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## Loyalty and Deference at Oral Arguments: An Empirical Examination of How Supreme Court Justices Treat Solicitors General

Amanda C. Bryan

Charles Gregory

Timothy R. Johnson

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# Loyalty and Deference at Oral Arguments: An Empirical Examination of How Supreme Court Justices Treat Solicitors General

*Amanda C. Bryan, Charles Gregory, and Timothy R. Johnson\**

*It is well documented that when the Office of the Solicitor General argues before the United States Supreme Court it is widely successful. Scholars have taken this success as evidence that the Court is deferential to the Solicitor General's office. This Article argues, however, that success is not synonymous with deference. Instead, by examining how the Justices treat the Solicitor General and deputies, this Article develops a more nuanced measure of deference to explain how and why the Court treats the Solicitor General differently than it treats other attorneys who appear before the nation's highest court. This Article uses this measure to test competing explanations of Solicitor General influence and overcome the observational equivalence between success and deference that beleaguers previous research. The results of this study support the argument that, during oral arguments, Justices on the Court are more deferential over time to the Solicitor General of the President who appointed him or her, than toward other Solicitors General.*

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\* Loyola University Chicago; Stephen A. Austin State University; and University of Minnesota, Twin Cities, respectively.

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## INTRODUCTION

During oral arguments in *King v. Burwell*,<sup>1</sup> Justice Antonin Scalia made no secret that he disagreed with the arguments put forth by Solicitor General Donald B. Verrilli Jr., who was responsible for defending President Barack Obama’s signature healthcare law.<sup>2</sup> At one point during an interaction between the two, Justice Scalia said: “Well, I disagree with that.”<sup>3</sup> Perhaps more interesting is the harsh language Justice Scalia used to characterize the Solicitor General’s response to a question concerning state-established healthcare exchanges: describing the response as “gobbledygook.”<sup>4</sup> Without question, these interactions demonstrate

1. 135 S. Ct. 2480 (2015).

2. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified at 42 U.S.C. § 18001 et seq.).

3. Transcript of Oral Argument at 48, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114).

4. *Id.* at 65. The answer Verrilli offered was, as follows:

GENERAL VERRILLI: So [. . .] no. I think the right way to think about this, Justice Alito, is that what’s going on here is that [. . .] the right place to focus, let me put it that way. The right place to focus here is not on the who, but on the what; on the thing that gets set up and whether it qualifies as an Exchange established by the State, and these Exchanges do qualify. And the reason they qualify is because they fulfill the requirement in Section 1311(b)(1) that each state shall establish an Exchange. And 1321 tells you that because it says to the HHS that . . . when a State hasn’t elected to meet the Federal requirements, HHS steps in, and what the HHS does is set up the required Exchange. It says such Exchange, which is referring to the [. . .] immediately prior to the required Exchange where the only Exchange required in the Act is an Exchange under Section 1311(b)(1). So it has to be that . . . what HHS is doing under the plain text of the statute is fulfilling the requirement of the Section 1311(b)(1) that each State establish an Exchange, and for that reason we say it qualifies as an Exchange established by the State. That’s reinforced, as Justice Breyer suggested earlier, by the definition which says that an Exchange is an Exchange established under Section 1311. 1311, again, has 1311(b)(1) which says each State shall establish an Exchange. And it has to be that way because Petitioners have conceded, and it’s at page 22 of their brief, that an Exchange that HHS sets up is supposed to be the same Exchange that Petitioners say function just like an Exchange that the State sets up for itself.

JUSTICE SCALIA: Well, you’re putting a lot of weight on the . . . one word, such, such Exchange. . . . [I]t seems to me the most unrealistic interpretation of “such” to mean the Federal government shall establish a State Exchange. Rather, it seems to me “such” means an Exchange for the State rather than an Exchange of the State. *How can the . . . Federal government establish a State Exchange. That is gobbledygook. You know, “such” must mean something different.*

GENERAL VERRILLI: *It isn’t gobbledygook, Justice Scalia.* And I think about it and I go back to something that Justice Alito asked earlier. And that [. . .] if the language of 36B were exactly the same as it is now, and the statute said in 1321 that an Exchange . . .

Justice Scalia's clear opposition to the Solicitor General's position—opposition he reiterated in his dissenting opinion.<sup>5</sup> But the interactions between Justice Scalia and the Solicitor General stand in stark contrast to how the two Justices appointed by President Obama—Justice Sonia Sotomayor and Justice Elena Kagan—addressed the Solicitor General's argument.

Justice Sotomayor asked the Solicitor General fewer than a handful of questions and her comments during the *King* oral arguments and questions toward Verrilli lacked the acerbic language that accompanied Justice Scalia's remarks.<sup>6</sup> This was rather surprising because, for most of her career as a federal judge and Supreme Court Justice, Justice Sotomayor cultivated a reputation as a jurist who asks pointed questions and dominates oral arguments. But during the Solicitor General's argument in *King*, she was uncharacteristically silent and gentle. Justice Elena Kagan was equally as sanguine about Verrilli's argument. But what led Justices Scalia, Sotomayor, and Kagan to treat the Solicitor General in the different ways that they did?

To answer this question, this Article begins with the notion that oral arguments are one of the few times the United States Supreme Court interacts with the public. In fact, these interactions are the first time the Justices discuss a case with one another and the *only* time they discuss the case with the advocates for each side. The quality of such discussions is important because they are finite—each side only gets thirty minutes—and because they are public. Specifically, oral arguments introduce the case and, oftentimes, the Justices to the American people. Thus, how the Justices choose to treat the advocates before them can, and does, have important implications for how the Court is understood and how effectively the Justices are able to gather the information they need to decide America's most important legal controversies.

In addition, this Article situates its argument within the broader literature that seeks to explain how the Court interacts with the executive

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. set up by HHS shall qualify as an Exchange established by the State for purposes of Section 1311, you wouldn't change the language of 36B one iota, and that wouldn't be any doubt in anyone's mind that the . . . subsidies were available on Federal Exchanges. And what we're saying is that effectively reading 1311 and 1321 together, that is what the statute does. And that is certainly . . . a reasonable reading of the statute. It is really the only reading of the statute that allows you to be faithful to the text of 1311(b)(1), the word "shall," and to the Tenth Amendment.

*Id.* at 64–66.

5. *King*, 135 S. Ct. at 2496–507 (Scalia, J. dissenting).

6. Transcript of Oral Argument at 14, 48, 72, *King*, 135 S. Ct. 2480 (No.14-114).

branch within the system of separated powers, specifically through its interactions with the Solicitor General when he or she, or someone from his or her office, appears before the Court. This literature suggests that, for a variety of reasons, the Solicitor General clearly has a special relationship with the Court.<sup>7</sup> This Article attempts to tease apart the competing theories of Solicitor General influence by analyzing a more nuanced form of deference than is typical. In particular, it posits that, instead of merely analyzing the success of the Solicitor General on the merits before the Court—or his or her success in convincing the Court to grant or deny certiorari in a given case—deference should be measured by how the Justices treat the Solicitor General in the one public aspect of the Court’s decision-making process—oral arguments.

Most specifically, then, this Article sheds light on whether Justices are more deferential to the Solicitor General of the President who appointed him or her during oral arguments. To test this claim, it utilizes data from 1986–2006 in an effort to determine how the Justices treat attorneys who appear before the Court. In so doing, this Article follows the lead of Black, Treul, et al. (2011)<sup>8</sup> and Johnson et al. (2009)<sup>9</sup> to compare the number of questions asked by Justices to Solicitors General and the emotional sentiment of such questions. Most specifically, it expects Justices to be more deferential to the emissaries of the President to whom they owe their seat, than to other Solicitors General or attorneys.

Part I of this Article establishes why Supreme Court oral arguments are so important to the Justices’ decision-making process and how Justices treat attorneys during these proceedings affects cases’ outcomes. Part II turns to the Court’s place in the federal system of separated powers. From there, Part III specifically considers the existing literature on the Court’s relationship with the Solicitor General. Next, Part IV builds the argument that deference should be understood as how the Justices treat the Solicitor General during oral arguments rather than whether the Solicitor General actually wins cases when he or

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7. RYAN C. BLACK & RYAN J. OWENS, *THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT: EXECUTIVE INFLUENCE AND JUDICIAL DECISIONS* 7–9 (2012) (discussing reasons for the Solicitor General’s success). See LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 7 (1987) (“[T]he influence of the Solicitor at the Court goes beyond helping the Justices set their docket.”).

8. Ryan C. Black, Sarah A. Treul, Timothy R. Johnson & Jerry Goldman, *Emotions, Oral Arguments, and Supreme Court Decision Making*, 73 J. POL. 572, 577 (2011) [hereinafter Black, Treul, et al.].

9. Timothy R. Johnson et al., *Inquiring Minds Want to Know: Do Justices Tip Their Hands with Questions at Oral Arguments in the U.S. Supreme Court?*, 29 WASH. U. J.L. & POL’Y 241, 242 (2009).

she appears before the Court. Part V discusses the data used to test this assertion as well as the variables employed in the models. Finally, Part VI presents the results and offers some remarks about why this measure provides the best picture of how and why the Supreme Court demonstrates deference to the Solicitor General and, in turn, to the executive branch of the United States.

### I. THE IMPORTANCE OF SUPREME COURT ORAL ARGUMENTS

Conventional wisdom in judicial politics suggests that oral arguments presented to the Supreme Court generally have no impact on how the Justices decide. As Jeffrey Segal and Harold Spaeth argue, there is no indication oral argument “regularly, or even infrequently, determines who wins and who loses.”<sup>10</sup> David Rohde and Spaeth assert oral arguments have little influence on the outcome of a case because Justices’ voting preferences are stable.<sup>11</sup> As evidence that Justices do not think about these proceedings as they decide the legal and policy issues of a case, Segal and Spaeth reference Justice Lewis F. Powell Jr.’s copious conference notes that make almost no references to oral argument.<sup>12</sup> This is important for their contention because the conference—where Justices cast initial votes in a case—occurs within a day or so of when Justices sit for oral arguments. In short, Segal and Spaeth suggest that if none of the Justices used the words “oral argument” during private conference discussions then the proceedings in open court must not affect the outcome of the case.<sup>13</sup> Generally, then, for Rohde and Spaeth and Segal and Spaeth, Justices’ votes will not change as a result of what transpires during a one-hour exchange between the Court and counsel.<sup>14</sup>

The Justices themselves contest this notion. Chief Justice Charles Evans Hughes claimed that oral arguments helped the Court “separate the wheat from the chaff.”<sup>15</sup> In 1955, Justice John Marshall Harlan explained that the view that oral arguments do not “count” was a “greatly mistaken one.”<sup>16</sup> He viewed oral arguments as “perhaps the most effective weapon”

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10. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 280 (2002).

