

## COMMENT

### The Solicitor General of the United States: Tenth Justice or Zealous Advocate?

The federal government loses hundreds of cases in the federal courts of appeals each year, but the Solicitor General will select only a handful of those cases—just fifteen or so in recent years—to petition the Supreme Court to review. When deciding whether to seek certiorari (cert.), the Solicitor General attempts to use the same standards that the Supreme Court uses when deciding whether to grant cert. And as the Supreme Court’s docket has been halved during the last quarter-century, the number of cert. petitions from the Solicitor General’s Office has declined even more precipitously.<sup>1</sup> Acting as the final “decider” on the overwhelming majority of federal appeals, the Solicitor General has a vast and underscrutinized<sup>2</sup> amount of discretion over the federal government’s legal agenda.

This Comment argues that the Solicitor General should behave more zealously in his<sup>3</sup> advocacy at the petition stage, which will almost certainly require him to file more cert. petitions each year. By mimicking the decisionmaking of the Supreme Court as he currently does, the Solicitor General is insufficiently attentive to his role as an advocate and has improperly appropriated a judicial function for himself within the executive branch. This Comment also addresses concerns about the credibility of the Solicitor General

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1. See *infra* note 25 for a caution against inferring causation in either direction exclusively.
  2. Cf. Adam Chandler, *The Early Brief Gets the Worm*, SLATE (Dec. 5, 2008), <http://www.slate.com/id/2206039> (noting the lack of scrutiny of cert.-stage amicus filings); Adam Chandler, *The One Question Elena Kagan Won't Get Asked*, AOL NEWS (June 29, 2010), <http://www.aolnews.com/2010/06/29/opinion-the-one-question-elena-kagan-wont-get-asked> (describing the lack of scrutiny during Supreme Court confirmation hearings of the Court’s cert. practice).
  3. Because the current Solicitor General is male, I use male pronouns throughout the Comment when discussing the Solicitor General.

and the scarce resources of his Office that might arise if he were to change his petitioning strategy. Ultimately, neither concern should inhibit the Solicitor General from being less restrictive in petitioning the Supreme Court. The Comment concludes with recommendations for reforming the Solicitor General's cert. practice.

## I. THE SOLICITOR GENERAL'S CERT. PRACTICE

Required by statute to be "learned in the law,"<sup>4</sup> the Solicitor General is the federal government's chief appellate lawyer,<sup>5</sup> as well as "the country's most influential litigator."<sup>6</sup> Along with his four deputies and seventeen assistants,<sup>7</sup> the Solicitor General conducts virtually all Supreme Court litigation on behalf of the government.<sup>8</sup> He writes both cert.-stage and merits-stage briefs, presents oral arguments, answers the Supreme Court when it seeks the Solicitor General's views, decides whether and how to participate as an amicus,

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4. 28 U.S.C. § 505 (2006).

5. Nearly a century and a half after Congress created the Solicitor General's position, see Act of June 22, 1870, ch. 150, § 2, 16 Stat. 162, 162, the identity of the Solicitor General's "client" remains a matter of some debate. Some suggest that the Solicitor General represents the President. See, e.g., CORNELL W. CLAYTON, *THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY* 58-61 (1992); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 411 (2002). Others say his client is simply "the United States." See *Solicitors General Panel on the Legacy of the Rehnquist Court*, 74 GEO. WASH. L. REV. 1171, 1180 (2006) (statement of Walter E. Dellinger, III); Matthew L. Sundquist, *Learned in Litigation: Former Solicitors General in the Supreme Court Bar*, 5 CHARLESTON L. REV. 59, 64 (2010). For others, the client "is but an abstraction." FRANCIS BIDDLE, IN *BRIEF AUTHORITY* 97 (1962). One former Solicitor General maintains that the Solicitor General has an obligation, at various times, to nine different clients, including the people of the United States, Congress, and the administration in which he serves. Drew S. Days, III, *Executive Branch Advocate v. Officer of the Court: The Solicitor General's Ethical Dilemma*, 22 NOVA L. REV. 679, 681 (1998). The debate is important in some circumstances, and, given that the Solicitor General is more solicitous of government actors like Congress and the President in petitioning for cert., the Office's cert. practice probably impacts some "clients" more dramatically than others. Still, this Comment's position is that, in general, regardless of the precise formulation given to the Solicitor General's client, that client would be better served by a more zealous advocate at the cert. stage.

6. Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1326 (2010).

7. See Sundquist, *supra* note 5, at 64.

8. See 28 C.F.R. § 0.20(a) (2010). There are rare exceptions when the Solicitor General authorizes another government lawyer to represent a government entity at the Court. E.g., *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990); see 28 U.S.C. § 518.

and chooses when to seek cert.<sup>9</sup> The Solicitor General has wide discretion in performing the last two of these functions, enabling him “to set the government’s legal agenda.”<sup>10</sup> The last function—playing “traffic cop” for government cert. petitions<sup>11</sup>—is the particular focus of this Comment.

The Solicitor General petitions for review in a small fraction of the cases that the government loses in the courts of appeals.<sup>12</sup> In determining which cases make the cut, the Solicitor General adopts the Supreme Court’s standard for “certworthiness,”<sup>13</sup> a standard that emphasizes two criteria: a split of authority in the lower courts and the underlying legal issue’s importance.<sup>14</sup> What makes a case important, however, is eminently subjective.<sup>15</sup> The Court rarely offers guidance on what it thinks is important, and there is no scholarship that illuminates how the Court uses the “importance” criterion in practice. Thus, the Solicitor General observes “what the Court has been accepting” to align his own judgments of “importance” with the Court’s.<sup>16</sup>

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9. See REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 12-13 (1992).
  10. Cordray & Cordray, *supra* note 6, at 1328.
  11. LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 6 (1987) (quoting Interview by Lincoln Caplan with Justice Potter Stewart (June 5, 1985)).
  12. See SALOKAR, *supra* note 9, at 18, 160; Rex E. Lee, *Lawyering for the Government: Politics, Polemics & Principle*, 47 OHIO ST. L.J. 595, 598 (1986); cf. Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1496 n.45 (2008) (observing that counts of the Solicitor General’s petitions are actually inflated because many of those petitions are not true requests for review but rather are filed so that a case will be held pending decision in a related case).
  13. See SALOKAR, *supra* note 9, at 110; Cordray & Cordray, *supra* note 6, at 1328; *Five Questions for . . . Gregory Garre on “The Tenth Justice,”* LEGAL PULSE (July 12, 2011), <http://wfllegalpulse.com/2011/07/12/five-questions-for-gregory-garre-on-the-tenth-justice> (“[T]he SG inevitably takes its cues from the Court.” (statement of former Solicitor Gen. Gregory Garre)); Solicitor Gen. Elena Kagan, Remarks at the Ninth Circuit Judicial Conference (July 23, 2009), available at [http://www.ce9.uscourts.gov/video/Kagan\\_web\\_full.wmv](http://www.ce9.uscourts.gov/video/Kagan_web_full.wmv) (“When we think about whether to file a petition for cert., we look at it in part through the lens of the Court. We ask how the Court is going to view this, what standards the Court applies to those decisions, and we try to apply those same standards.”).
  14. See SUP. CT. R. 10.
  15. See H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 221 (1991) (“[A] case is certworthy because four justices say it is certworthy.”).
  16. SALOKAR, *supra* note 9, at 113. Alumni of the Solicitor General’s Office confirm that the Office has grown more restrictive in seeking cert. in concert with the Court’s evidently heightened standards for granting cert. See Adam Chandler & Jennifer Harris, *Important Questions of Federal Law: An Empirical Survey of Possible Explanations for the Supreme Court’s Declining Docket* 6 (Sept. 18, 2009) (unpublished manuscript), available at [http://www.law.yale.edu/documents/pdf/Clinics/Declining\\_Docket\\_Student\\_Conference](http://www.law.yale.edu/documents/pdf/Clinics/Declining_Docket_Student_Conference)

