly cert-worthy.

There is practically no risk that the Court will grant a case where the respondent has waived without first calling for a response.⁸⁴ Thus, a litigant

2004 Term would be “04-5001”). *Id.* The original jurisdiction docket of the Court is numbered separately. *Id.* at 54.

⁸⁰ STERN ET AL., *supra* note 7, at 59, 493-94.

⁸¹ Smith, *supra* note 54, at 385.

⁸² See STERN ET AL., *supra* note 7, at 493-94.

⁸³ Telephone interview with Roy T. Englert, Jr., Partner, Robbins, Russell, Englert, Orseck, Untereiner & Sauber (Mar. 28, 2007); Telephone interview with Charles A. Rothfeld, *supra* note 49; Telephone interview with Kevin K. Russell, Partner, Howe & Russell (Apr. 10, 2007); Telephone interview with Dan Schweitzer, Supreme Court Counsel, Nat’l Ass’n of Att’ys Gen. (Apr. 10, 2007).

⁸⁴ Telephone interview with Roy T. Englert, Jr., *supra* note 83; Telephone interview with Frank Lorson, *supra* note 32; Telephone interview with Kevin K. Russell, *supra* note 83. There was only one petition granted between 2001 and 2004 with no response listed on the docket: *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 543 U.S. 1186 (2005) (No. 04-597). It is unclear whether there was genuinely no response or whether the docket is in error. There is one additional case, *Boeing Co. v. United States*, 537 U.S. 437 (2003), in which there was no response on the docket, but the respondent had separately cross-petitioned for a writ of certiorari. *Id.* (Nos. 01-1382, 01-1209). Respondent waived response in this vided case, presumably as they affirmatively desired review. A number of other vided or consolidated

need not fear that by waiving he will lose the opportunity to respond before the petition goes to conference. As noted by Stern and Gressman, a litigant can waive the right to respond “without any substantial risk if respondent feels certain that certiorari will be denied.”⁸⁵ However, in a potentially cert-worthy case, there are procedural ramifications of waiving response. First, when a respondent waives, the cert-pool memo will be written before a CFR is issued and the respondent files an opposition brief; conventional wisdom dictates that it is best to have filed a response prior to the drafting of the cert-pool memo.⁸⁶ When writing the pool memo, a law clerk might read something that appears persuasive in a cert petition, but which could have been immediately countered if he had the opposition brief in hand. Thus, there is a risk that the pool memo will be biased toward the only brief the memo writer has in hand, that of the petitioner.

As stated by two Supreme Court specialists: “If you waive[] a case that was not frivolous, there may be a remote risk of prejudice. The pool memo writer or even some justices may already have developed a bent towards a grant, based on reading the petition alone, that you will now have to counteract. This possibility cautions care in your initial determination whether to waive and counsels filing a brief in opposition when in doubt.”⁸⁷ In other words, a litigant may want to nip adverse arguments in the bud by filing an opposition brief instead of a waiver.

By not responding, there is also a risk that the process—and thus the collection of a favorable judgment or the imposition of a final injunction—will be slowed if the Court calls for a response following waiver.⁸⁸ The Justices use the “discuss list” to organize their conference, considering only those cases on the list for certiorari;⁸⁹ the Court will not include a petition on the discuss list unless a response has been received.⁹⁰ Thus, a Justice who wishes to discuss a case where response has been waived must first call for a response, wait for the response, and then place the case on the discuss list. Some respondents might benefit from the delay; they may be allowed to continue their activity or continue the effect of a challenged injunction. Other litigants may seek to expedite the process to reduce client anxiety, facilitate closure, and speed the entry of a final judgment.⁹¹

There are some idiosyncratic reasons rooted in tradition that weigh towards counsel filing a response in some cases. For one, a former clerk

cases listed the response on one docket but not the other. *See* *Randall v. Sorrell*, 548 U.S. 230 (2006) (Nos. 04-1528, 04-1530, 04-1697); *Clark v. Suarez Martinez*, 543 U.S. 371 (2005) (Nos. 03-878, 03-7434); *Scheidler v. NOW, Inc.*, 537 U.S. 393 (2003) (Nos. 01-1118, 01-1119).

⁸⁵ STERN ET AL., *supra* note 7, at 461.

⁸⁶ Telephone interview with Charles A. Rothfeld, *supra* note 49.

⁸⁷ Bishop & Sarles, *supra* note 18.

⁸⁸ *See* STERN ET AL., *supra* note 7, at 461-62.

⁸⁹ *See id.* at 292-93.

⁹⁰ Telephone interview with Frank Lorson, *supra* note 32.

⁹¹ Telephone interview with Kenneth S. Geller, *supra* note 73.

noted that former Chief Justice Rehnquist thought that a private party should always respond to a petition filed by the government as a matter of respect for the government. Similarly, the SG is widely viewed as a gatekeeper for the Court, and he only files those petitions for certiorari he deems likely to be granted; thus, a private party would be well-advised to file an opposition brief where the United States petitions for cert. According to a former Chief Deputy Clerk, when the United States is petitioning, it is best to file a response where there is any semblance of merit.⁹²

D. *The United States as a Party*

1. Waiver Practice of the United States as Respondent

The SG is the counsel of record for all Supreme Court litigation involving the United States or any part of the federal government. As such, the Office of the Solicitor General is responsible for handling all cert petitions that name the United States or any part of the government as a respondent.

As the most frequent “repeat player” before the Supreme Court, the SG must strike a judicious balance between responding to petitions in which a response would aid the Court, and guarding his time for use on potentially meritorious cases.⁹³ Accordingly, the SG “waive[s] the right to file opposition briefs in many cases deemed to be frivolous or insubstantial.”⁹⁴ Former Deputy Solicitor General A. Raymond Randolph describes the process for many cases: “The solicitor general’s office takes a look at a certiorari petition and then it informs the clerk [of the Court] that it waives response. In other words, the petition is considered so bad and so frivolous and so unworthy of Supreme Court attention that they won’t even respond to it.”⁹⁵

By all accounts, the Office of the Solicitor General strikes the appropriate balance between responding and waiving when the United States is the respondent to a cert petition.⁹⁶ Looking at both paid and IFP dockets, the United States (*qua* United States) was the first named respondent in 11,045 cert petitions, or 35.2% of all petitions filed.⁹⁷ Federal instrumentalities—such as agencies, administrations, and federal officers in their official

⁹² *Id.*

⁹³ See SALOKAR, *supra* note 28, at 117-18.

⁹⁴ STERN ET AL., *supra* note 7, at 461.

⁹⁵ SALOKAR, *supra* note 28, at 117-18.

⁹⁶ Telephone interview with Frank Lorson, *supra* note 32. See also *infra* Part II.C.1, for discussion of the unique role of the Solicitor General as a trusted litigant before the Court.

⁹⁷ As described in the methodology appendix, only the first named party was considered.

capacities⁹⁸—were the first named respondents in an additional 1,223 petitions (3.9% of all petitions filed). Of the 11,045 petitions naming the United States *qua* United States as the first respondent, the SG filed a response in 1,346 cases (12.2%) and did not respond in 9,699 instances (87.8%). Among the 1,223 petitions naming a federal instrumentality as the first respondent, the SG responded in 330 instances (27.0%) and did not respond in 893 cases (73.0%).

Overall, between OT '01 and OT '04, the SG waived response in 86.3% of all petitions he handled; this waiver rate is higher than it was in OT '99, when “responses were waived in 70% of all cases in which the Government was a respondent,” according to Stern and Gressman. Stern and Gressman found that “[t]he number of waivers by the Solicitor General . . . increased” between OT '90 and OT '99, from 70% to 84%.⁹⁹ Our data confirm that this trend has roughly stabilized in recent years, with the SG continuing to waive in 86.3% of cases.

Not surprisingly, the SG waives response more often in IFP cases than paid cases. Of the 961 cert petitions on the paid docket naming the United States *qua* United States as the first respondent, the SG filed a voluntary response in 32.0% (308 cases). In contrast, of 10,084 petitions filed on the in forma pauperis docket naming the United States *qua* United States as the first respondent, the SG filed a voluntary response in only 10.3% of cases (1,038). These data correspond to the finding of Stern and Gressman that the SG waives response more often in IFP criminal cases (92% in 1999) than in paid criminal cases (78% in 1999).¹⁰⁰

2. The Predictive Value of the Solicitor General's Waiver of Response on Certiorari Denial

The SG is generally seen to strike an effective balance of waiver and response to the immense load of cases filed naming the United States or a federal agency as a respondent. Assuming that the SG waives response to petitions that he deems less cert-worthy,¹⁰¹ the data confirm the common wisdom that the SG is effectively able to predict which petitions the Court will consider seriously. Of the 12,268 cases naming the United States or a

⁹⁸ Federal officials sued in their private capacity in civil rights actions under § 1983 were not included in the count of federal instrumentalities. The data are imperfect, as some petitions name the wrong defendants or mis-identify defendants, and the real parties in interest in mandamus actions cannot consistently be identified in the docket.

⁹⁹ STERN ET AL., *supra* note 7, at 521 n.48.

¹⁰⁰ *Id.*

¹⁰¹ It is possible, but unlikely, that the Solicitor General opts to waive response to certain meritorious petitions in an attempt to decrease the chance that it will be seriously considered at the Court or to avoid conceding in a response brief that the petition is cert-worthy. The data do not suggest this to be true, nor do any Supreme Court experts believe it to be the case.

federal instrumentality (such as an agency, department, or department head in her official capacity) as respondent, at least one response was voluntarily filed in only 1,676 (13.7%) cases, the vast majority of which were filed by the SG.¹⁰²

Strikingly, the grant rate for cases in which the SG files a response is 26 times higher than the grant rate for cases in which the SG does not file a response. Of the 10,592 cases to which the SG did not voluntarily respond, only 8 (0.08%) were granted plenary review. In contrast, of the 1,676 cases in which the SG voluntarily responded, the Court granted 36 (2.1%) cases. If the SG were to randomly choose petitions to which to respond, then the grant rates for responses and non-responses would be expected to be identical, for a ratio of 1. These data indicate that the SG's decision to file a response initially is highly predictive of the Court considering a grant more seriously. In other words, if the United States is the respondent and the SG does not respond, the Court is extremely unlikely to grant cert.

The SG's ability to predict which cases might be worthy of the Supreme Court's time extends to the ability to judge the quality of cases which, on their face, may seem like they have potential. Even when the Court requests a response from the United States, it rarely grants cert. In other words, even when the Court's interest is piqued by a cert petition to which the SG did not respond, it rarely turns out that the case is worthy of a grant after all. The Court was sufficiently interested in other cases that it called for a response in 234 of the 10,592 (2.2%) cases naming the United States or a federal instrumentality as respondent with no response filed.¹⁰³ Of these 256 calls for response, only 8 (3.1%) resulted in grants of plenary review.¹⁰⁴

¹⁰² It is possible, although rare, for another party in a complex multi-party case to file a brief in response and for the Solicitor General to waive. Similarly, the Solicitor General will file all briefs for the United States and federal agencies except in exceedingly rare inter-branch constitutional struggles. *See, e.g.,* *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994) (“Because the FEC lacks statutory authority to litigate this case, it necessarily follows that the FEC cannot independently file a petition for certiorari, but must receive the Solicitor General’s authorization.”); *Personnel Adm’r v. Feeney*, 442 U.S. 256 (1979) (in which amicus briefs were filed independently by the Solicitor General and by the Office of Personnel Management). *See also* Theodore B. Olson, *The Advocate as Friend: The Solicitor General’s Stewardship Through the Example of Rex E. Lee*, 2003 BYU L. REV. 1, 31-34 (describing an “example[] of two-headed government presentation”).

¹⁰³ The Court called for a response in a total of 256 cases with the United States as first respondent. The disparity—22 cases—between 234 and 256 is caused by the presence of multi-party cases in which some respondents filed a brief and others waived; in the 22 cases, the Court requested a response from one of the parties that had not yet responded. The docket information collection process is unable to identify which party responded voluntarily and which party was ordered to respond.

¹⁰⁴ This analysis also suggests that the Solicitor General does not attempt to conceal meritorious cases by failing to respond. Were the Solicitor General to do so, one would expect the grant rate for cases in which the Court called for a response—and thus closely examined the case—to be higher than the general grant rate.

The SG's decision to respond voluntarily is less predictive of a cert grant when focusing solely on paid cases. The grant rate for paid cases in which the SG voluntarily filed a response is about 11 times higher than cases in which the SG waived. Looking only at the paid docket, the SG voluntarily filed a response in 985 cases, which led to 32 grants of plenary review (3.2%); in contrast, of the 1,042 cases in which no response was filed, only 3 cases were granted plenary review (0.3%).¹⁰⁵

Looking across the entire docket—including both paid and unpaid cases—the Court calls for the SG's response less frequently than it does from other parties. The Court calls for a response from the United States in 2.2% of cases in which the SG waived response, compared to 3.2% of cases in which other types of respondents waived response. Further, only 3.1% of calls for the SG's response lead to grants, compared to 8.6% of all CFRs. The extremely low grant rate among CFRs received by the SG suggests that either the SG's analysis is frequently persuasive to the Justices, or that cases naming the United States as respondent are less frequently meritorious than other types of cases.

Put another way, the Supreme Court ultimately granted certiorari and argument in 44 cases naming the United States or a federal instrumentality as respondent. Of those cases, the SG had voluntarily responded in all but 8 (18%). In contrast, the SG filed voluntary responses in only 13.6% of all cases naming the United States or a federal instrumentality as respondent. In other words, despite responding in only 13.6% of cases, the SG successfully identified 82% of all cases which were ultimately granted plenary review. Had the SG randomly selected 13.6% of cases in which to file a response then it would be expected that they would predict only 13.6% of grants.¹⁰⁶ Across all respondent types, responses are filed in 19.4% of all filings, but only predict 78.3% of all grants; with fewer responses, the SG is able to predict a higher proportion of grants.