11. DAVID W. ROHDE & HAROLD J. SPAETH, *SUPREME COURT DECISION MAKING* 155 (1976).

12. SEGAL & SPAETH, *supra* note 10, at 280.

13. *Id.*

14. ROHDE & SPAETH, *supra* note 11, at 155.

15. DAVID C. FREDERICK, *THE ART OF ORAL ADVOCACY* 3 (2d. ed. 2011).

16. John M. Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?*, 41 *CORNELL L.Q.* 6, 6 (1955).

that appellate attorneys have.<sup>17</sup> Contemporary Justices share this opinion. Chief Justice John Roberts has called these proceedings “terribly, terribly important,” and Justice Scalia, who once called them a “dog and pony show,” tempered his view and admitted that “things can be put into perspective during oral arguments in a way that they can’t in a written brief.”<sup>18</sup>

There is now a substantial body of research to suggest that the Justices are correct in their assertion that oral arguments play a pivotal role in the Supreme Court’s decision-making process.<sup>19</sup> Indeed, although difficult to study, these proceedings have been the subject of scholarly inquiry for decades. Early analyses, however, used mostly anecdotal evidence to support such a hypothesis. Arthur Miller and Jerome Barron, for example, used anecdotes from notable Supreme Court cases to demonstrate how the Justices “can subtly steer counsel beyond the frontiers of traditional doctrine” and subsequently push the law closer to the Justices’ preferences and beyond the boundaries presented in the litigants’ briefs.<sup>20</sup>

In addition, Wasby et al. (1976) used examples from cases dealing with racial equality and desegregation in the mid-twentieth century to suggest that the Justices’ behavior at oral argument could reveal their strategies and preferences in ways that opaque written opinions could not.<sup>21</sup> Their analysis of the deliberate sample of cases, for example, indicated that the Justices’ “questions” were often more appropriately deemed “statements.”<sup>22</sup> Wasby et al. (1976) further noted that the Justices appeared to be negotiating over the legal and policy ramifications of the case with each other, rather than having a back-and-forth conversation with the lawyers.<sup>23</sup> Because there was a strong parallel between the Justices’ questions during oral argument and their final decisions on the merits, Wasby et al. (1976) suggested that their behavior during oral argument could be used to better understand the Justices’ strategies and

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17. *Id.* at 11.

18. DAVID M. O’BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 260 (Aaron Javiskas et al. eds., 9th ed. 2011); John G. Roberts, Jr., *Oral Advocacy and the Reemergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 69 (2005).

19. *See, e.g.*, TIMOTHY R. JOHNSON, *ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT* 97–99 (2004) (finding that Supreme Court opinions are influenced by oral argument); Timothy R. Johnson et al., *The Influence of Oral Argument on the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 99, 113 (2006).

20. Arthur Selwyn Miller & Jerome A. Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187, 1210 (1975).

21. Stephen L. Wasby et al., *The Functions of Oral Argument in the U.S. Supreme Court*, 62 Q.J. SPEECH 410, 411 (1976).

22. *Id.*

23. *Id.* at 418.

preferences.<sup>24</sup>

Similarly, E. Barrett Prettyman Jr. conducted a somewhat random analysis of oral arguments to find instances in which the Justices posed hypothetical questions to the litigants.<sup>25</sup> He concluded, similar to Wasby et al. (1976), that the Justices were using hypotheticals not only to test the policy implications of their decision, but also to engage in a kind of “pre-conference” discussion with their fellow Justices.<sup>26</sup>

Schubert et al. (1992) provided the first generalizable account of oral arguments.<sup>27</sup> Schubert et al. (1992) studied the transcripts and audio recordings of 300 randomly selected oral arguments and looked at word usage, pitch, other acoustical components of the Justices’ speech, as well as the types of arguments the Justices made.<sup>28</sup> They were primarily focused on two related goals: (1) demonstrating that oral arguments matter to the Justices and (2) that observational methods can, and should, be used to rigorously study these proceedings.<sup>29</sup> While they were semi-successful, their work never got fully off the ground.<sup>30</sup>

Despite these early accounts, the vast majority of what society knows about oral arguments comes from analyses conducted over the past fifteen years.<sup>31</sup> This work over the past fifteen years has firmly established that these proceedings are a pivotal stage in the Court’s decision-making process for three reasons: (1) the Justices use oral arguments to gather information relevant to their decision-making task; (2) oral arguments can directly influence and persuade the Justices during the proceedings; and (3) given the essential nature that these proceedings play in the Court’s decision-making process, a significant body of research has established that the Justices’ behavior during oral arguments is predictive of how they will ultimately decide cases they hear. In Part I.A, Part I.B., and Part I.C., this Article discusses the research that focuses on each of these specific areas of analysis.

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24. *Id.* at 420–22.

25. E. Barrett Prettyman, Jr., *The Supreme Court’s Use of Hypothetical Questions at Oral Argument*, 33 CATH. U. L. REV. 555, 556 (1984).

26. *Id.*

27. James N. Schubert et al., *Observing Supreme Court Oral Argument: A Biosocial Approach*, 11 POL. & LIFE SCI. 35, 36 (1992).

28. *Id.* at 35.

29. *Id.*

30. *Id.* at 51.

31. See text accompanying note 19 (discussing the pivotal role oral arguments play in Supreme Court decisions).



### A. Oral Arguments as an Information Gathering Tool

The Justices have access to a substantial amount of information in the form of litigant and amicus curiae briefs. These briefs serve to inform the Justices about the legal merits of various arguments and the policy and strategic implications of potential outcomes.<sup>32</sup> As Timothy Johnson notes, however, the Justices are passive recipients of this information: they do not directly control what the parties include in their briefs.<sup>33</sup> As a result, oral arguments play an essential role in the Justices' decision-making process because these proceedings represent the first and best opportunity the Justices have to actively seek out information they deem relevant to their decision-making process.

Justice Harlan argued that oral arguments offer an opportunity for the Court and counsel to engage in a joint effort to "search out the truth both as to the facts and the law."<sup>34</sup> Early Court-watchers also seized upon the fact that the Justices raised novel issues in oral argument in an attempt to use litigants to better understand the legal merits and policy implications of various arguments.<sup>35</sup> In fact, studies on attorney quality demonstrate that more experienced attorneys are more persuasive—at least in part—because they are better able to reduce the cost Justices must pay to obtaining information.<sup>36</sup> Kevin McGuire argues that Justices need "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."<sup>37</sup>

Oral arguments are not just about discussing legal principles. As policy-maximizing actors, the Justices require information about the potential policy implications of their decision.<sup>38</sup> Because they require the other branches to implement their opinions, the Justices also need information about the preferences of external actors and how the other branches may respond to their decisions.<sup>39</sup> Oral arguments, then, provide an invaluable

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32. Paul M. Collins, Jr., *Lobbyists Before the U.S. Supreme Court: Investigating the Influence of Amicus Curiae Briefs*, 60 POL. RES. Q. 55, 56–57 (2007).

33. JOHNSON, *supra* note 19, at 101–02.

34. Harlan, *supra* note 16, at 7.

35. ROHDE & SPAETH, *supra* note 11, at 60.

36. Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187, 189 (1995); Roberts, *supra* note 18, at 79.

37. Kevin T. McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 POL. RES. Q. 505, 522 (1998).

38. Michael A. Bailey et al., *Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making*, 49 AM. J. POL. SCI. 72, 73 (2005).

39. LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 138–39 (1998); Timothy R. Johnson, *The Supreme Court, the Solicitor General, and the Separation of Powers*, 31 AM.

source of information on both those fronts.

Johnson explicitly tests whether the Justices use oral arguments to seek out information that is not contained in the briefs by content coding the questions raised during the proceedings and comparing them to the issues included in the litigants' and amici briefs.<sup>40</sup> Specifically, he finds that the Justices use oral argument to "obtain information beyond that which is provided by the parties" to the case and, more specifically, that they use oral argument to ascertain their policy options, aid them in understanding the preferences of external actors, and determine how those actors may respond to the Court's decision.<sup>41</sup> James C. Phillips and Edward L. Carter similarly suggest that the Justices seek out novel information during oral argument and that this behavior has actually increased over time.<sup>42</sup>

Eve M. Ringsmuth and Johnson validate these findings and offer further evidence that the Court behaves strategically during oral argument as the Justices are more likely to seek out information about Congress and its preferences when the Court is constrained (i.e., ideologically distant relative to the median members of both chambers of Congress).<sup>43</sup> Black et al. (2013) add evidence that the Justices are more actively engaged in seeking out information during oral argument in cases that are politically salient to them personally.<sup>44</sup>

Generally, then, oral arguments are a pivotal step in the Court's decision-making process because they provide the Justices with an opportunity to seek out new information that is relevant to their decision-making tasks. The Justices use these proceedings to ask the litigants about the legal merits of their arguments and to help them understand the potential policy implications of different case outcomes. Further, argument sessions help the Justices better understand how external actors might respond to the decisions they will ultimately make.

### *B. Oral Argument and Persuasion*

Certainly the previous sections indicate Justices can and do use oral arguments to gain information that will help decide cases they hear, but the

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POL. RES. 426, 428 (2003).

40. JOHNSON, *supra* note 19, at 55.

41. *Id.* at 55–56.

