

Mixed Signals? Rethinking How Ideology and Institutional Motivations Shape the Solicitor General's Positions

Political Research Quarterly
2025, Vol. 0(0) 1–17
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DOI: 10.1177/10659129251348456
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Abstract

The Office of the Solicitor General (OSG) wins more cases before the US Supreme Court than any other party. Recent scholarship shows that justices are most likely to side with the OSG when its position is ideologically aligned with justices' predispositions and when the OSG takes a position counter its own presumed preferences. However, previous studies fail to account for how the institutional role of the OSG shapes what should be considered a counter-preference signal. We offer a new approach to defining the OSG's preferences and test our assumptions using cases argued before the Court from 1979 to 2018. We show it is more common for the OSG to act against its ideological predispositions than its institutional interests, and it is exceedingly rare for it to act against both. We find the effects of counter-interest signals are context dependent and may be less important than ideological congruence and institutional concerns.

Keywords

Supreme Court, Solicitor General, separation of powers, executive, ideology, institutions, signaling

In 2018, Congress passed the First Step Act, which made significant criminal justice reforms. One of these was to expand the number of defendants eligible to take advantage of a statutory “safety valve” that allows them to receive sentences under the statutory minimum. The statute lists three factors that would disqualify a defendant from safety valve relief, and these factors are joined by the word “and.”¹ The meaning of the word “and” in this provision was at the center of the Supreme Court case, *Pulsifer v. United States*.² Assistant to the Solicitor General Frederick Liu represented the government's position in oral argument and sought to persuade the justices that the word “and” should be read to mean “or.” This counter-intuitive argument is, by traditional measures, a conservative one, in that it would limit the number of defendants who could take advantage of the Act's safety valve.³ It also seems to stand in contrast to then-President Biden's support for sentencing reductions. In Executive Order 14074, Biden said, “[N]o one should be required to serve an excessive prison sentence....My Administration will fully implement the First Step Act, including by supporting sentencing reductions in appropriate cases....”

The Office of the Solicitor General (OSG) is part of the Department of Justice (DOJ), which in turn is part of the

executive branch. Both the Solicitor General and the Attorney General to whom she reports are presidential appointees who serve at the pleasure of the President. What, then, explains the OSG's conservative argument in this case? Previous scholarship suggests that the OSG might take a position contrary to that of the president because the office has a strong tradition of independence (Marasciullo 1988). This independence is often cited as one reason the OSG enjoys an impressive success rate at the Supreme Court (Pacelle 2003). By acting independently, the OSG establishes credibility. For example, research suggests that when the OSG acts counter to the presumed ideological predisposition of the appointing president, the OSG signals that it is following the law rather than politics and thus deserves to be believed (Bailey et al. 2005; Wohlfarth 2009).

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There is another, simpler explanation for the OSG's position in this case, however, that complicates the signaling story. The government is the party that brings criminal cases, giving the OSG a pivotal role in law enforcement. Federal prosecutions are brought by attorneys who are part of the OSG's home agency, the DOJ. It is in the DOJ's institutional interest to have as much authority and bargaining power in criminal cases as possible and to have the convictions and sentences it has already obtained upheld. Further, the government was the respondent in *Pulsifer*. This means it had already invested substantial resources to convict the defendant, secured a sentence that did not include safety valve relief, and argued successfully to have the sentence affirmed by the Court of Appeals. The defendant, rather than the government, sought Supreme Court review.⁴ Once the Court grants certiorari in a case in which the United States is the respondent, the OSG is expected, by both the DOJ and the Court, to defend the government's position. This institutional explanation for the OSG's position in *Pulsifer* does not undermine the general premise of the signaling model that the Court should be most receptive to arguments when they are counter to the OSG's predisposition. Instead, it should inform what we expect that predisposition to be.

The theory we present here echoes previous work on the separation of powers. That literature argues that political actors cannot single mindedly follow their own policy preferences but instead must be cognizant of the possible reactions from other branches of government and the need to maintain their own institutional authority (see, e.g., Clark 2009; Volden 2002). Just as Supreme Court justices may act strategically to preserve their institutional interests in some types of cases, while acting more ideologically in others (Pacelle et al. 2011; Segal et al. 2011), the OSG may act strategically to preserve executive and prosecutorial power, while being more likely to pursue its policy preferences in cases not directly related to its institutional interests. However, the OSG is further constrained because its power is indirect. Its ability to achieve its objectives depends on its ability to persuade the Court. To do so, it must maintain its credibility and avoid appearing too politicized (Lemos and Widiss 2025; Wohlfarth 2009).

Much of the previous scholarship examining the role politics and ideology play in explaining the OSG's success before the Supreme Court has limited its examination to civil rights and liberties cases (Bailey et al. 2005; Pacelle 2003; Wohlfarth 2009) and cases in which the OSG was an amicus curiae rather than a party (Bailey et al. 2005; Wohlfarth 2009). As these studies acknowledge, this limits their generalizability. It also sidesteps the complexity introduced by taking the OSG's institutional role seriously. This paper builds on these studies to

provide a more complete conception of what constitutes a credible signal from the OSG's office and how that might impact the justices' reactions to its arguments. We begin by outlining a new theory of when and how the OSG should be expected to act in accordance with executive ideological preferences and when it should be driven more by institutional concerns. We test our assumptions about institutional preferences by examining positions taken by the OSG in cases decided between 1979 and 2018. We evaluate whether our approach to signaling predicts outcomes in all cases in which the OSG was party or an amicus during our period of study. We find substantial support for our argument that institutional interests are a powerful determinant of the OSG's position. We further find that the OSG is most persuasive to justices on the opposite side of the ideological divide from the president when they take a position that is contrary to both their ideological and institutional interests. Our findings provide a clearer view of what it means for the OSG to act politically or legally, ideologically or institutionally, and ultimately give us better tools for predicting when the OSG should be most successful.

The Solicitor General in Institutional Context

The Solicitor General (SG) occupies a unique place in the US legal system. As a presidential appointee whose work has substantial policy impact, the SG is an important political actor. On the other hand, SGs are generally outstanding attorneys who deliver invaluable legal counsel for their client, the US government (Black and Owens 2011, 2013). The SG enjoys a special relationship with the Supreme Court (Caplan 1987). The OSG is the only litigant the Court will ask to participate in cases (Black and Owens 2012a), and the Court almost always grants the OSG's frequent requests to present oral argument as amicus. Indeed, in the modern era, the OSG has participated in 70–80 percent of cases on the Court's merits docket, either as party or as amicus (Covert and Wang 2021). The SG has offices in both the DOJ headquarters and the Supreme Court building, illustrating their strong connections to both the executive and judicial branches (Pacelle 2003).

The SG and other OSG attorneys are among the most talented and respected in the nation, but it is not just talent that leads to their success rate. Black and Owens (2012b) show that attorneys from the OSG win on the merits more often than other attorneys with similar experience and credentials, including former SGs. Thus, it is not simply legal acumen but also the unique institutional role of the OSG that leads the justices to side with them so often.

Policy and politics also matter. When the Court perceives the OSG as acting more politically than legally, the Court is less likely to agree with its position (Schoenherr and Waterbury 2022). For example, Wohlfarth (2009) shows that the more the OSG takes partisan positions, the less likely it is to receive the justices' votes. Similarly, Bailey et al. (2005) use signaling theory to argue that when the OSG takes a position counter to the President's ideological preferences, it sends a more credible signal to the justices that the weight of the law is on its side. This, in turn, makes the justices more likely to adopt the OSG's position.

