Agenda Setting on the Vinson Court

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The paper that follows is one of a series of papers I wrote regarding agenda setting on the Vinson Court. As each paper was completed updates and corrections may have changed some of the specific numbers presented in earlier papers, but the general results did not change. The papers were eventually combined into a book titled, *Supreme Court Agenda Setting: The Vinson Court* (available on Amazon.com). The individual papers became chapters in the book and the updated numbers were used for that version.

Again, the paper that follows is the original version. Some numbers may have been updated for the version included as a chapter in the book version, but the changes were usually minor and did not affect the overall results.

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Paper 7: Government Parties as a Factor

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Abstract

Although thousands of petitions seeking review by the Supreme Court are filed each year, the justices only accept about 150 or fewer for plenary review, with perhaps a few hundred more disposed of summarily. Because of this low acceptance rate scholars have long thought that the justices must use some strategy or process to reduce their workload to manageable levels. Although the examination of agenda setting on the Supreme Court is of continuing interest to judicial scholars, previous studies have usually focused only on cert petitions, specific issues, particular terms, or sampling for their data collection. A more comprehensive examination of the cases filed before the Supreme Court will provide a clearer picture of how the justices set their agenda.

Drawing from an ongoing database project this study examines all cases filed before the Vinson Court (1946 to 1952 Terms). The specific question addressed in this paper is whether the presence of government parties in a case affects the chances for acceptance by the Supreme Court. The results, which prove to be rather robust, show that they do. In various combinations, federal or state/local government entities, as appellant or appellee, in criminal or noncriminal cases, are associated with a statistically significant difference in the acceptance rate by the Court.

Agenda Setting on the Vinson Court
Paper 7: Government Parties as a Factor

This is the seventh paper in a series examining agenda setting on the Vinson Court. The examinations are largely empirical, but with a general grounding in familiar aspects of behavioral judicial politics. Although part of a series, I would like each paper to stand on its own. Thus, some explanatory material will be repeated from one paper to the next to provide background or context.

The decisions on the merits of cases made by the justices of the United States Supreme Court may be the most important aspect of judicial policy making, but scholarly examination of other aspects of the judicial decision making process have contributed to our overall understanding of judicial behavior and politics. A few examples of such research includes examination of opinion writing of the Supreme Court justices (Maltzman, Spriggs, and Wahlbeck 2000), acclimation effects of new justices (Hagle 1993), the use of precedent on the Supreme Court (Segal and Spaeth 1999), and dealing with the lack of precedent in the federal courts of appeal (Klein 2002).

Of course, agenda setting and its attendant strategic considerations have also been the focus of many studies. *Marbury v. Madison* (1803) may have been the earliest and most famous example of strategic agenda setting or decision making by the Supreme Court. Despite a general view at the time that judges were not policy makers—at least not along the lines of executives and legislators (see, for example, Spaeth 1979, chapter 1)—histories of the Court have certainly recognized strategic aspects to the Court's

decision making (e.g., Rodell 1955). Walter Murphy's *Elements of Judicial Strategy* (1964) is one of the earliest and most important examinations of how strategic considerations may affect judicial decision making. Other scholars have expanded and refined Murphy's arguments (e.g., Epstein and Knight 1998). A related line of research focuses more specifically on the ideological preferences of judges (e.g., Segal and Spaeth 2002) and a book by Brenner and Whitmeyer (2009) compares various models of strategic judicial behavior.

One aspect of strategic judicial behavior lies in agenda setting, which means how the Supreme Court decides which cases it will take to decide on the merits. Although several thousand petitions seeking review by the Supreme Court are filed each year, the justices only accept about 150 or fewer for plenary review (i.e., full briefs submitted, oral arguments held, and opinions written), with maybe a few hundred more disposed of summarily (i.e., the Court simply affirms, reverses, or vacates in a very short per curiam opinion, sometimes as little as "Judgment affirmed."). Thus, scholars have long thought that the justices must use some strategy or process to reduce their workload to manageable levels (e.g., Hagle 1990).

In his book-length examination of Supreme Court agenda setting Perry (1991) notes that aspects of agenda setting have been of interest to judicial scholars at least since Schubert (1959). Perry also notes that a few years later Tanenhaus, Schick, Muraskin, and Rosen, (1963) formulated "cue theory" as a way of explaining how the justices were able to navigate the "sea of work that must be processed" (1991, 114). As Perry goes on to note, cue theory fell out of favor when later, more sophisticated,

studies failed to replicate the initial results (1991 116). Nevertheless, although a study by Ulmer, Hintze, and Kirklosky rejected two of the three cues Tanenhaus et al., found significant, a third—the federal government as a petitioning party—was significant and the authors concluded that cue theory retained some viability (1972, 642).