3. Calls for Response from the United States as Respondent

Of the 11,045 petitions naming the United States (*qua* United States) as respondent, the Court called for response in 243 (2.2%). Of the 9,699 cases in which no response was filed, the Court called for response in 223 (2.3%).¹⁰⁷

¹⁰⁵ The normal caveats about small sample size apply to any analysis based on only three cases in which cert was granted.

¹⁰⁶ An alternative hypothesis is that the Court takes the Solicitor General's waiver as a strong signal that a case is not worthy of plenary review. These explanations are not mutually exclusive; either way the Solicitor General has an exceptional ability to sort out potentially meritorious and frivolous cases.

¹⁰⁷ The remaining 20 CFRs occurred in cases with multiple parties where one or more parties had already responded before the Court called for response from one or more non-responding parties.

Looking at the *in forma pauperis* docket, the Court called for response in 212 of 10,084 (2.1%) total petitions naming the United States as respondent, or 192 of 9,046 (2.1%) petitions which featured no voluntary response. In the paid docket, the Court requested response in 31 of 961 (3.2%) total petitions, or 31 of 653 (4.7%) with no voluntary response. Of the 1,223 petitions naming a federal agency, federal officer, or instrumentality as respondent, the Court requested response in 13 (1.1%), of which there were 893 cases in which no response was voluntarily filed by any party (1.2%).

Among cases filed on the *in forma pauperis* docket, the Court called for response in 8 of the 546 (1.5%) total cases naming a federal agency, federal official, or federal instrumentality as respondent, or 7 of the 504 (1.4%) in which there was no voluntary response filed. Looking at the paid docket, the Court called for response in 5 of the 677 (0.7%) petitions filed naming a federal agency, department, or officer in her official capacity as respondent, or 4 of the 389 (1.0%) in which no voluntary response was filed.

4. Calls for Response to Cert Petitions Filed by the United States

In sharp contrast to the status of the United States as respondent—in which the government waives its right to respond in the vast majority of cases—the vast majority of petitions filed by the SG ultimately result in a response brief being filed, either voluntarily or ordered by the Court through a CFR. Of 128 petitions filed by the United States and federal instrumentalities, the respondents filed voluntary responses 78.9% of the time (101 cases). Of the remaining 27 unanswered cases, the Court ordered response in 40.7% (11 cases). Ultimately, 87.5% (112 of 128) of petitions filed by the SG led to a response brief being filed. This extremely high response rate is consistent both with the SG’s role as an effective gatekeeper over United States litigation in the Supreme Court and the philosophy of responding as a matter of course to government-filed petitions.

E. *States as Parties*

1. Waiver Practice of Individual States as Respondents

Like the SG, the states are also faced with a high volume of cert petitions and must decide which cases merit response; states also waive in “many cases deemed to be frivolous or insubstantial.”¹⁰⁸

¹⁰⁸ STERN ET AL., *supra* note 7, at 461.

The particular waiver practice of a state may depend on whether that state has its own solicitor general or appellate department devoted solely to handling appeals. States with a solicitor general or appellate department, such as New York, Texas, Oregon, Illinois, and Ohio, tend to have a similar practice to that of the United States Solicitor General: such states respond in potentially meritorious cases and waive only in those cases that are clearly not worthy of certiorari.¹⁰⁹ State appellate litigators are often assisted by Dan Schweitzer, who helps state attorneys prepare for Supreme Court briefing and arguments in his role as Supreme Court Counsel of the National Association of Attorneys General. Mr. Schweitzer advises states to waive response if the petition does not present a colorable claim, is clearly a fact-bound question, and/or seems to be of interest only to the individual litigant. However, where there is a serious question presented to the Court in a cert petition, he recommends that the state respond.¹¹⁰

However, unlike the United States as respondent, some states waive response in *all* non-capital cases and file a brief only if the Court issues a CFR.¹¹¹ States also tend to waive response frequently in criminal cases,¹¹² due in part to the structure of state attorney general offices. Many state attorney general offices are separated into a civil division and a criminal division, with the criminal division handling only appellate matters and the head of that office acting as a *de facto* state solicitor general.¹¹³ Because these divisions often handle all direct appeals and habeas petitions, the workload can be oppressive. As a result, such states tend to waive response in the vast majority of criminal cases, where IFP/pro se prisoners often raise frivolous issues.¹¹⁴ In fact, “[i]n noncapital criminal cases, some state authorities refuse to file responses to *in forma pauperis* petitions unless requested to do so by the Court. On occasion, the Court may call for a response when it has difficulty in understanding from the petition what the petitioners’ claim is, or what the critical facts are.”¹¹⁵

The data bear out these observations, indicating that states waive response in the vast majority of cases and do so in a greater percentage of cases than respondents overall. A state, state agency, or non-prison state officer in his official capacity was named as the first respondent in 15.4% (4,842) of the 31,408 certiorari petitions considered. State prison wardens

¹⁰⁹ Telephone interview with Roy T. Englert, Jr., *supra* note 83; Telephone interview with David C. Frederick, *supra* note 49; Telephone interview with Frank Lorson, *supra* note 32; Telephone interview with Dan Schweitzer, *supra* note 83.

¹¹⁰ Telephone interview with Dan Schweitzer, *supra* note 83.

¹¹¹ *Id.*; Telephone interview with Roy T. Englert, Jr., *supra* note 83.

¹¹² STERN ET AL., *supra* note 7, at 521.

¹¹³ Telephone interview with Dan Schweitzer, *supra* note 83. In some states, the head of the criminal division of the state attorney general office also conducts trials, and in others he does not do direct appeals.

¹¹⁴ *Id.*

¹¹⁵ STERN ET AL., *supra* note 7, at 521 n.49.

and superintendents—the named party in petitions for a writ of habeas corpus, as well as prison condition claims—were named as the first respondent in an additional 20.1% (6,313) of petitions.¹¹⁶ Thus, roughly 11,155 (35.5%) petitions featured a state or state agency as the first named respondent.¹¹⁷ Of these 11,155 petitions, there was no response in 85.3% (9,520) of cases and a voluntary response filed in only 14.7% (1,635) of cases. The states' practice of waiving in 85.3% of cases is even higher than the average respondent, who waives in 80.5% of all cases. However, as shown, *infra*, states appear to select the correct petitions to respond to and their high waiver rates may be caused by the high number of IFP/pro se petitions filed against them.¹¹⁸

2. The Predictive Value of a State's Waiver of Response on Certiorari Denial

Like the SG, individual states also appear to be skilled in predicting which cases merit response, if we assume that states waive response primarily in cases that they deem unworthy of cert. However, as discussed above, states also waive in many instances where a petition may be cert-worthy, for both workload and strategic reasons. In any event, the data show that, as is the case with the SG, a state's decision to waive response is highly predictive of a denial of cert from the Court.

Between OT '01 and OT '04, there were 4,842 petitions naming states as the respondent, and 6,313 petitions naming state prison wardens as the respondent.¹¹⁹ The Supreme Court called for response in 117 (1.9%) cases naming state prison wardens as respondent. Of these 117 calls for response, only 2 (1.7%) resulted in grants, compared to 14 grants from the 550 cases featuring voluntary responses (2.5%). States—including states, state agencies, and state prison wardens—did not respond to 9,520 cert petitions, of which 13 were granted (0.14%). In contrast, states voluntarily responded to 1,635 petitions, which resulted in 35 grants (2.1%).

The grant rate for petitions in which states voluntarily respond is 15.6 times higher than the grant rate for petitions which states do not answer. While this 15.6 ratio is not as high as that of the SG (whose voluntary re-

¹¹⁶ Prison wardens were considered separately as they generally represent habeas petitions. *See Rumsfeld v. Padilla*, 542 U.S. 426, 447 (“Whenever a . . . habeas petitioner seeks to challenge his present physical custody within the United States, he should name his warden as respondent . . .”). There are a handful of federal prison wardens who could not be identified as such; they may have been inadvertently tagged as state prison wardens.

¹¹⁷ Some states may consolidate litigation on behalf of local government when it reaches the Supreme Court; this consolidation is not captured by the data available in the dockets.

¹¹⁸ *See infra* Parts I.E.2-3.

¹¹⁹ Again, suits naming prison wardens are generally petitions for a writ of habeas corpus. *See* source cited *supra* note 116.

sponse indicates that the cert petition is 26 times more likely to be granted), it still indicates that a state's decision to waive is highly predictive of an ultimate denial of cert.

The lower ratio for states can likely be explained by the tendency of some states to waive response indiscriminately, as discussed above. This hypothesis is supported by these data, which show that a state's decision to waive correlates more closely with the Court's decision to deny cert in paid petitions; as discussed above, states are more likely to waive across the board in IFP criminal cases. Looking only at the paid docket, the Court granted petitions for certiorari in 6 of the 818 petitions to which states did not respond (0.73%), and granted 20 of the 261 petitions to which states responded (7.7%). The grant rate for paid petitions to which states voluntarily responded is 10.4 times higher than the grant rate for cases in which states did not respond. This is nearly as high as the SG's ratio in paid cases.

3. Calls for Response from Individual States as Respondents

The Court calls for response more often in cases with state respondents than in cases overall. While the overall CFR rate during the examined period was 2.7%, the Court called for response in 4.2% of cases with a state or state agency as respondent (203 of 4,842). However, the Court issued a CFR in only 1.9% of cases with a state prison warden or superintendent as respondent (117 of 6,313). Combining state and state-prison respondents, there is a CFR rate of 2.9% of petitions filed (327 of 11,155), which approximates the overall CFR rate.

If we look only at those cases in which no response was filed, the pattern is the same: the Court issues substantially more CFRs in cases with state respondents than on average, but fewer than average CFRs where a state prison is named.

Looking only at cases naming states, state officials, and state agencies as respondent (but not including cases naming prisons), the Court called for response in 5.4% of cases with no voluntary response filed (203 of 3,757 cases). On the in forma pauperis docket, the Court called for response in 3.8% of cases (152 of 3,994), or 4.9% (152 of 3,133) of petitions with no voluntary response. On the paid docket, the Court called for response in 6.0% (51 of 848) of total petitions, or 7.5% (47 of 624) of cases with no voluntary response filed.

Looking only at cases naming state prison wardens as respondent, the Court called for response in 2.0% (116 of 5,763) of petitions with no voluntary response filed. Of the 6,082 certiorari petitions filed in forma pauperis,

the Court called for response in 1.8% (107), or 1.9% (106 of 5,569) of IFP petitions without voluntary response.¹²⁰

4. Calls for Response to Cert Petitions Filed by Individual States

As in the case of the SG, the vast majority of cert petitions filed by states are followed by response briefs, either voluntarily filed by respondents or called for by the Court. Of the 257 petitions filed by individual states or state agencies, voluntary responses were filed in 184 (71.6%). In contrast, across the entire docket, a voluntary response was filed only 19.5% of the time. Of the 73 cases without response, the Court requested response in 46 (63%). Ultimately, 230 of the 257 (89.5%) of the petitions by states resulted in either voluntary or requested responses. The high response rate is again consistent with principles of courtesy toward the government and is an indication that state appellate litigation is restricted to potentially meritorious cases.

F. *Private Litigants*

1. Waiver Practice of Private Litigants as Respondents

Private litigants are likely to file voluntarily briefs in opposition far more often than the United States and individual states, even after adjusting for the different mix of paid and IFP petitions filed naming private litigants as respondents.

Of the 2,256 petitions for certiorari naming a business¹²¹ as the first respondent (7.2% of all petitions), a response was voluntarily filed in 49.4% of cases (1,114 instances). Of 3,053 (9.7%) petitions naming an individual as respondent, a response was filed in 34.2% of cases (1,044 instances). These percentages are quite high; the average respondent files an opposition brief in only 19.5% of cases.

¹²⁰ Data regarding paid petitions naming state prison wardens as respondent are omitted due to the small sample size.

¹²¹ These respondents include any form of partnership, company, corporation, or DBA. These data do not include sole proprietorships that are not readily identifiable from the docket, nor do they include incorporated labor unions and political action committees.

		Individual	Business
Total Cases	<i>Petitions as Respondent</i>	3,053	2,256
	<i>Responses Filed</i>	1,044 (34.2%)	1,114 (49.4%)
Paid Cases	<i>Petitions as Respondent</i>	1,737	1,672
	<i>Responses Filed</i>	964 (55.5%)	1,004 (60.0%)

Looking solely at the paid docket, 1,672 cert petitions were filed naming a business as respondent. Compared to the total number of cases—74.1% of petitions naming a business as respondent were on the paid docket. Of these paid petitions with a business as first respondent, 60.0% (1,004) resulted in a response from at least one party. This is notably higher than the overall response rate of 46.4% of all cert petitions on the paid docket.

Looking again at the paid docket, 1,737 cert petitions were filed naming an individual as respondent (56.9% of petitions naming an individual as respondent were on the paid docket). Of these petitions, 964 (55.5%) resulted in a response being filed. This, again, is notably higher than the 46.4% likelihood of any case on the paid docket leading to a response being filed.

There are several possible explanations for why private litigants file waivers less frequently than states and the United States. Law firms representing corporate litigants and individuals often do not have the workload constraints faced by many state attorneys general and the U.S. Solicitor General; thus, these litigants may have the capacity to file a brief in opposition if they wish to do so. In addition, many attorneys unfamiliar with Supreme Court certiorari practice may unnecessarily file briefs in opposition to frivolous petitions out of a sense of expectation that a brief *should* be filed whenever possible.¹²² Attorneys may also fear malpractice for failing to file a brief should the case be granted¹²³ or may seek the added fees earned from the filing of the opposition brief.

There are also, however, reasons for private litigants to waive the right to respond. First, a brief in opposition can be costly if produced by a large law firm; pricing estimates for a brief in opposition range from \$20,000 to several times that figure, depending on the firm and the complexity of the issue.¹²⁴ Second, respondents may want a case to end sooner so that they may collect their judgment and end litigation. Filing a waiver document as

¹²² Telephone interview with Charles A. Rothfeld, *supra* note 49.