Signaling theory is ultimately about persuasion. Credible signals can persuade political actors to adopt a position they otherwise would not. This makes signaling theory especially well-suited for examinations of judicial decision making. Most judges are policy generalists and rely on attorneys to provide them with the necessary information to decide a case (Garner et al. 2010). The goal of any attorney is to persuade the judge or judges to vote in their client's favor. They do this by making strategic choices about how they provide information (Hazelton and Hinkle 2022; Hazelton et al. 2019; Lane and Schoenherr; McGuire et al. 2007). Signaling credibility is a particularly important persuasion strategy for repeat players like the OSG. The OSG's special status with the Court stems, at least in part, from its consistency as a trusted and reliable source of information (Black and Owens 2012a, 2012b). The sophisticated lawyers at the OSG likely recognize this and may sometimes choose to send a counter-interest signal to preserve or increase its credibility with the Court.

Existing work on OSG signaling is limited in scope because it focuses only on instances when the OSG filed a voluntary amicus brief. This leaves a question of whether the credibility and persuasiveness created by the OSG's political signals operate similarly in cases where the OSG represents the government as a party or when it is invited by the Court to participate as an amicus. Additionally, existing work focuses solely on civil rights and liberties cases, which tend to be more salient and have clearer ideological implications than other types of cases. The theory we advance below builds on the insights of this prior work and extends it to encompass the full range of OSG involvement at the merits stage of Supreme Court decision making.

Signaling in Merits Cases

The Supreme Court has discretionary jurisdiction and chooses which cases to hear (Lane 2022). One way the OSG retains its special relationship with the Court is by playing a gatekeeping role, screening government petitions, and asking the Court to review only those that are

most meritorious or important (Black and Owens 2011; Pacelle 2003). The OSG can also file amicus briefs at the certiorari stage, urging the Court to take or not take up a case. While generally any amicus brief at the certiorari stage signals the case's importance and increases the likelihood that the Court will take it (Caldeira et al. 2012; Lane et al. 2020), the OSG is unusually successful in persuading the Court not to take cases it would prefer not to see on the docket (Bird 2022; Black and Owens 2012b; Thompson and Wachtell 2008).

This gatekeeping role is critical for how we think about signaling at the merits stage. Because the OSG decides which of the cases the government lost at the Court of Appeals to ask the Supreme Court to review (Zorn 2002), if the OSG disagrees with the government's position in a case, it can simply decline to petition for certiorari. While the OSG may receive more pressure from other government actors in cases to which the government is a party than it does in voluntary amicus cases (Wohlfarth 2009), the office is generally given substantial independence and deference in making these decisions (Pacelle 2003). Moreover, the government is more likely to win on appeal because the Supreme Court is reversal prone (Black and Owens 2012b). Because filing a petition for certiorari is a strategic choice, when the OSG is the petitioner, the majority of the cases on which they seek review should advance both their institutional and policy preferences. If the OSG sends a counter-ideological signal when they are the petitioner in a case, they are making the choice to do so, and they have reason to believe it will be successful. Thus, if signaling theory applies in cases in which the OSG represents a party, it should impact the justices' votes most in cases in which the OSG is the petitioner.

Conversely, when the government is the respondent, the opposite is more likely. When the federal government is a party to a case before the Supreme Court, the OSG is generally the law office that represents it. As the lawyer for a party, the OSG has an obligation to represent the position of its client, as long as that position is consistent with its duties to the Court.⁵ Therefore, the OSG will always represent the government's position, though it may carefully shape its arguments to be more consistent with precedent or the administration's preferences (Pacelle 2003). Because the OSG is expected to defend the position of the government, institutional factors should shape how the Court interprets signals when OSG represents the respondent. Specifically, they should make counter-ideological positions less surprising to the justices—and therefore less persuasive.

Institutional Inclinations of the OSG

As a presidential appointee, the SG is generally expected to follow the policy preferences of the president

(Wohlfarth 2009). However, there are institutional reasons to believe this will not be universally true. First, as the attorney for the chief law enforcement officer of the US—the Attorney General—the institutional perspective of the OSG may be more pro-prosecution than an administration’s ideology might otherwise suggest. If the government is a party to a criminal proceeding, it will always be in the pro-government, anti-defendant position. Under the standard coding of ideology in Supreme Court cases, this is the conservative position (Spaeth et al. 2021). When acting as amicus, the OSG may have more freedom to depart from this position, but institutional interests may still lead it to take positions protecting the DOJ’s ability to obtain and defend convictions. Similarly, the DOJ is always a party in immigration cases where the government seeks removal of an individual from the country. The pro-immigrant position is considered to be the liberal position in these cases, and as part of the DOJ, the OSG should not be expected to take the immigrant’s side. For these reasons, the OSG should be expected to be in the conservative position in criminal and immigration cases, irrespective of the preferences of the President.

Conversely, as the federal government’s lawyer, we expect the OSG will consistently support exercises of federal power—particularly executive power. Under the ideological coding used in the Supreme Court Database, support for executive and federal power are considered liberal positions.⁶ While liberal and conservative presidents may pursue different substantive policies, even conservative presidents want to protect their authority. The case *Zivotofsky v. Kerry* (2015)⁷ provides an example of this. When President George W. Bush, a Republican, signed the Foreign Relations Authorization Act, he issued a signing statement objecting to a provision he saw as a violation of his constitutional executive authority over foreign affairs. *Zivotofsky* was brought in an effort to force the State Department to follow the provision Bush had opposed. By the time the case made it to the Supreme Court, Barack Obama, a Democrat, was President, and his administration, acting through the OSG, took the same position as Bush (and won).

When acting as a party, the OSG will always be on the side of the federal government more generally, so even under Republican administrations, we should expect it to take the “liberal,” pro-federal government position. Further, it is reasonable to expect the OSG to take a similar position even when acting as amicus because of its institutional role in protecting the interests of the federal government. A look at cases in issue areas regarding federalism supports this assumption. Under both Republican and Democratic administrations, the OSG has given its support to parties who allege state laws are preempted or violate the dormant commerce clause.⁸

Given their frequent interactions with the OSG, Supreme Court justices are keenly aware of these institutional incentives. Although at first glance it may appear that the SG appointed by a liberal president that argues for deportation or criminal conviction is taking a counter-ideological position, the Court would likely recognize that the OSG was doing so in pursuit of its *own* institutional interests. The same is true when, under a conservative president, the OSG argues for an expansive reading of federal or executive power. The OSG litigates cases in the areas of criminal law, immigration, and federal power regardless of the partisan affiliation of the president. As a result, we expect that when a counter-ideological signal is sent by an OSG in cases involving these issues, that signal will be less persuasive. It will not bolster the perception of credibility because institutional self-interest is more likely to be driving that position. Specifically, the Court is unlikely to think that the OSG is sending a more credible signal if it opposes a criminal defendant or immigrant under a Democratic administration or supports federal or executive authority under a Republican one. Signaling models must account for these institutional positions in exploring the impact of policy positions on the OSG’s reception at the Court. Taking institutional interests seriously leads to two expectations that will be tested in this article. First, we expect that counter-ideological signals will be least effective in swaying justices’ votes in areas where the OSG’s institutional interests predominate, specifically in cases involving criminal justice, immigration, federalism, and executive power. Second, we expect members of the Court to view an OSG position as the most credible counter signal when it is not aligned with *either* the OSG’s ideological or institutional interests.