Regardless of how cue theory itself has developed, like these two early examinations of the Supreme Court's agenda setting many later studies focused on how the justices deal with the large number of petitions for writs of certiorari.[1] Caldeira and Wright (1988), for example, examined organized interests in agenda setting with respect to the cert petitions filed during the Court's 1982 Term. In a recent edition of his text on the Supreme Court, Baum (2013, 88) provides an example of recent work examining litigant status (Black and Boyd 2012). Thus, although the examination of agenda setting on the Supreme Court is of continuing interest to judicial scholars previous studies have usually focused only on cert petitions (Tanenhaus et al. 1963), specific issues (Caldeira and Wright 1988; Black and Boyd 2012), particular terms (Ulmer, Hintze, and Kirklosky 1972), or sampling for their data collection (Tanenhaus et al. 1963; Perry 1991). A more comprehensive examination of the cases filed before the Supreme Court will provide a

[1] Cases come before the Supreme Court via two basic methods: petitions for writs of certiorari and appeals. Because this study will not distinguish between "cert" petitions and appeals, I hesitate to wade too deeply into their differences. Briefly, however, cert petitions are discretionary, which means that the justices are free to grant or deny them as they see fit. No legal meaning is attached to a denial except that the Supreme Court chose not to hear the case. Technically, the Supreme Court must hear cases that come as appeals, but the justices may avoid review by indicating that a case was not properly presented as an appeal for one reason or another. The Court may then treat the appeal papers as a petition for a writ of certiorari and grant or deny the petition. See Perry (1991, Chapter 2) for more on the difference between cert petitions and appeals. See also Stern and Gressman (1978) for a more extended discussion of the topic. Of course, changes to the law in 1988 (Public Law No: 100-352) removed several categories of the Supreme Court's mandatory jurisdiction in appeals.

clearer picture of how the justices set their agenda. To that end, this study will examine all cases on the Vinson Court's appellate docket.[2]

Government Parties as Litigants

In this paper I examine whether the presence of government parties makes a difference in terms of whether the case is accepted for review by the Supreme Court. As noted previously, Ulmer, Hintze, and Kirklosky (1972) found that the federal government as a petitioning party was a significant factor in whether a case would be accepted for review by the Court. Perry speaks of "importance" as a criterion for acceptance (1991, 253-260). Although Perry notes that "importance is in the nose of the beholder," he also notes that one aspect of importance the is the breadth the effect of a case may have (1991, 254). This can include the effect a case can have on the federal government.

Cases involving the federal government would certainly have nation-wide scope, though how broadly they affect people will vary depending on the nature of the issue. A personnel issue involving a federal agency, for example, might have broad scope if it

[2] Until the Court changed its numbering system for filed cases there were essentially three dockets: appellate, miscellaneous, and original. The appellate docket contained what are usually referred to as the "paid" cases, the miscellaneous docket contained the "unpaid" cases (also known as paupers, *in forma pauperis,* or *ifp* cases), and the original docket contained those cases coming to the Court via its limited original jurisdiction. Given my concern about excluding cases on appeal from prior analyses one might reasonably wonder why I do not examine all cases on the Court's three dockets. The original jurisdiction cases can be excluded because they are so few and are of a fundamentally different character. It is well documented that the *ifp* cases on the Court's miscellaneous docket are treated differently, on average, than cases on the appellate docket (e.g., Perry 1991, Chapter 2; Baum 2013, 96-100). Nevertheless, the Court sometimes grants review to unpaid cases (and sometimes grants *in forma pauperis* status to cases on the appellate docket). See below for more on how these cases are treated for this study.

applies to the entire federal workforce (or beyond), but might also be very limited if it is heavily fact-specific.

Cases involving state or local government entities might not be seen as having the same scope or breadth as cases involving a federal government entity. Cases involving some local regulation might have very limited scope. On the other hand, even cases coming from local government entities can have national implications when various constitutional rights are involved. Though not from the Vinson Court era, examples that come to mind include *Tinker v. Des Moines* (1969) and *Morse v. Frederick* (2007).[3] Of course, there are often times when a case involving the state government has nation-wide implications, such as when the Supreme Court used *Furman v. Georgia* (1972) and its companion cases to effectively declare all state death penalty statutes to be unconstitutional.

Although Ulmer, Hintze, and Kirklosky (1972) mention as a significant factor the federal government as the petitioning party, one could make an argument for the importance of cases involving the government as the appellee as well. As the appellant, the government might be seeking to reestablish its power or authority that was limited in some way in the lower courts. On the other hand, cases involving a government entity as the appellee might involve instances when the appellant believes the government has overstepped its authority or violated a constitutional right—such as the three cases just mentioned.

[3] For those who may not be familiar with these cases, both involved school authorities punishing students for speech activities. *Tinker* is the famous symbolic speech case where students wore black armbands to school to protest the Vietnam war. In *Morse* a student was suspended for holding a sign reading "Bong Hits 4 Jesus" during an activity off school grounds.

Aside from instances when a government entity is a party in a case, as appellant or appellee, we can also consider instances when both parties are government entities. In such cases it may be a matter of the Court needing to either apply principles of federalism or sort out conflicting government powers.