¹²³ Of course, very few cases have ever been granted without a response brief being filed or requested. *See supra* Part I.E.2.

¹²⁴ Telephone interview with Kenneth S. Geller, *supra* note 73.

soon as the cert petition is docketed allows the Court to consider a petition immediately rather than waiting for a response brief to be drafted and filed; an express waiver can save the respondent three to four weeks.¹²⁵ As Stern and Gressman note, a waiver will often “save time and money.”¹²⁶

A pattern of private defendants consistently responding to a high proportion of cases may also be explained by the inability of inexperienced litigants to accurately gauge the likelihood of certiorari being granted in any particular case, even if they intend to respond only to meritorious petitions. While some factors that lead to an increased likelihood of plenary review are well-known—such as a circuit split, a lower-court decision contradicting Supreme Court precedent, or an issue of national importance¹²⁷—the balance of these factors in evaluating the likelihood of review is difficult to determine without considerable experience. However, with the rise of “Supreme Court specialists”¹²⁸—appellate litigators who practice frequently before the Supreme Court—many private litigants are likely better able to evaluate petitions and file responses only in those cases where the Court will seriously consider a grant.

2. The Predictive Value of a Private Litigant’s Waiver on Certiorari Denial

The data indicate that a private litigant’s waiver is far less predictive of an ultimate cert denial than that of the SG or an individual state. Several factors are at play in this dynamic. First, as discussed above, private litigants file response briefs in a greater percentage of cases, minimizing the correlation between their waivers and cert denials. Second, and also discussed above, private litigants may not be as skilled as government attorneys at identifying petitions which merit response, assuming that an attorney’s goal is to respond in the most cert-worthy cases. Third, it is possible that private litigants are more likely not to respond to a cert-worthy petition intentionally, in an attempt to decrease the chance that the case will be seriously considered at the Court or to avoid making unwelcome concessions in a response brief. Last, it is possible that the different mix of cases handled by private respondents also make it more difficult to accurately predict the likelihood of cert; for instance, there are far fewer IFP petitions—which are often seen to be non-cert-worthy—filed against private respondents.

¹²⁵ STERN ET AL., *supra* note 7, at 288.

¹²⁶ *Id.* at 461.

¹²⁷ SUP. CT. R. 10; *see also* STERN ET AL., *supra* note 7, at 222-73 (detailing additional factors motivating the exercise of the Court’s certiorari jurisdiction).

¹²⁸ Joan Biskupic, *Lawyers Emerge as Supreme Court Specialists*, USA TODAY, May 16, 2003, at 6A, available at 2003 WLNR 606579.

Whatever the reason, the data show that a private litigant's waiver of response is not highly predictive of an ultimate denial of cert, in contrast to the predictive value of government waivers. The grant rate for cases in which business-respondents voluntarily file responses is only 3.1 times higher than the grant rate for cases in which no response is filed. This is significantly lower than the increase in the likelihood of a grant given the SG's response (26.0 times) and the increase in the likelihood of a grant given a state's response (15.6 times). Specifically, among the 2,256 petitions naming a business as the first respondent, the Court called for a response in 2.5% of cases (56 instances). Of these 56 calls for a response, the Court granted nearly a quarter of the cases (23.2%). Looking only at those cases in which no voluntary response was filed, the Court granted plenary review in 17 of the 1,142 (1.5%) cases naming a corporate respondent, compared to 51 of the 1,114 (4.6%) cases in which a voluntary response was filed.

Focusing on the paid docket, and looking at petitions naming a business as the first respondent, the Court granted plenary review in 17 cases of the 658 in which no response was filed voluntarily (2.6%), compared to 51 of the 1,004 (5.1%) of the cases in which a response was voluntarily filed. Thus, the grant rate for paid cases in which businesses voluntarily respond is only 2.0 times higher than the grant rate for cases in which no response is filed.

In other words, by one measure, the SG's decision to waive response is almost 9.0 times more predictive of a denial of cert than that of corporate litigants (26.0 times higher versus 3.1). Looking only at the paid docket, the SG is more than 5 times more predictive than corporate litigants (11.2 versus 2.0).

3. Calls for Response from Private Litigants as Respondents

The Court's CFR rate for cases with business entities as respondents is approximately the same as its overall grant rate, though private individuals are more likely to receive a CFR than the average respondent.

Looking first at petitions naming business entities as respondents, of the 2,256 petitions for a writ of certiorari naming a business or other business organization¹²⁹ as respondent, the Court called for response in 2.5% (56 cases); on average, the Court issued a CFR in 2.7% of petitions with all respondent types. However, the Court was more likely than average to issue a CFR where the business respondent had not voluntarily filed a response: of the 1,142 petitions with no voluntary response, the Court called for a response in 4.7% (54). The average for all respondent types is 3.2%.

The Court was far more likely to issue a CFR in a case where the business respondent did not respond to a paid petition than to an IFP petition.

¹²⁹ These respondents include partnerships, companies, corporations, and DBAs.

Looking only at the IFP docket, the Court called for response in 2 of 584 (0.3%) total cases naming a business entity as a respondent, or 1 of 474 (0.2%) petitions with no voluntary response filed. Looking at the docket for cases in which the filing fee was paid, the Court called for response in 54 of 1,672 (3.2%) total petitions, or 53 of 668 (7.9%) petitions with no voluntary answer.

Of the 3,053 petitions filed naming an individual¹³⁰ as respondent, the Court called for a response in 5.7% (173 cases), or 171 of the 8.5% (2,009) petitions with no voluntary response filed; these are substantially higher figures than the overall CFR rate of 2.7% of all petitions, or 3.2% of petitions without an initial voluntary response. The vast majority of these CFRs were issued in paid cases. The Court called for response in only 1.1% of all IFP petitions naming an individual as respondent, or 1.2% of such petitions where no voluntary response was filed. In contrast, the Court called for response in 9% of all 1,737 paid petitions naming a private individual as respondent, or 20.2% of 773 petitions (156 cases) for which there was no voluntary response. These 156 CFRs in no-response cases led to 30 grants (19.2%).

4. Calls for Response to Cert Petitions Filed by Private Litigants

While the majority of cert petitions filed by private litigants are ultimately followed by a response brief, the percentage is not as high as in the case of government petitioners; for individuals as petitioners, the number resulting in a response brief is considerably lower.

Looking first at businesses as petitioners, of the 1,321 cert petitions filed, 68.1% (900) led to voluntary response. Of the remaining 421 unanswered petitions, the Court called for response in 55 (13.1%). Ultimately, 72.3% of petitions filed by businesses led to responses being filed, compared with 87.5% and 89.5% of petitions filed by the SG and the individual states, respectively.

Of the 29,171 petitions filed by individuals, only 4,562 (15.6%) resulted in a voluntary response being filed. Of the remaining 24,609 cases with no voluntary response, the Court requested response in 647 (2.6%). Ultimately, only 17.9% (5,209) of all petitions filed by individuals led to a response being filed either voluntarily or at the request of the Court. IFP petitions that go unanswered account for a large portion of the 82.1% of private litigants' petitions that do not result in a response: of the 4,927 paid petitions filed by private individuals, 35.9% (1,771) led to voluntary responses being filed. Of the remaining 3,156 unanswered cases, the Court requested response in 169 (5.4%).

¹³⁰ These respondents include state officers in their private capacity under 42 U.S.C. § 1983 as they cannot be differentiated from truly private individuals based on the dockets.

G. *Conclusions on Waiver and CFR Practices*

The conventional wisdom about Supreme Court practice holds up to scrutiny. The practice of waiving response allows parties to save the time, energy, and resources that would be required to respond to the thousands of cert petitions filed each year. The vast majority of petitions for certiorari—especially those from the *in forma pauperis* docket—do not merit a response, as the Court is able to determine that such petitions do not raise a cert-worthy issue. The Solicitor General is especially skilled at distinguishing cert-worthy petitions and is extremely selective in his response. Similarly, the SG's role as gatekeeper of the government's petitions for a writ of certiorari is confirmed by the respect accorded to his petitions by other litigants and by the Court. However, private parties, and likely especially those litigating without the aid of "Supreme Court specialists"—those skilled litigators who frequently have practiced before the Court—often have difficulty identifying which cert petitions are worthy of response and which can be left alone. Many private parties file responses in cases in which the Court would have likely denied the petition even without the aid of a response, at a cost of thousands of dollars and possibly delaying the entry of a favorable judgment.

II. CALLS FOR THE VIEWS OF THE SOLICITOR GENERAL (OR CVSGS)

In the vast majority of cases, the parties' briefing will provide sufficient information for the Court to decide on the cert-worthiness of a petition. However, in some cases, the Court will call for the views of the United States Solicitor General ("CVSG"), to gain another perspective on a potentially cert-worthy brief.¹³¹ Through the CVSG process, the Court can use the SG as a resource to inform the Justices of the position of the United States and the importance of the issue presented by the petition to the government. As described by Justice Ginsburg:

Occasionally, the justices invite the views of the Solicitor General before voting on a review petition. The Solicitor General is the Department of Justice officer responsible for representing the United States in the Supreme Court. When we call for the Solicitor's views in a case in which the United States is not a party, the Solicitor acts as a true friend of the Court; after consulting with federal executive agencies and officers with relevant expertise, he offers his

¹³¹ In the past, the Court would on occasion call for the views of a state attorney general or state solicitor general. *See, e.g.,* *Brown v. Bd. of Educ.* (Brown II), 349 U.S. 294, 298-99 (1955) ("[W]e invited the Attorney General of the United States and the Attorneys General of all states requiring or permitting racial discrimination in public education to present their views on that question."). This practice is now defunct. This Article examines only the role of the U.S. Solicitor General.

views on the importance or unimportance of the question presented to the sound development of federal law.¹³²

Or, as described by former SG Drew Days:

[T]he Solicitor General is often asked formally by the Supreme Court through a process referred to in the relevant jargon as “CVSG” (or “call for the views of the Solicitor General”) to express his views on whether a pending petition for certiorari in a non-government case should be granted. In such instances, the Court is not seeking the advice of an advocate or a partisan, but rather as an officer of that court committed to providing his best judgment with respect to the matter at issue.¹³³

While there is a robust literature on the role of the SG and his relationship with the Court,¹³⁴ there is less written on the Court’s practice of calling for his views.¹³⁵ This Part considers the CVSG process and presents empirical conclusions based on data covering CVSG cases from OT ’92 through OT ’04.¹³⁶

A. *The CVSG Process*

The Supreme Court calls for the views of the SG through a formal process. During the study period, every petition for certiorari filed with the Court was initially considered by two law clerks: one from the chambers of Justice John Paul Stevens and one from the “cert pool.”¹³⁷ In Justice Ste-

¹³² Ruth Bader Ginsburg, *Workways of the Supreme Court*, 25 T. JEFFERSON L. REV. 517, 519 (2003) (internal parentheses omitted).

¹³³ Drew S. Days III, *The Solicitor General and the American Legal Ideal*, 49 SMU L. REV. 73, 79 (1995).

¹³⁴ See generally LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1987); CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—FIRST HAND ACCOUNT* (1991); SALOKAR, *supra* note 28; PETER N. UBERTACCIO III, *LEARNED IN THE LAW AND POLITICS: THE OFFICE OF THE SOLICITOR GENERAL AND EXECUTIVE POWER* (2005).

¹³⁵ The existing literature includes: SALOKAR, *supra* note 28, at 142-50 (examining the CVSG process from the Office of the Solicitor General’s perspective, the number of petition- and merits-stage invitations from 1959 to 1986, and the success rate of the Solicitor General in those cases); STERN ET AL., *supra* note 7, at 468 (describing the CVSG procedure); Cooper, *supra* note 28, at 690-91 (discussing the decision to CVSG and the frequency of a federal interest in cases where an CVSG is issued).

¹³⁶ Complete dockets and briefs are available for Terms OT ’01 through OT ’04; near complete dockets and briefs were collected for OT ’97 through OT ’00; only docket information was gathered for OT ’92 through OT ’96. Each empirical inquiry relies on the most complete data available to answer that question.

¹³⁷ STERN ET AL., *supra* note 7, at 290-91 & n.14; Ginsburg, *supra* note 132, at 520. Recently, however, Justice Alito has opted out of the certiorari pool, raising the number of law clerks who consider each certiorari to three. See source cited *supra* note 67. See generally Barbara Palmer, *The “Bermuda Triangle?”: The Cert Pool and Its Influence Over the Supreme Court’s Agenda*, 18 CONST.

vens's chambers, each clerk will prepare a memo for the Justice in approximately one of every four cases filed.¹³⁸ The "cert pool" is used by the other eight Justices to evaluate cert petitions. The Chief Justice's administrative assistant divides the petitions among the eight participating chambers.¹³⁹ A single clerk is assigned to each cert petition and then prepares a "cert-pool memo" for consideration by the eight Justices.¹⁴⁰ Each of the two assigned clerks—the Stevens clerk and the cert-pool clerk—recommend a disposition for the petition, such as to grant, deny, or "grant, vacate, and remand"¹⁴¹ the case. The clerks' memos could alternatively recommend that the Court issue a CVSG. One clerk from each of the cert pool chambers will review the cert pool memo and could also recommend a CVSG. Ultimately, the decision to CVSG is made by the Justices;¹⁴² the Court may opt to CVSG without a recommendation by a law clerk or reject a clerk's suggestion to CVSG.¹⁴³

Following distribution of the clerks' memos, the Chief Justice prepares a "discuss list" of petitions that are "considered worthy enough to take the time of the Justices at the conference for discussion and voting."¹⁴⁴ One possible outcome of the conference is a CVSG. If the Justices vote to request the views of the SG, the Clerk enters the request on the Order List and the docket for the case, which reads: "The Solicitor General is invited to file a brief in this case expressing the views of the United States."¹⁴⁵

Practitioners report that there has been uncertainty in the profession as to the number of votes at conference required to CVSG,¹⁴⁶ though the number of votes required is said to be listed in the Supreme Court's confidential internal handbook of procedures. In contrast, it is widely known that during the ordinary conference schedule, four votes are required to grant a cert petition.¹⁴⁷ According to former Supreme Court clerks and Supreme Court specialists interviewed for this Article, four votes are also required to

COMMENT. 105, 111-20 (2001) (examining the influence of the certiorari pool on the Justices and the Court's agenda).

