

## 1

## The Solicitor General and the Supreme Court

In 1992, the National Organization for Women (NOW) and two abortion clinics filed a petition for a writ of certiorari<sup>1</sup> asking the U.S. Supreme Court to hear their case and apply the Racketeer Influenced and Corrupt Organizations Act (RICO)<sup>2</sup> against a group of abortion protestors. NOW alleged the protestors broke that law by seeking to put abortion clinics out of business.<sup>3</sup> The claim faced an uphill battle. Both lower federal courts that heard the case decided against NOW, holding that to violate RICO, one must engage in economically motivated behavior. The lower courts stated that because the protestors sought to limit the *availability* of abortions rather than to gain abortion-related *business*, RICO did not apply. Had the litigation ended at the circuit court of appeals – as most appellate cases do – that would have been the end of the road for the litigants, and federal racketeering law would have looked very different today. But the litigation did not end there. NOW sought Supreme Court review to settle whether RICO imposed such an economic motive requirement.

Supreme Court review was improbable. The Court hears fewer than one hundred cases each year, granting review to less than 1 percent of all requests

<sup>1</sup> A petition for certiorari is a formal request asking the Supreme Court to review the decision of a lower court. When the Supreme Court issues a writ of certiorari, it orders the lower court that heard the case to send up the record of that case so that it can review that court's determination. As we discuss later, the Supreme Court grants such requests on a discretionary basis; that is, it is not obligated to grant certiorari to any particular type of case or legal issue, although there are a handful of *appeals* the Court must hear – these are largely election-related cases and constitute only a small fraction of the Court's cases each term.

<sup>2</sup> See, generally, 18 U.S.C. §1961, et seq.

<sup>3</sup> We obtained information on this case and others throughout the book from the cert pool memos, private docket sheets, and other archival data collected by us and others (Epstein, Segal, and Spaeth 2007) at the Library of Congress Manuscript Reading Room in Washington, D.C. We would like to extend a gracious thank-you to the staff of the reading room for their assistance while we collected our data.

2 *The Solicitor General and the United States Supreme Court*

(Owens and Simon 2012). During the 1992 term (in which NOW sought Supreme Court review), the Supreme Court heard only 97 petitions out of more than 7,200 requests. In line with the general tendency to hear only the fewest of cases, the law clerk tasked with summarizing the case for the justices privately urged them to deny review.<sup>4</sup> He pointed out that none of the traditional reasons to grant review, such as legal conflict or judicial review exercised by the lower courts that heard the case, applied to the petition. There was only minimal conflict among the lower courts regarding whether RICO required an economic motive. What is more, the Court had denied review to a similar certiorari request just three terms earlier. On top of all that, the clerk suggested the case might be too politically sensitive for Court review:

Whenever a case involves abortion, there is a risk that the parties will become distracted, and that the real issue will be distorted. The risk seems especially great in a case in which [one] of the plaintiffs (NOW) is a leading proponent of the “pro-choice” position and [one] of the defendants (Operation Rescue) is a leading proponent of the “pro-life” position. (Cert Pool Memo 92-780)

Another factor mitigating against review was that a merits decision had unclear downstream consequences. What would the decision do to RICO? What effect would it have on abortion doctrine? What would the decision do to the Court’s broader standing among the public? Justice Blackmun’s law clerk summed up the uncertainty that the justices surely faced when he wrote to Blackmun:

It’s very hard to predict what this Court would do with a case like this, and it’s equally hard to tell what unintended consequences would flow from a precedent one way or another. (Cert Pool Memo Markup 92-780)

Put plainly, none of the typical rationales for granting review seemed to apply, and so review was improbable – but not impossible.

During the Court’s conference vote on whether to hear the case, a handful of justices formally requested the views of the U.S. solicitor general (SG) – the attorney for the U.S. government; that is, before determining whether to hear the case, justices wanted the SG’s opinion of the petition. Was the issue important enough to merit review? Did RICO require judicial

<sup>4</sup> As we explain more fully later, each Supreme Court justice (except Justice Alito) pools his or her clerks together to write memos summarizing petitions for certiorari and to make recommendations as to whether the Court should grant or deny review to the case. They employ this mechanism as a time-saving device. In this case, the clerk recommended that the Court deny review, in part because of a lack of conflict among the lower courts. As we explain later in the book, one of the Court’s primary responsibilities is to unify the law. Thus it often grants review to clear up conflicting legal interpretations among the lower federal courts.

fine-tuning? Did the lower courts need Supreme Court guidance? To answer these questions, justices turned to the Office of the Solicitor General (OSG).

