SOLICITOR SUCCESS: THE CONTINUING EXPLORATION OF THE
DETERMINANTS OF GOVERNMENTAL SUCCESS
AT THE SUPREME COURT, 1986-2005

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Studies of the Supreme Court consistently show that the Office of the Solicitor General enjoys remarkable success before the Supreme Court, both at the *certiorari* stage and at the merits stage. These studies offer a variety of explanations for Solicitor General success, but fail to portray accurately the Office of the Solicitor General and to account for variations in governmental success. This paper seeks to continue the exploration of governmental success. By looking at the Office of the Solicitor General as a series of individuals with distinct characteristics rather than as a single entity, and by accounting for various situational dynamics, I attempt to explain the variations in executive success.
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# TABLE OF CONTENTS

**LIST OF TABLES** ...........................................................................................................v

**Chapter**

I. **INTRODUCTION TO THE STUDY OF THE SOLICITOR GENERAL**

.................................................................................................................................1

A. The Paradox of Governmental Success................................................. 1

B. Background on the Office of the Solicitor General................. 3

C. Thesis Structure......................................................................................... 3

II. **REVIEW OF THE LITERATURE**............................................................... 6

A. Introducing the Literature................................................................. 6

B. Careful Case Selection...................................................................... 8

C. Deference.............................................................................................. 10

D. Congruence......................................................................................... 12

E. Experience and Expertise................................................................. 15

III. **THEORY AND HYPOTHESES**.............................................................. 20

A. A Different Theoretical Approach.................................................. 20

B. Personal Characteristics................................................................. 21

C. Situational Dynamics...................................................................... 25
IV. DATA COLLECTION AND MEASUREMENT ................. 28
   A. Data Collection .................................................. 28
   B. Operationalization ............................................ 29
V. METHODOLOGY AND ANALYSIS .............................. 35
   A. Some Descriptive Statistics ................................. 35
   B. Methodology ...................................................... 36
   C. Statistical Analysis ............................................ 37
   D. Substantive Analysis ......................................... 42
VI. DISCUSSIONS AND FUTURE RESEARCH ..................... 51
   A. Discussions ...................................................... 51
   B. Future Research ............................................... 53
REFERENCES .................................................................. 58
# LIST OF TABLES

<table>
<thead>
<tr>
<th>Table</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Congruence Coding</td>
<td>33</td>
</tr>
<tr>
<td>2.</td>
<td>Average Attorney Experience</td>
<td>34</td>
</tr>
<tr>
<td>3.</td>
<td>Win Percentages</td>
<td>35</td>
</tr>
<tr>
<td>4.</td>
<td>Experience Percentages</td>
<td>35</td>
</tr>
<tr>
<td>5.</td>
<td>Experience/Win percentages</td>
<td>36</td>
</tr>
<tr>
<td>6.</td>
<td>Base Model Results</td>
<td>37</td>
</tr>
<tr>
<td>7.</td>
<td>Alternate Experience Model</td>
<td>38</td>
</tr>
<tr>
<td>8.</td>
<td>Alternate Congruence Coding</td>
<td>40</td>
</tr>
<tr>
<td>9.</td>
<td>Alternate Congruence Model</td>
<td>41</td>
</tr>
<tr>
<td>10.</td>
<td>Combined Congruence Model</td>
<td>42</td>
</tr>
<tr>
<td>11.</td>
<td>Predicted Probabilities for Personal S.G. Argument</td>
<td>43</td>
</tr>
<tr>
<td>12.</td>
<td>Predicted Probabilities for Government Role</td>
<td>47</td>
</tr>
<tr>
<td>13.</td>
<td>Petitioner Success rate between Government and Non-Government Attorneys</td>
<td>47</td>
</tr>
<tr>
<td>14.</td>
<td>Alternate S.G. Coding Model</td>
<td>49</td>
</tr>
</tbody>
</table>
CHAPTER I

INTRODUCTION TO THE STUDY OF THE SOLICITOR GENERAL

A. The Paradox of Governmental Success

The Supreme Court is traditionally considered by the public to be the fairest branch of government, thought to adjudicate cases objectively in the interest of justice and equity. Given this expectation, the Supreme Court’s preferential treatment of the Office of the Solicitor General seems discordant. In addition to being the most recurrent participant in cases arising before the Supreme Court, the federal government, represented by the Office of the Solicitor General, also enjoys a significantly greater success rate compared to other litigants (Puro 1981; Salokar 1992; Tanenhaus, Schick, Muraskin, and Rosen 1963; Caldeira and Wright 1988; Provine 1980; Johnson 2002; Segal 1988; Segal and Reedy 1988; Spriggs and Wahlbeck 1997). Even Segal and Spaeth, in their crusade-like attempt to explain judicial decision-making entirely on the basis of policy preferences, note that the federal government’s presence in a case overwhelmingly relates to the case’s chances of success at both the certiorari and merits stages (Segal and Spaeth 2002).

Why does this paradox arise? Judicial and legal scholars have proposed a number of potential explanations, most of which will be explored in the subsequent chapter of
this paper. Many of these theoretical avenues seem intuitive, but few have been rigorously and scientifically tested. One exception lies with the role of experience. McGuire (1998) argues that experience, as measured by the number of cases an attorney has argued before the Supreme Court, is the sole meaningful determinant of legal success before the High Court. While his theory is compelling and his empirical results support the idea that experience is an influential variable, his assertion that it is the only influential variable seems overreaching. In this paper, I seek to expand on previous research regarding the Office of the Solicitor General and the determinants of success, specifically experience.

I suggest looking at the office in a more nuanced manner. Specifically, instead of taking the office as a single monolithic party, I propose to examine the individuals within the office. Looking at the office in this way allows for the possibility of exploring the variations in background and experience among the individual attorneys inside the office. Specifically, I believe that there is something inherent about the Office of the Solicitor General, and possibly the Solicitor General himself, aside from experience, that leads to the Office’s repeated victory. By viewing the Office as a collection of individuals with varying professional experiences, I intend to demonstrate that experience is not the only factor significant in explaining governmental success before the Supreme Court on the merits.

Before beginning an exploration of the mechanics by which the government wins cases, it is important first to provide some general background information about the
Office of the Solicitor General and how it connects the executive and judicial branches of government.

B. Background on the Office of the Solicitor General

Originally authorized and created in the Statutory Authorization Act of June 22, 1870, the Office of the Solicitor General is the office in the Department of Justice tasked with supervising and conducting all litigation on behalf of the federal government at the United States Supreme Court. The Office of the Solicitor General determines the government’s positions on various cases, the cases in which to submit amicus briefs, and which cases decided adversely by lower courts would be petitioned to the Supreme Court for appellate review.¹

Because the Office of the Solicitor General plays such a prominent role at the Supreme Court, being the most frequent in attendance, and because it is an extension of the executive branch, it has the unusual distinction of essentially serving two masters, and is often referred to as the “tenth justice” (Scigliano 1971, Caplan 1987, Salokar 1992). This puts the office in a unique position of importance, and as such, it is necessary to take this more individualized look into the Office of the Solicitor General in order to further examine the reasons for its success.

C. Thesis Structure

In the following chapters of this paper, I will delve into the literature to explore the competing theoretical arguments for governmental success. After outlining these opposing ideas in chapter II, in chapter III I will elaborate on my own theory, introduce

¹ Information on the Office of the Solicitor General can be found at www.usdoj.gov/osg/
the hypotheses I will be testing, and the explanatory variables I will use. In chapter IV, I will describe how I will operationalize my variables and collect data on them. In chapter V, I will present the results of the analyses and their interpretations. Finally, I will close by offering some concluding comments and suggesting avenues of future research.
CHAPTER II

REVIEW OF THE LITERATURE

A. Introducing the Literature

Some scholars use the presence of the federal government via the Office of the Solicitor General as a control variable when exploring other ideas. Studies of agenda setting on the Supreme Court and Supreme Court decision-making, for example, have often used the presence of the Solicitor General as a control (McGuire 1993, Caldeira and Wright 1988, Lindquist and Klein 2001). Having said this, the preferential treatment of the Office of the Solicitor General before the Supreme Court appears more harmonious than originally thought.

As literature on the courts indicates, justices are not always fair and impartial adjudicators of law; instead, they make decisions, at least in part, based on their ideological policy preferences (Pritchett 1948, Segal and Spaeth 2002). Evidence also supports the notion that legal and strategic considerations influence judicial decision-making (Epstein and Knight 1998; Maltzman, Spriggs, and Wahlbeck 2000). Because we know that a variety of factors can affect judicial decision-making, it is not entirely surprising that the participation of the Office of the Solicitor General at the high court might also influence the Court.