¹³⁸ STERN ET AL., *supra* note 7, at 291 n.14.

¹³⁹ Ginsburg, *supra* note 132, at 520.

¹⁴⁰ See STERN ET AL., *supra* note 7, at 39.

¹⁴¹ See STERN ET AL., *supra* note 7, at 317, for a description of the GVR process.

¹⁴² *Medellin v. Texas*, 129 S. Ct. 360, 364 (2008) (Breyer, J., dissenting) (stating that four votes are required to call for the Solicitor General's views).

¹⁴³ See Palmer, *supra* note 137, at 119 ("[T]he influence of the cert pool over the Court's agenda is mitigated by the independent judgments of the Justices themselves.").

¹⁴⁴ STERN ET AL., *supra* note 7, at 13. Cases not on the discuss list are automatically denied. *Id.*

¹⁴⁵ STERN ET AL., *supra* note 7, at 468.

¹⁴⁶ Telephone interview with Roy T. Englert, Jr., *supra* note 83; Telephone interview with David C. Frederick, *supra* note 49; Telephone interview with Kenneth S. Geller, *supra* note 73; Telephone interview with Charles A. Rothfeld, *supra* note 49; Telephone interview with Dan Schweitzer, *supra* note 83.

¹⁴⁷ STERN ET AL., *supra* note 7, at 296 ("The Supreme Court has long followed the practice of granting plenary review of a certiorari case if a minimum of four Justices favor granting the petition.").

CVSG. The existence of a four-vote requirement has recently been confirmed publicly by Justice Breyer¹⁴⁸ and to the authors by a former Chief Deputy Clerk of the Court.¹⁴⁹ However, a 1994 Comment contradicts this conclusion, reporting that Justice Rehnquist stated in a letter that only three affirmative votes were required.¹⁵⁰

Responding to a CVSG places a burden on the SG's office. Accordingly, the Court's policy requiring four votes either to grant a petition or to call for the views of the SG may be based on respect for the time and resources of its coordinate branch. However, given that the decision to CVSG is not as weighty as the decision to grant or deny a case outright, an individual Justice without strong feelings on the case might be willing to contribute a fourth vote if three Justices are strongly interested in a CVSG. This unofficial policy would make the four-vote requirement a "soft four."¹⁵¹ It is also possible that where three or fewer Justices wish to grant, those Justices may encourage a CVSG, keeping the case alive, hoping for a persuasive recommendation to grant from the SG.¹⁵²

B. *The Significance of a CVSG*

1. The Effect of a CVSG on Grant Rate

The data show that the grant rate is considerably higher following a CVSG. This finding comports with both conventional wisdom and the fact that a CVSG indicates that there are at least four Justices with an interest in the case.

Specifically, of petitions filed from OT '98 through OT '04, the Supreme Court granted plenary review to 31 of 91 (34%) cases in which it called for the views of the SG. Thus, a petition is over 37 times more likely to be granted following a CVSG.¹⁵³ Looking only at paid cases, the Court

¹⁴⁸ *Medellin v. Texas*, 129 S. Ct. 360, 364 (2008) (Breyer, J., dissenting) (stating that four votes are required to call for the Solicitor General's views).

¹⁴⁹ Telephone interview with Frank Lorson, *supra* note 32. The Clerk's office is the entry-point for all business at the Supreme Court. STERN ET AL., *supra* note 7, at 25 ("[A]ll business with the Court is conducted through the Clerk's Office.").

¹⁵⁰ Cooper, *supra* note 28, at 690 & n.86. Here, we will use the four-vote requirement, as confirmed by Justice Breyer, among others. *Medellin*, 129 S. Ct. at 364.

¹⁵¹ Interview with Jeffrey L. Fisher, *supra* note 41.

¹⁵² *Id.*

¹⁵³ As we caution above with respect to CFRs, this is a descriptive statistic that reveals how the Court sees a petition, not an indication that the CVSG process itself increases the likelihood of a grant. It is not necessarily that the Solicitor General's recommendation itself increases the likelihood of a grant; instead, it is quite likely that cases which the Court thinks worthy of a CVSG are those it thinks possibly worthy of a grant. Thus, an observer who knows nothing about a case other than that the court has called

called for the views of the SG 67 times and granted 28 of these petitions (42%). In other words, a petition in a paid case is over 46 times more likely to be granted following a CVSG.

The Court actually grants more petitions following a CVSG than the SG recommends should be granted. In other words, the Court is likely to still grant a petition after a CVSG, even if the SG has recommended denying. From OT '98 through OT '04, the Court granted plenary review in 31 cases, despite the SG recommending a grant in only 24 cases. In light of the Court's small docket and minuscule overall grant rate, it may be unexpected that the Court would grant more cases following a CVSG than the SG recommends be granted. However, as discussed, a case is only sent to the SG when four Justices are sufficiently interested; thus, it may be possible that all or many of those four Justices were predisposed to vote to grant prior to the expression of the SG's views. Moreover, it is of course possible that the SG is somewhat risk-averse in recommending a grant to the Court, and thus, in erring on the side of caution, tends not to recommend a grant where cert-worthiness is a close call.

Period	Total Grants	Grant Rate
OT '98-OT '00	9 of 34	26%
OT '01-OT '04	22 of 57	39%

Notably, after OT '01, the Court became more likely to grant in a case where the SG was invited to file a brief, no matter what the recommendation of the SG turned out to be. This may signal a change in the way that the Court approaches the CVSG—with the modern trend suggesting that the Court may be using the SG more as an information-gathering tool rather than primarily as a source for a recommendation as to grant or deny.¹⁵⁴ Cases filed from OT '98 through OT '00 roughly correspond to the term of Solicitor General Waxman; cases filed from OT '01 through OT '04 roughly correspond to the term of Solicitor General Olson.¹⁵⁵ The SG's mixture of recommendations remained roughly constant: from OT '98 to OT '00, the SG recommended a grant in 9 cases and a deny in 11 cases (a ratio of 1:1.2), and from OT '01 through OT '04, the SG recommended a grant in 15 cases and a deny in 35 cases (a ratio of 1:2.3). However, from OT '01 through OT '04, the Court granted 22 of 57 (39%) of cases in which it requested the views of the SG, up from granting 9 of 34 (26%) from OT '98

for the views of the Solicitor can comfortably predict a substantially higher likelihood of a grant than in a case in which the Court has not yet acted.

¹⁵⁴ Of course, all the usual cautions about a small sample size apply.

¹⁵⁵ Acting Solicitor General Underwood served for five months during OT '00 (January to June of 2001) after the inauguration of President George W. Bush. As a result, not all cases filed in OT '00 were ultimately handled by Solicitor General Waxman.

through OT '00, thus indicating the increased likelihood of a cert grant after a CVSG.

2. The Effect of the Solicitor General's Recommendation

The data show that in the majority of cases, the Court follows the SG's recommendation on whether to grant cert. When the SG recommends that the Court grant, he typically also includes his opinion on the merits of the case.¹⁵⁶ The Court's ultimate decision on the merits is not highly correlated to the SG's merits recommendation in his invitation brief.

a. *On the Decision to Grant or Deny*

The SG recommends that the Court deny the petition in the majority of CVSG briefs and recommends a grant in just over a quarter of cases. Specifically, of the 92 CVSG cases from OT '98 through OT '04, the SG recommended a straight "grant" or "deny" in 79 cases—as opposed to a recommendation that the Court should hold the case pending an outcome in another case or grant a companion case. The SG recommended a *deny* in 55 instances (60.4% of all recommendations), a *grant* in 24 instances (26.4%), that the Court hold the case pending the outcome of a different case in 4 instances (4.4%), that the court GVR in 4 instances (4.4%), and idiosyncratic dispositions¹⁵⁷ in the remaining 5 (5.5%) cases.

Recommendation by SG	Percentage of Recommendations (OT '98-OT '04)
Deny	60.4%
Grant	26.4%
Hold	4.4%
GVR	4.4%
Other	5.5%

¹⁵⁶ See, e.g., Brief for the United States as Amicus Curiae, *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007) (No. 05-983), 2006 WL 2701737.

¹⁵⁷ These included a recommendation to grant *or* hold a case pending the outcome of a different case, a recommendation to grant a companion case, a recommendation to either deny or GVR, and a recommendation that the Court issue a summary reversal.

The data show, as many practitioners and Court-watchers believe,¹⁵⁸ that the Court's decision to grant or deny a case often follows the SG's recommendation. Of the 79 cases in which the SG recommended a *straight grant or denial*, the Court followed the SG's recommendation 78.5% of the time (62 cases).¹⁵⁹ The Court followed the SG's recommendation in all 4 of the 4 (100%) cases in which the SG recommended that the Court vacate and remand the case without argument. Accordingly, of the 83 cases in which the SG recommended a straight grant, deny, or GVR, the Court followed the recommendation 79.5% of the time (66 cases).

The likelihood that the Court will follow the suggestion of the SG does not appear to depend on what the SG recommends. From OT '98 through OT '04, the Court followed the SG's recommendation to *grant* 75% of the time (18 of 24 cases) and denied the remaining 6 petitions. In contrast, of the 55 invitation briefs in which the SG recommended that the Court *deny* the petition, the Court denied 80% of the petitions, granted 18%, and issued a GVR in 1 case.

The Court's response varied greatly across the 8 cases with recommendations other than grant, deny, or GVR. Of the 4 cases in which the SG recommended that the Court hold the case pending the disposition of a different case, the Court ultimately granted 2 cases, denied 1 case, and issued a GVR in 1 case. In 1 case, the SG recommended summary reversal, and the Court granted and then reversed on the merits. In 2 cases, the SG recommended that the Court grant a companion case; in both instances, the Court issued a GVR in the case at hand and granted the companion.

Period	Agreement with Grant Rec.	Agreement with Deny Rec.
'98-'00	4 of 9 (44%)	15 of 20 (75%)
'01-'04	14 of 15 (93%)	29 of 35 (83%)

Notably, after OT '01, the rate at which the Court followed the recommendation of the SG to grant a case increased dramatically: Of cases filed OT '01 through OT '04, the Court granted 14 of 15 (93%) of the cases¹⁶⁰ in which the SG (Olson, at the time) recommended a grant, up from a mere 4 of 9 (44%) from OT '98 through OT '00 (during General Waxman's tenure). However, the rate at which the Court followed the recommendation of the SG to deny a petition remained relatively constant. From OT '98 through OT '01, the Court followed 15 of 20 (75%) recommendations to deny a case, granted 4 (20%), and issued a GVR in the remaining case

¹⁵⁸ Telephone interview with Roy T. Englert, Jr., *supra* note 83; Telephone interview with David C. Frederick, *supra* note 49; Telephone interview with Kenneth S. Geller, *supra* note 73.

¹⁵⁹ In one case, the Solicitor General suggested that the Court either deny or GVR, and the Court denied the case; this was coded as an agreement.

¹⁶⁰ The Court later dismissed the writ in one case.

(5%). From OT '01 to OT '04, the SG recommended that the Court deny 35 petitions; the Court followed that suggestion in 29 (83%) cases and granted the remaining 6 (17%) cases.

Given the SG's unique relationship with the Supreme Court,¹⁶¹ it is perhaps unsurprising that the Court follows his recommendation in the vast majority of CVSG cases. As described by Former Solicitor General Days, "the Solicitor General's long-term relationship with the Court reinforces his duties as an officer of that Court and creates a sense of trust and obligation."¹⁶² Moreover, the SG's sparing recommendation to grant may also lead the Court to consider a grant recommendation to be particularly weighty: the SG receives many invitations but recommends a grant in only 26% of them. The Court's reliance on, and agreement with, the SG is also evidenced by the SG's high grant rate in cases in which the United States is petitioner,¹⁶³ and the success of the United States as an amicus in persuading the Court.¹⁶⁴

b. *On the Merits*

In invitation briefs in which the SG recommends that the Court grant, the SG typically makes an additional recommendation as to how the Court should rule on the merits. From OT '98 through OT '04, the SG filed 30 invitation briefs with a clear recommendation on the merits.¹⁶⁵ Of these, 24

¹⁶¹ See generally CAPLAN, *supra* note 134, at 19-32.

¹⁶² Days, *supra* note 133, at 77.

¹⁶³ Estimates of the Solicitor General's grant rate as petitioner range from 46% to 80%. See, e.g., ROBERT SCIGLIANO, *THE SUPREME COURT AND THE PRESIDENCY* 175 (1971) (finding a 70% grant rate for the United States' certiorari petitions between 1958 and 1967); STERN ET AL., *supra* note 7, at 221 (reporting an average grant rate of 46% for the United States as petitioner between 1992 to 1998); Cooper, *supra* note 28, at 683 ("Each year almost 80 percent of the government's petitions for certiorari are granted and in 80 percent of those cases the government's position on the merits is supported.").

¹⁶⁴ In cases in which the Solicitor General was invited to file an amicus brief at the petition or merits stage, "[f]ifty-six cases with invitations were decided on the merits and the government's position prevailed in 59 percent of the cases decided by plenary review." SALOKAR, *supra* note 28, at 144. Steven Puro, looking only at cases in which the Solicitor General was invited to weigh in on economic issues at the merits stage, found that the government prevailed 6 of 10 times. *Id.* at 145. In both voluntary and invited amicus briefs at the merits stage, the Solicitor General is on the winning side 75% of the time. Norman-Major, *supra* note 28, at 1095-96. There have also been several studies considering the Solicitor General's effectiveness as a voluntary amicus. See, e.g., Steven Puro, *The United States as Amicus Curiae*, in *COURTS, LAW, AND JUDICIAL PROCESSES* 220, 223-26 (S. Sidney Ulmer ed., 1981); Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 *LAW & SOC'Y REV.* 807, 827 (2004); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 *U. PA. L. REV.* 743, 801-04 (2000); Jeffrey A. Segal, *Amicus Curiae Briefs by the Solicitor General During the Warren and Burger Courts*, 41 *W. POL. Q.* 135, 138-41 (1988).