Data and Methods

We test our expectations using all orally argued cases with OSG participation in the Court’s 1979–2018 terms.⁹ For cases in which the OSG represented a party, we present separate analyses for those in which it was the petitioner and those in which it was the respondent for two reasons. First, because the OSG has greater strategic agency as petitioner, we expect a different effect of institutional interests in these cases compared to when it is the respondent. As petitioner, the OSG carefully selects the cases it asks the Court to review. Cases regarding institutional interests have long-term, systemic effects on the government’s ability to get convictions, enforce immigration law, or exercise authority, so we expect the OSG to take special care with these cases. If a case has the potential to harm the OSG’s institutional interests, we expect that it will opt not to petition for certiorari. For this reason, the OSG will only bring the strongest cases in areas of institutional interests to the Court and should be more

likely to win in these cases. In contrast, the OSG is more constrained as respondent (Wedeking 2010). It is often forced to defend cases in areas of its institutional interests even when those cases are not as strong as it might like. This may lead the OSG to lose more often in institutional interest cases as respondent. Second, petitioners are more likely to win cases all else equal (Black and Owens 2013). Presenting separate analyses allows us to evaluate the size of the effects of key variables of interest in these two different contexts, without requiring additional interactions.¹⁰ Although we analyze petitioner, respondent, and amicus cases separately, our primary variables of interest remain consistent.

Our outcome variable, *OSG Vote*, is constructed using the justice-level Supreme Court Database (Spaeth et al. 2021). It is coded as 1 if a particular Supreme Court justice voted in favor of the side the OSG represented or supported and 0 if the justice voted against the OSG's side.¹¹ Due to the binary nature of our dependent variable, we implement a logistic regression.¹²

Our expectations turn on interactions between our independent variables of interest. The first, *Ideological Distance*, is the absolute value of the distance between each justice and the presidential administration the OSG works within. Litigants and amici who are ideologically aligned with the Court are more likely to succeed (Collins Jr. 2004; Johnson et al. 2006). This includes the OSG (Bailey et al. 2005; Black and Owens 2012b; Wohlfarth 2009). When a justice and the OSG are ideologically compatible, justices are more likely to trust the OSG and support its position. As distance increases, trust and support decrease. Following Bailey et al. (2005), we code *Ideological Distance* as the absolute value of the president's ideology minus the justice's ideology, using judicial common space (JCS) scores (Epstein et al. 2007). We expect that as ideological distance increases, the likelihood of a justice voting for the OSG will decrease.

The second key variable is *Counter-Ideological Signal*. This is a dichotomous variable that takes the value of 1 when the OSG is part of a conservative [liberal] administration and takes a liberal [conservative] position in the case, and zero otherwise. To determine whether the OSG is expected to be liberal or conservative, we use the JCS mean for the president. We then code the signal based on the ideological direction of the lower court decision from the Supreme Court database and the position of the OSG in the case. If a liberal [conservative] OSG is the petitioner, or supports the petitioner, and the lower court decision was liberal [conservative], the OSG is sending a counter-ideological signal. If the same liberal [conservative] OSG is the respondent, or supports the respondent, in a case with a liberal [conservative] lower court ruling, the OSG is sending the expected ideological signal. Because this variable is interacted with ideological

distance and institutional interest, as explained below, its coefficient is expected to be negative because it represents those rare instances when there is no ideological distance between the justice and the OSG (and no institutional interest). A counter-ideological signal in such an instance means the OSG is taking a position that is not aligned the justice, and therefore should weaken the chance of obtaining the justice's vote.

The effects of a counter-ideological signal are expected to be most pronounced for justices who are ideologically distant from the OSG. The interaction between *Ideological Distance* and *Counter-Ideological Signal* was the primary variable of interest for Bailey et al. (2005). They found when the OSG sent a counter-ideological signal it nearly offset the effect of ideological distance. We largely follow their approach. We include this interaction as the ideological distance between the OSG and a justice when they make a counter-ideological argument in a case as party or amicus. When a counter-ideological signal is present, this variable is the ideological distance between the OSG and the justice. When there is no counter-ideological signal, this variable is 0.¹³ We refer to this interaction variable as *Counter-Ideological Signal Distance*. We expect its value to be positive, offsetting the usual impact of *Ideological Distance*.

Institutional Interest is our next variable of interest. This is a binary variable that indicates whether a case falls in the substantive areas of criminal law, immigration removal, federalism, or executive power. It takes a value of 1 when the Supreme Court Database *issueArea* variable is equal to 1 (criminal procedure) or 10 (federalism), or the *issue* variable is equal to 130015 (executive authority vis-a-vis Congress or the states) or 20110 (immigration deportation), and 0 otherwise. Our expectation for the effect of this variable is conditional on the role the OSG is playing in the case. Because they will select only the best cases in these issue areas as petitioner, we expect that when the OSG represents the petitioner, this variable will have a positive sign. However, in cases where the OSG is respondent, there is no strategic selection, and in cases where the OSG is an amicus, there is strategic selection in some cases and not others, as explained below. Thus, in the respondent and amicus analyses, we do not expect the OSG to be more likely to win in institutional issue cases.

Note that coding of *Institutional Interest* is not dependent on the position taken by the OSG. Our first hypothesis does not require a counter signal here—it simply suggests that counter-ideological signals will have less impact when they are in an issue area in which the institutional interests of the OSG would be expected to predominate. To test this, we interact the *Institutional Interest* variable with the *Counter-Ideological Signal Distance* variable. We expect that the interaction will be negatively signed because counter-ideological positions

may be expected in cases where the OSG's institutional interests are at stake, lowering the information the justices receive from the counter-ideological signal and reducing its impact on the justice's vote. To account for this second-order interaction, we also include the constituent interaction term between *Ideological Distance* and *Institutional Interests* (Clark and Golder 2023). We do not expect this interaction to be significant on its own.

Our second hypothesis does turn on the OSG's position on institutional issues, leading to our final variable of interest, *Counter-Interests Signal*. We expect that the strongest signal that the OSG can send that it is following the law rather than its own preferences is to act counter to both its ideological and institutional interests. This binary variable is coded as 1 when *Counter-Ideological Signal* is 1 and either: (1) The OSG takes a liberal (pro-defendant or immigrant) position in a criminal procedure or deportation case; or (2) The OSG takes a conservative (anti-federal or executive power) position in a federalism or executive power case. Similar to *Counter-Ideological Signal*, we expect the coefficient on this variable to be negative because it represents instances when there is no ideological distance between the OSG and the justice and the OSG's position is counter to their shared ideological predisposition (as well as institutional interest). We interact this variable with the *Ideological Distance* to determine if this signal improves the OSG's success in persuading ideologically distant justices. Table 1 summarizes all of our key explanatory variables and related expectations.