42. James C. Phillips & Edward L. Carter, *Source of Information or "Dog and Pony Show"?* *Judicial Information Seeking During U.S. Supreme Court Oral Argument, 1963–1965 & 2004–2009*, 50 SANTA CLARA L. REV. 79, 107, 151 (2010).

43. Eve M. Ringsmuth & Timothy R. Johnson, *Supreme Court Oral Arguments and Institutional Maintenance*, 41 AM. POL. RES. 651, 660 (2013).

44. Ryan C. Black et al., *Toward an Actor-Based Measure of Supreme Court Case Salience: Information-Seeking and Engagement During Oral Arguments*, 66 POL. RES. Q. 804, 812 (2013).

key question is whether they are actually persuaded by arguments presented to them during these proceedings. Or, are oral arguments simply the “dog and pony show” as Justice Scalia suspected early in his career?

While Segal and Spaeth suggest Justices may not be persuaded to vote in a given way based on what transpires during oral arguments, the Justices tend to disagree with this assessment.<sup>45</sup> For instance, Justice Ruth Bader Ginsburg once cautioned that though not many cases are won based on the oral argument alone, a party can lose a case at oral argument.<sup>46</sup> In addition, former Chief Justice William Rehnquist made similarly restrained comments about the probability that a Justice changes his or her vote based on oral argument when he admitted that oral argument “does make a difference.”<sup>47</sup> He said: “I think . . . [i]n a significant minority of the cases in which I have heard oral argument, I have left the bench feeling differently about the case than I did when I came on the bench.”<sup>48</sup> Recent research has focused on how and when oral arguments might play a role in altering or even changing the Justices’ decisions on a case. Scholars demonstrate at least two ways that oral arguments can alter the Justices’ votes: (1) these proceedings might provide unique information that clarifies the legal or policy elements of a case, and (2) these proceedings might influence the Justices’ votes by altering the frame or dominant issue of the case.<sup>49</sup>

The first way that oral arguments might serve to persuade the Justices is by providing them with novel information that alters their view of the case. As discussed above, these proceedings serve the important function of providing the Justices with relevant information about the legal and policy elements of a case as well as about the preferences of actors external to the Court.<sup>50</sup> The Justices might have strong and unwavering preferences, but, unless one assumes they are perfectly informed, the Justices might need additional information to determine the potential ideological impact of their decision. Oral arguments provide litigants an opportunity to supply the Justices with the information they need to translate their preferences into law.

For instance, McGuire suggests that more experienced litigants have a

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45. FREDERICK, *supra* note 15, at 3–5; Harlan, *supra* note 16, at 6–9.

46. Hon. Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567, 569 (1999).

47. Roberts, *supra* note 18, at 80 n.8.

48. WILLIAM H. REHNQUIST, *THE SUPREME COURT* 243 (1987).

49. JOHNSON, *supra* note 19, at 111–12; Justin Wedeking, *Supreme Court Litigants and Strategic Framing*, 54 AM. J. POL. SCI. 617, 617–18 (2010).

50. See *supra* Part I.A (discussing the importance of oral arguments as an information gathering tool).

greater probability of winning than their similarly situated, but less experienced, peers.<sup>51</sup> He argues this is because repeat players are better able to provide the Justices with essential information about the legal and policy merits of the case.<sup>52</sup> Although McGuire does not differentiate between the information litigants provide in their briefs and in their oral argument, his findings provide preliminary support for the hypothesis that arguments made at oral argument *can* be persuasive.<sup>53</sup> Indeed, if the Justices had strong and unwavering prior beliefs about the case, the quality of information provided by attorneys would have little to no effect on the Justices' votes.<sup>54</sup>

Regardless of the specific quality of attorneys who appear, Johnson offers evidence that information presented during oral arguments uniquely influences the Justices' votes.<sup>55</sup> He hypothesizes that if oral arguments play a significant role in how the Justices make their decisions, then information from these proceedings should feature prominently in the Court's eventual opinions.<sup>56</sup> To test this claim, Johnson tabulates the arguments raised in litigant and amicus briefs as well as the arguments raised during oral arguments.<sup>57</sup> He then tracks which arguments found their way into the Court's eventual majority opinion.<sup>58</sup> The results demonstrate that the Justices make statistically and substantively significant use of information that emanates *only* from oral arguments.<sup>59</sup> Hence, these proceedings can and do produce useful information that Justices use to form their beliefs and preferences about the case and therefore alter their legal and policy decisions.<sup>60</sup>

The second way that oral arguments may influence the Justices' votes is by altering the frame or dominant issue of the case. By analyzing how litigants and the lower courts frame their arguments, Justin Wedeking finds that external actors' behavior can impact the Justices' decisions.<sup>61</sup> Because petitioners lost at the lower court level, they have a strategic incentive to provide an alternative frame of the case when appearing before the

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51. McGuire, *supra* note 37, at 522–23.

52. *Id.*

53. *Id.*

54. *See, e.g.,* SEGAL & SPAETH, *supra* note 10, at 280 (considering the extent to which an oral argument may or may not sway a Justice's vote in a case).

55. JOHNSON, *supra* note 19, at 108.

56. *Id.* at 111.

57. *Id.* at 104–07.

58. *Id.* at 111.

59. *Id.*

60. *Id.* at 111–12.

61. Wedeking, *supra* note 49, at 617–19.

Supreme Court—to adopt the same frame used in the lower court would be to present a view that has already lost.<sup>62</sup> Wedeking finds that, all else equal, when the petitioner uses an alternative frame from the lower court decision, the petitioner increases his or her odds of winning the case.<sup>63</sup> This suggests that changing the rhetorical dimension of the case can lead to a more favorable interpretation “just enough to change the political outcome from an apparent loss to a victory.”<sup>64</sup> Wedeking suggests that this finding is consistent with Herbert Kritzer and Mark Richards’s analysis on the constraining force of the law on judicial decisions.<sup>65</sup> Per Kritzer and Richards, the Justices feel constrained to operate within an established jurisprudential regime—if a litigant can shift the debate to one issue that is more favorable to him or her (e.g., altering the level of scrutiny), he or she might be able “to snatch victory out of the jaws of defeat.”<sup>66</sup>

The Justices also use this sort of heresthetical maneuvering during oral arguments to alter case outcomes. Analyzing the Justices’ behavior during these proceedings between 1998 and 2006, Black, Schutte, et al. (2013) demonstrate that a Justice is more likely to raise and discuss threshold issues (e.g., whether the case was moot) when the most likely result on the case’s merits deviated from the Justice’s preferred policy outcome.<sup>67</sup> Similarly, if a Justice knew that the case would likely be resolved in a fashion that is inconsistent with his or her preferences, a Justice is more likely to push his or her colleagues to dispose of the case on a threshold issue.<sup>68</sup> This finding is consistent with experimental research into motivated reasoning and legal decision making.<sup>69</sup> The bottom line is that, by reframing the issues during oral arguments, the litigants and Justices can alter the debate and, in some instances, alter the outcome of the case as well.

Finally, by piecing together various thread of research, Johnson et al.

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62. *Id.* at 619.

63. *Id.*

64. *Id.*

65. Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 306 (2002); Wedeking, *supra* note 49, at 618 n.5.

66. Lee Epstein & Olga Shvetsova, *Heresthetical Maneuvering on the U.S. Supreme Court*, 14 J. THEORETICAL POL. 93, 110 (2002).

67. Ryan C. Black, Rachel A. Schutte & Timothy R. Johnson, *Trying to Get What You Want: Heresthetical Maneuvering and U.S. Supreme Court Decision Making*, 66 POL. RES. Q. 819, 819–21 (2013) [hereinafter Black, Schutte, et al.].

68. *Id.* at 819.

69. Eileen Braman, *Reasoning on the Threshold: Testing the Separability of Preferences in Legal Decision Making*, 68 J. POL. 308, 310 (2006).

(2006) provide compelling evidence that oral arguments matter.<sup>70</sup> They systematically code Justice Harry Blackmun's grades of attorney quality during oral argument and show, first, that he tended to give better grades to lawyers who possess characteristics that are typically associated with high-quality advocates. Specifically, he tended to give better grades to attorneys with more litigating experience or attorneys who attended elite law schools.<sup>71</sup> Second, Blackmun's grades were significant predictors of how the Court would vote even when controlling for other legally and attitudinally relevant variables *and* even when controlling for those same background characteristics used to determine that Blackmun's grades were not randomly assigned.<sup>72</sup> In confirmation of these findings, Ringsmuth et al. (2013) analyze the pre- and post-oral argument notes of Justice Powell and Justice Blackmun and find that the Justices altered their disposition about a case due in part to the arguments raised in oral argument.<sup>73</sup> Better performance of an attorney during oral arguments—either by providing high-quality information or strategically reframing the case—clearly seems to increase the odds that the litigant will win the case.

### *C. Oral Arguments and Predicting Case Outcomes*

Most importantly, this Article next considers whether what transpires during oral arguments can help scholars predict which side will actually win a case. Recall that oral arguments provide the Justices with important and unique information that can persuade the Justices to change their views and ultimate decisions in a case.<sup>74</sup> Given the pivotal role that these proceedings play in the Court's decision-making process, it should not be surprising to find that Court-watchers can use oral arguments to predict how the Court will rule in a given case.

Very early on in the study of oral arguments, scholars knew, or at least suspected, that the Justices' behavior during these proceedings could signal their eventual votes. Wasby et al. (1976) and Donald Cohen, for example, conducted qualitative assessments of the Justices' behavior during these proceedings and noted that the Justices' questions and statements closely mirrored the outcome and analysis used to justify that outcome in the Court's written opinions.<sup>75</sup> Linda Greenhouse noted that she could

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70. Johnson et al., *supra* note 19, at 104.

71. *Id.* at 105–06.

72. *Id.* at 107–08.

73. Eve M. Ringsmuth et al., *Voting Fluidity and Oral Argument on the U.S. Supreme Court*, 66 POL. RES. Q. 429, 431–40 (2013).