While the Solicitor General has always been stingy in pursuing cert. grants, over the last two decades he has “sharply curtailed” his requests for review even further.<sup>17</sup> Between October Term 1985 and October Term 1988, the Solicitor General filed an average of fifty cert. petitions per Term.<sup>18</sup> That figure steadily declined in the subsequent twenty years.<sup>19</sup> Most recently, between October Term 2005 and October Term 2008, the Solicitor General filed an average of just sixteen cert. petitions per Term.<sup>20</sup> Despite varying levels of participation at the cert. stage, the Solicitor General has enjoyed a rather invariant success rate for its cert. petitions, holding steady at approximately 70% (compared to about a 3% success rate for other “paid” petitions).<sup>21</sup>

It is unsurprising then that the decline in government cert. petitions has coincided with the Court’s own declining docket. The Court is now deciding fewer than half the number of cases it decided as recently as the mid-1980s.<sup>22</sup> Scholars, judges, and journalists have floated at least fifteen hypotheses for the decline,<sup>23</sup> but, aside from changing membership on the Court,<sup>24</sup> the only

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\_Paper\_Chandler\_and\_Harris.pdf; *Five Questions for . . . Gregory Garre on the “Tenth Justice,”* *supra* note 13 (“As the Court has seemingly heightened its standards for determining what is cert-worthy, the SG no doubt has as well.” (statement of former Solicitor Gen. Gregory Garre)); *see also* Cordray & Cordray, *supra* note 6, at 1352 (“[T]he Solicitor General’s office has raised the threshold for seeking review.”). There are other potential explanations for the Solicitor General’s decline in cert. activity. Perhaps the federal government is involved in less litigation than in the past, or perhaps the federal government is winning more of its cases in the lower courts. There is some indirect evidence supporting each of those explanations. *See* Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court’s Plenary Docket*, 58 WASH. & LEE L. REV. 737, 768-71 (2001). Scholars have ultimately found those explanations unpersuasive, however. *See* Cordray & Cordray, *supra* note 6, at 1350 (“Neither of these factors, however, can explain the Solicitor General’s most recent reduction in petitions for review.”).

17. Cordray & Cordray, *supra* note 6, at 1338; *see* Chandler & Harris, *supra* note 16, at 4-6.

18. Chandler & Harris, *supra* note 16, at 5.

19. *See* Cordray & Cordray, *supra* note 6, at 1348.

20. Chandler & Harris, *supra* note 16, at 5.

21. *See Solicitor General Oversight: Hearing Before the S. Comm. on the Judiciary*, 104th Cong. 52 (1995) (prepared statement of Thomas G. Hungar); SALOKAR, *supra* note 9, at 25, 108; ROBERT L. STERN ET AL., SUPREME COURT PRACTICE: FOR PRACTICE IN THE SUPREME COURT OF THE UNITED STATES 164 & n.6 (8th ed. 2009) (identifying the discrepancy); Lazarus, *supra* note 12, at 1493 (same); Corey A. Ditslear, Office of the Solicitor General Participation Before the United States Supreme Court: Influences on the Decision-Making Process 32 (photo. reprint 2004) (2003) (unpublished Ph.D. dissertation, Ohio State University) (on file with the Yale Law School Library).

22. *See* Chandler & Harris, *supra* note 16, at 1.

23. *See id.* at 2.

explanation that has withstood empirical testing is the decline in the number of Solicitor General cert. petitions. In two studies, Margaret Meriwether Cordray and Richard Cordray have demonstrated rigorously that the “significant reduction in the number of petitions for review filed by the Solicitor General” is a substantial and independent influence on the size of the Court’s plenary docket.<sup>25</sup>

The remainder of this Comment argues that the Solicitor General’s standard for pursuing cert. is misguided and may actually be weakening the Solicitor General’s position before the Court.

## II. THE SOLICITOR GENERAL AS ZEALOUS PETITIONER RATHER THAN TENTH JUSTICE

The Solicitor General abdicates his responsibility to advocate for the federal government and the United States when he refuses to bring cases to the Supreme Court in which those entities have an interest. That abdication is acceptable when in the service of a focused litigation strategy, when the stakes are minimal, or when an adverse Supreme Court ruling is assured. But concerns about the Solicitor General’s credibility and his Office’s fixed capacity are overblown and should not limit his advocacy at the cert. stage to the extent they do now. In particular, importing the Supreme Court’s standard for *granting* cert. into the Solicitor General’s Office as the standard for *seeking* cert. confuses the advocacy role of the Solicitor General. This Part argues that the Solicitor General should start behaving more like a lawyer and less like a Justice.<sup>26</sup>

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24. See David R. Stras, *The Supreme Court’s Declining Plenary Docket: A Membership-Based Explanation*, 27 CONST. COMMENT. 151 (2010).