Because of these various possibilities, I will examine several different aspects of government entities as parties in cases seeking review before the Supreme Court.

Data

Data for this study were drawn from an ongoing database project involving all cases on the Supreme Court's appellate docket since the 1946 Term. Data are complete for the Vinson Court (1946 through 1952 Terms) and provide a relatively stable period in which to examine the Court's docket.

Information on the cases in the database was drawn from several sources including the *United States Law Week*, various reporters for the state and federal courts, LEXIS, and other online sources. Every case that received an appellate docket number during the 1946-1952 Terms is included in the database. This results in 5,905 cases. Included in this number are 156 cases originally filed before the 1946 Term (the first term of the Vinson Court). The review decision for 95 of these 156 cases was made prior to the 1946 Term and those cases are not included in the dataset for this study. At the end of the Vinson Court 121 cases eventually received a 1953 Term (the first term of the

Warren Court) or later docket number.[4] The review decisions for 72 of these 121 cases were made after the 1952 Term but are included in the dataset given that those cases were initially filed during the Vinson Court. Also, included in the dataset are 67 cases that originally appeared on the Court's miscellaneous docket and were moved to the appellate docket.[5] Not included in the dataset are 64 cases that were dismissed on the motion of the petitioner prior to the review decision, 18 cases that were dismissed by a Supreme Court rule (e.g., late filing, failure to pay fees), and one case where no review decision could be found.[6] This results in a dataset of 5,727 cases.

Results

I begin by noting that of the 5,727 cases in the dataset the Court accepted 1,169 of them for review. That results in an overall acceptance rate of 20.4%

Table 1 shows the acceptance rates for cases that have at least one government party compared to those with no government parties. Unless specified otherwise, a

[4] Prior to the 1971 Term cases held over to the next term, before or after a review decision, were renumbered at the start of each term and there was no two-digit term indicator. For example, *Brown v. Board of Education* was initially filed during the Court's 1951 Term and given the docket number 436. It was held over to the 1952 Term with the new docket number 8, and again for the 1953 Term with the docket number 1.

[5] Through the Vinson and Warren Courts, cases originating on the miscellaneous docket (sometimes referred to as the "pauper's docket") that were granted review were usually moved to the appellate docket (sometimes referred to as the "paid docket") and given a new docket number. The Expanded United States Supreme Court Judicial Database, Harold J. Spaeth principal investigator, lists 26 cases with a miscellaneous docket number (with an "M" in the DOCKET field, meaning they were not transferred to the appellate docket) during the 1946-1952 Terms. Of these, 17 were granted review (with eight of those disposed of in a short per curiam), but are not included here. On the other hand, this dataset includes 19 cases initially filed on the appellate docket for which the Court granted *in forma pauperis* status to one of the parties (only one of which was granted review). (This is an older version of the Supreme Court Database before it was moved online, which, as of this writing, can be viewed at http://scdb.wustl.edu.)

[6] Without going into great detail, it appears that the case in question was withdrawn shortly after filing and refiled a month later with a new docket number. The latter case, *Deena Products Co. v. National Labor Relations Board* (1952) is included in the database and was denied review.

government party or entity can be any federal, state, or local government unit or person acting in an official capacity. Not included are foreign government entities. For purposes of this examination, foreign governments are treated as nongovernment parties.[7]

TABLE 1 ABOUT HERE

As can be seen from Table 1, two-thirds of the cases involved at least one government party (3,827 with a government party versus 1,900 without).[8] Of the 3,827 cases involving at least one government party, the Court accepted 944 of them of them for review (24.7%). In contrast, the Court granted review to only 225 of the 1,900 cases without a government party (11.8%). Despite the much higher number of cases with a government party, the Court accepted them for review at over twice the rate of cases without a government party.

Using a simple difference of means test (Wonnacott and Wonnacott (1972)), the difference in the acceptance rates between cases with a government party and those without is significant at $p < .001$ using a two-tailed test. Again, although one can make an argument that we should expect the Court to be more likely to accept cases with a government party, unlike Ulmer, Hintze, and Kirklosky (1972) for this comparison I am not limiting the examination to the federal government as the petitioning party (i.e., as

[7] There were only five cases with a foreign government party during the Vinson Court. One in which the foreign government entity was the appellant and the other four as the appellee. The federal government was the appellant in one of the four cases in which a foreign government was the appellee. The Court denied review to all five cases.
[8] In speaking of having more than one government party I mean that both the named appellant and appellee are government entities. Even though it is possible that more than one government entity is on one side of a case, the coding is always based on the named parties.

the appellant). I am also not limiting the examination to cases petitioning the Court for a writ of certiorari.[9]

Having established that the Court is far more likely to accept a case for review when it has at least one government party, the next step is to examine several variations of how government entities may be litigants. Picking up on the point made by Ulmer, Hintze, and Kirklosky (1972), Table 2 compares the acceptance rates for cases when the appellant is a government party with those when it is a nongovernment party. For this comparison the appellee can be either a government or nongovernment party.