¹⁶⁵ Invitation briefs recommending a GVR were included as briefs with an opinion on the merits as a recommendation of GVR inherently includes both procedure and result.

occurred in cases where the SG recommended the Court grant the petition; 2 were in cases where the SG recommended a GVR; 1 was in a case in which the SG suggested denying the petition, but made a recommendation on the merits should the case be heard; 1 was in a case in which the SG recommended a summary disposition; and the remaining 2 were in cases where the SG recommended granting a companion case or holding the case pending future developments.

The Court's ultimate decision on the merits is only loosely correlated with the SG's recommendation on the outcome at the petition stage.¹⁶⁶ Of the 2 cases where the SG suggested that the Court grant review in order to affirm the decision below, the Court denied one case and granted the other, but later dismissed the petition as improvidently granted before a decision on the merits could be issued. Of the 19 cases in which the SG suggested a grant in order to reverse, the Court ultimately granted and affirmed 3 cases, granted and reversed 12 cases, denied 4 petitions, and issued a GVR in 1 petition. In the remaining 2 cases, the SG made a recommendation that called for affirming in part and reversing in part, which resulted in one grant-and-affirm and one denied petition.

C. *The Court's Decision to Seek the Views of the Solicitor General*

1. The Unique Role of the Solicitor General

The Supreme Court can almost always benefit from hearing the views of the SG. The SG is the "consummate 'repeat player'" before the Court,¹⁶⁷ as such, he has considerable experience evaluating the merits of cert petitions. As described by former Solicitor General Rex Lee:

The Supreme Court in any given year will consider about 160 cases on the merits. The Solicitor General's client is a party in about sixty of those cases. In addition, his client will participate as amicus curiae both in the briefing and the oral argument of about twenty-five or thirty more cases. Those numbers alone render unique the relationship of this particular little twenty-three member law firm to the only court before which it practices. I know of no other court of general jurisdiction in the world in which one law firm appears in more than half of its cases.¹⁶⁸

¹⁶⁶ The record of the Solicitor General generally is quite impressive. SALOKAR, *supra* note 28, at 3. However, the role of the Solicitor General as an invited party at the petition stage is quite different. In addition, in some cases the position of the Solicitor General may change between petition and argument after further inter-branch negotiations take place.

¹⁶⁷ Norman-Major, *supra* note 28, at 1087.

¹⁶⁸ Rex E. Lee, *Lawyer for the Government: Politics, Polemics & Principle*, 47 OHIO ST. L.J. 595, 596 (1986).

In fact, in OT '01, the SG participated in “a full eighty-three percent of the Court’s argument docket.”¹⁶⁹ Moreover, the SG offers the Court an exceptionally high quality of legal analysis:

Beyond the numbers there is a widely held, and I believe substantially accurate, impression that the Solicitor General’s office provides the Court from one administration to another—and largely without regard to either the political party or the personality of the particular Solicitor General—with advocacy which is more objective, more dispassionate, more competent, and more respectful of the Court as an institution than it gets from any other lawyer or group of lawyers.¹⁷⁰

2. The Court’s Use of the CVSG, by Case Type

Given the SG’s unmatched experience with the Court and its standards for certiorari, and the quality of legal reasoning produced by the office,¹⁷¹ it is understandable that the Court would seek his opinion on close questions of certiorari. Of course, the Court cannot request the views of the SG in all cases; although the SG is known to some as the “tenth justice,”¹⁷² the Court must make selective use of the time and resources of the Office of the Solicitor General. The data show that the Court’s CVSG requests focus primarily on three types of cases: cases implicating the interests of the federal government, cases with the potential to shape an important area of law, and cases involving complex regulatory or statutory schemes.

First, the Court will frequently turn to the SG for information about the interests of the federal government in the case at hand.¹⁷³ One study considered the “level of federal interest” in invitations between 1935 and 1987 and found that “the Court is much more solicitous of the government’s views when the federal interest is direct and unqualified. Where that interest is implied or public, the Court shows great reluctance in asking the Solicitor General to file an amicus brief.”¹⁷⁴ Of 119 CVSG cases between 1984 and 1987, the study labeled 68 as involving a “direct” federal interest, 45 an “implied” federal interest, and 6 a “public” interest.¹⁷⁵ These numbers sup-

¹⁶⁹ Olson, *supra* note 102, at 4-5.

¹⁷⁰ Lee, *supra* note 168, at 597.

¹⁷¹ See *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 96 n.2 (1994) (“[T]he traditional specialization of [the Solicitor General’s Office] has led it to be keenly attuned to this Court’s practice with respect to the granting or denying of petitions for certiorari.”).

¹⁷² See CAPLAN, *supra* note 134, at 3.

¹⁷³ Telephone interview with Jeffrey L. Fisher, *supra* note 41; Telephone interview with David C. Frederick, *supra* note 49; Telephone interview with Charles A. Rothfeld, *supra* note 49.

¹⁷⁴ Cooper, *supra* note 28, at 691.

¹⁷⁵ *Id.* The author used the label “direct” in cases:

that invoke the Solicitor General’s interest in the construction and interpretation of various federal codes. Generally these are cases where the Solicitor General asserts an interpretation of a statute, treaty, or regulation. . . . The [“implied”] category consists of those cases where a decision regarding a state issue may affect a complementary federal issue. Here, the federal

port the conventional wisdom that “an invitation reflects the fact that some governmental interest may be involved in the case, an interest that is not represented by the private litigants. Or the question involved may be of sufficient public concern that the views of the Government are felt to be relevant to the Court’s consideration of the case.”¹⁷⁶ For example, in the dataset underlying this Article, seven invitations from OT ’97 through OT ’04 involved a Native American tribal council as petitioner or respondent, an area in which the United States has a particularly strong interest.

Second, the Supreme Court often seeks the SG’s views on how an area of law should be shaped, where the policy goals of the United States may be relevant.¹⁷⁷ The data—and also anecdotal evidence in recent cases¹⁷⁸—suggest the use of the SG to shape the law in several fields. Namely, the data show that of the 97 invitations issued between OT ’97 and OT ’04, roughly 15 cases involved intellectual property, 8 focused on antitrust law, and an additional 5 concerned the Americans with Disabilities Act.

Third, the Court will often seek the views of the SG in matters involving complex regulatory and statutory questions. Several Court experts have noted that petitions regarding unfamiliar regulatory systems motivate clerks to recommend CVSGs and lead the Court to seek the advice of the Office of the Solicitor General.¹⁷⁹ The Court can benefit from the work of the Deputy Solicitors General, who may have greater familiarity with the complex reg-

interest is not as strong or unique, but rather implied. Many of these cases, especially in recent years, concern aspects of state court procedure that might have federal trial implications. . . . The [“public”] group of cases, in which the Solicitor General’s involvement is most activist, are those cases involving state issues that are independent of any contemporary federal practice or interest. These cases typically affect social policy around the country, but do not otherwise involve the federal government.

Id. at 687-88.

¹⁷⁶ STERN ET AL., *supra* note 7, at 468.

¹⁷⁷ Telephone interview with Jeffrey L. Fisher, *supra* note 41; Telephone interview with David C. Frederick, *supra* note 49; Telephone interview with Charles A. Rothfeld, *supra* note 49.

¹⁷⁸ For example, the Solicitor General, acting at the behest of the United States Patent and Trademark Office (“USPTO”), has appeared in many recent intellectual property cases. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioner, *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007) (No. 04-1350), 2006 WL 2453601; Brief for the United States as Amicus Curiae Supporting Respondent, *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) (No. 05-130), 2006 WL 622120. The USPTO actively sought to shape the law in these cases through the Solicitor General. *See* Brief for the United States as Amicus Curiae Supporting Petitioner, *KSR Int’l Co.*, 550 U.S. 398 (No. 04-1350); Brief for the United States as Amicus Curiae Supporting Respondent, *eBay Inc.*, 547 U.S. 388 (No. 05-130); *see also* U.S. PATENT AND TRADEMARK OFFICE, PERFORMANCE AND ACCOUNTABILITY REPORT: FISCAL YEAR 2006, at 47 (2006), available at <http://www.uspto.gov/web/offices/com/annual/2006/2006annualreport.pdf> (“[T]he USPTO advises the Solicitor General of the United States on intellectual property matters before the Supreme Court This year, the USPTO assisted the Solicitor General in formulating the government’s position before the Supreme Court in several important intellectual property cases.”).

¹⁷⁹ Interview with Jeffrey L. Fisher, *supra* note 41; Telephone interview with Charles A. Rothfeld, *supra* note 49; Telephone interview with Kevin K. Russell, *supra* note 83.

ulatory and statutory regimes within their charge.¹⁸⁰ In contrast, experts note that it would be less likely for the Court to CVSG on a constitutional question, as the Court possesses more than sufficient expertise to answer constitutional questions.¹⁸¹

The data show that most CVSG cases involve complex regulatory and statutory schemes.¹⁸² Of the 97 CVSGs analyzed, 88 (91%) involved federal statutory or regulatory questions,¹⁸³ while only 7 (7%) included significant issues of constitutional law.¹⁸⁴ Similarly, 94 of the invitations to the SG were in civil cases, leaving only 3 criminal cases; criminal issues before the Supreme Court are more frequently constitutional issues than complex questions of federal statutory interpretation.¹⁸⁵ While the statutory cases varied in subject-matter, including questions on Medicaid and antitrust, the most common subject—as predicted by several Court-watchers¹⁸⁶—was intellectual property. Notably, IP (approximately 15 cases) was closely followed by questions regarding ERISA (approximately 10 cases), one of the most complicated regulatory regimes implemented by the federal government.¹⁸⁷

While it is difficult to determine empirically, Court-watchers agree that the Court will also CVSG to clarify whether there is a “vehicle problem”¹⁸⁸ or whether the case is of sufficient importance to merit review. With

¹⁸⁰ Interview with Jeffrey L. Fisher, *supra* note 41.

¹⁸¹ Telephone interview with Charles A. Rothfeld, *supra* note 49; Telephone interview with Kevin K. Russell, *supra* note 83.

¹⁸² The data only describe the types of cases in which the Court calls for the Solicitor General’s views and do not provide any comparison to the docket as a whole.

¹⁸³ This Article defines “complex regulatory and statutory scheme” to include pure statutory interpretation, administrative law, and mixes of statutory or regulatory questions with other issues. The coding of these cases should be considered approximate as every case worthy of the Solicitor General’s time is unique and cannot easily be classified into a rigid taxonomy.

¹⁸⁴ Numbers sum to more than 100% as some CVSGs included significant elements of both statutory/regulatory and constitutional law.

¹⁸⁵ Another author perused those cases from 1959 through 1986 in which invitations were issued and the Court reached the merits. She found that “[n]ine of these cases involved matters concerning Native Americans. Rules of the Securities and Exchange Commission, National Labor Relations Board, and antitrust enforcement were issues in fifteen cases, and many of the others involved state and federal relations with respect to taxation and entitlement programs.” SALOKAR, *supra* note 28, at 144.

¹⁸⁶ Telephone interview with Kevin K. Russell, *supra* note 83; Telephone interview with Dan Schweitzer, *supra* note 83.

¹⁸⁷ There are “thousands of pages of rules and regulations” governing U.S. pensions. Robert L. Brown, *A Modest Proposal for U.S. Pension Reform: The Factor of 11*, 11 J. PENSION BENEFITS 17, 22 (2004). To further complicate the issue, Supreme Court clerks fresh out of law school are particularly unlikely to have firsthand experience with pension plans governed by ERISA.

¹⁸⁸ A vehicle problem exists where a case raises an important question of law, but for some reason the Court would not be able to decide cleanly the important issue. For example, a lack of standing or a procedural default could be vehicle problems. See Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 285 (2006) (offering waiver and jurisdictional impediments as examples of a vehicle problem).

his unmatched familiarity as an attorney before the Court, the SG can often shed additional light on the general cert-worthiness of a case, based on a closer evaluation of standing, importance of the case to the law generally, and other issues that the parties may not have fully briefed. Former clerks have suggested that in cases where there may be a vehicle problem, clerks are often hesitant to recommend a grant, especially where there is a risk that the case could ultimately be dismissed as improvidently granted.¹⁸⁹ Court-watchers have expressed similar concern that “risk-averse clerks, who work at the Court for only one year, are reluctant to recommend that the Court grant any petition”¹⁹⁰ In such cases, if a clerk is wavering on recommending a grant due to a potential vehicle problem, that clerk might suggest that the Court CVSG. The Court may also seek a second opinion on importance: while it is to the advantage of petitioners (as well as many cross-petitioners and some respondents) to argue that the case at issue is highly significant, the SG can often provide a more objective view on this question.

3. The Likelihood of CVSG, by Party Type

The likelihood of a CVSG also varies depending on the type of litigants involved. The largest portion of cases in which the Court issued a CVSG involved a business entity as either the petitioner or respondent. Of petitioners, business entities were the first named petitioner in 67 (45.9%) of all cases which led to a CVSG, followed by individuals (43, or 29.5%), states (14, or 9.6%), and not-for-profits and NGOs (9, or 6.2%). Among respondents, businesses were the first named respondents in 60 (41.1%) of all CVSG cases, followed by individuals (44, or 30.2%), states (13, or 8.9%), and non-profits and NGOs (7, or 4.8%).

The most frequent pairing of parties was a business as both petitioner and respondent, which occurred in 36 (24.7%) petitions. This was followed by 22 (15.1%) petitions with a business as petitioner and an individual as respondent; 15 (10.3%) petitions with an individual as petitioner and business as respondent; and 12 (8.2%) petitions with an individual as petitioner and a state or prison as respondent.

