Explaining Executive Success in the U.S. Supreme Court

KEVIN T. McGUIRE, University of North Carolina at Chapel Hill

The solicitor general is widely believed to occupy a special status among the parties appearing in the U.S. Supreme Court. A broad array of theoretical advantages are thought to contribute to the federal government's influence, but scholars have no direct evidence of their impact. More importantly, virtually all existing research has failed to measure directly the influence of those advantages across other parties, as well. Estimating a series of probit models of executive success in the Court under both Democratic and Republican administrations, I test the impact of one such advantage, litigation experience, measured for all parties across all cases. The results suggest that, notwithstanding the conventional wisdom, there is nothing distinctive about the solicitor general's influence. Thus, existing explanations regarding the solicitor general's institutional prestige appear to overstate the importance of the executive's role in the Court.

After more than thirty years of research, scholars of the U.S. Supreme Court have yet to demonstrate why the solicitor general of the United States is such a successful litigant. To be sure, the federal government seemingly enjoys enormous advantages, holding a position of singular prestige, but the reasons that account for its victories remain undocumented. The most commonly offered explanation of this success is that, as the voice of the United States, the solicitor general is the prototypical repeat player and, as such, reaps a much magnified share of the litigation leverage accompanying that position; by contrast, such benefits can only be found in lesser degrees among other litigants (Galanter 1974). Ironically, scholars have no empirical foundation for the assertion that the solicitor general brings a distinctive and influential reputation to the high court. In fact, the claim that the executive branch

NOTE: I appreciate the comments and criticisms of Lawrence Baum, Gregory A. Caldeira, Lynn Mather, Steven Puro, George Rabinowitz, and Charles E. Smith, Jr.

Political Research Quarterly, Vol. 51, No. 2 (June 1998): pp. 505–526

carries special weight before the justices is based upon little more than explanatory models that account only for the participation of the federal government—its mere presence or absence—rather than any of the special qualities it is purported to possess. Moreover, whether those qualities are unique to the solicitor general or whether they are shared across litigants is largely an unanswered question, as well. Does the federal government genuinely have a special relationship with the Supreme Court, as the literature suggests? This question can only be addressed by measuring—directly and across all parties—some advantage, or set of advantages, that would likely benefit those who appear in cases before the Court. Such direct indicators of litigation advantage can then be utilized to test their general impact, their influence on judicial decision making across all cases. Furthermore, to the extent that they are beneficial, whether those attributes are especially meaningful for the solicitor general can also be subjected to systematic scrutiny.

What kinds of advantages might lend themselves to such testing? A prominent consideration is litigation experience (Galanter 1974; Songer and Sheehan 1992; Wheeler et al. 1987). Among the bar at large, litigation expertise plays a modest but significant role in shaping the direction of the Court's outcomes (McGuire 1995). Employing a direct measure of experience for all lawyers who appear before the Court, I show that, once such experience is taken into account, the "special status" of the solicitor general disappears, a condition that holds under both Democratic and Republican administrations. I conclude that, at least insofar as decisions on the merits are concerned, the federal government is not, as some have suggested, the "tenth justice" (Caplan 1987). Instead, the solicitor general is merely one of many successful lawyers who appear before the Court. The results suggest that, once direct measures of litigation advantage are introduced for all parties, there is no evidence for the literature's frequent assertion that the solicitor general's success is derived from an uncommon reputation as the Supreme Court's leading practitioner.

The Solicitor General and Litigation Expertise

Among judicial scholars, few assumptions are more widely held than the belief that the solicitor general is the principal external actor in the politics of the Supreme Court, a litigant unmatched in status, experience, and influence. As the primary overseer of federal litigation, the solicitor general is virtually the sole representative of the United States in the Supreme Court. What is more, a considerable portion of the Court's annual docket is devoted to cases in which the executive has a direct interest. Within the literature on the judicial process, the federal government is hardly an understudied participant, and, not surprisingly, this research is replete with testament to the solicitor

general's considerable impact on the justices' decision making (see, e.g., Brigman 1966; Caldeira and Wright 1988; Perry 1991; Provine 1980; Puro 1981; Salokar 1992; Scigliano 1971; Segal 1988; Segal and Reedy 1988; Tanenhaus et al. 1963). The most sensible interpretation of these tendencies is that the victories of the solicitor general's office can be traced to its distinctive standing as the Supreme Court's most frequent litigator: the government—perhaps more so than any other—is a party "which has had and anticipates repeated litigation, which has low stakes in the outcome of any one case, and which has the resources to pursue its long-run interests" (Galanter 1974: 98). Viewed as the quintessential repeat player, there are very strong prior expectations favoring the executive.

Consistent with this perspective, scholars therefore have variously concluded that: "[t]he professionalism and expertise of the solicitor general clearly contribute to the success of the executive" (Salokar 1992: 175); "[t]he Solicitor General's office . . . can provide the Supreme Court with expertise in many fields of the law and can often aid the Court in resolving problems concerning the importance of a case" (Puro 1981: 221); the solicitor general has "the talent, the resources, and the experience" (Tanenhaus et al. 1963: 115) and "prestige with the Court" (O'Connor 1983: 257). Such conclusions capture the conventional wisdom that the executive branch has a singular relationship with the Supreme Court.

