Agenda Setting on the Burger Court

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The paper that follows is one of a series of papers I have written regarding agenda setting on the Burger Court. The papers on Burger Court agenda setting follow the pattern and topics of those I wrote on the Vinson and Warren Courts' 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 were combined in a book titled *Supreme Court Agenda Setting: The Warren Court* (also available on Amazon.com). The paper for the Burger Court will be combined in a book to be titled *Supreme Court Agenda Setting: The Burger Court*. I expect it will be available on Amazon.com in the summer of 2026. The book will use the final numbers after all the corrections and updates.

Agenda Setting on the Burger Court
Paper 8: Law Enforcement 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 Burger Court (1969 to 1985 Terms). The specific question addressed in this paper is whether the presence of law enforcement parties in a case affects the chances for acceptance by the Supreme Court. The results show that the Court is slightly less likely to accept a case for review when a law enforcement entity is present. A more detailed examination, however, shows the Court to be much more likely to accept a case when a law enforcement entity is the appellant and very unlikely when the appellee. There were also differences between law enforcement and other government entities and between federal and state or local law enforcement entities as parties.

Agenda Setting on the Burger Court
Paper 8: Law Enforcement Parties as a Factor

This is the eighth in a series of papers examining agenda setting on the Burger Court (1969-1985 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) and the Warren Court (1953-1968 Terms). As such, certain elements of the prior papers will be repeated in the corresponding papers for the Burger 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*, and those of the Warren Court in a book titled, *Supreme Court Agena Setting: The Warren Court (1953 to 1968 Terms*, both of which are 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 Burger 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.

Law Enforcement Parties as Litigants

In the seventh paper in this series I found that the presence of government entities as parties in cases filed before the Supreme Court had an effect on the chances that a case would be accepted for review. In many instances there was an increased chance of acceptance, but in a few situations the chances were decreased. In particular, the chances were lessened when the government entity was the appellee in the case. (See Table 3 of the previous paper.[3]) The results also examined cases involving criminal issues and found it more likely for the Court to accept a case for review if the government party was the appellant as opposed to being the appellee. This proved true for the federal government, as well as for state and local government entities. (See Tables 8 and 9 of the previous paper.)

Contrary to expectations, the results of the prior paper also found that in criminal cases the Court was more likely to accept a case for review if the government party was a federal entity as opposed to a state or local one. (See Table 10 of the previous paper.) Even so, this finding was not inconsistent with a finding of by Ulmer, Hintze, and Kirklosky (1972) who 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.

The examination in the seventh paper looked generally at government entities. Although part of the analysis involved cases whose primary issue was criminal in nature, the definition of the parties was not specifically limited to law enforcement entities (though there were very few criminal cases with non-law enforcement parties). Moreover, some cases that were criminal in origin were actually coded as civil rights or liberties cases. For example, a criminal obscenity case would be coded as a First Amendment issue rather than a criminal one. Thus, a variety of

[3] The paper is titled, "Agenda Setting on the Burger Court, Paper 7: Government Parties as a Factor."

cases involving law enforcement entities were not included in the prior analysis. In this paper the focus is on law enforcement entities as parties regardless of the primary issue in the case as filed before the Supreme Court.

In the prior paper I noted Perry's comment on "importance" as a factor in whether a case would be accepted for review by the Court (1991, 253-260). He noted that one aspect of such importance is the breadth of the effect a case may have (1991, 254). As I noted in the prior paper, cases involving the federal government would certainly have nationwide scope, though how broadly any particular case affected people would vary depending on the nature of the issue. This was true for government entities in general, but also for law enforcement entities in particular. As I also noted, 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. On the other hand, even cases coming from local government entities could have national implications when various constitutional rights are involved.

Also as noted in the previous paper, 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—usually a criminal defendant—believed the government had overstepped its authority or violated a constitutional right. This may be particularly important for cases involving law enforcement entities where the primary issue of the case is not limited to simple criminal matters and includes civil rights or civil liberties issues.