74. See *supra* Part I.B (explaining the persuasiveness of oral arguments).

75. Donald S. Cohen, *Judicial Predictability in United States Supreme Court Advocacy: An*

outperform statistical models of Supreme Court decision making and legal experts due, at least in part, from her ability to make inferences about the Justices' behavior during oral arguments.<sup>76</sup> The question becomes whether the Justices systematically telegraph their intent in such a way that can be captured through methodical data collection.

Early analyses based on small samples of cases determined that the Justices speak at different rates from each other and at different rates between cases, providing a useful variable to determine, from a quantitative level, whether the Justices' behavior can be used to predict their votes.<sup>77</sup> A smattering of studies used this intuition to conduct small-n quantitative analyses of cases to determine whether the rate at which Justices speak is predictive of how they will vote. Sarah Shullman, for example, watched ten oral arguments and coded each of the Justices' comments based on how "helpful" or "hostile" their comments were to the litigant.<sup>78</sup> She noted that the Justices generally asked more hostile questions than friendly questions, that they specifically asked more hostile questions of the litigant who would go on to lose, and that they generally asked more questions (helpful or hostile) of litigants who ultimately lost the case.<sup>79</sup> Chief Justice Roberts conducted a similar analysis of fourteen cases from 1980 and fourteen cases from 2003.<sup>80</sup> He found that the litigant who was asked the most questions lost in twenty-four of those twenty-eight cases.<sup>81</sup>

Lawrence Wrightsman analyzed a non-random sample of twelve "ideological" cases and twelve "non-ideological" cases from the October 2004 term.<sup>82</sup> He defined an ideological case as one that should "trigger a value-laden bias in a justice."<sup>83</sup> His analysis largely confirmed what Shullman and Justice Roberts found: the side receiving more questions lost in seven of the twelve "ideological cases"—cases that are probably more

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*Analysis of the Oral Argument in Tennessee Valley Authority v. Hill*, 2 U. PUGET SOUND L. REV. 89, 110 (1978); Wasby et al., *supra* note 21, at 411–12.

76. Linda Greenhouse, *Press Room Predictions*, 2 PERSP. ON POL. 781, 781–82 (2004).

77. See Wasby et al., *supra* note 21, at 413–14 (discussing the rates at which the Justices ask questions as a means of determining the effectiveness of oral argument).

78. Sarah Levien Shullman, *The Illusion of Devil's Advocacy: How the Justices of the Supreme Court Foreshadow Their Decisions During Oral Argument*, 6 J. APP. PRAC. & PROCESS 271, 273 (2004).

79. *Id.* at 274.

80. Roberts, *supra* note 18, at 75.

81. *Id.*

82. LAWRENCE S. WRIGHTSMAN, *ORAL ARGUMENTS BEFORE THE SUPREME COURT: AN EMPIRICAL APPROACH* 137–38 (2008).

83. *Id.* at 137.

controversial for the Court.<sup>84</sup> This number dramatically decreased, however, in the “non-ideological cases”—where he could predict the winner in only three of the twelve cases.<sup>85</sup>

Johnson et al. (2009) conducted the first systematic, large-n analysis used to determine whether the Justices’ behavior during oral arguments is predictive of their final votes by studying all oral argument transcripts during the 1979 to 1995 Court terms.<sup>86</sup> They note that the mean number of questions asked per case increased over that time period from a minimum of slightly above eighty questions per case in 1985 to a maximum of 147 questions per case in 1995.<sup>87</sup> Further, they found that the average number of words uttered by the Justices during these proceedings increased from about 2,000 words per oral argument at the tail end of the Burger Court to over 2,800 words per oral argument in the early 1990s.<sup>88</sup>

Importantly, Johnson et al. (2009) demonstrate that the relative number of questions and words directed at the two sides is a statistically and substantively significant predictor in determining which side will win a case.<sup>89</sup> Indeed, when controlling for the Justices’ ideological preferences and other relevant variables (such as the Solicitor General and interest group participation) multivariate analysis indicates that there is a .64 probability of reversal when the Justices ask the same number of questions of each side but only a .39 probability of reversal when the Justices ask the petitioner fifty more questions than the respondent.<sup>90</sup> They find a similar pattern when analyzing the number of words spoken by the Justices during each side’s argument.<sup>91</sup>

Johnson et al. (2009)’s large-n, quantitative study indicates that the Justices’ behavior during oral arguments is highly predictive of their final votes.<sup>92</sup> It also demonstrates that scholars can use simple observational data to make such predictions. Subsequent analysis has delved deeper into the theory and data to generate more qualitatively rich accounts of the Justices’ behavior. For example, drawing on the fields of social

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84. *Id.* at 140–41; *see* Shullman, *supra* note 78, at 278–79 (finding that Justices ultimately asked less questions at oral argument of the subsequently prevailing party); *see also* Roberts, *supra* note 18, at 75 (discussing the number of questions litigants received from the Justices then comparing that to the case’s outcome).

85. WRIGHTSMAN, *supra* note 82, at 141.

86. Johnson et al., *supra* note 9, at 250.

87. *Id.* at 252.

88. *Id.* at 253.

89. *Id.* at 257.

90. *Id.* at 258.

91. *Id.* at 259.

92. *Id.* at 260–61.



psychology and linguistics, Black, Treul, et al. (2011) hypothesize that the Justices are likely to exhibit their preferences and views through the emotional content of their language during oral argument.<sup>93</sup> If the Justices have a preference, especially a strong preference, their “words, and the emotions behind them,” can provide observers valuable insights into the Justices’ “intentions, motives, and desires.”<sup>94</sup>

Ultimately, the public discussion that transpires at oral arguments can help scholars predict case outcomes. Combined with the other advantages of these proceedings, it is clear that oral arguments are, and should be, an important part of the Court’s decision-making process.

## II. THE SEPARATION OF POWERS, EXECUTIVE SANCTIONS, AND THE COURT

Within the context of oral arguments and the decision-making process more generally, Supreme Court Justices attempt to rule as closely as possible to their most preferred goals. At the same time, however, their decisions are constrained.<sup>95</sup> As they pursue policy goals, Justices pay attention to the preferences of external actors—especially those of the current Congress and executive branch. As Lee Epstein and Jack Knight point out: “To create efficacious law—that is, policy that the other branches will respect and with which they will comply—Justices must take into account the preferences and expected actions of these government actors.”<sup>96</sup> In other words, Justices on the Court act strategically when dealing with the other branches. This Part provides an argument about why the Justices must be specifically cognizant of the executive branch’s preferences.

Generally, Supreme Court Justices account for how the executive branch may react to decisions because the President can sanction the Court in a number of ways if he, or an agency, does not agree with their decisions. This Article focuses on three sanctions that might come into play: (1) executive agencies or the President might choose not to enforce the Court’s decisions, (2) executive agencies or the President can support anti-Court action in Congress, and (3) the President or agencies may publically criticize or withdraw support if they disagree with the Court’s decisions.

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93. Black, Treul, et al., *supra* note 8, at 577.

94. STEPHEN L. WASBY, *THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM* 267 (4th ed. 1993).

95. EPSTEIN & KNIGHT, *supra* note 39, at 138; FORREST MALTZMAN ET AL., *CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME* 18–19 (2000).

96. EPSTEIN & KNIGHT, *supra* note 39, at 138.

First, although executive agencies have the power to enforce the Court's decisions, they do not have to do so. As Epstein and Walker note, "[t]he bureaucracy can assist the Court in implementing its policies, or it can hinder the Court by refusing to do so, a fact of which the Justices are well aware."<sup>97</sup> While scholars debate about whether the President fully controls the bureaucracy and uses it for his political advantage, Terry Moe demonstrates that Presidents have some control over independent commissions.<sup>98</sup> Thus, even though a President might not be able to unilaterally order an agency to disregard a Court decision, the threat is real, and has been carried out in the past. For instance, Stephen L. Wasby notes that the Reagan administration had a policy of "nonacquiescence" for judicial decisions that it disliked, especially in social security cases.<sup>99</sup>

While the President might not have absolute control over the bureaucracy, he or she can personally sanction the Court by refusing to enforce its decisions. The most oft-cited example of this behavior is President Jackson's response to a Court decision that he particularly disliked: "John Marshall has made his decision, now let him enforce it."<sup>100</sup> Other confrontations demonstrate that the President can, and does, judge whether the Court has made the right decision. For instance, President Jackson vetoed a bill that established a national bank even after the Court declared such an entity constitutional.<sup>101</sup> Several years later President Lincoln defied the Taney Court by refusing to release an alleged traitor, imprisoned while the right of habeas corpus was suspended, even though the Court ordered him to do so.<sup>102</sup> This concern about enforcement is not relegated to the 19th century. Rather, Craig R. Ducat notes Justice Frankfurter's concern when the Court decided *Brown v. Board of Education*:<sup>103</sup> "Nothing could be worse from my point of view than for this Court to make an abstract declaration that segregation is bad and then have it evaded by tricks."<sup>104</sup>

Second, beyond refusing enforcement, the administration can support anti-Court action in Congress if the President or an agency disagrees with

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97. LEE EPSTEIN & THOMAS G. WALKER, *CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES, AND JUSTICE* 39 (Sarah Calabi et al. eds., 9th ed. 2016).

98. Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197, 200 (1982).

99. WASBY, *supra* note 94, at 330.

100. CRAIG R. DUCAT, *CONSTITUTIONAL INTERPRETATION* 110 (6th ed. 1996).

101. JOHNSON, *supra* note 19, at 9.

102. Johnson, *supra* note 39, at 431.

103. DUCAT, *supra* note 100, at 1301.

104. *Id.* at 110.

the Justices' policy choices.<sup>105</sup> Two examples illustrate this tactic: President Roosevelt's Court-packing plan in response to the Justices' continued rejection of the administration's New Deal policies and President Jefferson's involvement in forwarding the impeachment of Samuel Chase.<sup>106</sup> Third, if they disagree with a Court's decisions, a President and his or her advisors can publicly criticize or fail to support the Court.<sup>107</sup> Lawrence Baum argues that President Reagan and his Justice Department often used the former strategy, while President Eisenhower used the latter tactic.<sup>108</sup>

In general, while rarely invoked by the executive branch, the sanctions delineated here might decrease the Court's power as the ultimate arbiter of the law. If an administration refuses to enforce the Justices' decisions then the Court is impotent to make or affect policy. Similarly, public criticism or anti-Court measures can erode the Court's legitimacy. Thus, Supreme Court Justices must, on occasion, account for how the executive branch may react to their decisions, and ensure that they do not stray too far, too often, from its preferred policy goals. A key way that they can ensure that they do not do so is by listening to the one part of the executive that is regularly in the Court—the Solicitor General.

