Agenda Setting on the Warren Court

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The paper that follows is one of a series of papers I have written regarding agenda setting on the Warren Court. The papers on Warren Court agenda setting follow the pattern and topics of those I wrote on the Vinson Court's agenda setting. As each paper was completed updates and corrections sometimes changed a few of the specific numbers presented in papers that came earlier in the series. Even so, the general results for each paper did not change. The papers for the Vinson Court were eventually combined into a book titled, *Supreme Court Agenda Setting: The Vinson Court* (available on Amazon.com). The papers for the Warren Court will also be combined in a book to be titled *Supreme Court Agenda Setting: The Warren Court*. It will be available on Amazon.com in the summer of 2023. The book will use the final numbers after all the corrections and updates.

Agenda Setting on the Warren Court
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 Warren Court (1953 to 1968 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 Warren Court
Paper 7: Government Parties as a Factor

This is the seventh in a series of papers examining agenda setting on the Warren Court (1953-1968 Terms). This series of papers will follow the structure and topics contained in the series of papers I wrote examining agenda setting on the Vinson Court (1946-1952 Terms). As such, certain elements of the Vinson Court papers will be repeated in the corresponding papers for the Warren Court. The papers for the Vinson Court were eventually combined in a book titled, *Supreme Court Agenda Setting: The Vinson Court 1946 to 1952 Terms*, which is available in electronic form from Amazon.com.

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 focused more specifically on the ideological preferences of judges (e.g., Segal and Spaeth 2002) and a book by Brenner and Whitmeyer (2009) compared 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) noted that aspects of agenda setting have been of interest to judicial scholars at least since Schubert (1959). Perry also noted 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 those 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 (2022) provided an example of 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 clearer picture of how the justices set their agenda. To that end, this study will examine all cases on the Warren Court's appellate docket.[2]

[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. 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.

[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 2022, 90-91). 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.

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 spoke of "importance" as a criterion for acceptance (1991, 253-260). Although Perry noted that "importance is in the nose of the beholder," he also noted that one aspect of importance 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 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 Warren 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

[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.

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.

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 Warren Court (1953 through 1968 Terms) and provide a relatively stable period in which to examine the Court's docket.

Information on the cases was drawn from several sources including the *United States Law Week*, various reporters for the state and federal courts, LEXIS (now called NexisUNI), and

other online sources. Every case filed on the Court's appellate docket during the 1953-1968 Terms is included in the dataset. This results in 15,858 cases. Unlike the examinations of the Vinson Court, not included in this number are any cases filed before the 1953 Term that were held over and received a 1953 Term or later docket number.[4] Included in this number are 308 cases that originally appeared on the Court's miscellaneous docket and were moved to the appellate docket.[5]

Results

I begin by noting that of the 15,706 cases in the dataset where the Court made a review decision it accepted 3,099 of them for review. That results in an overall acceptance rate of 19.7%.

Table 1 shows the acceptance rates for cases that have at least one government party, appellant or appellee, compared to those with no government parties. Unless specified otherwise, a government party or entity can be any federal, state, or local government unit or person acting in an official capacity.[6]

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[4] Prior to the 1971 Term held over cases 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 191 cases with a miscellaneous docket number (with an "M" in the DOCKET field, meaning they were not transferred to the appellate docket) during the 1953-1968 Terms. There are also three cases from the Miscellaneous Docket after the numbering changed. Of these 194 cases, 133 were granted some form of review (usually a short per curiam vacating or reversing), but are not included here. On the other hand, this dataset includes 107 cases initially filed on the appellate docket for which the Court granted *in forma pauperis* status to one of the parties (45 of which were granted review). (For this study I made use of 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] For purposes of this comparison, foreign governments are included as government parties. There were only 20 cases with a foreign government party during the Warren Court. Fourteen in which the foreign government entity was the appellant and the other six as the appellee. The federal government was the appellee in two cases and state

TABLE 1 ABOUT HERE

As can be seen from Table 1, two-thirds of the cases involved at least one government party (10,522 with a government party versus 5,182 without).[7] Of the 10,522 cases involving at least one government party, the Court accepted 2,474 of them of them for review (23.5%). In contrast, the Court granted review to only 625 of the 5,184 cases without a government party (12.1%). Despite the much higher number of cases with a government party, the Court accepted them for review at almost 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 one-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 the appellant). I am also not limiting the examination to cases petitioning the Court for a writ of certiorari.[8]

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

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government in another. The Court granted review to six of the cases, including one with the federal government as appellee and the one with the state government as appellee.

