

# U.S. Supreme Court Justices and Partisanship: Support for the President and Solicitor General

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**Abstract**—This paper analyzes the extent to which the justices of the U.S. Supreme Court cast votes that support the positions of the president, or more generally the Executive Branch. Can presidents count on such deference from those justices they nominate or those whom are nominated by other presidents of the same party? Or, do the justices demonstrate judicial independence and impartiality such that they are not so predisposed to vote in favor of arguments of their nominating president's party? The results suggest that while in general the justices do not exhibit any marked tendency to partisan support of presidents, more recent and conservative Supreme Court justices are significantly more likely to support Republican presidents.

**Keywords**—Separation of Powers, Solicitor General, U.S. President

## I. INTRODUCTION

POLITICS in Washington D.C. has grown increasingly partisan as one might deduce from the recent debate over raising the debt ceiling and the pronouncements made by politicians, pundits and others who observe business in the U.S. capitol. Another example of the partisan nature of contemporary politics was seen during the administration of President George W. Bush in the scandal and resulting investigations related to firings in the Department of Justice. There were several layers to the scandal, among them firing of U.S. Attorneys, hiring practices of immigration judges, a screening process for interns and young lawyers that included alleged discrimination against those with ties to the Democratic Party or liberal groups and the firing of a career lawyer in the Department of Justice on allegations of her sexual orientation [1], [2], [3], [4]. Ground zero of this rancorous partisanship generally tends to be Capitol Hill as the two parties vie for control of the legislative branch, attack and support the President, and battle over legislation. One also finds ample evidence of the discord between presidents and the Senate playing out in the battles over judicial politics. The battles are usually most intense when the President sends forward a nominee for the United States Supreme Court. Senators either hope for or object to the nominee's willingness to support the President on controversial issues of the day, such as abortion, rights of the accused, the powers of the executive branch and so forth. Thus, one might legitimately wonder the extent to which the justices of the Supreme Court do cast votes that support the positions of the president, or more generally the executive branch.

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When studying support of the president or the positions of the executive branch at the Supreme Court, it is necessary to consider the solicitor general. The solicitor general almost exclusively represents the executive branch before the Supreme Court. It is believed that the solicitor general has "extraordinary influence" in his dealings with the Court [5]. The solicitor general has been dubbed the "Tenth Justice"[6]. The main reason for this reputation is because of the solicitor general's impressive ability to win cases before the Supreme Court on the merits or as an amicus curiae [7], [8], [9].

The president appoints the solicitor general and "can remove solicitors who do not live up to expectations" [3], page 136. The solicitor general is viewed as generally responsible for advancing the president's agenda [10], [11]. Puro states that the president and Solicitor General "maintain frequent contacts about the issues currently or potentially before the United States Supreme Court" [12] page 222. By using amicus briefs, Puro writes: "...the Solicitor General attempts to explain executive policy to the Supreme Court" [12] page 221. Pacelle's work [13] provides clear exposition concerning the difficult position the Solicitor General's Office finds itself in attempting to balance competing interests and constituencies. However, he also makes the point that "(v)oluntary amici briefs provide the best opportunity to further executive designs" [13] page 23. He adds: "In these so-called 'agenda cases,' the solicitor general most closely resembles the attorney general as policy advocate for the administration" [13] page 23. Yates writes that "(s)ince the solicitor general's office can take either side of a given Supreme Court dispute as an amicus participant, it is in this litigation role that the executive branch, though the solicitor general's office, has perhaps the most discretion in attempting to shape Supreme Court policy [14] page 99.

What certainly adds to the significance of this relationship, is the amount of contact and level of success the Solicitor General has with the Supreme Court. The federal appears far more frequently (as a litigant or amicus) than any other party or group. Such cases now constitute over fifty percent of the Supreme Court's workload [15], [16]. Deen, Ignagni, and Meernik [7] report that the rate of filing amicus briefs has increases substantially over the last fifty years. In fact, they found that there has been a 600% increase in the rate of filing from Eisenhower to Reagan. Even more importantly, has been "the spectacular degree of success that the office has had in litigating before the Court" [14] page 96.