¹⁸⁹ See Thomas Goldstein, *What Kind of Cases Catch the High Court's Eye?*, LEGAL TIMES, Aug. 24, 1998, at S-18 (“The clerks also have an abiding fear of recommending a case that later must be dismissed because of some undiscovered procedural default.”). See also STERN ET AL., *supra* note 7, at 328-32, for a discussion on improvidently granted writs of certiorari.

¹⁹⁰ STERN ET AL., *supra* note 7, at 291; Goldstein, *supra* note 189 (“Petitions are so rarely granted that the clerks are extremely reluctant to recommend that the Court hear any case”); Tony Mauro, *The Hidden Power Behind the Supreme Court, Justices Give Pivotal Role to Novice Lawyers*, USA TODAY, Mar. 13, 1998, at 1A (“[C]lerks . . . tend to be cautious about recommending cases for the court to take”).

Party Type	As Petitioner	% of Petitioners	As Respondent	% of Respondents
Business	67	45.9%	60	41.1%
City	2	1.4%	1	0.7%
County	2	1.4%	1	0.7%
Federal agency	(1) ¹⁹¹	0.7%	—	—
Foreign government	2	1.4%	—	—
Individual	43	29.5%	44	30.1%
Native American tribe	2	1.4%	3	2.1%
None (<i>In re</i>)	—	—	1	0.7%
Non-profit & NGO	9	6.2%	7	4.8%
Prison	—	—	2	1.4%
School district	3	2.1%	4	2.7%
State or state agency	14	9.6%	19	13.0%
United States	—	—	(0) ¹⁹²	0.7%
University	1	0.7%	3	2.1%

¹⁹¹ This item represents *FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994) (No. 93-1151). Normally, the SG would be the counsel of record for any federal litigation before the Supreme Court—and thus file a petition or response directly without invitation. However, in *NRA Political Victory Fund*, the Solicitor General authorized the FEC to represent itself in the case. Brief for the United States as Amicus Curiae at 13, *FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994) (No. 93-1151), 1994 WL 16100276 (“[T]he Solicitor General has authorized the petition filed by the Commission. We believe that this authorization permits the Commission to conduct this litigation on its own behalf in this Court.”). The Solicitor General’s invitation brief addressed the question of whether the FEC could represent itself before the Supreme Court without using the Office of the Solicitor General as counsel. *Id.* at 4.

¹⁹² The United States was the named respondent in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997). However, the litigation was being conducted as a *qui tam* action by a private party on behalf of the United States. *Id.* at 943 (“Schumer . . . commenced this action against Hughes pursuant to . . . the *qui tam* provision of the FCA that authorizes private individuals . . . to bring claims on behalf of the United States . . .”). We coded the respondent to be an individual as the real party that sought to benefit, even though the Solicitor General participated as amicus curiae.

Petitioner	Respondent	Instances	% of All
Business	Business	36	24.7%
Business	Individual	22	15.1%
Individual	Business	15	10.3%
Individual	Individual	6	4.1%
Individual	State or Prison	12	8.2%
State	Corp	5	3.4%
State	Individual	6	4.1%

D. *Timing Patterns in the Court's CVSG Practice*

The frequency with which the Court calls for the views of the SG has varied greatly over time.

A study published in 1992 reported that the Court issued 440 invitations to the SG from OT '59 through OT '86, including CVSGs at both cert and merits stages.¹⁹³ The study found that the number of invitations per year increased substantially between 1959 and 1986, with a total of 30 invitations issued in the five Terms from 1959 to 1964 (for an average of 6.0 per Term), and 127 over the five Terms from 1981 to 1986 (for an average of 25.4 per Term).¹⁹⁴ Because the study included invitations to the SG issued at the merits stage,¹⁹⁵ it is not directly comparable to the data relied upon here, which focus exclusively on petition-stage invitations.

The data here show that of all cases docketed in OT '92 through OT '04,¹⁹⁶ the Court called for the views of the SG at the petition stage in 146 cases. On average, the Supreme Court called for the SG's views in 11 of the petitions filed each year. Since OT '00, there has been a slight increase in the frequency at which the Court CVSGs; the Court called for the views of the SG in an average of 14 of the cases filed per Term from OT '00 to OT '04. This increase has continued in the most recent Terms (not included in this Article's dataset): the Court issued invitations to the SG in 16 cases in OT '05 and 18 cases in OT '06.¹⁹⁷

¹⁹³ SALOKAR, *supra* note 28, at 144.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 144-45.

¹⁹⁶ OT '04 is the last Term for which all relevant cases were resolved at the time of data collection. There were still a number of pending CVSG cases from OT '05 as of the data collection for this Article.

¹⁹⁷ See U.S. Dep't of Justice, Office of the Solicitor Gen., Type of Filing By Term, <http://www.usdoj.gov/osg/briefs/brieftype.htm> (follow either "2006" or "2005" hyperlink; then follow "Invitations" hyperlink) (last visited Nov. 15, 2008).

Year	# CVSG
OT '92	4
OT '93	8
OT '94	6
OT '95	6
OT '96	16
OT '97	15
OT '98	14

Year	# CVSG
OT '99	5
OT '00	15
OT '01	11
OT '02	22
OT '03	12
OT '04	12

Month	% Conferences	% CVSGs	(% CVSG/ % Conf.)
January	11%	7%	0.64
February	9%	8%	0.88
March	9%	10%	1.11
April	9%	7%	0.77
May	9%	8%	0.88
June	8%	10%	1.25
July	0%	0%	—
August	0%	0%	—
September	25%	0%	—
October	9% [+25%]	36%	(1.05) ¹⁹⁸
November	8%	7%	0.88
December	3%	8%	2.66

Some Court-watchers have hypothesized that there may be a greater number of CVSGs in the fall of each Term, when new law clerks have just started their jobs. They speculate that these relatively inexperienced clerks may be more likely to recommend a CVSG in their first months, when they may be less comfortable with the standards required to grant certiorari. The data do not support this hypothesis.

¹⁹⁸ The October ratio is adjusted to include September conferences because the orders (including CVSGs) from September conferences are released in October.

Month of Invitation	Average Invitations
January	0.8
February	0.8
March	1.1
April	0.8
May	0.9
June	1.2

Month of Invitation	Average Invitations
July	—
August	—
September	—
October	4.0
November	0.8
December	0.9

The Court spreads its invitations roughly evenly across the months in which it sits, with the exception of the summer months and October. On average the Court requested about one CVSG per month from November through June (from a low of 0.8 to a high of 1.2). The Court does not sit or conference in July or August¹⁹⁹ and no CVSGs were issued in those months. As for October, the Court conferences in the last week of September to review the accumulated “summer list,”²⁰⁰ but the orders—other than grants—resulting from that conference are not released until the first Monday in October. Accordingly, in October, the Court called for the views of the SG an average of 4.0 times. This average rate of 4 CVSGs per October is proportional to the typical monthly rate, given that it includes calls that would have been issued across four months (July, August, September, and October) if the Court sat year-round.²⁰¹

The rate of invitations to the SG can also be compared to the number of cases considered at conference in each month. The only month in which there is a notable increase in CVSGs as a proportion of cases considered at conference is December; while only 3% of all cases are on conference lists in December,²⁰² 8% of CVSGs are issued that month. Relative to the number of cases conferenced, CVSGs are 2.8 times more frequent in December than would be expected if there were an even distribution of CVSGs year-round. Conversely, the lowest ratio of conferenced cases to CVSGs occurs in January, when a given case is only 0.6 times as likely to result in a CVSG as would be expected from an even distribution of CVSGs.²⁰³

¹⁹⁹ See STERN ET AL., *supra* note 7, at 6-7.

²⁰⁰ The often extensive list of all petitions are submitted for the Justices' consideration during the summer months. STERN ET AL., *supra* note 7, at 289; Ginsburg, *supra* note 132, at 517.

²⁰¹ Spreading the 4.0 conferences across the 4 months would result in an average of 1 conference per month, in line with the range from 0.8 to 1.2 for other months.

²⁰² By definition, the Court will discuss an average of 8% of all cases per month (100% of cases, divided by 12 months).

²⁰³ The January CVSG count is slightly deflated by the fact that few, if any, December conferences carry across the holidays for announcement in January (unlike the September-October relationship).

The December jump and January dip in the proportion of considered cases that result in CVSGs can be explained: December is the last month in which the Court can invite a brief from the SG's office and be reasonably confident that it will arrive in time to vote on certiorari by the end of the Term.²⁰⁴ The data reflect this: of the 12 invitations issued in December, 10 (83%) were returned in May of the following year, with the other 2 (17%) returned in June.²⁰⁵ If the Court is able to grant a case in May, it can then calendar that case for the following October's sitting and fill its October oral argument calendar. In fact, "[t]he Court does . . . attempt to expedite consideration of cases in which the filings are completed late in May or early in June to avoid carrying those cases over the summer recess."²⁰⁶ If the Court must wait until after the summer recess, then it cannot discuss the case until the September conference, and, if granted, cannot hear the case in the October sitting even on an expedited briefing schedule.

This small fluctuation in CVSG rates across months is consistent with the observations others have made regarding the grant rate across different months. Looking at data from 1992 through 2002, Cordray and Cordray found that "[t]he Court granted a significantly lower percentage of petitions for certiorari during three periods: the summer recess and the February and March sessions."²⁰⁷ The authors posited that, much as in the CVSG context, the Court is concerned about fitting arguments into the docket: "by the February session, it is too late for the Court to place new cases on the current Term's argument schedule, and there is no hurry to grant cases for the next Term's schedule."²⁰⁸

E. *The Solicitor General's Response to an Invitation from the Court*

1. The Solicitor General's Process in Response to a CVSG

The Office of the Solicitor General responds to every invitation it receives from the Supreme Court to express its views; the invitation "is viewed by the office as an order, and it is an order that all solicitors general

However, the effect is minuscule (only 2% of all CVSGs, based on an examination of CVSGs from OT '01 to OT '04).

²⁰⁴ See *infra* Part II.E.2.a, for a discussion on the length of time between the invitation and Solicitor General's filing of his brief.

²⁰⁵ See *infra* Part II.E.2.b, for a discussion on the informal May "cut-off date" for filing invitation briefs.

²⁰⁶ STERN ET AL., *supra* note 7, at 288.

²⁰⁷ Margaret Meriwether Cordray & Richard Cordray, *The Calendar of the Justices: How the Supreme Court's Timing Affects Its Decisionmaking*, 36 ARIZ. ST. L.J. 183, 204 (2004).

²⁰⁸ *Id.* at 208.

have tacitly acknowledged.”²⁰⁹ According to the account of a former Assistant to the Solicitor General, the process is as follows: when the SG receives an invitation, the case is first sent to the docketing case management office, where the case is assigned to a case management officer.²¹⁰ The case management officer then sends all the petition-stage briefs to one of four Deputy Solicitors General, each of whom covers a portfolio of subject matters and/or a cluster of agencies, and to the appellate staff within the relevant division of the Department of Justice.²¹¹ If the subject of the case interests a federal agency, the case management officer will, at the direction of the Deputy Solicitor General, also send the briefs to that agency.²¹²

The relevant litigation group within the Department of Justice often has the primary responsibility for drafting the invitation brief; any recommendation from a federal agency will be sent to that DOJ office. For example, in *Powerex Corp. v. Reliant Energy Services, Inc.*,²¹³ following a CVSG, it is believed that the State Department sent a memo to the Civil Division of the Department of Justice, which then sent a draft to the SG.²¹⁴ Similarly, in *Watson v. Philip Morris Cos.*,²¹⁵ it is believed that the FTC issued a recommendation to the Civil Division, which was then forwarded to the SG.²¹⁶

The SG’s office often faces competing interests as it aims to determine the “views of the United States.”²¹⁷ As described by former Solicitor General Days, the SG job in general is “filled with difficult conflicts with respect to issues such as who is one’s client, how does one separate policy and law, what are the long-range as opposed to short-range interests of the United States, and where does one draw the line between the demands of one’s duty as an advocate for the executive branch and one’s responsibilities as an officer of the Court.”²¹⁸ Each of these conflicts affects the SG’s process in responding to an invitation from the Court.

²⁰⁹ SALOKAR, *supra* note 28, at 142. Based on interviews with attorneys in the Solicitor General’s office and former Solicitors General, Salokar concludes that the attorneys in the office have “mixed feelings” about invitations from the Court and often are forced to get involved in cases in which they would rather have not opined. *Id.* at 142-44.

²¹⁰ Telephone interview with David C. Frederick, *supra* note 49; *see also* Telephone interview with Kevin K. Russell, *supra* note 83.

²¹¹ Telephone interview with David C. Frederick, *supra* note 49.

²¹² *See* SALOKAR, *supra* note 28, at 143.

²¹³ 127 S. Ct. 2411 (2007).

²¹⁴ Telephone interview with David C. Frederick, *supra* note 49.

²¹⁵ 127 S. Ct. 2301 (2007).

²¹⁶ Telephone interview with David C. Frederick, *supra* note 49.

²¹⁷ *See* SALOKAR, *supra* note 28, at 69 (“In some sense, the political environment surrounding solicitors general is like a bramblebrush left to grow wild. It is an environment of intertwined influences and demands, each bearing thorny interests that resist even the most careful pruning.”).

²¹⁸ Days, *supra* note 133, at 82.