We also include several control variables. First, we account for the resource advantage the OSG has over most litigants they argue against. *Opponent Status* uses the ten-point scale created by Sheehan et al. (1992) to account for the resources of the party on the other side of the case from the OSG's position. We use only the opposing side's status because when the OSG is a party, its status is constant, and when it supports a party as amicus, it brings its resources to bear on behalf of that party.¹⁴ We expect that higher opponent status will lead to lower likelihood of success for the OSG. We also control for *Net Amici* advantage by subtracting the amicus briefs filed supporting the OSG's opponent from the number of amicus briefs filed for the OSG's side (Black et al. 2020; Collins Jr. 2004). A greater weight of briefs on the OSG's side is expected to increase its likelihood of success. Additionally, when cases are salient, justices possess stronger preferences (Wohlfarth 2009). Conversely, in less salient cases they possess less knowledge and are more open to persuasion, particularly by trusted attorneys like the OSG (McAtee and McGuire 2007). We control for salient cases using the Case Salience Index, created by Collins and Cooper (2012), and updated by Cota et al. (nd) and Scott et al. (2024). Similarly, we suspect that the justices will rely on repeat players like the OSG to provide reliable information in cases involving numerous, difficult legal issues (Maltzman and Paul 1996). Therefore, we control for case complexity using the Goelzhauser et al. (2022) measure of latent complexity, which primarily uses a count of issues and provisions listed in merits briefs. Because the amicus analyses include both cases where the OSG sides with the

Table 1. Summary of Primary Independent Variables of Interest, Measurement, and Expected Direction. P, R, and A in the Right Column Stand for Petitioner, Respondent, and Amici, Respectively.

Independent Variable	Measurement	Expected Direction
Ideological Distance	Absolute value of the ideological distance between the president and each justice	—
Counter-Ideological Signal	1 = OSG is part of a conservative [liberal] administration and takes a liberal [conservative] position in the case 0 = otherwise	—
Counter-Ideological Signal Distance	$Counter-Ideological\ Signal \times Ideological\ Distance$	+
Institutional Interest	1 = case issue area is criminal procedure, federalism, immigration, or executive authority 0 = otherwise	P: + R & A: null
Institutional Interest Signal Distance	$Institutional\ Interest \times Ideological\ Distance$	Null
Institutional Interest \times Counter-Ideological Signal Distance	$Institutional\ Interest \times Counter-Ideological\ Signal \times Ideological\ Distance$	—
Counter-Interests Signal	1 = when <i>Counter-Ideological Signal</i> is 1 and the OSG takes a liberal position in a criminal procedure or immigration case or a conservative position in a federalism or executive power case 0 = otherwise	—
Counter-Interests Signal Distance	$Counter-Interests\ Signal \times Ideological\ Distance$	+

petitioner and those where it sides with the respondent, in those models we also include a variable, *Petitioner's Side*, to reflect the fact that the justices are more likely to side with the petitioner. Finally, in the amicus models we control for cases where the Court called for the views of the Solicitor General (CVSG). When the OSG is not a party to the case and does not choose to voluntarily file an amicus brief, the justices may request (require) it to do so by CVSG (Thompson and Wachtell 2008). Existing work finds that the justices rely on these briefs to overcome informational uncertainty (Black and Owens 2012a). We utilize a dichotomous indicator from Black and Owens (2012b) and updated by Schoenherr and Waterbury (2022), where a case is coded as 1 if the Court issued a CVSG and 0 otherwise. We expect that the justices will be more likely to accept the OSG's position when they have asked for it, so the coefficient on this variable will be positive.¹⁵

Analysis

We begin by checking the facial validity of our assumption that the OSG will be unlikely to take positions that are counter to its institutional interests by looking at the frequency with which it took such positions in our period of study. Table 2 displays the number and percentage of cases in which the OSG took a position counter to its institutional interests, its ideological interests, and both of those at once, by their role in the case and in total. It provides strong support for our assumption that the OSG is highly unlikely to take positions that conflict with its institutional interests. It did so in just 3 percent of the cases in our data. Notably, in no case did the OSG take a counter-interest position in an immigration deportation case. Counter-institutional interest positions happen more frequently when the OSG acts as amicus curiae. This is likely a result of OSG amicus participation in state criminal cases in which taking a pro-defendant position will not directly impact federal government's ability to bring its own successful prosecutions.

In contrast, the OSG took positions in opposition to its presumed ideological predispositions 44 percent of the time. This is consistent with the view that the OSG is not a purely political actor (Pacelle 2003). It was exceedingly rare for the OSG to take a position that is counter to both

its institutional and ideological interests—this occurred in only 1.7 percent of cases. The OSG is least likely to take positions that are counter to its ideological predisposition in cases in which it is the petitioner—it did so only 39 percent of the time as a petitioner compared to 48 percent of the time in all other cases. Similarly, it was least likely to take a position that is counter to both its institutional and ideological interests as petitioner. This is unsurprising given the amount of discretion the office exercises over which cases it asks the Court to review. Overall, this snapshot suggests that institutional interests are a much stronger predictor of the OSG's position than ideology and supports our argument that they should be a central component of any account of the office and its influence.

OSG as Petitioner

We now turn to tests of our specific hypotheses.¹⁶ We begin with cases in which the OSG represents the petitioner. Model 1 in Table 3 tests our first hypothesis that counter-ideological signals will be less effective when they are sent in cases where the OSG also has an institutional interest, and Model 2 tests our second hypothesis that the OSG's signals are the strongest when they are counter to both their ideological and institutional interests. Every variable in both models is significant, and most are in the expected direction. Because of the complexity of the interactions, however, it is difficult to directly interpret the results. To assist in evaluating our hypotheses, Figure 1 illustrates the interaction between *Counter-Ideological Signal Distance* and *Institutional Interest* from Model 1. In this and all subsequent figures, predicted probabilities are estimated with the continuous control variables held at their means and dichotomous variables held at their modes.¹⁷ The top panels of Figure 1 show estimates for cases involving the OSG's institutional interests, while the bottom panels are cases that do not involve these interests. The left panels involve cases in which the OSG sent a counter-ideological signal, and those on the right side display estimates for when there is no counter-ideological signal, and when, as a result, the value of our interaction term, *Counter-Ideological Signal Distance*, is 0. We see in both panels on the right that when this signal is absent, justices with the smallest ideological distance (light color

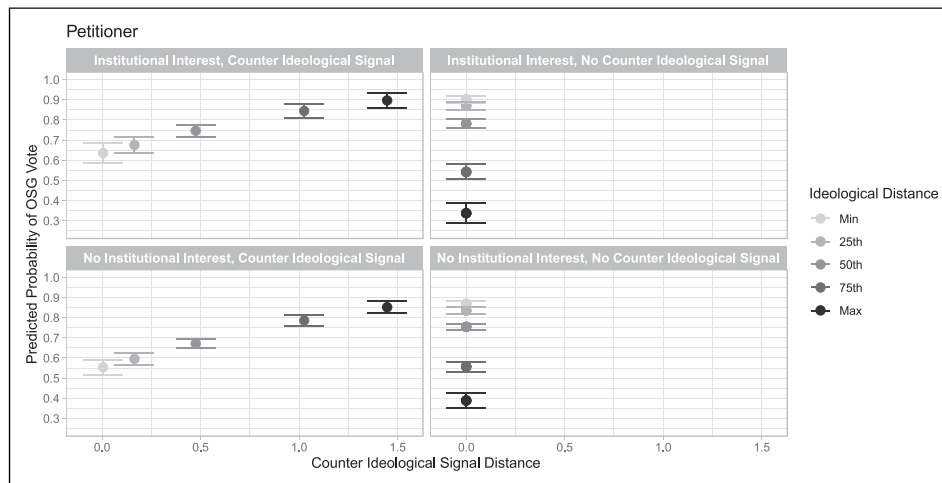
Table 2. Frequency of OSG Arguments That are Counter to Its Institutional Interests, Ideological Alignment, or Both.