Because of the various possibilities involving law enforcement entities at different levels, I will examine several 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 from the Vinson Court through the Burger Court (1946 through 1985 Terms). Data are complete for the Burger Court (1969 through 1985 Terms) and provide a relatively lengthy 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 number during the 1969-1985 Terms is included in the dataset. This results in 33,112 cases. Unlike the examinations of the Vinson Court, not included in this number are any cases filed before the 1969 Term that were held over and received a 1969 Term or later docket number.[4] Included in this number are 23 cases that originally appeared on the Court's miscellaneous docket and were moved to the appellate docket .[5]

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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 12 cases with a miscellaneous docket number (with an "M" in the DOCKET field, meaning they were not transferred to the appellate docket) during the 1969-1985 Terms. There were also a large number of cases from the Miscellaneous Docket after the numbering changed. Many of these cases 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 1,344 cases initially filed on the appellate docket for which the Court granted *in forma pauperis* status to one of the parties (587 of which were granted review). (For this study I made

An additional note on the coding for this examination is necessary before proceeding. The focus here is on government entities acting in a criminal law enforcement capacity. I phrase that a bit differently than just "law enforcement entity" because in some instances an entity normally thought of as law enforcement might be acting in another capacity. For example, we normally think of the Federal Bureau of Investigation (FBI) as a law enforcement entity. The FBI could, however, be involved in a case involving a personnel matter. In such a case the FBI would be coded as an administrative government entity and not included in the current analysis. In addition, the FBI could be coded as a generic government entity (i.e., neither law enforcement nor administrative) if the case involved something like a simple car accident unrelated to any criminal situation (e.g., an FBI employee hits another car on the way to work). Thus, although the primary issue in the cases included is not limited to what were defined as "criminal" in the prior paper, the government entities here must have been acting in some criminal law enforcement capacity for the case to be included.

Results

I begin by noting that of the 32,761 cases in the dataset where the Court made a review decision it accepted 4,337 of them for review. That results in an overall acceptance rate of 13.2%.[8]

Table 1 shows the acceptance rates for cases that had at least one law enforcement party (as appellant, appellee, or both) compared to those with no law enforcement parties.[9] Unless

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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.)

[8] This number is less than the 33,112 noted previously because it does not include cases where the Court did not make a formal review decision due to Rule dismissals before the decision or due to requests for dismissal by the petitioner.

[9] There were five cases with law enforcement parties on both sides of the case. Two were federal-state (one granted review), one was state-state, and two were local-state.

specified otherwise, a law enforcement party or entity can be any federal, state, or local unit or person acting in an official criminal law enforcement capacity.

TABLE 1 ABOUT HERE

As can be seen from Table 1, just under one-third of the cases involved at least one law enforcement party (10,794 with a law enforcement party versus 21,967 without). Of the 10,794 cases involving at least one law enforcement party, the Court accepted 1,103 of them of them for review (10.2%). In contrast, the Court granted review to 3,234 of the 21,967 cases without a law enforcement party (14.7%).

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 law enforcement 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.[10]

The difference between these two types of cases was slightly less than what was found in the prior paper for all government entities. This is not entirely surprising, however, given that another finding from the prior paper suggested that the Court was less likely to take cases with a criminal issue when the government party—which was most likely a law enforcement entity—was the appellee. Even so, Table 1 makes no distinction whether the law enforcement entity was the appellant or appellee, or whether it was federal or a state or local entity. Thus, the use of a

[10] In the second paper in the series, "Agenda Setting on the Burger Court, Paper 2: Certiorari and Appeal on the Burger 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.

two-tailed test is appropriate and although the difference reaches a traditional level of statistical significance, the difference is in the opposite direction and slightly less than for government entities as a whole.