First, the SG must manage the dual pressures of being responsible to both the executive branch and the Court.²¹⁹ As Days describes the invitation request: “It’s a tall order. I guess it tests the question of whether the SG as an officer of the Court first and foremost is a member of the executive branch. And so this is the tension that we all have to deal with in this office.”²²⁰ The SG must consider whether to represent the views of the current administration or the institutional interests of the federal government, where they differ.²²¹ As one commentator frames the issue:

To what extent is he, like most other high-ranking executive branch officials, properly concerned with carrying out the policies of the Administration in which he serves? Or should he, instead, remain aloof from Administration policies and concern himself only with the institutional interests of the federal government? And if the latter, how does one define the institutional interests of the federal government?²²²

Moreover, the interests of the executive branch are not always clear, particularly where federal agencies have conflicting views on the matter. For example, in cases involving civil rights statutes, the Civil Rights Division of the DOJ is responsible for enforcing the laws under which federal officials in other agencies can be sued.²²³ In employee discrimination suits, the federal government may approach the matter both as a plaintiff and a defendant.²²⁴ In addition, if the case raises issues that implicate the political leanings of the administration, the SG will also have to account for those interests in his recommendation. As Days recalls:

The Solicitor General, of course, has a special responsibility with the Court, as well as with his or her own administration. And I think each of us who served in the office have had to make it clear to departments, to agencies, to cabinet officials, and even sometimes to the President, that the Solicitor General’s client is the United States of America. It is the United

²¹⁹ While it is difficult to determine who is the client, the Solicitor General no doubt has one: “No recent Solicitor General has adopted a policy of systematically refusing to take any position that he would not vote for as a Justice. Indeed I suspect that every recent Solicitor General could name many occasions on which he took a position before the Court that he would certainly have voted against if he were a Justice. The Office sees its principal business as advocacy . . . [T]hey seek to advance the side that favors the government.” David A. Strauss, *The Solicitor General and the Interests of the United States*, 61 LAW & CONTEMP. PROBS. 165, 168-69 (1998).

²²⁰ Maureen Mahoney et al., *Solicitors General Panel on the Legacy of the Rehnquist Court*, 74 GEO. WASH. L. REV 1171, 1176 (2006).

²²¹ Strauss, *supra* note 219, at 166-68 (discussing the institutional and the administration approach to the role of the Solicitors General).

²²² *Id.* at 165.

²²³ Telephone interview with Kevin K. Russell, *supra* note 83.

²²⁴ Strauss, *supra* note 219, at 166.

States to whom you have the fiduciary responsibility and not to the particular President who happens to be serving or to his particular politics.²²⁵

Lobbying by litigants adds another layer of complexity. Oftentimes, litigants will meet with the SG's office in order to encourage the SG to advocate for a grant or deny.²²⁶ From the litigant's perspective, this meeting is critical, as it is the only opportunity for the attorney to influence the SG's invitation brief.

Ultimately, the SG is charged with considering all competing interests and identifying the true interests of the United States. The SG "is expected to look not only to the interests of his client, but also to the long-term effects upon the government, and upon the country, of positions taken in the Court."²²⁷ His "responsibility is ultimately not to any particular agency or person in the federal government but rather 'the interests of the United States' which may, on occasion, conflict with the short-term programmatic goals of an affected governmental entity."²²⁸

2. The Solicitor General's Timeline in Response to a CVSG

a. *The Solicitor General's Response Time*

The CVSG response process is unique in that there is no deadline by which the SG must file his invitation brief.²²⁹ The SG often takes a considerable amount of time to respond to a CVSG.²³⁰ In fact, when asked by his former law clerk and then-Deputy Solicitor General at the Office of the Solicitor General how the office could improve, former Chief Justice Rehnquist

said very frankly that our office was just too slow. He was always quite adamant about getting work done on time. But the Solicitor General would get requests from the Court to submit his views in certain cases and it would take months and months and months for the SG's

²²⁵ Mahoney et al., *supra* note 220, at 1180.

²²⁶ Telephone interview with Dan Schweitzer, *supra* note 83.

²²⁷ Days, *supra* note 133, at 81-82.

²²⁸ *Id.* at 77.

²²⁹ STERN ET AL., *supra* note 7, at 468 ("The order inviting the filing of an *amicus* brief usually does not contain a time limit.").

²³⁰ *Id.* ("Taking advantage of [the no time limit], the Solicitor General's office, as well as other invitees, often takes many more than 30 days to file the brief."); Telephone interview with Roy T. Englert, Jr., *supra* note 83; Telephone interview with David C. Frederick, *supra* note 49; Telephone interview with Frank Lorson, *supra* note 32; Telephone interview with Charles A. Rothfeld, *supra* note 49.

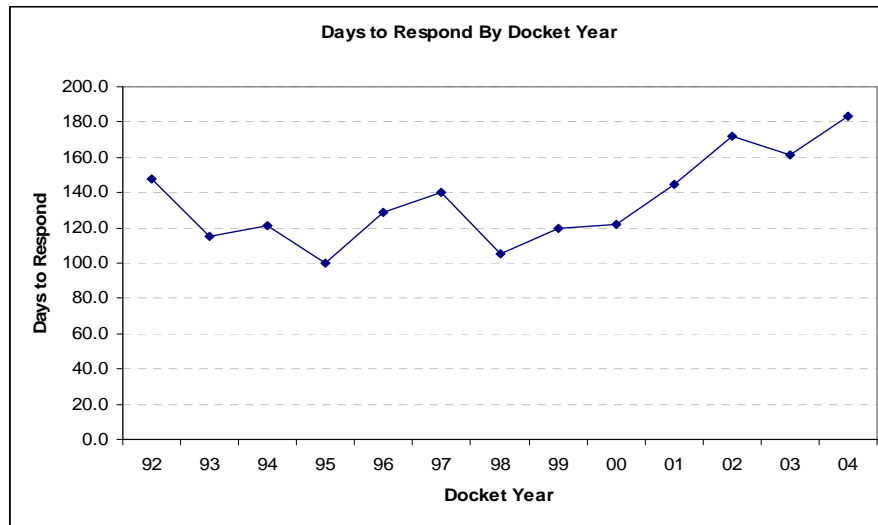
office to respond because those briefs would not have a deadline. So he sent me back with a mission, which was to speak to the office and make sure that the briefs got in sooner.²³¹

The data confirm that the SG takes, on average, over four months to respond to the Court's invitations. The delay has been increasing in recent years. Considering all CVSG briefs from OT '92 through OT '04, the SG took on average 4.6 months (137 days) to respond, with a median of 4.5 months (135 days) and a standard deviation of 2.3 months (68 days). That delay has fluctuated over time, from a low of 3.5 months (105 days) in cases docketed in OT '98, to a high of 6.1 months (183 days) in cases docketed in OT '04.

The SG responds, on average, slightly slower in cases in which he recommends that the Court deny than in cases in which he recommends a grant. Between OT '98 and OT '04, the SG averaged a response time of 5.1 months (152 days) in the 54 invitation briefs recommending a flat denial, compared to 4.0 months (121 days) in the 24 invitations recommending a flat grant. It is possible that cases in which a grant is recommended are moved more quickly through the Office of the Solicitor General in order to get them on the calendar for argument, whereas cases in which a deny is recommended are given a lower priority.

Docket Year	Avg. Days to Respond	Avg. (30-day) Months to Respond
OT '92	147.8	4.9
OT '93	115.3	3.8
OT '94	121.5	4.0
OT '95	100.2	3.3
OT '96	128.6	4.3
OT '97	139.9	4.7
OT '98	105.0	3.5
OT '99	120.0	4.0
OT '00	121.6	4.0
OT '01	144.8	4.8
OT '02	171.7	5.7
OT '03	161.4	5.4
OT '04	183.1	6.1

²³¹ Mahoney et al., *supra* note 220, at 1174.



Month of Invite	Avg. Days to Respond	Avg. Months (30-day) to Respond
January	175.6	5.9
February	101.2	3.4
March	88.6	3.0
April	159.1	5.3
May	143.4	4.8
June	154.4	5.1
July	<i>no invites</i>	—
August	<i>no invites</i>	—
September	<i>no invites</i>	—
October	135.4	4.5
November	163.8	5.5
December	168.8	5.6

There are several explanations for why the SG takes several months to respond to the Court. First, the Court’s calendaring process creates incentives for the SG to respond by one of two “cut-off” dates,²³² but there is no incentive to file shortly after the date of the invitation. Second, it often takes time for internal decisions to be made within the executive branch as

²³² See *infra* Part II.E.2.b.

to what are the “views of the United States.”²³³ As discussed *supra*, there may be conflicting opinions expressed by different federal agencies over a policy question raised by a case, requiring time-consuming discussions before the SG can draft a response to the Court. Third, because there is no rule of the Court imposing a deadline and the SG’s office is handling deadlines for briefs in which the United States is a party, it is perhaps expected that CVSG responses would be filed long after the request from the Court.²³⁴

b. *Time of Year*

The Court’s calendaring process creates incentives for the SG to file invitation briefs, in response to CVSGs, by two informal “cut-off dates”: late December and late May. In order for the Court to hear a case in a given Term, all relevant briefs must be filed by the end of December, so that the Court can consider the case at conference in January, in time to calendar the argument for April. Thus, the SG has an incentive, if not a formal deadline, to answer pending CVSGs—those requested, roughly, between May and October—before the end of the calendar year. For invitations received by the SG between, roughly, November and April, the SG has an incentive to respond by the end of May, so that the Court can consider the case at its June conference, before its summer recess, and calendar the argument for the beginning of the next Term starting in October. To be more precise, the Clerk’s office allows parties ten days after receipt of the SG’s brief to file a supplemental brief with the Court; thus, in order for the case to be discussed in the June or January conferences, the SG must respond ten days before conference. As described by Stern and Gressman: “Any party whose position is adversely affected by the views expressed in that brief is given a short but reasonable period of time, after consultation with the Clerk, in which to prepare and file a response or supplemental brief.”²³⁵ The existence of these two informal “cut-off” dates is widely recognized by those in the Supreme Court Bar.²³⁶

The data indicate that these informal cut-off dates do guide the Office of the Solicitor General in its filing practice. Despite the mostly even distribution of invitations across the year,²³⁷ the Office of the Solicitor General filed more than half of its invitation briefs in May and December. Specifically, 32.9% of invitation briefs filed by the SG were returned to the Court

²³³ See EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 517 (9th ed. 2007) (“Because the government generally does not have a previously formulated position on the question presented, doing so regularly involves considerable consultation with those both inside and outside the government.”).

²³⁴ See sources cited *supra* notes 229-30.

²³⁵ STERN ET AL., *supra* note 7, at 468.

²³⁶ See, e.g., Telephone interview with Roy T. Englert, Jr., *supra* note 83; Telephone interview with David C. Frederick, *supra* note 49.

²³⁷ See *supra* Part II.D.

in May, and an additional 17.8% of invitation briefs were returned in December. Moreover, there were also a large number of “near-miss” briefs filed in January (15 briefs, or 10.3%) and June (also 15 briefs, or 10.3%). However, the Court “does . . . attempt to expedite consideration of cases in which the filings are completed late in May or early in June to avoid carrying those cases over the summer recess.”²³⁸ Thus it is possible that some invitation briefs which appear to be “near-misses” in fact achieve the desired scheduling results. In other cases, if the Office of the Solicitor General has missed the December or May cut-off dates, it may just wait until the next major date before filing.

Given the delay caused by the long turnaround time at the Office of the Solicitor General, there is the question of whether a deadline should be imposed by the Court. While such an approach would provide greater predictability for parties and the Court, it is unlikely that the Court would take this step. First, and perhaps dispositive for this question, the SG is not a party in these cases, but rather is offering a service of the executive branch as a favor to the Court. Thus, it would be politically insensitive for the Court to require the SG to respond by a certain date. Second, any step by the Court to limit the amount of time available to the SG might be perceived as a criticism of the SG by the Court, potentially complicating the relationship between the two institutions.

Recently, Solicitor General Paul Clement himself weighed in on this issue in response to a party’s application to require an invitation brief to be filed within thirty days of the Court’s request.²³⁹ His response further illuminates the process taken by the SG following a CVSG and makes the case for an allowance of greater time for the Office to respond. As Clement writes:

By their nature, such invitations are extended in cases that present difficult questions of law in litigation to which the United States is not a party and, most often, has not participated prior to the time the invitation is extended. Because the government generally does not have a previously formulated position on the question presented, doing so regularly involves considerable consultation with those both inside and outside the government. Representatives of this office routinely arrange meetings with counsel for the parties to the case before the Court, including in some instances follow-up meetings, in order to better understand the legal issues, litigation history, and record. We also engage in extensive consultation with interested departments and agencies within the government to ensure that we fully understand the implications of the questions presented on the broad array of government programs and interests.²⁴⁰

²³⁸ STERN ET AL., *supra* note 7, at 288.

²³⁹ GRESSMAN ET AL., *supra* note 233, at 517.

²⁴⁰ *Id.*

Month of Filing	SG Briefs Filed	% of Briefs
January	15	10.3%
February	2	1.4%
March	2	1.4%
April	7	4.8%
May	48	32.9%
June	15	10.3%

Month of Filing	SG Briefs Filed	% of Briefs
July	3	2.1%
August	4	2.7%
September	8	5.5%
October	9	6.2%
November	7	4.8%
December	26	17.8%

F. *Conclusions on CVSG Practices*

The SG, sometimes called the “tenth justice,”²⁴¹ is one of the most powerful information-gathering tools the Supreme Court can use when deciding whether to grant or deny a petition for a writ of certiorari. However, the Supreme Court limits its usage of the CVSG process to a handful of cases each year, perhaps mindful of the burden a call imposes on another branch of government. The Court is most likely to turn to the SG when dealing with complex statutory regimes, such as ERISA or intellectual property law. For a litigant, seeing the Court call for the views of the SG in a particular case is a sign that the likelihood of certiorari being granted is quite high; the Court granted briefing on the merits in 34% of cases in which it called for the views of the SG, a 36-time increase above the overall grant rate. This grant rate increased in the later years of this study, roughly corresponding to the tenure of Solicitor General Olson. The Court follows the recommendation of the SG to grant or deny a case roughly 80% of the time. The data suggest that the SG is very conscious of the internal deadlines of the Court and attempts to file briefs in order to help the Court process cases in a timely fashion.

CONCLUSION

The procedures allowing the Court to call for the views of the SG and to request response from parties who have voluntarily waived are two of the most powerful information-gathering tools available to the Court. This Article has used a 30,000-record dataset to perform an empirical analysis of the Court’s CVSG and CFR practices.

²⁴¹ CAPLAN, *supra* note 134, at 3.