25. Cordray & Cordray, *supra* note 6, at 1340; see Cordray & Cordray, *supra* note 16, at 763-71. It would be a mistake, though, to infer pure causation in either direction. Instead, a downward-spiraling feedback loop is likely operating. In one direction, the Cordrays have shown that the declining number of petitions filed by the Solicitor General’s Office plays a significant role in driving down the Supreme Court’s docket size. In the other direction, when the Supreme Court’s docket declines, the Solicitor General likely responds by raising his standards for seeking cert. to match the Court’s seemingly heightened exclusivity. Accordingly, he may file fewer petitions and further shrink the Court’s docket. And so on.

26. As a theory of the Solicitor General’s role, the “Tenth Justice” model is captured in its most potent form by David Strauss, who wrote that, under a “Tenth Justice” approach, “the Solicitor General should simply take the position that reflects his best judgment of what the law is, just as he would if he were literally a Justice.” David A. Strauss, *The Solicitor General and the Interests of the United States*, LAW & CONTEMP. PROBS., Winter/Spring 1998, at 165, 168. The strong Tenth Justice model is not widely embraced. See CLAYTON, *supra* note 5, at 61 (quoting Warren E. Burger, Tribute, *Wade McCree*, 21 LOY. L.A. L. REV. 1051, 1052 (1988))

A. *The Argument for More Zealous Petitioning*

One hallmark of effective advocacy, according to the *Model Rules of Professional Conduct*, is zeal.<sup>27</sup> The *Model Rules* suggests that a lawyer's officer-of-the-court responsibilities are "usually harmonious" with her responsibilities as a zealous advocate.<sup>28</sup> They also permit a "zealous advocate" to "assume that justice is being done" "when an opposing party is well represented."<sup>29</sup>

The *Model Rules* is a guide for all lawyers, including, explicitly, government lawyers.<sup>30</sup> It would serve the Solicitor General—and those he represents—well if he remembers the ideal of the zealous advocate imagined by the *Model Rules*. He must remain as mindful of the interests he represents as he does of the Court's perspectives, if not more so.<sup>31</sup> Twenty-five years ago, the Solicitor General filed petitions in only about one-sixth of the cases in which petitions were sought by cabinet heads, U.S. attorneys, assistant attorneys general, and general counsels from departments and agencies.<sup>32</sup> The frustration of the government officials whose recommendations were not followed might sound something like Judge Learned Hand's remark that "[i]t is bad enough to have the Supreme Court reverse you, but I will be damned if I will be reversed by some Solicitor General."<sup>33</sup>

Now that the Solicitor General files fewer than a third as many petitions as he did then, the number of disappointed "clients" has likely swollen. What's more, even when the Solicitor General is not acting on behalf of a department or agency, he frequently decides not to appeal monetary awards against the government—which directly affect the public fisc—as well as losses in criminal cases, tax cases, *Bivens* cases, and cases spanning the diversity of the federal

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(describing the Solicitor General as "the Government's advocate in the Supreme Court, not the Supreme Court's representative in the Department of Justice"); SALOKAR, *supra* note 9, at 98 (quoting four former Solicitors General rejecting the "Tenth Justice" appellation).

27. MODEL RULES OF PROF'L CONDUCT pmbl. ¶¶ 2, 8-9 (2008).

28. *Id.* pmbl. ¶ 8.

29. *Id.*

30. *E.g., id.* pmbl. ¶ 18, R. 1.9 cmt. 1, R. 1.11.

31. *Cf.* Ara Lovitt, Note, *Fight for Your Right To Litigate: Qui Tam, Article II, and the President*, 49 STAN. L. REV. 853, 886 (1997) ("By failing to challenge the [False Claims Act]'s encroachment on core executive powers, the Solicitor General has abdicated its duty to advocate zealously on behalf of its client—the President of the United States.").