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Wright 1988, Lindquist and Klein 2001). Having said this, the preferential treatment of the Office of the Solicitor General before the Supreme Court appears more harmonious than originally thought.

Distlear (2003), paraphrasing Baum (1997), provides three reasons why we might expect this influence and success. First, the ever increasing quantity of litigants requesting review strains the time available to the justices such that they will often rely on shortcuts by reading briefs of credible and experienced attorneys, such as the solicitor general. This builds a level of trust between the Supreme Court and the solicitor general. Second, while justices do base their decision partially on their preferred policy outcomes, they may not have established an opinion or position on every possible issue that might potentially reach the Court; in those cases where the justices lack a definite position, they might be more receptive to the arguments made by the representatives of the Office of the Solicitor General. Finally, the Supreme Court lacks the ability to enforce its rulings and needs the cooperation of the executive branch to do so. It is consequently reasonable to imagine the position of the executive branch, through its appointed representative and advocate, might carry weight.

Given that it is logical to expect that the Office of the Solicitor General affects judicial outcomes, we can now turn to examine further the range of possible reasons for its success. The hypotheses posited to explain the success of the Office of the Solicitor

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2 Here, influence and success are used interchangeably, but some of the literature attempts to separate the two, to show that the success accorded the Office of the Solicitor General is attributable to influence rather than coincidence or simple congruence. For now, success and influence are seen as similar enough to be used together for identifying the uncanny nature of the outcomes involving the Office of the Solicitor General.

3 Solicitor General and the Office of the Solicitor General might also be used interchangeable for now, but the distinction between the two will be suggested later as well.
General can fit into four general categories: (1) careful case selection by the Office of the Solicitor General; (2) the Court’s deference to the Office of the Solicitor General specifically or the executive branch generally; (3) ideological congruence between the court and the executive branch; and (4) expertise of the solicitor general and the attorneys working in the office (Distlear 2003, Baum 1998, Wrightsman 1999). Some of these arguments refer to success at the certiorari stage while others apply to the merits stage. While the focus of this paper remains on the success of the Office of the Solicitor General at the merits stage, it is important to understand the basic arguments for success as it might apply at all stages.

B. Careful Case Selection

One line of research postulates that the Solicitor General’s success at the certiorari stems from the ability of the Office of the Solicitor General to select cases that help ensure such success. For example, Ulmer notes that the federal government will frequently litigate an issue in different appellate courts until a conflict among the resulting rulings develops (Ulmer 1985). Because the presence of such a conflict between lower courts increases the likelihood of the Supreme Court taking a case, this strategy helps the government ensure that a case makes the journey upwards and gains review before the high court (Ulmer 1984). While this applies less specifically to the Solicitor General and more to the federal government in general, he goes further and says that government attorneys are better able to identify, weed out, and decline to seek review on weak cases (Ulmer 1985).
Additionally, the Supreme Court maintains obscure standards for review that most nongovernmental attorneys fail to decipher. The lawyers working for the Office of the Solicitor General however, are more adept at identifying these weakly articulated guidelines and thus formulate their arguments and briefs to conform. While this line of argument refers primarily to the decision at the certiorari stage, the importance of case selection can also applied to the merits stage.

Herbert Jacob adds such an argument. He argues that because of the large volume of litigation available, those in the Office of the Solicitor General can choose to delay the appeal of an issue to the Supreme Court until the right case or the right moment arrives (Jacob 1981). This in some ways relates to the repeat-player line of explanations discussed later. Because the solicitor general is a party to so many cases, and has such a large selection to choose from, it is easier to select cases much more carefully than most one-shot attorneys can. This also means that the solicitor general will specifically avoid certain types of cases that might turn out in favor of the government’s opposition. By picking cases in such a way, the Office of the Solicitor General can control the types of issues the high court decides and influence the scope of judicial decision-making.

The careful selection of cases applies not just to the case facts and other legal considerations (O’Connor 1983), but might also extend to the members of the Office of the Solicitor General taking into account the justices’ personal ideological policy preferences when forming arguments and preparing briefs. According to this argument, the attorneys within the Office of the Solicitor General know the justices’ ideologies and request review only on those cases that might match the ideology of enough justices for
such review to be granted (Ulmer and Willison 1985). They can both anticipate weakness in their cases that might otherwise prevent review and marshal their arguments to touch upon the justices’ concerns and interests (Provine 1980).

Scholarly work produced more recently proposes this hypothesis as well. Paul Collins, in a paper presented at the annual Southern Political Science association meeting in 2005, argues that a large amount of the success accorded to solicitors general lay with their ability and propensity to select cases with a greater amount of “winnability” (Collins 2005). While other factors do share in adding to the frequency of success, Collins asserts that the primary determinant of such success is case selection.

C. Deference

Other scholars hypothesize that the Supreme Court shows deference or respect to various other actors - either to the executive branch generally or the solicitor general specifically - which then leads to a higher success rate. A related line of scholarship posits a special and unique relationship specifically between the Supreme Court and the Office of the Solicitor General, as the solicitor general acts both as an agent of the executive branch, and as an agent of the court.

Robert Scigliano suggests one such hypothesis. He asserts that the justices acquiesce to the executive branch because of the president’s popular or democratic mandate (Scigliano 1971). This corresponds to Dahl’s proposition that the Court shows deference to the more democratic branches in order to maintain legitimacy (Dahl 1957).

A related line of scholarship posits a special and unique relationship specifically between the Supreme Court and the Office of the Solicitor General, as the solicitor
The solicitor general appears to work on behalf of the Court as much as the executive branch so much so that the Office has been referred to as the “tenth justice” (Caplan 1987). Because the solicitor general sometimes works largely independent of control from the appointing administration, the justices on the Supreme Court can better trust that the information and opinions coming from the Office serve not just the political ambitions of the administration, but honest interest in making good law for the nation. The Court then defers to the position taken by the Office of the Solicitor General because of its perceived interest in protecting legal principal (Salokar 1992, Puro 1971).

The Court might also show gratitude and respect to the Office of the Solicitor General because of its role in filtering unnecessary litigation and helping limit the amount of work coming into the Supreme Court. The solicitor general can act in this role both when selecting cases to bring before the Court and in the decision to file amicus curiae briefs.

Salokar, for example, offers that the solicitor general acts as a gatekeeper for the Supreme Court (Salokar 1992). The Office of the Solicitor General selects only the best government cases for the Court’s review. Doing this helps assist with the caseload problem the justices on the Court experience each term and thus the justices assume that those that are brought before them for review are all warranted (Sheehan 1992). When the solicitor general chooses to take a case to the Court, or chooses to file an amicus brief in another case to which the government is not a party, this acts as a cue to the Court identifying the importance of a case or the issues involved in the case (Ulmer 1985).
Other arguments along this line propose that the Court shows this favoritism because of the quality and reliability of the information the Office of the Solicitor General provides the Court. McGuire asserts that the justices give greater weight to the information supplied by litigants who have shown themselves capable of reducing the court’s informational burdens by providing accurate information. (McGuire 1998).

According to Doris Marie Provine, when the United States is a petitioner in a case before the Supreme Court, the justices may feel a special responsibility to resolve the dispute because the cases are often ones that probe the limits of a regulatory agency’s statutory authorization (Provine 1980). In this way, she argues, there might be a pro-federal government bias that plays a role in the Court’s perception of the important issues. Additionally, the Supreme Court might also be sensitive to the solicitor general’s position because the Office represents the position of the federal government, and since the justices on the Supreme Court occupy seats within the national government, they have a long-standing familiarity with governmental enforcement problems.

D. Congruence

One other broad category of explanations for solicitor general success suggests that the success of the Office of the Solicitor General comes just as much from ideological congruency as from other sources. That is, the Office wins because either the solicitor general or the appointing administration maintains ideological policy preferences similar to that of the majority of the justices sitting on the high court.