Unfortunately, this conventional wisdom is so ingrained that it is tempting to take for granted that political scientists have established an independent and accurate gauge of why the solicitor general does so well. In truth, the literature provides little empirical guidance on the question of why the federal government prevails as often as it does (Segal 1991). There is no direct evidence that the justices reward the solicitor general's careful selection of cases (Scigliano 1971). Nor is there research supporting the view that the Court values the neutrality and political independence of that office (Caplan 1987; Note 1987). Moreover, no firm empirical footing exists for the argument that the government's expertise and superior work product explain its success (Cooper 1990; Perry 1991). Instead, quantitative assessments underwriting these conclusions, though sophisticated, continue to model these forces as a single measure, the presence or absence of the solicitor general (see, e.g., George and Epstein 1992; Segal and Reedy 1988). This variable generally proves to be a stunningly powerful predictor of the Supreme Court's decision making, and thus the inference is commonly made that the theory regarding the role of the executive is correct: The federal government *should* win because of these various advantages; the federal government, in fact, *does* win; the solicitor general, therefore, must indeed be a uniquely situated litigant who enjoys a special relationship with the justices.

The great difficulty with such analysis is that its theoretical foundation rests on a circular argument: The basis for the prediction that the solicitor general will win—that the federal government will succeed because of its unique status in the eyes of the justices—is based largely upon the knowledge that the solicitor general prevails more often than any other litigant. Stated differently, scholars know that the executive wins quite often and consequently introduce just such a prediction into their equations. Not too surprisingly, these results document a strong connection between the solicitor general and case outcomes in the Supreme Court. From such results, one can conclude that the federal government fares well, even when other factors are held constant, but one still cannot claim that the solicitor general benefits from any of its supposed advantages. All that one can say is that the solicitor general predicts case outcomes (Segal 1991: 378-79). Naturally, this does not mean that there are no sound reasons for postulating a variety of benefits that augur in the executive's direction; it does mean, however, that in the absence of specific measures of those benefits one cannot be confident that the solicitor general carries the unparalleled impact that existing models commonly assume.

An equally telling weakness in such models is their failure to take into consideration the extent to which those qualities attributed to the solicitor general might be found among other parties who advance their goals in the Supreme Court. In other words, not only do quantitative accounts of the Court fail to model directly the solicitor general's supposed advantages, such research hardly registers, even in a crude fashion, the advantages that other litigants probably possess in varying degrees. Political scientists, for the most part, have avoided measuring any of the competing advantages that might exist among litigants more generally. As a result, most empirical examinations of the Supreme Court model the solicitor general, not as one of several repeat players, but rather as the only repeat player. A noteworthy exception that reflects an effort to overcome such problems relies upon a measure of party status, which ranks competing litigants from highest (i.e., the federal government) to lowest (i.e., individuals) based upon the kinds of resources and expertise they are thought likely to possess (Sheehan, Mishler, and Songer 1992). Even this variable, despite its virtues, does not measure directly the relative degrees of resources that different parties are presumed to enjoy.

Ideally, one would have firsthand indicators of these advantages for all parties. Unfortunately, "specific information about the wealth of particular parties or the relative litigation experience of those parties is often not available in court opinions" (Songer and Sheehan 1992: 238). Hence, the difficulties in bringing to bear data on litigation resources in the Supreme Court are considerable. Notwithstanding the problems of data collection, it bears emphasizing that, unless these characteristics can be measured and permitted to

vary across all parties, models that account only for the institutional participation of the executive branch may well overstate the impact of the solicitor general. Indeed, such analyses permit no firm conclusions about the role of the federal government in the Court. What kinds of measures might serve to alleviate this problem?

Chief among the advantages that litigants might possess is litigation experience. After all, what differentiates repeat players from one-shotters is that the latter have only sporadic contact with the courts, while the former are distinguished by frequent interactions with judicial policymakers (Galanter 1974). Accordingly, experience in Supreme Court litigation would be a leading candidate for helping to clarify the nature of the executive's impact. Of course, the likely effect of this resource should not be oversold; for their part, the justices are apt to follow their policy preferences, resolving cases in ways that most closely track their collective attitudes (Segal and Spaeth 1993). Whatever their preferences, however, the members of the Court must still rely upon lawyers to provide them with reliable intelligence regarding the legal issues raised in a case as well as their likely political consequences. These informational needs are extensive. In the selection of cases, for example, the justices face uncertainty in locating genuinely meritorious cases from among the thousands of petitions brought annually to the Court; they depend, therefore, to a great extent upon organized interests to help identify cases of legal and political import (Caldeira and Wright 1988). Likewise, at the merits, the Court also requires a faithful rendering of the issues posed by a case as well as attention to the potential policy implications of a decision (Harlan [1955] 1985; Shapiro 1984; Stern et al. 1993). Consequently, like many government decisionmakers, the justices should give greater weight to the information supplied by those who have shown themselves capable of reducing these informational burdens.[1]