### III. THE SOLICITOR GENERAL'S RELATIONSHIP WITH THE SUPREME COURT

Certainly the Constitution and the model of separated powers provide for the federal branches to levy sanctions against one another. But it is clear that possible presidential sanctions affect the Court. First, the President can and does levy sanctions against the other branches of the federal government and even the threat of doing so can be effective. Indeed, research on the interaction between the President and Congress shows that the mere threat of a sanction—a veto, for example—can change congressional decisions.<sup>109</sup> Second, there is evidence that Supreme Court Justices are concerned enough about the preferences of the President, members of Congress, and other institutions to suggest they take potential sanctions seriously and act to ensure that possible threats do not come to fruition. For instance, analysts argue that the

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105. LAWRENCE BAUM, *THE SUPREME COURT* 159 (5th ed. 1995).

106. WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* 22–23 (1992).

107. BAUM, *supra* note 105, at 159.

108. *Id.*

109. CHARLES M. CAMERON, *VETO BARGAINING: PRESIDENTS AND THE POLITICS OF NEGATIVE POWER* 188 (2000).

Warren Court remained unanimous on its school integration cases to ensure the Justices put up as strong an argument as possible so the executive would effectively enforce the decisions.<sup>110</sup> Similarly, the Court unanimously ruled against the President in *United States v. Nixon*<sup>111</sup> in an effort to guarantee President Nixon would comply with its decision.<sup>112</sup>

In addition, scholars suggest the Justices show deference to the executive by often ruling in favor of the federal government when the Solicitor General appears before the Court as either a litigant or as an *amicus curiae*.<sup>113</sup> Therefore, most studies insinuate that the Court rules in favor of the government to maintain a strong relationship with the executive branch.<sup>114</sup> The Court can then expect that the vast majority of its rulings—even if some are out of step with the President’s preferences—will be enforced.

For example, Bailey et al. (2005) argue that Justices show deference by accepting cues the Solicitor General sends when he is either a litigant in a case or when he files as an *amicus curiae*.<sup>115</sup> Interestingly, one of the key findings of Bailey et al. (2005) is that Justices are especially receptive to the Solicitor General’s arguments that are ideologically compatible with the President or with the Solicitor General.<sup>116</sup> Bailey et al. (2005) conclude that the Solicitor General’s influence is clearly political precisely because he or she is more likely to persuade his or her ideological allies.<sup>117</sup>

Moreover, there is evidence the Justices defer to the Solicitor General because the office has a high degree of credibility with the Court,<sup>118</sup> it provides the best legal arguments,<sup>119</sup> and its attorneys have the most experience.<sup>120</sup> Indeed, studies demonstrate that the Justices might show deference to the Solicitor General by inviting him or her to appear at

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110. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 55 (Simon & Schuster 1979).

111. *United States v. Nixon*, 418 U.S. 684, 716 (1974).

112. LEE EPSTEIN & THOMAS G. WALKER, *CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS* 244 (6th ed. 2007).

113. BLACK & OWENS, *supra* note 7, at 36.

114. *But see* Johnson, *supra* note 39, at 434 (discussing the importance of a strong relationship between the branches of government).

115. Bailey et al., *supra* note 38, at 76.

116. *Id.* at 81.

117. *Id.* at 83.

118. REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 113–14 (1992).

119. Jeffrey A. Segal, *Amicus Curiae Briefs by the Solicitor General During the Warren and Burger Courts: A Research Note*, 41 W. POL. Q. 135, 138 (1988).

120. Miller & Barron, *supra* note 20, at 1241.

oral arguments as an *amicus curiae*.<sup>121</sup> While this might not be a typical way of showing deference, it helps support this Article's argument because the Solicitor General is the only attorney who is regularly invited to appear before the Court when he or she is not already involved in a case. In short, such invitations suggest that the views of the executive branch are so important in the eyes of the Justices that they often bring the Solicitor General to oral arguments to hear those views.

Other analysts posit that the Justices show deference to the Solicitor General simply because the Solicitor General possesses a special relationship with the Justices.<sup>122</sup> This view manifests itself in several ways. First, because scholars refer to the Solicitor General as the "Tenth Justice," the nine Supreme Court Justices are simply more likely to accede to the Solicitor General's views in cases where the government appears.<sup>123</sup> Second, because the Justices are more likely to rule in favor of attorneys who appear more often before the Court, and because the Solicitor General is the quintessential repeat player, the Justices are likely to defer to the government when it appears.<sup>124</sup>

Finally, in the most comprehensive analysis of the Solicitor General's influence on the Court, Ryan C. Black and Ryan J. Owens find that the Solicitor General influences every aspect of the Court's decision-making process including how the Justices set the agenda, determine who wins a case, write opinions, and interpret precedent.<sup>125</sup> For this Article's purposes, Black and Owens make clear that when the Solicitor General personally appears at oral arguments—as opposed to an assistant Solicitor General—he or she is significantly more likely to win the case.<sup>126</sup> Therefore, it is clear that the Justices certainly show deference to the Solicitor General in this scenario. As with other analyses, however, Black and Owens do not explain what might be leading to that deference—beyond the choice of who argues the case in open Court. The bottom line is that, for whatever the reason, it is clear that the Court defers to the Solicitor General's views, even though that deference only seems to result in a higher likelihood that the government will win its case.<sup>127</sup>

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121. JOHNSON, *supra* note 19, at 102.

122. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 99 n.9. (1974).

123. BLACK & OWENS, *supra* note 7, at 34.

124. *Id.* at 36. *See also* Galanter, *supra* note 122, at 112 (analyzing the structure of the legal system in an attempt to better understand how to effectuate change).

125. BLACK & OWENS, *supra* note 7, at 54.

126. *Id.* at 135.

127. *Id.* at 136.

While these studies demonstrate that the Justices defer to the executive, they never fully explain how such deference to the executive branch actually manifests itself and why. This Article provides this missing explanation by focusing on a slightly tangential question: Do Justices have a special relationship with the Presidents who appointed them?

In answering this question, this Article makes two marked deviations from the existing literature on the Solicitor General. First, it argues that Justices are most deferential to Solicitors General to whom they have some form of preexisting loyalty. That is, they are deferential to the Solicitors General who serve under the President who appointed them. In other words, this Article contends that Justices have personal reasons to respond to the Solicitor General. These personal reasons should manifest themselves as much in how that Justice treats the Solicitor General as they do in whether the Solicitor General comes away victorious. Second, this Article deviates from past literature in that it looks not at whether the Solicitor General gets what he or she wants, but rather how the Justices interact with, and treat, the Solicitor General. Specifically, it contends that deference out of loyalty can best be found in how the Justices treat attorneys who appear at oral arguments.

#### IV. A THEORY OF DEFERENCE

The vast majority of existing work that seems to account for the Supreme Court's deference toward the Solicitor General focuses solely on the government's success before the Court (e.g., having cases placed on the agenda or winning on the merits). But success and deference are not synonymous. In fact, it is not possible to equate wins and deference because of the notion of observational equivalence. For example, many scholars attribute the "winning result" to a host of other reasons including: having a stronger case, having support of amici curiae, or having more experienced counsel making arguments.<sup>128</sup> As such, to really understand the degree to which the Court shows deference to the Solicitor General, especially of the President who appointed them, one must look elsewhere. The question remains, therefore: Where should one turn one's focus?

This Article focuses on the oral arguments heard in cases the Court decides. To support this claim, it initially looks beyond judicial politics

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128. See, e.g., JOHNSON, *supra* note 19, at 101 (considering the notion of "winning" oral arguments with respect to their impact on the Justices' decision-making process); see also McGuire, *supra* note 37, at 507 (discussing the need for reliable information to aid the Court in its ruling).

and examines social psychology, organizational behavior, and communications to ascertain the deference in how Justices treat attorneys who appear before the Court. Specifically, this argument can be broken down into two complementary points.

First, deference generally comes in how actors—specifically, legal actors—engage in discussion. Marianne Schmid Mast suggests that forwarding arguments is an assertive action, but deference, in contrast, manifests itself with the simple act of listening.<sup>129</sup> Mazur et al. (2015) are even more specific about this relationship as it pertains to conversation by positing deference as whether an individual is speaking or listening.<sup>130</sup> Mazur et al. (2015) explain that “[i]t is this difference that explains the generally reliable finding that those of high status speak more than those of low status.” Thus, the final aspect of deference manifests itself in both how much someone speaks and how much those involved in the conversation or debate listen to them; the more they are allowed to speak, the more deference they are shown.

Beyond just listening, signals of deference include how listeners actually treat those with whom they are speaking. People often express deference, for instance, with a willingness to yield to another’s preferences or opinions as a sign of respect or reverence.<sup>131</sup> Yet, deference is not just yielding to arguments. Rather, scholars argue that signals of deference convey an acceptance of someone’s position.<sup>132</sup> Combined, then, a variety of disciplines demonstrate that listening to and accepting arguments are clear signals of deference.<sup>133</sup>

This Article applies this concept of deference to ascertain how the Supreme Court Justices treat attorneys, specifically those from the

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129. Marianne Schmid Mast, *Dominance as Expressed and Inferred Through Speaking Time: A Meta-Analysis*, 28 HUM. COMM. RES. 420, 444 (2002).

130. Allan Mazur et al., *Does the Biosocial Model Explain the Emergence of Status Differences in Conversations Among Unacquainted Men?*, 10 PLOS ONE 1, 3 (2015).

131. Joseph Henrich & Francisco Gil-White, *The Evolution of Prestige: Freely Conferred Deference as a Mechanism for Enhancing the Benefits of Cultural Transmission*, 22 EVOLUTION & HUM. BEHAV. 165, 168 (2001).