[7] 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.

[8] In the second paper in the series, "Agenda Stetting on the Warren Court, Paper 2: Certiorari and Appeal on the Warren 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.

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 1,530 cases in which a governmental party (federal, state, or local) was the appellant. Of them, 801 were granted review (52.4%). There were 14,176 cases in which the appellant was a nongovernment party, only 2,298 of which were granted review (16.2%). 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.

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 9,262 cases in which a government party was the appellee. This actually constitutes a majority (59.0%) of the total 15,706 cases being examined. Of the 9,262 cases with a government party as the appellee, 1,790 were granted review (19.3%). In contrast, there were 6,444 cases in which a nongovernment party was the appellee. Of these, 1,309 were granted review (20.3%). Thus, the Court actually granted review to a larger percentage of cases in which the nongovernment party was the appellee. Here, the results were

in the opposite direction from that expected. Thus, the Court was more likely to grant review when a nongovernment party was the appellee, but the difference failed to reach a traditional level of statistical significance. 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 270 cases during the Warren Court era when both parties were government entities. Of these, 117 were granted review (43.3%). In contrast, there were 15,436 cases in which only one or neither of the parties was a government entity. The Court granted review to 2,982 of these cases (19.3%). Although this difference is still statistically significant ($p < .001$) the difference is less so than findings of Table 2 due to the smaller number of cases in the test category. 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 6,465 cases that involved a federal government party. Of these, 1,485 were granted review (23.0%). (In 28 of the 6,465 cases federal government entities were both appellant and appellee. The Court granted review to 15 of the 28 cases.) In contrast, there were 5,184 cases in which neither party was a government entity. The Court granted review to only 625 of these cases (12.1%). 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 3,868 cases when one at least one of the parties (appellant, appellee, or both) was a state or local government entity.[9] Of these cases, the Court accepted 898 for review (23.2%). (There were 70 cases when both parties were state or local government entities. The Court granted review to only 15 of these cases.) The row for cases with no government parties is the same as in Table 5. Thus, not only was the Court was more likely to take cases involving state or local government parties over those with no government parties to a statistically significant level, it was also slightly more likely to take cases involving state or local government parties than federal ones.

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

[9] 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.

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 were 12 cases during the Warren Court (only one of which was 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 Warren 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 was the appellant and those when the government party was 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, 3,203 of the 3,378 criminal cases before the Warren Court (94.8%) involved the government party as appellee. Also not surprisingly, the Court accepted a small percentage of these cases for review, only 480 of the 3,203 (15.0%). In sharp contrast, although there were only 175 cases when the government party was the appellant, the Court accepted 77 of them (44.0%).

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 175 cases indicated in Table 7 when the government party was the appellant in a criminal case, only 68 of them (38.9%) involved the federal government. In contrast, of the 3,203 cases when the government was the appellee, the federal government was involved in 1,991 (62.2%). The Court accepted for review 56 of the 68 cases (82.4%) when the federal government was the appellant. In sharp contrast, the Court only accepted for review 286 of the 1,991 cases when the federal government was the appellee (14.4%).

TABLE 9 ABOUT HERE

Turning the state and local cases, Table 9 shows the comparison between acceptance rates when a state or local government was the appellant or appellee. As suggested from Table 8, there more cases when a state or local government was the appellant in a criminal case than when the federal government was. Of the 106 such cases, the Court accepted 20 for review (18.9%). That percentage was well below what we saw in Table 8 for the cases when the federal government was the appellant. It was also only slightly above the acceptance rate for cases in which the state or local government was the appellee. In particular, there were 1,211 cases when a state or local government was the appellee and the Court accepted 194 of them for review (16.0%). Although in the expected direction, this difference does not reach statistical significance.

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 342 of the 2,057 criminal cases in which the federal government was a party, either as appellant or appellee (16.6%). For the criminal cases in which the state or local government was a party the Court granted review to 213 of the 1,314 cases (16.2%). The difference between federal and state or local cases is only minimally in the expected direction and that's only because of the high percentage of cases the Court accepted when the federal government was the appellant (see Table 8).