TABLE 2 ABOUT HERE

I now begin the process of fleshing out the differences of how cases involving law enforcement entities are handled by the Court. Table 2 compares cases with a law enforcement entity as the appellant to those cases without a law enforcement party. The row for non-law enforcement parties is the same as in Table 1. There were only 1,824 cases with a law enforcement entity as the appellant, but the Court granted review to 749 of them (41.1%). This was a much larger percentage than the acceptance rate for cases without a law enforcement party, which was only 14.7%. Given the findings from the previous paper we might expect the Court to have a higher acceptance rate for cases involving a government party. This proved to be true specifically for law enforcement entities as the appellant. In fact, the acceptance rate for all government parties as appellants, as shown in Table 2 of the prior paper was 42.0%, which was even above the 41.1% acceptance rate for law enforcement entities as appellants.

TABLE 3 ABOUT HERE

Moving on to cases when a law enforcement entity was the appellee, given prior findings we can expect the Court to have been less likely to grant review to such cases. Table 3 shows this to be the case. In Table 3 we see that there were 8,975 cases with a law enforcement entity as the appellee. Once again, the non-law enforcement row is the same as in Table 1. Of the cases with a law enforcement entity as the appellee, the Court granted review to only 355 (4.0%). That percentage was well below the percentage for cases without a law enforcement party (14.7%). This finding is consistent with that of Table 3 in the previous paper where we saw that

the Court was less likely to accept cases for review with a government entity as the appellee compared to cases without a government party. The difference here, however, was slightly smaller.

The next step is to look specifically at federal law enforcement parties. The next three tables will consider federal law enforcement parties in general, as appellants, and as appellees.

TABLE 4 ABOUT HERE

Table 4 compares the acceptance rates for cases with a federal law enforcement party as a litigant, appellant or appellee, with those cases with no law enforcement litigant. For this table, as well as the next two, the row for non-law enforcement cases is the same as in Table 1. There were 6,065 cases when a federal law enforcement entity was a party. Of these, the Court accepted 378 for review (6.2%). That was a lower acceptance rate than we saw in Table 1 for all law enforcement entities (i.e., when state and local law enforcement entities were included). The lower percentage for federal law enforcement entities is a bit surprising given the finding of Table 5 in the previous paper which showed a higher rate for federal government parties as litigants as opposed to cases with no government parties. As mentioned previously, the Court seemed to give additional consideration to federal government entities but the findings in Table 4 do not confirm that for federal law enforcement litigants when not controlling for whether they are the appellant or appellee.

TABLE 5 ABOUT HERE

Table 5 shows the more specific comparison of federal law enforcement entities as appellants with cases without a law enforcement entity as a party. There were only 312 of these cases, but the Court accepted 245 of them for review (78.5%). This percentage was much higher than that of Table 2 (41.1%), which also included state and local law enforcement entities as

appellants. Once again it appears the Court was more accepting of cases with federal rather than state or local parties as appellants.

TABLE 6 ABOUT HERE

To complete this set, Table 6 compares the acceptance rates of federal law enforcement entities as appellees with cases without a law enforcement litigant. There were 5,753 cases with a federal law enforcement entity as the appellee. Of these, the Court granted review to 133 of them (2.3%). This is consistent with the finding of Table 3, in that the Court was less likely to accept a case for review with the law enforcement party as the appellee when state and local law enforcement parties were included. Even so, the acceptance rate was a bit lower, 2.3% compared with 4.0% shown in Table 3. That suggests once again that the Court was a bit less receptive to cases involving a federal government party. The acceptance rate for federal law enforcement entities as the appellee was sufficiently below the rate for cases without a law enforcement entity that it reaches a statistical level of significance ($p < .001$).

Before moving to comparisons involving state and local law enforcement it is worth considering how federal law enforcement entities do when another federal government entity was a party. We have seen that the Burger Court was more likely to accept cases when federal government entities were litigants (Table 5 of the prior paper), in general and also specifically for federal law enforcement entities. We have also seen this to be true when the federal government entity was the appellant (Table 5). In contrast, the Court was less likely to accept a case for review when a federal government entity was the appellant (Table 6). Given slight differences in these findings when looking at all federal government entities as opposed to specifically federal law enforcement entities, it is worth examining whether there was a difference in how different types of federal government entities were treated.

The next three tables will follow the pattern set above by examining when a federal law enforcement entity was a party, appellant or appellee, and the other party was also a federal government entity, when the federal law enforcement entity was the appellant and another federal government entity was the appellee, and then when a federal law enforcement entity was the appellee and another federal government entity was the appellant.