132. See, e.g., Alison Fragale, *The Power of Powerless Speech: The Effects of Speech Style and Task Interdependence on Status Conferral*, ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 243, 252 (2006) (discussing the impact of speech on “status conferral judgments”); Fiona Lee, *Verbal Strategies for Seeking Help in Organizations*, 29 J. APPLIED SOC. PSYCHOL. 1472, 1479–96 (1999) (discussing the effectiveness of deference on influencing others’ opinions); Sabrena R. Parton et al., *Employment Interview Outcomes and Speech Style Effects*, 21 J. LANGUAGE & SOC. PSYCHOL. 144, 152 (2002) (considering the impact of a “powerful speech style” on employability).

133. See *supra* Part II (discussing the Supreme Court’s tendency to make decisions with the executive branch’s preferences in mind).

Solicitor General's office, during oral arguments. These proceedings provide an excellent venue to analyze this theory of deference because, as with the work cited above, oral arguments are truly a conversation between litigants and Justices about how to decide a case.<sup>134</sup> Litigants are meant to provide arguments while fielding questions from the bench; therefore, Justices can show deference through how,<sup>135</sup> and the degree to which, they question each attorney who appears.<sup>136</sup>

Consider the argument that listening more, and allowing a speaker to say more, is a sign of deference.<sup>137</sup> Research on the Supreme Court suggests such deferential treatment may manifest itself during oral arguments.<sup>138</sup> Indeed, a plethora of studies demonstrates that the attorney that the Justices ask fewer questions to is much more likely to win his or her case.<sup>139</sup> Combining this argument with the assertions that the Court is likely to accede to the wishes of the executive,<sup>140</sup> this Article proposes a "Listening Hypothesis": if the Justices show deference to the President who appointed them, they should ask fewer questions of the Solicitors General and Assistant Solicitors General from that President.

Beyond listening more than questioning to measure deference, this Article also analyzes the emotive content of the words that the Justices use in their questions. Specifically, it posits that the reason the Court is nicer to some attorneys is that the Justices feel a higher sense of deference toward those attorneys.<sup>141</sup> In turn, it is intuitive that being nicer to one side shows deference to the attorney making the argument.

Again, given the work cited in the previous section,<sup>142</sup> this Article hypothesizes that the attorney the Court will defer to the most is the Solicitor General. Though Black, Treul, et al. (2011) demonstrate that the emotional content of the Justices' questions can predict the success of a litigant, their research leaves what causes the emotion as something

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134. Harlan, *supra* note 16, at 7.

135. Black, Treul, et al., *supra* note 8, at 573.

136. Johnson et al., *supra* note 9, at 246–49.

137. See Lee, *supra* note 132, at 1480 (showing that deference is effective in gauging listeners' acceptance).

138. Johnson et al., *supra* note 9, at 256.

139. WRIGHTSMAN, *supra* note 82, at 140–41; Johnson et al., *supra* note 9, at 256; Roberts, *supra* note 18, at 75.

140. See *supra* Part II (discussing the Supreme Court's tendency to make decisions with the executive branch's preferences in mind).

141. See Black, Treul, et al., *supra* note 8, at 572–74, 579 (demonstrating that the emotional content of the Justices' questions can predict the success of a litigant).

142. See *infra* Part III (discussing the Solicitor General's relationship with the Supreme Court).



of a black box.<sup>143</sup> The cause of the emotion is their study's key independent variable, rather than the dependent variable.<sup>144</sup> But an important point in the work of Black, Treul, et al. (2011), and the starting premise of this Article, is that the relationship between the emotion the Court directs toward the party and the party's chance of winning is *not* moderated by ideology.<sup>145</sup> It is not as simple as the Court being nicer to the side with whom they already agree. Because Black, Treul, et al. (2011) do not predict emotion—as it is outside the scope of their project—they do not answer the important question of why this relationship exists or determine why the Justices are “nicer” to some attorneys than others. This Article's theory of deference, however, offers an answer by positing that using less negative language toward an attorney is a sign of deference. Thus it predicts in its “Emotive Behavior Hypothesis”: if the Justices show deference to the President who appointed them, they should use less negative language in the questions asked of the Solicitor General and the Assistant Solicitors General from that President.

## V. DATA

To test these two hypotheses, this Article relies primarily on data from two sources. First, for data on how Justices listen to and treat the Solicitor General at oral arguments, this Article uses the data created by Black et al. (2012) who downloaded all available oral argument transcripts from 1986 to 2006.<sup>146</sup> These data provide information concerning not only the number of questions that the Justices ask, but also the manner in which Justices treat litigants at these important proceedings.<sup>147</sup> Thus, Black et al. (2012) offer the perfect opportunity to investigate judicial deference during oral arguments.

Second, for data on case characteristics, this Article turns to the Supreme Court Database, which remains the cornerstone for examining the Court's decision-making process.<sup>148</sup> This Article uses these two data sets to analyze every case decided by the Supreme Court between the 1986 and 2006 terms. The unit of analysis is each individual Justice in each case orally argued in front of the Court. More specifically, each

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143. Black, Treul, et al., *supra* note 8, at 576–79.

144. *Id.* at 575.

145. *Id.* at 573.

146. RYAN C. BLACK ET AL., ORAL ARGUMENTS AND COALITION FORMATION ON THE U.S. SUPREME COURT: A DELIBERATE DIALOGUE 15 (2012).

147. *Id.* at 14–16.

148. Harold J. Spaeth et al., *2016 Supreme Court Database, Version 2016 Release 01*, SUP. CT. DATABASE, <http://supremecourtdatabase.org> (last visited Dec. 27, 2016).

observation represents how one particular Justice questioned each of the litigants—petitioner and respondent—involved in each case argued before the Court.

Because this Article is interested in how Justices listen to and treat the Solicitor General at oral arguments, it employs two dependent variables. The first is a count of the number of questions Justices ask during oral arguments. This variable captures the willingness of Justices to listen to counsel. As such, fewer questions suggest more listening and therefore, more deference to a given attorney. The second dependent measure is the percentage of words that the Justices use in their questions that are unpleasant (or negative). More precisely, it is the percentage of negative words individual Justices direct toward attorneys at oral arguments. Here, this Article suggests that more negative words signal less deference the Justices give to that attorney.<sup>149</sup>

To explain the use of more questions or nicer language toward an attorney this Article employs several independent variables in the model. First, it includes a measure for “Appointing President”: a measure of which President appointed a specific Justice. Recent research investigates the loyalty of Supreme Court Justices toward the President who appointed them and finds that Justices are more likely to support their appointing Presidents.<sup>150</sup> Similarly, it is reasonable to expect Justices will be more deferential toward the Solicitor General of the President who appointed them. That is, when questioning the attorney representing the President who appointed them, a Justice will ask fewer questions and express less negativity. This variable indicates whether a Justice’s appointing President was in office when the case was orally argued. Justices whose appointing Presidents were in office when the case was orally argued are set equal to 1, and 0 otherwise.

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149. These measures were originally created by Black, Johnson, and Wedeking (2012) who used them as independent variables to examine who will prevail on the merits of a case. See BLACK ET AL., *supra* note 146, at 15–16. We, however, use them as our point of departure from previous research. By using these measures as dependent variables, we provide a unique avenue for studying judicial deference that goes beyond the traditional examination of Justices’ votes on the merits, expecting that Justices will be more deferential towards the Solicitor General of the President who appointed them. That is, when questioning the attorneys representing the Presidents who appointed them, Justices will ask fewer questions and express less negativity towards them. To account for this relationship, we include Appointing President. This variable indicates whether a Justice’s Appointing President was in office when the case was orally argued. Justices whose Appointing Presidents were in office when the case was orally argued are set equal to 1, and 0 otherwise.

150. Lee Epstein & Eric A. Posner, *Supreme Court Justices’ Loyalty to the President* (Dec. 10, 2015) (manuscript at 12), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2702144](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2702144).

This Article also includes several traditional Solicitor General variables in the model. As previously discussed, it is well recognized that the Solicitor General influences all facets of the Court's decision-making process.<sup>151</sup> To account for this influence, this Article includes three dichotomous variables. First, this Article includes a binary variable to indicate whether a petitioner or respondent is represented by the "Office of the Solicitor General." If the attorney is either the Solicitor General or Assistant Solicitor General, this variable is set equal to 1, and 0 otherwise. To be clear, this variable makes no distinction between Solicitors General or Assistant Solicitors General arguing before the Supreme Court. Rather, it indicates that the attorney presenting oral arguments before the Court works for the Office of the Solicitor General. When the Solicitor General or Assistant Solicitor General stands before the Court, this Article expects the Justices to be more deferential to him or her at oral arguments.

Second, this Article includes a binary variable to indicate whether the attorney is the "Actual Solicitor General." If the petitioner or respondent is actually the Solicitor General, this variable is set equal to 1, and 0 otherwise. When the actual Solicitor General participates in oral arguments, this Article expects the Justices to behave with more deference to this attorney.

Third, this Article includes a binary variable for "Solicitor General Invited": whether the Supreme Court invited the Solicitor General to participate as *amicus curiae*. If the Court invited the Solicitor General to file an *amicus* brief, the "Solicitor General Invited" variable is set equal to 1, and 0 otherwise. The Court invites the Solicitor General to participate because it respects the role this important office holds in the federal judicial system. Given this, this Article expects that the Justices will display more deference at oral arguments when they invite the Solicitor General to participate as *amicus curiae*. Overall, it expects Justices to display higher levels of deference when the Solicitor General is involved on cases before the Supreme Court.

Finally, the model includes a measure of "Ideological Distance." Existing research demonstrates that ideology influences judicial behavior.<sup>152</sup> But ideal point estimates do not exist for attorneys not representing the Office of the Solicitor General. To work around this limitation, this Article follows previous research that bases the ideological position of petitioners and respondents on the lower court

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151. See *infra* Part VI (discussing the Supreme Court's deference toward the Solicitor General).