The U.S. government has won an average of 63 percent of cases on the merits between 1953-1991 [17] page 569. Earlier research has shown that the Solicitor General does even better when participating as amicus[5], [12], [9]. O'Connor claims that the Solicitor General has "a substantial effect on public policy" [5] page 264. Consistent with this claim is the fact that from 1952-1990, no presidential administration won less than 65 percent of its cases when participating as an amicus, and some won over 80 percent [17], [19]. In fact, because of this high rate of success it has generally been accepted wisdom that the Solicitor General enjoys special advantages before the Court. This has led some to refer to the Solicitor General as the Court's "nine and a half" member or the "tenth justice" [6], [18], [20]. Explanations for this phenomenon have included: the vast experience and resources of the Solicitor General's office (they are classic "repeat players"); a special or personal relationship (possessing a high level of credibility) with Court; the Solicitor General's role as a gatekeeper (reducing the Court's workload); the Solicitor General's office selecting only cases which it has a high probability of winning; the federal government's importance vis a vis the states; and deference for a co-partner in the federal system [16], [21], [22], [23], [11], [18], [19], [24]. However, McGuire has pointed out that this widely held view of the Solicitor General possessing a special status is not based upon direct evidence [25]. His research concluded that when one controls for litigation experience, the Solicitor General's office is no more likely to win than other similarly accomplished lawyers. Similarly, the work of Deen, Ignagni, and Meernik, points out conventional wisdom in this area has been overstated [7], [8]. One might suspect that the number of amicus briefs filed by the Solicitor General has increased over time because the success rate of such briefs has also increased. However, the opposite is true. While Solicitors General have certainly remained successful, their overall winning percentage dropped from 85% during the Warren Court years to 68% under Rehnquist. Furthermore, when one takes into account the issue being decided, there is great variance in terms of success. In certain areas, Solicitors General lose more cases than they win [7], [8]. Therefore, they argue that the assumption that the Solicitor General wins in almost every setting needs some adjustment. In fact, the research that has examined the issue of presidential support by the justices [26], [8], [27], [28], [29], [25], [19], [30]. [31], [32], [33], has primarily focused on their support of the solicitor general. These scholars have variously concluded that such factors as ideological compatibility between the president's policy preferences and those of the justices; the experience and expertise of the contending lawyers; the nature of the solicitor general's brief in support of the petitioner or the respondent, and the issues at stake, play a role in this process. In this paper the focus is on one particular factor—partisan ties between the president and the justices. While some research does tend to show that among certain justices there is a greater propensity to vote in favor of one's nominating president, the relationships tend to be fairly weak [7], [30] and it tends to be confined to the nominating president and does not extend to subsequent fellow partisans in the White House [27], [30], [31].

Despite such problems, however, it seems that an analysis of the impact of partisanship on judicial decision making is warranted for several reasons.

First, much of the extant research on Supreme Court support of the solicitor general concentrates on the cases where the solicitor general files an amicus brief. Few scholars have analyzed support of the Executive Branch on all cases to which the U.S. is a party as [30] page 150, recommends. Second, again the extant research focuses on the solicitor general, who is certainly a worthy subject of empirical inquiry, but whose performance vis a vis the Court is but one piece (albeit a critical one) of the, overall, track record of Executive Branch success. By examining all cases in which the U.S. government, or an administrative agency was a party to a case, we develop a much broader and deeper appreciation for the determinants of executive branch success in general, and the role of partisan ties in particular. Third, given the increasing levels of partisanship regarding Supreme Court nominees and many critical issues before the Court, assessing the level of partisanship in judicial decision making is a timely and important topic.

This research will provide an analysis of the tendency of Supreme Court justices to support the positions of fellow partisans in the White House on cases involving U.S. administrative agencies and cases where the U.S. was a party. The data for this project comes from 1953-2005 and the U.S. Judicial Data Base. The analysis of judicial decision making and partisanship indicate that the justices do not, generally, exhibit this type of obvious partisan voting. However, there is strong evidence to suggest that some of the Court's more recent and conservative members exhibit a marked preference to support Republican administrations.