TABLE 7 ABOUT HERE

Table 7 compares the acceptance rate for cases with a federal law enforcement entity, as appellant or appellee, with those cases that have a non-law enforcement federal government entity (i.e., any federal government entity not acting in a law enforcement capacity) as appellant or appellee. The federal law enforcement row is the same as in Table 4. Specifically, there were 6,065 cases when a federal law enforcement entity was a litigant and the Court granted review to 378 of them (6.2%). There were 6,379 cases in which some other federal government entity was a litigant in a case. The Court accepted 1,145 of these cases for review (17.9%). The difference in acceptance rates, which reaches statistical significance, indicates that the Court was less likely to take a case with a federal law enforcement entity as a litigant than some other federal government entity.

TABLE 8 ABOUT HERE

Table 8 shows the comparison of acceptance rates between federal law enforcement and other federal government entities when they are appellants. The federal law enforcement row is the same as in Table 5. There were 312 cases in which a federal law enforcement entity was the appellant and the Court accepted 245 of them for review (78.5%). For other federal government entities, there were 906 cases when they were the appellant and the Court granted review to 628

of them (69.3%). Although that acceptance rate is quite high, it is still well below the rate for federal law enforcement entities to a statistically significant degree.

TABLE 9 ABOUT HERE

Table 9 shows the comparison of acceptance rates between federal law enforcement and other federal government entities when they are appellees. The federal law enforcement row is the same as in Table 6. There were 5,753 cases in which a federal law enforcement entity was the appellee and the Court accepted 133 of them for review (2.3%). There were 5,524 cases in which a non-law enforcement federal government entity was the appellee and the Court granted review to 538 of them (9.7%). Although this difference is less than for appellants found in Table 8, it still reaches statistical significance.

From Tables 7, 8 and 9 we see that when comparing law enforcement to other federal government entities the Court is more likely to accept cases involving non-law enforcement entities (Table 7), but the specifics are more nuanced. The Court was much more likely to accept a case when a federal law enforcement entity was the appellant (Table 8) but slightly less likely to do so when such entities were the appellee (Table 9). The findings of Tables 8 and 9 are consistent with those of Tables 5 and 6 in that whether the federal law enforcement entity was the appellant or appellee made a clear difference in the likelihood of the case being granted review.

The next step is to examine the acceptance rates for state and local law enforcement entities. The approach will be the same as the examinations for federal law enforcement entities. The next three tables will compare the acceptance rates for cases with a state or local law enforcement entity with those for cases without a law enforcement party in general, as appellant, and then as appellee.

TABLE 10 ABOUT HERE

Table 10 shows the comparison in acceptance rates in cases with a state or local law enforcement entity with those cases without a law enforcement entity. The non-law enforcement row is the same as in Table 1, and will be the same in Tables 11 and 12. There were 4,731 cases in which a state or local law enforcement entity was a party and the Court accepted 726 of them for review (15.3%). For cases without a law enforcement entity the Court accepted 3,234 of 21,967 cases for review (14.7%). Thus, the Court was slightly more likely to take cases involving a state or local law enforcement entity. This finding is similar to what we saw in Table 4 for federal law enforcement entities where the Court was more likely to accept such cases for review though the difference here is smaller and does not reach statistical significance.

TABLE 11 ABOUT HERE

Table 11 shows the comparison of acceptance rates between cases when a state or local law enforcement entity was the appellant and those without a law enforcement entity. There were only 1,512 such cases and the Court granted review to 504 of them (33.3%). This acceptance rate was above the acceptance rate for non-law enforcement cases, but also well below the rate for federal law enforcement entities as appellants shown in Table 5. The difference with non-law enforcement entities is statistically significant.

TABLE 12 ABOUT HERE

Table 12 shows the comparison of acceptance rates between cases when a state or local law enforcement entity was the appellee and those without a law enforcement entity. There were 3,222 of these cases and the Court accepted 222 of them for review (6.9%). This result is not surprising given the findings of prior tables.