A recent article by Bailey, Kamoie, and Maltzman sought to investigate solicitor general success in a manner that included the political factors which previous attempts
had failed to consider (Bailey, Kamoie, and Maltzman 2005). They argued that the success of the Office of the Solicitor General stems not just from the expertise and experience, but is instead tempered by the ideological congruency between the Office of the Solicitor General and the Supreme Court. Consequently, solicitors general from different administrations facing a different ideological mix of Supreme Court justices can expect to enjoy different rates of success. Their study concludes that viewing the success of the Office of the Solicitor General simply in terms of the legal aspects of a case is inconsistent with their results. The solicitor general is a political actor, and as such, the message sent, the opinions given, and the cases argued act as political cues, indicating to the justices how the administration feels politically about a case or issue. They determined that solicitors general more often gain the support of the Supreme Court when they represent an outcome or party representing an ideology opposite to their own. Liberal solicitors general, for example, gain support from the Court more frequently when voicing an argument in the conservation direction. The same applies for conservative solicitors general. Perhaps this is because solicitors general gain some credibility by arguing against their own party’s self-interest.

Deen, Ignagni, and Meernik make a similar observation in their 2003 *Judicature* article, looking at the differences in success rates of solicitors general over time. They note that one cause of such differences in success lies in the difference between ideological positions of the solicitor general and that of the Supreme Court. Additionally, these differences become more pronounced in various issue areas. Specifically, civil rights cases cause greater amounts of fluctuation between administrations and solicitors
general. Moreover, they suggest that the increasing shift in perception of the solicitors
general as ideologically oriented, and working not for good law, but for the agenda of the
current administration, might serve as an explanation for the changing success levels
(Deen, Ignagni, and Meernik 2003).

Congruence theories seem at odds with theories of deference or experience. Justices cannot simultaneously give deference to the Office of the Solicitor for its independence from the politics of the executive branch and take cues from the solicitor general that indicate the ideological stance of the administration to make policy decisions. These two cannot logically coexist. The argument implicit in explanations from the congruence category assumes that the solicitor general shares ideological positioning with those within the administration.

Salokar’s research into the solicitor general indicates that the selection process of picking an individual to fill the position ensures that such an individual will share the political ideology of the administration served (Salokar 1992). She states that although the solicitor general might appear independent, it is only illusory. The solicitor general is no more independent than other cabinet officials within the administration or any other political appointee. This is especially true because both the attorney general and the president can overrule the judgment of the solicitor general and force the Office of the Solicitor General to take a case when it may otherwise be unwilling. While it is plausible that deference and congruence might be active for different cases, the two cannot both exist to explain the same case.
Meinhold and Shull, in a 1998 *Political Research Quarterly* article, seek to discover to what extent the influence and success of the Office of the Solicitor General are consistent with the policy and ideological preferences of the appointing presidents. Agreeing with Salokar, they say that because of the care the administration takes in selecting a solicitor general with a similar ideological outlook, it is reasonable to expect the solicitor general to conform to the president’s broad philosophical orientation (Meinhold and Shull 1998). Their conclusion supports the notion that solicitors general and their appointing presidents share ideology, and that the solicitor general uses this ideology in discretionary action, namely *amicus* briefs, before the Court.

Provine also notes that political ideology might play a role in the solicitor general’s success before the court by specifically looking at *amicus curiae* briefs. She posits that the participation of the solicitor general in a case increases its chances for review, that the subject matter of the preferences of that Court also appears relevant (Provine 1980). Additionally, Puro makes brief note that the ideological position of the *amicus* brief act as an important indicator to the Court (Puro 1981).

E. Experience

Many aspects of the literature discussed in this last, and most extensively tested, group of hypotheses, stem from Galanter’s (1974) seminal article that addressed the relative success of different types of parties before the Court. Galanter suggested that certain types of litigants have a greater probability of success in court because they appear more often than do others. These “repeat players,” as he calls them, enjoy specific benefits not bestowed upon “one-shotters.” Generally, these advantages include advance
information; ready access to specialists and resources; developed relations with the Court; established credibility; and the willingness and ability to play, not just for immediate victory, but for long term rules that might influence the outcome of future litigation to which the repeat player might be a party (Galanter 1974). Repeat players are likely to be more skilled at formulating theories, writing briefs, and presenting oral arguments than the less-frequent litigators (Ulmer 1985). The Solicitor General is the paradigmatic repeat player, and as such, receives many of these benefits. These advantages, as we shall soon see, have been argued to contribute to, and in some arguments solely cause, the Solicitor General’s success before the Court.

Following Galanter, Robert Scigliano is the next in the series of scholars to present arguments explaining the success of the Office of the Solicitor General based on experience and expertise. Scigliano argues that the Office of the Solicitor General attracts highly qualified attorneys. These attorneys, he contends, tend to come from private practices and have the capacity to outmatch in ability the average litigants opposing them (Scigliano 1971). Additionally, the members of the Solicitor General’s office have more experience in dealing with the Supreme Court than any other law firm in the country.

Provine also adds to Galanter and Scigliano’s arguments, agreeing that the litigation experience, both general litigation and specifically arguments before the Supreme Court, give that Office an edge over other parties (Provine 1980). She says also that the success the Office of the Solicitor General enjoys at being granted review is attributable to the expertise of the Office in anticipating and articulating the Court’s fundamental concerns. Those within the Office of the Solicitor General are then not only
capable attorneys with expertise in sound legal argument, as Scigliano suggests, but also skilled at framing issues and arguments in such a manner as to appeal directly to the justices’ primary concerns.

Confirming this speculation, McGuire makes a similar assessment. He says that the experience of the representing attorneys, separate from their status or that of their representative party, plays a significant part in determining judicial outcomes (McGuire 1995). In making their decision, McGuire notes, “…justices require clear and faithful focus on the issues presented in the case, an understanding of the relationship of those issues to existing law, a clarification of uncertainties, and a view of the implication of a decision for a public policy, tempered with candor” (McGuire 1995). Attorneys that frequently participate at the high court are able to provide this type of information effectively to the justices. The Solicitor General and the other attorneys who work in the Solicitor General’s office are such actors. The frequency of their participation, McGuire argues, translates directly into their expertise, and this in turn increases their performance and chances of victory.

Continuing this line of argument, McGuire later asserts that frequently appearing attorneys have an incentive to provide the kind of insight, analysis, and legal argumentation to which the justices are most likely to be responsive (McGuire 1998). Additionally, McGuire argues that expertise is the primary consideration needed to explain the success of the Office of the Solicitor General.

He says that, “Once direct measures of litigation advantages 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” (McGuire 1998). Continuing, he says that the one constant in all litigation, is the justices’ need for accurate and reliable information about the legal issues involved in the case that allows them to maximize their policy designs in the most informed manner. The Office of the Solicitor General, according to McGuire’s contention, happens to possess great experience with litigation of cases, especially at the Supreme Court. This experience causes the greater success rate, just as other litigants’ success rates correlate positively with their experience before the Court.

According to McGuire, the conclusions of other research - that there is something “special” about the solicitor general – are artifacts of their methodologies. Other investigations into success fail because of the manner in which the Solicitor General’s influence has been modeled (McGuire 1998). The presence of the United States as a party typically becomes a dichotomous variable and the competing characteristics of other litigants rarely, if ever, get included. These estimates consequently fail to measure properly whatever influence the Office of the Solicitor General might possess. McGuire attempted to synthesize these other theories in his model to show that their supposed effects could really be explained as caused by experience.

Experience provides the Office of the Solicitor General with some amount of respect and credit with the Court, and this line of reasoning argues that the experience directly translates into the ability of the Office of the Solicitor General to better argue cases to victory. The justices rely on this experience and expertise in cases where the federal government presents briefs amicus curiae, especially in those cases where the
Supreme Court requests its input; this is why the Court more often cites the Solicitor General’s positions in final opinions on cases where the Solicitor General does not directly participate (Salokar 1992, and Scigliano 1971, McGuire 1995).

One can see that the explanations posited by the literature represent an assortment of possible influences in determining governmental success. As previously stated, while some of these, namely experience, have been tested before, most have not received rigorous empirical examination. Having addressed the relevant literature concerning the various arguments for success of the Office of the Solicitor General, I turn now to the next chapter of the paper, where I will present an alternate theory of solicitor general success at the Supreme Court, looking specifically at the merits stage in order to test many of these hypotheses.
CHAPTER III

THEORY AND HYPOTHESES

A. A Different Theoretical Approach

The primary purpose of this research is to continue the exploration of the factors that determine executive success, in an attempt to fill in the holes left by prior research. Literature has repeatedly shown that the presence of the government in a case overwhelmingly relates to its chances of success. What the research does not generally explain is the variation in governmental success – why does the government win sometimes, yet lose others. Typically, the literature tends to point towards experience to explain general variations in success among litigants. But does experience have the same determinative effect when looking solely at the individual attorneys assigned to represent the United States federal government rather than the Office of the Solicitor General as a whole?