The decision to call for the views of the SG turned out to be consequential. The OSG recommended that the Court grant review to the petition, reverse the lower court's decision, and declare that RICO contained no economic motive requirement. This recommendation appeared to have changed at least one justice's mind – and the course of law. As Figure 1.1 shows, after the justices received the SG's grant recommendation, Justice O'Connor changed her vote. Her first vote (in the initial round of voting) was to deny review, yet her second vote – which came after the OSG's recommendation – was to grant review. Her grant vote (technically a join-3 vote) became the fourth vote to hear the case (along with Justices White, Blackmun, and Stevens) and triggered full Court review.<sup>5</sup>

At the merits stage, the OSG performed ably, making a series of persuasive arguments. First, OSG lawyers argued that the economic motive requirement failed as a matter of statutory construction. Neither the plain meaning of RICO's text nor its legislative history evinced any such economic motive requirement. Second, they claimed that such a requirement would make it difficult for U.S. Attorneys to prosecute acts of violence based on political or religious reasons. Forcing prosecutors to show that a defendant had economic rather than political goals would impose unnecessary hurdles for them to obtain guilty verdicts. Third, requiring federal judges to determine whether an act was economic or noneconomic in nature would pose a practical problem. Could judges really determine how much economic benefit would be needed to make an act economic rather than political? Without objective criteria, judicial capacity would be stretched.

The Court agreed. On January 24, 1994, every justice – even those opposed to the Court's abortion jurisprudence – ruled that RICO contained no economic motive requirement. The decision thus cleared the way for courts to apply RICO to actors with noneconomic motives. This included, of course, abortion protestors like Scheidler, the Pro-Life Action Network, and others.<sup>6</sup> And though the ruling did not mean that pro-life activists would necessarily be held to have violated RICO (as future litigation would reveal),<sup>7</sup> it did mean

<sup>5</sup> When granting review to a petition of certiorari, the Court operates according to a Rule of Four. If at least four of the nine justices vote to grant review, the case will be placed on the Court's plenary (merits) docket. Technically, the Court will grant review to a case with three grant votes plus a join-3 vote (Perry 1991). O'Connor's vote in *Scheidler* was a join-3 vote, which triggered review.

<sup>6</sup> See *National Organization for Women v. Scheidler*, 510 U.S. 249 (1994).

<sup>7</sup> *Scheidler v. NOW, Inc.*, 547 U.S. 9 (2006).