The results of Tables 11 and 12 are generally consistent with those of Tables 5 and 6. Although the Burger Court was much more accepting of law enforcement entities as the appellant, they were much more so when the entity was federal law enforcement than state or local. Conversely, the Court was less likely to accept a case when law enforcement was the appellee, and less so federal than state or local law enforcement. The difference between Tables 4 and 10, that the Court was less willing to accept cases with federal law enforcement (appellant or appellee) compared to cases without a law enforcement entity and a bit more willing to accept those with state or local law enforcement, cannot be explained by a view of federalism where the Court might be more likely to take cases from federal government entities.

The next three tables involve state and local law enforcement and follow the pattern for the federal law enforcement in Tables 7, 8, and 9. As with federal law enforcement, it will be interesting to see whether there are differences in how the Court treats various types of state and local government entities.

TABLE 13 ABOUT HERE

Table 13 compares the acceptance rates of all cases with a state or local law enforcement entity as a party with those cases that have a non-law enforcement state or local government entity as a party. The state and local law enforcement row is the same as in Table 10. There were 4,731 such cases and the Court granted review to 726 of them (15.3%). There were 6,640 cases with a non-law enforcement state or local government party and the Court granted review to 1,364 of them (20.5%). This result is not surprising given that we know the large imbalance between whether the state or local law enforcement entity was the appellant or appellee (Tables 11 and 12).

TABLE 14 ABOUT HERE

Table 14 shows the comparison in the acceptance rates between cases with a state or local law enforcement entity as the appellant with the cases when the appellant was a non-law enforcement state or local government entity. The state and local law enforcement row is the same as in Table 11. Again, there were only 1,512 cases involving a state or local law enforcement entity as the appellant and the Court accepted 504 of them (33.3%). In contrast, there were 2,272 cases with a state or local non-law enforcement government entity as appellant and the Court granted review to 730 of them (32.1%). This finding is consistent with prior findings in terms of direction, though the difference is smaller than for federal law enforcement entities found in Table 8 and does not reach statistical significance. Nevertheless, it is interesting to see that the acceptance rate for non-law enforcement state or local government entity cases was less than half that of the federal level (Table 8).

TABLE 15 ABOUT HERE

Table 15 shows the comparison in acceptance rates between cases with a state or local law enforcement entity as the appellee and those cases with a non-law enforcement state or local government entity as the appellee. The law enforcement row is the same as in Table 12. There were 3,222 cases with a state or local law enforcement entity as the appellee and the Court accepted 222 of them for review (6.9%). There were 4,598 cases with a non-law enforcement state or local government entity as the appellee and the Court granted review to 660 of them (14.4%). We saw in Table 12 that the Court was less inclined to accept cases with a state or local law enforcement entity as the appellee compared to non-law enforcement entities. What we see in this table is that the acceptance rate for such cases was basically the same as the rate for other state or local government entities as the appellee. Interestingly, the rate for non-law

enforcement state or local government entities as the appellee was nearly five points higher than for federal non-law enforcement entities (Table 9).

The final three tables compare the acceptance rate for cases with federal law enforcement entities in the three situations (as either party, as appellant, and as appellee) with those when the law enforcement entity is state or local. Note that the two rows for each of the following tables appeared in prior tables. For example, the federal law enforcement row of Table 16 is the same as in Table 4 and the state and local row is the same as in Table 10. The difference is that the figures in the two rows are now being compared with each other.

TABLE 16 ABOUT HERE

Table 16 shows the comparison in acceptance rates when cases have a federal law enforcement entity as a party (appellant or appellee) with those when one of the parties was a state or local law enforcement entity. As we might have guessed from prior findings, the federal acceptance rate, 6.2%, was lower than for the state or local rate of 15.3%. Again, this result is not surprising given what we know about the distribution of the state and local cases between appellant and appellee.