152. Lee Epstein et al., *The Judicial Common Space*, 23 J.L., ECON., & ORG., 303, 305 (2007).

decision. For example, “if the lower court made a liberal ruling, we assume the petitioner seeks a conservative outcome and the respondent seeks a liberal outcome from the Supreme Court.”<sup>153</sup> This Article then defines the position of Justices based on their “Judicial Common Space” scores and compares the two positions.<sup>154</sup> If the lower court made a liberal decision and a Justice prefers a liberal decision, then the Justice and petitioner are ideologically compatible but the Justice and respondent are not—ideologically compatible Justices and attorneys are coded 1, and 0 otherwise.

Beyond the variables of interest, this Article also includes several control variables to account for other factors that might influence deference to the Solicitor General and, in turn, the President. First, it controls for whether an attorney is the petitioner or respondent; this variable is coded 1 if the attorney is the petitioner and 0 if the attorney is the respondent. Although this Article controls for whether an attorney is the petitioner or respondent, it has no clear expectations on whether Justices will display more deference toward one side.

To capture the salience of a case, this Article relies on the “Case Salience Index” created by Collins and Cooper.<sup>155</sup> Specifically, it employs this measure to overcome the limitations that have been identified as accompanying the salience measure created by using front-page stories of *The New York Times*.<sup>156</sup> The “Case Salience Index” employs four newspapers from four regions of America as its foundation. It codes salience as follows: cases that make the front page of a paper are coded 2, those covered anywhere in a paper are coded 1, and those not covered are coded 0. These scores are then summed and range from 0 to 8.

In addition, this Article includes a second variable to serve as a proxy

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153. Johnson et al., *supra* note 19, at 106–07.

154. Epstein et al., *supra* note 152, at 304.

155. Todd A. Collins & Christopher A. Cooper, *Case Salience and Media Coverage of Supreme Court Decisions Toward a New Measure*, 65 POL. RES. Q. 396, 400–02 (2012). The primary measure of salience used by judicial scholars is one that Epstein and Segal created that indicates whether a case appeared on the front page of *New York Times* on the day after the Supreme Court announced its decision. Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 72–73 (2000); see Michael A. Bailey, *Comparable Preference Estimates Across Time and Institutions for the Court, Congress, and Presidency*, 51 AM. J. POL. SCI. 433, 448 (2007) (including an analysis of Epstein and Segal’s measure of salience); Vanessa A. Baird, *The Effect of Politically Salient Decisions on the U.S. Supreme Court’s Agenda*, 66 J. POL. 755, 760–61 (2004) (same).

156. See, e.g., Isaac Unah & Ange-Marie Hancock, *U.S. Supreme Court Decision Making, Case Salience, and the Attitudinal Model*, 28 LAW & POL’Y 295, 304–05 (2006) (discussing possible biases in Epstein and Segal’s *New York Times* salience measure).

for issue salience. In particular, it includes the total number of “Amicus Briefs” filed in the case. Amicus briefs are recognized as sources of information for Justices about the importance of a case. For example, Collins argues that, “amici provide the Justices with myriad information regarding their perceptions of the correct application of the law in the case, at the same time highlighting diverse perspectives on the broader policy concerns implicated by the dispute.”<sup>157</sup> Because amicus briefs aid the Justices in their decision-making duties, this Article expects Justices to be more amenable to listening, and less inclined to using unpleasant language, during oral arguments when there are more amicus briefs in a case.

## VI. RESULTS

This Article begins the analysis by examining the willingness of Justices to extend deference toward litigants who presented oral arguments before the Supreme Court from 1986 to 2006. To do so, it models the number of questions Justices ask at oral arguments. Because the dependent variable is a count variable the coefficient estimates are based on a Negative Binomial model. Negative binomial regression is used instead of Poisson regression because it is better able to account for overdispersion that characterizes the variance of our dependent variable.<sup>158</sup>

The results presented in Table 1 provide initial evidence for the Listening Hypothesis. As expected, the variables Appointing President and Solicitor General Invited are in the correct direction and reach acceptable levels of statistical significance. That is, the results show that when questioning the attorneys representing the Presidents who appointed them, Justices ask fewer questions to the attorney who appears from the Solicitor General’s office.

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157. PAUL M. COLLINS, JR., *FRIENDS OF THE COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING* 2 (2008).

158. Negative Binomial Regression models account for the overdispersion of zeros in a model by allowing “the conditional variance of  $y$  to exceed its conditional mean.” See, e.g., J. SCOTT LONG, *REGRESSION MODELS FOR CATEGORICAL AND LIMITED DEPENDENT VARIABLES* 230 (1997).

TABLE 1: Negative Binomial Regression—Modeling the Number of Questions by Individual Justices Directed Toward the Solicitor General

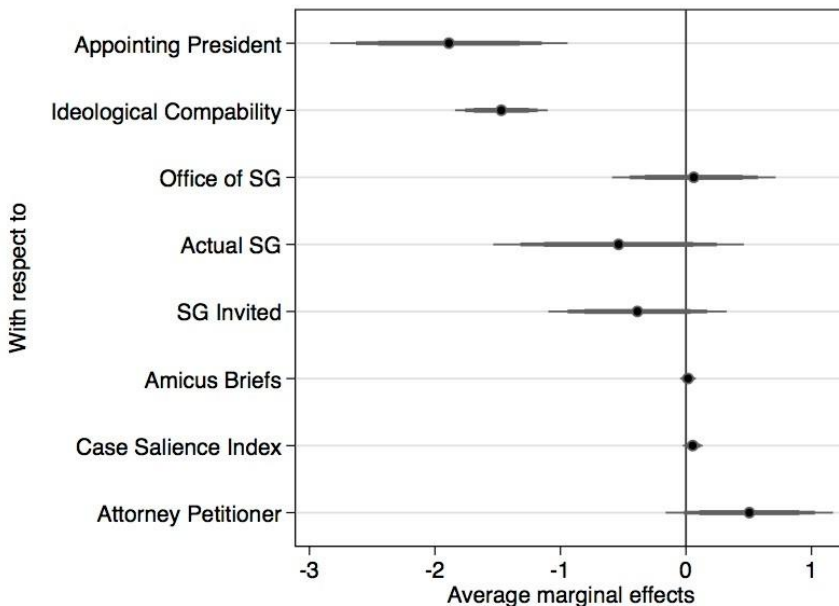
	(1) Questions b/se
<b>Appointing President</b>	-0.232*** (0.035)
<b>Ideological Compatibility</b>	-0.180*** (0.041)
<b>Office of Solicitor General</b>	0.008 (0.024)
<b>Actual Solicitor General</b>	-0.066* (0.037)
<b>Solicitor General Invited</b>	-0.047* (0.026)
<b>Amicus Briefs</b>	0.002 (0.002)
<b>Case Salience Index</b>	0.007*** (0.003)
<b>Attorney Petitioner</b>	0.062*** (0.025)
<b>Constant</b>	2.159*** (0.013)
<b>In(alpha)</b>	-0.510*** (0.014)
<b>Observations</b>	15654
<b>Chi-squared</b>	239.574

\* $p < 0.10$ , \*\* $p < 0.05$ , \*\*\* $p < 0.01$

To further illustrate this relationship, Figure 1 displays the predicted number of questions asked of attorneys during oral arguments (1986–2006). We estimated the point estimates (dot) and 95 percent confidence intervals (whiskers) using results presented in Table 1. In so doing, we held all other variables at their mean or modal values. Figure 1 demonstrates that the Justices ask Solicitors General of their appointing President approximately two fewer questions per case. To put this in perspective, the expected number of questions Justices direct toward attorneys of the Presidents who appointed them decreases by approximately 21 percent. As for when the Supreme Court invites the Solicitor General to participate, the results in Table 1 clearly indicate

that Justices are willing to show the Solicitor General more deference. In other words, Justices are more willing to listen to oral arguments when the Court has extended an invitation to the Solicitor General to participate. This probably reflects the fact that when Justices invite the Solicitor General to participate, they are hoping to obtain valuable information about the preferences of other political actors.<sup>159</sup> As such, they should be, and are, more deferential to that attorney.

FIGURE 1: The Predicted Number of Questions Asked of Attorneys During Oral Arguments (1986–2006)<sup>160</sup>



Focusing on interactions between Justices and the Solicitor General, the data show that the variable “Actual Solicitor General” is not only in the correct direction, but also statistically significant as well. It is well documented that the Solicitor General holds a unique position in the federal judicial system.<sup>161</sup> Thus, the deference given to the actual

159. Lee Epstein & Jack Knight, *Mapping Out the Strategic Terrain: The Informational Role of Amici Curiae*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONAL APPROACHES* 215, 217–18, 221–22, 225 (Cornell W. Clayton & Howard Gillman eds., 1999).

160. Point estimates (dot) and 95 percent confidence intervals (whiskers) were estimated using results presented in Table 1. All other variables were held at their mean or modal values.

161. See, e.g., BLACK & OWENS, *supra* note 7, at 7–9 (discussing reasons for the Solicitor General’s success).

Solicitor General is possibly based on the reverence Justices hold for this position. While it is evident the actual Solicitor General can expect deferential treatment in front of the Court, this does not hold for assistant Solicitors General. The variable “Office of Solicitor General” is in the correct direction, but falls short of reaching traditional levels of significance. This suggests that assistant Solicitors General are treated differently than are their bosses—the Actual Solicitor General. This finding is also consistent with previous work on the Solicitor General’s relationship with the Court.<sup>162</sup>

In addition, there is clear evidence that Justices are more deferential toward litigants who are “Ideologically Compatible” with them. Table 1 shows that this coefficient is both negative and significant—which suggests that the Justices evince more deference to litigants whose arguments they ideologically are more likely to accept. This finding is born out in Figure 1, which illustrates that Justices ask Ideologically Compatible attorneys 1.5 fewer questions per case. In other words, when all of the variables are held constant, the number of questions posed to compatible petitioners or respondents decreases by approximately 17 percent. While this substantive effect is compelling, care must be taken when interpreting this finding because our measure of “Ideologically Compatible” is quite blunt.