Why litigation experience contributes to reducing those burdens is fairly obvious. Most lawyers handling cases in the Supreme Court do so only rarely, and for such actors, unlikely to be before the Court again, the consequences of exaggeration for the sake of victory are less severe; lawyers making a single appearance before the Court can, with relative impunity, misinform the justices by embellishing or trivializing different aspects of their argument. For lawyers who appear with frequency before the justices, by contrast, there are substantial incentives to provide consistently the kind of insight, analysis,

[1] Schlozman and Tierney (1986) make much the same argument regarding the impact of congressional lobbyists. Members of Congress, whose informational needs are also quite considerable, reward with access those policy advocates who consistently provide reliable intelligence in the course of the legislative process.

and argumentation to which the justices are most likely to be responsive; their future successes are dependent upon preserving their reputations (Perry 1991; Shapiro 1984; see also Baird, Gertner, and Picker 1994; Spence 1974). With scarce resources and considerable constraints on their time, the justices will value credible advocacy. Lawyers who are best able to convey accurately the values in conflict while still advancing their clients' interests should significantly, albeit marginally, affect the outcomes of cases. In short, experienced actors who reduce the justices' information costs should be those in whom the Court is more likely to invest. Empirically, there is support for the view that credible litigators have a hand in directing the course of the high court; parties with more experienced advocates, for example, fare much better than their less experienced counterparts (McGuire 1995), a relationship that also holds up within more specific areas of the Court's docket (Wahlbeck 1997). Similarly, in seeking accurate indicators of certworthiness from among its scores of petitions for review, the Court is more likely to select for formal consideration those cases brought by experienced practitioners who must routinely seek the justices' goodwill (McGuire and Caldeira 1993).

Clearly, the solicitor general is one such litigator, and the general view is that the executive's reliability for faithful advocacy is exceptional. A good deal of scholarly evidence documents its singular success rate. Still, as I have noted, winning records do not necessarily imply that solicitors general possess, as some have concluded, a special capacity to persuade the justices (see, e.g., McConnell 1988; Note 1969; Salokar 1992).[2] In fact, if the justices' policy preferences are the dominant force shaping their decisions—and there is every reason to believe that they are—then it is tenuous to argue that, irrespective of who serves as solicitor general or what policy positions are advanced under the imprimatur of that office, a single litigant possesses an enduring and unqualified capacity to persuade the members of the Court (Segal 1991). Why, then, is the solicitor general so successful?

According to conventional wisdom, it is because the solicitor general "speaks with special authority" (Tanenhaus et al. 1963: 115); that is, "[a] special relation-

[2] Perhaps one reason why scholars have come to argue that the solicitor general occupies a special place among practitioners has been the tendency to make interval-level assumptions based upon ordinal-level data. That is, because the solicitor general consistently tops the ranking of litigants most successful in the Court (i.e., an ordinal ranking), many have interpreted this to mean that the executive branch holds a station that is elevated well beyond any of its contemporaries (i.e., an interval ranking). Success is, after all, a relative matter: that the solicitor general wins more often than anyone else means only that the federal government does better than its peers; that the executive enjoys a special relationship with the Court is merely a matter of interpretation.

ship exists between the Solicitor General and the justices" (Segal and Spaeth 1993: 206) and, as a result, the office plays "an extraordinary role" (George and Epstein 1992: 325). Such conclusions are warranted, however, only if the influence of the executive remains strong after one controls for the litigation strength of all parties before the Court. If the conventional wisdom is correct—if the solicitor general's relationship with the justices is truly nonpareil—then the impact of the federal government should be distinctive, even when broadly held attributes, such as litigation experience, are taken into account.

If, on the other hand, the influence of the executive vanishes in the face of general litigation experience, then, far from being a privileged litigant in a class by itself, the solicitor general is merely one of many litigants who, by virtue of their expertise, advance credible arguments before the justices and thereby increase their chances of securing decisions favorable to their interests. Adopting this perspective, I argue that the winning record of the solicitor general reflects no unusual reputation or skill; instead it is simply an artifact of superior litigation experience, a more general advantage shared among the lawyers who advocate their interests in the Court.

To support this argument, my empirical case is grounded in the assertion that the frequency with which a lawyer appears before the Supreme Court can be taken as an imperfect indicator of that lawyer's litigation expertise. Obviously, this is a potentially problematic supposition, given that mere participation does not by itself ensure that any genuine command of the requisites of effective appellate advocacy are derived and endure. At the same time, participation before the Court—however crude—is nonetheless a direct measure of a lawyer's familiarity with the process, expectations, and informal norms of litigating before the nation's highest tribunal.