TABLE 17 ABOUT HERE

Table 17 compares the acceptance rates for the two levels when the law enforcement entity was the appellant. Recall that the acceptance rate when a federal law enforcement entity was the appellant was a very high 78.5%. The rate for state and local law enforcement entities was only 33.3%. The large difference in these percentages reaches a traditional level of statistical significance despite the relatively small number of cases for the two rows.

TABLE 18 ABOUT HERE

Finally, Table 18 shows the acceptance rates for the two levels when the law enforcement entity was the appellee. The acceptance rate when a federal law enforcement entity was the appellee was only 2.3%. The acceptance rate when a state or local law enforcement entity was the appellee was just a few points higher at 6.9%, but still reaches statistical significance.

Discussion

The results from this examination clearly show that the Burger Court treated cases involving law enforcement entities differently than other cases for purposes of granting review. The differences are nuanced, however, and digging more deeply into the details provided a better understanding of the Court's preferences.

Some of the results shown in this paper confirm aspects of conventional wisdom about how cases involving law enforcement entities are handled at the review stage. We would expect, for example, that the Court would be less likely to accept cases for review when the law enforcement entity is the appellee. This follows from the understanding that many appeals from criminal defendants clearly lack the criteria necessary for review by the Court.

The results are also consistent with the results of the seventh paper in the series which examined government parties more generally. In particular, from the prior paper we learned that the Burger Court was more likely to accept cases with government entities, both in general and when the government party was the appellant. On the other hand, the Court was less likely to accept cases for review when the government party was the appellee. The Court was also more likely to accept cases involving federal government entities as opposed to those involving state or local government entities. Cases involving criminal issues changed the dynamic and provided the impetus for this paper.

In thinking about cases involving law enforcement entities we could reasonably expect that there would be certain differences from the Court's review decisions involving government parties more generally. In particular, we could expect there to be far more cases with the law enforcement entity as the appellee than as the appellant. That expectation proved correct as shown in Tables 2 and 3, and in later tables when separating federal from state and local law enforcement parties. The different balance between the cases when law enforcement entities appeared as appellant or appellee significantly changed the comparison of these cases relative to cases not involving a law enforcement entity. Although the prior paper found that the Court was half again as likely to accept a case for review if it involved a government party compared to the cases that did not involve a government party, Table 1 in this paper showed the difference between cases with a law enforcement party and those without to be a bit smaller (though still statistically significant).

Examining the cases in more detail found that there was a large imbalance in the cases when a law enforcement entity appeared as the appellant versus as the appellee. For example, from Tables 2 and 3 we saw that there were nearly five times as many cases when the law enforcement entity was an appellee than as an appellant. The imbalance was even greater for federal law enforcement at over 18 times as many (Tables 8 and 9), but at the state and local level it was only a bit over twice as great (Tables 11 and 12).

Consistent with the findings from the prior paper, the Court was more likely to accept cases for review when a law enforcement entity was the appellant. A law enforcement entity's ability to appeal is more limited than that of a criminal defendant's, so the issues are more likely to be ones involving constitutional issues or concerns about government power. On the other hand, from a substantive perspective a criminal defendant's ability to appeal is much broader—at

least in theory. The reality is that although there are certainly some cases in which criminal defendants raise important constitutional issues that the Court accepts for review and establishes a new precedent, the vast majority of appeals by criminal defendants have little merit in the eyes of the justices. In examining these cases one finds that vague claims of "Due Process" violations are frequent.

The large number of cases with law enforcement entities as the appellee reduced the Court's general inclination to accept cases involving government entities, including law enforcement. Interestingly, this proved particularly true for federal law enforcement entities which had an acceptance rate about nine points below that of state and local law enforcement entities.

Comparisons between law enforcement and other government entities at the same level indicated that for federal entities although the Court was more likely to accept a case with a law enforcement entity as the appellant than if some other government entity was the appellant, it was less likely to grant review when the government entities appeared as the appellee. Although that was true as well for state and local government entities, both law enforcement and other state and local entities had higher acceptance rates than those at the federal level.