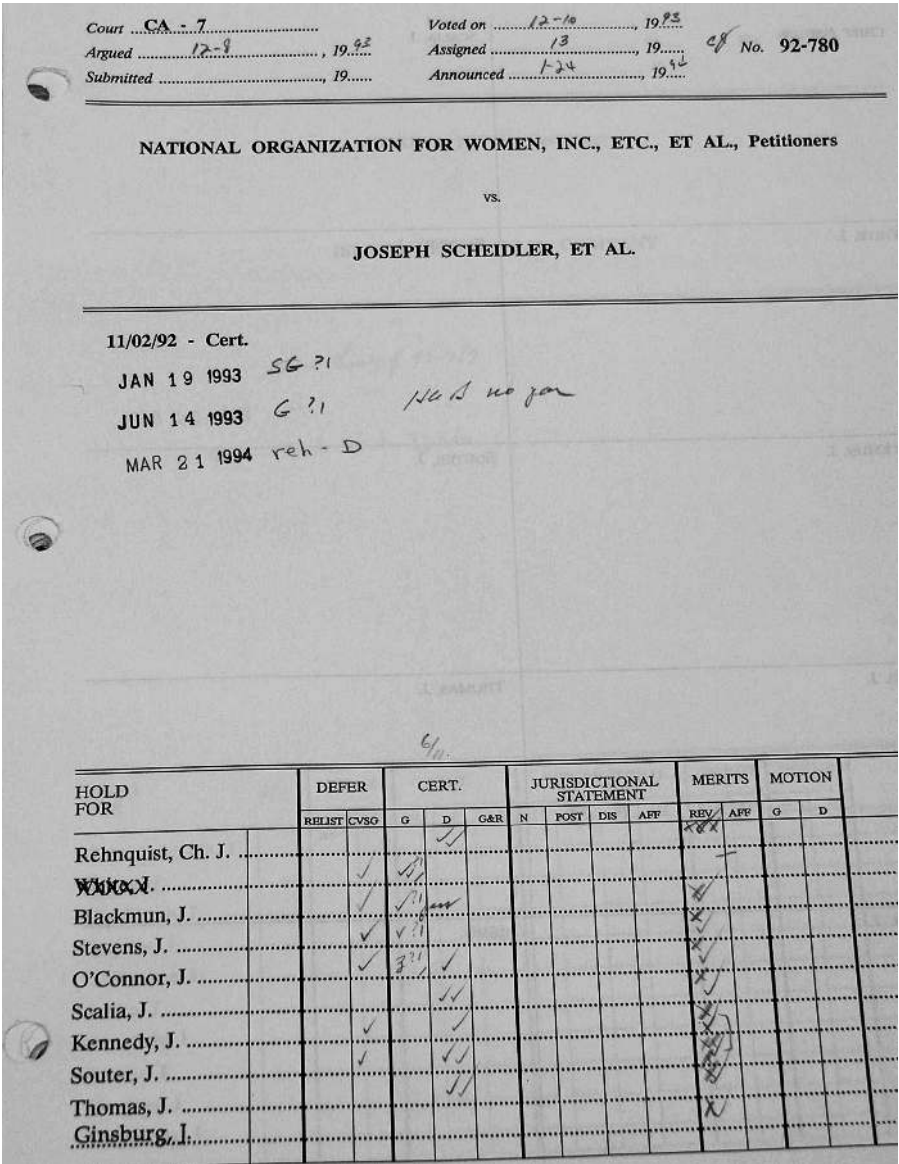


FIGURE 1.1. Justice Blackmun’s docket sheet in *NOW v. Scheidler* (92-780), obtained from Epstein, Segal, and Spaeth (2007). The Court’s initial round of voting occurred on January 19, 1993. The second round of voting occurred on June 14, 1993, after the Court received the SG’s recommendation.

that they would have to defend themselves against RICO challenges, draining them of much-needed resources that might have been spent more profitably elsewhere.

In sum, the SG and his staff of lawyers persuaded the Court in the following ways:

- To hear the case, though six justices initially opposed review
- To overturn two lower court rulings in a politically sensitive case
- To rule unanimously that noneconomic actors, including pro-life protestors, could be charged with violating federal racketeering laws

#### GOAL OF THE BOOK

Were the events that took place in *Scheidler* typical? Does the OSG influence the U.S. Supreme Court, or did the OSG simply get lucky? This is the phenomenon we scrutinize: SG influence. We examine one central question throughout this book: does the OSG influence the U.S. Supreme Court? We provide a multifaceted empirical analysis of SG influence throughout the Supreme Court's decision-making process. We examine the Court's agenda stage, its brief-writing stage, and its merits termination stage, all with the goal of determining whether the OSG influences the Court. Of course, while our goal is to determine whether the OSG influences the Court, we also seek to make broader connections regarding the source(s) of that influence. In other words, not only do we seek to provide a rigorous analysis of OSG influence but we also hope to bring clarity to the overall picture of what drives OSG influence.

To be sure, we are not the first to examine the SG's relationship with the Court. A long train of well-respected empirical and qualitative studies show that throughout the Court's decision-making process, SGs succeed frequently (Wohlfarth 2009; Nicholson and Collins 2008; Bailey, Kamoie, and Maltzman 2005; Deen, Ignagni, and Meernik 2003; Pacelle 2003; Days 1995; Salokar 1992; Caplan 1987). These and other studies have pointed out a number of features that all highlight OSG success before the Court. From them, we know, for example, that the Court grants review to far more government certiorari petitions than petitions filed by any other party (Black and Owens 2009a; Caldeira and Wright 1988). We know that the OSG wins an astonishingly high percentage of its Supreme Court cases (Epstein, Segal, Spaeth and Walker 2007). We know that when the OSG participates as an amicus curiae, the side it supports usually wins (Collins 2004; Segal 1988). We even know that the

Court may be more likely to borrow language from the SG's brief than from briefs filed by all other litigants (Corley 2008).

Of course, if SG *success* implied SG *influence*, we would not hesitate to assert that the OSG influences the Court at every turn. In fact, we would not need to write this book! Success, however, does not necessarily imply influence. SGs may succeed before the Supreme Court for reasons that have nothing to do with influence. For example, if justices were inclined for ideological or legal reasons to support the OSG's argument – even before the office provided its argument – could we contend that the OSG influenced them? We think not.

Rather, to determine OSG influence, one must examine judicial behavior *but for* the presence of the SG; that is,

the measure of a Solicitor General's advocacy [i.e., influence] is not how often the Court agrees with him, but how often he has persuaded the Court to take a position it would not have taken without his advocacy. (McConnell 1988, 1115)

Only if judicial outcomes look different because of the OSG can one infer influence.

