

**01-2 Linda R. Cohen and Matthew L. Spitzer, “The Government Litigant Advantage: Implications for the Law” (forthcoming FLORIDA STATE UNIVERSITY LAW REVIEW).**

This paper argues that the Solicitor General’s strategic control of the federal government’s litigation can increase the federal government’s winning percentage, and alter the development of the law in the government’s favor. First, this paper shows that the federal government has strategic incentives to appeal only cases in which it has a very high chance of victory, and accept all other losses. By accepting a loss in any given circuit, the federal government preserves its option of following the government’s preferred policies in all other circuits, and conforming its behavior only in the circuit where the court of appeal ruled against the government. By appealing the loss to the Supreme Court, the federal government runs the risk of losing and then being forced to follow unwanted (from the government’s point of view) policies everywhere and possibly for a wider range of issues and agencies than was required by the court of appeals. As a consequence, only those cases that are almost sure victories for the federal government will be appealed to the Supreme Court. An extended empirical analysis of Supreme Court cases demonstrates the effect of strategic appeals by the Solicitor General and distinguishes the effect from other theories of why the Solicitor General tends to be unusually successful before the Supreme Court. The authors argue that this may alter the development of case law in favor of the government.