As in the prior paper, the results here question whether there was a federalism component to the Burger Court's preferences. As a percentage, the Court was more likely to accept cases for review if a federal law enforcement entity was involved as the appellant. In general or as the appellee, state and local law enforcement entities had higher acceptance rates. These differences proved statistically significant when directly compared in Tables 16, 17, and 18.

Conclusion

To conclude, three basic points seem to follow from these findings. First, the type of party involved in a case made a difference. This is no surprise to those who study the Court, but the results provide details regarding a specific type of government entity. Second, and particularly for cases involving law enforcement entities, whether the entities appeared as appellant or appellee made a difference. The difference was certainly based on the specific nature of these cases and in particular the large imbalance between whether the law enforcement entity appeared as an appellant or an appellee. Even so, the basis for the difference is certainly worth knowing. Third, an element of federalism that appeared in prior papers did not seem to be present in the Court's review decisions for cases involving law enforcement entities. As noted in the prior paper, the notion of federalism used here is very general and suggests that the Court would be more willing to take cases involving federal entities. The Burger Court, however, was less likely to accept cases involving federal law enforcement entities than those that were state or local.

As with previous papers in this series, the results of this examination provide additional information and context about the Supreme Court's agenda setting.

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Table 1

Acceptance Rates for Cases With a Law Enforcement Party Compared With Those Without on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
With Law Enforcement Party	1,103	9,691	10,794	10.2%*
Without Law Enforcement Party	3,234	18,733	21,967	14.7%
Column Total	4,337	28,424	32,761	13.2%

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

Table 2

Acceptance Rates for Cases With a Law Enforcement Party as Appellant Compared With Those With No Law Enforcement Party on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Law Enforcement Appellant	749	1,075	1,824	41.1%*
No Law Enforcement Party	3,234	18,733	21,967	14.7%
Column Total	3,983	19,808	23,791	16.7%

* $p < .001$, 2-tail difference of means test.

Table 3

Acceptance Rates for Cases With a Law Enforcement Party as Appellee Compared With Those With No Law Enforcement Party on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Law Enforcement Appellee	355	8,620	8,975	4.0%*
No Law Enforcement Party	3,234	18,733	21,967	14.7%
Column Total	3,589	27,353	30,942	11.6%

* $p < .001$, 2-tail difference of means test.

Table 4

Acceptance Rates for Cases With a Federal Law Enforcement Party Compared With Those Without on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Federal Law Enforcement Party	378	5,687	6,065	6.2%*
No Law Enforcement Party	3,234	18,733	21,967	14.7%
Column Total	3,612	24,420	28,032	12.9%

* $p < .001$, 2-tail difference of means test.

Table 5

Acceptance Rates for Cases With a Federal Law Enforcement Party as Appellant Compared With Those With No Law Enforcement Party on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Federal Law Enforcement Appellant	245	67	312	78.5%*
No Law Enforcement Party	3,234	18,733	21,967	14.7%
Column Total	3,479	18,800	22,279	15.6%

* $p < .001$, 2-tail difference of means test.

Table 6

Acceptance Rates for Cases With a Federal Law Enforcement Party as Appellee Compared With Those With No Law Enforcement Party on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Federal Law Enforcement Appellee	133	5,620	5,753	2.3%*
No Law Enforcement Party	3,234	18,733	21,967	14.7%
Column Total	3,367	24,353	27,720	12.1%

* $p < .001$, 2-tail difference of means test.

Table 7

Acceptance Rates for Cases With a Federal Law Enforcement Party Compared With Those With a Federal Non-Law Enforcement Party on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Federal Law Enforcement Party	378	5,687	6,065	6.2%*
Federal Non-Law Enforcement Party	1,145	5,234	6,379	17.9%
Column Total	1,523	10,921	12,444	12.2%

* $p < .001$, 2-tail difference of means test.

Table 8

Acceptance Rates for Cases With a Federal Law Enforcement Party as Appellant Compared With Those With a Federal Non-Law Enforcement Party as Appellant on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Federal Law Enforcement Appellant	245	67	312	78.5%*
Federal Non-Law Enforcement Appellant	628	278	906	69.3%
Column Total	873	345	1,218	71.7%

* $p < .001$, 2-tail difference of means test.