## II. PARTISANSHIP AND JUDICIAL VOTING BEHAVIOR

Why would partisan ties between Supreme Court justices and the president play a role in judicial decision making? We briefly review two potential rationales for this relationship. First, and most simply, presidents of a particular political party and justices who are nominated by that president or a president of the same party are likely to share many policy preferences. While some presidents have been sorely disappointed in the decisions handed down by their nominees (e.g., Eisenhower and Warren; G.H.W. Bush and Souter), in general, we would expect there to be a fair degree of ideological compatibility. For example, [31] find that there is a fairly high degree of correlation between a nominating president's ideology and the ideology of their justices. However, they do ultimately find that "In both domains, the early terms of the justices' careers drive concordance, with the substantive impact of presidential ideology declining the longer justices sit on the bench" [31] page 567, see also [34].

Since we would expect some degree of shared policy preferences between presidents and their Supreme Court nominees, is there any evidence that partisan ties contributes added value to our explanations of Supreme Court decision making? The evidence is not persuasive. Deen, Ignagni and Meernik [7], [8] do not find any evidence that partisan ties between the High Court justices and the President predict

support when the solicitor general files an amicus curiae brief in cases. Segal [30] finds that “The President does rather well in Court, but it is only marginally, if at all, due to the justices he has appointed”. Reference [27] conclude that “...presidents do better before district court judges appointed during their administration”, but that such influence does not extend beyond the appointing president. Reference 32 finds that Supreme Court justices of the same party as the appointing president, are more likely to support independent agencies, but not cabinet line agencies. The evidence for a partisan impact is weak and seems to be confined to the nominating president. Nonetheless, we argue that given the evidence of increasing politicization in the office of the Solicitor General [6] and the need to expand our analysis to a wider variety of Executive Branch cases, we have reason to believe that some level of partisan effect may be influencing judicial behavior.

Second, justices may consciously or unconsciously accord value to shared partisan ties. One has to look no further than *Bush v. Gore* in 2000 to see that the breakdown in judicial voting followed partisan lines [35]. Justices may be genuinely, primarily and consistently interested in the letter of the law, but their views on the law are shaped by many forces beyond its black letters. Chief among these may be the shared preferences that bind, however abstractly, justices to their parties. Parties act as socializing agents that bring like-minded individuals together and inculcate a value and belief system that eventually finds expression in ideological goals and objectives. Having arrived at two of the highest political offices in the land through their ability to form alliances with like-minded individuals in their political parties, both presidents and Supreme Court justices have already invested a great deal of time and energy working toward partisan ends, even if justices are not always so open regarding their policy preferences and ambitions. The network of ties, shared history and support for shared party goals among fellow partisans may well shape justices’ subsequent behavior on the bench. Ultimately, the partisan ties that bind Supreme Court justices and presidents should prove powerful enough to emerge in the votes justices cast from the bench.

### III. METHODS, ANALYSIS, AND RESULTS

In order to evaluate the extent to which judicial voting behavior is influenced by partisan ties Supreme Court cases were examined where 1) a federal administrative agency was a party to the case; and 2) the U.S. was a party to the case. Determinations made regarding the identities of parties to the case were made with reference to the U.S. Supreme Court Database using the “Party” variables. The votes cast by the individual justices in both categories were included from 1953 to 2005. For the first tests of the hypotheses, simple models were estimated using probit, a technique utilized for analyzing dichotomous outcomes—in this case whether the administrative agency or the U.S. position was supported by each of the justices. Three variables were used in these models: 1) a dichotomous indicator for Republican presidential administrations; 2) the ideological direction of the decision sought by the executive branch—whether liberal or

conservative—as determined by the U.S. Supreme Court Database; and 3) whether the Executive Branch sided with the petitioner or the respondent. One would expect that the more liberal (conservative) the justice, the more likely he or she would be to favor an administration argument seeking a liberal (conservative) outcome [36], [19], [36]. One would also expect that justices would be more inclined to support the petitioner rather than the respondent as much previous research has indicated (e.g., [37], [21]). After estimating probit models for each of the individual justices using these three variables, we then calculated the impact exercised by the presidential administration variable as our measure of partisan ties, holding other factors constant. We expect that those justices nominated by Republican presidents will be more likely to support Republican administrations and those justices nominated by Democratic administrations less so. The impacts are provided in Table I both for the administrative agency cases and the cases where the U.S. was a party.