The Court calls for a response approximately 210 times per year. The data suggest that the SG—acting as counsel for the United States—is able to carefully choose the cases in which to waive the right to respond, so as to respond to potentially meritorious petitions while still minimizing workload. State attorneys general and appellate litigation departments also match their responses to those cases in which the Court ultimately grants review, although to a lesser degree. Private litigant waiver practice correlates the least tightly to the Court’s decisions on cert; they respond in many cases which are not granted review but fail to respond in many cases which ultimately are granted review.

Roughly 60% of all calls for response come from the paid docket, with only 40% coming from the IFP docket. A higher proportion of cases in which the Court calls for a response were granted plenary review (8.6%) than of the docket overall (0.9%) or of cases with voluntary response (4.3%). However, the grant rate for cases with private litigants as respondents after a call for response is notably higher: Roughly 20% of paid cases with a private litigant as a respondent in which the Court requested response were granted plenary review. There is some evidence to suggest that the grant rate following a call for response is higher among calls for response that arise from the cert pool; there is a statistically significant increase in grant rate to 14.5% among petitions in which response was requested 8 to 10 days after the petition was distributed.

The Court calls for the views of the SG infrequently, in around a dozen cases per year, but has been inviting briefs more often in recent years. The data suggest that the Court is likely, particularly recently, to grant cases in which it has invited the SG to file. The Court generally follows the recommendation of the SG, especially with regards to recommendations to grant. The Court frequently calls for the views of the SG in cases in which a business is either petitioner or respondent. In the majority of instances, the Court uses the SG to inform the Court in statutory, regulatory, or administrative—rather than constitutional—questions. The SG takes an average of 4.6 months to respond to invitations—slightly longer for briefs recommending a denial of review and slightly shorter for briefs recommending a grant—and will generally attempt to return briefs by critical “cut-off dates” in order to help the Court fill its oral argument calendar.

There remain many avenues for future research. It would be useful to compare the record of the SG in invitation amicus briefs to his record in voluntary amicus briefs. An analysis of the particular arguments made by the SG for and against cert grant, as well as the persuasiveness of these different arguments, would also be fruitful. Detailed analysis of the cases in which the Court did *not* follow the recommendation of the SG could also yield results. With respect to petitions generally, a broader predictive model of the Court’s grant and deny practices could be extremely useful to litigants.

APPENDIX: METHODOLOGY

The analysis in this Article is based on two datasets. Below are descriptions of the coverage of each dataset, our data collection process, and the steps we took in analyzing the data.

CFR Data

The Supreme Court website provided the full docket for almost every petition for a writ of certiorari filed from OT '01 through OT '04. The dockets are in a roughly standard format across years, allowing for automated processing of docket entries with little modification required from year to year.

First, the authors wrote a small program in the Java programming language to collect each HTML docket information²⁴² file from the Supreme Court's website. The Office of the Clerk consistently named the files in a "YY-####.htm" (for example, the 100th paid case filed in 2004 would be named "04-100.htm") format, allowing the custom Java program to simply fill in all possible entries. The program saved each HTML file locally for later analysis. The program successfully collected 31,459 docket entries and found 49 (0.15%) docket numbers unavailable.²⁴³ It is unclear if the missing docket numbers do not represent actual petitions filed²⁴⁴ or if they represent actual cases without docket information available.²⁴⁵

A second small program using the Java language was then written by the authors to analyze each HTML file. The program automatically cycled through all docket files in the input directory, analyzing each file in sequence.

Within each file, the docket information sought was presented in a reasonably consistent pattern; for example, each docket event (such as a petition being filed) began with the date of the event wrapped in "<TD>" tags,²⁴⁶ followed by a description of the event wrapped in another set of "<TD>" tags. For example, a line of the docket describing a petition filed on June 19, 2001 may appear as:

²⁴² HTML docket information includes the title of the case, the date when the case was brought before the Supreme Court, and a detailed list of information of the procedural history.

²⁴³ The 31,459 successful docket entries included cases within the mandatory jurisdiction of the Supreme Court, which were later removed from the dataset.

²⁴⁴ For example, this could be the case if a petition were revoked for a reason such as mistaken duplicate filings before it could even be given a docket number, or if the docket numbers were mistakenly skipped by the Office of the Clerk.

²⁴⁵ For example, this could be the case if the file were accidentally misnamed or intentionally redacted in light of sensitive information.

²⁴⁶ The <TD> tag defines a new table entry in HTML.

<TR><TD>Jun 19 2001</TD><TD>Petition for writ of certiorari filed. (Response due August 28, 2001) </TD></TR>

Each line of the HTML file was analyzed against known patterns, using both simple text matching and “regular expressions”²⁴⁷ to determine whether the line represented docket information or mere visual formatting and web browser metadata. If the line contained docket information then a context-sensitive search pattern was used to determine what type of event was encoded on that line of the docket. If a significant²⁴⁸ docket event being recorded was found then it was temporarily stored in memory for later analysis.

After analyzing each docket file, the program summarized the data collected within that file and wrote the output data to a tab-delimited master data file. The master data file was a very large (roughly 1 megabyte per year) text file which contained one line for each docket file, with one column for each type of data described below. Errors were logged for analysis. The program was iteratively refined based on manual data checks and the error log until no known data collection errors occurred.

The tab-delimited file was then exported into Microsoft Excel. The import file tool was used to ensure that date and number formats were correctly imported. A small handful of dates were not parsed properly by Excel and were re-entered manually.

Quality assurance was provided by spot-checking random docket entries against a manual perusal of the Supreme Court docket, by searching for anomalous patterns,²⁴⁹ and by analysis of the error log.

For the purposes of this Article, we removed all appellate (mandatory jurisdiction) and original (usually state v. state) cases from the dataset, leaving only the certiorari docket. For each case filed from OT '01 through OT '04, we gathered the following information: (a) docket number; (b) the date on which the cert petition was filed; (c) name of the first listed petitioner; (d) name of first listed respondent; (e) whether the respondent filed a motion to proceed in forma pauperis (*not* whether that motion was granted);²⁵⁰

²⁴⁷ Regular expressions (or simply “regex”) are a powerful search methodology that allows for searching for text strings that match a certain *pattern*, rather than looking for an exact match. For example, the very simple regular expression “[0-9][0-9]-[0-9]+” searches for any two numbers followed by a dash, followed by a series of numbers. This, of course, is designed to match docket numbers (e.g., “04-5001”). Substantially more complicated regular expressions can be designed to strip the “<TD>” tags surrounding data, to look for dates, etc.

²⁴⁸ This program did not seek to collect data about *all* aspects of Supreme Court practice; for example, docket notations regarding extensions of time to file briefs and responses were ignored.

²⁴⁹ Several typos by the Court were found (e.g., petitions filed in 2010 rather than 2001) and were corrected if the correction was obvious from the context. If the correct answer was ambiguous then the data was excised.

²⁵⁰ We did not note whether the Court granted the motion as most cases are denied review before the Court decides the motion.

(f) whether the petition being filed was a habeas petition; (g) whether the docket included a petition for a stay of execution; (h) whether the petition being filed was for a writ of prohibition; (i) whether the petition being filed was for a writ of mandamus; (j) the Court's disposition on the cert petition (i.e., whether they granted or denied the petition); (k) the date of the Court's decision on the cert petition; (l) whether any respondent filed a waiver notice with the Clerk's office; (m) whether any respondent filed a brief in opposition to cert; (n) the date of the first brief filed in opposition to cert; (o) whether there was a CVSG issued; (p) the date of the invitation to the SG (if any); (q) whether there was a CFR issued; (r) the date of the CFR (if any); (s) the first distribution date; (t) the first conference date; (u) the distribution date immediately prior to the invitation (if any); (v) the conference date immediately prior to the invitation (if any); (w) the distribution date immediately following the invitation (if any); (x) the conference date immediately following the invitation (if any); (y) the distribution date prior to the CFR (if any); (z) the conference date prior to the CFR (if any); (aa) the distribution date following the CFR (if any); (bb) the conference date following the CFR (if any); (cc) the number of days between the first conference and the decision on the cert petition; (dd) the party-type of petitioner;²⁵¹ and (ee) the party-type of respondent. CFR items (dd) and (ee) were coded in the same manner as described above for CVSG items (i) and (j).

The data in Excel were analyzed primarily using the "Pivot Table" function; however other means—including manual counts—were utilized as required.

For the purposes of all data included in this Article, we considered all cases with an XX-docket number to be included in OT 'XX. This method of categorizing cases by year does not track the listing of invitation briefs on the SG's website,²⁵² but is the most consistent for purposes of analysis in this area.

CVSG Data

For Part II of this Article, we collected data on the 146 instances in which the Supreme Court called for the views of the SG between OT '92 and OT '04, inclusive. The level of information available varied by the docket year in which the case was filed; the most data were available for cases filed from OT '98 through OT '04, with slightly less data available for cases filed from OT '92 through OT '97.

²⁵¹ This was manually coded following the same procedure in the CVSG section. The process of manually coding each and every petitioner and respondent provided an additional quality assurance step.

²⁵² See U.S. Dep't of Justice, *supra* note 197.

The Supreme Court's website provides dockets for all petitions filed from January 2000 to present, thus presenting complete data for OT '01 onward.²⁵³ To compile data on cases dating back to OT '92, we searched the Journal of the Supreme Court of the United States for the docket numbers of cases in which the Court issued a CVSG.²⁵⁴ Chief Deputy Clerk Chris Vasil then provided to us the electronic dockets for cases listed in the Journal in which the Court called for the views of the SG.

From these dockets, we manually collected the following information: (a) the docket number; (b) the date on which the cert petition was filed; (c) the date of invitation from Court to SG; (d) the date on which the SG's brief was filed; (e) the disposition of the certiorari petition (i.e., grant, deny, etc.); (f) the date of disposition of the cert petition; (g) if granted, the date of the final disposition by Court; (h) if granted, decision by Court on merits (i.e., affirm, reverse, vacate); (i) the party type of petitioner (e.g., individual, business, etc.); and (j) party type of respondent (same).

For the more recent CVSG cases (OT '00 through OT '04), we searched the Supreme Court docket database on the Supreme Court's website for cases in which "The Solicitor General is invited"²⁵⁵ For each of those cases, we gathered the same information as listed above (items (a) through (j)). In addition, from the dockets, we collected information on: (k) the distribution date prior to the invitation; (l) the conference date prior to the invitation; (m) the distribution date following the invitation; (n) the conference date following the invitation; and (o) the number of amici at the petition stage.

For CVSG cases from OT '98 through OT '04, we read each invitation brief—available on the SG's website²⁵⁶—to ascertain the following additional information: (p) recommendation of the SG on the cert petition; (q) if recommending grant, recommendation of the SG on the merits (if any); and (r) the subject matter of the case.

For items (i) and (j), we broke down all litigants into a set of party-type categories. We based the party type on the name of the first petitioner and first respondent appearing on the docket. Multiple parties listed or "et al." listings were not considered. If parties were cross-petitioners then the first party listed was considered to be the petitioner for the sake of analysis. Each litigant was coded as one of the following:

- (a) "Individual" (including multiple individuals)

²⁵³ See Supreme Court of the U.S., Docket, <http://www.supremecourtus.gov/docket/docket.html> (last updated Apr. 21, 2008).

²⁵⁴ See Supreme Court of the U.S. Journal, <http://www.supremecourtus.gov/orders/journal.html> (last updated Nov. 6, 2008).

²⁵⁵ See *supra* note 253.

²⁵⁶ See U.S. Dep't of Justice, *supra* note 197.

- (b) “United States” (the United States as a party and “ex rel.” matters)
- (c) “Federal instrumentality” (any part of the federal government, such as a federal agency or federal official in their official capacity)²⁵⁷
- (d) “State” (a state listed as a party, or any part of the state government, such as a state agency, state commission, the governor, or state attorney general and workers’ compensation boards and waste management, transit, or water districts)
- (e) “City” (a city listed as a party, or any part of a city, such as a municipal board and unified city-counties, such as “City and County of SF”)
- (f) “County” (a county listed as a party, or any part of a county)
- (g) “School district” (any school board or school district listed as a party)
- (h) “Non-profit” (any non-profit association or religious establishment)
- (i) “Business” (any private business, such as corporations, LLCs, companies, and individuals doing business as companies)
- (j) “Union” (any union)
- (k) “University” (any public or private university)
- (l) “Native American tribe” (any group of Native Americans listed as a party)
- (m) “Prison” (including all correctional facilities, wardens, superintendents of correctional facilities, state prisons and privately run prisons)
- (n) “State court” (when respondent)
- (o) “Federal court” (when respondent)

We coded the subject matter of each CVSG case based upon the question presented in the SG’s brief. Each case was coded in three separate categories as follows:

- (a) Case type
 - i. Criminal

²⁵⁷ Federal agencies are generally represented by the Solicitor General before the Supreme Court, however one exceptional case featured a CVSG in a case of a federal instrumentality representing itself before the Court. *See supra* note 191.

- ii. Civil
- (b) Subject type
- i. Constitutional
 - ii. Procedural
 - iii. Statutory
 - iv. Administrative
 - v. Any combination of the above
- (c) Subject matter, including but not limited to:
- i. Jurisdiction
 - ii. RICO
 - iii. ERISA
 - iv. Sovereign Immunity
 - v. EEOC
 - vi. FCA
 - vii. Tax
 - viii. Securities fraud
 - ix. ADA
 - x. Commerce Clause
 - xi. Medicaid
 - xii. First Amendment
 - xiii. Sentencing
 - xiv. Privileges and Immunities Clause
- (d) Level
- i. State
 - ii. Federal
 - iii. Federalism
 - iv. Foreign
 - v. Any combination of the above

These data were loaded into a Microsoft Excel spreadsheet for analysis. Analysis was generally conducted by use of the “Pivot Table” function provided within Excel, but other means were used as needed. Quality assurance was provided by manually re-checking data at each step (e.g., checking the party names and types when reading the SG’s invitation brief), as well as searching for any anomalous patterns.