So, insofar as direct participation in advocacy before the justices translates into some degree of expertise, lawyers who bring a greater wealth of litigation experience to the Court, like all repeat players, seem certain to benefit. Thus, if the solicitor general, more often than not, has the edge in terms of litigation expertise, it is a plausible hypothesis that the federal government would prevail simply as a function of its comparative advantage over practitioners whose track records before the Court are less extensive. To win, according to this view, solicitors general do not need some absolute degree of expertise; instead, they need only have more than their opposition. Once such expertise is taken into account, is there, in fact, any evidence that the executive occupies a place of special distinction before the Supreme Court?

Analysis

To assess the impact of the solicitor general before the justices, I employ data on all orally argued cases in the Supreme Court over six consecutive

terms, 1977 to 1982 (N = 989).[3] Since it is the Court's common practice to accept for review those cases it intends to reverse (Armstrong and Johnson 1982; Baum 1977; Provine 1980), I construct a series of explanatory probit models in which the dependent variable is the identity of the winning party, the petitioner (coded as 1), or the respondent (coded as 0) (see Aldrich and Nelson 1984). To gauge the effects of lawyer expertise, I exploit additional data, previously gathered, on the amount of litigation experience of all lawyers—within the solicitor general's office and otherwise—who appeared at oral argument on behalf of direct parties during this time period.[4] These data, assembled through a careful mining of the *U.S. Reports* and various editions of *Briefs and Records of the United States Supreme Court* and *Martindale-Hubbell National Lawyer Directory*, represent the number of times any given lawyer was involved as counsel for either the petitioner or the respondent for decisions on the merits. Collected originally for the purposes of investigating a number of questions related to the participation and consequences of lawyer experience in the Court, these data represent the necessary direct indicator of litigation expertise for all lawyers—an attribute previously unmeasured by researchers—and cover most of the work of two solicitors general, Wade McCree and Rex Lee.[5] Quite significantly, the data also have the added virtue of incorporating both a Democratic and a Republican administration at a time in which the ideological direction of the Court's decisions was virtually unchanged; in other words, the preferences of the Court are more or less held constant,

[3] Using the *United States Supreme Court Judicial Database*, I selected cases on the basis of docket number. For the terms I sampled, this yielded an initial N of 997 cases. Eight of those cases, however, contained no docket number (i.e., the cases were consolidated, not with another case or cases under the same citation in the *U.S. Reports* but rather with another case or cases under the same docket number), these were excluded.

[4] The reason for focusing upon the lawyer who appears at oral argument is that it is the one common denominator for every litigant that is reliably recorded in the Court's official reports; if other lawyers contributed meaningfully to the preparation of a case, their names might be on the merits brief (and thus in the *U.S. Reports*), but they also might not. Similarly, many lawyers participate on the merits as counsel for amici curiae, but, unless they actually appear at oral argument on behalf of a friend of the court, their names are not recognized in the reports either. Since litigation expertise is measured here at the level of the individual lawyer, one must establish a standard basis upon which it can be calculated across cases. To be sure, fixing upon the qualities of the lawyer who carries the banner into the Supreme Court is not to deny that there may be other soldiers in the ranks. Still, it is certainly a reasonable method, one that, importantly, facilitates ready and reliable contrasts between parties.

[5] This includes all of the terms in which McCree served in office, as well as half of Rex Lee's tenure as solicitor general (see Caplan 1987: x).

approach on a more limited sample reveals that prior experience is no better an estimator; if anything, the indicator I employ is more conservative.[9] Furthermore, since I am only concerned with which lawyer in a case has more experience, employing a running tally of previous cases is, in all likelihood, unnecessary. If, for example, a member of the solicitor general's office served as counsel in twenty-four cases during the 1977-1982 time frame (i.e., four cases per term), knowing that he had appeared in fifty cases prior to 1977 would be redundant, since in either instance he would almost surely have more experience than the lawyer he opposes. What is more, with so much prior experience, it seems implausible that each additional case would meaningfully increase his expertise.

Accordingly, using the average number of cases per term, my measure simply takes account of which party has the more experienced lawyer, the petitioner (coded as 1), the respondent (coded as -1), or neither party (coded as 0). This variable should be positively related to the decision to reverse or affirm the lower court; when litigation experience favors the petitioner, it should increase its likelihood of success, while that probability should be reduced when the respondent has greater experience.

Overall lawyer experience—measured at the level of the individual lawyer—may shed light upon the influence of the legal community as a whole,

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single attorney or the appearance of different lawyers with the same name. In order to establish whether the "James Smith" in one case is the same "James Smith" from another case, one must first turn to the microfiche version of the merits briefs to identify the lawyer's address and affiliation in each case. If they differ, one must then consult the mammoth (and, until quite recently, unindexed) *Martindale-Hubbell* annual legal directory to compare their biographical information. This exercise is further frustrated by lawyers moving from job to job and from city to city. Consequently, over a period of years, the "James Smith" in Chicago may turn out to be the same "James Smith" in New York as well as the same "James Smith" in Washington. In addition, because of the apparent lack of protocol for reporting names in the *U.S. Reports*, it is difficult to determine whether "James Smith" is the same lawyer as "James W. Smith," "J. Wallace Smith," "James Wallace Smith," "James Smith III," and so on. To collect data on the complete litigation histories of lawyers, even for a limited six-year sample, would impose prohibitive costs indeed. Moreover, as I note above, it would yield little additional information.