TABLE 2 ABOUT HERE

There were 684 cases in which a governmental party (federal, state, or local) was the appellant. Of them, 392 were granted review (57.3%). There were 5,043 cases in which the appellant was a nongovernment party, only 777 of which were granted review (15.4%). This very large difference was highly significant and confirms the finding by Ulmer, Hintze, and Kirklosky (1972). One thing to keep in mind, however, is that the cases examined here include those coming to the Court on a petition for a writ of certiorari as well as those on appeal. In addition, some of the cases when the appellant was a nongovernment party would include those when the appellee was a government party. The results in Table 1 indicated that cases with a government party, without differentiating between those as appellant or appellee, had a statistically significant higher acceptance rate than those without a government party as a litigant.

[9] In the second paper in the series, "Certiorari and Appeal on the Vinson Court Agenda," I examined the difference in acceptance rates for cases on appeal and those petitioning for a writ of certiorari. Although it was true that the Court was more likely to accept for review cases on appeal, acceptance was far from automatic and in later papers I usually did not distinguish between the two methods of reaching the Court.

Having mentioned government parties as appellee, the next step is to see whether there is a higher acceptance rate when a government party is the appellee. Table 3 examines this relationship. (Again, without a limitation on the type of appellant.)

TABLE 3 ABOUT HERE

In Table 3 we see that there were 3,224 cases in which a government party was the appellee. This actually constitutes a majority (56.3%) of the total 5,727 cases being examined. Of the 3,224 cases with a government party as the appellee, 582 were granted review (18.1%). In contrast, there were 2,503 cases in which a nongovernment party was the appellee. Of these, 587 were granted review (23.5%). Thus, the Court actually granted review to a larger number of cases in which the nongovernment party was the appellee despite the far smaller number of such cases. Once again, this difference was significant, but in the opposite direction. In other words, the Court was less likely, to a statistically significant degree, to accept a case when a government entity was the appellee.

Once again it is worth noting that the cases without a government party as the appellee include those in which a government party was the appellant. Before moving on to examinations of government level and general case types, it is worth examining one more general aspect of cases with government parties. Specifically, cases in which both parties, appellant and appellee, are government entities.

TABLE 4 ABOUT HERE

Table 4 shows the comparison of cases in which both the appellant and appellee were a government entity versus the cases in which only one party was a government

entity or neither of them were. There were only 81 cases during the Vinson Court era when both parties were government entities. Of these, 30 were granted review (37.0%). In contrast, there were 5,646 cases in which only one or neither of the parties was a government entity. The Court granted review to 1,139 of these cases (20.2%). Although this difference is still statistically significant ($p < .01$) the difference is less than findings of the prior three tables. To a certain extent, and aside from the small number of such cases, we saw in Table 2 that the Court was more likely to take cases when the appellant was a government entity, but in Table 3 the finding was that the Court was less likely to take cases were the appellee was a government entity. The findings of Tables 2 and 3 come together and seem to work at cross purposes in the findings of Table 4.

Thus far I have not distinguished between different types of government entities, either as to level (federal, state, or local) or as to type (criminal, administrative, etc.). A few of these differences are worth closer examination.

In examining the acceptance rates of cases with government parties an obvious distinction can be made based on whether the government party is a federal, state, or local entity. One can certainly make an argument that the Court would be more likely to accept cases when a federal government entity is a party. In certain contexts, one could also make an argument that the Court would be more likely to take cases when a state or local government entity is a party. Thus, it is worth examining these aspects.

Table 5 compares the acceptance rates of cases when at least one of the parties (appellant, appellee, or both) was a federal government entity versus cases in which neither party was a government entity. No distinction is made regarding the type of

federal government entity. The federal government party could be the "United States" in either a criminal or noncriminal context, cabinet-level departments (Department of Defense), smaller offices (e.g., Immigration and Nationality Service), or even courts (e.g., federal district courts or judges).

TABLE 5 ABOUT HERE

Table 5 shows that there were 2,333 cases that involved a federal government party. Of these, 657 were granted review (28.2%). (In 10 of the 2,333 cases federal government entities were both appellant and appellee. The Court granted review to seven of the 10 cases.) In contrast, there were 1,900 cases in which neither party was a government entity. The Court granted review to only 225 of these cases (11.8%). Again, this is a statistically significant difference. Thus, and not surprisingly, the Court was more likely to accept a case for review if it involved a federal government party.

Again, we can make an argument that the Court should also be more willing to accept cases involving a state or local government entity. Even if it is, will the difference be statistically significant and will the acceptance rate be as high as it is for cases involving federal government parties. Table 6 addresses these questions.