OSG Role	Counter-Institutional	Counter-Ideological	Counter-Both	Total Cases
Petitioner	21 (2 percent)	344 (39 percent)	8 (0.9 percent)	884
Respondent	16 (2 percent)	346 (48 percent)	9 (1.2 percent)	721
Amicus	36 (6 percent)	264 (47 percent)	19 (3 percent)	560
All cases with OSG involvement	73 (3 percent)	954 (44 percent)	36 (1.7 percent)	2,165

Table 3. OSG as Petitioner: Logit Regression Results With Robust Standard Errors.

	Dependent Variable	
	OSG Vote	
	(1)	(2)
Ideological Distance	−1.618*** (0.091)	−0.736*** (0.058)
Counter-Ideological Signal	−1.681*** (0.100)	
Counter-Ideological Signal Distance	2.680*** (0.141)	
Institutional Interest	0.341*** (0.108)	
Counter-Ideological Signal Distance × Institutional Interest	0.440** (0.172)	
Ideological Distance × Institutional Interest	−0.389*** (0.138)	
Counter Interests		−1.174** (0.512)
Ideological Distance × Counter Interests		1.392* (0.745)
Opponent Status	0.052*** (0.014)	0.036*** (0.013)
Net Amici	0.043*** (0.008)	0.041*** (0.008)
Latent Complexity	−0.098** (0.043)	−0.074* (0.042)
Case Salience Index	−0.089*** (0.012)	−0.077*** (0.012)
Constant	1.999*** (0.104)	1.475*** (0.083)
Observations	7,173	7,173
Log Likelihood	−3,950.615	−4,219.810
AIC	7,623,230	8,455,620

Note. * $p < 0.1$; ** $p < 0.05$; *** $p < 0.01$.

**Figure 1.** Interaction of *Institutional Interest* and *Counter-Ideological Signal Distance* when OSG is the petitioner. Vertical lines represent 95 percent confidence intervals.

points)—those most ideologically aligned with the president’s administration—are the most likely to support the OSG’s position and those most distant are least likely (dark colored points). The two panels on the left side of Figure 1 show that the presence of a counter-ideological signal largely reverses this effect. The justices with the greatest ideological distance from the OSG and president become just as likely to support the OSG’s position when there is a counter-ideological signal as those with the least distance are when there is not. Support among the most

ideologically aligned justices drops when there is a counter-ideological signal. However, even though the OSG is making an argument that opposes their preferences, these justices are still more than likely to vote for the OSG than the other party to the case; they do so 64 percent of the time in cases with an institutional interest and 56 percent of the time when that interest is absent. Considering that in these circumstances even the justices most ideologically opposed to the president are likely to vote for the OSG 90 percent and 85 percent of the time,

respectively, when the OSG sends a counter-ideological signal their likelihood gaining a majority of the justices' votes, and therefore winning, is incredibly high.

We do not see support for our expectation that institutional interests dampen the effect of counter-ideological signals. Instead, when a case involves institutional interests, we see that the OSG does better with all but the most ideologically distant justices, and even then only in cases without a counter-ideological signal. While this does not support our first hypothesis, it does support our general expectation that when the OSG is the petitioner, it will be more successful in institutional interest cases.

The results for Model 2 in Table 3 provide support for our second hypothesis. Figure 2 illustrates the interaction of *Ideological Distance* and *Counter Interests*. It shows that most cases when a counter-interest signal is not present (solid line), the justices who are most ideologically aligned with the OSG are most likely to vote in their favor—they do so about 80 percent of the time. The likelihood of getting a justice's vote decreases as ideological distance increases—dropping below 60 percent for the most distant justices. The relationship is reversed when the OSG argues against both institutional and ideological interests (dashed line). The confidence intervals largely overlap because there are very few cases in which the OSG makes such arguments as petitioner. The slope of the lines, however, suggests that the counter-interest signal reverses which justices' votes the OSG is most likely to get. When a counter-interests signal is present, ideologically distant justices are more likely to vote for the petitioner, and the opposite is true for the justices most ideologically aligned with the OSG.

However, the most ideologically distant justices' likelihood of voting for the OSG when seeing counter-interest signals does not reach that of the most allied justices when these signals are absent.

In sum, when the OSG is the petitioner and therefore exercises the greatest discretion, we find that a counter-ideological signal is incredibly effective. It significantly increases vote probability from justices who are typically opposed to the president's preferences and still retains most of the votes from justices who are closer to the president's ideology. Our theory that institutional interest would weaken the credibility of the OSG's signal does not seem to be the case when the OSG is the petitioner. Instead, the OSG's careful case selection in these issue areas increases their likelihood of getting almost all justices' votes.

OSG as Respondent

Table 4 presents the results for cases in which the OSG represented the respondent. Model 1 shows that the justices are significantly less deferential to the OSG in cases involving its institutional interests when it is the respondent. This difference supports our argument that the OSG's strategic case selection as petitioner—an option not available to it as respondent—provides its advantage in institutional issue cases. Figure 3 illustrates the effects of the interaction between *Counter-Interest Signal Distance* and *Institutional Interest* in Model 1. Note that all the point estimates are lower here than in the petitioner results. When the OSG is the respondent, the highest probability of receiving a justice's vote is about

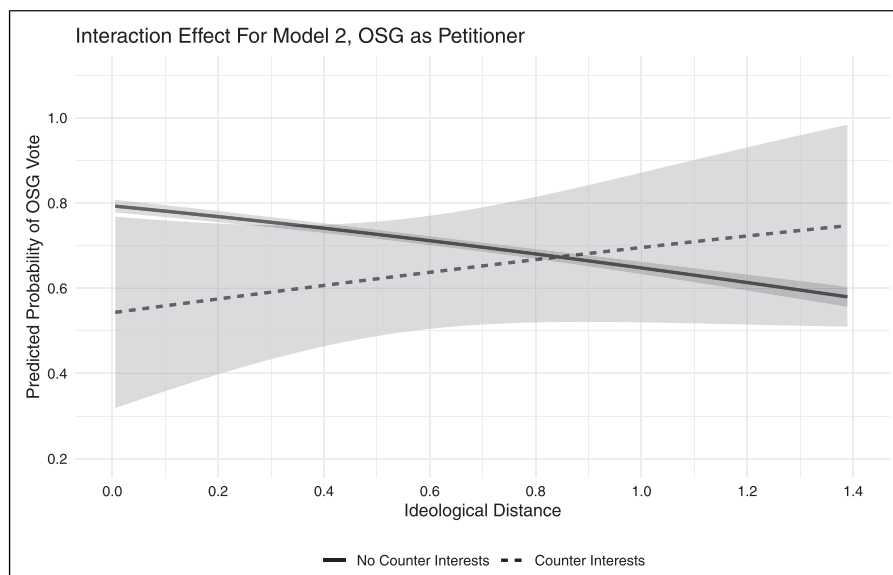
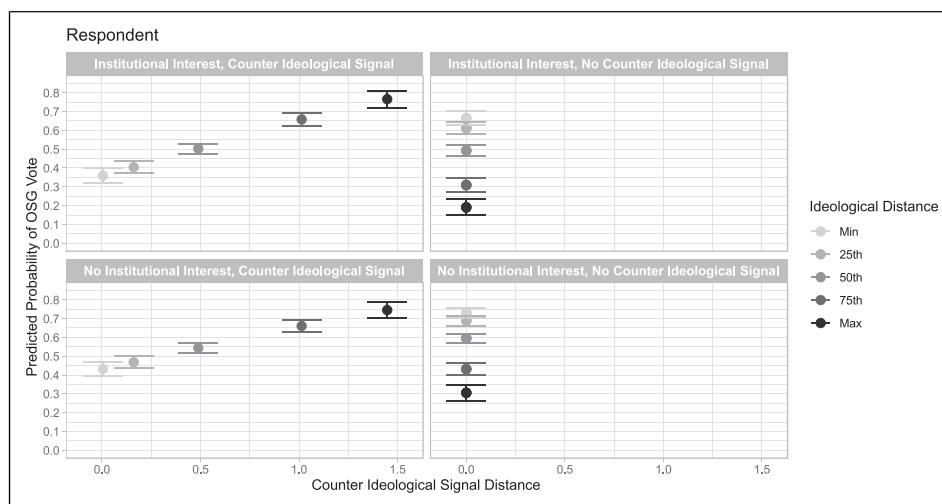