[9] Analyzing cases from 1982 alone, for example, allows testing for the impact of experience from the preceding five terms. This exercise demonstrates that litigation expertise derived from prior cases is only a slightly better predictor of case outcomes than the measure I employ, increasing the probability of the petitioner's success by .17. By comparison, the estimated effect of my measure of experience improves the odds of reversal by .11 above the baseline expectation. So, as an empirical matter, it appears to be unnecessary to gauge a lawyer's total experience before the Court. If there is a drawback, it is that my method appears to understate the impact of that experience.

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but it is not apt to reveal anything about the independent, institutional impact of the federal government. Leaving aside how much experience members of the solicitor general's staff might have before the Court, their presence in a case alone represents a distinctive consideration, the participation of the executive branch. Hence, the involvement of the federal government must be incorporated into the explanatory models. If, beyond the relative expertise of lawyers in the aggregate, the solicitor general possesses advantages that others do not, then any of the remaining qualities about which there exists scholarly speculation—for example, the solicitor general's informal links to the Court, its prestige, its reputation for nonpartisanship, or the Court's deference to its institutional peer—would be represented by a variable that registered the government's direct participation. This variable is coded as 1 for those cases in which a lawyer from the solicitor general's office argued on behalf of the petitioner, -1 if on behalf of the respondent, and 0 otherwise.[10] Like the measure of experience, this variable should be positively related to the Court's disposition of a case.

With these two measures, the influence of the federal government specifically, relative to lawyer expertise more generally, can be readily distinguished. In Table 1, equation 1 models the direct influence of the solicitor general. By taking account of only the institutional participation of the solicitor general's office, this model mimics prior research. Like that research, it suggests a strong link between the involvement of the executive branch and the Supreme Court's disposition of its plenary docket. The interpretation is straightforward enough; as a petitioner, the solicitor general notably improves the probability of a reversal, while as a respondent, the government decreases those odds.

What happens to the predictive power of the solicitor general, though, once overall litigation experience is introduced into the equation? It turns out that the apparent independent influence of the executive branch is illusory. In model 2, experience emerges as a highly significant predictor of litigation success, and the role of the federal government, formerly so strong in model 1, is not simply diminished; rather, it disappears completely. These estimated coefficients provide substantial support for the view that, across the board, the justices place a value upon the reliability of the information that they

[10] Controlling for litigation experience is not the same as controlling for the participation of the solicitor general for one very obvious reason: rather than being restricted solely to the solicitor general's caseload, the data involve the Supreme Court's entire plenary docket. The majority of cases—68 percent in fact—are ones in which the solicitor general is not involved. The correlation between a lawyer's litigation experience and the involvement of the solicitor general is .66; a variable that explains 44 percent of the variance of another measure can hardly be regarded as an identical indicator.

TABLE 1
MODELS OF LITIGATION SUCCESS IN THE U.S. SUPREME COURT, 1977-82

Variable	All cases	All cases	Non-Solicitor General cases only
	(1)	(2)	(3)
Intercept	.34***	.34***	.32***
	(.04)	(.04)	(.05)
Solicitor general	.31 ***	.10	—
	(.07)	(.10)	
Litigation experience	—	.23***	.25***
		(.07)	(.07)
Pseudo R^2	.03	.05	.03
-2 x Log Likelihood	18.10	29.25	13.04

Note: N = 989 (633 petitioner wins, 356 respondent wins) for all models, except N = 668 (417 petitioner wins, 251 respondent wins) for model 3; dependent variable equals 1 where the petitioner won, 0 otherwise; table entries are maximum likelihood coefficients; numbers in parentheses are standard errors.
* $p < .05$, ** $p < .01$, *** $p < .001$.

receive. By way of illustration, the justices followed their prevailing path of reversing lower court decisions, deciding in favor of the petitioner approximately two-thirds of the time; so, assuming that the petitioner's baseline likelihood of success is .66, the impact of overall lawyer experience is easily expressed in probabilistic terms. When the petitioner had the advantage of a more experienced advocate, for instance, its chances of success increased to .75. Similarly, even though the odds still favor a reversal, that probability decreases to .57 when a more experienced lawyer argued for affirmance. So all manner of lawyers—both in and out of the solicitor general's office—stand a better chance of persuading the justices when they have the edge in expertise. Still, the government's advocacy bears no special influence beyond that general advantage. To the contrary, the model furnishes no evidence that the solicitor general profits from any of the special privileges to which the literature lays claim; whatever benefits might be captured by the presence of the solicitor general, those benefits clearly do not linger in the face of litigation expertise.

Since the federal government appears in so many cases on the merits—and given that it usually has the advantage in litigation expertise when it does appear—it would be fair to question whether the measure of expertise really reflects, to a large extent, the participation of the solicitor general. If that were so, then the estimate for experience would lapse when the cases involving the executive were removed from the equation. In model 3, I provide precisely that test. Here the results show that the coefficient for litigation expertise remains stable and strong, even for those cases in which the solicitor general

was uninvolved. Clearly, litigation expertise provides its own strong link to success in the Court, a force that works independently of the United States' status as a party.