32. Lee, *supra* note 12, at 598; *cf.* Kagan, *supra* note 13, at 10:30 ("I say 'no' all the time.").

33. See Archibald Cox, *The Government in the Supreme Court*, 44 CHI. B. REC. 221, 224-25 (1963) (quoting Judge Hand). Judge Hand was referring to the Solicitor General's occasional practice of confessing error after the government has won in the lower courts, a practice outside this Comment's scope.

government's litigating activity. The Solicitor General has even chosen not to petition when a circuit split on an issue was acknowledged and its importance manifest.<sup>34</sup> In total, the Solicitor General declines to pursue a vast array of federal interests in the Supreme Court, and this Comment finds no justifications for that practice that could be called zealous representation.

Crucially, it is not at all clear that the Supreme Court even endorses the Solicitor General's strict screening.<sup>35</sup> Indeed, the Cordrays find strong evidence that "the Solicitor General's pullback [from filing cert. petitions] is now thwarting the Court's desire to hear more cases involving the federal government."<sup>36</sup> The Court has responded by devoting more of its docket to cases in which the government is the respondent, a category of cases that the government is more likely to lose.<sup>37</sup> Accordingly, the Cordrays observe, "the Solicitor General's highly restrictive petitioning decisions are opening the door to more of the least desirable cases for the federal government."<sup>38</sup> In other words, the current strategy has begun to backfire.

To be sure, there are strategic and prudential reasons—plainly within the realm of smart and zealous advocacy—for the Solicitor General not to petition in certain cases. If the Solicitor General determines that the monetary stakes of

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34. See, e.g., *United States v. Deloitte LLP*, 610 F.3d 129 (D.C. Cir. 2010). The Solicitor General declined to petition for cert. in *Deloitte* despite an acknowledged split with two other circuits on the scope of the work-product privilege. See Alan Horowitz, *No Supreme Court Review in Deloitte*, TAX APP. BLOG (Sept. 27, 2010), <http://appellatetax.com/2010/09/27/no-supreme-court-review-in-deloitte>.
  35. See Linda R. Cohen & Matthew L. Spitzer, *The Government Litigant Advantage: Implications for the Law*, 28 FLA. ST. U. L. REV. 391, 395-96, 421 (2000) (arguing that the Solicitor General's Office is so selective that its screening process alters the Court's "menu of cases" and prevents the Court from hearing cases that it would like to); *id.* at 414 (estimating that the Solicitor General keeps away from the Justices 20% of the cases that they would want to review). *But cf.* *United States v. Providence Journal Co.*, 485 U.S. 693, 702 n.7 (1988) (expressing the Court's expectation that the Solicitor General will decline to petition in some of the cases that the government lost below, despite the wishes of interested agency heads).
  36. Cordray & Cordray, *supra* note 6, at 1346. It is instructive to compare the Cordrays' findings to then-Solicitor General Kagan's apparent overestimation of the Court's reliance on the Solicitor General's judgment in seeking cert.: "[W]e'll think about how it's likely to look from the Court's perspective, because we know that the Court counts on us to take into account its own set of criteria and standards for deciding on cert. petitions." Kagan, *supra* note 13, at 7:18.
  37. See Cordray & Cordray, *supra* note 6, at 1345-46, 1366-68. The Court has also responded by calling for the views of the Solicitor General on other parties' petitions more frequently. See Tony Mauro, *Justices Increasingly Asking the SG's Office for Its Views*, NAT'L L.J., Aug. 24, 2011, <http://www.law.com/jsp/nlj/PubArticleSCI.jsp?id=1202512126287>.
  38. Cordray & Cordray, *supra* note 6, at 1346.