Put plainly, although scholars and journalists have produced high-quality research on the SG – and we wholeheartedly recommend these works to our readers – our understanding of OSG influence over the Court remains shrouded in mystery. Our goal here is to remove the mystery.

Why is SG influence important to study? Why should OSG influence matter to legal scholars, political scientists, politicians, and the public? Jeffrey Segal answered this question over twenty years ago, when he stated: "Our understanding of the Supreme Court will not be complete until the role of the solicitor general is better understood" (Segal 1988, 142–43). More specifically, there are at least four reasons why readers should care about OSG influence. First, as the lawyer for the U.S. government before the Supreme Court, the SG's behavior can affect millions of us. The OSG appears before the Court more than any other litigant. If the OSG could influence justices, its powers would be extensive. Indeed, national policy might turn on the position taken by the SG. So if we care about Supreme Court policy outcomes, we must understand the OSG.

Second, it is almost exclusively through the SG's office that presidents interact with the Supreme Court. The president's only direct link to the Court is through the SG. To be sure, the president nominates justices, and with that dynamic comes some indirect control over Court outcomes. Once on the bench, however, all bets are off; the president can exercise no direct control over them (Epstein, Martin, Quinn and Segal 2007). Simply put, to understand

executive–judicial relations, one needs to understand the intermediary – the OSG.

Third, if the SG could influence the Court, presidents might circumvent Congress and use the OSG to make policy. When faced with hostile legislators, presidents have three choices: they can moderate and work with Congress, they can pursue their agendas within the executive branch through regulation, or they can seek policy victories in the judicial branch through Supreme Court litigation. If they succeed in the judiciary, presidents can make an end run around Congress, and if their success is tied to the OSG, that office becomes crucial to understand in a separation-of-powers context.

Finally, the OSG employs highly skilled lawyers who often go on to become Supreme Court justices themselves. It is no surprise that three of the last four justices confirmed to the Supreme Court once worked in the OSG. Justice Kagan was SG from 2009 to 2010, Justice Alito was assistant to Solicitor General Rex E. Lee from 1981 to 1985, and Chief Justice John Roberts served as principal deputy solicitor general from 1989 to 1993. A number of other justices throughout the Court's history also had served in the OSG (Epstein, Segal, Spaeth and Walker 2007). Because so many justices were once OSG lawyers, knowledge of the OSG may actually provide useful background information about the Court.

#### OUTLINE OF THE BOOK

Before we get ahead of ourselves, though, we briefly outline our strategy in this book. Chapter 2 starts off our investigation of OSG influence by providing important background information on the OSG. We examine when and why Congress created the office as well as the critical functions the SG fulfills today. We then provide a host of descriptive data on OSG success before the Court.

Chapter 3 discusses existing theories that seek to explain SG success. We examine a number of theories such as the (poorly named) agent of the Court theory, attorney experience, attorney quality, ideological and separation-of-powers considerations, and the OSG's possible strategic case selection. We discuss the observable implications of each of these theories and examine whether they – and their accompanying studies – can tell us anything about SG influence.

Chapter 4 is the first of four empirical chapters that examine OSG influence. It analyzes whether the OSG influences the votes justices cast during the agenda-setting stage. We analyze how justices respond to OSG recommendations to grant or deny review to certiorari petitions, taking advantage of



unique archival data that allow us to peer inside justices' private conferences and observe how they voted. Using research-backed methods of vote prediction, we predict how a justice will vote in a case and then compare her actual agenda vote to her predicted agenda vote. This research design allows us to examine whether the OSG influences justices to cast agenda votes that they might not otherwise cast.

In Chapter 5, we search for influence by comparing the probability of an OSG victory with the probability of a non-OSG victory in cases where the two attorneys are otherwise identical. The chapter employs a unique matching technique to investigate whether arguing on behalf of the OSG causes an attorney to be more victorious before the Court. More specifically, we seek out lawyers and cases that are as identical as possible in terms of experience before the Court, resources, ideological position vis-à-vis the Court, and the like. We then split the data into two groups: cases in which an OSG lawyer participates and cases in which someone other than an OSG lawyer participates. After matching these cases so that they are as similar to each other as possible, save for our treatment (the presence of an attorney from the OSG), we examine whether the OSG attorney is more likely than the non-OSG attorney to win before the Supreme Court.

Chapter 6 searches for OSG influence by examining whether Court opinions borrow more language from OSG briefs than from otherwise identical non-OSG briefs. Our approach in Chapter 6 employs the same matching methodology as used in Chapter 5. We take two briefs that are nearly identical in all relevant manners and ask whether the Court borrows more language from the OSG brief than from the non-OSG brief. Once again, by matching on all relevant characteristics but for the treatment, we can determine if OSG status drives up the probability of favorable treatment by the Supreme Court.