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 7,155 noncriminal cases in which a government party was involved and the Court granted review to 1,920 of them (26.8%). In contrast, there were 5,154 cases that did not involve a government party as appellant or appellee and the Court granted review to only 616 of them (12.0%).

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 11 of the 270 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 other party in this table was a nongovernment entity. With this limitation in mind, the results are rather dramatic. The Court granted review to 502 of the 707 noncriminal cases in which the federal government was the appellant (71.0%). On the other hand, only 742 of 3,898 noncriminal cases with the federal government as appellee were granted review (19.0%).

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. The Court granted review to 218 of the 635 cases in which a state or local government was the appellant (34.3%). 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 567 of the 2,156 noncriminal cases in which a state or local government was the appellee (26.3%). 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, and the difference was 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. Similar to the criminal cases examined in Table 10, there was very little difference in the acceptance rate for cases involving a federal government entity and those involving a state or local government entity. The Court granted review to 1,229 of the 4,579 noncriminal cases with a federal government party (26.8%). Of the noncriminal cases involving a state or local government as a party the Court granted review to 771 of 2,724 (28.3%). 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 and a half 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.

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), 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 slightly less inclined to accept the case for review. On reflection, 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 expected to see a federalism[10] aspect to the acceptance rates, but the Warren Court accepted cases involving the federal government at a slightly lower rate than those involving a state or local government party. This is somewhat surprising. Legally, the Court will let state courts sort out questions of state (or local) law. As much as those seeking US

[10] 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 (1969), particularly Chapters 2 and 3.

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 in the courts below. In fact, of the 175 cases in which the government party was the appellant, 93 involved a lower court reversal (53.1%). Results from the fifth paper in the series showed that the Warren Court was more likely to accept cases for review when there had been a lower court reversal.[11]

The second aspect from Table 7 to consider is that of the 480 cases accepted for review when the government party was the appellee, 166 were initially filed on the Court's miscellaneous docket and moved to the appellate docket after 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 granted review in this particular category. Without these 166 cases, the numbers in the Appellee row of Table 7 would be 314 accepted, 2,697 denied for a total of 3,011 and an acceptance rate of 10.4%.[12] In other words, although the difference shown in Table 7 was highly significant, the difference would be even greater without the 166 cases originally filed on the miscellaneous docket.

The results shown in Tables 8, 9, and 10 partially showed what we would expect regarding criminal cases. They also failed to show the signs of federalism we might have expected. Regardless of government level, the Court was more willing to accept cases for review when the

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

[12] The number of cases denied review is less than in Table 7 because there were 26 cases originally filed on the miscellaneous docket that were denied review after having initially been granted review and moved to the appellate docket.

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 of getting a conviction overturned. Even so, the difference was much smaller when a state or local government was the party (Table 9). From the federalism perspective, the Warren Court was still slightly 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 Warren 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 much smaller compared to when the federal government was the party involved. Nevertheless, the difference still reached a traditional level of statistical significance, unlike the difference for criminal cases (Table 9).

Finally, the comparison of Tables 10 and 14 is interesting because difference in the acceptance rates between cases with a federal versus state or local government party were very small suggesting, perhaps, that the Warren Court was not particularly concerned about a difference between criminal and noncriminal cases.

Vinson Court Comparison

As with prior papers in the series, when comparing the results for the Warren Court with those for the Vinson Court we see many similarities, but also a few differences.

Both Courts were about twice as likely to accept a case for review if it involved a government party. Both also were much more likely to grant review when the government party was the appellant. It was also true that both Courts were less likely to grant review when the government party was the appellee, but the difference was smaller for the Warren Court and did not reach statistical significance. Both Courts were also much more likely to grant review when there were government parties on both sides of the case. Compared with cases with no government party, both Courts were again more likely to grant review when a federal government party was involved or when a state or local government party was involved.

In looking at just the criminal cases, both Courts were much more likely to accept a case for review when the government party was the appellant. It was also true that both Courts were much more likely to grant review to cases where the federal government was the appellant rather than the appellee. Interestingly, however, although the Vinson Court was also much more likely to grant review to a case when a state or local government was the appellant rather than the appellee, the same was only marginally true for the Warren Court and the difference did not reach statistical significance.