TABLE 6 ABOUT HERE

In Table 6 we see that there were 1,445 cases when one at least one of the parties (appellant, appellee, or both) was a state or local government entity.[10] Of these cases, the Court accepted 267 for review (18.5%). (There were 26 cases when both parties were

[10] Here and in later tables I group state and local government entities together. Although an argument can be made that the Court might view state and local government actions differently, because the same federalism-type relationship does not exist between state and local governments as it does between the federal and state governments, I will group local government entities with state governments for purposes of this examination.

state or local government entities. The Court granted review to only three of these cases.) The row for cases with no government parties is the same as in Table 5. Thus, although the Court is more likely to take cases involving state or local government parties over those with no government parties to a statistically significant level, the difference is less than it was for cases involving federal government parties.

Criminal Cases

The next distinction to examine concerns a particular type of case, namely, criminal cases. Before discussing them, however, a brief explanation is necessary regarding coding for the cases.

Each of the cases included in the database is given up to six issue codes based on the issues identified in the source material, which is a combination of the *United States Law Week* summary and the lower court opinion when they are available. One of these issues is designated the primary issue, meaning the one that is the main or most significant issue raised in the case. The coding for the issues is numerical and follows the coding for Spaeth's "Expanded United States Supreme Court Judicial Database." The codes for criminal issues are all between 10 and 199. Thus, one can easily sort the cases based on their issue code into those that are criminal or not.

There are, however, two twists to the coding. The first is that some cases that are criminal in nature nevertheless have a primary code that is noncriminal. For example, a civil rights case involving a sit-in, which might involve a trespassing charge, will likely have a primary code for protests (First Amendment) or desegregation (civil rights).

Regardless of whether the case involves an underlying criminal charge, if the primary issue is not coded criminal the case will be counted as noncriminal.

The second twist is that the coding does not make a distinction between civil and criminal contempt. There are 10 cases in the database for the Vinson Court (two of which were granted review) that do not name a government party as appellant or appellee but where the primary issue is a contempt ruling by a lower court. Although the contempt citation in these cases was designated as civil, because a government party—a court—issued the citation they are included in "criminal" cases.

With the exception of the handful of civil contempt cases just noted, criminal cases will necessarily involve a governmental party. The most common example consists of cases when the government (federal, state, or local) brings criminal charges against a defendant. As criminal cases make their way to the Supreme Court, the government party can end up being either the appellant or the appellee depending on the rulings in the courts below. Another common type of criminal case involves state prisoners who are challenging their state convictions in federal court via a petition for a writ of habeas corpus. More often than not, the government party, usually a state prison warden, is the appellee in such cases.

Regardless of the specific type of criminal case, many of them are filed before the Court each term. Many such cases actually appeared on the Vinson Court's miscellaneous docket. A few of these were granted review and moved to the Court's appellate docket. There were also many criminal cases that were filed directly on the Court's appellate docket.

TABLE 7 ABOUT HERE

Table 7 compares the acceptance rates in criminal cases between those when the government party is the appellant and those when the government party is the appellee. Not surprisingly, the bulk of the criminal cases involved a defendant or person convicted of a crime as the appellant before the Court. More specifically, 1,186 of the 1,265 criminal cases before the Vinson Court (93.8%) involved the government party as appellee. Also not surprisingly, the Court accepted a small percentage of these cases for review, only 133 of the 1,186 (11.2%). In sharp contrast, although there were only 79 cases when the government party was the appellant, the Court accepted 59 of them (74.7%).

The sharp difference in the acceptance rates for cases when the government party was the appellant versus those in which it was the appellee should be expected. Those familiar with the Court's docket know that many cases filed by defendants or those convicted of crimes are, if not frivolous, often a longshot. In contrast, government entities are more limited in their legal ability to file an appeal. When convictions are overturned by lower courts, prosecutors have several options other than an appeal (e.g., retry the case, reach a plea deal, drop the case). Thus, the justices may view the government's decision to appeal to be more thoughtful, and thus more worthy of review.

Given the different acceptance rates of federal and state or local government entities as shown in Tables 5 and 6, it is worth examining whether this difference exists in criminal cases. To examine if such a difference exists, I have separated the data from

Table 7 into two groups, when the federal government is appellant or appellee (Table 8) and when a state or local government is appellant or appellee (Table 9).

TABLE 8 ABOUT HERE

Table 8 shows the comparison in acceptance rates for when the federal government was the appellant or appellee. Interestingly, of the 79 cases indicated in Table 7 when the government party was the appellant in a criminal case, 67 of them (84.8%) involved the federal government. In contrast, of the 1,186 cases when the government was the appellee, the federal government was involved in only 459 (38.7%). The Court accepted for review 52 of the 67 cases (77.6%). In sharp contrast, the Court only accepted for review 78 of the 459 cases when the federal government was the appellee (17.0%).

TABLE 9 ABOUT HERE

Turning the state and local cases, Table 9 shows the comparison between acceptance rates when a state or local government is the appellant or appellee. As suggested from Table 8, there were very few cases when a state or local government was the appellant in a criminal case. Of the 12 such cases, the Court accepted seven for review (58.3%). Although that percentage is well below what we saw in Table 8 for the cases when the federal government was the appellant, it is still well above the acceptance rate for cases in which the state or local government was the appellee. In particular, there were 727 cases when a state or local government was the appellee and the Court only accepted 55 of them for review (7.6%).