Figure 2. Interaction of *Ideological Distance* and *Counter Interests*. Shaded regions represent 95 percent confidence intervals.

Table 4. OSG as Respondent: Logit Regression Results With Robust Standard Errors.

	Dependent Variable	
	OSG Vote	
	(1)	(2)
Ideological Distance	−1.259*** (0.104)	−0.214*** (0.059)
Counter-Ideological Signal	−1.280*** (0.092)	
Counter-Ideological Signal Distance	2.194*** (0.138)	
Institutional Interest	−0.306*** (0.096)	
Counter-Ideological Signal Distance × Institutional Interest	0.509*** (0.155)	
Ideological Distance × Institutional Interest	−0.220 (0.151)	
Counter Interests		−1.209*** (0.433)
Ideological Distance × Counter Interests		1.961*** (0.620)
Opponent Status	−0.020 (0.013)	−0.006 (0.012)
Net Amici	0.056*** (0.009)	0.055*** (0.008)
Latent Complexity	−0.051 (0.040)	−0.044 (0.038)
Case Salience Index	−0.026** (0.012)	−0.032*** (0.012)
Constant	1.232*** (0.109)	0.461*** (0.078)
Observations	5,967	5,994
Log Likelihood	−3,869.842	−4,092.676
AIC	7,761.685	8,201.352

Note. * $p < 0.1$; ** $p < 0.05$; *** $p < 0.01$.

**Figure 3.** Interaction of ideological distance, counter-ideological signal, and institutional interest when OSG is respondent. Vertical lines represent 95 percent confidence intervals.

80 percent, while in the petitioner analysis, estimates get as high as 90 percent. The lower-end estimates are also lower; the lowest estimates from the petitioner model hovered around 35 percent, whereas when the OSG is the respondent, estimates get as low as 19 percent. This 10–16 percent point downward shift is consistent with both the Supreme Court’s tendency to take cases it seeks to reverse and the OSG’s lack of control over case selection as respondent.

The right side of Figure 3 shows that when there is no counter-ideological signal, the justices who are ideologically similar to the president are the most likely to vote for the OSG’s side. Unlike above, however, when the OSG is the respondent and there is no counter-ideological signal, cases involving institution interests lower the likelihood of the OSG gaining any justices’ votes, regardless of ideological distance. The left panels show that when a counter-ideological signal is present, the institutional

interest has the largest effect on the most ideologically proximate justices, decreasing the likelihood that the OSG will get their votes by about seven percentage points. The most ideologically distant justices are not significantly affected. This suggests that these most distant justices are responding less to a signal of credibility and more to the alignment of their preferences and the OSG's position.

Figure 4 illustrates the interaction of *Ideological Distance* and *Counter Interests* from Model 2. It shows that in most cases in which the OSG represents the respondent, the ideological distance between the office and a justice reduces the probability that the justice will support the OSG's position, though the difference in likelihood is much smaller than when the OSG represents petitioner. The most ideologically aligned justices favor the OSG position 57 percent of the time as respondent, compared to nearly 80 percent of the time as petitioner, while the least aligned justices support it approximately 49 percent of the time as respondent, compared to approximately 57 percent of the time as petitioner (comparing solid lines). When the OSG takes a position counter to both its institutional and ideological interests as respondent, its probability of obtaining most justices' votes improves (comparing solid and dashed lines). A counter-interests signal makes justices at the median ideological distance just as likely to vote for the OSG position as the most ideologically aligned justices and makes the most ideologically distant justices as likely to vote with the OSG as the most aligned justices when the signal is absent. The presence of a counter-interests signal leads justices at the greatest ideological distance from the OSG to vote for its position approximately 80 percent of the time, similar to the rate in the comparable figure for OSG as petitioner. However, justices who are

usually most aligned with the OSG become less likely to vote for its position when a counter-interest signal is present.

The respondent models provide strong support for our theory. We find that counter-ideological signals are the strongest predictor of justices' votes. Yet, for justices usually aligned with the president and OSG, institutional interests significantly weaken the impact of this signal. Further, when the OSG is the respondent, counter-interest signals give the OSG's position enhanced credibility with most justices and increase the likelihood that ideologically distant justices will vote for it.

OSG as Amicus

Previous work on signaling and the OSG have focused on cases where the OSG participates voluntarily as amicus in civil rights and liberties cases (Bailey et al. 2005). In this last empirical section, we expand on this work by examining whether our theory applies to all instances in which the OSG participates as an amicus, both voluntarily and under a CVSG. Table 5 presents the results for these cases. As in the respondent analyses, justices have a lower likelihood of voting for the OSG's position in institutional interest cases. However, here, the interaction between *Institutional Interest* and *Counter-Ideological Signal Distance* is not significant.

Figure 5 illustrates this interaction. In both this and Figure 6, predicted probabilities are calculated for when the OSG is on the side of the petitioner, as this is the majority (60 percent) of cases.¹⁸ The control variable *CVSG* is held at 0, its modal value. We see that when the OSG is an amicus on the side of the petitioner, its success rates are very similar to when it represents the petitioner