When exploring these ideas, McGuire generally reduced the concept of expertise simply to a measure of experience. Additionally, he suggested that expertise and experience may also imply some amount of credibility given to the attorneys when providing information to the Supreme Court. While these ideas hold merit, McGuire, in reducing them only to a measure of experience, seemed to neglect exploring these other individual concepts in a more precise way.

In order to address the question of the role of expertise in a more nuanced way, I propose a model that includes not simply experience, but also various personal, professional, and situational factors present in any given case that may also play a role in
solicitor general expertise. Most notable among these factors, I propose, is the presence of the individual solicitor general in a given case. In addition, I propose to measure experience at the individual level rather than attributing the experience of the solicitor general to the entire staff, so all parties are on equal footing. Indeed, and contrary to conventional wisdom, I theorize that, given the inclusion of the solicitor general variable, as well as the other individual and situational variables, that experience will lose significance.

In this chapter, I will introduce the variables within my theory, explain their potential impact, and hypothesize their effects.

B. Personal Characteristics

a. Experience

Foremost among the personal characteristics attributed to lawyers within the Office of the Solicitor General, and the one primarily focused in most other studies, is experience. As the literature suggests, those within the Office of the Solicitor General collectively appear before the high court at a much higher rate than attorneys outside the office. This frequency, it is suggested, provides the attorneys with the necessary edge, both in terms of litigation skill and credibility, over their opponents in order to more likely secure victory. McGuire proposes, perhaps prematurely, this professional characteristic is theoretically the single most important factor in explaining governmental success at the Supreme Court.

Given the importance of the Office of the Solicitor General in the context of both the Judicial and Executive branches of government, we can reasonably expect that the
solicitor general would only hire those individuals who are exceptionally qualified, or, as Salokar put it the “crème of the crop” (Salokar 1992). As she argues, many attorneys in the Office have served as law clerks, graduated from the top legal institutions in the country, held teaching positions at nationally ranked law schools, and some have even been judges themselves. This provides the office as a whole with a tremendous variety of professional knowledge and skill.

Even though we know that the attorneys in the office are, as education and work experience go, the best-of-the-best, they have not in every instance argued more cases than their opponent has. There are certainly cases where the opposing counsel has at least as much as, if not far more experience at arguing before the high court as compared to the government’s attorney⁴. This apparent contradiction suggests that experience is not the sole variable of interest concerning success at the Supreme Court, and McGuire’s explorations fail to address this occurrence. Even when confronted with one of these reversed disparities, will the government still be overwhelmingly likely to win? In order to resolve this query, I will test McGuire’s hypothesis regarding the role of experience and the attorneys within the Office of the Solicitor General.

\[ H1: \text{differences in attorney experience will have a statistically significant impact on a participant’s likelihood of success in cases before the Supreme Court.} \]

⁴ See e.g. Sable Communications of Cal. Inc v. FCC [492 U.S. 115], and Citicorp Industrial Credit, Inc. v. Brock [483 U.S. 27].
b. Clerking for the Court

Another factor, which could potentially aid an attorney’s quest to win at the Supreme Court, is previous interaction with the Court. Specifically, when an individual has spent time previously in their career clerking for a justice at the Supreme Court, he or she might gain some advantage from those experiences.

The attorney may gain some form of personal credibility from the court. Because justices have wide discretion in selection of their clerks, they tend to select those most qualified and most likely to side with their ideological position on issues (Ditslear and Baum 2001). Access to the Court’s decision making may give clerks insight that they may later use – when representing clients – to formulate arguments in a way that best assist the court. Consequently, this may lead the justices to put more faith in arguments those former clerks later present.

Additionally, the experience of clerking at the High Court may simply work to hone the skills necessary for successful litigation at the Supreme Court. Clerks at the Supreme Court are trusted to research cases, draft opinions, and analyze petitions, along with other various duties of high responsibility (Ditslear and Baum 2001, Domnarski 1996). This exposure to the process and procedures of the Supreme Court, and to the types of efforts that are effective, potentially leads them to be more effective litigants.

This reasoning would lead us to expect that such a valuable line on an attorney’s résumé might have a positive influence on their chances for success at the High Court. For whichever reason, having clerked for a justice might have an impact on the litigant’s success; this leads to my second hypothesis:
H2: An attorney that has clerked for a Supreme Court justice will have a greater likelihood of success at the Supreme Court.

c. Personal Appearance by the Solicitor General

Although various members of the Office of the Solicitor General argue the vast majority of cases at the Supreme Court in which the federal government is a party, there are cases in which the solicitor general himself will choose to appear at the Supreme Court. Solicitor General Charles Fried suggested that solicitors general feel their presence indicates to the justices in the court that the issue is significant to the current administration (Interview with Fried presented in Salokar 1992). While not all solicitors general have necessarily argued cases because of their importance to the administration, it is still possible that the justices view the solicitor general’s presence as being indicative of importance.

Consequently, the personal appearance of the solicitor general might act as a signal to the justices that the case is important to the administration; with the Solicitor General acting as sort of a “name brand” that indicates the message of special importance to the justices (Abramson, Aldrich, Paolino, and Rohde 2000). This leads to my third hypothesis:

H3: Argument by the solicitor general will increase the government’s likelihood of success.
C. Situational Dynamics

a. Petitioner versus Respondent

One argument presented in the literature explaining success at the Supreme Court is the role taken by each of the parties. More specifically, because the Supreme Court has a tendency to accept cases for review that it is likely to overturn, the petitioner in a case usually has a greater chance of success (Armstrong and Johnson 1982; Baum 1977; Provine 1980; McGuire 1998).

In addition to the petitioner maintaining an advantage because of the propensity of the court to take cases in order to reverse, the solicitor general as petitioner might possess an additional advantage. Among the myriad of cases from which to decide, the Office of the Solicitor can pick relatively few cases to bring to the Court. Because the Office of the Solicitor General can move forward only with such a few number of cases, those within the office are proficient at selecting only the most winnable cases (Scigliano 1971, Jacob 1981). As McGuire (1998) points out, if this argument were to be true, then the chances the government would have of winning would be different if the case being argued was one selected by the Office of the Solicitor General for review, rather than one against the government, where the attorneys in the office had no hand in picking (see also Provine 1980).
This leads to my fourth hypothesis:

**H4:** The government is more likely to be successful when arguing a case before the Supreme Court if it is the petitioner in the case.

To clarify, this means that if the government is the petitioner, is it more likely to win than if it is the respondent.

b. Ideological Congruence

One factor, which, according to much of the literature, has exceptional explanatory potential, is ideological congruence. Because the conventional wisdom remains that justices vote with their ideological goals in mind (Pritchett 1949, Segal and Spaeth 2002), we can reasonably believe that ideological congruence between the Supreme Court and the solicitor general will certainly have a significant impact on whether the United States will be victorious in cases argued at the Court. When the attorneys representing an administration with views similar to those of the majority of the justices argue, then the court should vote in favor of the administration. Alternatively, stated as a hypothesis:

**H5:** The attorneys in the Office of the Solicitor General’s are more likely to win at the Supreme Court when they share ideological congruence with the majority of the justices on the Supreme Court.
c. Interaction Between Congruence and SG Appearance

Given the notion that the justices on the Supreme Court react to the ideology of the administration through the Office of the Solicitor General, the personal presence of the solicitor general in oral argument might make even more of a difference. I have already speculated that the presence of the solicitor general might send a signal to the justices regarding the importance of the issue for the administration. This signal could be more important when taking into account the justices’ ideological leanings. For example, the presence of the Solicitor General from an extremely conservative president at a court made up of mostly conservative justices might indicate to those justices that the issue being presented by the government is an exceptionally conservative one, and the justices will consequently be even more likely to side with the government. The opposite can also said to be true. Thus my final hypothesis:

\[ H6: \text{Argument by the solicitor general at the Supreme Court will have an even greater effect when the two are ideologically congruent.} \]

Having discussed the assorted variables thought to relate to the success of the Office of the Solicitor General and their purported effects, I can now turn to the discussion of research design, data collection, and methodology.

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5 Both the office and the individual
CHAPTER IV

DATA COLLECTION AND MEASUREMENT

A. Data Collection

This original data set consists of all cases considered by the Supreme Court from 1986-2005 in which the government was a party, the court heard oral arguments, and made a decision indicating a clear victor. These cases were collected from a variety of internet sources, primarily including the websites Lexis-Nexis and FindLaw\(^6\). This selection of cases is appropriate for this study for a number of reasons.