TABLE I  
 PROBABILITY OF JUSTICE SUPPORT FOR REPUBLICAN ADMINISTRATIONS

Justice	Administrative Agency Support	US as a Party Support
Black (D)	-0.17 **	-0.04
Blackmun (R)	-0.05	0.02
Brennan (R)	-0.05	0.01
Breyer (D)	0.05	0.05
Burger (R)	-0.01	0.06 *
Clark (D)	0.00	0.01
Douglas (D)	-0.07	-0.04
Frankfurter (D)	-0.18	-0.08
Ginsberg (D)	0.05	0.009
Harlan (R)	-0.09 *	-0.05
Kennedy (R)	0.12 *	0.12 **
Marshall (D)	-0.05	0.07
O'Connor (R)	0.17 **	0.04
Powell (R)	-0.01	0.09 *
Rehnquist (R)	0.07 *	0.05 *
Scalia (R)	0.10 *	0.11 *
Souter (R)	0.05	0.03
Stevens (R)	-0.01	0.12 **
Stewart (R)	-0.09 *	0.03
Thomas (R)	0.20 **	0.04
Warren (R)	-0.15 **	-0.03
Whitaker (R)	0.00	0.09
White (D)	0.00	0.07 **

D or R (Democratic or Republican) is the party of the appointing president for each justice

Positive (negative) coefficients indicate support for Republican (Democratic) presidents

\* = statistically significant at the .05 level

\*\* = statistically significant at the .01 level

As the reader can see, there are several justices in each category who are more inclined to support/not support presidents of a particular party, even after controlling for ideological compatibility and the status of the executive branch as petitioner or respondent. While we do not find that Supreme Court justices in general are more likely to support presidents of the same party as their nominating president, there is significant and interesting evidence of partisanship of late. Perhaps the most striking finding in Table 1 is that a number of the recent Reagan and G.H.W. Bush appointees are the most partisan. Justice Anthony Kennedy is 12% more likely to support Republican administrations in either administrative agency cases or cases where the US is a party. Justice Antonin Scalia is 10% more likely to support administrative agencies and when the U.S. is a party if a Republican is in the White House. Justice Rehnquist was 7% and 5%, respectively, more likely to side with these actors. Justice O'Connor was 17% more likely and Justice Thomas was 20% more likely to side with Republican administrative agencies, although the likelihood of their supporting Republican administrations when the U.S. is a party is not statistically significant. All these justices were appointed by Republican presidents. While there are several justices who are less likely to side with Republican-controlled administrative agencies (Black, Harlan, Stewart and Warren), there were none who were statistically less likely to support Republicans when the U.S. is a party. As well, among those justices appointed by Democratic presidents, only Justice Black was more likely to side with Democratic presidents and only in cases involving administrative agencies. Finally, we also note that only one Democrat-appointed justice, Byron White, was more likely to side with the U.S. when Republicans are in the White House.

The results here lend qualified support to the notion that some justices are more likely to side with presidents of the party who nominated them. This relationship, however, seems to be a fairly recent phenomenon as the justices who are most noteworthy in this regard were mostly all appointed by Presidents Reagan and G. H. W. Bush (the exception being Rehnquist). President Clinton's nominees do not exhibit this sort of behavior. To investigate this issue further we ran some additional analyses of the voting behavior of those justices who served in the period 1977 – 2005, which includes the more recent years and a more balanced pool of Republican and Democratic administrations. We would like to know more about the circumstances under which some of these justices are more likely to support the positions of Republican administrations. Therefore, we ran some cross-tabulations of judicial voting behavior and our Republican administration dummy variable while controlling for the ideological position sought by the government. Table II contains cases involving administrative agencies while Table III encompasses cases where the US was a party. For example, in Table II, we see in cases involving administrative agencies that Justice Sandra Day O'Connor was more likely to support Republican

administrations when they were seeking a conservative outcome from the Court, while Justice Potter Stewart was more likely to support Democratic administrations when they were seeking a conservative outcome.