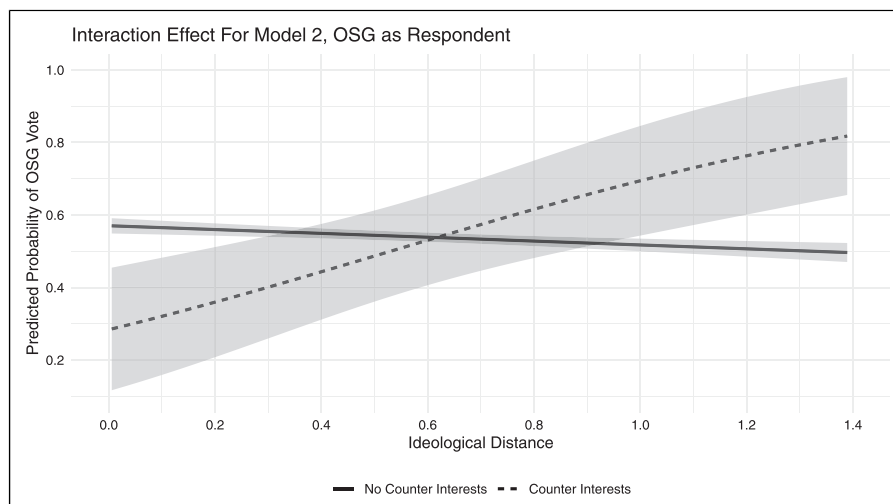
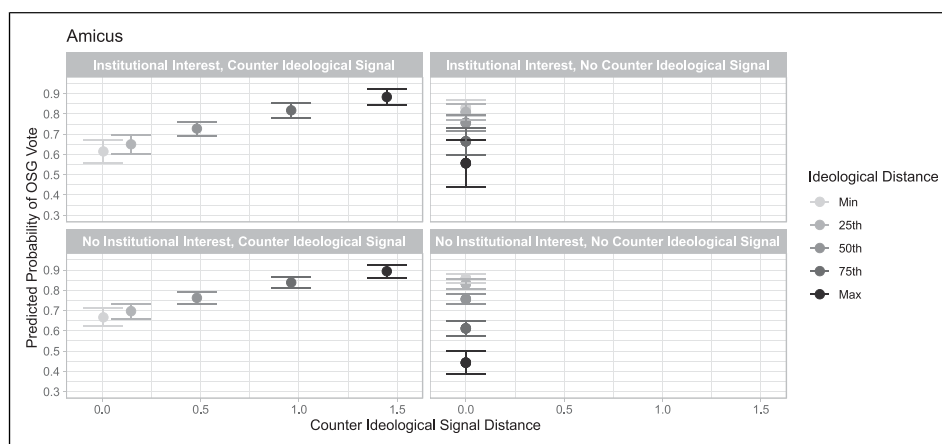


Figure 4. Interaction of *Ideological Distance* and *Counter Interests*. Shaded regions represent 95 percent confidence intervals.

Table 5. OSG as Amicus: Logit Regression Results With Robust Standard Errors.

	Dependent Variable	
	OSG Vote	
	(1)	(2)
Ideological Distance	−1.410*** (0.119)	−0.305*** (0.080)
Counter-Ideological Signal	−1.124*** (0.120)	
Counter-Ideological Signal Distance	2.407*** (0.182)	
Institutional Interest	−0.226* (0.129)	
Counter-Ideological Signal Distance × Institutional Interest	−0.388 (0.238)	
Ideological Distance × Institutional Interest	0.473** (0.221)	
Counter Interests		−1.065*** (0.315)
Ideological Distance × Counter Interests		1.793*** (0.485)
Petitioner	0.800*** (0.070)	0.745*** (0.068)
CVSG	0.232*** (0.074)	0.205*** (0.071)
Opponent Status	−0.014 (0.016)	−0.011 (0.015)
Net Amici	0.017*** (0.006)	0.015** (0.006)
Latent Complexity	−0.347*** (0.051)	−0.334*** (0.049)
Case Salience Index	−0.053*** (0.016)	−0.058*** (0.015)
Constant	1.448*** (0.134)	0.896*** (0.109)
Observations	4,441	4,441
Log Likelihood	−2,534.274	−2,640.214
AIC	5,094.549	5,300.429

Note. $p < 0.1$; ** $p < 0.05$; *** $p < 0.01$.

**Figure 5.** Interaction of *Institutional Interest* and *Counter Ideological Signal Distance* when the OSG sides with the petitioner as amicus. Vertical lines represent 95 percent confidence intervals.

as a party. When there is no counter-ideological signal, we once again see that the most ideologically aligned justices are the most likely to vote for the OSG's position. However, unlike cases where it represents the

petitioner as a party, when the OSG supports the petitioner as an amicus, institutional interests slightly decrease its likelihood of getting ideologically aligned justices' votes.

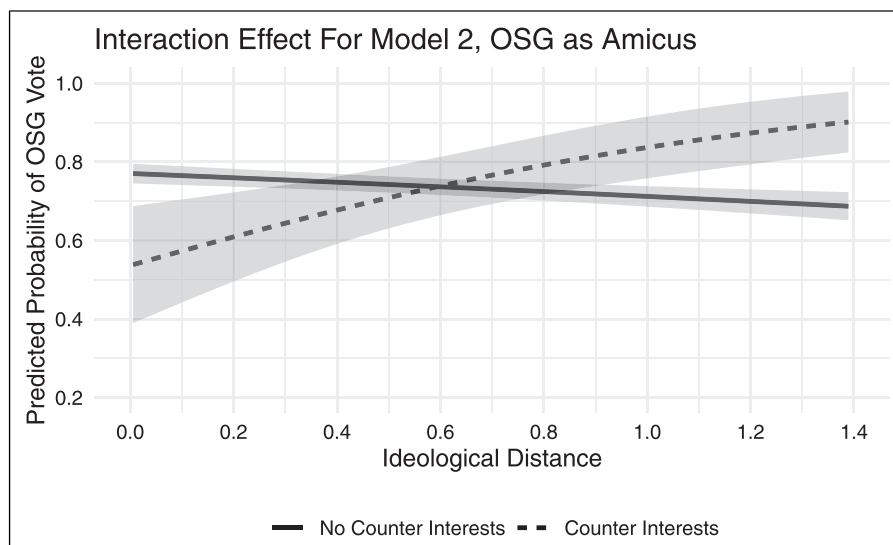


Figure 6. Interaction of *Ideological Distance* and *Counter Interests* when the OSG sides with the petitioner as amicus. Shaded regions represent 95 percent confidence intervals.

As in the previous analyses, when a counter-ideological signal is present, the justices most likely side with OSG are reversed. However, when a party is lucky enough to have the OSG file an amicus brief on their side that sends a counter-ideological signal, the likelihood of getting any justice's vote exceeds 60 percent. That is, any amicus brief in the counter-ideological direction sends a credible enough signal that even those justices who are ideologically opposed to the position are more likely than not to vote for the OSG. As in the respondent model, institutional interests decrease the impact of a counter-ideological signal for all but the justices with the greatest ideological distance from the OSG, consistent with our first hypothesis.

Figure 6 illustrates the interaction of *Ideological Distance* and *Counter Interests* from Model 2. For justices at the median to maximum ideological distance, the effects are similar to the equivalent figure from the respondent analysis, though the overall likelihood that the OSG's side gets the justice's vote is higher. Consistent with our expectations, when the OSG acts as an amicus against their ideological and institutional interests, those typically opposed to the OSG's views are significantly more likely to vote for the OSG's position. As in the respondent analysis, the most ideologically aligned justices become significantly less likely to support the OSG in these rare cases than the mostly ideologically distant justices are in cases without this signal. This suggests that if the goal is persuasion, sending a counter-interests signal is a risky strategy that is most likely to work if the

majority of justices are ideologically opposed to the OSG.

Discussion and Conclusion

On March 15, 2024, Justice Elena Kagan delivered the majority opinion in *Pulsifer v. United States*, ruling in favor of the US government. The OSG succeeded in convincing six members of the bench that “and” actually does mean “or” in the First Step Act, contrary to the President's policy position. Five conservative justices joined Justice Kagan's opinion. That is, the liberal OSG sent a counter-ideological signal to defend its institutional interest and was able to gain the votes of a critical number of conservative justices. Justice Kagan voted against her own ideological predisposition, perhaps because, as a former SG herself, she is particularly sensitive to the OSG's institutional interests. The other two Democratic appointees, however, voted against the OSG's position, consistent with their presumed preferences.