Table 9

Acceptance Rates for Cases With a Federal Law Enforcement Party as Appellee Compared With Those With a Federal Non-Law Enforcement Party as Appellee on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Federal Law Enforcement Appellee	133	5,620	5,752	2.3%*
Federal Non-Law Enforcement Appellee	538	4,986	5,524	9.7%
Column Total	671	10,606	11,277	6.0%

* $p < .001$, 2-tail difference of means test.

Table 10

Acceptance Rates for Cases With a State or Local Law Enforcement Party Compared With Those Without on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
State or Local Law Enforcement Party	726	4,005	4,731	15.3%
No Law Enforcement Party	3,234	18,733	21,967	14.7%
Column Total	3,960	22,738	26,698	14.8%

Table 11

Acceptance Rates for Cases With a State or Local Law Enforcement Party as Appellant Compared With Those With No Law Enforcement Party on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
State or Local Law Enforcement Appellant	504	1,008	1,512	33.3%*
No Law Enforcement Party	3,234	18,733	21,967	14.7%
Column Total	3,738	19,741	23,479	15.9%

* $p < .001$, 2-tail difference of means test.

Table 12

Acceptance Rates for Cases With a State or Local Law Enforcement Party as Appellee Compared With Those With No Law Enforcement Party on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
State or Local Law Enforcement Appellee	222	3,000	3,222	6.9%*
No Law Enforcement Party	3,234	18,733	21,967	14.7%
Column Total	3,456	21,733	25,189	13.7%

* $p < .001$, 2-tail difference of means test.

Table 13

Acceptance Rates for Cases With a State or Local Law Enforcement Party Compared With Those With a State or Local Non-Law Enforcement Party on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
State or Local Law Enforcement Party	726	4,005	4,731	15.3%*
State or Local Non-Law Enforcement Party	1,364	5,276	6,640	20.5%
Column Total	2,090	9,281	11,371	20.5%

* $p < .001$, 2-tail difference of means test.

Table 14

Acceptance Rates for Cases With a State or Local Law Enforcement Party as Appellant Compared With Those With a State or Local Non-Law Enforcement Party as Appellant on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
State or Local Law Enforcement Appellant	504	1,008	1,512	33.3%
State or Local Non-Law Enforcement Appellant	730	1,542	2,272	32.1%
Column Total	1,234	2,550	3,784	32.6%

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Table 15

Acceptance Rates for Cases with a State or Local Law Enforcement Party as Appellee Compared With Those With a State or Local Non-Law Enforcement Party as Appellee on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
State or Local Law Enforcement Appellee	222	3,000	3,222	6.9%
State or Local Non-Law Enforcement Appellee	660	3,938	4,598	14.4%
Column Total	882	6,938	7,820	11.3%

* $p < .001$, 2-tail difference of means test.

Table 16

Acceptance Rates for Cases With a Federal Law Enforcement Party Compared With Those With a State or Local Law Enforcement Party on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Federal Law Enforcement Party	378	5,687	6,065	6.2%*
State or Local Law Enforcement Party	726	4,005	4,731	15.3%
Column Total	1,104	9,692	10,796	10.2%

* $p < .001$, 2-tail difference of means test.

Table 17

Acceptance Rates for Cases With a Federal Law Enforcement Party as Appellant Compared With Those With a State or Local Law Enforcement Party as Appellant on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Federal Law Enforcement Appellant	245	67	312	78.5%*
State or Local Law Enforcement Appellant	504	1,008	1,512	33.3%
Column Total	749	1,075	1,824	41.1%

* $p < .001$, 2-tail difference of means test.

Table 18

Acceptance Rates for Cases With a Federal Law Enforcement Party as Appellee Compared With Those With a State or Local Law Enforcement Party as Appellee on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Federal Law Enforcement Appellee	133	5,620	5,753	2.3%*
State or Local Law Enforcement Appellee	222	3,000	3,222	6.9%
Column Total	355	8,620	8,975	4.0%

* $p < .001$, 2-tail difference of means test.