a dispute are less than the resources required to reverse the prior ruling, he is justified to question whether it is in the public's interest to pursue an appeal. (It may still be, for precedential reasons.) Also, adverse Supreme Court precedent impacts the government more frequently than it impacts any other litigant, so the Solicitor General has a special interest in limiting its spread. In most circumstances, that interest will require him to keep "sure losers" away from the Court; he is acting as an advocate, and a good one, when he does so.<sup>39</sup> Finally, it is permissible and wise advocacy when the Solicitor General strategically selects a particular case out of several on the same issue to take to the Supreme Court. That strategy will sometimes require him to decline to petition in cases with weaker facts or procedural postures as he waits for a more desirable vehicle to develop. All three of these exceptions are valid practices under this Comment's conception of the Solicitor General's role, and they may rule out some significant percentage of potential cert. vehicles. Still, they cannot explain all of the cases the government currently declines to petition. After all, there is no reason to think these exceptions are thrice as common today as compared to thirty years ago, and yet the Solicitor General is filing a third as many petitions now as then. Moreover, these explanations are not the ones offered to justify why the Solicitor General's Office petitions so infrequently; rather, the Office's credibility and limited resources are the commonly cited explanations.<sup>40</sup>

### *B. The Office's Defense of Its Cert. Practice*

When asked why the Solicitor General's Office does not file more cert. petitions, representatives of the Office do not cite strategic reasons like those mentioned in Section II.A. Instead, they make two arguments: (1) the Solicitor General's credibility with the Court is paramount, and he risks that credibility by filing more cert. petitions; and (2) the lawyers in the Office have only so much time, and the Solicitor General must make exacting choices about which priorities to pursue. Neither of these justifications is particularly persuasive.

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39. Compare *supra* text accompanying notes 35-38, which explains how the Solicitor General's restrictive petitioning may actually be positioning the government to lose more frequently at the Supreme Court.

40. This Comment takes no position on the desirability of a larger Supreme Court docket. Accordingly, this Section has ignored that result as a probable consequence of an increase in government cert. petitions.



1. *Credibility*

The predominant justification given for the Solicitor General's high bar for seeking cert. is the need for the Solicitor General to maintain credibility with the Supreme Court.<sup>41</sup> When Elena Kagan was Solicitor General, she remarked, "I say 'no' all the time because I say the Court won't take it, our credibility is on the line, the Court will wonder why on earth we're filing this cert. petition."<sup>42</sup> It is true that the Solicitor General is the consummate repeat player at the Court, and he must guard his reputation carefully.

But the extent to which that reputation is protected by seeking cert. narrowly has been exaggerated. No one suggests that the Solicitor General was any less credible in the 1980s when he was filing three times as many petitions as he is today. Indeed, his grant rate then is commensurate with the current rate.<sup>43</sup> Also, an empirical study of amicus filings found that the government's amicus filings increased without decreasing the Solicitor General's prestige or success before the Court.<sup>44</sup> Furthermore, the Solicitor General could—without risking the reliability of his recommendations—write cert. petitions that simply do not allege a circuit split when there is not one, and that do not pretend that issues are equally important when they are not. The Solicitor General would still be asking for review, but would also be honest about his judgment of each case's qualifications for a cert. grant. Filing such cert. petitions would make a difference because it would put the cases into the hands of the Court. The Court can then provide an independent, *judicial* assessment of an issue's certworthiness. But more saliently, the Solicitor General would have made the requisite effort to advocate fully and honestly for the government and the public's interests, within the constraints of his special role as a repeat player at

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41. See, e.g., SALOKAR, *supra* note 9, at 115 ("The importance of the reputation of the solicitor general's office has often been cited as a key variable in case selection."); Cordray & Cordray, *supra* note 6, at 1330 ("By carefully limiting the number of petitions filed, the Solicitor General's office . . . safeguards its reputation with the Court . . ."); Wade H. McCree, *The Solicitor General and His Client*, 59 WASH. U. L.Q. 337, 341 (1981) ("[O]ur need to preserve credibility when we advise the Court . . . requires rejection of many such proposals for certiorari."); sources cited *infra* note 42.

42. Kagan, *supra* note 13, at 11:04. Two other members of the Solicitor General's Office made similar remarks about the credibility of the Office. Neal Katyal, Acting Solicitor Gen., Address to Interns in the U.S. Department of Justice's Civil Division (Aug. 4, 2010); Edwin Kneedler, Deputy Solicitor Gen., Address to the Supreme Court Advocacy Clinic at Yale Law School (Apr. 6, 2010).