Despite a weak showing by the solicitor general, it is still quite possible that the measure employed to test its effects masks important differences that may exist across different administrations. Certainly, the federal government consistently wins more often than it loses, but the Court does not necessarily respond uniformly to all of those who occupy the solicitor general's office, particularly if they advocate competing substantive agendas before the Court (see O'Connor 1983; Salokar 1992). During the time period in this analysis, the Burger Court's membership was virtually unchanged; consequently its policies, on balance, remained consistently more conservative than liberal, edging above the 50 percent liberal mark in only one year. By contrast, control of the solicitor general's office passed from Carter appointee Wade H. McCree to Rex E. Lee, his immediate counterpart from the Reagan administration, and there is little doubt that these two advocates pressed substantially disparate positions before the justices (Caplan 1987). To the extent that the justices and the executive share ideologically compatible views, the Supreme Court is liable to be more solicitous to the federal government (see Dahl 1957; Segal 1990). Separate estimates distinguishing between these two solicitors general, therefore, should show that, while both are strongly related to the Court's decision making, the magnitude of the Republican administration's effect is greater than that of the Democratic executive. Again, the coding of the solicitor general's involvement remains as before. In this instance, though, the analysis is cognizant of the executive's partisanship.

The results of equation 4 presented in Table 2 appear to lend credence to the argument that the government's successes are driven, to some degree, by shared policy preferences. The coefficient for President Reagan's solicitor general is almost 50 percent larger than the estimate for President Carter's, suggesting that a conservative Supreme Court evinced greater support for the positions taken by a conservative executive branch. In probabilistic terms, however, this difference is not terribly dramatic: as the petitioner, for example, the Democratic solicitor general increased the probability of a reversal to .77 from the baseline expectation, while in the same position the Republican pointman raised that likelihood to .81, only slightly higher.

Any interest in comparing these differential effects, though, is made inconsequential by incorporating litigation experience into the model. In equation 5, expertise maintains its strong link to case outcomes, and both estimates for the solicitor general are rendered insignificant. If there were any traces of important effects for the United States above and beyond the expertise it shares with the rest of the Court's legal community, they would surely be reflected in

TABLE 2
MODELS OF EXECUTIVE SUCCESS IN THE U.S. SUPREME COURT, 1977-82
BY PARTISANSHIP OF THE ADMINISTRATION

Variable	(4)	(5)
Intercept	.34***	.34***
	(.04)	(.04)
Solicitor general, Democratic administration	.27***	.05
	(.09)	(.11)
Solicitor general, Republican administration	.39***	.18
	(.13)	(.14)
Litigation experience	—	.23***
		(.07)
Pseudo R^2	.03	.05
-2 x Log Likelihood	18.67	29.90

Note: See Table 1.

these estimates; yet no such effects appear, a tendency that holds for both the Democratic and Republican administrations included here.

Even if the direct advocacy of neither solicitor general matters, a remaining possibility is that the justices appreciate the executive's discretion in minimizing the volume of potential government appeals to the Court. That is, another conventional assumption is that the executive wins, in part, because the solicitor general is so selective about the cases it chooses to appeal to the Court. The United States, the argument goes, faced with scores of possible candidates, seeks review in only a scant few of the most meritorious cases, and the justices reward this selectivity at the merits; stated differently, the solicitor general knows how to pick winning cases (Scigliano 1971). If that were so, then the solicitor general would be more successful as the petitioner—since those are cases the government appeals to the Court—than as the respondent. In Table 3, this scenario is modeled in equation 6. In this instance, one variable measures whether the solicitor general was the petitioner in a case (coded as 1; otherwise 0); a companion variable indicates whether the government appeared as the respondent (coded as 1; otherwise 0). Their coefficients should run positively and negatively, respectively; more importantly, the absolute magnitude of the former should be noticeably greater than the latter.

Excluding litigation expertise from the equation, such a distinction suggests confirmation of this hypothesis. Appearing on either side of a case, the solicitor general is significantly more likely to win, but in those cases where the government successfully sought certiorari, there is a noteworthy advantage. When seeking a reversal on the merits, the solicitor general can raise the probability from the baseline of .66 to .81, a considerable increase. In at-

TABLE 3
MODELS OF EXECUTIVE SUCCESS IN THE U.S. SUPREME COURT, 1977-82 BY THE GOVERNMENT'S STATUS AS A PARTY

Variable	(6)	(7)
Intercept	.32***	.32***
	(.05)	(.05)
Solicitor general as petitioner	.38***	.16
	(.11)	(.13)
Solicitor general as respondent	-.22*	-.02
	(.12)	(.14)
Litigation experience	—	.23***
		(.07)
Pseudo R^2	.03	.05
-2 x Log Likelihood	18.87	29.90

Note: See Table 1.

tempting to preserve lower court victories, the government is not nearly as strong, reducing from .66 to .57 the estimated likelihood of reversal in the Court. At first glance, it is tempting to accept this as evidence of the importance of the solicitor general's selectivity. Clearly, though, these results are misleading: when litigation expertise is introduced in equation 7, the coefficients for the United States—on either side—are statistically indistinguishable from zero while the impact of lawyer experience is quite strong and unchanged from its prior estimates. Further exploration of these data reveals that these results persist when one reestimates these models, controlling for the identity of the solicitor general.