TABLE II  
 SUPPORT FOR POSITIONS ADVOCATED BY ADMINISTRATIVE AGENCIES

Justice	Govt. Seeks Conservative Outcome		Govt. Seeks Liberal Outcome	
	Republican Administration	Democratic Administration	Republican Administration	Democratic Administration
Blackmun	67%	78%	74%	74%
Brennan	49%	56%	80%	83%
Bryer	51%	48%	88%	83%
Burger	81%	86%	64%	58%
Ginsberg	53%	51%	88%	75%
Kennedy	69%	60%	58%	41%
Marshall	51%	51%	78%	86%
O'Connor	76%	62%	* 54%	35%
Powell	75%	87%	57%	46%
Rehnquist	84%	84%	55%	40%
Scalia	72%	71%	54%	31%
Souter	54%	48%	73%	65%
Stevens	60%	61%	67%	67%
Stewart	52%	68%	* 60%	63%
Thomas	78%	66%	51%	22%
White	78%	76%	76%	79%

\* = statistically significant at the .05 level  
 \*\* = statistically significant at the .01 level

The most revealing evidence regarding when many of the Reagan and G. H. W. Bush appointees are more apt to support Republican presidents is found in columns 3 and 4 of Table II. These justices, in particular Justices O'Connor, Rehnquist, Scalia and Thomas are statistically more likely to side with Republican presidents when they seek a liberal outcome than when Democratic administrations seek a similar type decision. This tendency, coupled with the even more pronounced inclination to support Republican administrations when they advocate conservative positions helps account for the strong levels of partisan support for Republican presidents by these justices that we saw in Table 1. Apparently these justices find more to their liking in the arguments proffered by a Republican administration when it advances a liberal position than when Democratic administrations do so. Perhaps the liberal positions of Republican administrations are not quite as liberal as those argued by Democratic administrations. Unfortunately, our simple measure of ideology does not allow us to ascertain the degree of liberalism or conservatism embodied in the arguments of the U.S. government's lawyers.

The results in Table III involving cases where the U.S. is a party are much more diverse.

TABLE III  
 SUPPORT FOR POSITIONS ADVOCATED WHEN THE US IS A PARTY

Justice	Govt. Seeks Conservative Outcome		Govt. Seeks Liberal Outcome	
	Republican Administration	Democratic Administration	Republican Administration	Democratic Administration
Blackmun	77%	75%	63%	58%
Brennan	42%	36%	71%	77%
Bryer	54%	53%	92%	73%
Burger	88%	80% *	51%	50%
Ginsberg	47%	54%	100%	73% *
Kennedy	76%	63% *	69%	63%
Marshall	50%	37% *	70%	77%
O'Connor	81%	74%	56%	59%
Powell	85%	74% *	49%	45%
Rehnquist	87%	82%	50%	43%
Scalia	76%	69%	55%	34% *
Souter	61%	55%	70%	77%
Stevens	62%	48% *	69%	60%
Stewart	61%	54%	54%	56%
Thomas	76%	73%	44%	37%
White	80%	61% *	66%	78% *

\* = statistically significant at the .05 level  
 \*\* = statistically significant at the .01 level

First, we do note there are some instances of Republican appointed justices favoring the arguments of Republican administrations, but they are generally not the justices we found engaging in such behavior in Table II. Justices Burger, Kennedy, Powell and Stevens were more likely to favor Republican administrations when the government advocated a conservative position. They are joined in this tendency by Democratically appointed Justices White and Marshall. Clearly none of these justices would be numbered among the more conservative members of the High Court, while those justices that are the more ideologically conservative are neither more nor less likely to favor one type of administration over the other in these types of cases. When the government advocates a liberal position we see that both Justice Scalia and Justice Ginsberg are more likely to favor Republican administrations. Interestingly, Justice White is more likely to support Democratic administrations when they advocate a liberal position. He seems to be exhibiting the most variability of the justices depending on the party occupying the White House. He is more likely to support conservative positions advanced by Republican administrations and liberal positions argued by Democratic presidencies.

To further tease out these findings, we ran some additional analyses (results not shown) to examine the voting behavior of Justices Rehnquist, O'Connor, Scalia, Kennedy and Thomas to determine on which issues they were more likely to side with Republican administrations advocating liberal positions (we note these justices are already extremely likely to support Republican presidents when they advocate conservative positions and so do not analyze these cases where there is little variation in support).