Given the distinction in how the Court handles federal versus state or local criminal cases it is worth examining the difference more directly. This is done in Table 10.

TABLE 10 ABOUT HERE

Table 10 compares the acceptance rate for criminal cases in which the federal government is a party (appellant or appellee) versus those in which a state or local government is a party. In Tables 8 and 9 we saw a clear difference in the acceptance rates between these levels of government and in Table 10 we are able to compare them directly. The Court granted review to 129 of the 525 criminal cases in which the federal government was a party, either as appellant or appellee (24.6%). In sharp contrast, the Court granted review to only 62 of the 729 criminal cases in which a state or local government was a party (8.4%). The significant difference between federal and lower governments as parties should be expected given the results shown in prior tables, but the direct comparison without controlling for whether the government party was appellant or appellee is interesting.

Noncriminal Cases

As noted above, criminal cases tend to be different in character from noncriminal cases. Thus, the next step in examining how the Court treats government entities is to see if there is a difference in how the Court treats government parties in noncriminal cases. As a reminder, some cases that involved a criminal charge might nevertheless be

coded as noncriminal if the primary issue involved civil rights or liberties (e.g., a trespass involving First Amendment rights).

TABLE 11 ABOUT HERE

Table 11 compares the acceptance rates in noncriminal cases for those when a government entity at any level was a party versus those when there was no government party. Consistent with the results of prior tables, when government parties were involved there was a distinct increase in the acceptance rate. There were 2,564 noncriminal cases in which a government party was involved and the Court granted review to 754 of them (29.4%). In contrast, there were 1,890 cases that did not involve a government party as appellant or appellee and the Court granted review to only 223 of them (11.8%).

Although the range of issues is much broader in noncriminal cases (e.g., business, unions, civil rights, judicial power) the next three tables will follow the pattern for the criminal cases in Tables 8, 9, and 10.

TABLE 12 ABOUT HERE

Table 12 compares the acceptance rates in noncriminal cases between those in which the federal government was the appellant and those in which it was the appellee. Recall from Table 4 that the Court was more likely to grant review to cases in which both parties were government entities. All but two of the 81 cases indicated in Table 4 in which both parties were government entities were noncriminal cases. To isolate the particular factor for Table 12 a bit more, the appellee in this table was a nongovernment entity. With this limitation in mind, the results are rather dramatic. The Court granted

review to 261 of the 396 noncriminal cases in which the federal government was the appellant (65.9%). On the other hand, only 262 of 1,142 noncriminal cases with the federal government as appellee were granted review (18.7%).

TABLE 13 ABOUT HERE

Table 13 compares the acceptance rates in noncriminal cases for when a state or local government was the appellant versus when it was the appellee. This is the first of the tables for which the comparison does not reach some traditional level of statistical significance. The Court granted review to 44 of the 129 cases in which a state or local government was the appellant (34.1%). That rate was higher than some other acceptance rates for government parties, but it turns out that it was not much higher than the acceptance rate for when a state or local government was the appellee. Specifically, the Court granted review to 159 of the 552 noncriminal cases in which a state or local government was the appellee (28.8%). That state appellee rate was well above the rate for when the federal government was the appellee. As with the federal appellant-appellee comparison in Table 12, the Court granted state and local governments review at a higher rate when they were the appellant than when the appellee, but the difference was not great enough to reach statistical significance.

TABLE 14 ABOUT HERE

Finally, Table 14 compares the acceptance rate in noncriminal cases when the federal government was a party (appellant or appellee) versus those in which a state or local government was a party. Contrary to the criminal cases examined in Table 10, there is very little difference in the acceptance rate for cases involved a federal

government entity and those involving a state or local government entity. The Court granted review to 523 of the 1,800 noncriminal cases with a federal government entity as a party (29.1%). Of the noncriminal cases involved a state or local government as a party the Court granted review to 203 of the 681 cases (29.8%). Although the Court was more inclined to grant review to cases when the federal government was an appellant, the much larger number of cases when it was the appellee, and the much lower acceptance rate, reduced the overall rate to within a percentage point of the acceptance rate when a state or local government entity was a party.

Discussion

In considering government parties as litigants, one can make reasonable arguments as to when or why the Court might be more or less willing to accept such cases for review. This was the reason I used a 2-tailed test for significance in all the tables. Nevertheless, the results generally confirmed the basic expectations for whether the Court would be more inclined to accept certain cases for review.

At the most general level, meaning without differentiating between the types of cases (substantive issue) or how the case came to the Court (appeal or a petition for a writ of certiorari) or whether the government party was an appellant or appellee, the Court was more likely to accept cases for review when at least one of the parties was a government entity. Because this is a largely empirical examination I will leave theorizing about this for later, but one reason for the difference shown in Table 1 may

be the way the Court sees itself as the third branch of the federal government and protector of federal interests relative to state and local governments.