Given that the focus of this paper is on determining the effect of assorted factors explaining variations in governmental success at the Supreme Court, I look only at the cases in which the government was involved. Beginning from the list of all Supreme Court cases for the given time period, taken from a list of all cases for each year, I selected only cases in which the United States, an officer of the United States, or some executive department, federal agency, or governmental organization was involved.

The primary goal of explaining success of the Office of the Solicitor General at the Supreme Court relies greatly on the role of experience and its significance, or lack thereof. Experience here is measured by the number of cases any given attorney has argued. Because of this method of capturing the concept of experience, I narrowed my selection of cases down further by using only those in which a decision was made only after hearing oral arguments.

\(^6\) [www.findlaw.com](http://www.findlaw.com)
Additionally, because, as I suggested, the primary interest is in explaining success, it is important to be able to determine readily and accurately which party is the winner in a given case. In order to achieve this, I removed from the case list those cases in which no clear victor can be determined\(^7\).

Finally, the period of cases selected is also appropriate. The period from 1986-2005 represents one “court:” specifically the Rehnquist court. The Rehnquist court covers a variety of presidential terms, including an approximately equal amount of Republican and Democrat administrations, as well as a number of changes to the general make-up of the Supreme Court. After narrowing the original list of cases down with these criteria, what is left is a set of cases that is recent, relatively easy on which to gather data, and enough variation in individuals to examine the concepts presented here. This provides a useable case list of approximately 450 cases\(^8\).

B. Operationalization

Prior to moving on to the results of the study, it is necessary to explicate how each of the variables were operationalized, coded, and the data for each collected. See the appendix for precise information on the coding of all of the variables.

a. Dependent Variable

The purpose of this paper is to discern the factors leading to Solicitor General success at the Supreme Court. As such, the dependent variable is success. In this data set, success is measured as a dichotomous variable, with one representing governmental

\(^7\) This primarily involves cases in which the decision is affirmed in part and reversed in part.

\(^8\) Some additional cases were removed for various reasons, such as those where the government was arguing against itself; see Department of Commerce v. United States House of Representatives et al. [525 U.S. 316], for example
success, and zero indicating a loss by the government. This information is gained from reviewing the Supreme Court opinions for each case and coding the victor appropriately.

b. Independent Variables

i. Personal Characteristics

In order to examine the characteristics specific to the individual arguing the case, it is necessary to determine which attorney argued each case. Fortunately, the arguing counsel for each case is listed in and retrieved from the case record for each case in Lexis-Nexis.

   i. Experience

The first and theoretically the most important personal characteristic of interest is attorney experience. As previous studies have done, I similarly measure experience as the volume of cases a litigator has presented oral arguments for before the Supreme Court. Instead of estimating experience as an average, as McGuire’s (1998) study does, experience here is a running count; this means that if an attorney has argued multiple cases in the data set, each subsequent case will have an experience value of one higher than the previous.

Data on litigator experience was retrieved for both the attorneys arguing on behalf of the government and opposing counsel by using the case record to identify which attorney argued each case. These data were obtained from a dataset provided by Professor Corey Ditslear. The experience variable itself is operationalized first by determining the total experience count of the arguing attorney at the time of each observed case. Second, the difference between the experience of the governmental attorney and the opposing
counsel is determined. Finally, if the governmental attorney has more experience, the variable is coded as one. If the litigants have the same level of experience, the variable is coded as zero. If the government is at an experiential disadvantage, then the variable is coded as negative one. Additionally, in a subsequent iteration of the model, experience is measured by the raw difference in cases between the opposing litigants.

This type of coding is justifiable. It is reasonable to believe that large differences in experience are not nearly as important as the basic existence of a difference in experience. That is, an attorney would not likely gain much more of an advantage if he or she were arguing his hundredth case than if she were arguing only their ninety-ninth case. Instead, an attorney who has argued even a single case prior might gain some measure of advantage. Because of this supposed diminishing marginal returns of experience, simply measuring the existence or absence of an experiential difference should be sufficient to capture its effect.

ii. Clerking for the Court

The second personal characteristic of interest was whether the governmental attorney had clerked for a Supreme Court justice previously in his or her career. This, too, is measured dichotomously, with the variable being recorded as a one if the attorney had clerked for a Supreme Court justice and zero otherwise.

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9See also McGuire (1998) for a justification of this simplified coding method for experience.
10A difference of a single case in favor of the government alters its chances of victory by about a tenth of a percent. A difference of twenty cases worth of experience, the average difference among all cases, in favor of the government only changes the government’s chances by approximately two percent. The results for this coding are displayed later in this chapter.
Information on Supreme Court clerks was derived from a data set provided by Professor Corey Distlear collected for his work on the Supreme Court polarization and the selection of law clerks (Baum and Ditslear 2001).

iii. Personal Presence of the Solicitor General

The final personal characteristic of concern is the personal presence of the individual appointed as the solicitor general. The Solicitor General variable is measured dichotomously as well. Here, one represents the presence of the Solicitor General, while zero indicates that some other governmental attorney within the Solicitor General’s office has appeared to argue the case.

Information on the various solicitors general was collected from the Department of Justice’s website for the Office of the Solicitor General11.

ii. Situational Dynamics

i. Government Role

The first variable regarding situational dynamics concerns the position the government takes on a particular case. This information is retrieved easily enough by examining the case history and is coded as a binary variable. In cases where the government is the petitioner, the variable becomes a one. When the government is the respondent, the variable takes on the identifier of zero.

ii. Ideological Congruence

The second situational dynamic of interest is the relative ideological congruence between the Supreme Court and the Office of the Solicitor General. Capturing this

11 www.usdoj.gov/osg/aboutsog/sglist.html
variable involved a multi-stage process. First, I used data identifying ideology scores of the various justices on the Supreme Court throughout the time-period covered in the data set. This information was gained from Jeffrey Segal’s website\(^{12}\). Second, taking these scores, I then determined the score of the median member of court for each case in the data set. Third, I used ideology of the president as a proxy for solicitor general ideology\(^{13}\). Because Segal’s ideology scores for presidents do not cover the entire time-period in the data set, I determined executive and thus solicitor general ideology simply by the party of the president. Finally, if the ideology score of the median justice falls on the conservative side of the spectrum, and the president is a Republican, the variable is coded as one, indicating congruence; if the median justice falls on the conservative side of the spectrum, and the president is a Democrat, then congruence is coded as zero, indicating no congruence. Table 1 displays this coding scheme.

<table>
<thead>
<tr>
<th></th>
<th>Conservative Court</th>
<th>Liberal Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conservative Executive</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Liberal Executive</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>

Table 1 – Congruence Coding

iii. Interaction Between Congruence and SG Appearance

Finally, to measure the combined impact of ideological congruence and the presence of the government’s counselor, I used an interaction term between the two

\(^{12}\) [http://www.sunysb.edu/polsci/isegal/data/presse_main.htm]

\(^{13}\) Literature presented in a previous chapter supports using this as a proxy; see Salokar 1992; and Meinhold and Shull 1998 for example. Additionally, this type of proxy is used by McGuire (1998) as well.
dichotomous variables; this essentially means that cases where the Solicitor General argues the case for the government and he is ideologically congruent with the median justice on the Supreme Court, the variable is coded as one; otherwise, the variable is coded as zero.

Having examined how the data is retrieved, how the variables are measured, and how they were operationalized, I can next turn to how the data will be analyzed and discuss results from such an analysis.
CHAPTER V

METHODOLOGY AND ANALYSIS

A. Some Descriptive Statistics

Before proceeding to discuss the methodology and analysis, general information can be gained by looking at some summary and descriptive statistics regarding the data used in the study. First, by looking at the average experience for each side on any given case, it becomes obvious that the government in fact does enjoy a significant advantage in terms of litigation experience. As Table 2 indicates, the average experience of a government attorney is more than seven times that of the average non-governmental litigant.

<table>
<thead>
<tr>
<th>Attorney Experience</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Avg. Experience of Gov. Attorney</td>
<td>21</td>
</tr>
<tr>
<td>Avg. Experience of Non-Gov. Attorney</td>
<td>3</td>
</tr>
<tr>
<td>Avg. Experience of Solicitors General</td>
<td>18</td>
</tr>
</tbody>
</table>

Table 2 – Average Attorney Experience

Even solicitors general enjoy a six hundred percent greater experience advantage over other attorneys. Because of this, one might expect the government to have an experiential advantage in almost every case, and this is indeed the case. The government possessed more experience in nearly ninety percent of the cases in which they participated. But does that in-and-of itself lead us to believe that these disparate levels of experience leads to the greater success of the United States government at the Supreme
Court? While the government may have more experience in approximately 90% of the cases, the government only wins 67% of all of the cases in which it is involved (see Table 3). That means there is still a substantial portion of the cases in which they should win, where they in fact do not.