43. See *supra* text accompanying note 21.

44. James L. Cooper, *The Solicitor General and the Evolution of Activism*, 65 IND. L.J. 675, 694-95 (1990).

the Court.<sup>45</sup> The added cert. filings would require the Court to review more petitions than it has been reviewing recently, but there is no reason to think that they would diminish the Court's high regard for the Solicitor General. In fact, they would create more transparency for the Solicitor General's cert. recommendations, thereby enhancing his reputation when his spectrum of judgments aligns with the Court's.

There is even reason to think that the Court would welcome the additional cert. petitions. As noted in Section II.A, there is evidence that the Court wants to hear more cases involving the federal government and has resorted to granting a larger fraction of cases in which the government is the respondent. The Court may also desire more latitude to set its own agenda by choosing from a wider menu of government cases. Or it may think that, as a matter of process, it is more appropriate for the Court, rather than an executive official, to make a final judgment on many of the cases. In any case, the Solicitor General's current practice may actually be jeopardizing the reputation of the Office, as the Court must look elsewhere to find the cases it seeks to hear.

## 2. Scarce Resources

Another defense of the Solicitor General's current cert. practices is that the Office's resources are finite and not every possible cert. petition can be written.<sup>46</sup> Elena Kagan also made this point when asked about cert.: "Forget our credibility, it's just not worth the time of the lawyers in my office. We only have twenty-two lawyers in the Solicitor General's office, we have to be pretty careful about the way we use them and the way we allocate their time."<sup>47</sup>

This argument is particularly weak. The size of the Solicitor General's staff today is the same size it was in the mid-1980s, when the Office was filing more than triple the number of cert. petitions it is today.<sup>48</sup> More fundamentally, it is the duty of the Solicitor General to pursue zealously his client's interest, so it must also be the duty of the Solicitor General to request additional funding for the Office if it does not have the capacity to perform sufficient advocacy. Furthermore, the Solicitor General's Office rarely writes first drafts of anything it files, and it would be able to diffuse much of the extra labor throughout the

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45. There is no tension between honest advocacy and zealous advocacy. Honesty is an explicit requirement of the *Model Rules*. MODEL RULES OF PROF'L CONDUCT pmbl. (2008).

46. See Matthew Reid Krell, *Raising the Bar: Elite Advocacy in Supreme Court Public Interest Litigation*, 34 J. LEGAL PROF. 275, 287 (2010); sources cited *supra* note 42.

47. Kagan, *supra* note 13, at 10:17.

48. See Cordray & Cordray, *supra* note 6, at 1360.

various components of the Department of Justice. Filing cert. petitions is a core function and responsibility of the Office, and a Solicitor General heeding this Comment's recommendations would necessarily find a way to get the job done.

*C. Reforming the Office's Cert. Practice*

There are at least three related ways to reconceptualize and alter the Solicitor General's current practices to make him a more zealous participant at the cert. stage. First, perhaps the Solicitor General's default position should be to petition the Court to review every case the government loses in the courts of appeals, unless there is a specifically stated reason not to do so. Indeed, that default is the general practice of the Office when a federal statute has been declared unconstitutional by a court of appeals. The Solicitor General will almost always file a cert. petition in such circumstances; if he declines to, the Attorney General must file a report with Congress within thirty days giving "a complete and detailed statement of the reasons" why the law's constitutionality will not be defended.<sup>49</sup> Defending acts of Congress is a chief responsibility and privilege of the Solicitor General, but it is not inevitable that other matters, such as large damage awards or regulatory infractions, should be treated with less urgency and transparency as a matter of course. If the default position were switched, the Solicitor General could still petition those matters less frequently, but he should have to justify briefly (and perhaps not even publicly) why he will not pursue the government's interest in the cases he declines to petition. Obviously, as discussed in Section II.A, sometimes there will be very good reasons for not petitioning, but by shifting the default and requiring the Solicitor General to articulate to his constituencies the reasons he declines to pursue their interests, the Solicitor General will become more solicitous of those constituencies.