Regardless of the reasons for the higher acceptance rate for cases with government parties, the results proved robust across a number of variations. That said, the results shown in Table 3 actually indicated that when the government entity was the appellee the Court was less inclined to accept the case for review. Again, this should not have been surprising given the wide range of challenges to government actions, particularly when considering the number of criminal cases appealed to the Court. As much as many landmark Supreme Court cases involved individuals or nongovernment parties challenging government actions—such as those mentioned earlier—far more such cases are not accepted for review.

In Tables 5 and 6 we started to see a federalism[11] aspect to the acceptance rates. The Court accepted cases involving the federal government at a much higher rate than those involved a state or local government party. Again, this should not be surprising. Legally, the Court will let state courts sort out questions of state (or local) law. As much as those seeking US Supreme Court review must allege some violation of federal law ("due process" is quite common), the claims are often very weak.

In focusing more specifically on how cases involving criminal issues are treated, there are two aspects of the results shown in Table 7 that are worth noting. The first is that when the government party is the appellant it is often because there was a reversal

[11] I am using "federalism" in a relatively general sense to indicate differences in how the Court treats cases originating in the federal or state courts. Legal aspects of such differences are detailed in Stern and Gressman (1978), particularly Chapters 2 and 3.

in the courts below. In fact, of the 79 cases in which the government party was the appellant, 38 involved at least one lower court reversal (48.1%). Results from the fifth paper in the series showed that the Court was more likely to accept cases for review when there had been a lower court reversal.[12]

The second aspect from Table 7 to consider is that of the 133 cases accepted for review, 37 were initially filed on the Court's miscellaneous docket and moved to the appellate docket after once review was granted. As noted previously, the vast majority of the cases on the miscellaneous docket are denied review. Moving cases accepted for review to the appellate docket tends to inflate the number of cases in this particular category. Without these 37 cases, the numbers in the Appellee row of Table 7 would be 96 accepted, 1,053 denied for a total of 1,149 and an acceptance rate of 8.4%. In other words, although the difference shown in Table 7 was highly significant, the difference would be even greater without the 37 cases originally filed on the miscellaneous docket.

The results shown in Tables 8, 9, and 10 confirmed what we would expect regarding criminal cases, but also showed additional signs of federalism. Regardless of government level, the Court was more willing to accept cases for review when the government party was the appellant rather than the appellee. This difference may be less a matter of a preference for the government over the accused or convicted than an indication of the much larger number of cases filed with the government as the appellee, cases which are often less grounded in substance and more in a longshot hope

[12] "Agenda Setting on the Vinson Court, Paper 5: Lower Court Reversals and Dissents as Factors." See, in particular, Table 1.

of getting a conviction overturned. From the federalism perspective, the Court was still more likely to take cases with the federal government as appellant than those when it was a state or local government.

In the noncriminal cases, we again saw from Table 11 that the Court was more likely to accept cases for review when a government party was involved. As with the criminal cases, the Court was also more likely to accept cases for review when the federal government was the appellant rather than the appellee. Again, this was not overly surprising to the extent the Court, as the third branch of the federal government, views itself as the referee or interpreter of federal law.

Interestingly, although the Court was more likely to accept cases for review when a state or local government was the appellant rather than the appellee, the difference was relatively small and not statistically significant. Although the acceptance rate for when the federal government was the appellant was much higher than when it was a state or local government entity, the lack of statistical significance in Table 13 may suggest a more even distribution in the types of cases in this category or that the Court may view its role differently relative to state and local governments.

Conclusion

As is often the case, this examination of government parties as a factor in whether cases are accepted for review answers some questions about the Court's agenda setting but also suggests others for further study.

It was no surprise that cases with government parties were treated differently by the Court, but the effect was not uniform. Digging deeper into the data found differences related to the level of the government party, whether the government party was an appellant or appellee, and differences based on the broad substantive issue of the case. Like other papers in the series, this examination was limited to the single factor of government parties, but drilling down into several different aspects of the factor helped to refine its effects and limitations on the Court's agenda setting.

One goal of the narrowly-focused papers in this series is to lay the groundwork for later multivariate examinations. Along these lines, it seems clear from the results here that there will be an interaction between government parties and lower court reversals, particularly in certain areas of the law. The effect of federalism, though perhaps less easily measured, also seems to be relevant to the Court's agenda setting. Other factors, such as whether the case came to the Court by an appeal or a petition for a writ of certiorari, though not directly implicated in the present analysis, may also be important in a more complex analysis.

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Table 1

Acceptance Rates for Cases With a Government Party Compared to Those Without on the Vinson Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
With Government Party	944	2,883	3,827	24.7%*
Without Government Party	225	1,675	1,900	11.8%
Column Total	1,169	4,558	5,727	20.4%

* $p < .001$, 2-tail difference of means test (see Wonnacott and Wonnacott 1972, 178).