<table>
<thead>
<tr>
<th>Cases Argued by United States Government</th>
<th>Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Won</td>
<td>309</td>
<td>67%</td>
</tr>
<tr>
<td>Lost</td>
<td>152</td>
<td>33%</td>
</tr>
</tbody>
</table>

Table 3 – Win Percentages

Additionally, whereas the government wins 67% overall in the cases in which it participates, when it enjoys an experiential advantage, it likewise wins approximately 67% of the cases.

<table>
<thead>
<tr>
<th>Cases When United States Possessed More Experience</th>
<th>Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Won</td>
<td>276</td>
<td>67%</td>
</tr>
<tr>
<td>Lost</td>
<td>134</td>
<td>33%</td>
</tr>
</tbody>
</table>

Table 4 – Experience Percentages

Note that this result is not entirely different from the government’s win rate when it is at an experiential disadvantage. As illustrated on Table 5, when the government has a disadvantage in experience, its attorneys still win 58% of the time; when the government has neither an advantage nor a disadvantage, the success rate goes up to 72%. This last outcome seems particularly intriguing. It suggests that, if experience were equal, if neither party had an advantage over the other, the government is still more likely to win, even more likely, it seems, than it is in cases where experience seems in its favor.
Perhaps this suggests that it is indeed something besides experience that drives these successes and failures.

<table>
<thead>
<tr>
<th></th>
<th>Won</th>
<th>Lost</th>
<th>Percent Won</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gov. and Non-Gov. have equal experience</td>
<td>13</td>
<td>5</td>
<td>58%</td>
</tr>
<tr>
<td>Gov. has less experience than Non-Gov.</td>
<td>18</td>
<td>13</td>
<td>72%</td>
</tr>
</tbody>
</table>

Table 5 – Experience/Win percentages

B. Methodology

a. Logit Regression for Dichotomous Dependent Variables

Because this study attempts to explain a binary dependent variable, I must utilize a maximum likelihood estimation model. To test the hypotheses presented in chapter IV, I use a logit model; this will allow me to determine how each of the independent variables influences the government’s chances for success at the Supreme Court. Following the logit model, I will use predicted probabilities in an attempt to determine the substantive meaning of each of the coefficients presented.
C. Statistical Analysis

| Government Success | Coefficient | $P >|z|$ |
|--------------------|-------------|---------|
| **Constant**       | 0.342       | 0.177   |
| **Personal Characteristics** |            |         |
| Experience         | 0.072       | 0.702   |
| Clerked for Supreme Court | -0.079 | 0.700   |
| The Solicitor General | -0.938 | 0.056*  |
| **Situational Dynamics** |            |         |
| Government Role    | 0.513       | 0.014** |
| Ideological Congruence | 0.162  | 0.459   |
| Congruence and The S.G. | 1.419  | 0.041** |

| LR Chi² (6) | 13.85 |
| Prob > Chi-Squared | 0.0314 |
| Psuedo R-squared | 0.0238 |

$N = 457$

Table 6 – Base Model

a. Personal Characteristics

1. Experience

The experience hypothesis ventured that, when only considering cases taken by the Office of the Solicitor General, experience would prove meaningful as an explanatory factor. Unlike results presented in previous studies, and contrary to this hypothesis here, experience fails even remotely to reach significance. Although the results do not reach statistical significance, the result in general has potential theoretical significance. When looking specifically and only at the cases argued by the Office of the Solicitor General, experience diverges from its normal importance; that is, experience does not explain why some cases argued by the government are won while others lost.
However, this result could be an artifact of the coding method. Instead of using an ordinal coding scheme as I did here, and as McGuire did in his 1998 study, one could measure disparities in experience directly. Table 7 presents results of an analysis using a more precise measure of experience – the actual difference between the numbers of cases tried. Although closer, the effect of experience still does not fall within traditional levels of significance (see footnote 15). Indeed, this different measure results in a change of sign on the experience coefficient. All other variables retain their significance levels. In Table 7, I display the results of this test.

| Governmental Success | Coefficient | $P > |z|$ |
|----------------------|-------------|-------|
| Constant             | 0.496       | 0.021 |
| **Personal Characteristics** |            |       |
| Experience           | -0.001      | 0.108 |
| Clerked for Supreme Court | -0.064     | 0.754 |
| The Solicitor General| -1.008      | 0.041**|
| **Situational Dynamics** |            |       |
| Government Role      | 0.551       | 0.008***|
| Ideological Congruence| 0.145       | 0.507 |
| Congruence and The S.G.| 1.444     | 0.038**|

LR Chi$^2$ (6) 16.26
- Prob > Chi-Squared 0.0124
- Psuedo R-squared 0.0280

$N = 457$

Table 7 – Alternate Experience Model
2. Clerking for the Court

Despite the expectations that clerking for a Supreme Court justice provides the litigants with some form of additional advantage, the results of the model offer no support for the corresponding hypothesis. Not only does the clerk variable fail to achieve significance, but it also appears in a direction contrary to expectations.

3. Personal Appearance of the Solicitor General

Results from the personal appearance variable are fascinating. The personal presence of the solicitor general arguing before the court on behalf of the government is significant in the second model and marginally significant in the first\(^\text{14}\). However, the results of the solicitor general appearance hypothesis anticipated were opposite to what materialize. This means that, despite the prediction that the solicitor general will increase the likelihood of the government to win, instead his presence relates to a decrease in governmental success.

b. Situational Dynamics

1. Government Role

The first situational hypothesis proposed was that when the government is petitioner in a case, the government is subsequently more likely to win that case. Here, the model indicates that government role is not only highly significant, but also emerges in the expected direction. This result confirms that the probability of the government succeeding changes depending on the capacity in which it is present.

\(^{14}\) Although this result is not within the traditional 95\% significance level, it is not unreasonable or unheard of to claim significance beyond the .05 level (Achen 1982; Freedman, Pisani, Purves, and Adhikari 1991; Phillips 1973; Krehbiel 1991; and Dion & Huber 1997).
2. Ideological Congruence

Despite the hypothesized relationship between ideological congruence and case outcomes favoring the government, the logit results fail to demonstrate any statistically significant connection. This might plausibly signify that the Supreme Court, or at least the median justice of the Court, decides cases not by the ideological position taken by the government, but perhaps by other aspects of the case, such as law or fact.

This too might emerge because of the way the concept was coded. Rather than coding ideological congruence between the Supreme Court and the Office of the Solicitor General indirectly through the party of the president in office, I could code the congruence between the Supreme Court and the ideological position taken by the Office of the Solicitor on each given case\textsuperscript{15}. Coding this variable as one when the ideological position taken by the governmental attorney in a case is congruent with the ideological position of the median member of the Supreme Court leads to the additional results shown in Table 9.

<table>
<thead>
<tr>
<th>Conservative Court</th>
<th>Liberal Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conservative Case Position</td>
<td>1</td>
</tr>
<tr>
<td>Liberal Case Position</td>
<td>0</td>
</tr>
</tbody>
</table>

Table 8 – Alternate Congruence Coding

\textsuperscript{15} This information was gained through Spaeth’s Supreme Court Database.
| Governmental Success | Coefficient | $P > |z|$ |
|---------------------|-------------|------------|
| Constant            | 0.253       | 0.362      |
| **Personal Characteristics** |             |            |
| Experience          | 0.083       | 0.670      |
| Clerked for Supreme Court | -0.130     | 0.532      |
| The Solicitor General | -0.802    | 0.175      |
| **Situational Dynamics** |             |            |
| Government Role     | 0.553       | 0.008***   |
| Ideological Congruence (Case) | 0.278      | 0.216      |
| Congruence and The S.G. | 0.993      | 0.178      |

LR Chi$^2$ (6) 12.57  
Prob > Chi-Squared 0.0504  
Psuedo $R$-squared 0.0223  

$N = 444$

Table 9 – Alternate Congruence Model

Unlike the previous iteration of the model, most of the results here fail to reach significance at traditional levels. Only the position taken by the government remains significant. Perhaps by controlling for both the president’s ideological position, which is likely the position the justices on the court expect from the government’s attorney, and the actual position taken by the Solicitor General, the results change further.