Chapter 7, our final empirical chapter, analyzes OSG influence by examining whether the Court's treatment of legal precedent is a function of the OSG's recommendations. We examine whether the Court is more likely to positively or negatively interpret precedent when the SG recommends such treatment of it. To do so, we once again employ matching. We compare cases in which the OSG recommends a particular treatment to the Court with cases in which the OSG does not make such a recommendation. By so doing, we can determine whether the Court is more likely to treat precedent positively or negatively as a result of the OSG's recommendation.

Chapter 8 concludes the book. In it, we review our results and discuss what OSG influence means for Supreme Court decision making, the separation of powers, and nomination politics more broadly.

So that there is no confusion over our results, we highlight our major findings at the outset. Our results all point toward one unmistakable finding;



the OSG does not simply succeed before the U.S. Supreme Court, it actually influences the Court throughout its decision-making process. The OSG influences justices to grant review to cases they otherwise would prefer not to hear; it influences the Court's rulings (who wins and loses); it influences the language of Court opinions; and it influences the evolution of doctrine by supporting and opposing Supreme Court precedent. In all facets of the Court's decision-making process, the OSG influences the Court.

We pause to offer a note to the reader about our approaches and methods. We employ a mixed-methods approach that includes archival data, large- $n$  quantitative analysis, and cutting-edge empirical methods. At all times throughout this book, however, we aim to describe clearly our data sources, our methods for coding variables, and our hypotheses. We do so, of course, to meet the stringent demands of social science (which require that data be valid and reliable and that future researchers be able to replicate our study) but also to aid the reader's understanding of our work. As such, while we seek to provide a systematic treatment of SG influence over the Supreme Court, we also strive to make our approach readable, entertaining, and accessible for readers of all backgrounds.

As a further note, we understand that a broad empirical approach such as the one we take here necessarily forces us to ignore some of the nuances inherent in each case before the Court. We recognize, for example, that personal characteristics unique to justices and SGs might lead to outcomes in particular cases, and we remain cognizant that there may well be some variables that influence the OSG's relationship with the Court that are simply impossible to measure. Still, these are issues that affect all quantitative studies, and scholars have decided – quite correctly, we believe – that those trade-offs are worthwhile to pursue answers to broad, general questions. The approach we take, in short, although not perfect, allows us to generalize from our data to all issues, all SGs, and all justices. Put simply, we hope that our approach – which raises theoretical questions and answers them using rigorous but clearly explained empirical analyses – is one that our readers will enjoy and that advances our understanding of the Supreme Court and the SG.

Former SG Erwin Griswold once stated, “I think a strong solicitor general can have very considerable influence on the Court” (quoted in Salokar 1992, 98). Was this comment merely the hopeful wish of a Supreme Court practitioner or the accumulated wisdom of an acute mind? In what follows, we examine this precise question.

## 2

## The Office of the Solicitor General: “The Finest Law Firm in the Nation”

During his testimony before the Senate Judiciary Committee to become solicitor general (SG), Paul Clement discussed the virtues and complexities of working in the Office of the Solicitor General (OSG), or what he called “the finest law firm in the Nation” (Clement 2005, 5). The SG, stated Clement, has important responsibilities to each of the three branches of the federal government. An actor with legal and political responsibilities, the SG must advocate for the government but must also be cognizant of the Court’s needs and demands:

The Solicitor General is an executive branch official, and the office defends the policies and practice of the executive branch in the courts when they are challenged. . . . The office quite literally sits at the crossroads of the separation of powers as the primary vehicle through which the Article II branch of Government speaks to Article III. But, of course, the office also owes important responsibilities to the Article I branch, the Congress of the United States. . . . Finally, the office also owes an important responsibility to the Supreme Court of the United States. I have heard reference made to the Solicitor General as the tenth Justice of the Supreme Court. I am quick to add I have never heard that comment made by any of the nine real Justices.

Clement’s testimony reflects an important concept. The SG must simultaneously weigh a number of factors when determining whether and how to proceed with cases. Fidelity to the law might mean, at times, rejecting a position of the executive in favor of one in line with the Court’s jurisprudence. At other times, it might mean adopting a position of the president, pushing the boundaries of law, and rejecting claims made by Congress or others. And still yet, at other times, the SG may need to strike out and pursue arguments envisioned neither by the administration nor by the Court. Simply put, the SG and the OSG are subject to contextual complexities that push and pull