Table 2

Acceptance Rates for Cases With a Government Party as Appellant Compared to Those With Nongovernmental Party as Appellant on the Vinson Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Government Party Appellant	392	292	684	57.3%*
Nongovernment Party Appellant	777	4,266	5,043	15.4%
Column Total	1,169	4,558	5,727	20.4%

* $p < .001$, 2-tail difference of means test (see Wonnacott and Wonnacott 1972, 178).

Table 3

Acceptance Rates for Cases With a Government Party as Appellee Compared to Those With Nongovernmental Party as Appellee on the Vinson Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Government Party Appellee	582	2,642	3,224	18.1%*
Nongovernment Party Appellee	587	1,916	2,503	23.5%
Column Total	1,169	4,558	5,727	20.4%

* $p < .001$, 2-tail difference of means test (see Wonnacott and Wonnacott 1972, 178).

Table 4

Acceptance Rates for Cases with Government Parties as Appellant and Appellee Compared with those with one or no Government Party as Litigant on the Vinson Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Both Government Parties	30	51	81	37.0%*
One or No Government Parties	1,139	4,507	5,646	20.2%
Column Total	1,169	4,558	5,727	20.4%

* $p < .01$, 2-tail difference of means test (see Wonnacott and Wonnacott 1972, 178).

Table 5

Acceptance Rates for Cases With a Federal Government Party Compared to Those With No Government Party on the Vinson Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Federal Government Party	657	1,676	2,333	28.2%*
No Government Party	225	1,675	1,900	11.8%
Column Total	882	3,351	4,233	20.8%

* $p < .001$, 2-tail difference of means test (see Wonnacott and Wonnacott 1972, 178).

Table 6

Acceptance Rates for Cases With a State or Local Government Party Compared to Those With No Government Party on the Vinson Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
State or Local Government Party	267	1,178	1,445	18.5%*
No Government Party	225	1,675	1,900	11.8%
Column Total	492	2,853	3,345	14.7%

* $p < .001$, 2-tail difference of means test (see Wonnacott and Wonnacott 1972, 178).

Table 7

Acceptance Rates for Criminal Cases With a Government Party Compared to Those With No Government Party on the Vinson Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Appellant	59	20	79	74.7%*
Appellee	133	1,053	1,186	11.2%
Column Total	192	1,073	1,265	15.2%

* $p < .001$, 2-tail difference of means test (see Wonnacott and Wonnacott 1972, 178).

Table 8

Acceptance Rates for Criminal Cases With the Federal Government as the Appellant Compared to Those with the Federal Government as the Appellee on the Vinson Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Appellant	52	15	67	77.6%*
Appellee	78	381	459	17.0%
Column Total	130	396	526	24.7%

* $p < .001$, 2-tail difference of means test (see Wonnacott and Wonnacott 1972, 178).

Table 9

Acceptance Rates for Criminal Cases With a State or Local Government as the Appellant Compared to Those with a State or Local Government as the Appellee on the Vinson Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Appellant	7	5	12	58.3%*
Appellee	55	672	727	7.6%
Column Total	62	677	739	8.4%

* $p < .001$, 2-tail difference of means test (see Wonnacott and Wonnacott 1972, 178).

Table 10

Acceptance Rates for Criminal Cases With a Federal Government Party Compared to Those With a State or Local Government Party on the Vinson Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Federal Government Party	129	396	525	24.6%*
State or Local Government Party	62	677	739	8.4%
Column Total	191	1,073	1,264	15.1%

* $p < .001$, 2-tail difference of means test (see Wonnacott and Wonnacott 1972, 178).

Table 11

Acceptance Rates for Noncriminal Cases With a Government Party Compared to Those Without on the Vinson Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
With Government Party	754	1,810	2,564	29.4%*
Without Governmental Party	223	1,667	1,890	11.8%
Column Total	977	3,477	4,454	21.9%

* $p < .001$, 2-tail difference of means test (see Wonnacott and Wonnacott 1972, 178).

Table 12

Acceptance Rates for Noncriminal Cases With the Federal Government as the Appellant Compared to Those with the Federal Government as the Appellee on the Vinson Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Appellant	261	135	396	65.9%*
Appellee	262	1,142	1,404	18.7%
Column Total	523	1,277	1,800	29.1%

* $p < .001$, 2-tail difference of means test (see Wonnacott and Wonnacott 1972, 178).

Table 13

Acceptance Rates for Noncriminal Cases With a State or Local Government as the Appellant Compared to Those with a State or Local Government as the Appellee on the Vinson Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Appellant	44	85	129	34.1%
Appellee	159	393	552	28.8%
Column Total	203	478	681	29.8%

Table 14

Acceptance Rates for Noncriminal Cases With a Federal Government Party Compared to Those With a State or Local Government Party on the Vinson Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Federal Government Party	523	1,277	1,800	29.1%
State or Local Government Party	203	478	681	29.8%
Column Total	726	1,755	2,481	29.3%