Again, by including both measures of ideological congruence, all of the variables except for the role of the government lose significance at traditional levels. Table 10 displays these results.
### Table 10 – Combined Congruence Model

| Variable                                    | Coefficient | $P > |z|$   |
|---------------------------------------------|-------------|--------|
| **Governmental Success**                    |             |        |
| Constant                                    | 0.113       | 0.707  |
| **Personal Characteristics**                |             |        |
| Experience                                  | 0.078       | 0.688  |
| Clerked for Supreme Court                   | -0.139      | 0.503  |
| The Solicitor General                       | -0.751      | 0.204  |
| **Situational Dynamics**                    |             |        |
| Government Role                             | 0.529       | 0.012***|
| Ideological Congruence (Presidential)       | 0.253       | 0.227  |
| Ideological Congruence (Case)               | 0.293       | 0.194  |
| Congruence and The S.G. (Case)              | 0.922       | 0.212  |
| LR Chi$^2$ (6)                              | 14.02       |        |
| Prob > Chi-Squared                          | 0.0508      |        |
| Psuedo R$^2$-squared                        | 0.0249      |        |
| $N = 444$                                   |             |        |

### 3. Interaction Between Congruence and SG Appearance

The interaction effect of personal appearance variable and ideological congruence is significant and shows a positive direction. While mere ideological congruence falls short of significance, congruence combined with the presence of the Solicitor General does appear to have some positive effect on the likelihood of the government winning the case.

### D. Substantive Analysis

Of the 457 cases examined during this period, the government successfully argued 305 to victory. As with previous studies, the government won roughly two-thirds of the
time they were present at the court (see Sheehan 1989; Crowley 1987; Handberg 1979; Cannon and Giles 1972; Tanenhaus 1960; Pritchett 1948; and Sheehan 1992). Even though the model tells us which variables appear significant statistically, the coefficients presented do not lead to ready interpretation. Unlike Ordinary Least Squares coefficients, logit results require an additional step to determine the substantive meaning of the outcomes. I will use the predicted probabilities of the significant variables to elucidate further their effects.

a. Personal Appearance of the Solicitor General

The effect of the personal participation of the solicitor general at the Supreme Court comes as a surprise given the previous expectations. Table 11 displays some interesting findings.

<table>
<thead>
<tr>
<th>Probability of Winning the Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Solicitor General Not Present</td>
</tr>
<tr>
<td>Solicitor General Present, but no Congruence</td>
</tr>
<tr>
<td>Solicitor General Present and Congruence</td>
</tr>
</tbody>
</table>

Table 11 – Predicted Probabilities for Personal S.G. Argument

*This holds experience at a governmental disadvantage, assumes the attorney has not clerked for the Supreme Court, and assumes the government is the respondent.*
When a staff attorney in the Office of the Solicitor General appears on behalf of the government, the base probability for governmental success, when all variables are at the most detrimental hypothesized positions, is $57\%$. This means that when all factors disfavor the Office of the Solicitor General, the government is still likely to win over half of the time. Holding all else constant, when the Solicitor General himself is present for oral arguments, the government’s likelihood of achieving success drops to only $34\%$; this represents a full $23\%$ decrease in the government’s chance of victory.

This finding is both interesting and puzzling. That is not to say, however, that it is altogether unreasonable. It may be that the original winnability of the case affects when the Solicitor General chooses to argue the case himself. That is, perhaps the solicitor general himself chooses to appear because the case itself begins at some preliminary disadvantage. Maybe the case is highly important to the administration politically, but rests on questionable legal grounds. In such cases, perhaps the president, the attorney general, or the solicitor general himself makes the decision to have the solicitor general argue the case in attempt to sway the court.

Alternately, the justices on the Supreme Court might see the presence of the solicitor general as a sign of political posturing. Wanting to decide cases in a fair, judicious, and impartial way to achieve the best legal results, the justices might take this

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16 That is, the government is the respondent, at an experiential disadvantage, the attorney has not clerked for a Supreme Court justice, the attorney arguing is not the Solicitor General, and the Supreme Court and federal government are at ideological odds. These probabilities are based on the original permutation of the model.
political maneuver by the solicitor general as an indication that they should start-out by doubting the veracity of the government’s legal claims.\footnote{Assuming, of course, that we buy the argument that justices do in fact decide cases that way – which is a debate for an entirely different set of literature.}

Regardless of the reasoning, the negative coefficient seems at first counter-intuitive. It certainly warrants further research, particularly research on why the solicitor general appears personally in some cases but not others, and how and why that decision is made.

b. Government Role

Like the Solicitor General variable, the significance of the governmental role variable produces interesting substantive ideas. As Table 12 indicates, when the government is respondent, the probability of the government winning is 57%. Compared to this base probability, the government assuming the role of petitioner raises the likelihood of success to 69%. This marks a 12% increase in the chances of success. This seems to lend further credence to the notion that the petitioner achieves success more readily than the respondent does. This result probably stems from the idea that the Supreme Court frequently takes cases it intends to overturn. The government wins more as petitioner than it does as respondent, but does it also win more as petitioner than nongovernmental litigators do? If so, would that result support one of the other, conventional explanations for solicitor general success? Specifically, McGuire quotes Scigliano (1971), saying:
“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 selectively at the merits; stated differently, the solicitor general knows how to pick winning cases.”

McGuire continues by saying:

“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.

He indicates that this certainly holds true in studies that fail to account for experience. In this study, however, experience is controlled for, and the variable still maintains its significance. That is, even when controlling for the effects of experience, the government is still more likely to win as the petitioner than if it were the respondent.

Perhaps then, if the government wins more as petitioner than nongovernmental attorneys, the results of this study not only show that the relationship between experience and success is not as traditionally expected, but also provides some support for the “conventional” theories explaining success that remain, aside from McGuire (1998) relatively untested. In fact, the data seems to lean that direction. As Table 13 indicates, the government wins 72% of cases in which it is the petitioners, while non-governmental litigants win only 61% of the cases in which they are petitioner.
Probability of Winning the Case

Solicitor General not present 57%

Solicitor General not Present and Petitioner 69%

Table 12 – Predicted Probabilities for Government Role
*This holds experience as a governmental disadvantage, assumes the attorney has not clerked for the Supreme Court, and assumes no ideological congruence.

<table>
<thead>
<tr>
<th>Petitioner Success</th>
<th>Government as Petitioner</th>
<th>Non-Government Attorney as Petitioner</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percent cases as Petitioner</td>
<td>51%</td>
<td>49%</td>
</tr>
<tr>
<td>Success rate</td>
<td>72%</td>
<td>61%</td>
</tr>
</tbody>
</table>

Table 13 - Petitioner Success rate between SG and Non-SG attorneys

c. Ideology and The Solicitor General

While neither ideological congruence nor the presence of the Solicitor General by itself causes a substantive increase in the likelihood of governmental victory, the combination of the two together does seem to have that effect. Again compared to the baseline, the presence of both other factors causes a 14% increase in the likelihood of victory. This means that if the solicitor general is present and the Supreme Court as a whole (meaning the median justice) and the executive branch are ideologically similar, then the governments enjoy a 71% likelihood of prevailing.

This can conceivably build on the previous proposal regarding the negative impact of the presence of the solicitor general. If the court views the presence of the
solicitor general as a political move by the administration, and there is ideological congruence between that administration and the court, then they would obviously be more receptive to those political positions.\(^{18}\)

Perhaps modeling this concept in a slightly different manner will lead to an alternate look at the results. Rather than including the solicitor general variable itself and the interaction term, I will replace them with two other variables. The first will be coded as one if both the solicitor general is present and he is ideologically congruent with the median justice on the Supreme Court, and zero otherwise. The second is coded as one if the solicitor general is both present and is not ideologically congruent with the median justice on the Supreme Court. This compares the presence of the solicitor general in each of the instances of congruency with the absence of the solicitor general in either instance. Table 14 displays the results.