Is there some specific area of agreement in policy preferences between these justices and Republican administrations that transcends the more general conservative outlook of this particular group of justices? We examined support by these justices across several broad categories of issues using the U.S. Supreme Court Database's "Value" variable when Republican administrations advocate liberal positions. Also, from the same judicial data base, the issue areas are: 1) criminal procedure; 2) civil rights; 3) first amendment; 4) due process; 5) privacy; 6) unions; 7) economic activity; 8) judicial power; 9) federalism; and 10) federal taxation. The results are quite clear. Each of these justices demonstrate the greatest proclivity to support liberal positions advocated by Republican presidents on economic activity cases, with only one exception (O'Connor is slightly more likely to support liberal positions on due process cases). In addition, the economic activity cases are the most numerous as well. Thus, the pronounced tendency of these fairly conservative justices to accept liberal positions is conditioned in part on these arguments pertaining to economic activity cases made by Republican administrations. While we do not have any pre-conceived notions regarding why support for liberal arguments made by Republican presidents are so persuasive on economic issues, it may be that these justices are more likely to trust Republican presidents on critical, free-market issues when they advocate a liberal, most likely government intervention-style, outcome, than when Democratic administrations make such arguments.

#### IV. DISCUSSION

We argued that Supreme Court justices ought to be more likely to side with presidential administrations of the same party as their nominating president because of shared ideological preferences, partisan ties and deference to the party. The results demonstrate that while such partisan voting habits are not found among most justices, we do see that there is a pronounced tendency among some of the more recent Reagan and G.H.W. Bush appointees to favor Republican administrations. Justices Rehnquist, O'Connor, Scalia, Kennedy and Thomas all exhibited a marked tendency to support administrative agencies when Republicans were in the White House than when Democrats were in control. This was especially likely to be the case when these administrative agencies argued a liberal position. These mostly conservative justices, while generally disinclined to support the liberal arguments of administrative agencies when Democrats were in control, were significantly more likely to do so when Republicans were making the case.

Given that all are Republican presidential appointees, one wonders if this sort of behavior is confined to these partisans or to conservative justices more generally? It is interesting to note that the more moderate and recent members of the Supreme Court for whom we have data—Justices Souter, Ginsberg and Breyer—do not appear to fit this partisan pattern. Rather it is the most conservative justices, with

O'Connor being the noticeable exception to this generalization, who are the most partisan in their decision making. If these conservative justices have truly been voting the party line, however, it is puzzling that we find this mostly in evidence in their tendency to support Republican administrations when they seek a liberal outcome, particularly on economic issues involving administrative agencies. One might have expected partisan zeal to reveal itself in a more pronounced and consistent proclivity to support conservative positions advocated by Republican presidencies. Thus, while we find strong evidence of partisanship exhibited by a select group of justices, we are still lacking evidence of a motive.

Since these five justices, with the exception of Rehnquist, are among the more "recent" (relatively speaking) additions to the High Court, one wonders if this is a more recent trend in judicial voting behavior. Given the high profile of the presidential appointment "mistakes" such as those mentioned above, the rarity of opportunities for presidents to nominate Supreme Court justices, and the political and policy benefits (costs) of appointing the "right" ("wrong") kind of justice, it is possible there has been presidential learning over time in the process by which individuals are screened for Supreme Court nomination (see also Szmer and Songer's [2005] analysis of the quality of information on Supreme Court nominees' preferences and their likelihood of siding with the executive branch). That is, we might expect that presidents have grown more adept at nominating individuals who are more likely to share their policy and partisan preferences.

Future research in this area should investigate judicial voting behavior on those cases in which the solicitor general files an amicus brief on behalf of a particular party. In these cases where the Executive Branch enters voluntarily (with the exception of instances where the Supreme Court requests a brief) can provide us with additional evidence in a domain in which the policy preferences of the Executive Branch are more clearly apparent. Further down the road we will also wish to investigate the voting behavior of George W. Bush appointees to determine if they continue this trend of Republican partisanship especially during Democratic administration, such as President Barack Obama. Lastly, and perhaps most interestingly, it would be very useful to investigate judicial voting behavior on cases in which the political parties and their office seekers are the actors in the case, such as *Bush v. Gore*. Do the justices exhibit a tendency toward partisanship in such instances when partisan politics itself is the source of the dispute? Certainly the findings here are suggestive enough to warrant further analysis into the impact of this critical feature of the American political landscape.

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