This is one example of the OSG sending a counter-ideological signal in an area of institutional interest, which is quite common. We examine these occurrences systematically across the various ways that the OSG can participate in Supreme Court litigation and find that OSG's institutional and ideological interests interact in complex ways to shape the justices' votes. Cases in areas of the OSG's institutional interests consistently increase the likelihood that a justice will vote for their position when the OSG represents the petitioner, as it did in

Pulsifer. This is likely due more to the control the OSG exercises as petitioner over *which* institutional interests cases to ask the Court to review, rather than any signal these cases send to the justices. It reflects the OSG's skill in strategically selecting cases that will best advance its institutional interests. In contrast, in cases where the OSG represents the respondent or acts as amicus, cases involving its institutional interests are less likely to be successful. We argue this is because the justices view its positions in these cases as expected, and therefore less credible.

We find that for the justices who are most ideologically distant from the OSG, ideology, rather than signaling, is the most important predictor of their votes. When the OSG takes a position counter to these justices' ideological predispositions, the most distant justices are least likely to support that position, and when it takes the counter position, they become most likely to support them. This is true regardless of whether the case involves an institutional interest and whether the OSG takes a position counter to that interest.

Conversely, if counter-ideological signals explain any justices' behavior, it is those justices who are most ideologically proximate to the OSG. These justices are less likely to vote with the OSG when the OSG's position is counter to their shared ideological predisposition, but they are still more likely to vote for the OSG position than the most distant justices are when the signal is absent. However, for cases in which the OSG is respondent or amicus, the effect of the counter-ideological signal on these ideologically proximate justices is dampened by institutional interests. This is consistent with our theory that an otherwise credible counter-ideological signal is less persuasive when it is not truly unexpected because it is in the OSG's institutional interests. Even in institutional interest cases, these justices vote for the OSG's position more often than their ideological preference can explain. This could be a response to the credibility of the counter-ideological signal, but there is another possibility: these could be cases in which the law more clearly favors one position over the other. In other words, an exogenous factor—the body of existing law—may be shaping both the OSG's position and the justices' votes in these cases.

In the rare cases where the OSG takes a position that is counter to *both* its presumed ideological and institutional interests, the votes of justices who are moderately to most ideologically distant from the OSG appear to be positively affected, especially in cases in which the OSG is respondent or amicus. Sending a counter-interests signal is a risky strategy, however, because the justices who are most ideologically aligned with the OSG are negatively affected by these signals.

Unlike the cases where there is only a counter-ideological signal, these usually aligned justices appear most skeptical of the OSG's position when it follows neither type of presumed interest.

Scholars have long recognized that the SG must balance competing interests, including institutional interests and policy preferences. Previous studies of the OSG have side-stepped the complexity of the interaction of these factors by focusing on a subset of cases (Bailey et al. 2005; Pacelle 2003; Wohlfarth 2009), or by using a matching design that accounts for ideology but not case type (Black and Owens 2012b). However, the OSG participates in the overwhelming majority of the Court's cases (Covert and Wang 2021), so it is important to more fully understand how the OSG exerts its influence and balances its interests. We advance this understanding by situating signaling models within the broader context of the OSG's work. Our findings suggest that the OSG is far more consistent in following its institutional interests than its ideological ones, and that when it comes to persuasion, factors like the OSG's role in the case, its institutional interests, the law, and the justices' own preferences matter at least as much—likely more—than any signal the OSG may be thought to send.

Although we have offered a more comprehensive approach to understanding OSG success, there are still avenues needing further exploration. Given the complexity of our models, we were unable to account for individual attorney factors known to be important for success, such as prior Supreme Court experience as an advocate or clerk, (Black and Owens 2021; Johnson et al. 2006; McGuire 1995; Nelson and Epstein 2022).¹⁹ Future work could examine variation in attorney skill within the OSG and how it relates to case assignments and success. Additionally, future work should consider how polarization interacts with the dynamics explored here. Considering how other factors, including institutional interests, impact the perceived politicization of the OSG will help us better understand whether or how the SG can maintain trust in the “Tenth Justice.”

Author's Note

Prepared for the 2024 Southern Political Science Association Annual Meeting, New Orleans, LA, and the 2024 American Political Science Association Annual Meeting, Philadelphia, PA. We thank Christine Bird and Justin Wedeking for their comments and feedback, and Ryan Black, Greg Goelzhauser, Ben Kassow, Ryan Owens, Doug Rice, Jessica Schoenherr, and Nicholas Waterbury for generously sharing their data. Data for replication is available on Dataverse, at <https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/RNMIJ0>.

Declaration of Conflicting Interests

The authors declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The authors received no financial support for the research, authorship, and/or publication of this article.

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Supplemental Material

Supplemental material for this article is available online.

Notes

1. See 18 U.S.C. 3553(f) (1), which explains the safety valve may apply unless the defendant has “(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines; (B) a prior 3-point offense, as determined under the sentencing guidelines; and (C) a prior 2-point violent offense, as determined under the sentencing guidelines....”
2. Docket # 22–340, 2024.
3. Under the government’s position, defendants could be disqualified if any of the provisions applied, whereas under the petitioner’s reading all three would have to apply for the defendant to be disqualified from safety valve relief.
4. Notably, though, the OSG did urge the Court to grant certiorari. See, Brief for the United States, https://www.supremecourt.gov/DocketPDF/22/22-340/252232/2023011313350378422-340_Pulsifer.pdf.
5. See, for example, ABA Rules of Professional Conduct, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/.
6. See, Decision Direction, Supreme Court Database Codebook, https://scdb.wustl.edu/documentation.php?var=decision_direction.
7. Docket # 13–628.
8. See, for example, *Coventry Health Care of Missouri, Inc. v. Nevils* (2017) and *National Pork Producers Council v. Ross* (2023).
9. Our data end at the 2018 term to maintain consistency across cases. The October 2019 Term of the Court was plagued by COVID-19, resulting in multiple institutional changes (Houston et al. 2023).
10. We present a pooled party analysis in the [supplemental appendix, Table A4](#).

11. Because we are interested in whether the OSG’s position was successful, cases in which the OSG submitted an amicus brief supporting neither side are excluded from the analysis.
12. We also tested our expectations using linear probability models, and these results are presented in the [supplemental appendix, in Tables A1, A2, and A3](#). While generally consistent with the logistic regression results, the OLS models resulted in some predicted probabilities of greater than 1, indicating that an MLE approach is a better fit for the data.
13. Though we construct this variable in the same way as Bailey et al.’s (2005) *Outlier Signal* variable, our modeling approach differs somewhat. They hard-coded this interaction as a single variable in their model and failed to include the constituent dummy variable, *Counter-Ideological Signal*, as we do here for completeness (Clark and Golder 2023).
14. A robustness check for our amicus analysis includes both party’s statuses. See [Table A6 in the supplemental appendix](#).
15. In the [supplemental appendix](#), we include separate models for CVSG cases and voluntary cases. See [Table A5](#).
16. To ensure our models are not inflated due to collinearity, we conducted Variable Inflation Factor tests which are reported in [Table A7 in the supplemental appendix](#). We find no issues with collinearity for either our party or amicus models.
17. For the petitioner and respondent analyses, all controls are continuous. The only binary controls, Petitioner and CVSG, appear in the amicus models.
18. [Figures A1 and A2](#) in the supplemental appendix illustrate the interactions when the OSG is on the respondent’s side.
19. We do examine whether there is a difference in success when the SG presents the argument personally. See [Table A8 in the supplemental appendix](#). We find no evidence of greater success for the SG.

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