\(^{18}\) Assuming, in this case, that decisions are made based on ideological policy preferences.
As with the previous model, the results similarly show that both experience and clerking for a justice at the Supreme Court fail to reach significance. Government role is once again highly significant in the positive direction and similar magnitude. Unlike the original model, here ideological congruence appears significant (with the slightly expanded allowance for significance). The unusual outcome here is that one of the new variables is significant while the other is not. In both cases, however, the coefficient is negative; this seems to confirm that regardless of whether the solicitor general and the court are congruent, his presence is still a negative influence on the government's

| Government Success | Coefficient | $P > |z|$ |
|--------------------|-------------|-------|
| **Constant**       | 0.320       | 0.203 |
| **Personal Characteristics** | | |
| Experience         | 0.062       | 0.743 |
| Clerked for Supreme Court | -0.132 | 0.518 |
| **Situational Dynamics** | | |
| Government Role    | 0.524       | 0.012** |
| Ideological Congruence | 0.361 | 0.081* |
| SG & Congruent     | -0.491      | 0.237 |
| SG & Incongruent   | -1.203      | 0.011*** |
| LR Chi² (6)        | 16.63       |      |
| Prob > Chi-Squared | 0.0107      |      |
| Psuedo R-squared   | 0.0286      |      |
| $N = 457$          |             |      |

Table 14 – Alternate S.G. Coding Model
chances of winning. This negative effect is exacerbated when the executive and the Supreme Court are not ideologically congruent.

Moreover, these results also confirm the idea that studying those within the Office of the Solicitor General as individuals rather than as just one group certainly helps explain some of the mystery behind governmental success at the Supreme Court. Continuing to look at the office in such a way will likely continue to shed further light on the role of the Office of the Solicitor General in determining case outcomes.
A. Discussion

The findings presented in this paper indicate a number of interesting ideas about the factors relevant in determining United States success at the Supreme Court from which we can draw several conclusions. First, while previous studies suggest that litigation experience is a primary factor in determining success at the Court, the results here seem to contradict that notion. Instead, when looking only at the counsel arguing on behalf of the government, experience fails to explain differences in success rates between attorneys. This result, while certainly significant and fascinating, is not the only outcome of interest.

The most remarkable finding here relates to the effect the presence of the solicitor general has on the outcome of cases. Contrary to the expected notion that the solicitor general’s presence makes a case more likely to fall in the government’s favor, the data support the opposite conclusion. The data indicate that the presence of the solicitor general actually lowers the chances that the government will win the case. Given that the literature in general has focused almost entirely on looking at the participation of the government as a single unit, rather than as a collection of individuals, is it unsurprising that such a result has not surfaced before.
Additionally, the findings suggest that there may be some support for prior “conventional” theories of solicitor success, namely case selection. As McGuire rightly pointed out, if ability to select only the best cases contributes to governmental victory, then the government should be more successful on those cases that were selection by the Office of the Solicitor General to bring to the Supreme Court for review. In these cases, the government would be the petitioner. As it turns out, the data show that, even controlling for the supposed effects of experience, the Untied States federal government, as petitioner, does win at a higher rate than do other litigants as petitioner. Moreover, this variable also indicates that the government is more likely to win as petitioner than it is as respondent, which is in line with the notion that the Supreme Court frequently accepts cases for review that it intends to overturn.

The last of the results of interest concerns the concept of ideological congruence. While congruence itself did not prove to be a significant factor in determining governmental success, congruence coupled with the presence of the solicitor general does increase the probability that the government will emerge victorious in a given case. As suggested throughout the data analysis, there can be a number of explanations and justifications for the effects shown for both the presence of the solicitor general, ideological congruence, and their interaction.

Even when the method of measurement for congruence changed to include the ideological position taken by the government in each case rather than the position of the president, congruence failed to prove independently significant. This result might suggest that, when looking only at the cases involving the government, the role of ideology in
determining success seems to fall away. Perhaps the significance of the interaction of the presidential ideology and the personal presence of the solicitor general is indicative of another factor at work as well. When the solicitor general personally represents the government and his principal is an ideological match with the court, the justices are more likely to defer to his agent. Perhaps this result suggests some support, albeit far from strong, that the deference argument is not totally without merit. In any event, the general lack of support for theories of ideological decision making seem striking, and their relevance to studies of governmental success certainly calls for additional examination.

Prior research fails to specifically address the presence of the individual solicitor general as a mitigating factoring in determining success of the government as a party at the United States Supreme Court. Additionally, most previous studies fail to examine the Office of the Solicitor General as a series of individuals litigating cases, rather than as a single entity. This paper fills in many of the holes left in this area of literature.

Having reviewed some of the findings from the previous chapter, I can turn now to my final section, where I propose a number of ways that other scholars can expand upon this work with future research.

B. Future Research

Although we have seen that experience may not have as much explanatory power as originally thought in relation to the attorneys in the Office of the Solicitor General, our exploration does not need to end there. Instead, there are a number of different ways we can examine this concept and various other avenues of research with which to continue our quest for answers.
One obvious way to expand upon the results of this research is to increase the data set. By expanding the set of cases, we can see if the results persist over various presidents and the terms of various other Supreme Court chief justices. Perhaps greater differences in ideological congruence between the presidents and the Supreme Court will have a different effect on the success rates. A logical first step then would be to look at the Warren Burger or Earl Warren courts.

Additionally, further information can be gleaned not simply by viewing all of the cases the same way, but instead, differentiating the cases by the type of issue involved in the case. Whether this differentiation involves dividing cases by criminal versus civil cases, or economic versus civil liberties, or even more specifically by any number of individual issues, such as those presented in Harold Spaeth’s data set, this division would be useful in determining if experience does play a larger role in some types of cases. For example, the court might place more importance on the personal presence of the solicitor general arguing before the court on criminal matters rather than civil ones, or economic issues rather than civil liberties ones (see Sheehan 1992).

Though not specifically addressed in this paper, we can gain more insight into the individual importance of the solicitor general himself by focusing on another aspect of his authority. The results here show that the appearance of the individual solicitor general is slight significant, but in a way contrary to my expectations. In addition to looking at the specific presence of the solicitor general, as I did here, perhaps looking at the explicit absence of the solicitor general on a case might prove informational as well.
Typically, regardless of which attorney within the Office of the Solicitor General is presenting the oral arguments of the case before the Supreme Court, the solicitor general himself is required to sign off on the brief before it is filed. There are some cases where the solicitor general has, for whatever reason, intentionally not signed on to a brief. In these cases, perhaps the notable absence of the solicitor general sends a different signal to the justices that the issue at hand is sufficiently contentious to cause a split in the executive branch between the president or the attorney general and the solicitor general.

In a similar line of thinking, we might consider the presence a non-traditional governmental attorney separately from the appearance of the customary attorneys from the Office of the Solicitor General. There are cases where the attorney general has argued for the government, and others where attorneys have been brought in by the solicitor general’s office from other departments and agencies. Further research can explore not only the effects of these attorneys on the outcome of the case, but can also seek to determine in what instances these attorneys are brought in to argue the case instead of the typical attorneys from within the Office of the Solicitor General.

Yet another way to expand on the finding is to take an individual justice view when determining case results. Instead of looking at the outcome of the case from the Supreme Court as a whole, future researchers can explore to see how individual justices vote on these cases. Perhaps some justices react differently to the personal presence of

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19 See, e.g. *Bethesda Hospital Assn. v. Bowen* [485 U.S. 399]; and *FERC v. Martin Exploration Management Co.* [486 U.S. 204].
solicitor general himself, while others might be more swayed by argumentation related to increased experience. This might be particularly interesting when examining the role of ideological congruence and the presence of the solicitor general on individual justices’ vote choices.

Finally, we can take an ever more individualized look at the attorney arguing the cases. If the goal here is to break free of the notion that experience reigns supreme as our only significant explanatory variable, and propose instead that something inherent in the office leads to success, we can look to the individual attorney level of analysis.

As can be expected, working in the Office of the Solicitor General can act as a springboard into more or other lucrative endeavors later in a career. Many who have worked in the solicitor general’s office have gone on to become judges or justices, to be appointed in various positions within administrations, and others still have gone on to work in private practice offering appellate litigation services where they continue to appear before the Supreme Court (Jacob 1978). By looking at some of these individual attorney careers when they have argued cases at the Supreme Court both during their time within the solicitor general’s office and again during private practice, we can see if they were more likely to win a case when there arguing for the government than otherwise.

When an attorney goes on to private appellate practice after working for the solicitor general’s office, they certainly gain additional experience in the process. Consequently, if an attorney has a greater success rate later in their career, we can reasonably infer that experience plays a significant role after all. If the attorney won more cases while part of the Office of the Solicitor General, when they possessed less
experience, then we can likewise infer that it was something inherent about the office, which caused the increased rate of victory.

In the end, there is much more work that can be done to add to our base of knowledge about the Office of the Solicitor General, and future research can certainly add to what we know and address many of the questions that remain unanswered.
REFERENCES