Skeptics of these results could well argue that I have not fully challenged the conventional wisdom, given that I have failed to test directly for the solicitor general's distinctive status. Such condition, of course, is easily modeled. Evidence that the voice of the United States carries above and beyond that of other experienced advocates would be found in an interaction term between the estimates for general lawyer experience and the participation of the solicitor general.[11] A positive and significant coefficient for this variable would help

[11] The lawyers in the solicitor general's office do not, as one might assume, always have more experience than their colleagues who oppose them. In fact, there is a good deal of variation in the experience of the individuals who staff the office. In more than 10 percent of the government's cases, for example, the solicitor general was represented by a lawyer who averaged less than one oral argument per year. With the aid of his or her assistants, the solicitor general parses out the responsibilities of preparing petitions, writing briefs on the merits, arguing cases, and so on (see, e.g., Stern 1960; Wilkins

provide the grounds necessary to verify that a special relationship exists between the government and the Court. Is such a conclusion justified? Equation 8, presented in Table 4, provides a clear answer.

The expertise of the executive has no unique effects. Note that, despite the general influence of credible advocacy, none of it is specific to the solicitor general. The multiplicative term—which is an estimate of the executive's dominant strength in litigation—has no statistically significant impact whatsoever. Simply stated, there is no empirical foundation for the assertion that any of the commonly held beliefs about the unique advantages of the solicitor general—the prestige of the office, its independence of mind, its careful control of the flow of litigation, its ability to select cases it is likely to win, and so on—exercise any effect on the Court; moreover, expertise appears not to be a mere proxy for such factors. It is true that solicitors general enjoy the rewards of having experience in Supreme Court advocacy, but those rewards are no greater than they are for any other party with veteran representation. Thus, the United States' achievements, at least at the merits stage, are not so much tied to its inordinate amount of experience but rather to its comparative advantage over its opposition. To put it another way, the executive branch does not win because it has unique expertise; instead, it succeeds because it usually has more than anyone else.[12]

Finally, it is well worth noting that these results are based upon a time frame in which the Supreme Court was ideologically disposed to favor litigants of higher status, such as the solicitor general. As a rule, of course, courts favor the "haves" over the "have nots" (Galanter 1974; Songer and Sheehan

1988: 1170), and when this is coupled with the regular turnover within the office—the average annual rate of attrition is just over 20 percent (Caplan 1987: 319)—some staff members inevitably accumulate more experience before the justices than others. At the same time, many of the cases in which the United States is a party attract considerable national attention, and not surprisingly veteran Supreme Court practitioners—lawyers who themselves have numerous cases to their credit—often are recruited to join forces against the government's position. Consequently, there are cases in which the federal government does not have the advantage of expertise, roughly 4 percent of the solicitor general's total caseload. While this may seem modest in an absolute sense, in relative terms it is noteworthy that the executive can ever be bested in terms of its expertise.

[12] Of course, one weakness native to this enterprise is that it seeks only to explain wins and losses, as opposed to tracing the development of the law. There are probably ways in which, over time, the solicitor general can have a broad hand in the evolution of doctrine, without necessarily prevailing on the merits. My model ruthlessly assumes that the solicitor general's only goal is to win. Furthermore, testing why the solicitor general prevails on the merits still leaves open the question of why the federal government is so effective in persuading the justices to grant certiorari. Obviously, this an important question, but one that is simply beyond the scope of this investigation.

TABLE 4
MODELS OF EXECUTIVE SUCCESS IN THE U.S. SUPREME COURT, 1977-82
TESTING FOR THE GOVERNMENT'S "SPECIAL RELATIONSHIP"

Variable	(8)	(9)
Intercept	.31***	.29***
	(.05)	(.05)
Party status	—	.023**
		(.010)
Solicitor general	.09	.03
	(.10)	(.10)
Litigation experience	.23 ***	.20 **
	(.07)	(.07)
Solicitor general X Litigation experience	.11	.12
	(.09)	(.09)
Pseudo R^2	.05	.06
-2 x Log Likelihood	30.76	35.64

Note: See Table 1

1992; Wheeler et al. 1987), but this was especially true for the years I examine (Sheehan, Mishler, and Songer 1992). In other words, even in an era in which the justices were most likely to defer to the federal government, its participation made no appreciable difference in the Court's decision making once litigation expertise was taken into account. Statistically, this can be illustrated by including, in equation 9, a general barometer of the status of direct parties. This indicator, derived from a comparison of the theoretical advantages different litigants are thought to possess, has been used successfully in other analyses (see, e.g., Sheehan, Mishler, and Songer 1992). Operationally, the petitioner and the respondent are assigned a value along an ordinal scale according to their individual standing, and the variable itself is the difference between these two values.[13] Its logic is obvious; larger positive values should raise the probability of the petitioner prevailing, while negative scores should favor the respondent. The conclusion one is led to from this estimate of relative party status is scarcely a wonder: as expected, upperdogs did better than underdogs. Apart from that fact, the influence of litigation experience remains unaffected. With this metric taken into account, the results mark a telling contrast between the independent impact of credible advocacy and the absence of its particular effects for the solicitor general.