Second, and relatedly, the Solicitor General could adopt a different, more lenient standard for determining when he will advocate the interests of the federal government at the cert. stage. Perhaps the primary question the Solicitor General should ask, after examining Court precedent, is, "[C]an th[is] particular program be defended in Court?"<sup>50</sup> Asking whether a particular program *can be defended* is a much more permissive and germane inquiry for a government attorney than whether the Supreme Court will grant cert. to

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49. 28 U.S.C. § 530D (2006).

50. RICHARD L. PACELLE, JR., *BETWEEN LAW & POLITICS: THE SOLICITOR GENERAL AND THE STRUCTURING OF RACE, GENDER, AND REPRODUCTIVE RIGHTS LITIGATION* 16 (2003) (quoting Seth Waxman, a Solicitor General under President Clinton, speaking about a somewhat different context).

review that program. In fact, the “defendability” inquiry is similar to the standard the Solicitor General uses when deciding whether to defend a federal statute whose constitutionality he questions.

Third, even if the Solicitor General declines to adopt those specific prescriptions, he should nevertheless abandon his reliance on a *judicial* standard for determining when to pursue a cert. grant. It is tautological that only the Supreme Court can determine what is certworthy.<sup>51</sup> The Solicitor General can only guess what is certworthy—inevitably imperfectly—and thereby abandons some percentage of cases that the Justices would have reviewed if presented to them. But even more problematic is the exercise of a judicial standard within an executive context where the considerations should be those of an advocate.<sup>52</sup> The Solicitor General, as an advocate, should view the Court’s cert. standards as challenges to be overcome.<sup>53</sup> Instead, he has attempted to adopt the cert. standards himself and propagated them within his own branch. For the Solicitor General, though, the cert. calculation should involve purely executive interests—for example, the public fisc or the administrability of a regulation—and the judicial standard for certworthiness should present something analytically distinct, an occasion for legal strategy and argument. Pushing one’s case against a formidable judicial standard is a routine part of an advocate’s job, but it is a role the Solicitor General declines by incorporating the stringent standard into his own practice and judgment.<sup>54</sup>

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51. Cf. PERRY, *supra* note 15, at 221 (“Fundamentally, the definition of ‘certworthy’ is tautological; a case is certworthy because four justices say it is certworthy.”).

52. One scholar has noted the potential “separation of powers concerns” if the Solicitor General’s cert. recommendation were allowed to stand in for a Justice’s vote when the Court does not have a “full bench available.” Jonathan Remy Nash, *The Majority That Wasn’t: Stare Decisis, Majority Rule, and the Mischief of Quorum Requirements*, 58 EMORY L.J. 831, 885 & n.189 (2009).

53. Cf. John O. McGinnis, *Principle Versus Politics: The Solicitor General’s Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799, 802 (1992) (“[The Solicitor General] cannot merely echo the Court’s precedents, but must project vigorously, albeit respectfully, the President’s distinctive constitutional voice.”).

54. A fourth possible reform, not explored here because it is external to the Office, is for Congress to grant agencies broader independent litigating authority so that they can petition for themselves when the Solicitor General declines to do so. See generally *FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994) (holding that the FEC does not have statutory authority to petition on its own behalf).

## CONCLUSION

The Solicitor General is excessively restrictive in seeking cert. and is growing ever more so. This litigation strategy does not amount to zealous advocacy of the interests the Solicitor General represents, and it needlessly employs a judicial standard within an advocacy role. There are good reasons for the Solicitor General to be filing more cert. petitions, and they outweigh unconvincing excuses for not doing so, such as concern for the Office's reputation and limited human resources.

Elena Kagan appeared to grasp the import of this argument soon after she was confirmed as President Obama's first Solicitor General. Speaking at the Ninth Circuit Judicial Conference, she reflected on the Solicitor General's consistently high grant rate for its cert. petitions:

Somebody said to me recently, "Maybe those figures [grant rates of approximately 70%] are too high." . . . [T]here's an interesting question there [whether the Solicitor General's office is filing enough cert. petitions]. I used to be a big fan in my old job as Dean of saying that "if you don't fail sometimes, it means you're not trying to do enough things." And there is a point there.<sup>55</sup>

Indeed there is.

ADAM D. CHANDLER

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55. Kagan, *supra* note 13, at 10:35.