Another difference between the two Courts occurred when comparing criminal cases with a federal government party with those with a state or local government party. During the Vinson Court this difference was large and statistically significant, but during the Warren Court it was well less than a percentage point and not significant.

The two Courts followed similar patterns when considering the noncriminal cases. Both Courts were more likely to grant review when there was a government party involved. Both were also more likely to grant review when the federal government was an appellant as opposed to an appellee. The two Courts were also a bit more likely to grant review when a state or local government was the appellant rather than the appellee, but the number of such cases was too small for the difference to reach statistical significance. Finally, as with the Vinson Court, the Warren Court was slightly more likely to grant review to cases involving a state or local government party in a noncriminal case, but for both Courts the difference did not reach statistical significance.

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, did not seem as important for this area of the Warren 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 Warren Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
With Government Party	2,474	8,048	10,522	23.5%*
Without Government Party	625	4,559	5,184	12.1%
Column Total	3,099	12,607	15,706	19.7%

* $p < .001$, 1-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 Warren Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Government Party Appellant	801	729	1,530	52.4%*
Nongovernment Party Appellant	2,298	11,878	14,176	16.2%
Column Total	3,099	12,607	15,706	19.7%

* $p < .001$, 1-tail difference of means test

Table 3

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

	Accepted	Denied	Row Total	Acceptance Rate (%)
Government Party Appellee	1,790	7,472	9,262	19.3%
Nongovernment Party Appellee	1,309	5,135	6,444	20.3%
Column Total	3,099	12,607	15,706	19.7%

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 Warren Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Both Government Parties	117	153	270	43.3%*
One or No Government Parties	2,982	12,454	15,436	19.3%
Column Total	3,096	12,606	15,702	19.7%

* $p < .001$, 1-tail difference of means test

Table 5

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

	Accepted	Denied	Row Total	Acceptance Rate (%)
Federal Government Party	1,485	4,980	6,465	23.0%*
No Government Party	625	4,559	5,184	12.1%
Column Total	2,110	9,539	11,649	18.1%

* $p < .001$, 1-tail difference of means test

Table 6

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

	Accepted	Denied	Row Total	Acceptance Rate (%)
State or Local Government Party	898	2,970	3,868	23.2%*
No Government Party	625	4,559	5,184	12.1%
Column Total	1,523	7,529	9,052	16.8%

* $p < .001$, 1-tail difference of means test

Table 7

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

	Accepted	Denied	Row Total	Acceptance Rate (%)
Appellant	77	98	175	44.0%*
Appellee	480	2,723	3,203	15.0%
Column Total	557	2,821	3,378	16.5%

* $p < .001$, 1-tail difference of means test

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 Warren Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Appellant	56	12	68	82.4%*
Appellee	286	1,705	1,991	14.4%
Column Total	342	1,717	2,059	16.6%

* $p < .001$, 1-tail difference of means test

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 Warren Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Appellant	20	86	106	18.9%
Appellee	194	1,017	1,211	16.1%
Column Total	214	1,103	1,317	16.2%

Table 10

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

	Accepted	Denied	Row Total	Acceptance Rate (%)
Federal Government Party	342	1,715	2,057	16.6%
State or Local Government Party	213	1,101	1,314	16.2%
Column Total	555	2,816	3,371	16.5%

Table 11

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

	Accepted	Denied	Row Total	Acceptance Rate (%)
With Government Party	1,920	5,235	7,155	26.8%*
Without Governmental Party	616	4,538	5,154	12.0%
Column Total	2,536	9,773	12,309	20.6%

* $p < .001$, 1-tail difference of means test

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 Warren Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Appellant	502	205	707	71.0%*
Appellee	742	3,156	3,898	19.0%
Column Total	1,244	3,361	4,605	27.0%

* $p < .001$, 1-tail difference of means test

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 Warren Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Appellant	218	417	635	34.3%*
Appellee	567	1,589	2,156	26.3%
Column Total	785	2,006	2,791	28.1%

* $p < .001$, 1-tail difference of means test

Table 14

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

	Accepted	Denied	Row Total	Acceptance Rate (%)
Federal Government Party	1,229	3,350	4,579	26.8%
State or Local Government Party	771	1,953	2,724	28.3%
Column Total	2,000	5,303	7,303	27.4%