[13] Specifically, both litigants are categorized along the following ordinal scale, 1 for poor individuals, 2 for minorities, 3 for individuals, 4 for unions, 5 for small businesses, 6 for businesses, 7 for corporations, 8 for local governments, 9 for state governments, and 10 for the federal government.

Because these various equations control for the institutional presence of the Office of the Solicitor General, as well as the impact of the lawyers both in and out of that office, the model helps to disentangle the effects of the solicitor general's institutional reputation from the influence stemming from the differing levels of expertise among the larger legal community of which its members are a part. Again, the results reinforce the view that the solicitor general qua solicitor general has no unique role in the Supreme Court; if the justices accorded any special respect to the executive—that is, if the Court favored the positions of the federal government simply because they were the federal government's—then the coefficients measuring the participation of the solicitor general's office would be significantly related to the Court's decision making. Once litigation expertise is held constant, no such effects reveal themselves.

Conclusion

Previous research on the solicitor general is replete with speculation on the sources of the executive branch's influence before the Supreme Court. The government's expertise, selectivity, prestige, resources, and political neutrality, to name but a few, have been offered as the basis for the United States' winning record. Yet these are, in some sense, dubious assessments, given what is known about the justices' decision making; it seems unlikely that a court, whose members are driven dominantly by ideology, would mete out its rewards on the basis of such a complex series of considerations. One constant in all litigation, however, is the justices' need for reliable information—data and clarity about the nature of the legal principles in conflict that will enable them to maximize their policy designs in the most informed manner. Those better able to serve that end stand to earn dividends. To be sure, this is a capacity possessed by solicitors general, but they are scarcely the only members of the legal community in whom the Court might invest its trust. Based on these results, I conclude that the solicitor general's advantage—indeed, its only advantage and a rather weak one, at that—is its command of litigation expertise. The difference between the solicitor general and other repeat players, it turns out, is evidently one of degree, not of kind.

On this point, one final quantitative buttress can be laid in place, through an analysis of the influence of those strengths of the solicitor general that are not a function of expertise. Empirically, this measure is derived by regressing the federal government's participation on the variable for lawyer experience. The residuals from this equation represent a measure of the solicitor general's capabilities, completely purged of litigation expertise. The impact of this modified measure of the solicitor general on case outcomes is virtually zero (r = .03), hardly a solid foundation from which to build a claim that the executive possesses myriad other advantages.

Why then is the literature replete with testament to the special role of the executive in the Supreme Court? Seemingly, it is a consequence of the manner in which the United States' influence has been modeled. Lacking more precise measures, the federal government's advantages typically have been registered solely by dummy variables, indicating whether or not the United States was a party. Moreover, the competing qualities of those litigants who oppose the United States, as well as one another, are included rarely, if at all. As a result, these quantitative surveys, in effect, take crude account of the expertise of the federal government; more importantly, not only do they ignore the level of litigation experience of those who square off against the executive, they fail to assess the expertise of the parties in cases where the federal government is not involved. What appears in most models as the unique influence of the solicitor general is actually masking a more widespread phenomenon.

There are several consequences of the analysis reported here. It is noteworthy, for instance, that these results, as well as the theory supporting them, are quite in keeping with the precepts of the attitudinal model. After all, assuming that the justices act on the basis of their policy predilections, it is considerably more plausible to allow that lawyers of all stripes may, to some degree, temper the ideological ambitions of the justices than it is to maintain that the Court routinely extends special consideration to an anomalous litigant. Clear though these findings may be in their assessment of the solicitor general, they do merit some circumspection, given that they are restricted to the Burger Court. Extending this analysis to both earlier and later time periods would provide a more solid foundation for judging the executive's capacity as a judicial actor. At the very least, scholars should be cautious in attributing influence to the solicitor general, thinking more carefully about the kinds of qualities the federal government brings to litigation as well as the extent to which those qualities might be distributed among the Court's legal community more generally. In addition and relatedly, this statistical analysis has broader implications for our understanding of the relationship between the executive and judicial branches. Insofar as the solicitor general's fortunes are tied to little else beyond having the edge in litigation expertise, it suggests that the Supreme Court moves along a quite single-minded and independent path, showing little deference to its popularly elected peer.

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Received: June 9, 1997
Accepted: December 16, 1997

Explaining Executive Success in the U. S. Supreme Court

Kevin T. McGuire

Political Research Quarterly, Volume 51, Issue 2 (Jun., 1998), 505-526.

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