Finally, we turn to our control variables. As indicated in Table 1, we find a positive and significant relationship between a Justice’s inclination to listen and to whom they are addressing. Holding constant all other factors, Justices ask petitioners approximately 6 percent more questions. As for the other two variables—intended to capture the relative importance of Supreme Court cases—we find mixed results. On the one hand, the number of amicus briefs supporting a petitioner or respondent does not significantly affect a Justice’s tendency to listen to an attorney during oral argument. On the other hand, the salience of a case—as measured by the Case Salience Index<sup>163</sup>—leads a Justice to listen less to the attorneys. The substantive effect of this variable, however, is minuscule. These two findings suggest that the salience of a case does not substantially influence a Justice’s propensity for inquiry. As such, salience does not seem to affect deference.

Taken as a whole, Table 1 and Figure 1 present initial support for the Listening Hypothesis. Indeed, the Justices are likely to show some deference to the actual Solicitor General. They are also more likely to

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162. See, e.g., *id.* at 5–6 (discussing the Solicitor General’s influence over the Supreme Court).

163. See Collins & Cooper, *supra* note 155, at 405 (concluding that salience of a case has a significant effect on outcomes).



show such deference to Solicitors General who are appointed by the same President. Finally, the Justices also show some propensity to defer to the office of the Solicitor General when the office has been invited to the arguments.

Next, this Study analyzes the language Justices use when interacting with the attorneys who appear before the Court. The dependent variable indicates the percentage of unpleasant or negative words in the Justices' questions and comments. More precisely, it is the percentage of negative words the Justices direct toward attorneys at oral arguments, which allows this Study to compare how Justices treat litigants at oral argument. Because the dependent variable is continuous, this Study models this form of deference with an Ordinary Least Squares model.

Table 2 and Figure 2 demonstrate that the Justices display more deference to attorneys representing the Presidents who appointed them. Indeed, the negative and significant coefficient for Appointing President demonstrates that, when questioning the attorneys representing the Presidents who appointed them, Justices use less unpleasant or negative language. To further illustrate this relationship, Figure 2 displays the predicted percentage of words that the Justices use in their questions that are unpleasant or negative during oral arguments (1986–2006).

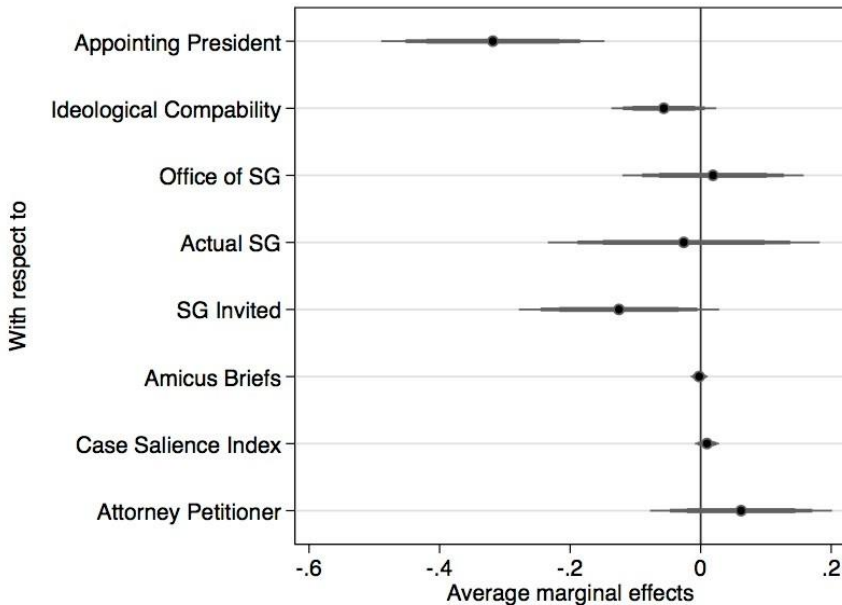
We estimated the point estimates (dot) and 95 percent confidence intervals (whiskers) using results presented in Table 2. This finding clearly illustrates the substantive impact of this relationship and indicates that this impact is sizable when compared to the other factors included in the model. As with our first model, the Justices also use less unpleasant language when the Supreme Court invites the Solicitor General to participate. On the other hand, because the Office of Solicitor General is signed incorrectly and is not statistically insignificant, this suggests that the Justices do not seem to display more deference toward attorneys on behalf of the Office of the Solicitor General. Taken together, these findings provide mixed support for our hypothesis that Justices treat Solicitors General or Assistant Solicitors General differently than private attorneys during oral arguments.

TABLE 2: Ordinary Least Squares Regression—Modeling the Negative Emotive Content of Individual Justices Directed Toward the Solicitor General

	(1) Negativity b/se
<b>Appointing President</b>	-0.318*** (0.052)
<b>Ideological Compatibility</b>	-0.056** (0.024)
<b>Office of Solicitor General</b>	0.019 (0.042)
<b>Actual Solicitor General</b>	-0.026 (0.063)
<b>Solicitor General Invited</b>	-0.125*** (0.047)
<b>Amicus Briefs</b>	-0.002 (0.004)
<b>Case Salience Index</b>	0.010* (0.006)
<b>Attorney Petitioner</b>	0.062 (0.042)
<b>Constant</b>	1.367*** (0.024)
<b>Observations</b>	15654
<b>R-squared</b>	0.003

\* $p < 0.10$ , \*\* $p < 0.05$ , \*\*\* $p < 0.01$

FIGURE 2: Predicted Probability of the Negative Emotion of Questions Asked of Attorneys During Oral Arguments (1986–2006)<sup>164</sup>



Beyond the Solicitor General variables, there is some evidence that other factors affect the Justices' use of unpleasant language toward attorneys who appear at the Court. First, they clearly use less-unpleasant language when interacting with Ideologically Compatible attorneys. This suggests that they also show deference to the attorneys who argue for the side with which the Justice is likely to agree. As with the number of questions they ask, this finding is intuitive. In addition, there is not a systematic association between Justices' use of harsh language and the number of amicus briefs filed or with whether an attorney represents the petitioner before the Court. On the other hand, there is a statistical relationship between cases the public may find salient—as measured by the *Case Salience Index*—and how the Justices treat attorneys. That said, this variable is not substantively significant.

#### CONCLUSION

Existing literature suggests that the Supreme Court Justices defer to the Office of the Solicitor General as a signal that the Court defers to the

164. Point estimates (dot) and 95 percent confidence intervals (whiskers) were estimated using ordinary least squares regression. All other variables were held at their mean or modal values.

executive branch. But the vast majority of this literature is based solely on idea that deference manifests itself in whether the Solicitor General wins before the Court. Such findings might show deference, but wins are behaviorally equivalent to other reasons why the Solicitor General may win (e.g., the office has better attorneys, they are considered the tenth Justice, or they offer highly credible arguments). The findings in this Article provide a much more nuanced way to understand the degree to which the Court defers to the Solicitor General and, in turn, the executive.

Specifically, it is clear that the Justices simply show more deference to Solicitors General who are appointed by the same President. In fact, Justices are more likely to allow similarly appointed Solicitors General to provide more of their own argument because they face fewer questions from the bench. At the same time, when they do ask questions, they use less harsh language toward attorneys appearing on behalf of the federal government. These findings clearly add to the accepted wisdom that the Court does defer to the Solicitor General and also provide a measure of deference that goes well beyond the concept of the Solicitor General simply winning at the Court. Indeed, when combined with the findings of Johnson et al. (2009) and Black, Treul, et al. (2011), our analysis begins to provide an explanation for the mechanism that leads to why the Solicitor General wins more often before the Court.<sup>165</sup> As such, we add an important component to this vast and important literature in the study of Supreme Court decision making.

Ultimately, this Article makes two explicit contributions to the separation of powers literature. First, this literature usually focuses on the relationship between the President and Congress<sup>166</sup> or the Court and

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165. See Black, Treul, et al., *supra* note 8, at 576–79 (discussing results of tests analyzing the Supreme Court’s use of negative language toward a petitioner during oral argument and the likelihood of that petitioner winning); Johnson et al., *supra* note 9, at 256–61 (discussing results of hypothesis testing which revealed that the attention Supreme Court Justices give at oral argument to one side or the other strongly affects the case outcome).

166. See, e.g., JON R. BOND & RICHARD FLEISHER, *THE PRESIDENT IN THE LEGISLATIVE ARENA* 8–11 (1990) (discussing presidential success in pushing a legislative agenda through Congress); NIGEL BOWLES, *THE WHITE HOUSE AND CAPITOL HILL: THE POLITICS OF PRESIDENTIAL PERSUASION* 1–3 (1987) (discussing the White House Office of Congressional Relations, specifically focusing on the Johnson administration); GEORGE EDWARDS III, *PRESIDENTIAL APPROVAL: A SOURCEBOOK* 1–3 (1990) (summarizing presidential approval polling); PAUL C. LIGHT, *THE PRESIDENT’S AGENDA: DOMESTIC POLICY CHOICE FROM KENNEDY TO CLINTON* 5–6 (3d ed. 1999) (discussing how Presidents have prioritized their legislative agendas).

Congress.<sup>167</sup> Thus, this analysis significantly increases scholarly understanding of inter-institutional relationships at the federal level because it focuses on the relationship between the Court and the President. Second, existing literature often assumes that Justices have complete information about how Congress and the President want them to act. This Article argues that this is not the case, and provides systematic evidence that Justices actively seek information about the preferences of the current administration through the Solicitor General. In so doing, we delineate explicit conditions under which the Justices should be, and are, concerned with how the current administration wants them to act. The findings shed light on the Court's decision-making process as well as on the way that our federal institutions interact with one another.

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167. See, e.g., William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CALIF. L. REV. 613, 615–17 (1991) (discussing the congressional view of the Supreme Court's civil rights jurisprudence); Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the State Farm and Grove City Cases*, 6 J.L., ECON. & ORG., 263, 264 (1990) (discussing the influence of Congress in Supreme Court decision making); but see Andrew D. Martin, *Congressional Decision Making and the Separation of Powers*, 95 AM. POL. SCI. REV. 361, 376 (2001) (discussing the influence of separation of powers concerns on Congress).